

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 136  
5384303

BETWEEN                      NICOLA SHANNON  
                                         WATSON and HELEN CLARE  
                                         HOBBS  
                                         Applicants

AND                                PRIDEX KITCHENS (PN)  
                                         LIMITED

AND                                BRIDGET ROSEMARY  
                                         DAVEY-HICKS  
                                         Respondents

Member of Authority:      P R Stapp

Representatives:            Jenny Murphy, Counsel for Applicants  
                                         Bridget Davey-Hicks, in person and for the Second  
                                         Respondent

Investigation Meeting:      8-9 October 2012 at Palmerston North

Further submissions and  
information:                    9 and 15 October 2012

Date of Determination:      2 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This employment relationship problem has come about because Pridex Kitchens (PN) Limited (PPN) did not pay the applicants four weeks wages in lieu of notice when their employment ceased on 18 November 2011. The matter has escalated from that to involve a counterclaim for the repayment of commissions, damages for the cost of connection fees and the replacement value for a broken phone.

[2] In addition, the applicants have activated a personal grievance for unjustified action and disadvantage for compensation for hurt and humiliation that had been

raised previously, but not claimed in the original statement of problem. Both parties are claiming costs.

[3] PPN ceased trading at the close of business at 5pm on 18 November 2011. On the same day both applicants were informed that their employment had ended due to redundancy linked to PPN ceasing trading.

[4] Ms Davey-Hicks denies all the claims and in particular that she is personally at any fault for aiding and abetting in any alleged breaches in the matter. There has been mediation, but it now rests with the Authority to determine the matter.

### **The facts**

[5] PPN is solely owned by Rosemary Davey-Hicks. She is the sole director of the company. It remains registered. It is a franchise. It had been financed by Mr Steve Channing Pearce, a director of Pridex Industries NZ Limited, the franchiser (PINZL).

[6] Ms Watson was employed in the position of kitchen designer/sales person by PPN on a permanent fulltime basis from 31 January 2011. She had an employment agreement and this was signed off by her and Ms Davey-Hicks.

[7] Ms Hobbs was employed in the position of design and sales by PPN on a permanent fulltime basis from 5 September 2011. She also had a signed off individual employment agreement.

[8] The employment agreement is a generic document prepared and recommended for use by PINZL. Ms Watson's and Ms Hobbs' individual terms and conditions of employment exist in a schedule (Schedule A) in each agreement. The terms and conditions are much the same. The relevant provisions in the generic agreement and both schedules applicable to Ms Watson and Ms Hobbs include the following:

- 2.1 *The Company agrees to:*
  - (a) *Provide a supportive and rewarding work environment;*
  - (b) *Act fairly and responsibly in exercising its rights and obligations under the Agreement; and*
  - (c) *Provide opportunities for ongoing training and professional development.*
- 2.2 *You agree to:*
  - (a) *Act in a way consistent with PINZL's Visions, Missions, Values and Goals;*

- (b) *Maintain high standards of work;*
- (c) *Work in the best interests of the Company, its staff, customers and any employment relationships;*
- (d) *Comply with all reasonable lawful instructions provided by the Company including requests to work additional hours;*
- (e) *Conform to all operating policies, procedures, and processes or any other regulations set from time to time by the Company;*
- (f) *Conform to New Zealand Health and Safety Regulations which the Company supports and upholds, and specifically the Health and Safety in Employment Act 1992 (as amended); and*
- (g) *Refrain from acting in a manner that brings, or could bring, the Company into disrepute.*

[9] PINZL has not been cited as a party to these proceedings. Ms Davey-Hicks accepted that that generic agreement related to PPN as Ms Watson's and Ms Hobbs' employer. There have been no claims made against PINZL. In Ms Hobbs' agreement there is a trial period clause. This states:

- 7.1 *The employee agrees to serve a trial period pursuant to section 67A of the Employment Relations Act 2000 for 90 days from the beginning of the employee's employment. If, during this trial period, the employer dismisses the employee then he or she may not bring a personal grievance or other legal proceedings against the employer in respect of the dismissal.*
- 7.2 *Where the employer terminates the agreement under this clause the Employer may, at its discretion, elect to pay one week's wages in lieu of notice.*

[10] The clause has not been relied upon by the employer in any sense. Indeed the failure of the employer to even discuss any notice with Ms Hobbs would mean that it has failed to give adequate consideration and failed to consult with Ms Hobbs on the discretion to pay at least the minimum of one week's notice. Furthermore, it remains unclear as to when the employment agreement was signed off. Ms Davey-Hicks was emphatically clear in her evidence that she recalled signing it off before the employment started at 9.00am on the day Ms Hobbs started work with PPN. Ms Hobbs, in referring to her diary, agreed that she started work on 5 September, but could not recall when she signed the agreement off. In the circumstances it would seem to be more likely than not that she signed off the employment agreement before she started work. The personal grievance is a claim for unjustified disadvantage relating to the procedure as to whether or not there was adequate consultation. The personal grievance does not purport to relate to challenging the dismissal where it is clear under the law that the trial period clause does not apply in such circumstances.

[11] The next relevant clause in the generic employment agreement is clause 31; termination of agreement:

- 31.1 *Subject to any other termination provisions in this agreement, either party may terminate this Agreement by giving notice to the other party in writing. The period of notice required is as follows:*
- (a) *Salaried and commissioned workers whether part-time or fulltime: 4 weeks (Unless otherwise stated in Schedule A) ...*
- 31.2 *If either of us gives notice to terminate this agreement we may at our sole discretion at any time during the notice period:*
- (a) *Either pay you wages or salary in lieu of any remaining notice period; and*
- (b) *We may reassign you to other duties during the notice period and this reassignment will not constitute a unilateral variation of this Agreement;*
- (c) *Alternatively, PINZL and you may mutually agree to a shorter notice period as defined under the termination of employment. Such agreement is to be recorded in writing.*
- 31.3 *The employee may give no more than the notice period as set out in Schedule A of this Agreement.*
- ...
- 31.5 *The Company reserves the right to pay you your base remuneration in lieu of notice or alternatively require that you do not perform your duties or attend the workplace during this period. In that event, you will continue to receive your base remuneration for the balance of the notice period. You will remain an employee of the Company, and will continue to be bound by your duties of confidentiality and fidelity.*
- ...
- 31.10 *All salaries, wages, retainer, sales commissions or sales bonuses will be paid up on your last day of employment. Any ongoing or active files that are not resolved or closed by the date of termination will be forwarded to other staff members and any entitlements to sales commission or sales bonus will be withdrawn. We do not agree to pay you any sales commission or sales bonus on unsettled files (including but not limited to: kitchens not ordered/in production, kitchens not paid in full, kitchens not delivered) after termination. The current Sales Commission policy is available on the intranet. If there is any conflict in the terms, the latest policy will take precedence.*
- ...

[12] In this case both applicants' Schedule A refers to four weeks' notice. That is consistent with the termination under 31.1(a) of the generic agreement. In this particular case there was no notice provided. At its extreme the applicants were first informed that their employment had ended for redundancy on 18 November 2011 when they were provided with the letter of termination. There was no reference in

that letter to any notice being provided and any time for discussion and consultation. The final payment of entitlements and holiday pay was paid to each applicant on 22 November 2011 upon them seeking legal advice and obtaining assistance.

[13] Under clause 11 there is provision for remuneration (along with the terms outlined in the provisions of Schedule A for each of the applicants) that provided for the following:

*11.7 On termination we will pay you any outstanding monies and holiday pay without undue delay. If you owe us anything at that time, you agree that we can deduct it from any final pay or holiday pay owing. If the amount of your final pay does not cover the debt owing to the company, you agree to reimburse the company for all debt owing within four weeks of the date of your termination.*

[14] Both applicants did not receive any detailed particulars (except for a payslip on what their final pay comprised) and they were paid on 22 November 2011.

[15] The counterclaim for an overpayment of commission has not been made in accordance with this clause. I am supported in this conclusion by the following.

- (a) First, no calculation was completed at the time of the termination as to any money owing on commission.
- (b) Second, PPN had been paying Ms Watson her commissions in advance without any deductions for sales that were not completed. There was no practice in place for the repayment of that money.
- (c) Third there was no deduction made from the final pay for any overpaid commissions.
- (d) Finally there was no request with any details to be repaid *within four weeks of the date of the termination*.

[16] It is more likely than not that the sales were closed in any case. Ms Davey-Hicks has not been able to prove any damages or losses equating to the details of the sales that she claims Ms Watson and Ms Hobbs should pay back. Indeed Ms Davey-Hicks has not provided sufficient details relating to each of the claims for sales in which she says need to be repaid.

[17] Under clause 37 there is an employment protection provision. This states that:

- 37.1 *Where you are no longer required to perform your work due to us selling, transferring, or contracting out all or part of our business to a new employer (unless we are bankrupt or in receivership or liquidation), and in negotiating with the new employer we will:*
- (a) *Provide the new employer with your details, the terms of your employment, and the staffing structure for our business or part of our business affected;*
  - (b) *Seek agreement with the new employer about whether you or other affected Employees or some of them will be offered transfer on substantially the same terms and conditions of employment or offered employment with the new employer on different terms and conditions of employment;*
  - (c) *Offer the new employer the opportunity to meet with you and other affected employees; and*
  - (d) *Keep you informed about the redundancy situation subject to any commercial needs for confidentiality.*
- 37.2 *You are entitled to choose whether or not to accept employment with the contractor/service provider. In the event that the contractor/service provider offers you employment in terms of clause 37.1 above, no redundancy situation will arise, and you will not be entitled to receive redundancy compensation or payment of outstanding notice period, whether or not you choose to accept the offer of employment.*
- 37.3 *In the event that the contractor/service provider is not prepared to offer you employment in terms of clause 37.1 above, or offers employment on lesser terms and conditions and/or without recognition of your service, the employee will be entitled to work their agreed notice period.*
- 37.4 *If the employee's position is redundant there will be no redundancy payment made to the employee. Where the employer's organisation or company is sold or transferred the employer will not pay redundancy compensation to the employee.*

[18] In addition, Ms Hobbs' remuneration clause under its general terms provided verbatim for:

- *A reimbursive non-taxable travel allowance for use of your personal vehicle on business related mileage (as per the attached Schedule A).*

[19] There was no attached Schedule A to this and there were no details provided of any practice or procedure in claiming a reimbursing non-taxable travel allowance for Ms Hobbs. Instead her final payslip shows that she had been paid a travel allowance in the sum of \$1,034.42. The employer claims that this was an error and that she should never have been paid. It never sought to correct it prior to the employment ceasing. Also, given the payment and the provision Ms Hobbs had a reasonable expectation to receive a payment.

[20] In Ms Watson's terms and conditions of employment there was a provision for a travel allowance. Her additional remuneration provided verbatim for:

*In addition, you are entitled to a reimbursive vehicle allowance of \$5,000 per annum pro rated fortnightly as a contribution to the costs of running your vehicle.*

She was paid this.

[21] Both applicants worked from the Pridex Palmerston North office. The Pridex arrangement inextricably linked both companies through the involvement of Mr Steve Channing Pearce and his investment. He informed the Authority that there were staff meetings on 4, 11, and 15 November 2011 involving him and the Pridex Industries (NZ) Limited staff. Ms Hobbs and Ms Watson were invited to attend at least the first meeting which involved some discussion around the background to the financial circumstances of the Pridex Industries (NZ) Limited company activities. It would seem that a number of options were discussed that included:

- (a) The cessation of operations. This involved a prospect that all operations would cease on or before 20 December 2011 and staff being required to take outstanding annual leave before that date. Notice would be given to all staff according to their two or four week notice period by 18 November 2011 and any jobs not completed at the 20th of December would be completed by casuals in January and paid on an hourly basis.
- (b) The reduction of salaries and wages. He proposed first, a 50% reduction on base rates for a period of four months. Second, he agreed to propose an adjustment of a 20% reduction in gross pay until further notice but in any event such a reduction would not reduce any pay to below the minimum wage. He looked forward finally to all team members playing a part in returning the company to profitability as soon as possible.

[22] He then asked Pridex Industries (NZ) Limited employees to vote on the proposals. He told me that Ms Watson and Ms Hobbs were not requested to participate in the vote because they were employed by PPN.

[23] From as early as 4 November no other action appears to have been taken in respect of Ms Hobbs and Ms Watson in their employment with PPN. They certainly were not offered any new jobs with the same terms and conditions with Pridex Industries while they were employed with PPN. Instead they were requested to continue the work that they were doing.

[24] After their employment had been terminated by Ms Davey-Hicks, Mr Channing Pearce arranged for proposed employment agreements to be presented to both of them anticipating they both would continue to work at Pridex Industries NZ Limited. It is not important how these agreements were provided to the applicants suffice to say that all the parties have a disagreement over that, but it is common ground that Ms Hobbs and Ms Watson each received a proposed employment agreement after they had been told of the immediate termination of their employment at PPN. They considered that the proposed agreements were inferior to the terms and conditions of employment that they had previously been employed under by PPN. The negotiations after their employment terminated became acrimonious and there is a disagreement between both parties as to whether Ms Hobbs and Ms Watson accepted offers and counter offers that had been made by Mr Steve Channing Pearce. It is common ground they never worked for Pridex Industries (NZ) Limited after 18 December. In addition to their termination notices Ms Hobbs and Ms Watson were provided with references (dated 18 November 2011) signed by Ms Davey-Hicks. The fact that Mr Channing Pearce missed the opportunity to negotiate with the applicants while they were employed at PPN means that their termination of employment occurred without any transfer arrangements in place. The fact that Ms Watson and Ms Hobbs did not get any notice was due to a failure of PPN to properly consult and give the required notice. They have been disadvantaged in their employment by the employer's breaches to meet the two requirements.

[25] Ms Hobbs' and Ms Watson's representative sought payment of all outstanding monies including salary, sales commissions, sales bonuses, holiday pay and any other expense reimbursements payable and four weeks payment in lieu of notice of the redundancy in a letter dated 22 November 2011. There was a payment as I said earlier, forwarded on 23 November 2011 with the exception of a payment for four weeks salary in lieu of notice for redundancy.

[26] On 24 November 2011 Ms Hobbs' and Ms Watson's representative requested PPN to provide full disclosure of the applicants' employment files including but not limited to all notes and internal memoranda, all time and wage records and details of all sales commissions and bonuses. This request was made pursuant to the Privacy Act 1993 and section 130 of the Employment Relations Act 2000. In terms of section 130 of the Employment Relations Act Ms Davey-Hicks acknowledged during the Authority's investigation meeting that no wage and time records had been provided and she did not have them available at the Authority's investigation meeting.

[27] On 23 December 2011 Ms Hobbs' and Ms Watson's representative raised a personal grievance on behalf of Ms Hobbs and Ms Watson for unjustified disadvantage. In their first statement of problem filed in the Authority both applicants sought a compliance order for the payment of their four week salary in lieu of notice plus 5% interest on the amount, and penalties against Ms Davey-Hicks under section 134(2) of the Employment Relations Act for aiding and abetting.

[28] After the statement in reply had been received dated 25 June 2012 in which a counterclaim was made against both applicants for various matters, their representative responded with a reply to the counterclaim and in an amended statement of problem provided a claim for remedies for humiliation, loss of dignity and injury to feelings in the sum of \$10,000 each for Ms Hobbs and Ms Watson respectively. Half the filing fee each was claimed for both applicants.

### **Determination**

[29] The notice was always a matter of discretion and if the jobs that were offered by Pridex Industries NZ Limited were substantially different then the applicants would have been required to work their notice out. This did not apply. It did not apply because it is not known and simply unclear as to whether the business transferred to Pridex Industries (NZ) Limited. Mr Channing Pearce told me that he took over the running of the business in Palmerston North, but from new premises. Because there were no sales reps he says that he then moved to make redundant 29 other employees at Pridex Industries. I am not satisfied that the transfer of employment clause in the employment agreements applied in this setting.

[30] PPN breached its obligation to provide notice under the terms of the applicants' employment arrangements and, being most generous, Ms Davey-Hicks

would have only had to give as a fair and reasonable employer, one week's notice to Ms Hobbs (purportedly under the trial period clause), but at least four weeks' notice under the termination provision and schedule A. The unjustifiable action disadvantage claim relates to the adequacy of any notice. There was no notice provided. That is not the action of a fair and reasonable employer. In this particular case, having regard to the evidence from Mr Steve Channing Pearce, both employees could have been provided with notice much earlier given:

- (a) That the franchise arrangement was due to cease on 31 October 2011 in any case.
- (b) That Mr Channing Pearce says he extended the arrangement on a month by month basis.
- (c) That Mr Steve Channing Pearce had included Ms Hobbs and Ms Watson in discussions with his employees at Pridex Industries (NZ) Limited. At least in one of those meetings there is an indication that earlier notice could have been given having regard to his own notes.

[31] Ms Davey-Hicks failed to act on any of those matters which a fair and reasonable employer would have acted on. Instead she did not talk to Ms Hobbs and Ms Watson and immediately after a meeting between her and Mr Channing Pearce on 17 November decided to act and terminate the applicants' employment immediately on 18 November.

### **Conclusion**

[32] Under the terms and conditions of the employment agreement neither applicant was due and could expect an entitlement to be paid four weeks wages in lieu of notice as it was a discretionary payment. However, they could have reasonably expected better and more reasonable notice than no notice at all. In that regard their claim for the wages in lieu of notice is dismissed but they have established an unjustified action disadvantage personal grievance because of the lack of consultation on redundancy and the notice that goes with it.

[33] Furthermore, the company through its agent, Ms Davey-Hicks has failed to provide wage, time and leave records as requested. The claim for a penalty was not

made against the first respondent in the statement of problem, but against Ms Davey-Hicks personally. The claim was made in twelve months of the cause of action.

[34] This is not a matter for a penalty for aiding and abetting because I have not been satisfied that Ms Davey-Hicks deliberately, wilfully and maliciously used the situation to “stitch up” Mr Channing Pearce as claimed by both applicants and/or to default on her obligations in respect of both applicants. She failed to act as a fair and reasonable employer would in managing the company that was the applicants’ employer. As such she should have provided the wage and time record in a timely period as requested. The employment relationship problem did not focus on any arrears of wages but on the payment of four weeks notice. There was common ground that the applicants had not been paid the notice. This was an arguable issue and the wage and time records would not have assisted in resolving it.

[35] Both applicants have claimed compensation for hurt, humiliation and loss of dignity. I can only compensate them for the unjustifiable action that has disadvantaged them in their employment that relates to the employer’s action for failing to provide adequate notice. That failure, I am satisfied has caused the applicants upset and hurt their feelings because of the suddenness of Ms Davey-Hicks’ notice of her decision. I award both of them \$3,000 each.

### **Orders of the Authority**

[36] Pridex Kitchens (PN) Limited is required to pay Nicola Watson and Helen Hobbs \$3,000 each under s. 123 1(c) (i) of the Employment Relations Act for hurt humiliation and loss of dignity.

[37] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority