

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 321
3028111**

BETWEEN	RAMANDEEP KAUR Applicant
AND	UBNZ CORPORATION LIMITED First Respondent
	PACIFIC SETTLEMENTS LIMITED Second Respondent
	ROBERT BELL Third Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Gelb, Advocate for Applicant
Shelley Eden, Counsel for Respondent

Investigation Meeting: 12 July & 8 October 2018 at Auckland

Submissions received: 8 October 2018 from Applicant and from Respondent

Determination: 17 October 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Ramandeep Kaur, claims that she was unjustifiably dismissed on 2 November 2017 by the Respondent, UBNZ Corporation Limited (UBNZ)

[2] Ms Kaur further claims that she was also an employee of Pacific Settlements Limited (PSL).

[3] UBNZ denies that it unjustifiably dismissed Ms Kaur, and claims she was justifiably dismissed by reason of redundancy.

[4] PSL claims that it did not employ Ms Kaur at any time or owe her wages or statutory entitlements.

Note

[5] At the Authority's investigation held on 12 July and 8 October 2018 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[6] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

[7] KlickEx Corporation Limited changed its name to UBNZ during 2017. To avoid confusion I have used the current name of UBNZ when referring to the company which was previously known as KlickEx Corporation Limited.

Issues

[8] The issues for determination are whether or not:

- Ms Kaur was employed by PSL or UBNZ
- Ms Kaur was unjustifiably dismissed by reason of redundancy

Background Facts

[9] UBNZ is a community focused service supporting pacific island countries by making clearing house systems available across the Pacific. It had previously been known as KlickEx Corporation Limited prior to its name change to UBNZ on 16 August 2017. Mr Bell is a director of UBNZ and states that he is currently involved in duties related to the closure of UBNZ.

[10] UBNZ (at that time known as KlickEx Corporation Limited) made a job offer to Ms Kaur by email dated 23 December 2015 for a position as a Senior Test Engineer at an annual salary of \$82,000.00. In addition the email stated that Ms Kaur would be entitled to:

The standard company employee benefits package, which includes Life Insurance, Income Protection, and Medical Insurance;

[11] Ms Kaur commenced employment on 20 January 2015, reporting to Mr Bell. During Ms Kaur's employment UBNZ had approximately eight employees, four of whom were based in the same office as her.

[12] Ms Kaur said she had reviewed and read a draft Individual Employment Agreement which had been provided to her, but had not been signed by Mr Bell. Mr Bell said his recollection was that the Individual Employment Agreement had been finalised and signed. No signed copy of the Individual Employment Agreement was provided to the Authority.

Financial situation 2016

[13] Mr Bell said that UBNZ, of which he had been a director, began to experience serious financial difficulties during 2016 when banks in New Zealand and in other countries began closing payment providers' accounts without notice. He said all of UBNZ's bank accounts were closed by 31 March 2016.

[14] Ms Kaur said she began to notice anomalies in her bank statements which concerned the payer identity of her salary and other related payments. Initially the payer had been KlickEx, but the payment on 20 April 2016 identified Mr Bell as the payer: '*R A J Bell PAYE 1597.35 Other 204.99 KlickEx SAL*'. From mid- 2017 she said she was paid by cash deposits.

[15] Mr Bell said UBNZ had been unable to make the employee salary payments as a result of its financial difficulties and as a result he had personally funded employee salary payments.

[16] Ms Kaur said she also noticed that her IRD portal had not been updated since she commenced employment with UBNZ. She contacted the IRD which told her it had not received any information or payments from UBNZ.

[17] During early 2016 Ms Kaur said she raised these issues with Mr Bell. During March 2016 she emailed Mr Bell informing him that she did not believe her salary payments and PAYE payments to be correct, enclosing her calculations and asking him to verify them and check the PAYE payments.

[18] Mr Bell did not respond, so she had emailed him a reminder email on 17 June 2016 to which Mr Bell had responded on 26 June 2018: "*all done now. Payslips are also coming.*"

[19] Mr Bell emailed all the UBNZ employees on 26 June 2016 stating:

Hi Team,
Please fill out the attached forms, for us to submit to the IRD.
...

I think the easiest way is to do one each, per month, going back.

...

So if all of you could please take a look, fill out, give it to me to sign, then take photos – and submit by post AND email to the IRD – so that all these things are up to date.

I'll send through what I've been paying the IRD on behalf of each of you by separate email.

[20] During August 2017 Ms Kaur emailed Mr Bell requesting that the employees be provided with payslips for July, August, September and October 2016, and asking that these include leave entitlements. Ms Kaur explained that she required the information for a bank loan request she had made.

[21] Mr Bell replied on 27 October 2016 by email asking Ms Kaur to draft a template for a pay slip and setting out in the email her pay component details.

[22] Ms Kaur had received an email from the IRD dated 6 January advising that it had not received any income information for her from UBNZ since June 2016 onwards.

[23] Mr Vijesh Prasad was appointed as the Chief Financial Officer for KlickEx Pacific Limited in February 2017. His role was also to assist with the operation of UBNZ.

[24] Mr Prasad said he had undertaken payroll administration on behalf of UBNZ and at the time of the termination of Ms Kaur's employment had ensured that all her statutory entitlements had been met.

Redundancy consultation with Ms Kaur

[25] Mr Bell, who travelled extensively throughout the Pacific region, said he had kept all the UBNZ employees fully informed of the financial position of UBNZ, including Ms Kaur. Primarily this was by way of face-to-face meetings whenever he was in New Zealand.

[26] Ms Kaur said that she recalled many staff update meetings held by Mr Bell. Mr Bell had provided information regarding the UBNZ's financial position, but she had not been concerned that UBNZ was facing financial difficulties because Mr Bell's attitude had been positive throughout her employment.

[27] She had recalled Mr Bell stating at one stage during her employment that UBNZ had enough funds available for it to operate for approximately six months, and then the employees would be moved to a new company called PSL. However this had never been confirmed to her in writing.

[28] Mr Bell denied he had made such a statement and said that PSL was a holding company, it did not have employees. It held some of the Intellectual Property from a former operation only. Mr Prasad confirmed the status of PSL as a holding company only and stated that it had no payroll, no revenue and no employees.

[29] Mr Bell said that as a result of the information about the operational future of UBNZ he provided to them, some employees left during the period at the end of 2016 to 2017 to take up alternative employment, others requested him to continue trying to salvage the situation adversely affecting UBNZ, and the majority had agreed to concessions to cut costs.

[30] The office had been moved from its existing location to another, lower cost office, and UBNZ was run primarily from a 'work from home' situation. Non-payroll costs including healthcare and life insurance were stopped by agreement with the employees. Mr Bell said the exception in this situation was Ms Kaur who continued to insist that her health insurance costs be met by UBNZ.

[31] Mr Prasad said that at the time of his involvement in UBNZ during the latter part of 2017 it was operating at significant cost and closure appeared a distinct possibility. His understanding and perception had been that the UBNZ employees had been fully apprised of the situation facing UBNZ by Mr Bell, and in addition by means of their own knowledge of the falling volume in business. As a result the majority had transition plans in place to find, or had already moved to, alternative employment.

[32] Mr Bell said that although Ms Kaur had been informed that her position was at serious risk of redundancy as a result of the failing fortunes of the business, she was the last UBNZ employee to have a transition plan in place.

[33] Whilst Ms Kaur agreed that Mr Bell had spoken to the UBNZ employees about its financial position, she said he had always appeared positive about UBNZ's future. In particular she had understood that a project with IBM was proceeding and that this would provide financial security for UBNZ business in the future.

[34] Ms Kaur said that she had placed reliance upon an email from Mr Bell to all the UBNZ employees dated 14 April 2017 in which he expressed a positive outlook for UBNZ, describing: "*a record return to volumes that gave us our best year*" and making the comment that: "*And that's a wonderful return to form*".

[35] Mr Bell said that the IBM proposed business project had been slow moving, and had never represented a full resolution to UBNZ's financial situation and he had kept Ms Kaur

fully aware of that. In particular he had fully appraised her of the situation at a meeting held on 11 September 2017.

Meeting 11 September 2017

[36] Ms Kaur said that during the meeting with Mr Bell on 11 September 2017 he had advised her that there was a possibility of UBNZ facing serious operating difficulties if the IBM project did not materialise. In that case he would be making all the employees redundant apart from one employee working on the helpdesk.

[37] Mr Bell had also advised her to seek alternative employment as a precautionary measure. She had asked him if she could remain employed until February 2018 because of her personal situation.

[38] Ms Kaur said she had not fully understood that her continued employment was at risk because Mr Bell had told her position would be secure if the IBM project proceeded, and he sounded confident that it would do so.

[39] Mr Bell confirmed he had spoken to Ms Kaur on 11 September to discuss the UBNZ situation and said he had not mislead her concerning the IBM situation noting the email he had sent her that same date, 11 September 2017, in which he had written:

But in confidence, if IBM doesn't go live on time, then I'm not sure we can afford business as usual; and we may have to halve all departments – Sales, Finance, Support, and IT costs too; to match with revenue. If so, it would only be fair to give everyone maximum notice so we can do our best we can to come up with alternative plans, or to give everyone a good chance to get settled in to new work before Christmas comes around.

[40] He said that Ms Kaur had subsequently asked him if she could change her job title to assist with her applying for other positions, stating in an email dated 13 September 2017 : *“Can I add the designation “Test team lead” instead of ‘senior test engineer’ for my time at Klickex?,* to which he had agreed.

Events October 2017

[41] Mr Prasad said that on 16 October 2017 UBNZ and IBM announced that UBNZ had agreed to use an IBM cross border payment platform known as WorldWire.

[42] Mr Bell had asked him to ensure that steps were taken to close UBNZ by finalising all outstanding matters. Accordingly he had met with the remaining UBNZ employees individually to explain to them the ongoing business situation, specifically that payroll costs were being cut as payroll was the major operational expenditure contributor, and revenue was dropping and unable to meet costs.

[43] He had spoken to Ms Kaur on or about 20 October 2017 who had told him that she was fully aware of UBNZ's position; but that she did not want to have to obtain alternative employment prior to February 2018. In response he had told her that he would ascertain if that was possible, but that he could not guarantee it in the circumstances.

Notice of Termination

[44] Ms Kaur said she had received a letter signed by Mr Prasad and dated 2 November 2017 informing her of the termination of her employment. The letter stated:

... As per the conversation between you and the Chairman, the communication was clear for you to start exiting the business and look for new opportunities outside. Furthermore in our meeting on 10th October 2017, we discussed the need for the business owners to look at the overall business performance, the need to streamline processes, enhance performance and improve efficiency.

The business has maintained a positive relationship with you but would inform you with regret that it is not viable to sustain the pressure on the payroll in the long-term.

As such the business has decided to terminate your employment effective 30th November 2017. Your notice period is 4 weeks. Therefore your employment will end on 30th November 2017.

Determination

Was Ms Kaur employed by PSL or by UBNZ?

[45] Ms Kaur's evidence was that she had concluded post-termination that her employer had changed from UBNZ to PSL. Her conclusion was based upon IRD records she had obtained which stated that the employer name was PSL during the latter part of her employment.

[46] Mr Prasad's evidence was that as the person responsible for payroll administration he had provided Ms Kaur with payslips for July, August and September 2017 which correctly showed her employer as UBNZ/KlickEx. However he had mistakenly used PSL's tax code to file Ms Kaur's final set of tax paperwork when making a manual deposit of cash at a Westpac branch for the period August to November 2017.

[47] I accept that at the time of the Investigation Meeting the coding error had not been rectified despite the evidence of Mr Prasad that rectification with the IRD was in progress.

[48] Payments to the IRD provide a good indicator of the identity of the employer but are not determinative of the issue. Examining whether or not Ms Kaur's employment had been transferred to PSL from UBNZ during 2017 I note as significant the following:

- Although Ms Kaur's evidence was that Mr Bell had told her that her employment would be moving from UBNZ to PSL, this was not confirmed in writing and is denied by Mr Bell;
- Mr Bell and Mr Prasad's evidence that PSL was merely a holding company without employees, a payroll or revenue;
- There was no offer of employment from PSL to Ms Kaur; no acceptance of such an offer by her, and no evidence supporting an intention to create legal relations between her and PSL;
- The wage payments to her were all made by UBNZ (as funded by Mr Bell personally) as supported by payslip evidence; and
- The IRD statement on which Ms Kaur relies was filed after her employment with UBNZ had terminated.

[49] In all the circumstances I determine that Ms Kaur made was not employed by PSL. Her employer was initially, and remained, UBNZ.

Was Ms Kaur unjustifiably dismissed?

[50] Ms Kaur was dismissed from her employment with UBNZ by reason of redundancy. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

1. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
2. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[51] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[52] Looking firstly at the substantive justification I find that Mr Bell regularly updated the UBNZ employees including Ms Kaur concerning UBNZ's financial position. However there was a minimum provision of formal financial evidence and a lack of opaqueness in what was provided which resulted in Ms Kaur having placed undue reliance upon the positive attitude of Mr Bell, especially in relation to the IBM project, in regard to her perception of continuation of her employment.

[53] Turning secondarily to procedural fairness and whether or not the decision to dismiss Ms Kaur by reason of redundancy was one a fair and reasonable employer could have made I observe that in a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s.4 of the Act.

[54] The duty of good faith is set out in s.4 of the Act:

s.4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2) –
 - (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-
 - (i) to mislead or deceive each other, or
 - (ii) that is likely to mislead or deceive each other
- (1A) The duty of good faith in subsection (1)-
 - ...
 - (c) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative

[55] The Chief Judge in *Simpsons Farms Limited v Aberhart*¹ noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”

¹ [2006] ERNZ 825

Consultation

[56] The Employment Court in Vice Chancellor of *Massey University v Wrigley* stated that:

The purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer.²

[57] The duty of good faith applies to both the employer and the employee in an employment relationship. The duty required UBNZ to consult meaningfully with Ms Kaur.

[58] Mr Bell clearly communicated with Ms Kaur about the financial position and continued operation of UBNZ. However I find that the information provided was limited by the extent and manner of the information provided by Mr Bell. As already noted Ms Kaur's evidence was that she had placed, albeit erroneous, reliance upon Mr Bell's positive attitude and the information provided about the IBM project.

[59] I note that the email dated 11 September 2017 in which Mr Bell referred to the situation regarding IBM as supporting evidence of communication of a redundancy situation, Mr Bell referred to a possible but not concluded scenario in the statement: "*if IBM doesn't go live on time,*" and the need in that eventuality to make redundancies.

[60] Formal consultation would have avoided any ambiguity in communication by providing (i) unambiguous information about UBNZ's financial position, (ii) the fact that even if it were finalised the IBM project referred to would not alleviate the financial collapse of UBNZ, and (iii) the implications for Ms Kaur's continued employment with UBNZ.

[61] I find that UBNZ failed to follow a fair and proper process.

[62] I determine that in all the circumstances at the relevant time, Ms Kaur was unjustifiably dismissed on the basis of a redundancy situation by UBNZ.

Remedies

[63] Ms Kaur was unjustifiably dismissed and she is entitled to remedies

Lost wages

² *Massey University v Wrigley* [2010] NZEmpC 37 at [55]

[64] Ms Kaur is entitled to lost wages. Ms Kaur obtained alternative employment on 12 February 2018. I am satisfied that she took steps to mitigate her loss and obtain alternative employment after the notification of her employment

[65] I order that UBNZ pay Ms Kaur for a period of 11 weeks from 30 November 2017 in the sum of \$17,346.15 gross (calculated as \$82,000.00 per year x 11 weeks) pursuant to s 128(3) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[66] Ms Kaur is also entitled to compensation for hurt and humiliation.

[67] I order UBNZ pay Ms Kaur the sum of \$10,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[68] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[69] I have determined that Ms Kaur was unjustifiably dismissed by UBNZ. However I find that Ms Kaur was made aware informally at a very early stage of the precarious nature of UBNZ's operation. In her written evidence she stated:

- Recalling a number of : *'multiple staff update meetings'* in which Mr Bell had mentioned that he was: *'trying to get a bank's license or to get bank accounts'*;
- A meeting with Mr Bell in which he advised her that: *"there is a possibility of things going downhill if IBM project doesn't go ahead. In that case, he will have to let everyone go ..."*;
- Mr Bell advising her in the meeting held on 11 September 2017 to: *'try and look for another job'* and
- A meeting with Mr Prasad on or about mid October 2017 when he asked her if she was aware of the situation facing UBNZ and she confirmed that she was.

[70] I find that Ms Kaur was sufficiently aware, despite the lack of formalised financial information and consultation, of the likelihood of her employment terminating from UBNZ in

the latter part of 2017. However despite her awareness of the precarious nature of UBNZ's employment and in consequence the adverse implications for her ongoing employment with it, she wilfully chose to ignore it.

[71] The duty of good faith is incumbent upon both parties to the employment relationship. I consider that if acting in good faith Ms Kaur had been responsive and communicative, she could have turned her mind to the situation and requested and have obtained full financial disclosure of the true situation; embarked upon obtaining a suitable position earlier than she did; and potentially avoided having her employment unilaterally terminated by the employer.

[72] In these circumstances I find contribution to the situation in which she found herself on 2 November 2017. Accordingly the remedies awarded are reduced by 40%.

Medical Insurance

[73] Ms Kaur was contractually entitled to medical insurance. UBNZ does not dispute that it owes monies in respect of the medical expenses incurred by Ms Kaur in accordance with her contractual entitlement to medical insurance.

[74] I order that UBNZ pay to Ms Kaur the sum of 598.77 in respect of medical insurance contribution.

Penalty

[75] Ms Kaur's evidence is that she received inadequate information concerning the correct payment of her salary, holiday leave entitlements and PAYE information.

[76] The evidence provided by Mr Bell and Mr Prasad and the written evidence, in particular the email dated 26 June 2016 in which Mr Bell requested UBNZ employees to fill out forms for submission to IRD, I find to support Ms Kaur's evidence that the payroll information provided to the UBNZ employees was poor prior to the involvement of Mr Prasad in late 2017.

[77] Employers are expected to maintain wage and time records as required by s 130 of the Act. Failure to do so will incur a penalty pursuant to s 130 (4).

[78] I order that UBNZ to pay a penalty of \$500.00 for its breach of s 130 of the Act and order \$250.00 of that amount be paid to Ms Kaur and \$250.00 to the Crown Account.

Costs

[79] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[80] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority