IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 195
3103792

	BETWEEN	DONNA ISAACSON Applicant
	AND	SONOVA AUDIOLOGICAL CARE NEW ZEALAND LIMITED (TRADING AS TRITON HEARING) Respondent

Member of Authority:	Michele Ryan
Representatives:	Nikkii Flint, counsel for the Applicant Sarah Riceman, counsel for the Respondent
Investigation Meeting:	12 February 2021 in Palmerston North
Submissions	Oral and written submissions from both parties on the day of the investigation meeting
Further Information Received:	15 & 17 February 2021 from the Applicant 22 February 2021 from the Respondent
Date of Determination:	10 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sonova Audiological Care New Zealand Ltd trading as Triton Hearing ("Triton") is owned by a parent company based in Switzerland. Triton provides hearing products and services, largely through its community based clinics.

[2] Donna Isaacson worked for Triton for approximately 5½ years as one of 18 Ear Nurses amongst a total staff of 200 or thereabouts. On 30 March 2020 she was advised her role was disestablished. Her employment ended shortly thereafter. The central issue in this case is whether Ms Isaacson's dismissal was justified in the circumstances.

Summary of relevant information

[3] Ms Isaacson was based at the Palmerston North clinic. A sizeable portion of her Ms position involved ear wax removal functions but the role was not limited to those activities. I will return to this matter.

[4] Triton's managing director, Mr James Whittaker, says the wax removal service was launched as a means to generate referrals to its audiologists and sales of hearing aids, but that, in reality, this seldom occurred. He says the wax removal service was reviewed in late 2019. Despite the service not generating revenue, it was retained as it provided a point of difference compared to its competitors. I understand the Ear Nurses were not aware of the review at that time.

[5] As with all non-essential businesses, Triton was required to halt face-to-face trading when New Zealand entered Level 4 Covid-19 restrictions on 25 March 2020. Mr Whittaker, says when New Zealand commenced the lockdown his immediate focus was to protect the business so that it could reopen and trade in the future. He says he anticipated the clinics would be closed longer than they were, noting the average age of Triton's clientele is 72. Triton's overseas counterparts had already been negatively impacted and it was considered likely that the New Zealand operations would be similarly affected.

[6] Over the first week of the lockdown Mr Whittaker and Triton's management team sought to reduce overheads. To this end 28 positions were identified for disestablishment, including the Ear Nurses.

[7] On 30 March 2020 Triton emailed a letter to Ms Isaacson. Amongst other things, Triton said difficult and urgent decisions had been made. The letter informed Ms Isaacson that her position (and by inference the positions of all Ear Nurses) will be terminated at the conclusion of the lockdown as the wax removal service would not reopen.

[8] Ms Isaacson was given 4 weeks' notice, her last day of employment was said to be on 24 April 2020. Triton advised normal pay would continue over this timeframe, after which Triton would pass the value of the Government Subsidy to her for a further 8 weeks' if she could not find alternative employment.

[9] Ms Isaacson sought legal advice the following day and Triton was notified of a personal grievance on 3 April 2020 concerning the procedure used to disestablish her positon. A grievance regarding the dismissal was raised on or about 28 April 2020.

[10] As it transpires, Triton was required to provide Ms Isaacson with 8 weeks' notice pursuant to the employment agreement between them. There was a dispute about when notice would be paid and the quantum. I understand these matters were ultimately resolved and on 1 May 2020 Ms Isaacson was up to 25 May 2020 in accordance with the notice provision conceding the end of employment, and holiday pay.

[11] On 18 May 2020 Ms Isaacson opened her own clinic providing ear wax removal and related services.

[12] Ms Isaacson says Triton's failure to involve her in its decision to disestablish her position unjustifiably disadvantaged her in several ways and resulted in her unjustified dismissal. She seeks a range of remedies connected to Triton's actions (and omissions) leading up to and including her dismissal.

The Authority's investigation

[13] Ms Isaacson, her husband Mr Ewan Isaacson, Mr Whittaker, and Ms Shiree Murdoch who had worked at Triton in Human Resources at the material time, each provided written statements to the Authority and attended the investigation meeting. As permitted by 174E of the Employment Relations Act 2000 (the "Act") I have not recorded all the evidence or material placed before the Authority. The determination has stated findings of fact and law and made orders necessary to dispose of the claims lodged before the Authority.

Analysis

The legal position

[14] Triton accepts it dismissed Ms Isaacson. The onus lies with it to justify the action.

[15] In *Grace Team Accounting Limited v Brake* the Court of Appeal reinforced the legal position that the justification of a dismissal due to redundancy is determined by applying s 103A(2) of the Act, as it is with all inquiries into the justifiability of a dismissal.[1]

[1] *Grace Team Accounting Limited v Brake* [2014] NZCA 541

[16] Section 103A(2) requires the Authority to objectively assess whether the employer's actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[17] In practical terms the Authority must consider whether there were genuine grounds on which to make an employee's position redundant, and whether the process taken to reach that decision was fair. The assessments may overlap. If some or all the actions are found to be not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred then it is likely the dismissal will be unjustified, unless the defect is procedural, minor, and did not result in the employee being treated unfairly.

[18] There are several additional provisions within the Act that inform an assessment of the employer's actions as follows.

(a) Section 4 imposes various good faith obligations between parties to an employment relationship including, at s 4(1A)(c), that an employer proposing to implement redundancies, is required to provide to affected employees access to information relevant about the proposal, and an opportunity to comment on it, before the decision is made".

(b) Section 103A(3) sets out a list of procedural standards the Authority must consider when assessing the employer's actions. These are not entirely dissimilar to the obligations at s 4(1A)(c), and an employer can be expected to inform an employee of its concerns and allow him or her an opportunity to respond before it takes disciplinary action.

[19] In the employment agreement between Ms Isaacson and Triton, consultation in a redundancy situation is referred to at cl 20.10 in the following way:

> Where practical the employer shall consult with the employee before terminating employment due to the employee's position becoming redundant with the object of identifying and considering alternatives to the loss of employment. Redundancy compensation is not payable.

Discussion

[20] It is useful to first address the procedural issues arising from the way in which Ms Isaacson was made redundant, as these matters form a considerable portion on which her claim focusses.

[21] Triton very properly concedes that when it finalised its decision to disestablish Ms Isaacson's positon it had not followed the procedural requirements set out at s 4(1A)(c) of the Act or the procedural considerations at s 103A(2). Nevertheless it submits the Authority should view the deficiencies in the context in which they occurred.

[22] I accept Mr Whittaker held genuine fears at the beginning of the Level 4 restrictions, as to whether Triton would stay afloat until it was safe to reopen, particularly where there was no real certainty as to when this would occur. It is in these circumstances that Triton says it would have been disingenuous to consult with staff where there was no prospect, at that time, of the wax removal service continuing, particularly where it did provide income. Ms Murdoch and Mr Whittaker considered it would be better for staff to be advised of the decision early so that they could begin to make alternative plans.

[23] It is understandable that Triton sought to reduce overheads given the uncertain times but, unusual as the circumstances were, they did not absolve it from the obligations it owed towards its employees. In *Grace* the Court of Appeal referred to disclosure and good faith consultation requirements in a redundancy situation as now explicit [because it is now codified in legislation].[2] Further, and despite the challenges, there is no evidence that Triton was prevented from communicating with Ms Isaacson (and other affected staff) about it concerns, although clearly it could not physically meet in-person to do so.

[24] With the exception as to how confidential information is treated, the duty of an employer to provide an employee whose job is at risk with information relevant to that matter and allow the employee to comment on it, is a fundamental and mandatory obligation in an employment relationship. There is nothing in the good faith provisions at s 4 which would allow an employer to by-pass the requirements at s 4(1A)(c) in the circumstances on which Triton refers.

[25] As I will discuss more fully in the 'Remedies' section, Triton's failure to consult with Ms Isaacson in respect of its proposal to disestablish her positon undermined any possibility for the parties to discuss options that may have kept Ms Isaacson in employment. Through the lens of considerations under s 103A(3) I must find Triton did not comply with the minimum procedural standards recorded under this provision. The defects in its procedure were not

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2 Above n 1, at [81]

minor nor could it be said Ms Isaacson was fairly treated despite those omissions. Ms Isaacson was unjustifiably disadvantaged in this way.

[26] It is trite to observe that a fair and reasonable employer will comply with the statutory and contractual obligations concerning its employees. Triton did not meet these obligations it owed to Ms Isaacson in the lead up to disestablishing her positon, and it follows that I must find the dismissal was unjustified.

[27] Ms Isaacson did not contribute to her personal grievances, and she is entitled to remedies without reductions.

Remedies

[28] Where the Authority determines an employee has a personal grievance it may reimburse the whole or any part of wages or any other money lost by the employee as a result of the grievance, and award compensation for humiliation, loss of dignity, and injury to feelings. When the grievance has resulted in lost wages s 128(2) requires the Authority to order the payment of a sum equal to the lesser of the sum actually lost or 3 months' ordinary time remuneration.

Wages and other monies lost as a result of the grievance

[29] Ms Isaacson asks the Authority to exercise its discretion and make an order to have Triton reimburse lost wages for approximately 8.5 months, beginning on the day in which her notice concluded until the date of the Authority's investigation meeting. There are two issues arising from this aspect of Ms Isaacson's claim.

The scope of the claim for lost wages claim

[30] The first concerns the extent for which Ms Isaacson may seek lost wages.

[31] Triton says the decision to discontinue the wax removal service was substantively justified. It says any claim for lost remuneration must be limited to the period of time in which proper consultation may have taken.

[32] At issue then is whether Ms Isaacson's role and duties were confined to the wax removal service. Ms Isaacson says the wax removal services comprised approximately 60% of her time, with the remainder of her work largely connected to health care checks. Based on appointment

calendars Ms Murdoch considers time spent on wax removal was greater than Ms Isaacson estimates. Ms Murdoch concedes however that no definitive assessment had been undertaken as to the time Ear Nurses, in general or Ms Isaacson in particular, spent on various functions. On balance I have preferred Ms Isaacson's appraisal as to the content of her work, noting that her job description records a number of activities separate to the wax removal service that comprise the role she performed. Whether or not wax removal duties were removed from Ms Isaacson's suite of activities, I am satisfied her role, at least in part, continued.

[33] The failure to consult with Ms Isaacson highlights, in this instance, the overlap between procedure and substance. Mr Whittaker's candid concession that "*in hindsight, different decisions might have been made*" is telling. Had Triton discussed its proposal with Ms Isaacson's role, it may have moved to reduce the total number of nurses but select a number to perform the remaining duties full time including Ms Isaacson. Alternatively Ms Isaacson may have agreed to vary her hours of work to part time. It may have been that the ear wax removal service simply continued. The significance of the foregoing is that consultation may have identified alternative options to redundancy. Without exploration of those matters with Ms Isaacson, Triton has been able to demonstrate it was reasonable of it to conclude it no longer had a role for her. It therefore has not been able to justify the dismissal on substantive grounds. It follows Ms Isaacson is entitled to wages following the loss of her job.

[34] The second aspect regarding Ms Isaacson's claim concerns when the loss of remuneration occurred. There is a suggestion that because Ms Isaacson's role ended on 24 April 2020, an assessment of lost wages should begin on that date, and take into account the payment of notice she received until 24 May 2020. I do not consider this is an appropriate approach.

[35] Triton's view that Ms Isaacson's notice period was 4 weeks' was based on an incorrect assumption. I have already noted Ms Isaacson was entitled to 8 weeks' notice before her positon finished. As a matter of contract I find her employment ended on 24 May 2020 in accordance with the notice period provisions. But even if I were wrong on this issue, I do not accept Triton may treat the payment of notice (for which it is was obliged to pay) as a factor that may be taken into account when assessing losses under the statutory framework at s 128(2). Triton was contractually obliged to pay Ms Isaacson her notice up to 24 May 2020 and her claim for lost remuneration as a result of her grievance began after that point.

The quantum of lost wages

[36] Ms Isaacson seeks reimbursement of the difference between her average weekly earnings at Triton of $1,216.86 gross per week and drawings taken from the business until the date of the Authority's investigation meeting, approximately 8.5 months later.

[37] There is a submission on behalf of Triton that the Authority's assessment of Ms Isaacson's losses should take into account the full income of Ms Isaacson's business over the material period. An overview of the company accounts reflect a total monthly income from which the clinic operating expenses are taken, with Ms Isaacson then accessing drawings. I agree with counsel for Ms Isaacson that the appropriate method by which to calculate her losses as a result of the grievance should be measured by assessing the difference between her average weekly earnings at Triton[3] and drawings taken from the business for the following the end of her employment and notice period.[4] Using this methodology, under s 128(2) of the Act Ms Isaacson is entitled to $5,190 (gross), the sum equal to her losses over the three month period between 25 May 2020 and 24 August 2020.[5]

[38] I am not persuaded however that this case warrants an order reimbursing lost wages for a further 5.5 months. This is because I do not accept Ms Isaacson's only means to mitigate losses following her redundancy was to open the business. This view is formed on the following chronology of events:

[39] On receiving notice that her position had been disestablished on 30 March 2020 Ms Isaacson's immediately asked Triton whether she could purchase the ear nurse equipment from the clinic. Several weeks' later, on 17 April 2020, Ms Isaacson incorporated the business, and it began trading on 18 May 2020, the first Monday under Level 2 restrictions. In a Facebook post announcing the opening of the clinic, Ms Isaacson commented, amongst other things, that her redundancy had been a shock, and noted "*it was the push I needed to go out on my own*". I accept Ms Isaacson sent an email to the Ministry of Health on 1 April 2020 asking to be considered for a positon at the National Close Contact Centre. She received a response advising the Centre was not yet set up for staff to work remotely (as would be needed for Ms Isaacson) but would be in touch. No further information was supplied on this matter. However I am

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3 3 months' average earnings at Triton = $15,819.18

4 Drawings taken by Ms Isaacson over 14 weeks beginning 25/05/2020 = $11,447. 13 weeks of drawings = $10,629.

5 $15,918.18 - $10,629 = $5,190

unwilling to accept that the DHB and health clinics in the region were not hiring registered nurses within Ms Isaacson's scope of practice. There is no evidence to support that position or that Ms Isaacson applied for other roles and/or made formal inquiries to this end.

[40] Ms Isaacson sought to mitigate her loss and it is commendable she did so, but I am satisfied her preference was to open her own clinic rather than obtain employment elsewhere in the health sector. The financial implications of that decision cannot be fairly regarded as monies lost as a result of the grievance. In this situation I decline to exercise the Authority's discretion under s 128(3).

The claim for other money lost

[41] I am unwilling to award Ms Isaacson the sum of $12,024.78 she says was loaned to her by her husband to start up the company, for the following reasons.

[42] Firstly I am not convinced the monies given to the company by Mr Isaacson can truly be characterised as a debt which has a legal consequences noting there is no evidence that Ms Isaacson (or the company) are bound to terms of repayment.

[43] I find the sum in question is more aptly described as a commercial investment by the Isaacson's into the company for which they may see returns and obtain benefits from in the long term, noting the clinic is already making a profit. I note the items said to be purchased by the loan are likely to be regarded as business expenses and tax deductible. It follows that I am not persuaded that the sum sought from Ms Isaacson can be fairly characterised as monies lost as a result of the personal grievance for which Triton should reimburse. This aspect of Ms Isaacson's claim is dismissed.

Compensation

[44] But for her dismissal I am satisfied Ms Isaacson could have reasonably expected to be paid several incentive bonuses that were paid to all Palmerston North clinic staff in the months after it reopened. The evidence is that staff were paid $1,000 for each concluded month for June, July and August 2020. I am satisfied Ms Isaacson's should be compensated for the loss of $2,774.19 as a benefit she would have received. This sum is equal to incentive bonus payments of $1,000 for June and July 2020, and the same pro-rated up to 24 August 2020.

[45] In her written statement to the Authority Ms Isaacson detailed the shock she experienced at the suddenness of her dismissal and her distress by the way it was implemented. She seeks an above average award of compensation and points also to a letter drafted on her behalf by her GP, 6 months' or thereabouts after her role has been disestablished, advising that several of her pre-existing health conditions may be exacerbated by stress, and that these have worsened recently by the forced redundancy.

[46] It is clear from Ms Isaacson's testimony that she views her dismissal as a betrayal and an insult in circumstances where she has given dedicated service to Triton. Ms Isaacson says Triton has actively undermined her business by directing clients elsewhere but she did not call evidence from anyone to corroborate the position. There is an assertion also that Triton used the pandemic as a pretext to divest itself of the Ear Nurses, and Ms Isaacson she says she has lost trust and confidence in others. Triton emphatically denies each of the claims. I am unwilling to place any weight on these matters when there is no evidence to support either of the allegations. In any event, I understand a sizeable portion of customers have followed Ms Isaacson to her new endeavour.[6]

[47] I have no doubt Ms Isaacson felt intensely and negatively impacted by the dismissal where she was prevented from any participation on the matter. On balance however, I find those effects were relatively short lived. The Authority was provided with an article from the business section on Stuff News dated 10 June 2020, which reported on Ms Isaacson's transition from redundancy to the opening of the clinic. The article stated Ms Isaacson "*was shocked to lose her job … but then brushed herself off and took the chance to be her own boss*". Ms Isaacson is then quoted as saying "*I cried for a couple of weeks, and then went hard on setting up my own clinic*." This appraisal likely reflects the effect the dismissal had, and its duration. Notably also, it reinforces the view that shortly after her dismissal Ms Issacson's focus moved towards opening the clinic. Having considered the evidence and current award levels I consider $12,000 is an appropriate award of compensation.

Additional claims

[48] Separate to Ms Isaacson's action for an unjustified dismissal, remedies for an unjustified disadvantage regarding the consultative and procedural deficiencies has been

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6 Stuff News Article, dated 10 June 2020

sought[7] as well as penalties for a breaches of the employment agreement[8] and the Act for the failure to consult.[9] The same conduct underpins each of these claims and am unwilling to award additional compensation or impose penalties on matters for which Ms Isaacson has been awarded remedies. To do otherwise would amount to double dipping and should be avoided unless there are special facets which would warrant additional sanction.[10] There is no evidence of that nature in this instance. The remedies and penalties sought for an unjustified disadvantage and for breaches corresponding to the obligation to consult are dismissed.

[49] There is a remaining issue concerning payment of notice. As noted, Triton was mistaken in its initial approach regarding Ms Isaacson's notice period. But there is no corresponding disadvantage where Ms Isaacson's notice was paid in full in accordance with the employment agreement.[11] There was a further claim recorded in the statement of problem regarding the wage subsidy. This was not pursued at the Authority's investigation meeting and I take the matter no further.

Orders

[50] Sonova Audiological Care New Zealand Ltd trading as Triton Hearing is ordered to pay Donna Isaacson the following:

(a) $12,000 as compensation pursuant to s 123(1)(c)(i) of the Act;

(b) $5,190 (gross) in lost wages pursuant to s 128(2) of the Act;

(c) $2,774.19 (gross) in lost benefits pursuant to s 123(1)(b) of the Act.

Costs

[51] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

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7 Statement of Problem, at 1.2 and 3.2
8 Statement of Problem, at 1.5, and 3.8
9 Statement of Problem, at 1.6 and 3.8
10 *Xu v McIntoch* [2004] ERNZ 448
11 The parties' employment agreement did not provide for payment of notice in lieu but appears to have been paid on this basis.