

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 161

3000548

BETWEEN KASIA CHAPMAN-LABECKA
 Applicant

AND VETLIFE LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cahill, Advocate for Applicant
 Penny Shaw, Counsel for Respondent

Investigation Meeting: 22 June 2017 at Christchurch

Submissions received: 29 June 2017 and 14 July from Applicant
 6 July 2017 from Respondent

Determination: 26 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Kasia Chapman-Labecka was unjustifiably dismissed from her employment with Vetlife Limited.**
- B Vetlife Limited is ordered to pay to Kasia Chapman-Labecka the following:**
- (i) The sum of \$13,071 gross being reimbursement of lost wages.**
 - (ii) The sum of \$10,000 without deduction being compensation.**
- C I have reserved costs and have timetabled in the event agreement cannot be reached for an exchange of submissions.**

Employment relationship problem

[1] Kasia Chapman-Labecka says that she commenced employment as a veterinarian with Vetlife Limited (Vetlife) or its predecessor from August 2000. Vetlife says that she commenced employment on 9 August 2003 which accords with the date of commencement of her employment in her employment agreement.

[2] At the material time Ms Chapman-Labecka was party to an individual employment agreement (the employment agreement) with Vetlife dated 10 November 2009. The employment agreement described Ms Chapman-Labecka's position as part-time veterinarian at the Ashburton/Methven clinic.

[3] Ms Chapman-Labecka was given one month's notice on 15 December 2015 when her 0.5 full-time equivalent (FTE) position was made redundant and she was not selected for the remaining 0.5 role FTE role at the Ashburton clinic.

[4] In final submissions, although the statement of problem referred to unjustified actions causing disadvantage, Mr Cahill limited the matters before the Authority to two issues. The first was whether Ms Chapman-Labecka was unjustifiably dismissed, and the second whether there was a breach of the duty of good faith under s 4 of the Employment Relations Act 2000 (the Act).

[5] Ms Chapman-Labecka seeks reimbursement of lost wages less earnings for a period of 12 weeks in the sum of \$13,071, compensation for humiliation, loss of dignity and injury to feelings in the sum of \$20,000 together with costs and disbursements.

[6] Vetlife is a duly incorporated company that carries on a veterinary business. It has 18 veterinarian clinics and an administration base/support office. Its clinics are located from North Canterbury to Central Otago. Vetlife do not accept that Ms Chapman-Labecka was unjustifiably dismissed or disadvantaged. It says that she was made redundant following full and fair consultation and a fair selection process during a restructure across its business. Further, that there were no suitable roles for Ms Chapman-Labecka to be redeployed to, and that she was offered support throughout the restructure.

The issues

[7] The issues for the Authority to determine are as follows:

- The business reason Vetlife commenced its review of the Ashburton clinic that resulted in Ms Chapman-Labecka's redundancy.
- The process followed in the review of the Ashburton clinic.
- Whether Ms Chapman-Labecka was encouraged to resign during the process at the meeting on 19 November 2015.
- Was there a proper basis for concluding that Ms Chapman-Labecka was a companion animal veterinarian and that her role should properly be included in the process?
- Could Vetlife fairly and reasonably conclude that Ms Chapman-Labecka and one other were the only ones in the selection pool for the remaining 0.5 position?
- Was the dismissal for reason of genuine redundancy?
- Was the process in accordance with that in the employment agreement?
- Was consultation fair and reasonable and in accordance with good faith obligations?
- Did the selection criteria change and if it did was there corresponding unfairness?
- Was support provided in accordance with the obligation in the employment agreement?
- Was the decision not to select Ms Chapman-Labecka for other than genuine reasons?
- Was the dismissal justified?
- If the redundancy was unjustified then what remedies are available, and are there issues of mitigation or contribution?

The business reasons Vetlife commenced its review of the Ashburton clinic?

[8] The managing director of Vetlife is Adrian Campbell. The Authority heard evidence from Mr Campbell and Vetlife's human resources manager Nicola Williams.

[9] Mr Campbell said in his evidence that 2015 was a difficult year for Vetlife. The East Coast drought had started to affect Vetlife's clients in a significant way from January 2015 and, combined with the impact of the low dairy milk solids returns, resulted in a reduction in the amount dairy farms were able to spend with their veterinarians. Dairy herds were also reduced and this had a long term impact on the Vetlife business. There were some steps taken throughout 2015 to try to address these concerns with staff encouraged to use annual leave, supported to change to part-time work, and take unpaid leave. In the event of natural attrition, vacancies were not filled.

[10] During the Authority investigation meeting Ms Chapman-Labecka provided a copy of a letter that all staff had received dated 29 September 2015. It confirmed the impact on the dairy industry that had reduced spend with their veterinarians and stated that since January 2015 Vetlife has been "hit hard". Ms Chapman-Labecka placed some weight on a reference toward the end of the letter that *we are also fortunate that our income drop is somewhat masked by good increases in our companion animal fee pull*. When I put that to Mr Chapman he said that at that time he was careful in that letter not to be too optimistic or pessimistic and that in some clinics the companion animal fees were flowing in well.

[11] By October 2015 Vetlife determined that the impact of the drought, reduction in milk solid prices and herd size was becoming clear. Mr Campbell worked with Ms Williams on a proposal for change to identify ways to reduce and manage costs within the business, including staff costs.

[12] All 18 clinics were assessed, together with head office, and a proposal was prepared that referred to each of the clinics and the administration office. There was to be no further action for most of the clinics with the rationale for this contained alongside each clinic in the proposal document. The only reduction in vet capacity proposed was that in the Ashburton clinic.

[13] In the Ashburton clinic it was proposed, amongst other changes, a reduction in companion animal vet capacity by 0.5 FTE. The rationale in the proposal for a reduction in companion animal vet capacity was stated to be a reduction in workload that had impacted vets, vet nurses and support staff. Ms Chapman-Labecka was considered to be a potentially affected individual under the proposal together with another employee I shall refer to as S.

The process that followed the review

4 November and provision of general and specific proposals

[14] On 4 November 2015 a meeting was held with Ms Chapman-Labecka, S, Mr Campbell and Ms Williams. Ms Chapman-Labecka was given the proposal document for all clinics and a document from Mr Campbell dated 3 November 2015 that outlined the specific proposal potentially impacting on Ms Chapman-Labecka and S.

[15] The specific proposal document set out the rationale for change and the proposed changes. It stated in the document that each branch had been looked at in terms of profitability, efficiency and potential. It set out that a close review of the Ashburton clinic showed a decrease in the workload for companion animal vets as a result of the general market conditions.

[16] There was a belief that the Ashburton clinic was over-resourced in terms of companion animal vets by approximately 1.5FTE. Mr Campbell explained in his evidence that in November 2015 the Ashburton clinic employed six large animal vets, two full time animal companion vets, a 0.8 companion animal vet and two 0.5 animal companion vets. The employee in the 0.8 position was on maternity leave.

[17] It was stated that capacity would reduce by 1.0 FTE during 2016 with a companion animal vet's impending maternity leave and that her position would not be covered by a locum but it would remain open for her to return in 2017. It was proposed to reduce companion animal vet capacity in the team by a further 0.5 FTE to reflect the current workload and create a sustainable companion animal organisation.

[18] If the proposal was adopted then it was stated that would mean the disestablishment of one of the two part-time companion animal vet positions and the workload would be covered by the remaining one full time and one part-time companion animal veterinarians. The options in the event the proposal was adopted and the process and timeline that followed

were set out. This included the selection criteria. Ms Chapman-Labecka was advised that she was entitled to seek advice and be represented at all meetings. There was also an offer of support although it was not clear what that may consist of. The first meeting in the timeline after the proposal was provided was on 11 November 2015 and this was to provide feedback and comments to the proposal.

11 November 2015 meeting

[19] Ms Chapman-Labecka in her evidence said initially that a meeting on this date did not take place but then accepted that it must have. Ms Chapman-Labecka I find attended the meeting by herself. Mr Campbell, Ms Chapman-Labecka's manager Raylene Clement and Ms Williams attended for Vetlife. Notes taken at that time by Ms Williams do not reflect a significant contribution by Ms Chapman-Labecka.

16 November 2015 written feedback that not in companion animal role

[20] The final day for other feedback to be provided about the proposal was 16 November 2015. Ms Chapman-Labecka provided written feedback on that day. Her feedback was that she was not working in the part time companion animal role and that she was surprised to have been included in the consultation process and considered for redundancy. She wrote that only S was in that role and since being employed at the practice she had covered all mixed animals with the exception of dairy work. She suggested mediation to resolve the matter if not agreed. She put forward two further suggestions about small animal orthopaedics being an area the practice could improve and that she would be prepared to take a few weeks unpaid leave early the next year to work as a locum in the after-hours clinic.

17 November 2015 decision to disestablish part- time role

[21] A document dated 17 November 2015 is headed 'Decision on new structure'. It contains the decision to adopt the proposal to reduce one part-time veterinarian position in Ashburton. It provides the key reason for the decision is the need to change Vetlife's structure as the result of the NZ dairy industry recession and reduced spending with an estimate of up to 2 years to see a return to previous spending.

[22] The consultation feedback was addressed. It was set out that Ms Chapman-Labecka's veterinarian role had been included as a large proportion of her workload is companion animal focussed. This was based on professional fee income over recent years, focus of

continuing professional development and participation in the companion animal roster rather than the production animal roster. It was noted that Ms Chapman-Labecka has said that she was happy in her role and I have taken that to refer to a comment recorded in the meeting notes of 11 November. It was recorded that feedback had been considered and appreciated but that based on current work load only one part-time vet in Ashburton was required and there was no requirement to divert additional resource to the production animal area. It was noted that this was reinforced by the fact that the business plan includes a continued withdrawal from the equine market.

[23] Ms Chapman-Labecka was eligible to be considered for the remaining part time companion animal vet role. The selection criteria set out mirrored those in the specific proposal of experience, skill base, qualifications attained and accreditations. A process and time line were set out.

19 November 2015 meeting at which 17 November decision document was provided

[24] During the Authority investigation meeting Ms Chapman-Labecka provided her notes of this meeting that she attended with Mr Campbell, Ms Clement and Ms Williams. They could therefore be considered against the notes taken by Ms Williams of the meeting which were in the respondent's bundle of documents. Both sets of notes confirm that the 17 November decision document was provided at the meeting and read.

[25] Ms Chapman-Labecka's notes confirm that she continued to maintain at the meeting she was not a companion animal vet. Ms Chapman-Labecka's notes record that she was told there was consideration of her professional fees back to 2013, no doubt put forward to support why Vetlife concluded she was in that role. Ms Chapman-Labecka, from her notes, appeared to accept that her professional development had been equine and companion animal based.

[26] There was some discussion about Ms Chapman-Labecka's equine calls and that she did not understand previously that Vetlife was withdrawing from the equine market. Mr Campbell is shown as responding that equine work is not making any profits and debts have to be written off. One particular client was referred to in respect of debt write off. During the Authority meeting Ms Chapman-Labecka said that the client had in fact paid his fees. The notes reflect discussion about whether Ms Chapman-Labecka wished to be considered for the remaining part-time veterinarian position that was identified in the decision and the process outlined for that if she did. Further there was discussion about what would happen if Ms

Chapman-Labecka did not enter the selection process. Ms Chapman-Labecka said that she would confirm her decision by email.

23 November 2015

[27] Ms Chapman-Labecka confirmed that she wished to be considered for the part-time companion animal role or other suitable role at Vetlife.

[28] At that time Ms Chapman-Labecka was on leave and she had a personal matter arise. The decision document dated 17 November provided that if Ms Chapman-Labecka wished to be considered for the role or any other suitable role then she should provide an up to date curriculum vitae outlining her career to date and a summary of continuing professional development. She was asked to provide information on the selection criteria of experience, skill base, qualifications and accreditations. By agreement this information was supplied outside of the timeframe in the process about one hour before the interview on 25 November 2015.

The interview 25 November 2015 at 1pm

[29] On 25 November 2015 Ms Chapman-Labecka was interviewed for the remaining role. She attended with her husband for support. Those present at the interview for Vetlife were Mr Chapman, Ms Williams and Ms Clement. Mr Chapman explained in his evidence that he was to be the decision maker with Ms Clement there as Ms Chapman-Labecka's manager and Ms Williams present for advice on the process of interview.

[30] The interview guide completed for both Ms Chapman-Labecka and S by Ms Williams during the interviews has questions about the selection criteria set out in the decision document of 17 November 2015 and additional matters being career aspirations, teamwork and leadership. After the interview Ms Chapman-Labecka submitted some further information to clarify and expand upon points she did not feel she fully explained. This included some comment on leadership. I could not be satisfied that anyone on the selection panel asked her to do this but rather it was more likely that she provided this information of her own volition. For completeness I am not satisfied that Ms Chapman-Labecka had any knowledge of the additional selection criteria until she received the preliminary decision.

The preliminary decision and advice to Ms Chapman-Labecka on 30 November of the preliminary decision

[31] The preliminary decision was made to appoint S to the role. A meeting was held on 30 November 2015 about this decision. A letter was provided to Ms Chapman-Labecka at this meeting that confirmed that decision and set out the eight selection criteria although she had only been consulted during the process about four of these.

[32] It set out that whilst Ms Chapman-Labecka had leadership experience, this has been in external committee type settings and not in the companion clinic environment. Further that her career had been geared toward mixed practice and that she had maintained her knowledge and skill across a broad range of species particularly equine. That was not held to align to the current and future business goals. It was stated that S was selected for her specific experience in leading a companion animal team in the clinic setting and her experience focussed solely in companion animal medicine and surgery which was a key need in the current situation and for the future development of the business.

[33] There was an opportunity for Ms Chapman-Labecka to provide feedback on the preliminary decision for Vetlife to consider and it was agreed that this could be done by 4 December with a final decision by 8 December 2015. An extension of time was granted in which to provide feedback to 8 December 2015 at the request of Ms Chapman-Labecka.

Provision of a without prejudice letter

[34] Ms Chapman-Labecka maintained that she provided Vetlife with feedback on or about 8 December however she marked the letter on legal advice without prejudice. Ms Williams and Mr Campbell did not accept that there was any feedback provided to the preliminary decision. I cannot see that letter so any dispute about the contents of the letter is therefore unable to be resolved. Ms Williams did follow up with Ms Chapman-Labecka by email on 8 December about whether there was any further feedback that she wished to put forward about the preliminary decision. She advised that she would consider such material the next day and make a decision on the Thursday. There was no response from Ms Chapman-Labecka.

[35] Vetlife say that this was the time for Ms Chapman-Labecka to raise any concerns about the selection process and preliminary outcome.

Decision meeting 15 December 2015

[36] A meeting to deliver the final decision was originally meant to have been held on 11 December but was delayed until 15 December 2015 because Ms Chapman-Labecka's mother was suddenly admitted to hospital. Ms Chapman-Labecka attended the meeting on 15 December 2015. Mr Campbell attended with Ms Clement because Ms William was not available. No notes were taken of the meeting.

[37] Ms Chapman-Labecka was told that she had not been successful and she was given a months' notice from 15 December 2015. She was given a letter dated 11 December 2015 that contained advice that Ms Chapman-Labecka could have an opportunity to be paid that sum in lieu of notice. Ms Chapman-Labecka did not accept as was stated by Mr Campbell that she was given that option at the meeting but failed to respond. No notes were taken at that meeting. I will record two other matters that were discussed.

Discussion about sudden resignation of a vet at Methven

[38] Ms Chapman-Labecka talked to Mr Campbell about a vet at the Methven clinic having resigned suddenly. She wanted to discuss the possibility of her moving into the position or the implications the resignation may have otherwise on the redundancy with covering those extra duties. Mr Campbell accepted that he told Ms Chapman-Labecka that he was not able to discuss that matter at that stage. He said that this was because it was clear to him that the resignation was a further opportunity to reduce veterinarian numbers but he had not had the opportunity to discuss that with anyone else. He was not in a position to confirm what would happen with the role but in evidence for the Authority investigation meeting said that the role was not filled.

Discussion about suitable roles in the future

[39] Ms Chapman-Labecka asked if she would be appointed for a suitable role in the future. Mr Campbell said that she was welcome to apply.

Period of sick leave during notice

[40] Ms Chapman-Labecka was then on a period of sick leave confirmed in a medical certificate for a period from 17 December 2015, fit to resume work on 4 January 2016.

Email from Ms Williams dated 23 December 2015 to Ms Chapman-Labecka

[41] The email from Ms Williams advised that there had been no response from Ms Chapman-Labecka to the offer to be paid in lieu of notice. Ms Williams advised as nothing further had been heard and there was a medical certificate covering a substantial proportion of the notice period a decision had been made to pay in lieu of notice with 23 December 2015 being the final working day. A copy of the payslip was attached to the email and Ms Chapman-Labecka was thanked for her service and asked to arrange a time to return equipment.

Ms Chapman-Labecka sends two emails on 31 December to Ms Williams and Mr Campbell

[42] The first email expressed surprise that 23 December was her final working day and said that she had not agreed to being paid in lieu of notice earlier. She gave Ms Williams an opportunity to clarify the matter otherwise she intended to turn up for work on 4 January 2016.

[43] The second email set out concerns about the Methven vet situation and that she had felt under pressure to resign during the 19 November meeting. She also referred to a view that she had provided feedback to the preliminary decision and said that comments made to her during the 19 November meeting and the interview were designed to portray her in a poor light. There was also reference to Ms Clement not taking notes at the interview process and using her cell phone under the table.

[44] Ms Williams responded by email of the same date and referred to clause 7.2 of the employment agreement to support the ability for the employer to pay in lieu of notice and asked again for the return of the Vetlife property including the motor vehicle. Ms Chapman-Labecka duly returned the property. There did not appear to have been any response about the other matters referred to in the second email.

[45] Ms Chapman-Labecka's then solicitor raised personal grievances of unjustified disadvantage and dismissal in a letter dated 10 March 2016. The letter referred to an advertisement for Vetlife on 1 March 2016 advising that there were currently roles available in Otago and Canterbury.

Was pressure put on Ms Chapman-Labecka to resign at the 19 November 2017 meeting?

[46] Mr Chapman and Ms Williams did not accept that at any time it was put to Ms Chapman-Labecka that an alternative was for her to resign. Ms Chapman-Labecka's own notes taken of that meeting provided during the Authority investigation record a question from Mr Campbell whether she wanted to be part of the selection process for the one remaining role or make a decision that day not to be in the selection process. The notes she took state the question was repeated three times by Mr Campbell but do not mention the words resign. I accept that Ms Chapman-Labecka felt under pressure during the meeting. I cannot be satisfied that went beyond pressure to make a decision whether or not to be part of the selection process, to pressure to resign.

Could Vetlife reasonably conclude that Ms Chapman-Labecka was a companion animal vet and her role should properly be included in the process?

[47] The evidence supports that the services provided by the Ashburton clinic fall into small and large animal services. Mr Campbell explained that the Ashburton clinic operated a split roster and veterinarians are either on the companion animal or large animal roster. The companion animal vet deals with dogs, cats and rabbits. The large animal veterinarians Mr Campbell said, as Ashburton is a dairy area, essentially were all dairy vets. Large animal vets he said are out visiting farms and Ms Chapman-Labecka was in the veterinary clinic.

[48] Ms Chapman-Labecka as well as providing services for small animals also did some equine work which was a particular interest and skill of hers. She also had the skills to provide services for larger animals. On that basis she considered herself a mixed practice veterinarian. She accepted during the review process that she did not undertake dairy work. I accept as likely the amount of small animal work had increased in recent times for Ms Chapman-Labecka as a result of staffing changes.

[49] It appeared from the evidence that the vets at the Ashburton clinic are categorised as companion or large animal and rostered accordingly. I further understand from the evidence that whilst at least some vets do undertake work for both animal types their roles are categorised by their predominant focus as companion or large animal vets. On that basis I do not conclude it unreasonable or unfair for Vetlife to have regard to an analysis of the actual

work carried out by Ms Chapman-Labecka to conclude whether her work fitted more clearly into one than the other.

[50] This was a process able to be undertaken by reviewing professional fees for work done because the fee analysis broke down the fees for work undertaken into small animal and large animal fees. A fair and reasonable employer could conclude that the majority of fees generated by Ms Chapman-Labecka were small animal fees for the period I saw over 2014/2015 and 2015/ 2016. Continuing professional development and roster participation was also taken not unreasonably to support this conclusion.

[51] I find that a fair and reasonable employer could conclude as a result of that that at the Ashburton clinic the work Ms Chapman-Labecka undertook fitted more clearly into that of a companion animal vet. For completeness although Ms Chapman Labecka suggested mediation about this matter I do not find unfairness in all the circumstances when this suggestion was not taken up.

Could Vetlife fairly and reasonably conclude that the selection pool should be restricted to Ms Chapman-Labecka and S

[52] There were three other vets referred to during the Authority investigation who Ms Chapman-Labecka considered should have been included in the pool. Mr Campbell said two were large animal vets and the third was the companion animal vet on maternity leave who was not to be replaced during her absence by a locum. I could not be satisfied that they should have been included. Mr Cahill then referred to seven other names in final submissions but I heard no evidence about those named individuals. They apparently are full time vets.

[53] Mr Cahill submits there should have been a proposal to reduce the number of vets working in the dairy role because issues impacting on dairy were the cause of the difficulties. Mr Campbell's evidence addressed that when he said that by not replacing the positions of two large animal vets the staffing level of large animal vets in the Ashburton clinic was considered to be "about right."

[54] In conclusion I find that Vetlife could conclude that S and Ms Chapman-Labecka should be in the selection pool.

Was the dismissal for reasons of genuine redundancy?

[55] The Court of Appeal in *Grace Team Accounting Limited v Judith Brake*¹ confirmed that the clear words of the justification in s 103A of the Act now require the Employment Court [and Authority] to determine on an objective basis whether the employer's actions, and how it acted, were what a reasonable employer would have done.² The test that the Authority applies in this case is whether the employer's actions, and how it acted, were what a fair and reasonable employer **could** have done.

[56] The Court of Appeal in *Brake* confirms that it is not helpful to focus on pre-s 103A case law when interpreting and applying s 103A. The importance of addressing the genuineness of redundancy was emphasised by the Court of Appeal.³ Following on from statements about pre-s103A case law when applying and interpreting s 103A the Court of Appeal stated:

Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would [or, now, could] have done in the circumstances.

[57] A fair and reasonable employer could be expected to comply with statutory and contractual obligations. I will shortly set out the relevant provisions in Ms Chapman-Labecka's employment agreement. Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and includes consultation when making employees redundant. Parties to an employment agreement must not mislead or deceive each other, or do anything likely to mislead or deceive each other. Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment to provide access to

¹ [2014] ERNZ 129, [2014] NZCA 541

² Above n 1 at [84]

³ Above n 1 at [85]

information relevant to the continuation of the employee's employment about the decision and give an opportunity for comment on that information.

[58] There should not be pedantic scrutiny of the process followed by the employer but the emphasis should be on substantial fairness and reasonableness. The key element of procedural fairness in the context of a proposed redundancy is to provide relevant information and actively consult before making a final decision – *Stevens v Hapag-Lloyd (NZ) Limited*.⁴

Definition in the employment agreement of a redundancy situation

[59] A redundancy situation is defined in clause 1 of the employment agreement as:

means circumstances which in the sole discretion of the Employer cause the Employer to consider whether the continued employment of the Employee under this agreement is economically justified.

[60] Mr Cahill submits that there was no information given to Ms Chapman-Labecka about her fee generation and how that may impact on the business. He submitted that in fact her fee generation increased by 6% in the years 2014/2015 and 2015/2016.

[61] At the investigation meeting the Authority was provided by Ms Chapman-Labecka with a document reflecting her fee generation for 2014/2015 commencing during the month of April 2014 and then for the year 2015/2016 up to August 2015. Vetlife provided documents with a total employee cost for Ms Chapman-Labecka for the period from April 2014 to March 2015 and from April 2015 to December 2015 compared with her fees income. Ms Chapman-Labecka in her evidence said that she spent time supervising, mentoring and giving product advice which was not work that necessarily generated fees. I accept that. The fees were reviewed to see if they supported the need for a reduction of companion animal veterinarian positions in the Ashburton clinic but they were not used for selection purposes.

[62] Mr Campbell said that a review of the fees generated by Ms Chapman-Labecka during the process supported that there was a low fee income level and that the practice could not support the current level of staffing. He advised Ms Chapman-Labecka during the process that the majority of fees she had generated were in companion animal. Mr Campbell accepted that the fees generated by Ms Chapman-Labecka may have increased by 6% but they had not

⁴ [2015] ERNZ 224 at [60] with reference to *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160

covered her salary. It more correctly put her salary, expenses and continuing professional development costs.

[63] Objectively assessed Ms Chapman-Labecka's fee generation did not support that there was no need to reduce companion animal staffing.

Ulterior motive for redundancy situation

[64] Mr Cahill submits that Ms Chapman-Labecka had previously been critical of management at Vetlife and that had made her a target for redundancy. He submits that the process undertaken was designed to focus on Ms Chapman-Labecka's position as the one to be made redundant. He also refers to some critical comments made during the restructuring process including the selection process about Ms Chapman-Labecka.

[65] Some of the criticism of management was historical. There was however a written warning issued to Ms Chapman-Labecka on 24 September 2015 for conduct towards her manager Ms Clement and that conduct was observed by Ms Williams. This was very close to restructuring commencing.

[66] Mr Campbell and Ms Williams deny this was simply a process designed to focus on Ms Chapman-Labecka's role. They say that the incident was dealt with and concluded with a warning and that was the end of the matter.

[67] In circumstances where there is an allegation of other motivating factors in a dismissal the Authority has regard to evidence about those factors and also considers whether there is evidence to support a basis of genuine consideration of a review or reorganisation.

[68] There was evidence to support a basis of genuine consideration of a review or reorganisation. Vetlife had considered future projections for its business for 2016 against difficulties from the start of 2015 as a result of the drought and low dairy milk solids. In doing so it concluded that there was an impact on the expenditure by clients of Vetlife on its products and services. There had been a deliberate decision not to replace employees who left and 10 – 12 roles were disestablished by way of natural attrition. Ms Williams in her evidence said that at the beginning of 2015 Vetlife had 176 employees on payroll and this decreased by the end of November 2015 to 161.

[69] I do pause on the fact that the only vet role to be made redundant during the process was Ms Chapman-Labecka's. There was however some evidence to support that fee income of companion animal vets in the Ashburton was low. I find that there were, within the definition of a redundancy situation in the employment agreement, circumstances in which Vetlife could consider whether the continued employment of one of the 0.5FTE companion animal vets was economically justified.

[70] In conclusion therefore I am satisfied that there was a genuine redundancy situation. I shall now consider the process and in particular the selection of Ms Chapman-Labecka for redundancy.

The process in the employment agreement in a redundancy situation

[71] Clause 11 in Ms Chapman-Labecka's employment agreement provides where employment is terminated because of a redundancy situation the employer shall adopt the procedure and policy in terms of Schedule E. Schedule E in clause 1 provides that the parties recognise the consequences of loss of permanent employment and seek to minimise these consequences by the policy and procedures that I shall set out below in schedule E.

[72] Clause 2 provides that both parties agree in good faith to discuss and attempt to resolve any redundancy situation with a view to avoiding the loss of employment if at all possible. Both parties also acknowledge the need for each to be fully informed and advised at all times in relation to any redundancy situation, actual or potential, and for there to be adequate representation during discussions and negotiations relating to it.

[73] Clause 3 of Schedule E provides about notice for advice to the employee at the earliest practicable time of any impending redundancy situation, and that if a redundancy situation cannot be avoided then the employer shall give to the employee not less than one month's notice of the termination of employment. If the employee ceases work before the expiry of the notice then the employer shall not be liable to pay for the balance of the period of notice.

[74] Clause 4 of Schedule E provides the employer shall where possible immediately counsel or provide counselling for the employee and assist so far as reasonably possibly in obtaining other employment.

[75] Clause 5 provides that an employee made redundant shall be considered for any vacancy at another of the employer's clinics, however, he or she shall not be entitled as of right to a vacant position in any other clinic.

Consultation and good faith

[76] There was adequate consultation about the proposal to disestablish one of the 0.5 FTE positions and an opportunity for feedback. The second time in the process when a decision was made was whether or not to appoint Ms Chapman-Labecka to the remaining 0.5 FTE position.

[77] At that point, as was stated by the Employment Court in *Jinkinson v Oceana Gold (NZ) Ltd*,⁵ in carrying out the selection process the employer was proposing to make a decision that would, or was likely to, have an adverse effect on the continued employment of one or more of its employees. If selected the employee will continue in employment and if not the employment is terminated.

[78] There are good faith obligations in s 4(1A)(c) of the Act to provide access to information relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information before the decision is made.

[79] The Authority questioned Mr Campbell and Ms Williams about the change to the selection criteria, set out in both the proposal and the decision document, to include other criteria. Mr Campbell said that he did not think this change was a "u turn or change of direction." Ms Williams said that she did not see it as a change from the existing criteria.

[80] At the time of the interview Ms Chapman-Labecka as part of the consultation process knew that she was eligible to be considered for the remaining part-time position based on four selection criteria. They were level of experience, qualifications attained, skill base and accreditations. She was asked to provide information on the four criteria which she duly did.

[81] During the interview process there were questions about teamwork, career aspirations, leadership and skills and strengths. Aside from skills and strengths I do not find that the other three criteria relied are extensions to, or related to, the criteria consulted about. They were additional new criteria about which information had not been provided to Ms Chapman-

⁵ *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 at [41]

Labecka. At some point in the period after the consultation on 19 November 2015 there had been a decision to include these additional matters. They were in the mind of the interview panel at the time of the interview but not known about by Ms Chapman-Labecka. Ultimately considerable weight was placed on the new criteria in reaching a decision not to select Ms Chapman-Labecka as set out in the preliminary decision document.

[82] Vetlife places some reliance on the ability for Ms Chapman-Labecka to comment on the preliminary decision made not to select her for the position as establishing fairness. At that point the interview had been held and a decision, albeit a preliminary one, made on criteria not consulted about. Consultation must precede a decision to be meaningful. There had already been consultation about the selection criteria and Ms Chapman-Labecka had relied on the decision made in submitting material in advance of the interview as requested about the criteria. There was no further consultation on the changed criteria before or even during the interview. Ms Chapman-Labecka did not fairly and properly know for example that her career aspirations would have been a significant factor to the interview panel and ultimately in the decision not to appoint her. The ability then to provide feedback on a selection decision does not overcome the fundamental unfairness and breach of good faith obligations.

Support provided

[83] I do not find that the unspecified offers of support to Ms Chapman-Labecka, although made regularly throughout the process, satisfied the obligations the parties specifically agreed in their employment agreement for counselling and assistance to find another job. A fair and reasonable employer could have been expected to have advised of specific support both about counselling and assistance to obtain other employment.

Was there other than a genuine reason not to select Ms Chapman-Labecka?

[84] Ms Chapman-Labecka considered that she had been specifically targeted for redundancy. I have found that there was a genuine redundancy situation. Notwithstanding a genuine redundancy situation a selection process can be for other than genuine reasons. Some aspects of the process when considered as a whole and objectively assessed could support a decision not to select Ms Chapman-Labecka for other than genuine reasons.

[85] There is the change to the selection criteria which I have already referred to.

[86] A fair and reasonable employer could have been expected to conclude it was not appropriate for Ms Clement to be present at the interview given her direct involvement in the circumstances leading to Ms Chapman-Labecka's written warning a few weeks earlier. I could not be satisfied that her role was simply that of observer or that she was not involved in any way with discussions about selection or measurement against criteria.

[87] There was a statement by Mr Campbell on the day of the interview to Ms Chapman-Labecka that she had the highest insurance claim against the practice. Mr Campbell says that was in the context of a discussion about equine. Ms Williams says that was said but outside the actual interview process. It clearly concerned Ms Chapman-Labecka. Whilst I agree with Mr Campbell that context is important it seems an inappropriate matter to refer to at an interview process even if outside of the interview proper. It was historical and potentially prejudicial.

[88] There was then a refusal to discuss a vacancy at the Methven clinic when a vet resigned. Ms Chapman-Labecka requested information at the time she was advised of the decision to terminate her employment. The failure to discuss and provide the information was not in accordance with the requirement in the employment agreement in schedule E clause 2.1 to resolve any redundancy situation with a view to avoiding the loss of employment if at all possible. It did not accord with good faith obligations to provide information.

[89] A fair and reasonable employer could and should have put the giving of notice on hold until information was available about whether that resignation and the cover of the work impacted the decision to make a 0.5 FTE redundant. Even if the decision had been not to fill the vacancy there was still some measure of unknown about how the vet's remaining work would be covered and undertaken. Cover of workload, for example in the event of disestablishment of the 0.5 FTE position, was specifically referred to in the proposal provided to Ms Chapman-Labecka on 4 November. It referred to the workload being covered by the remaining full time and part-time companion animal vets with support from mixed practice veterinarians if needed from time to time. There should have been provision of information to Ms Chapman-Labecka about that in terms of the Methven vet resignation. For completeness there was no evidence about any other redeployment options.

[90] There was then a decision made whilst Ms Chapman-Labecka was on sick leave confirmed by a medical certificate to terminate her employment and pay her notice in lieu

because there was the ability under the employment agreement to do so. This was in circumstances where there could be no issue of fault and an expectation of a more dignified exit. It is often easier to find another role whilst still employed. It is surprising there was no attempt to seek input about this.

[91] Finally there was no real effort to discuss with Ms Chapman-Labecka vacancies which the employment agreement in clause 5.1 of schedule E provided she “shall be considered for” although she was not entitled as of right to a vacant position in any other clinic. On its face that clause, because it refers to an employee made redundant, survives termination. If Ms Chapman-Labecka had not been paid out her notice in lieu her employment would have terminated on or about 15 January 2016. There was then an advertisement some six weeks later for roles in Otago and Canterbury at Vetlife clinics. When this was raised with Vetlife on 10 March 2016 Vetlife through Ms Shaw initially denied advertising any veterinarian positions since the restructure, and then stated that they were in Temuka and Ranfurly.

[92] In her evidence Ms Williams said that the position being recruited at that time was a mixed practice position with an emphasis on dairy in Oamaru and a full time companion animal position in Ashburton due to the resignation of the full time vet although the filling of that role was delayed somewhat. Ms Chapman-Labecka was not contacted about or considered for those vacancies. S also resigned in March from the 0.5 role although Ms Williams said her role was not filled.

[93] There were then some other vacancies a few months later. Ms Chapman-Labecka said that she applied for one of these roles within the time stipulated in the advertisement but Ms Williams said by the time the application was received an offer had already been made to another successful candidate.

[94] I find when considered as a whole that these matters support there were other motivating factors in not appointing Ms Chapman-Labecka to the remaining role.

[95] In conclusion I find that the actions are not what a fair and reasonable employer could have done in all the circumstances for the reasons set out above. The procedural unfairness was not minor and it did result in unfairness. The process as set out above was also not in accordance with what the parties had agreed in the employment agreement and was not in accordance with good faith obligations. A decision to dismiss that results from a procedure that does not comply with s 4(1A)(c) will not be justifiable.

Was the decision to dismiss Ms Chapman-Labecka justifiable?

[96] I do not find that the decision to dismiss Ms Chapman-Labecka was justifiable. Ms Chapman-Labecka has made out her personal grievance of unjustified dismissal and is entitled to consideration of remedies.

Remedies

Lost Wages

[97] Ms Chapman-Labecka seeks to be reimbursed for 12 weeks lost wages in the sum of \$13,071 taking into account some earnings over that period of \$1392. The wages are assessed on the basis of 24 hours per week multiplied by an hourly rate of \$50.22 less earnings of \$1392.

[98] Ms Shaw submits that there is no evidence to support that there was any attempt by Ms Chapman-Labecka to obtain further employment for the period wages are claimed for. Ms Chapman-Labecka said that she felt too unwell with stomach pains, broken sleep and lack of confidence to look for another veterinarian role until about March 2016 but she did undertake some gardening work. There is no medical evidence to support that after termination of employment. I accept the process did have an impact on Ms Chapman-Labecka's health during the period of notice confirmed by a medical certificate and consultation notes.

[99] She also started working in a garden centre from 7 February 2016 which was only a few weeks after notice would have ended. That such work was undertaken by a very experienced veterinarian is consistent with a loss of confidence during that period of time. I also take into account that Vetlife did not, as it agreed in the employment agreement, assist her as far as reasonably possible to obtain other employment. When its vacancies were raised with it in early March 2016 it initially said that there were none. There was no ability for mitigation of loss by way of these matters.

[100] Given the procedural unfairness in this matter which went beyond simply the selection process I cannot be satisfied that even if the process of selection had been fair with proper consultation Ms Chapman-Labecka would have still been made redundant.

[101] I accept the claim for lost wages is properly made out in the sum of \$13,071 gross which takes into account earnings received.

[102] I order Vetlife Limited to pay to Kasia Chapman-Labecka the sum of \$13,071.00 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

Compensation

[103] The claim under this head is \$20,000. The evidence supported that Ms Chapman-Labecka was quite significantly affected by the process of redundancy. She felt that her loyalty, extra work and enthusiasm had simply been discounted. She described her confidence as severely shaken and that when her employment was terminated during the notice period she concluded that Vetlife just wanted her to go as quickly as possible.

[104] Ms Chapman-Labecka had been employed by Vetlife for a considerable period. The manner in which she was dismissed and the feeling of unfairness about the process contributed I find to the loss of her confidence. In all the circumstances I am of the view that an appropriate award for compensation is \$10,000.

[105] I order Vetlife Limited to pay to Kasia Chapman-Labecka the sum of \$10,000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution

[106] I do not find that there was any contribution by Ms Chapman-Labecka to the dismissal.

Costs

[107] I reserve the issue of cost. Agreement may be able to be reached about costs failing which Mr Cahill has until 10 October 2017 to lodge and serve submissions as to costs and Ms Shaw has until 24 October 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority