

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 340
3034485

BETWEEN ANNA COMBRINK
Applicant

AND D B & P A JAMES LIMITED t/a
NOVUS NEW ZEALAND
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, Advocate for Applicant
John Shingleton, Counsel for Respondent

Investigation Meeting: 8 March 2019

Submissions received: On the day

Determination: 7 June 2019

DETERMINATION OF THE AUTHORITY

- A Anna Combrink was not unjustifiably dismissed from her employment.**
- B There was a breach of good faith obligations by D B & P A James Limited t/a Novus New Zealand.**
- C The Authority has found there is a personal grievance under s 122 of the Employment Relations Act 2000 (the Act) other than the type alleged being an unjustified action causing disadvantage because of the breach of good faith obligations.**
- D D B & P A James Limited is ordered to pay to Anna Combrink:**
- (i) **A compensatory payment of \$3000 without deduction under s 123 (1)(c) (i) of the Act.**

(ii) **Payment for the balance of wages owing for the notice period in the sum of \$9,153.84 gross.**

(iii) **Payment for holiday pay in the sum of \$2,364.60.**

E Costs are reserved and failing agreement a timetable set.

Employment Relationship Problem

[1] Anna Combrink commenced her employment as a group finance manager with D B & P A James Limited which trades as Novus New Zealand (Novus) on 12 December 2016. She was party to an individual employment agreement.

[2] By email dated 27 March 2017 Ms Combrink provided notice of her resignation advising that her last day of employment would be 19 May 2017. Her email noted she had tried to address issues that were making it impossible to perform her duties to her high standards to no avail and she could not continue to try to perform in the current circumstances.

[3] The general manager for Novus New Zealand is John Armstrong. He acknowledged Ms Combrink's email and advised in a letter dated 27 March 2017 that the company was happy for her to work out her notice period. He further noted that the company was surprised to receive her resignation and her comments and would be happy to meet with her to discuss further.

[4] A meeting took place on 31 March 2017 with Ms Combrink, Mr Armstrong and Michael James who is a company director of DB & PA James Limited and a general manager of Novus. Ms Combrink requested that her notice period be extended to allow her to work until Friday 26 May 2017 and there was agreement to this.

[5] Subsequent to this meeting Mr Armstrong wrote to Ms Combrink on 3 May 2017 and advised amongst other matters that:

Over the past months we have provided every opportunity to allow you to execute your role including allowing you to restructure the finance team, recruit resources and to introduce a new ways [sic] for some of the day to day activities.

There have been occasions where you have brought to my attention some activities that you believe were a possible hindrance to you and some staff members. I made decisions to mitigate those impediments as best possible to

suit the business and its staff, including restricting communication between yourself and the commercial manager (P) and using myself as a conduit for communication.

Over the time you started with Novus, your absences have placed considerable stress on the finance team member, made planning difficult and required intervention on my behalf to provide some stability and show a bit of leadership for your staff. This business has incurred additional costs including occasions where I have arranged to be down in ChCh to discuss business activities, only to have to try and return on other occasions due to your non-availability in the office.

With respect to your reference of workplace bullying, I fail to find reference to the specific activity and more so, where this is impeded your doing what you are employed to do.

Given the circumstances we find ourselves in, the current situation is no longer tenable and as we would not wish to cause further stress for our staff or yourself, I am suggesting that your attendance at the office no longer be required, allowing you the opportunity to attend to your personal circumstances adequately and for our business to implement permanent plans ahead.

Please feel free to contact me to discuss this further, or if I am unavailable at the time, Mike James is fully briefed and will assist.

[6] Ms Combrink responded to this email the same day advising that before she was able to reply she had heard from her team that she was not coming back but could not email from her work email as access had been disconnected.

[7] Ms Combrink asked in her email how payments for the fortnight and the balance of her notice period would be processed. She asked whether it would be paid in a lump sum on Tuesday or whether it would continue to be paid fortnightly until her notice period finished on 26 May. She attached a timesheet for the fortnight.

[8] On 9 May 2017 Ms Combrink again sent an email to Mr Armstrong requesting the information.

[9] Mr James responded by email of the same date to Ms Combrink advising that the records showed that once what Ms Combrink owed is deducted from “unentitled sick leave” she owed Novus \$1,570.60. Mr James advised that as an act of good faith Novus was willing to waive what is owed. The calculation set out in that email was as below:

Sick days taken and paid with no entitlement – 20 days

Other – 13 days

Less deducted from accrued leave via payroll – 4.5 days

Days owed to Novus taken as paid without entitlement – 28.5 at daily rate \$15,346.11

Less pay to 26/5 at daily rate \$11,323.81

Balance at this point \$4,022.30

Less available holiday pay \$2,451.70

Balance owed to Novus \$1,570.60

[10] Ms Combrink advised in subsequent emails that she did not agree with the calculations. She wrote in an email dated 20 May that she took issue with the suggestion in an email from Mr James that she paid herself because the pays are reviewed and approved by two providers. She referred in an email dated 12 May 2017 that she was disputing not only the calculations but her treatment. In that email and later emails dated 16 and 20 May 2017 there was reference by Ms Combrink to the way she had been treated, especially the way it was suggested that she not return to work amongst other matters. She referred to not having had a chance to reply as the rest of the team was informed she would not return 2 hours later and her email was disabled.

[11] The parties attended mediation in November 2017 but the matter was not resolved. A statement of problem was then lodged in August 2018.

[12] There are three claims in the statement of problem. Ms Combrink alleges that she was unjustifiably dismissed from her employment during her notice period by way of the email dated 3 May 2017 from Mr Armstrong. She says that there was a breach of good faith obligations because Novus was not active and communicative in maintaining the employment relationship and there was a failure to give her an opportunity to comment on the information before a decision was made. Ms Combrink finally says that the respondent made unlawful deductions to her wages in breach of the Wages Protection Act 1983. Ms Combrink seeks determinations that she was unjustifiably dismissed and that good faith obligations were breached. She seeks compensation for lost earnings or alternatively payment for the balance of the notice period, compensation for hurt and humiliation and holiday pay.

[13] Novus do not accept that Ms Combrink was dismissed or that there was a breach of good faith obligations. At the Authority investigation meeting Mr Shingleton confirmed the view of Novus was that Ms Combrink was placed on garden leave in accordance with the provisions in her employment agreement. Novus say that Ms Combrink owed it money at the end of the employment relationship period.

[14] Mr Shingleton accepts in final submission that there was no consultation with Ms Combrink notwithstanding the general deductions clause in her employment agreement before the deductions from the final pay were made. He accepted therefore that there had been a breach of the Wages Protection Act 1983 (WPA) and that s 11 of the Act does provide for recovery.

[15] Mr Shingleton submits that the Authority has jurisdiction to order that the sum required to be paid should be reduced by the sum equal to what Ms Combrink has effectively been overpaid because she was not entitled to be paid for all of the days when she took time off work. He relies on the equity and good conscience provision under s 157 of the Employment Relations Act 2000 (the Act).

The Issues

[16] The issues for the Authority to resolve are as follows:

- (a) What are the material provisions of Ms Combrink's employment agreement?
- (b) Was Ms Combrink dismissed during her notice period?
- (c) If Ms Combrink was dismissed during her notice period then was her dismissal justified?
- (d) If Ms Combrink was not dismissed but instead placed on garden leave then was she at that time treated in accordance with good faith obligations?
- (e) If Ms Combrink was unjustifiably dismissed and/or there were breaches of the duty of good faith what remedies should flow?
- (f) Is the Authority able to reduce any amounts owing to Ms Combrink for wages and holiday pay due to her in her final pay if there may have been an overpayment?

What are the material provisions of Ms Combrink's employment agreement?

[17] Clause 13.2 is material because it is about resignation. It provides as follows:

When resigning, the Employee must give the period of notice as set out in schedule A, in writing. If agreed to by the parties in writing, this period of notice may be reduced or extended. The Employer, at its sole discretion may elect to pay the Employee in lieu for all or part of his or her notice period or require the Employee to take paid garden leave during the period of notice.

[18] Clause 13.21 is also material because it is about garden leave and provides as follows:

Where a notice of termination for the Employee's employment has been given by any party for any reason the Employer may require the Employee to take garden leave during the notice period.

[19] Clause 19.9 is also material because it is about Wage Protection. It provides as follows:

- (a) The parties will comply with the provisions of the Wage[s] Protection Act 1983 and any amendments to that legislation. For the purposes of this Agreement and the Employee's employment, the Employee expressly gives his/her written consent to the Employer deducting any money legally due and owing by the Employee to the Employer from his/her remuneration, including monies received upon termination of employment.

Was Ms Combrink dismissed during her notice period?

[20] Ms Oberndorfer submits that two possibilities exist as to how the employment relationship ended. The first is that Ms Combrink was dismissed and the second that she was placed on garden leave. I find there is also a third possibility in that the employer may also pay the employee in lieu for part or all of the notice period under clause 13.2.

[21] Neither Novus nor Ms Combrink in their correspondence to resolve issues of payments after 3 May 2017 referred to garden leave or dismissal. Mr Shingleton was instructed fairly late in the piece and whilst there were references that could be viewed as consistent with dismissal in Mr James and Mr Armstrong's statements of evidence those aspects were amended.

[22] I agree with Ms Oberndorfer's submission that the evidence supported Ms Combrink had become unhappy in the employment relationship before she resigned. Although not the focus of her employment relationship problem she referred in her evidence to having issues with P who undertook work for Novus and she viewed that relationship as bullying and undermining. She did not consider Novus had resolved issues and she had become increasingly unhappy and felt unsupported. Ms Combrink said in her evidence there was a link between the relationship problems in the office and her working from home and/or her unwellness from time to time.

[23] Novus had become increasingly concerned with Ms Combrink's absences from the work place which numbered a little over 30 days within the five months of employment. There was a concern about the impact those absences were having on the support for the team at the office.

[24] Shortly before 3 May 2017 and during the notice period Ms Combrink was unwell again and then Mr Armstrong sent the letter that she not attend at the office.

[25] Objectively assessed I am not satisfied that there was a clear sending away in this matter in the nature of a dismissal. The facts of the Authority determination Ms Oberndorfer referred to in *Spence v Lake Ohau Holdings Limited*¹ are distinguishable. The employee in that case was told she must leave in the middle of her shift during her notice period because of concerns about her behaviour. A sending away was therefore clear.

[26] In this case not attending the office was put as a suggestion and Ms Combrink was advised that she should feel free to contact Mr Armstrong or Mr James to discuss further.

[27] Ms Combrink expressed concerns in subsequent emails about the manner in which she had been told not to return to work and her team knowledge but her focus was on ensuring she was paid her entitlements. There was no suggestion that her entitlements would not be considered up to the agreed final day of notice of 26 May 2017. That date was specifically set out in Mr James' email of 9 May 2017 with the calculations.

[28] When considered in the round I find it more likely than not that Novus simply exercised the provisions in the employment agreement to either pay notice in lieu for part of

¹ *Spence v Lake Ohau Holdings Limited* [2013] NZERA Christchurch 34

the notice period or place Ms Combrink on garden leave and not require her to attend at the office.

[29] I do not find that Ms Combrink was dismissed from her employment in the circumstances of this case.

Was Ms Combrink treated in accordance with good faith obligations at the time she was told not to return to the workplace

[30] I accept Mr Shingleton's submission that several actions of Novus were consistent with good faith obligations. Novus held meetings to talk about issues that Ms Combrink had and concerns that it had about her absences. Further Novus agreed to an extension to the notice period to 26 May 2017 when requested by Ms Combrink. Further when the penultimate paragraph of the 3 May 2017 emailed letter from Mr Armstrong is considered Ms Combrink not returning to the office is put as a suggestion rather than a fait accompli.

[31] What followed then was that Ms Combrink's team was advised and her work email disconnected before she could communicate further and discuss the suggestion that she not attend at the office. In light of that Ms Combrink did not respond to some of the concerns that Mr Armstrong had raised in his letter.

[32] Mr Shingleton referred the Authority to a determination in *Shirtcliffe v Tuatara Brewing Company Limited*² where there was a lack of consultation about a placement on garden leave. The Member in that matter concluded, when considering whether that was unjustified, that the parties had already addressed the matter in the employment agreement where a clause expressly stated ways in which the Company could protect its business during the notice period including placement on garden leave. That matter concerned protection of commercial interests.

[33] The statutory obligations in s 4 (1A) of the Act require the parties to an employment agreement to be active and constructive in maintaining a productive employment relationship in which the parties are amongst other things responsive and communicative. The emailed letter of 3 May 2017 from Novus initially met those obligations. What happened then impacted on any ability for consultation and discussion. Ms Combrink was emailed the letter

² *Richard Shirtcliffe v Tuatara Brewing Company Limited* [2018] NZERA Wellington 79

at 10.44am³ and the staff were spoken to less than two hours later between 12.15pm and 12.30pm and advised that Ms Combrink's attendance at the office would no longer be required. Ms Combrink found that she could not for whatever reason access her work email and in her evidence said that she received a telephone call from a colleague that she had heard that she would not be coming back. I find that Ms Combrink felt unable to end her employment in a dignified manner and experienced a feeling of loss of control. A colleague brought her glasses and water bottle from the office to her. Ms Combrink said that she tried but was unable to contact Mr Armstrong by telephone.

[34] Good faith obligations to consult and be responsive and communicative were breached. There should have been an attempt to contact Ms Combrink by telephone before announcing the situation to Ms Combrink's team. I have assessed these good faith obligations against advice from Mr Armstrong on 27 March 2017 on receipt of Ms Combrink's resignation that the company was happy for her to work out her notice period. In short there was a change of heart and a stronger emphasis therefore for consultation and fairness than may otherwise have been the case. The *Shirtcliffe*⁴ determination did not have that aspect.

Remedies for breach of good faith obligations

[35] The remedy for any breach of good faith in the statement of problem is a compensatory award.

[36] I find that the breach of good faith can and should be viewed as an unjustified action that caused Ms Combrink disadvantage. I am satisfied that this employment relationship problem was raised in several emails that I have referred to earlier from Ms Combrink to Novus well within the statutory timeframe for raising grievances.

[37] The circumstances of this matter and the findings therefore require the Authority to view this matter under s 122 of the Act as a different type of personal grievance than alleged.

[38] A modest award is called for in all the circumstances where there was some humiliation and loss of dignity and injury to feelings as a result of the lack of consultation about non-attendance at the office during the notice period.

³ See email to Ms Combrink from Mr Armstrong dated 3 May at 6.53pm confirming time.

⁴ Above n 2.

[39] I do not find there was any contribution by Ms Combrink to the failure to act in good faith at that time.

[40] I order D B & P A James Limited t/a Novus New Zealand to pay to Anna Combrink the sum of \$3000 under s 123 (1)(c) (i) of the Employment Relations Act 2000.

Is the Authority able to reduce any amounts owing to Ms Combrink for wages and holiday pay due to her in her final pay if there is an overpayment?

[41] The short answer to this is a very clear no. The evidence does not satisfy the Authority there are statutory exceptions to s 4 of the WPA that wages owing must be paid in full without deduction. It has also been made very clear by the Court of Appeal that the right to be paid under s 4 cannot be defeated by the Authority or Court exercising the equity and good conscience jurisdiction.⁵

[42] There are still significant concerns for Novus about overpayments I accept but no claim before the Authority about this.

[43] Both parties have very different views about overpayment and whether in particular Ms Combrink worked during periods she was absent from the office including on sick leave. Ms Combrink refers to a swings and roundabouts type of approach.

[44] It would be unwise for the Authority to make too much comment. Ms Oberndorfer and Mr Shingleton however are experienced practitioners and may be able to bring some common sense to resolution if in fact the matter of overpayments is to be pursued having heard the evidence and read the emails and letters.

[45] All of this of course points to the desirability for consent to have been reached as envisaged by the Wages Protection Act before the relationship ended.

Payment for the notice period

[46] It is properly accepted by Mr Shingleton that Novus cannot under the WPA withhold the payment for the balance of the notice period because there was a failure to consult about

⁵ *New Zealand Tramways and Public Passenger Transport Employees Union Inc v Mana Coach Services Limited* [2011] NZCA 571.

the deduction before it was made.⁶ Novus agreed in the employment agreement as well to comply with the provisions of the WPA.

[47] The parties appear to be in agreement that Ms Combrink was owed 17 days' pay. There are 15 working days between 8 May 2017, when Ms Combrink was, according to her medical certificate, fit to return to work, and 26 May being the final day of notice with a daily rate of \$538.46 with an annual salary of \$140,000.⁷ There does not appear to be any dispute that Ms Combrink was not paid for 24 April 2017 that was a work day and 25 April which was a public holiday but otherwise would have been a working day for Ms Combrink.

[48] I find that Ms Combrink is entitled to a payment of \$9,153.84 gross being short payment for the notice period withheld unlawfully on the basis that Ms Combrink had been overpaid.

[49] I order D B & P A James Limited t/a Novus New Zealand to pay to Anna Combrink the sum of \$9,153.84 gross being payment owing for the notice period.

Holiday pay

[50] Ms Oberndorfer has set out two amounts of holiday pay. Ms Combrink has estimated that at the date of dismissal she was owed \$2,364.60 in holiday pay. Mr James in his calculations estimated \$2,451.7 is owed for holiday pay.

[51] Ms Oberndorfer suggested that the lesser amount be awarded.

[52] I accept holiday pay remained unpaid and there was no consultation about that before it was withheld.

[53] I order D B & P A James Limited t/a Novus New Zealand to pay to Anna Combrink the sum of \$2,364.60 gross being payment for holiday pay.

Costs

[54] I reserve the issue of costs.

⁶ Notwithstanding the general deductions clause.

⁷ \$140,000 divided by 52 and then divided by 5 to arrive at a daily figure.

[55] Failing agreement being reached, Ms Oberndorfer has until 21 June to lodge and serve submissions as to costs and Mr Shingleton has until 5 July to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority