

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lisa Tunncliffe (Applicant)  
**AND** Le' Kreme Limited (Respondent)  
**REPRESENTATIVES** R Oldham, Counsel for the Applicant  
B Spong, Advocate for the Respondent  
**INVESTIGATION MEETING** 24 November 2004, 24 February 2005  
**MEMBER OF AUTHORITY** R A Monaghan  
**MEMORANDA RECEIVED** 22 and 28 April 2005  
**SUBMISSIONS RECEIVED** 27 and 31 May, 8 June 2005  
**DATE OF DETERMINATION** 9 June 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Lisa Tunncliffe says she was dismissed by her former employer, Le Kreme Limited (“Le Kreme”). She worked as a beauty therapist at the ENVIE Beauty and Day Spa (“ENVIE”), which Le Kreme owned and operated.

[2] Her grievance, as set out in a letter from her solicitors dated 27 February 2004, was that on or about 23 February 2004 she was unjustifiably dismissed on the ground of redundancy. She believed that the business had been sold, that as a result of the sale her position was technically redundant. Le Kreme had breached her employment agreement in failing to consult with her about the redundancy and failing to provide the required four weeks’ notice of termination in a redundancy situation.

[3] The statement of problem raised a further alternative claim that on or about 23 February 2004 Ms Tunncliffe was unjustifiably and constructively dismissed, as well as a claim for damages for breach of the duty of good faith and a claim for a penalty for breach of the implied duty to act fairly and reasonably towards Ms Tunncliffe.

**The ‘sale of the business’**

[4] Unfortunately this problem began in part because of a misunderstanding about what was sold in the course of the ‘sale of the business’.

[5] During the relevant period Le Kreme’s owners, Elena Kremeshnaya and Leonid Kremeshnyi, were negotiating with Elizabeth Hamilton about Ms Hamilton’s acquisition of a 50% shareholding

in Le Kreme. To that end the parties executed an off market securities transfer form on 19 February 2004, and Ms Hamilton signed a formal shareholding agreement dated 20 February 2004.

[6] The shareholding agreement included a provision requiring Ms Hamilton to provide management services to Le Kreme. Indeed the consideration for Ms Hamilton's acquisition of a 50% shareholding was said to be Ms Hamilton's entering into a management agreement 'to progress Le Kreme to a profitable state'. It was in that capacity Ms Hamilton was speaking with Ms Tunncliffe during the key conversation of 23 February 2004.

[7] It seems that within a few weeks the management and share transfer arrangement ran into difficulties. Ms Hamilton ceased her association with Le Kreme in what I understand became acrimonious circumstances. That state of affairs has caused problems for this investigation. Despite numerous attempts - both formal and informal, through the issue of summonses and other approaches from the Authority and from Mr Spong - Ms Hamilton has resisted providing any form of evidence on the ground that she is suffering from stress. The stress is apparently associated with her dealings with Le Kreme. It transpired that her partner, Michal Bourduk, was present during the 23 February conversation, but he, too, has resisted all efforts to obtain evidence from him.

[8] I record further that Ms Hamilton was served with a copy of Ms Tunncliffe's written brief of evidence, invited to respond to it, and warned that if she did not do so then Ms Tunncliffe's account would be accepted.

[9] Both Ms Hamilton and Mr Bourduk have purported in writing to be willing to 'help' the investigation, despite their asserted inability to answer summonses served on them and their failure to respond to requests to provide evidence by less formal means. Their expressions of willingness to help proved to be no more than assertions on pieces of paper. They have not been willing to help at all. However, after hearing from the parties on the matter, I have concluded it is unfair to Ms Tunncliffe to delay issuing a determination any longer.

#### **The conversation of 23 February 2004**

[10] The background to Ms Tunncliffe's view that she was technically redundant was her awareness that Le Kreme was facing serious financial difficulties in the last quarter of 2003, and that Mrs Kremechnaya was taking steps in an attempt to address the difficulties. By early 2004 Ms Tunncliffe was concerned about whether her position would continue to exist. However she was unaware of the negotiations with Ms Hamilton and did not know Ms Hamilton. Moreover she was on leave between 12 and 20 February 2004, which was about the period during which the negotiations were conducted.

[11] On or about 19 February 2004 a person identifying herself as Ms Hamilton left a message on Ms Tunncliffe's phone. Ms Hamilton said she was the new manager/owner of the ENVIE salon, and sought a meeting with Ms Tunncliffe on Monday 23 February to discuss Ms Tunncliffe's 'employment position'. Ms Tunncliffe contacted Ms Hamilton, who confirmed there would be a meeting and that she was the new owner.

[12] Ms Tunncliffe also contacted a colleague in an attempt to update herself on events during her absence. The colleague told her one therapist's position was to disappear. At the time Ms Tunncliffe and the colleague were the only two therapists employed, although a third had just left. Consideration was indeed being given to whether Ms Tunncliffe's position should be made redundant, but events overtook that matter and it was not the basis for the termination of Ms Tunncliffe's employment.

[13] During the investigation meeting Ms Tunnicliffe said that, even before the meeting with Ms Hamilton began, she had assumed that her employment with Le Kreme had ended. That view was premature.

[14] Ms Tunnicliffe nevertheless reported to the ENVIE premises on 23 February, and for her meeting with Ms Hamilton. The meeting started badly and did not recover. Ms Tunnicliffe arrived a little late. Ms Hamilton asked why, was given the reason, and reacted in a way Ms Tunnicliffe considered confronting and hostile. The conversation continued in the reception area, apparently in the presence of Mr Bourduk. It became heated.

[15] Matters were not helped in that there was confusion over Ms Hamilton's description of the salon as having been sold and herself as the new owner. This was correct only to the extent that she was acquiring a half share in the company operating the business. Thus Ms Hamilton's description of her role was inaccurate, and she did not explain or clarify it.

[16] For her part Ms Tunnicliffe understood the 'sale' of the salon meant Ms Hamilton was the new owner in her own right, and was not her employer. During the conversation she even said to Ms Hamilton that Ms Hamilton was not a party to her employment agreement with Mrs Kremechnaya. That statement was inaccurate too. Le Kreme was the employer party to the employment agreement, not Mrs Kremechnaya, and provided she was appropriately authorised Ms Hamilton was entitled to act as the employer's representative.

[17] Ms Hamilton asked Ms Tunnicliffe whether she wanted to continue to work for ENVIE. Because of the misunderstanding just set out, Ms Tunnicliffe said that depended on what employment was being offered. There was no response. Instead Ms Hamilton referred to complaints allegedly received about Ms Tunnicliffe's attitude. Ms Tunnicliffe denied knowledge of any complaints, and Ms Hamilton started to walk away. Ms Tunnicliffe asked Ms Hamilton to come back and continue the discussion about her employment, but Ms Hamilton kept walking away 'berating' Ms Tunnicliffe about her rudeness and her lateness. Ms Hamilton finished by saying Ms Tunnicliffe was to start work immediately, or leave. After a further exchange about whether Ms Tunnicliffe would see a client booked for treatment later that morning, Ms Hamilton repeated that Ms Tunnicliffe could work or leave.

[18] Ms Tunnicliffe repeated her view that Ms Hamilton was not the employer and asked to speak to Mrs Kremechnaya, but was told she was unavailable. Since Ms Tunnicliffe had arranged for someone else to see the client, she believed she had no further obligations in that respect. Indeed it seems there was also misunderstanding about what Ms Tunnicliffe was scheduled to do that day. Finally, Ms Tunnicliffe believed she already had no job with Le Kreme and now would have no job with Ms Hamilton. Accordingly, she left.

[19] In response Ms Hamilton wrote Ms Tunnicliffe a letter dated 23 February 2004, which read:

"You and I had an arrangement to have a meeting at 10 A M on February 23, 2004 to discuss the possibility of your future employment.

The company went through major structural changes and this started with new management. You were 20 minutes late for the meeting and your rude attitude was unacceptable.

However, you had an appointment with a client at 12 A M and I asked you to take this appointment, but you said you don't have any obligations to me, and you left, which I accept as a resignation. Before you left I explained to you that if you left now it would mean that you resigned."

[20] I take it from the letter that Ms Hamilton believed Ms Tunnicliffe had resigned from her employment. I turn shortly to whether Ms Hamilton was entitled to view as a resignation Ms

Tunncliffe's departure, but note that Ms Tunncliffe denied being told expressly that her leaving the premises on 23 February would indicate her resignation. In the absence of evidence from Ms Hamilton, I accept Ms Tunncliffe's denial.

[21] Ms Tunncliffe was advised the letter would be forwarded, so arranged to collect it at the salon 24 February. She and her partner gave evidence, which I accept, that Mrs Kremechnaya confirmed the salon had been sold. Ms Tunncliffe told Mrs Kremechnaya she wanted payment in respect of the four weeks' notice of redundancy set out in the employment agreement and there was a discussion about seeking legal advice. No payment was made in respect of the 'redundancy'.

[22] The solicitors' letter raising Ms Tunncliffe's personal grievance followed almost immediately. Unfortunately it appears neither Ms Hamilton nor Mrs Kremechnaya sought professional advice in respect of it. Had they done so, at the very least their advisor could have clarified for Ms Tunncliffe and her solicitors the nature of the interest Ms Hamilton had acquired (or was supposed to have acquired) and rebutted the allegation that there had been a redundancy. Instead Ms Hamilton replied in a brief letter dated 4 March 2004, saying merely that she disagreed with the account of events in the solicitors' letter and was bewildered by the claim.

[23] Even more unfortunately an early attempt at mediation did not go ahead, and no statement in reply was filed in the Authority. It was not until the first investigation meeting in November 2004 that information about the nature of the arrangement between Le Kreme's shareholders and Ms Hamilton - or any further indication of the substantive nature of Le Kreme's response to Ms Tunncliffe's grievance - became available.

#### **Whether there was an unjustified dismissal**

[24] As at the beginning of 23 February 2004 Le Kreme remained Ms Tunncliffe's employer, its assets and business had not been sold, and Ms Tunncliffe's position had not been disestablished. She had not been made redundant, whether technically or otherwise. Nevertheless it is abundantly clear from the evidence that Ms Tunncliffe thought her employment with Le Kreme was already over. However accurate her colleague's information about the planned disestablishment of a therapist's position might have been, for example, she was not entitled to assume anything about the matter and should have waited until it was raised with her.

[25] That assumption, together with Ms Tunncliffe's very firm view that Ms Hamilton was a stranger to her relationship with Le Kreme, means it would be inconsistent for Ms Tunncliffe to say Ms Hamilton's treatment of her on 23 February was repudiatory of an ongoing relationship with Le Kreme. She did not accept that Ms Hamilton had any rights in respect of that relationship, and to her it had already ended anyway.

[26] At the same time Le Kreme has not taken issue with whether Ms Hamilton's actions were binding on it. It appears they were, and I proceed accordingly.

[27] Ms Hamilton did not conduct the 23 February discussion at all well, regardless of how rude Ms Tunncliffe's attitude may have been. Although Ms Tunncliffe did not know it, Ms Hamilton was the employer's representative. Not only did Ms Hamilton fail to make her role and her purpose clear to Ms Tunncliffe - or at least express it accurately - but she allowed herself to depart from her probable intentions in that respect and begin making allegations concerning complaints about Ms Tunncliffe. In the circumstances it is hardly surprising that turn of events raised Ms Tunncliffe's hackles.

[28] Although Ms Tunncliffe proceeded on a mistaken understanding when she left on 23 February, she repeated her position on 24 February and again through her solicitors' letter of 27 February. The misunderstanding could easily have been corrected and there was more than one opportunity for that, but the opportunities were not taken.

[29] The misunderstanding also went some way towards explaining – although did not entirely excuse – Ms Tunncliffe's behaviour on 23 February. The failures to make any attempt to correct the misunderstanding, not to mention the failure to adequately explain Ms Hamilton's role in Le Kreme in the first place, mean I do not accept Le Kreme was entitled to treat Ms Tunncliffe's departure on 23 February as a resignation.

[30] In the circumstances I conclude Ms Tunncliffe was dismissed. The dismissal was not justified.

### **Remedies for the personal grievance**

[31] Ms Tunncliffe is entitled to seek the reimbursement of remuneration lost as a result of her personal grievance. She seeks such reimbursement in respect of the three months following the termination of her employment.

[32] Her evidence was that her actual gross earnings during that period came to a total of \$2,978.03. She earned \$14 an hour gross at ENVIE. I was provided with a series of payslips, from which I exclude one undated slip which seems out of place and may be a payment of holiday pay. From the remaining slips I calculate that Ms Tunncliffe worked an average of 31 hours per week, for an average total gross weekly wage of \$434. Over 13 weeks the total is \$5,642.00. There was further evidence of an agreement to increase Ms Tunncliffe's hourly rate to \$15 per hour, although the increase had not taken effect as at the date of termination. Thus the additional loss is \$1/hour x 31 hours x 13 weeks = \$403. The total loss at a rate of \$15 per hour is \$6,045.

[33] The difference between \$6,045 and \$2,978.03 is \$3,066.97. Ms Tunncliffe is entitled to that amount and I order accordingly.

[34] Ms Tunncliffe also earned commission on products sold. I assume that the amounts described on the payslips as 'bonus' were the commission payments. They appear as gross figures. From the two bundles of payslips I have, those payments total \$370.26. Averaged over the 25 weeks to which the payslips related, the weekly gross amount was \$14.81. The average loss over 13 weeks is \$192.53. Ms Tunncliffe is entitled to that amount and I order accordingly.

[35] Ms Tunncliffe believes she has missed out on at least two positions for which she applied because of poor references from Le Kreme. To test this hypothesis she had a friend telephone Le Kreme, pose as a potential employer and ask for a verbal reference. Although the response was not positive, there was no evidence that any genuine potential employer had contacted Le Kreme and was put off by a similar response. If the evidence was intended to shed light on the circumstances of Ms Tunncliffe's dismissal, the obvious confusion in the account given to the friend merely confirmed the matter was unclear and did not assist in resolving it.

[36] However Ms Tunncliffe is entitled to compensation for injury to her feelings arising from her personal grievance. There was evidence of such injury, although some of the injury was caused by the wrong assumption about redundancy. Similarly, although Ms Hamilton's handling of the 23 February discussion was poor, Ms Tunncliffe was not as civil as she should have been either. For these reasons Le Kreme is to compensate Ms Tunncliffe in the sum of \$4,000.

**Damages for breach of the duty of good faith**

[37] I do not believe the events of February 2004 amounted to a breach of the duty of good faith. The problem was more likely to be one of a lack of appreciation of the requirements of New Zealand employment law, simple poor management of Ms Tunncliffe's responses, and a layperson's incomplete understanding of the difference between the transfer of shares in a company and the sale of a company's business and assets. The shortcomings thus exposed have been taken into account in the finding that Ms Tunncliffe was unjustifiably dismissed.

[38] Accordingly I dismiss the claim for damages for breach of the duty of good faith.

**Penalty for breach of duty to act fairly and reasonably**

[39] Section 133(1)(a) of the Employment Relations Act 2000 gives the Authority jurisdiction to deal with actions for the recovery of penalties under the Act for any breach of an employment agreement. I understand that provision to be the basis for the claim for a penalty in respect of breach of the implied duty to act fairly and reasonably towards Ms Tunncliffe. Again, however, any shortcomings in that respect have been taken into account in the finding that Ms Tunncliffe was unjustifiably dismissed.

[40] Accordingly I dismiss the claim for a penalty for breach of the employment agreement.

**Summary of orders**

[41] Le Kreme is to pay to Ms Tunncliffe:

- (a) \$3,066.97 (gross) as reimbursement for lost wages;
- (b) \$192.53 (gross) as reimbursement for loss of commission
- (c) \$4,000.00 as compensation for injury to feelings.

**Costs**

[42] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority they may file and serve memoranda on the matter.

**R A Monaghan**  
**Member, Employment Relations Authority**