**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2021] NZERA 211
3105912

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| | BETWEEN | GAIL LEES<br>Applicant |
| | AND | SONOVA AUDIOLOGICAL CARE NEW ZEALAND LIMITED (TRADING AS TRITON HEARING)<br>Respondent |
| Member of Authority: | Michele Ryan | |
| Representatives: | Matt Belesky, counsel for the Applicant<br>Sarah Wiseman, counsel for the Respondent | |
| Investigation Meeting: | 6 April 2021 in Wellington | |
| Submissions | Oral and written submissions from both parties on the day of the investigation meeting | |
| Date of Determination: | 19 May 2021 | |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Gail Lees was employed as an Ear Nurse for 3½ years (or thereabouts) with the respondent, Sonova Audiological Care New Zealand Ltd. The company trades under the name 'Triton Hearing' ("Triton").

[2] On 30 March 2020, Ms Lees was advised by Triton that her role had been disestablished and that she was to be made redundant. In her statement of problem Ms Lees asked the Authority find her dismissal was unjustified and sought orders for compensation, lost wages, a penalty for breach of good faith and damages for breach of contract. Her claim for reinstatement was withdrawn at the Authority's investigation meeting.

**The Authority's investigation**

[3] Ms Lees and her daughter, Ms Rachel Lawson, lodged written statements and presented at the Authority's investigation meeting. Managing director of Triton, Mr James Whittaker, and Triton's HR consultant at the time of the restructure, Ms Shiree Murdoch, both having previously lodged written statements were also in attendance. All witness answered questions where necessary.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the "Act") not all the evidence and material put before the Authority has been recorded. This determination has stated findings of fact and law, and expressed conclusions on matters where necessary, so as to make orders if needed, and dispose of the claims lodged before the Authority. In this respect not all the evidence and material put before the Authority has been recorded.

**Background**

[5] Ms Lees' employment was based at Triton's Johnsonville location but she travelled to various clinics in the region. A portion of her work involved ear wax removal functions but her role was not limited to those activities. I will return to this matter.

[6] 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. Several days earlier Triton had emailed staff advising wages would continue as usual to the end of the then current pay period and that it would provide further information by no later than 1 April 2020.

[7] Mr Whittaker, says when New Zealand commenced the lockdown his focus lay with protecting the business so that it could reopen and trade in the future. He says Triton's overseas counterparts had already been significantly impacted and he considered the New Zealand clinics would be equally affected. As a consequence, during the first week of the lockdown he and Triton's management team sought to reduce overheads. Amongst other matters, Triton determined that it no longer wished to continue with the wax removal service performed by its Ear Nurses (18 in total) as those functions were not a core business activity and regarded as uneconomic.

[8] By way of background, Mr Whittaker says the wax removal service had been launched as an entry point to increase referrals to its audiologists and promote sales of hearing aids, but that this had seldom occurred. He says in late 2019 Triton had reviewed the service but despite the service not generating revenue, it was retained as it provided a point of difference

compared to its competitors. I understand neither Ms Lees, or any of the other Ear Nurses, had been aware of the review at the time it was undertaken.

[9] As foreshadowed, on 30 March 2020 Ms Lees was informed by letter attached to an email that her position had been disestablished. The letter advised normal pay would continue up to Friday 24 April 2020 (in effect, 4 weeks' notice) and her employment would end at that point. Triton advised however that it would pass on the value of the Government Subsidy for a further 8 weeks (until 19 June 2020) if she had not found employment. Triton advised that it understood there was a demand for registered nurses (particularly at the DHB) and that it was available to provide support to assist Ms Lees to transition to alternative employment.

[10] Notably, the employment agreement between Ms Lees and Triton required the company to provide Ms Lees with 3 months' notice. This matter did not become apparent until November 2020 on the request of Ms Lees' solicitor. Ms Lees was subsequently paid out the difference between the subsidy payment and her contractual entitlement in December 2020. I shall return to this matter also.

**The Authority's investigation**

**Analysis**

***The legal position***

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

[12] In *Grace Team Accounting Limited v Brake* the Court of Appeal reinforced the legal position that the justification of a dismissal due to redundancy, as with any other inquiry into the justifiability of a dismissal, is determined by applying s 103A of the Act.[1]

[13] 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.

[14] In practical terms, the Authority must examine whether there were genuine grounds on which to make an employee's position redundant, and whether the process in reaching that decision was fair, noting the procedural standards recorded at 103A(3) of the Act which the Authority must consider. As a matter of procedural fairness, at a minimum an employer is

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

expected to inform an employee of its concerns and allow the employee an opportunity to respond before it takes action.

[15] Section s 4(1A)(c), of the Act imposes an additional consideration when assessing an employer's actions. The provision requires an employer proposing to implement redundancies, to provide affected employees with access to information relevant about the proposal, and an opportunity to comment on it, before the decision is made.

[16] Ms Lees' employment agreement reinforces the statutory obligation by providing that it will deal with Ms Lees in good faith.

***Discussion***

[17] Not infrequently, the inquiry under s 103A(2) of the Act as regards the substantive basis for the dismissal, and the process taken to dismiss the employee, may overlap. And it is apparent in the factual matrix of this matter that this is one of those cases.

[18] I have begun with an assessment of the process used as my findings on this aspect leads me not only to conclude the dismissal was unjustified on procedural grounds, but also brings into question the genuineness of the redundancy.

[19] Triton very properly concedes that when it finalised its decision to disestablish Ms Lees' 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(3). Nevertheless Triton submits the Authority should view the deficiencies in the context in which they occurred.

[20] I have no doubt that at the beginning of the Level 4 restrictions, Mr Whittaker held genuine fears 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. In these circumstances 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 not provide a profit. The evidence is that 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 over the course of their notice period and while wage subsidies were available.

[21] However, unusual as the circumstances were at the time of the lockdown, they did not absolve Triton from its legal obligations 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 prevailing challenges, there is no evidence that Triton was prevented from communicating with Ms Lees (and other affected staff) about its concerns, albeit clearly it could not physically meet with her in-person.

[22] 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 mandatory statutory 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. Triton's failure to consult in good faith with Ms Lees in respect of its decision to disestablish her position undermined any possibility for the parties to negotiate alternative arrangements that may have kept Ms Lees in employment. Further, Triton did not comply with the minimum procedural fairness standards at s 103A(3). Those omissions were not minor nor could it be said Ms Lees was fairly treated despite those omissions.

[23] A fair and reasonable employer can be expected to comply with the statutory and contractual obligations concerning its employees. Triton did not meet those obligations in the lead up to disestablishing Ms Lees' positon, and it follows that the dismissal was unjustified.

[24] As foreshadowed, Triton's failure to consult, highlights, in this case, the difficulty in establishing there was a genuine basis for the redundancy.

[25] I accept Triton had genuine grounds for wanting to discontinue the wax removal service, but that matter does not, in and of itself, provide substantive grounds for disestablishing Ms Lees' position if her role was not confined to the wax removal service.

[26] Ms Lees says the wax removal services comprised approximately 40% - 50% of her time, with the remainder of her work largely connected to health care checks.[3]

[27] Ms Murdoch holds the view that a greater portion of Ms Lees' working hours were committed to wax removal functions. That appraisal is based on an overview of scheduled client appointments, but she accepts no objective assessment regarding the portion spent on

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2 Above n 1, at [81]

3 Ms Lees' testimony during the investigation meeting

wax removal or any other duties and functions performed by Ms Lees or other Ear Nurses had been compiled.

[28] The difficulty for Triton is that the onus rests on it to establish Ms Lees' role was surplus to its requirements. In the absence of some clear indicia that the wax removal activities was the primary and predominant function of her position I am not persuaded Triton was in a positon to fairly say the work Ms Lees performed no longer existed. Notably, Ms Lees' job description records a number of activities separate to wax removal activities, and Triton has not suggested those functions were also superfluous. On the contrary, Triton conceded there are aspects of Ms Lees' positon that have continued and now undertaken by other staff.

[29] During the Authority's meeting, Mr Whittaker advised that the decision to disestablish the Ear Wax service was made in haste, and that in hindsight others decisions might have been made. I find this evidence to be credible and is likely an accurate appraisal as to the circumstances in which Ms Lees was made redundant. Had Triton discussed its proposal with Mss Lees, there are a range of possible outcomes that may have occurred. Ms Lees may have agreed to vary her hours of work to part-time and perform the remaining duties. Alternatively Triton may have reduced the total number of nurses, and Ms Lees may have been selected to perform ear health checks and related duties on a full time basis. As noted in *Isaacson v Sonova Audiological Care New Zealand Ltd,* the significance of the foregoing is that consultation may have identified alternative options to redundancy.[4] Without exploration of those matters with Ms Lees, Triton has been able to demonstrate it was reasonable of it to conclude it no longer had a role for her.

**Remedies**

[30] Triton has not been able to justify Ms Lees' dismissal on substantive and procedural grounds and Ms Lee's is entitled to remedies as a consequence.

***Compensation***

[31] Compensation under s 123(1)(c)(i) of the Act is awarded where the applicant has experienced humiliation, loss of dignity and injury to feelings as a result of the dismissal.

[32] Ms Lees says the way she was made redundant made her feel worthless and put down. She further says the dismissal has destabilised her depression which she previously had under

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4 *Isaacson v Sonova Audiological Care New Zealand Ltd trading as Triton Ltd* [2021] NZERA 195

control, and she now suffers bouts of anxiety.[5] As Ms Lees describes it she says the redundancy has totally ruined her.[6]

[33] Ms Lees refers also to an incident during her notice period where confidential information discussed in mediation was published on Triton's "WhatsApp" chat group, albeit briefly. This incident is said to have exacerbated her distress and humiliation.

[34] Having considered the evidence and taking into account the current levels awarded by the Authority for non-economic loss I consider Ms Lees should be awarded $17,000 in compensation.

***Lost wages***

[35] When a grievance has resulted in lost wages, s 128(2) of the Act requires the Authority to order payment equal to the lesser between the sum actually lost or 3 months' ordinary time remuneration. Section 128(3) then provides the Authority with a discretion to order a sum greater than that at ss (2).

[36] Notably, Ms Lees seeks her actual losses from when payment of her notice ceased 30 June 2020, to the date of the Authority's investigation in early April 2021, as she has been unable to obtain permanent employment.

[37] In *Sam's Fukuyama Food Services Ltd v Zhang* the Court of Appeal, observed there is no automatic entitlement to full reimbursement of loss. Such loss merely sets the upper limit of an award.[7] The Court reiterated awards are discretionary, and moderation is required. Further, any award must be individualized to the circumstances of the particular case,[8] and the assessment must allow for contingencies, (including that the employee may not have remained in his or her employment with the employer or have received the anticipated full sum sought).

[38] Ms Lees provided in excess of 20 applications sent to various clinics and related services up to early November 2020. She obtained casual work in late October 2020 which lasted 7-8 weeks but is yet to find permanent employment. As a matter of personal choice, Ms Lees conceded at the Authority's investigation that she has not applied for nursing

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5 Ms Lees' Brief of Evidence at para. 80 and 81.
6 Above at para. 73
7 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [38]
8 Above, at [38]

positons with District Health Boards or in nursing homes, which I find has likely limited the scope of work from which she might derive employment.

[39] I cannot also be certain that Ms Lees' position would have remained as it was had her employment continued after the lockdown.

[40] Applying the considerations expressed *Zhang* to this matter, I decline to exercise the discretion under s128 but Ms Lees is entitled to the sum equal to three months wages.[9] I calculate this sum to be $14,742. (gross)[10]

***Contribution***

[41] Ms Lees did not contribute to her personal grievances, and she is entitled to remedies set out above without reductions.

***Additional claims***

[42] Ms Lees seeks a penalty for Triton's breach of its statutory obligation to consult under 4(1A)(c) of the Act. I have already accepted Triton failure in this regard and the consequences of that failure have been addressed in remedies already ordered. In any event I am not persuaded Triton's failure to consult in the particular circumstances of this matter can be fairly characterised as deliberate, serious and sustained in such a way as to justify a penalty under s 4A of the Act. The grounds on which a penalty should be ordered have not been met.

[43] The claim for damages was not pursued in final submissions. But in written evidence Ms Lees stated she could have received interest on the amount owed if received when due.[11] I agree. It is appropriate to order interest of $66.30 be paid on the sum for the period between when wages due under the notice provisions (including final holiday pay) should have been paid and when it eventually was.[12]

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9 Pursuant to s 128(2) of the Act

10 Applicant's Bundle of Documents at "Doc 20' records Ms Lees' rate per day as $226.80. $226.80 x 5 days per week x 3 months = $14,742.

11 Ms Lees' Brief of Evidence at para 31.

12 Interest has been formulated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, and with reference to the Bundle of Documents at Doc 20, by assessing when various wage payments were due (the deficient amounts) and calculated by assessing when these were paid, which appears to be in or around 7 December 2020.

**Orders**

[44] Sonova Audiological Care New Zealand Ltd trading as Triton Hearing is ordered to pay Gail Lees the following:

(a) $17,000 compensation pursuant to s 123(1)(c)(i) of the Act;

(b) $14,742 (gross) in lost wages pursuant to s 128(2) of the Act;

(c) $66.30 in interest on wages and holiday pay pursuant to the Act at Schedule 2, cl 11.

**Costs**

[45] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority