

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 124
5509547

BETWEEN

PATRICIA SLEETH
Applicant

AND

BROMLEY PARK
HATCHERIES LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Michael Smyth, Counsel for the Applicant
Stephen Langton, Counsel for the Respondent

Investigation Meeting: 18 December 2014

Determination: 4 May 2015

DETERMINATION OF THE AUTHORITY

- A. Patricia Sleeth was unjustifiably disadvantaged by failure of her managers to consult her about changes at work but those breaches were not sufficiently serious for her subsequent resignation to be deemed a constructive dismissal.**
- B. In remedy of the unjustified disadvantage Mrs Sleeth suffered Bromley Park Hatcheries Limited (BPHL) must pay her:**
- (i) \$334.87 as lost wages; and**
 - (ii) \$2000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.**
- C. BPHL must also pay a penalty of \$1000 to Mrs Sleeth for a breach of her employment agreement.**
- D. Costs are reserved.**

[1] Patricia Sleeth worked for Bromley Park Hatcheries Limited (BPHL) from March 1996 until she resigned on 25 July 2014.

[2] BPHL is in the business of hatching chickens for sale to domestic and export markets. Mrs Sleeth was employed as a hatchery worker and sexor at its Tuakau hatcheries. Her employment agreement included a schedule stating she was employed on a part-time basis for work on Mondays and Thursday with the start and finish times for her normal hours of work varying “*depending on workload*”. Her main tasks were described as “*machine sexing and feather sexing*”.

[3] Those tasks involved identifying the sex of newly hatched chickens (to sort into batches for customers buying them for egg laying or to be raised for meat). The machine sexing work, which involved putting a probe into each chick, was paid at \$40 an hour. The feather sexing work involved only visual inspection and was paid at the rate of \$16.50 an hour. Mrs Sleeth was also paid a travel allowance for days she did machine sexing work, but not for days that she did feather sexing or other hatchery work.

[4] According to her statement of problem Mrs Sleeth learned “*through rumour in the workplace*” in early June 2014 that BPHL was considering using a different, manual method for determining the sex of the chickens and that a Filipino couple were to come to New Zealand to train BPHL staff in the method that was called squeeze or vent sexing. Squeeze sexing was said to be faster, more accurate and have animal welfare benefits superior to the machine sexing technique.

[5] The squeeze technique was developed in Asian countries. There was a shortage of people in New Zealand trained in using it. BPHL had failed in two earlier attempts to recruit workers from the Philippines to use the technique in its hatcheries.

[6] On 3 July Mrs Sleeth returned to work after two weeks annual leave and was told by another employee that the Filipino couple had been employed for 40 hours a week and would be doing her job. That day she asked for a meeting with BPHL’s operations manager Jimmy Chand to find out what was happening. Mr Chand tried to arrange the meeting with BPHL’s general manager Brent Williams that day but Mrs Sleeth and other sexors had finished work and gone home by the time Mr Williams was free to meet later that afternoon.

[7] The Filipino couple had started work before Mrs Sleeth's next day of work on 10 July. On arriving at work that day she found her usual hatchery work clothes (provided and laundered by BPHL) were being used by one of the Filipinos and the couple were doing the sexing work that she had expected to do that day. Instead she was put to work on other hatchery tasks for which she received a lower pay rate.

[8] Mr Chand arranged a meeting that afternoon with Ms Sleeth and three other sexors who were working that day to tell them about BPHL's plans for the Filipino couple and to arrange to meet individually with each employee to discuss how it would affect them. Mr Williams, who was working in Christchurch, attended the meeting by Skype. BPHL's financial controller Tracy Jarman also attended the meeting. There was conflicting evidence from Mrs Sleeth, Mr Chand and Mr Williams about what was said during it. They did agree Mr Williams had talked about BPHL's plans to increase the size of its hatcheries and its capacity to process large orders and why BPHL had arranged to employ the Filipino couple. Those reasons included the recent retirement or semi-retirement of two of the present sexing team (and who were then only available on a casual basis) and problems with continued use of the machine sexing technique. Mrs Sleeth disputed Mr Chand's evidence that Mr Williams had also said BPHL planned to have the Filipino couple train her and the other sexors in use of the squeeze technique.

[9] On 16 July Mr Chand and Mr Williams met with Mrs Sleeth. She was told there would be no machine sexing work for her for the following four weeks. Instead the work on a major export order that was to be filled during three of those weeks would be done by the Filipino couple using the squeeze technique. Mr Williams said it was an opportunity to assess the speed, accuracy and mortality rates of the couple's use of the technique.

[10] There was a dispute in their respective evidence about whether, during that discussion, Mrs Sleeth was also told about the prospect of being considered for a position as a supervisor that was about to be created at BPHL's nearby Riverlands hatchery. Mr Chand and Mr Williams said Mr Chand mentioned that job could give Mrs Sleeth more hours of work in addition to time she was required for machine sexing in future. Mrs Sleeth denied the job was mentioned in that discussion or any other time prior to her resignation.

[11] A work roster for 'hatch dates' from 21 July to 28 August issued after the meeting listed Mrs Sleeth and three other sexors as working on feather sexing over that six week period while the Filipino couple would work on squeeze sexing.

[12] Mrs Sleeth's evidence was that she formed the view from that information that she could "*no longer afford to keep coming to work*" as she would not get any machine sexing work and "*it simply wasn't worth getting up at 2-3am to work for a few hours at \$16.50 per hour and I couldn't bear to watch someone else do my job*".

[13] At work on 25 July Mrs Sleeth asked to meet with Mr Chand and Mr Williams. Only Mr Chand was available. She told him that she considered she had been made redundant by the employment of the Filipino couple and she should be paid compensation. She gave Mr Chand oral notice of her resignation and said she would work for the following two weeks so she would not lose any leave entitlements from her final pay. Mr Chand said she would be paid her notice with no deduction but he could not authorise any compensation. Mrs Sleeth left work that day.

[14] Mrs Sleeth and her husband, Geoff Sleeth, met with Mr Chand, Mr Williams and Ms Jarman on 29 July. They debated whether the employment of the Filipino couple had made Mrs Sleeth's role redundant and whether Mr Williams had told her in their 16 July meeting that no training in the squeeze technique would occur for two years. Mrs Sleeth was asked if she would return to work but she confirmed that she would not and insisted she wanted compensation.

[15] On 1 August Mrs Sleeth's lawyer raised a personal grievance in writing. Although Mrs Sleeth had resigned on 25 July, and confirmed on 29 July that she would not return to work, the grievance was described as an unjustified disadvantage for "*unilateral variation of [her] contract terms without any prior consultation*". The letter stated she had "*verbally indicated her intention to resign her employment*" on 25 July and that, if she did resign, then she would have been constructively dismissed.

[16] BPHL's legal representative responded in writing on 11 August, denying Mrs Sleeth was unjustifiably disadvantaged or constructively dismissed. BPHL said her role at the hatchery was still available and she was welcome to return and commence training in the new sexing technique.

[17] The parties attended mediation on 28 August without resolving the problem. In a letter dated 29 August Mrs Sleeth's lawyer then wrote to BPHL "*to confirm her resignation from employment and raise a claim for constructive dismissal*".

[18] Mrs Sleeth's statement of problem, lodged soon after, claimed BPHL had breached the terms of her employment agreement and its statutory duty of good faith to her, resulting in a loss of trust and confidence so that her subsequent resignation was an unjustified constructive dismissal. She sought orders for lost wages, distress compensation and penalties for the alleged breaches.

[19] In reply BPHL asserted it had met its good faith consultation obligations and not breached relevant terms of Mrs Sleeth's employment agreement. It said there was no obligation to consult Mrs Sleeth about its decision to recruit the Filipino couple from overseas and it had consulted her over its intention to stop machine sexing for a four week period.

Issues and investigation

[20] The issues for investigation and determination were:

- (i) Did BPHL breach statutory and/or contractual duties to Ms Sleeth in respect of arrangements for changes to her duties or work in July 2014?
- (ii) If so, was Mrs Sleeth's resignation then caused by any such breaches and were the breaches sufficiently serious so that it would have been reasonably foreseeable to BPHL that Mrs Sleeth would resign in those circumstances?
- (iii) If BPHL acted unjustifiably towards Ms Sleeth, what remedies should she be awarded, considering:
 - (a) lost wages; and
 - (b) compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) Should any remedies awarded be reduced for contributory conduct under s124 of the Act?
- (v) If BPHL did breach duties owed to Ms Sleeth, should any penalty be awarded, and, if so, in what amount and to whom?
- (vi) Should either party contribute to the reasonably incurred costs of representation of the other party?

[21] For the purposes of the Authority's investigation written witness statements were lodged by Mrs Sleeth, Mr Sleeth, Mr Williams, Mr Chand and Ms Jarman along with relevant documents, including Mrs Sleeth's employment agreement, some meeting notes and minutes, and information about hours worked by her and other employees before and after her resignation. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their witness statement and answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions on the evidence and the issues for determination.

[22] As permitted by s174E of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Breaches of duty

[23] Mrs Sleeth submitted BPHL's actions had breached the following contractual and statutory duties owed to her by:

- (i) Not consulting her about amendments to her duties and not giving her one week's written notice of commercially necessary changes (clause 2.1 of her employment agreement); and
- (ii) Not consulting her about alteration to her hours and not giving her one week's written notice of any alteration (clause 4.5 of her employment agreement); and
- (iii) Failing to provide adequate training in a new work method introduced by the employer (under clause 22 of her employment agreement); and
- (iv) Failing to give her an opportunity to comment on the proposal to employ the Filipino couple before steps were undertaken to do so as those steps had an adverse effect on the continuation of her employment, by eliminating or significantly reducing the amount of sexing work available to her (referring to section 4(1A)(c) of the Act); and
- (v) Failing to be active, responsive and communicative in maintaining a productive employment relationship, both about the proposal to employ the Filipinos and on their arrival, about the resulting changes to work

arrangements and plans for training (referring to section 4(1A)(b) of the Act);

[24] BPHL submitted the circumstances and its actions did not trigger the operation of s4(1A)(c) of the Act because the proposed changes – that included the employment of the Filipinos and the use of the squeeze technique in its sexing operation – were not likely to have an adverse effect on the continuation of Mrs Sleeth’s employment. I have agreed with that proposition. The evidence of Mr Williams and Mr Chand established that the changes, objectively assessed, were not likely to adversely effect Mrs Sleeth’s continued employment. BPHL’s business plan – with a focus on orders for hatching a certain higher value category of chick, expanding its hatchery capacity and introducing a new sexing technique – and its evidence about the size of orders actually processed from October 2014 onwards suggested Mrs Sleeth’s employment was likely to have become more secure rather than less so.

[25] However the s4(1A)(b) good faith duty for active communication was triggered by those plans and developments. Section 4(4) provides that the good faith duty applies to an employer’s proposal that “*might impact*” on employees and to consultation about “*the effect on employees of changes to the employer’s business*”. The reference to changes includes those that are potentially positive as well as negative or adverse ones.

[26] Mrs Sleeth’s evidence established that she had heard from a co-worker who was told by Mr Williams about an attempt by BPHL in the previous year – 2013 – to employ two other Filipinos that had not gone ahead because they had health problems and were declined immigration clearance. Similarly she had only heard informally in June 2014 about the efforts to recruit the Filipino couple who eventually arrived in July. She had formed the view from that indirect information that their arrival would result in a loss of work for her but had not heard any direct information about BPHL’s plan from its managers before the 10 July meeting. If BPHL had taken earlier steps to observe its good faith obligation to be communicative about proposals and changes to its business that would affect its employees, what it subsequently saw as a misunderstanding on Mrs Sleeth’s part may have been avoided. Accepting Mr Williams’ evidence about the intention of BPHL’s business plan there was no doubt that Mrs Sleeth and other sexors would be affected by changes by having larger orders

to work on and the prospect of being trained in a new technique, so the circumstances did trigger the communication obligations.

[27] Steps to recruit the Filipino couple had began in February 2014 but it was not until after they had arrived and started work that Mr Williams and Mr Chand met with the other sexors to explain what effects might result. The evidence of Mr Williams and Mr Chand was that this delay in properly explaining the situation to the existing workforce was caused, at least in part, by the immigration approval and travel of the Filipino couple having occurred more quickly than they anticipated. However it was also clear that Mr Williams had not turned his mind, before the Filipino couple's arrival, to formally talking to the existing team of sexors about BPHL's plans. It was a failure to comply with the prospective nature of the s4(1A)(b) communication obligations.

[28] Two further breaches occurred in respect of Mrs Sleeth's contractual terms relating to amendment of her duties and changes to her hours.

[29] BPHL submitted there was no amendment to her duties because her job description referred to machine sexing and feather sexing tasks. It submitted the four week period of no machine sexing work, that she was told about on 16 July, was a suspension rather than an amendment of her duties. It was at least arguable, however, that her duties were, in fact, 'amended' for that period because her usual pattern of work was to do the work that was instead – for at least those four weeks – given to the Filipino couple to do by using another sexing technique. There was no doubt though that the arrangement Mrs Sleeth was informed of on 16 July was a breach of the clause 4.5 term about alteration of her hours. She was given that information verbally about a roster that started five days hence, on a day that she would normally work, so it did not meet the terms requirement for one week's notice in writing. It was not a change that met the term's requirement that an alteration would be made "*following consultation in good faith*". She was told of the change, not consulted about it. It changed her reasonable expectation that her work during the coming four weeks would mostly be at the higher \$40 an hour rate to a reality that she would only get work for which she was paid \$16.50 an hour.

[30] In his evidence to the Authority Mr Chand calculated Mrs Sleeth's notional loss of wages was around \$334 for that four weeks, based on comparing available

hours she could have worked at the lower pay rate that week with (if the Filipinos had not been doing the work) what would otherwise have been available hours doing machine sexing. He and Mr Williams also suggested in their evidence that, had Mrs Sleeth indicated that the loss of pay was a problem for her, they would have done something more to help her (as they had for another employee who had complained about the effect on her earnings). Neither point negated the fact of the breach of the contractual term. Mrs Sleeth's evidence fairly commented that Mr Chand's evidence sought to trivialise the effect on her when she was entitled to be consulted about a proposal to have her 'stand down' from higher paid machine work for those weeks rather than having the change unilaterally imposed. BPHL's failure to talk to her about the idea before deciding to do it was a breach of its contractual duty to her.

[31] However Mrs Sleeth's evidence failed, I concluded, to establish there was a breach of any term to train her in new work methods. While BPHL submitted there was no contractual obligation, under the term regarding "*adequate training*" in new work methods (clause 22), to train Mrs Sleeth in the squeeze technique, that was not really relevant as the evidence of Mr Williams and Mr Chand was that they did plan for her and other sexors to be trained in the technique. Mrs Sleeth's evidence was that Mr Williams had said to her in their 16 July meeting that training in the squeeze technique would not start for at least two years but Mr Williams denied he had mentioned any such lengthy delay before the Filipino couple would start that training. His evidence was more likely to be correct as a matter of business common sense, both to have more staff able to use the technique and because learning it required an extended period of training.

[32] Having established that there were some breaches of contractual and statutory good faith duties BPHL owed to Mrs Sleeth, it was necessary to look at whether those breaches caused her to resign.

Causation – did the breaches of duty cause Mrs Sleeth's resignation?

[33] In considering causation it was important to establish whether Mrs Sleeth's resignation, in fact, occurred on 25 July when she spoke to Mr Chand. There was an attempt in her lawyer's letter to BPHL on 1 August to describe her words at that time as an indication of an intention rather than an act of resignation. Mrs Sleeth's own evidence established however that she unequivocally resigned on 25 July. Mr

Sleeth's evidence confirmed that before she went to work that day he and his wife had discussed and agreed that was what she would do. All witnesses agreed that Mrs Sleeth had confirmed her resignation in the 29 July meeting. She had also not come to work on 28 July, a day she was rostered to work. Accordingly, by word and deed, her resignation occurred on, and was effective from, 25 July.

[34] Mrs Sleeth submitted BPHL's breaches had caused her resignation because she had no other motivation to resign. She had worked 18 years for BPHL. She was 61 years old, with perhaps four or five years of work left before she retired. She had few other qualifications, so seeking other employment was not a palatable option. However BPHL's actions of altering her duties with consequential changes to her likely hours and pay and not dealing with her in good faith had, she submitted, gone to the heart of her trust and confidence in the employment relationship.

[35] Three operative factors, I have concluded, resulted in Mrs Sleeth's resignation – firstly, the breaches of duty identified earlier in this determination; secondly, mistaken or incorrect views that she held or formed of events; and, thirdly, a failure by her to adequately explore resolution of her concerns before resigning.

[36] The evidence of Mr Williams and Mr Chand established that Mrs Sleeth held incorrect views about the prospects of BPHL's business plan for expanding the hatchery operation, the need to use staff trained in both machine sexing and squeeze sexing for upcoming orders, and the intention of BPHL's managers to have her and others trained in using the squeeze technique. Until the meetings of 10 and 16 July Mrs Sleeth could not be criticised for not taking account of that information because Mr Williams and Mr Chand had failed to properly communicate those plans. Following the two meetings however Mrs Sleeth appeared to have closed her mind to any adjustment of the view that she had formed – according to her own evidence – over previous months that BPHL would no longer need or want her skills and services once the Filipinos were employed.

[37] There was also the prospect that the approach BPHL had taken – particularly the four week stand down from machine sexing duties imposed on Mrs Sleeth while the Filipino couple did the work by another method – was based on an incorrect interpretation of its rights as the employer to change work arrangements. In those circumstances Mrs Sleeth arguably had some obligation to explore the prospect of

resolving that difference of opinion through further discussion or mediation before taking the drastic step of resignation.¹ She did not do so because she believed she was redundant and entitled to a compensation payment for that situation, despite her employment agreement expressly excluding redundancy compensation (clause 31.4).

[38] However a constructive dismissal may still occur even if an employer is not seeking the employee's resignation and would prefer that person to stay in the job, as BPHL submitted was its preference for Mrs Sleeth. The Employment Court has explained that situation is this way:²

Because of the nature of a constructive dismissal, it may be that the employer does not intend the employment relationship to end and may, as here, so advise the employee. But if the employer in so doing acts in continued fundamental breach of the contract or evinces an intention not to be bound by fundamental elements of it, that may nevertheless give the employee grounds to treat the position as a constructive dismissal even although it may appear to be the antithesis of an actual dismissal.

[39] On that basis, although I concluded the evidence established – at best – mixed reasons for Mrs Sleeth's resignation, BPHL's intentions did not negate the role of its breaches of duty in causing her decision. However to establish her resignation was a constructive dismissal, those breaches must have been sufficiently serious for BPHL to have reasonably foreseen she would resign in those circumstances.

Seriousness of the breaches and foreseeability of resignation

[40] Mrs Sleeth's evidence, I concluded, did not establish BPHL intended a continued and fundamental breach of obligations owed to her. Her view, that she would be permanently deprived of higher-paid machine sexing work and would not be trained in the squeeze technique for at least two years, was at odds with what I have accepted as reasonably reliable evidence from Mr Williams and Mr Chand. The breach occasioned by a unilateral change of her machine sexing duties for the four week period (with a reduction of pay over those weeks) was resolvable by further discussion. The prospect that she might also be appointed to a supervisor's position at the neighbouring hatchery, as well as doing machine sexing work in future, indicated a willingness to strengthen rather than undermine the employment relationship. In that light I have concluded the breaches were not sufficiently serious for BPHL to

¹ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 at [66]

² *Hwang v Boyne Co Ltd t/a Goodday Newspaper* [2004] 2 ERNZ 412 at [23].

have been reasonably able to foresee that Mrs Sleeth would resign rather than put up with the short-term changes.

[41] As a result I have concluded the circumstances of Mrs Sleeth's resignation did not amount to a constructive dismissal. Those circumstances, however, did include actions by BPHL that unjustifiably disadvantaged Mrs Sleeth and about which she had raised a personal grievance on 1 August 2014. Those disadvantages were the unilateral four week 'stand down' from expected machine sexing work advised to her on 16 July, the failure to communicate properly about plans for recruitment of the Filipinos, and the consequent distress caused to Mrs Sleeth when she arrived at work on 10 July to find that her usual size and set of work clothes were being used by someone else (the similarly-sized Filipina). Remedies for that disadvantage required assessment.

Remedies

Lost wages and distress compensation

[42] Mrs Sleeth lost four weeks' wages as a result of the unilateral 'stand down' from her expected work on 16 July. After being told about the stand down she had made some arrangements with the hatchery manager and Mr Chand about exactly which other alternative duties she would do during the four week period – and had been told she could work in the egg room and on vaccination tasks rather than do what she described as other 'dirty' work. However as a result of her concerns about what was happening she did not do that alternative work and resigned on 25 July. She made no other earnings in the period but could have mitigated her loss by doing the work she was offered, which Mr Chand had agreed would include payment of the travel allowance she usually only got when she did machine sexing. As a result I have accepted the assessment of the actual loss, properly mitigated, would have been that calculated by Mr Chand and amounted to \$334.87.

[43] The consultation failure by BPHL's managers also resulted in Ms Sleeth suffering humiliation, loss of dignity and injury to her feelings when she arrived at work on 10 July. While the work clothes provided were not hers, the use of them by one of the Filipino workers upset Mrs Sleeth in a way that was understandable in those circumstances. While the situation was not objectively as intractable as she felt

it might be, her subjective sense of loss was created on that day by the failure of her managers to have much earlier advised her of their plans for the arrival of those workers and to have discussed how it might impact on her employment. While the information deficit was addressed in subsequent meetings, I concluded an appropriate award for the distress caused to her that day was \$2000.

Contribution

[44] Mrs Sleeth was not responsible for the situation in which BPHL's actions amounting to unjustified disadvantages occurred and consequently no reduction for the limited remedies awarded in that respect were required.

Penalties

[45] In light of the finding that BPHL breached Ms Sleeth's terms of employment by its 16 July imposition of a change in her expected work, I concluded a penalty in the amount of \$1000 to be paid in whole to Mrs Sleeth was warranted under s134(1), 135 and 136 of the Act. While there were also failings in BPHL's observation of its good faith obligations in how it communicated with Mrs Sleeth and other employees about its business plans, including employment of the Filipino workers, I was not persuaded they were so deliberate, serious or sustained that a further or higher penalty should be imposed.

Costs

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[47] If they are not able to do so and an Authority determination on costs is needed Mrs Sleeth may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum BPHL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[48] The parties could expect the Authority to determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless particular circumstances or factors required an adjustment upwards or downwards.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.