IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2015] NZERA Christchurch 84
5521188

	BETWEEN	CHERIE NEE Applicant
	A N D	BEST HEALTH PRODUCTS LMITED Respondent

Member of Authority:	James Crichton
Representatives:	Andy Ogilvie, Counsel for the Applicant James Yuan Gu, Advocate for the Respondent
Investigation Meeting:	4 June 2015 at Christchurch
Date of Determination:	25 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Nee) alleges that she was unjustifiably dismissed from her employment, that the respondent (Best Health) breached its obligation of good faith to her, failed to pay her salary at the increased level agreed, and failed to provide wage and time records for which a penalty is sought.

[2] Best Health denies that the dismissal was unjustified claiming that it was a justified dismissal for redundancy, denies it acted in bad faith, denies it failed to pay salary when due and denies it failed to provide wage and time records when requested.

[3] Ms Nee commenced her employment with Best Health on 4 June 2013 as a sales manager and the employment continued until termination for redundancy on 20 October 2014.

[4] Within not much more of a month of the employment commencing, Ms Nee received a letter from Best Health dated 12 July 2013 which indicated that she had *"made good progress of getting our products into retail stores"*, which was essentially what she was employed to do. The letter goes on to say that:

> *... this is a great achievement within such a short period of time. We really value your contribution to the business and propose a review to your salary now.*

[5] The balance of the letter sets out an incentive scheme to apply to Ms Nee's position such that by her getting Best Health products into an additional number of stores, her salary would increase by increments of $1,000.

[6] The first such increment of $1,000 was to apply once she achieved between 20 and 29 stores in the South Island and it is common cause that she was subsequently paid that additional $1,000 which presumably indicates that so far as Best Health was concerned she had achieved that particular target.

[7] The relationship between this letter and its schedule of targets on the one hand and an attachment to the employment agreement entitled *"Schedule of performance"* will become relevant in the Authority's investigation. In particular, the Authority will need to determine whether the letter and subsequent correspondence replace the schedule of performance or not.

[8] There is an exchange of correspondence between the parties subsequent to the 12 July 2013 letter and, amongst other things, an issue around what salary Ms Nee was supposed to be receiving. In a letter from Ms Nee to the employer dated 12 September 2013, she refers to a meeting the parties had had that same day, talks about her understanding of the arrangements made for her salary to increase based on her increasing the number of stores carrying Best Health's products and then claims (entirely erroneously) that the effect of the bonus scheme regime proposed in the 12 July 2013 letter was to entitle her to a salary of $118,000 per annum being the sum of the two territories, one for the North Island and one for the South Island.

[9] The 12 July 2013 letter was written by Mr Gu who speaks English as a second language. It is not as artfully worded as it might be, but I am absolutely clear that there was never any intention on the part of Best Health for the salary payable to Ms Nee to effectively double, no matter how well she performed. The reality is that

the letter proposed a series of increments on the original base figure and by no stretch of the imagination could that figure produce double the starting figure.

[10] Sadly, Best Health focused on this mistaken view that Ms Nee was seeking a salary of $118,000 and seems to have become fixated on it and many of its claims around what she sought from this litigation are simply wrongheaded. Not only is there this issue of the contention that Ms Nee was claiming twice the salary that she started on (she was not), but also Best Health witnesses (specifically Yali Li, a director of Best Health) stoutly maintained in the investigation meeting that the claim the Authority was entertaining amounted to more than $70,000. This is just nonsense and it is difficult to know where this idea emanated from.

[11] Moreover, Yali Li also maintained that she had been threatened by Ms Nee and her adviser (her counsel, Mr Ogilvie). Again, I have to say that there is no evidence whatever that anybody threatened anybody else.

[12] The short point is that Ms Nee is entitled to bring her claim in the Authority because she says that she has sustained a personal grievance as a consequence of the behaviour of Best Health. That is what this claim is about and she is entitled under New Zealand law to bring it; the bringing of a claim is not a threat or a demand that is in any way improper. It is the operation of a legal process and Ms Nee is perfectly entitled to pursue her rights in this forum.

[13] Mr Ogilvie questioned Yali Li on her allegations of intimidation and despite his efforts and mine in questioning Ms Li, there simply was no evidence of any improper behaviour either by Ms Nee herself or by her adviser.

[14] This is an evidence-based process and in the absence of any evidence of impropriety I dismiss out of hand the suggestion Ms Li makes. Moreover, I am not impressed with her suggestion that her various health problems are a consequence of Ms Nee's personal grievance action. I say again that Ms Nee is entitled to bring a personal grievance in terms of New Zealand law and it is unreasonable of an employer party to blame any health issues that they might have on a legitimate pursuit of a party's rights in accordance with the law.

[15] In any event, in its letter of 20 September 2013, Best Health appeared to rest on the proposal in its letter of 12 July 2013 and I am satisfied that the 12 July 2013 letter sets out Ms Nee's entitlement to salary increases.

[16] The essence of her complaint in this regard is that notwithstanding her achievement of targets in that letter, she has not been paid in accordance with the entitlements created by that letter and she seeks redress in that regard. Best Health says that she did not achieve the targets claimed.

[17] During the employment there were a number of minor irritants, one relating to the provision of payslips, another relating to the appropriate way of paying for expenses while Ms Nee was on the road travelling, an argument about the use of the company vehicle, and an issue around childcare subsidy payments.

[18] On 25 September 2014, Ms Nee was summoned to a meeting and presented with a proposal curiously dated the following day which set out a proposal to restructure the business, one of the consequences of which potentially was the disestablishment of Ms Nee's position.

[19] I have before me the document that Ms Nee received; it is a standard restructuring proposal document containing the sort of information I would expect to see in a document of this kind.

[20] Ms Nee's position was that she was never provided with sufficient information about the true financial position of Best Health to enable her to make any meaningful contribution to the consultation process and in the result, she never made any submission to the employer about the restructuring and the position occupied by Ms Nee was in consequence disestablished, she worked out her notice and left the company effective 20 October 2014.

The issues

[21] The Authority must determine whether this dismissal for redundancy was unjustified and in order to do that, there must first be an inquiry as to the genuineness (or otherwise) of the redundancy and then a consideration of the process by which the redundancy was effected, in particular the question whether consultation was adequate in all the circumstances.

[22] Then I will need to decide if Ms Nee is owed salary and finally I will need to consider whether there has been either a breach of good faith by the employer or a failure to provide wage and time records sufficiently serious to justify the imposition of a penalty.

Was the redundancy genuine?

[23] The starting point in any consideration of the genuineness or otherwise of a redundancy must be the fundamental legal principle that in order for the Court or the Authority to be satisfied as to the genuineness of a restructuring proposal, it is not enough for the employer to simply assert the need, for example to take costs out of the business. The Court or the Authority must have before it sufficient material to demonstrate that the redundancy is what a fair and reasonable employer could do in the particular circumstances of the case: see for instance *Michael Rittson-Thomas t/a Totara Hills Farm v. Hamish Davidson* [**2013**] NZ EmpC 39 where Chief Judge Colgan clearly enunciated this principle.

[24] Applying the law then to the present case, it is apparent first that Ms Nee was quite mistaken in her contention made throughout the run up to the investigation meeting that her position was the only position affected by the proposed restructure. Indeed, Mr Gu gave evidence to the effect that all of the sales employees of the employer were made redundant as a consequence of the process of restructure. This was not a huge number but nonetheless broadens the canvas in which the restructure must be evaluated.

[25] Mr Gu's evidence is that Best Health provided all the information it had to Ms Nee and that there was nothing held back by the employer. That evidence, however, is inconsistent with the email traffic between the parties after the restructuring process was commenced where some of Mr Gu's communications seem to suggest that he was holding material back deliberately rather than providing all he had. However, I am inclined to the view that much of the difficulty with engaging with this employer is a function of its evident confusion about its obligations as an employer and, to a lesser extent, difficulties with speaking English as a second language.

[26] I am satisfied that the best evidence about what financial information was available and what was not available comes not from the employer witnesses at all but from a witness for Ms Nee, Craig Calder, who was for a time effectively the general manager of Best Health although his engagement was as an independent contractor.

[27] Mr Calder's evidence tends to support my thesis that Best Health was not a well-run organisation and that Mr Gu in particular did not appear to have a good grip

of what was actually going on. There were, on Mr Calder's evidence, continuing problems getting basic issues addressed by Mr Gu and these were matters not of any great moment but simply the sorts of issues that were constantly frustrating to staff when things were not addressed and fixed.

[28] There is one clear point at which Mr Calder's frustration with Mr Gu's performance boiled over and he sent an email to the other director of Best Health, Ms Li, complaining about Mr Gu and his apparent inability to get simple things attended to.

[29] Of particular relevance though to the question of whether the full extent of the financial information available to Best Health was provided to Ms Nee, is Mr Calder's evidence that he never got sufficient financial information to manage the company's affairs properly and he satisfied me in the evidence that he gave to the investigation meeting that that was because the company simply did not have robust enough financial systems to provide credible information about its financial performance.

[30] That said, Mr Calder was equally clear that *"the company was suffering major cashflow problems"* and as a consequence, he was told by the two directors that they would need to develop a restructuring proposal.

[31] Mr Calder was involved in the restructuring plans and records in his evidence being in attendance at the initial consultation with Ms Nee (together with the two directors) and that they communicated that Best Health had *"run out of money"*, *"there was no cashflow"*, *"the Chinese market was now impossible to export to"*, the firm was *"downsizing"* and it was *"out of their control"*.

[32] It is apparent on the email traffic between the parties immediately after the restructuring process was initiated that Best Health did provide information pertaining to the financial performance of the business especially as it related to Ms Nee. In an email dated 2 October 2014, Mr Gu provided *"a detailed sales report for all store sales in the South Island"* from the beginning of Ms Nee's employment to 14 September 2014 and he goes on to identify that the total revenue generated in the subject period was just equivalent to her annual salary. Then at the end of the same email, Mr Gu insists that all relevant information has been provided and that *"no other confidential information will be released"*.

[33] Mr Gu's conviction that all he need do was provide information relevant to the employee affected by the proposed restructure is mistaken. Mr Gu's obligation is to provide material not just about the performance of the affected employee in her role but also about the overall performance of the business as a whole so that the Authority can assess *"…whether the decision, and how it was reached, were what a fair and reasonable employer …could have done in all the relevant circumstances." : Rittson-Thomas.*

[34] It seems from the evidence before the Authority that all that Ms Nee was ever provided with was material pertaining to her own role in the business and its apparent inability to generate sufficient revenue to justify its continuation, together with a succession of generalisations of the sort Mr Calder remembers from the initial consultation meeting with Ms Nee.

[35] While I think the matter is finely balanced, I am impelled to the conclusion that notwithstanding the messy and muddled way in which Mr Gu chose to operate the business, there is sufficient evidence before me to justify a conclusion that the restructuring proposal was a genuine attempt by the employer to right the financial ship. I am particularly drawn to this conclusion by the evidence of Mr Calder who made it abundantly clear in his evidence that even while he was trying to manage the business for the directors, he himself had difficulty getting basic financial information. Whether this is a function of the secretiveness of the directors or their incompetence is difficult to tell. But I have to conclude that the evidence about Ms Nee's own role being surplus to requirements is clear enough (it is plain that she was simply not generating sufficient sales to justify her salary), and the fact that Mr Calder was involved and was himself satisfied (based on his evidence) that the firm was in dire financial straits, seems to me to satisfy the legal test that this was indeed a genuine redundancy even although it was badly managed.

Was the consultation process adequate?

[36] I am satisfied on the evidence before me that the consultation process was adequate. A stock standard consultation document was generated which identified what was supposed to happen, made clear what the plan was and what the timeline was and actively sought consultation with Ms Nee.

[37] Indeed, Best Health put back its timeline on more than one occasion to try to get Ms Nee to engage with it but that was to no avail.

[38] The short point is that despite Best Health's efforts in this regard, while I am satisfied it did its level best to fulfil its legal obligations, Ms Nee took no steps whatever to engage with the employer and suggest alternatives to the strategy that it had formed a preliminary view about, namely the disestablishing of her role and the role of the other salesperson.

[39] Ms Nee tried to establish that the restructuring was somehow predetermined. There is an error in the date of the consultation document which she wanted me to accept indicated a predetermination. I do not accept that view. I think it was simply an error and no more than that.

[40] Ms Nee also invited me to consider the evidence of Lynda Strowger who, when working for a third party, remembers receiving an email from Best Health signed by Mr Gu which indicated that *"all sales staff had been made redundant"*.

[41] That evidence is, of course, brought before me to try to suggest that Best Health had determined to disestablish the positions before it commenced the consultation, that in fact the consultation was just a sham.

[42] The difficulty with that thesis is that Ms Strowger could not be certain when she got this email from Best Health and in answer to a question from me at the investigation meeting she confirmed that the email could have been in early October. Given that the consultation process commenced in late September and may not have even been concluded by the time that Ms Strowger saw the offending email, it is certainly not persuasive evidence of any impropriety.

[43] Mr Calder's evidence is also called in aid because he remembers discussions that he had with the directors of Best Health and taken literally, some of those discussions might suggest predetermination by the directors, but I think I must be cautious about accepting that evidence without corroboration given the difficult circumstances in which Mr Calder and Best Health parted and so I take that evidence no further.

[44] My conclusion then in respect of the consultation issue is that the employer has done everything the law requires to consult with Ms Nee and she has failed

absolutely in her obligation to engage with it. She says that she did not have sufficient information to make any response and I do not agree with that.

[45] As I have already made clear in the earlier section of this determination, Ms Nee received adequate information about the circumstances pertaining to her own position anyway, and on Mr Calder's evidence, got pretty clear and dramatic information about the health of the business even if it was short on specifics. I am satisfied Ms Nee could and should have engaged with the employer and had sufficient information to enable her to suggest alternative strategies which the directors of Best Health may have been prepared to entertain.

[46] In summary then, I am satisfied that Ms Nee lost her position through redundancy and that that redundancy, while far from perfectly effected by the employer, was effected sufficiently well to meet the law's basic requirements. It follows from that conclusion that Ms Nee does not have a personal grievance for unjustified dismissal.

Is Ms Nee owed salary?

[47] I am satisfied on the evidence I heard that Ms Nee is owed salary. There are two elements to her entitlement. The first is an entitlement to a salary increase on the base rate of 5% from 4 June 2014. That was paid in her final pay. The second is an entitlement to incremental increases based on her achievement of the targets set out in the letter from Mr Gu to Ms Nee dated 12 July 2013.

[48] I deal with each of these matters in turn. In respect to the salary increase, Mr Calder's evidence was absolutely clear that he obtained the consent of Best Health for Ms Nee to be paid a salary increase of 5% to take effect from 4 June 2014.

[49] Mr Calder's evidence is that he was instructed by Best Health to conduct Ms Nee's performance appraisal, that this took place on or about 4 July 2014 and that as a consequence of that performance review, he told Ms Nee that he would recommend to her a 7% wage increase and a new bonus structure.

[50] Mr Calder's evidence was that he emailed that proposal to the directors of Best Health on 14 July 2014 and got no response whatever which he observed was typical of the way that the directors dealt with matters of that sort.

[51] On 23 July 2014, Mr Calder, plainly frustrated at the failure of the directors to even engage with him on his recommendation, emailed Ms Li separately, complained about the performance of Mr Gu, and sought Ms Li's engagement on the subject of Ms Nee's salary increase. I have already referred in passing to this email from Mr Calder to Ms Li, complaining about Mr Gu's performance.

[52] Ms Li was in China when this email was sent but she returned shortly thereafter to New Zealand and her evidence to me at the investigation meeting was that she thought (erroneously I am satisfied) that Mr Calder had already agreed to that salary increase but she was very clear that she herself subsequently agreed to a salary increase not of 7% but of 5%. There was no increase agreed in relation to the bonus structure that Mr Calder was recommending.

[53] Whatever Ms Li thought Mr Calder may or may not have agreed to, I am satisfied that Mr Calder did not agree to pay the increase to Ms Nee without getting the directors' sign-off because it is absolutely inconsistent with his evidence. It will be recalled that Mr Calder's evidence was that he had told Ms Nee only that he would recommend an increase, that he had in fact recommended that increase by email to the directors and there had been no reply.

[54] That is inconsistent with Ms Li's contention that Mr Calder had already agreed to the increase and in any event it is inconsistent with the numbers involved because what Mr Calder told Ms Nee he was recommending was 7% and a bonus change and what Ms Li conceded she had agreed to was no alteration to the bonus but an increase on the base rate salary of 5%. Ms Li could not remember when the salary increase was to take effect from, but I am satisfied on the evidence of Mr Calder alone that that should take effect from 4 June 2014.

[55] It is common ground that the salary increase just discussed was paid out to Ms Nee in her final pay, that is fully five months after the increase was supposed to take effect.

[56] The second issue that requires discussion is Ms Nee's claim for increased salary as a consequence of meeting bonus targets. I refer first to the addendum to the employment agreement entitled *"Schedule of performance"*. This addendum is referred to in clause 7.2 of the operative employment agreement in the following terms:

> *The employee shall be eligible to receive a bonus of not less than $5,000 after each 12 months' service, provided the employee has achieved the performance target set in The Schedule of Performance Target. The schedule should be reviewed from time and* [sic] *time and at least once a year.*

[57] What the schedule of performance provides for is a series of stepped bonus payments at quarterly rests. To illustrate how the provision is structured, I set out below, as a representative sample, the provision relating to the first three months of the employment. It is in the following terms:

> *Within the first three months:*
> *(1) Get our main products into 10 or more major stores such as Pak'N'Save, New World;*
> *(2) Achieve sales of $0.25m excluding GST for the three months.*

[58] I observe first that this provision does not clearly identify whether the employee is required to achieve both point 1 and point 2 or one or the other in order to attract the bonus. Put another way, there is no indication that the provision is either conjunctive or disjunctive and that being the case, it is difficult to apply.

[59] However, I do not need to take that point any further because I am satisfied by the terms of clause 7.2 (final sentence) that the schedule *"should be reviewed from time and* [sic] *time ..."*. Presumably this means that the schedule of performance can and should be reviewed from time to time.

[60] It seems to have been agreed by both parties to this employment relationship problem that the letter Mr Gu sent to Ms Nee on 12 July 2013 was the operative bonus calculation and that being my considered view of the evidence I heard, I think it is safe for me to conclude that that letter constitutes a review and reformulation of the schedule of performance contained within the employment agreement.

[61] I think I can accept the primacy of the 12 July 2013 letter because it followed so closely after Ms Nee's employment (and the contemporaneous signing of the employment agreement) and the $1,000 salary increase postulated in the 12 July 2013 letter was immediately paid by the employer which suggests that it sought to be bound by the provisions of the 12 July 2013 proposal.

[62] Moreover, the subsequent correspondence between the parties, while frankly confusing, particularly from Best Health's point of view, keeps reverting to the provisions in the 12 July 2013 letter.

[63] I conclude for those reasons that the calculation of Ms Nee's entitlement (if any) to bonus payments must be derived by the application of the principles in the 12 July 2013 letter.

[64] Again, I am indebted to Mr Calder for providing evidence to me which enables me to assess what additional bonus entitlement Ms Nee can appropriately claim.

[65] Ms Nee provided to me with her brief of evidence a schedule of supermarket businesses which she says she *"recruited"* and which therefore entitles her to additional bonus payments based on the 12 July 2013 letter.

[66] The attachment to her brief (attachment 3) is simply a list of supermarkets under three separate heads. The first head is *"the South Island:"*, the second is *"the North Island:"* and the third is *"since added: North Island"*.

[67] Mr Calder told me that in respect of this attachment only the entries under the heading *"the South Island:"* ought to be attributed to Ms Nee's work because the balance of the entries relating to North Island stores would have been achieved by the work of others.

[68] On that basis then, Ms Nee is entitled to an additional $625 on her calculation being the difference between the start figure of $53,500 and the correct figure of $54,500 and she is also entitled to holiday pay on that additional sum.

[69] On the evidence I heard, Ms Nee is not entitled to the further claim that she makes which proceeds on the footing that she achieved the target necessary to get a base salary of $60,000 on and from March 2014. That entitlement can only exist if Ms Nee is to receive credit for Auckland sign-ups and Mr Calder's evidence was very clear that she was not entitled to that.

[70] As Mr Calder was her witness and his evidence was not challenged at the investigation meeting, I am not able to take that aspect of her claim any further.

Is there a breach of good faith and/or a requirement to levy a penalty?

[71] I agree with Ms Nee that working for Best Health must have been a frustrating experience. The evidence I heard suggests that Best Health was not well run and that the employer's position on a number of matters was at best confusing.

[72] However, I think the explanation for the employer's behaviour has more to do with incompetence than it has to do with bad faith; put another way, I am not persuaded that the element of culpability that seems to me necessary for a finding of bad faith is in existence here, but rather that there is simply evidence of muddlement and confusion. I decline to make a negative finding for that reason.

[73] Ms Nee also claims a penalty for the failure to provide wage and time records. I think the failure to provide proper wage and time records is evidence of muddlement and confusion rather than culpability and while an inability to provide material required by law because of unsatisfactory processes is no defence, I do observe that the payslips that Ms Nee was so concerned to acquire during the employment were eventually provided to her; Mr Gu says he had to work all night in order to produce this material and he blames his accounting software package for that circumstance.

[74] I accept Ms Nee's evidence that she tried to get wage and time records during the employment, particularly to resolve the continuing confusion about the payment of salary. I have already made clear that the correct salary increase was only paid to her in the final pay, some five odd months after the increase took effect.

[75] Moreover, that increase required a huge amount of effort in order to resolve and when coupled with the failure to properly address Ms Nee's claims relating to bonus payments, it seems to me Best Health needs to be encouraged to pay attention to the obligations it has as an employer and the needs of its employees.

[76] Accordingly, I think it appropriate that Best Health pay a penalty for its failure to adequately engage with Ms Nee in respect of her continuing requests for wage and time records so as to understand whether and to what extent she was entitled to bonus payments and that penalty of $2,500 is to be paid to Ms Nee for her use.

[77] I make the point that no criticism can be levelled at Ms Nee for her failure to accurately calculate her bonus entitlement and for making a claim in this proceeding which I have found she is not entitled to; the level of confusion that seems to be evident in the business practices of this employer would make any calculation of entitlement challenging.

Determination

[78] I have not been persuaded that Ms Nee has any personal grievance because I am satisfied that the redundancy was a genuine one and that the process that the employer used to effect that redundancy was in accordance with the law.

[79] However, I think Ms Nee is entitled to additional salary based on achieving bonus targets and I direct that she is to be paid a further sum of $625 gross together with the holiday pay on that sum.

[80] In addition, Ms Nee's attempts to obtain clarity on her position by seeking wage and time records (to which she is entitled as a matter of right) entitle her to the payment of a penalty of $2,500 which Best Health Products Limited must pay to her together with the wages and holiday pay due and owing within 14 days of the date of this determination.

[81] Leave is reserved for the parties to revert to the Authority for further orders should that be necessary.

Costs

[82] Costs are reserved.

James Crichton
Member of the Employment Relations Authority