

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 172/09
5130991

BETWEEN GINA KENT
 Applicant

AND SIGNATURE SECURITY LTD
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Nicholas Carter, counsel for Applicant
 Ian Davidson, advocate for Respondent

Investigation Meeting: 4 March 2009

Submissions Received 16 March, 15 and 24 April 2009

Determination: 29 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In her statement of problem the applicant Ms Gina Kent describes the matters she wishes the Authority to resolve as:

- (a) *Compliance order;*
- (b) *Personal grievance for unjustified dismissal.*

[2] The compliance order has been sought in relation to an incentive payment claimed by Ms Kent to have been offered by the respondent, Signature Security Limited (SSL), as an inducement to enter into an employment agreement.

[3] There is no dispute that Ms Kent would have received \$4,038.46 if SSL had allowed her request to be given the incentive payment. She also claims to recover an amount equivalent to 2 ½ days pay in lieu of annual leave, pursuant to an associated incentive allegedly offered by SSL. There is no dispute that 2 ½ half days of paid annual leave had a value to Ms Kent of \$337.00.

[4] The claim of unjustified dismissal arises from the termination by SSL of Ms Kent's employment on the grounds of purported redundancy. In particular it is claimed the dismissal lacked justification because SSL did not adequately consult Ms Kent about the availability of other suitable positions to avoid the loss of her job. Ms Kent claims that SSL had unreasonably viewed her as having decided to leave her employment regardless of whether re-deployment was available. It is contended for Ms Kent that the procedure followed by SSL in dismissing her for redundancy was defective to an extent that made the dismissal substantively unjustified.

[5] Mediation undertaken by the parties did not resolve the employment relationship problems.

Transfer from Radius to Signature

[6] On 15 October 2007 Ms Kent signed her acceptance of an offer to transfer her employment. The move was from Radius Security Limited, with whom she had been employed since April 2007, to SSL which had bought part of the Radius business in which Ms Kent had worked as a Community Care Co-Ordinator.

[7] Ms Kent was one of a number of Radius employees given the opportunity of transferring to SSL. Those employees were required to elect to go to SSL by 17 October 2007 and employment was to commence with that company on 19 October. Employees invited to transfer to SSL were advised that if they did not do so their positions would be made redundant by Radius.

[8] A letter from Radius outlining to Ms Kent the terms of transfer to SSL was given to her on 11 October 2007. In it Radius advised that the terms and conditions of employment with SSL "*.....will be the same as your current terms and conditions.*" At about the same time, a presentation was made by SSL managers to employees invited to transfer. Ms Kent attended with others and was given an information pack. In it was a pamphlet printed under the names of both Signature and Radius and giving advice headed "***SIGNATURE INCENTIVES.***"

[9] Two particular incentives are the subject of the application by Ms Kent for a compliance order to enforce their payment. They are described in the pamphlet as follows:

STAY BONUS

Payment equivalent to 6 weeks' pay on the 6 month anniversary of employment with Signature. Note that if you decide to leave Signature beforehand, or you are dismissed for serious and wilful misconduct then you won't receive the stay bonus.

ANNUAL LEAVE BONUS

Normally, annual leave entitlements are not paid on bonuses. But every staff member who is paid a Stay Bonus will also receive an annual leave payment based on the 6 weeks' equivalent to 2.5 day's pay.

[10] In opposing her claim SSL has argued that bonuses detailed in the Signature/Radius pamphlet under the heading "**SIGNATURE INCENTIVES**" were not intended for Ms Kent and that it was by mistake she received the pamphlet advising her of them. SSL has argued that they were intended only for Radius employees transferring to SSL on fixed term agreements limited to six months employment, whereas Ms Kent was offered a transfer of permanent employment.

[11] SSL has argued that the objective of the incentives had been to encourage the fixed term employees to stay for the entire period of that employment, as they were more prone than permanent employees to leave as soon a longer term job could be found.

[12] I accept, and it is not disputed, that SSL's intention was to offer the stay incentives only to the six month fixed term transferees. SSL had not intended that employees such as Ms Kent, who were transferring on permanent employment agreements, would be offered the inducement of the stay bonuses. Despite that intention SSL, by mistake, allowed Ms Kent to receive the written advice about the incentives. SSL's mistake gave Ms Kent some basis for thinking the incentives were intended to apply to her.

[13] For SSL it is argued that the bonus entitlements claimed by Ms Kent were not terms and conditions of the employment agreement she subsequently entered into with the company to ratify her transfer to it. That agreement was signed by Ms Kent on 17 October 2007. The purpose of it was stated to be to provide for the appointment of Ms Kent as Community Care Co-ordinator and to set out the obligations of the parties.

[14] In signing the agreement Ms Kent expressly declared that she had read and understood its terms and conditions and that prior to signing it she had been given an opportunity to seek independent advice about anything in the agreement she did not understand.

[15] The agreement does not provide for the payment of the Stay Bonus or Annual Leave Bonus previously offered by Signature to employees transferring from Radius. It contains general limitations and exclusions that are material to its scope. One of those is Clause 1.2, which provides:

This agreement contains the whole of the agreement between the parties and supersedes and replaces any previous representations, understandings or arrangements.

[16] Clause 31 is also relevant in this regard:

The terms and conditions set out in this agreement represent the entire agreement of the parties and replace any previous agreements and understandings.

[17] If they apply those express terms of the employment agreement would defeat Ms Kent's claim to the bonus payments, which are not referred to in the contract. The agreement and entry into it may however become the subject of the statutory remedies and relief under the Contractual Remedies Act 1979 and the Fair Trading Act 1986, which are available to enforce pre-contractual representations made in some circumstances.

[18] Under s 6 of the Contractual Remedies Act if a party has been induced to enter into a contract by misrepresentation, that person may become entitled to damages from the other contracting party in the same manner and to the same extent "*as if the representation were a term of the contract that has been broken.*"

[19] On that basis, if the Contractual Remedies Act applied to the circumstances of this case, the provision of the Stay Bonus and the Annual Leave Bonus would be deemed terms or conditions of the employment agreement, and damages would be available in the amount of the bonus in each case.

[20] The Fair Trading Act provides remedies for misleading or deceptive behaviour occurring in conjunction with the offering of employment; s 12 of the Act.

Inducement

[21] Ms Kent's case was argued by Mr Carter in final submissions as being one of inducement. He submitted that she was induced to sign her employment agreement with SSL by the "**SIGNATURE INCENTIVES**" document given to her on 11 October 2007.

[22] Whether there has been any inducement to contract is a question of fact. In contract law inducement has two aspects. Firstly, to be actionable a representation must cause or induce a party to act in a particular way. Secondly, the representor must have intended the party to act in that way; *Savill v. NZI Finance Ltd* [1990] 3 NZLR 135.

Was there inducement?

[23] On the first aspect of inducement, neither in her written or oral evidence did Ms Kent claim that the Signature incentives had influenced in any way or to any degree her decision to transfer from Radius to SSL.

[24] I do not consider that it can reasonably be inferred there was such an influence operating. It is equally open to inference that since Ms Kent was transferring to SSL with permanent employment and on the same terms and conditions she had had with Radius, that was the inducement for her to accept the offer by SSL of continuing employment. Ms Kent was not in the less fortunate position of others who were offered only fixed term employment for six months and who might in that time be expected to look around for permanent employment and leave before the end of the period, unless induced to stay for all of it.

[25] Ms Kent gave evidence of a discussion she had about the SSL employment agreement and stay pay with SSL's National Sales Manager, Ms Wendy Odom, on 15 October 2007. Ms Kent said:

We discussed the fact that the six weeks stay pay was good and would help with any loss of income whilst changing from the Radius brand to Signature.

[26] I do not regard the expression of approval given by Ms Kent to Ms Odom with regard to the stay incentives as clear evidence that the incentives were an influence in

her decision to accept the offer of employment with SSL. I cannot find that Ms Kent was induced by the incentives to enter into an employment agreement with Signature.

Was inducement intended?

[27] With regard to the second aspect of inducement, I am satisfied that SSL had no intention of offering Ms Kent the Stay Bonus and the Annual Leave Bonus. SSL therefore had no intention of influencing Ms Kent to accept employment by offering those incentives. An intention by SSL to induce a contract cannot be imputed to the employer from that fact that Ms Kent was mistakenly informed by the company of the incentive bonuses offered to some others.

[28] In my view the wording of the bonus incentives document itself supports the claim by the company that it intended those incentives to be available only to employees transferring on six months' fixed term employment.

[29] As submitted by Mr Davidson for SSL, the wording "*But every staff member who is paid a Stay Bonus will also receive an annual leave payment.....*" implies that not all staff members would become eligible for a Stay Bonus if they stayed six months with SSL.

[30] Further, there is reference to "*staff on fixed term agreements*" as being eligible for paid overtime. This too indicates that the Signature incentives document was intended to be addressed only to staff on such agreements.

[31] Then there is the following under the heading Travel Allowance:

If you decide to take up any permanent opportunities that Signature has available and the position requires you to work at the Signature Penrose Office ...

[32] From the outset, the opportunity Ms Kent had taken up was a permanent position available with Signature and she did not face a situation where fixed term employment would come to an end, leaving her without ongoing employment.

[33] This is reinforced by the statements:

Nearly all staff will be offered a job with Signature for the next six months.

[34] Although not without ambiguity, this statement implies that other staff were to be offered employment for periods other than six months. The possibility of future permanent employment was also repeated:

After the 6 months integration period there will be a number of opportunities for permanent employment with Signature.

[35] It should have been clear to Ms Kent that this did not refer to her situation, which had been from the beginning one of on-going or permanent employment. The opportunity in that regard was realised at the start of her employment with SSL.

[36] I therefore consider that SSL did not wilfully use language calculated, or of a nature, to induce a normal person to enter into employment with the company.

[37] There clearly was a mistake made by SSL in allowing Ms Kent to be given a copy of the information intended for the six month fixed term employees only. I find however that the mistake by itself is not sufficient to found a case of inducement or misrepresentation, in circumstances where SSL did not intend that result and had written the incentives document in a way that clearly enough showed it was addressed to a group of employees in which Ms Kent was not included, because she was not transferring to SSL under a fixed term agreement.

[38] I therefore reject the existence of inducement as the basis relied upon in Ms Kent's claim to enforce the bonus payments. I find that Ms Kent is not entitled to recover the six month Stay Pay Bonus or the two and a half days Annual Leave Bonus, whether by compliance or by award of damages for breach of a deemed term of the employment agreement.

Claim of unjustified dismissal

[39] By letter of 19 June 2008, SSL's General Manager Human Resources, Ms Armin Morrison, advised Ms Kent that her position was to be made redundant on 30 June. Ms Kent was also advised that she would receive contractual entitlements of one months pay in lieu of notice, accrued annual leave and outstanding commissions.

[40] The reason for Ms Kent's dismissal was confirmed to be redundancy by SSL's Group General Manager Human Resources, Mr Tim Armstrong, in his letter of 7 July 2008.

[41] It is contended for Ms Kent that her dismissal was unjustified, both substantively and procedurally.

[42] The test of justification is contained at s 103A of the Employment Relations Act 2000; the Authority must consider, objectively, whether SSL's actions and how SSL acted, were what a fair and reasonable employer would have done in all the circumstances at the time dismissal occurred.

[43] With regard to substantive justification, I find that a situation of genuine redundancy had arisen in the employment of Ms Kent at the time SSL decided to dismiss her. The decision to disestablish Ms Kent's role was made for commercial reasons to do with the efficient and economic operation of SSL's business. The employer's reasons did not relate to Ms Kent personally. They were not a response to any adverse views SSL might have formed about her as a loyal and committed employee of the company after she had strongly criticised the company in her email of 28 April 2008.

[44] While I find that Ms Kent has a personal grievance arising from her dismissal, I do not uphold the submission made on behalf of Ms Kent that the procedure for carrying out the redundancy was so defective as to render the dismissal substantively unjustified. I am satisfied that redundancy was genuinely the reason for the dismissal of Ms Kent and was not a pretext for ending her employment because of any dissatisfaction with her or her performance or her conduct, held on the part of SSL.

[45] There is no dispute that SSL after taking over the business from Radius and after a period of assessing its performance, commenced negotiations with Smartsales Limited with a view to giving that company an agency to sell and service medical alarms. This was work that Ms Kent had been employed by SSL to do.

[46] The appointment of an agent made it unnecessary for SSL to employ its own staff, particularly in the position of Community Care Co-Ordinator in which Ms Kent and several others had been working.

[47] Further, I do not uphold the submission that Ms Kent's dismissal was unjustified because of the fact that SSL did not consult with her about its entry into a business arrangement with Smartsales until after an agreement for that had been signed. The employer was entitled to maintain confidentiality over sensitive commercial negotiations, while still remaining bound to observe its duty of good faith

and its obligation to consult in relation to any termination of employment that might result from the agency agreement reached with Smartsales.

[48] There is no dispute that SSL did not tell Ms Kent about the arrangements it had entered into with Smartsales to outsource the medical business and the impact of those on her position, until a meeting on 18 June 2008.

[49] With reference to that meeting, the following day Ms Morrison in a letter said:

As you may appreciate we were not able to advise you of the outsourcing of the medical business until the new model had been finalised and we had been able to discuss future opportunities with you. Therefore, while this news may have come as a surprise we are endeavouring to work through a process whereby you are informed of what is occurring and its impact on you.

[50] There is also no dispute between the parties that SSL did not offer to Ms Kent any alternative position to the one she held and which was being made redundant, whether with SSL or with Smartsales.

[51] The main issue between the parties in this case is the reason given by SSL for not consulting Ms Kent about any particular opportunities that were available as an alternative to dismissal for redundancy.

[52] SSL has maintained in its evidence given by Ms Morrison and Mr Armstrong that Ms Kent by her behaviour rejected or waived any need for her to be consulted about redeployment. To them she had appeared intent on pursuing a payout or severance pay and ending her employment rather than continuing it. The evidence of several SSL witnesses was that Ms Kent had shown no wish to engage in looking at future opportunities that existed with SSL or with Smartsales.

[53] I do not accept that the proposal made in writing by Ms Kent on 28 April 2008 (before she had any knowledge of plans to restructure the part of the business in which she worked) amounted in any way to notice that she was resigning or even intending to resign her employment.

[54] I find as a fact that when Ms Kent was notified of her dismissal on 19 June she had not resigned and had not given any clear indication that she was intending to resign. Her termination resulted from the action of dismissal taken by her employer SSL, and the question is therefore whether in carrying out that action SSL discharged

its obligations as a fair and reasonable employer handling a genuine redundancy situation.

[55] In my view the company did not. There is no dispute that opportunities were available as an alternative to redundancy. SSL could have put those opportunities forward for discussion with and response from Ms Kent, even if it felt confident she was unlikely to accept any proposals offered.

[56] I find the employer did not discharge its obligation under s 4 of the Act, requiring it to deal in good faith with Ms Kent.

[57] Under s 4(1A), SSL and Ms Kent were required to be active and constructive in establishing and maintaining a productive employment relationship in which they were required to be, amongst other things, responsive and communicative.

[58] Section 4(1A)(c) also obliged SSL to provide to Ms Kent access to information relevant to the continuation of her employment, before it made any decision likely to have an adverse effect on that employment. Ms Kent was required to be given an opportunity to comment on such information before any decision was made.

[59] I find that the information Ms Kent was entitled to have access to included the opportunities that were available for her to continue working for SSL, or to be redeployed with Smartsales. Section 4(1A) of the Act was applied in this way by the Employment Court in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825.

[60] I do not accept in the circumstances that SSL was reasonably able to conclude from any behaviour or conduct of Ms Kent's that she was not interested in such information and did not wish to engage in considering it and commenting on it. Her attitude would have been tested best by advising her of the available positions and seeing how she responded to consultation.

[61] SSL was required to consult in good faith about alternatives, although that did not require the company to agree to appointing Ms Kent to any available positions.

[62] It is clear from s 4(4) that the duty of good faith in s 4(1) applies to proposals by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part

of the employer's business. The duty of good faith expressly applies to the matter of making employee's redundant.

[63] I therefore find that SSL failed to discharge its duty of good faith by withholding from Ms Kent information about the opportunities that did exist for her to become deployed as an alternative to redundancy. I reject the claim that she was disinterested in considering alternatives and that her sole objective had been to resign once agreement had been reached about a compensation package.

Determination of grievance claim

[64] For the above reasons the Authority finds that the dismissal of Ms Kent was unjustified in the circumstances as known to the employer at the time the decision was made.

[65] Alternatively, applying s 122 of the Employment Relations Act, Ms Kent is found by the Authority to have a disadvantage grievance arising from SSL's unjustified action of not consulting her about redeployment opportunities.

[66] I find that no grievance or other remedy arises out of the claim that SSL did not provide Ms Kent with leads to 12 new customers each week, as Radius had supplied her with from telemarketing. That claim is based on a representation made by Radius to transferring employees that the terms and conditions of employment with SSL would be the same as those with Radius. As SSL did not itself make that promise to Ms Kent, it is not enforceable against that company.

Remedies

[67] Turning to the remedies to which Ms Kent may be entitled to resolve her grievance, there is no suggestion that there was any contributory fault or blame on her part that was causally linked to the employer's failure to adequately or sufficiently consult her about existing alternatives to redundancy. Her request for compensation or the criticism she expressed of SSL do not amount to blameworthy conduct for the purposes of assessing contribution under the Act.

[68] Matters to be taken into account in considering whether Ms Kent is entitled to reimbursement of lost wages include the circumstances that led to her having to decline to take up a position of employment because of her husband's illness for a

period of time. Even if Ms Kent had been offered an opportunity with SSL, it cannot be certain that she would have accepted the redeployment. She was clearly discontented with her SSL employment and it is quite possible therefore that she would not have wished to continue with that company even if offered redeployment.

[69] In my view the appropriate period for assessing reimbursement of lost remuneration is three months, on the basis of her availability to work during that time. From Ms Kent's evidence I find there was no loss flowing directly from her grievance. She said she had not looked for work for the first few weeks after the dismissal and then she had not started the job she did obtain because she had wanted to care for her husband while he recovered from illness. It seems to have been after the three month period following her dismissal that Ms Kent felt able to return to work, which was in the family business. No award is therefore made for lost remuneration.

[70] The level of compensation for hurt feelings, humiliation and distress must relate to the failure of SSL to properly consult Ms Kent about alternatives to redundancy, rather than the loss of her position through genuine redundancy. I fix \$4,000 as compensation to be paid to Ms Kent under s 123(1)(c)(i) of the Act.

Determination

[71] In summary, the Authority determines that Ms Kent was not entitled to the Stay Bonus or the Annual Leave Bonus offered to some employees of Radius for transferring to SSL.

[72] The Authority also determines that the dismissal, or alternatively the disadvantaging, of Ms Kent was unjustified. She is awarded \$4,000 compensation to be paid by SSL for hurt feelings, humiliation and distress.

Costs

[73] Costs are reserved. The parties and their representatives are expected to confer with a view to resolving themselves this question. If that proves not to be possible, application may be made on behalf of Ms Kent within 21 days of the date of this determination. SSL shall have a further 14 days after that time in which to provide any response to the application in writing.

A Dumbleton
Member of the Employment Relations Authority