IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 118
3026673

	BETWEEN	CLAUDENE SPENCE Applicant
	AND	PALDENE LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Philip Ross, counsel for Applicant Russell Drake, advocate for Respondent
Investigation Meeting:	23 and 24 May 2018 at Napier
Submissions Received:	1 June and 18 June 2018 from Applicant 11 June 2018 from Respondent
Determination:	21 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Claudine Spence, claims she was unjustifiably dismissed by the respondent, Paldene Limited, on 20 December 2017. She also claims she is yet to receive her final pay of $3,115.

[2] Paldene is of the view its arrangement with Ms Spence came to an end as was always envisaged when it engaged her to address specified issues over what the parties envisaged would be a finite period. Paldene also believes Ms Spence has been paid all money due.

[3] There was also a counter claim that Ms Spence had breached the duty of good faith by misleading Paldene. This is denied.

Background

[4] Ms Spence has a background in human resources [HR] and had, in the period leading to these events, been consulting. Paldene operates retirement village/rest homes in Waipukurau, Feilding and Hamilton.

[5] A relative of Ms Spence resided in one of the Paldene's establishments and as a result she came to discuss various matters with staff. One of those, discussed with Donna Wilson, Paldene's operations manager, around Christmas 2016 was something Ms Spence describes as a difficult employment problem and, according to Ms Spence, led to a query as to whether or not she might be available to assist Paldene. That, in turn, led to her engagement as a contracting consultant.

[6] About that Ms Spence says *... the intention was that I have a defined scope of work including establishing appropriate human resources policies, drafting employment agreements and reviewing policies and procedures*.[1]

[7] Ms Spence says notwithstanding that additional tasks were soon added. This led to an approach from Ms Wilson suggesting it might be cheaper and therefore more sensible for Paldene to engage Ms Spence as an employee. This was discussed at a meeting on 11 April at which it was agreed Ms Spence would commence on the 17th (Easter Monday). Her first task would be to address a pressing personal grievance claim. Ms Spence would work twenty hours a week and be paid $70 an hour. Work would be performed at the various sites and also from Ms Spence's home. Ms Spence says she also envisaged continuing with some consultancy work for others.

[8] Ms Spence then prepared an individual employment agreement which took the form of one applicable to an on-going arrangement.

[9] On 27 April Denise Webster, one of Paldene's directors who had been at the meeting of 11 April , sent Ms Spence an e-mail in which, amidst other things, stated her view *... a fixed term agreement would be more appropriate given what we discussed at our recent meeting*.

[10] Ms Spence replied on 1 May. Included therein is a statement that:

> *We agreed that once I completed the work with the policies etc and retraining around the new policies and procedures and new IEA's*

[1] Brief of evidence at [9]

> *that as there would be no longer be any work that the position would then become redundant.*

[11] The reply goes on to indicate Ms Spence thought the work would ordinarily take six months but as they had discussed some additional tasks it would likely be *a bit longer*.

[12] Ms Spence then states:

> *We cannot utilize a fixed term agreement because we do not have an end date to insert. An IEA is not an agreement whereby you can't get rid of someone – any position whereby there is no longer any work becomes redundant and as we discussed you will not need to make me redundant at that point because as soon as the work is completed I would resign. I am not interested in maintaining status quos as I thrive on challenge which is why I do the work that I do – coming into organisations and streamlining all HR functions then leaving for someone else to 'maintain' from there.*[2]

[13] The company subsequently signed the IEA.

[14] Ms Spence goes on to say she soon concluded she could not maintain her consultancy business as she was working considerably more than twenty hours a week for Paldene due, primarily, to issues in Feilding. She says she considered there were grounds for disciplinary action against a manager there. In discussing that with Ms Webster and Alex Webster, Paldene's General Manager, it was agreed any outcome would fall short of dismissal which would require additional support from elsewhere in the organisation and some reallocation of tasks. According to Ms Spence that, in turn, led to a restructure which included her assuming *…all human resources responsibilities which meant I had to visit the site weekly*.

[15] Paldene denies such an arrangement was ever intended to be permanent. It is of the view Ms Spence would perform the HR tasks in concert with Ms Wilson who, having learnt by that process, would then be capable of performing the HR function. Ms Spence says that view was not mentioned till later (19 September).

[16] Ms Spence goes on to say:

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[2] E-mail Spence to Webster dated 1 May 2017

> *Given the increase in my responsibility and the fact that this requirement that the human resources work for the Feilding site was to be managed by me, there was no end in sight for my involvement with the respondent and I advised [three managers] that I was not returning to consultancy work. In short, I had committed my professional career totally to the respondent.*[3]

[17] As already said Paldene disputes there was any suggestion Ms Spence assume permanent responsibility for Feilding's HR. There is also no evidence she advised Paldene about her concerns she could no longer continue contracting despite giving oral evidence she had concluded that was impossible within days of signing the IEA. She also stated, when answering questions, she had concluded the job was ongoing about the same time but again there is no evidence she raised this with Paldene.

[18] Ms Spence goes on to say that with one exception things went smoothly until late July. The exception related to whether or not she was required to complete timesheets. She says she was getting conflicting instructions but it did not really concern her as she was working more than the 20 hours for which she was being paid. An issue did however arise when Ms Spence provided one timesheet which led to an instruction from Mr Webster she limit her time to the contracted 20 hours. That occurred by e-mail on 31 May.

[19] Ms Spence says she then noticed a reduction in the number of tasks she was being allocate during August. She says that was not because the work did not exist but because others were being asked to do it. Ms Spence says issues also remained in Fielding with tension between herself and the employee who was previously the subject of concern. That led to Ms Spence being asked to cease going to Feilding though she was present at a disciplinary meeting with the employee concerned on 22 August at which it was announced Ms Wilson would assume responsibility for Feilding's HR. Some might then be passed to Ms Spence but that would only be with Ms Wilson's approval. Ms Spence takes issue with this on the grounds it had not been discussed with her prior.

[20] Paldene sees this announcement as confirming what had always been intended, namely Ms Wilson assuming the HR responsibility. It remains of the view Ms Spence was aware that would occur.

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[3] Above n 1 at [24]

[21] Ms Spence states from that point *... my work was drastically reduced,* .and refers to only working 18 hours in the fortnight ended 28 August 2017 and nothing over the week of 11-17 September.

[22] On 12 September 2017 Ms Spence wrote expressing concern. One interesting phrase in the e-mail is Ms Spence's statement that:

> *I have stated to Denise that I am contracted to December 12 ... but that I will start applying for jobs now however I am still employed till the 12th December unless you wish to pay me out for the remainder of my contract with you.*

[23] The above comment appears to have its origins in a without prejudice discussion concerning Ms Spence's future and which it is not appropriate the Authority review.

[24] The e-mail led to a meeting on 19 September at which Ms Spence was told she was to be made redundant. Ms Spence advises she responded that her work remained but Paldene was simply giving it to others. She expressed the view this would lead to a personal grievance but then advised she was prepared to forego that and commit to looking for alternative employment on the basis her work was returned in the interim and there be no further consideration of redundancy. Ms Spence says Ms Webster agreed.

[25] Ms Webster denies the above agreement occurred. She says the date of 12 December was introduced by way of Ms Spcnce advising she had been instructed by the funding District Health Board (MCDHB) to supervise any HR work performed by an employee who was resigning on 12 December and she therefore had to remain till then. Ms Webster says this was the first she had heard of such an arrangement but she decided the timeframe was such she could live with it as she interpreted the comments as constituting Ms Spence's resignation effective the same day.

[26] Ms Webster subsequently asked Ms Watson check with MCDHB and claims that resulted in advise no such instruction had been issued. The required supervision related to resident care and not the HR function. Notwithstanding that and given her belief she had an agreement Ms Spence would leave Paldene's employ in December she chose to do nothing.

[27] Ms Spence complains that despite the agreement her work at Feilding was not returned though she did start to look for other work.

[28] On 27 November, Ms Spence received an email attached to which was a letter allegedly sent on 13 November (a day upon which Ms Spence had been on sick leave). Ms Spence denies receiving the letter. Indeed she alleges it was never sent prior to 27 November. The letter served as four weeks notice of termination and advised the employment would end on 12 December 2017.

[29] Ms Spence immediately challenged the dismissal's propriety. The response was an e-mail on 7 December advising Paldene was taking legal advice and termination would not now proceed on the 12th.

[30] That was followed on 11 December 2017 with correspondence from Paldene's representative concerning the matter appended to which was a restructuring proposal which could see the disestablishment of the HR Manager position Ms Spence occupied. Feedback was sought by 1.00pm on 18 December and there was advise the decision would be conveyed approximately 3 hours later. The letter also raised various allegations such as Ms Spence had breached her duty to Paldene by misleading the company as to the nature of the employment arrangement it required and by expressing an intention to leave on 12 December which *... you knew would not be binding but which they took to be an assurance upon which they could rely*. It also alleged she had misled Paldene about MCDHB's supervisory instructions ([25] and [26] above).

[31] Ms Spence was concerned at the content and what she saw as misinformation and misrepresentation. She rapidly provided a fulsome response.

[32] On 19 December 2017 she received two communications she portrays as inconsistent. The first was from Paldene. It alleged there had been no feedback regarding the proposed restructure and advised Ms Spence had till 1pm the following day to respond. Failure to do so would see a decision based on the then available information.

[33] The second was from the representative who, at 4.20pm, advised feedback on the restructuring proposal was required by 5.00pm.

[34] Ms Spence replied at 5.33pm stating there was no response to her letter of 12 December and complaining the company appeared to be progressing in the absence of requested documentation and clarification. She also asked which of the two response times was correct.

[35] At 3.00pm on 20 December 2017 Ms Spence advised she was taking domestic leave. She went and says she later learned Paldene's representatives sent an email. Attached as a letter entitled *Restructure proposal - confirmation of final outcome* which advised her redundancy. It also said she would not be required to work her notice and would cease forthwith.

[36] Ms Spence says as a result of her absence she first became aware of this on 22 December 2017 when she saw what she thought was an overpayment. It was her final pay and that was confirmed when she phoned Ms Webster who confirmed the redundancy.

Discussion

[37] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[38] Ms Spences's prime claim is she was unjustifiably dismissed.

[39] As already said, Paldene accepts it dismissed Ms Spence. In doing so, it accepts it is required to justify the dismissal. The justification expressed in the letter advising dismissal is redundancy.

[40] Ms Spences' position is the redundancy was a sham devised to cover a dismissal attributable to other factors.

[41] It is well established that when reviewing redundancy decisions the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it is carried out. The inquiry into each factor is carried out separately.[4]

[4] *Coutts Cars Ltd v. Bageley* [2001] ERNZ 660 (CA)

[42] Additionally and while redundancy is a dismissal to which the requirements of s 103A, albeit suitably altered, apply there is an additional overlay under which consultative requirements are emphasised. In particular s 4(1A)(c) of the Employment Relations Act 2000 (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 someone's employment must give that employee access to relevant information and an opportunity to comment before the decision is made.[5]

[43] The above narrative is, by my standards, relatively long. That is because, in my view, it speaks for itself.

[44] It is clear Paldene entered into an arrangement it thought to be temporary and for a specific purpose. As a result the role was ill-defined and the allocation of functions ad-hoc. This must affect the substantive justification for the redundancy as it will be hard to justify the disestablishment of a job that in the employers view never existed in the first place at least in the form it ultimately took. If nothing else, and when the scope of the job is in dispute, it is imperative there be clarity about what is being addressed, altered or disestablished before a legitimate decision can be made. Both the evidence I heard and the correspondence make it clear this was yet to occur which, I conclude, totally undermines any substantive justification for this redundancy.

[45] Paldene's situation is even worse when the procedure is considered. Paldene's original intention that Ms Spence's role be temporary was not, in the minds of its principals, ever reversed yet notwithstanding that and Mr Webster's comment it was a mistake to sign the employment agreement there can be no doubt it contains nothing that comes remotely close to adhering to the requirements of s 66 of the Act. Add the fact that by the time of signing Paldene had already raised the agreements form and I can only conclude it knew what it had entered into and must accept the consequences. Paldene agreed to an ongoing as opposed to temporary arrangement with Ms Spence.

[46] When it found that to be the case it embarked upon initiatives designed to reinstitute a temporary scenario and then came to the view it had succeeded on 19 September with Ms Spence's departure scheduled for 12 December. When Paldene came to the realisation that understanding was ill founded in early December it

[5] *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 at [40]

suddenly changed track and aired a proposal under which Ms Spence's position would be deemed surplus. It then embarked upon a hurried process during which various conflicting messages were sent and requests for information from Ms Spence left unanswered. Neither is there any evidence Paldene addressed inaccuracies in its proposal Ms Spence was raising with the most glaring being the assertion she had originally been provided with a three month fixed term employment agreement.[6] That is both false and reflects the misapprehension Paldene operated under throughout.

[47] The rushed and inadequate process resulted in Paldene acting on the proposal absent any meaningful input from Ms Spence.

[48] To bluntly summarise, the evidence must lead to a conclusion the redundancy cannot be considered anything other than a sham designed to achieve what Paldene always believed it originally had – namely a fixed term arrangement entered into for the purpose of updating various HR documents and policies then training operational staff in the use thereof and which came as a reaction to the failure of more than one previous attempt to achieve that outcome. The dismissal is unjustified.

[49] Here mention should be made of the dealings in September and a resulting argument it binds Ms Spence to departure and estoppes this claim. That cannot be the case and subsequent correspondence appears to confirm that. The only inarguable indictor such an agreement may have occurred is Ms Spence's e-mail of 12 September. Assuming it accurately reflected an agreed understanding at that time (and that is doubtful given Ms Webster's evidence talk of 12 December did not occur till 19 September) its effect was nullified by Paldene's subsequent actions. Paldene attempted to continue with its attempts to attain an immediate cessation. Applying the basics of offer and acceptance that would constitute a rejection of any offer Ms Spence's made to leave with effect 12 December. The resulting discussion of 19 September clearly had no agreed and/or definitive outcome to which Ms Spence could be bound.

[50] The conclusion the dismissal is unjustified raises the question of remedies. In closing submission it was advised the remedies were as originally specified in the statement of problem.[7]

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[6] Proposed restructure at [2.2]
[7] Closing submission of 31 May (received 1 June) at [75]

[51] Those remedies included reinstatement but Ms Spence advised, during the investigation, that was no longer being sought and the claim was withdrawn. For that reason it will be considered no further. The submission went on to state Ms Spence … *merits a significant award of compensation for humiliation and stress as well as compensation for lost income.* In this respect she originally sought three months at her usual rate of pay and $18,000 pursuant to s 123(1)(c)(i).[8]

[52] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. There is then discretion to award a greater sum though that is not necessary as it was not claimed.

[53] Three months at Ms Spence's agreed rate (20 hours at $70 per hour) is $18,200. From that must be deducted the value of some sporadic consultancy work she managed to obtain and the income from which she states to be around $3,000. The residue is $15,200.

[54] Turning to compensation. The evidence tendered in support of the claim was, given its magnitude, remarkably sparse. In the brief it amounted to 21 words which related to prior events and not the effect of the dismissal. There was a second paragraph which was equally sparse taking issue with the fact dismissal occurred at Christmas and in the absence of alternate consultancy work.

[55] Ms Spence's additional oral evidence was equally sparse meaning that while it is accepted hurt must emanate from an unjustified dismissal an award of the magnitude sought cannot be contemplated. Having considered what evidence I have and the guidance of other awards I consider $5,000 to be appropriate.

[56] These conclusions mean I must, in accordance with s 124 of the Act, address whether or not Ms Spence contributed to her dismissal in a way that warrants a reduction in remedies.

[57] It is here I comment on the counterclaim, such as it is. I say such as it too was sparsely pleaded – again 21 words, 7 of which can be considered introductory. There are a further 28 words dedicated to remedies – costs and penalties.

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[8] Statement of problem dated 15 March 2018 at 3(c) and (d)

[58] The effort put into this claim and the lack of a supporting precise of facts leads me to conclude it is nothing other than an attempt to discourage the applicant from pursuing her original claim. This is especially so as while relevant issues were canvassed in evidence there was no serious attempt to link them to the alleged counterclaim. To that I add a view the allegations, namely that Ms Spence misled and deceived Paldene about the nature of the relationship can, and given the deficient pleadings should, more properly be viewed as part of the s 124 consideration.

[59] Again the facts speak for themselves. Ms Spence was engaged as the HR expert. She was primarily engaged to perform what was clearly a finite task and her e-mail of 1 May reflects she knew that was so. Notwithstanding that she then made assertions which were legally incorrect and which she should have known were incorrect to attain a form of agreement which, in light of these proceedings, has proven beneficial to her. Fixed terms need not be limited to date based arrangements as she asserts ([12] above) but may include task based assignments.[9]

[60] Ms Spence then continued to mislead Paldene via utterances that indicted one intention while her actions indicated another. For example the e-mail of 12 September again indicted, as did the one of 1 May, that she accepted her tenure would be truncated but her actions in challenging all attempts by Paldene to make that so state otherwise. There is then the fact I remain unconvinced she ever advised Paldene she was no longer consulting and had concluded the job need be permanent – indeed the correspondence already referred to above could easily have led Paldene to believe otherwise.

[61] Ms Spence was, I conclude, acting in her own interests via disingenuous and incomplete portrayals of her intent and ignored what was a glaring conflict of interest. In doing so she reinforced Paldene's mistaken belief that notwithstanding the employment agreement's content it remained temporary and contributed to the events which followed. Having said that Paldene must also shoulder significant blame. It knew what the agreement said and could have sought independent advice rather than rely on a conflicted Ms Spence much earlier than it did. Having reviewed other contribution determinations I conclude 25% is appropriate.

[9] Sections 66(1)(b) and (c) of the Employment Relations Act 2000

[62] The last matter is the wage arrears claim. That applies to two main elements – hours worked but not paid at appropriate rates on public holidays and the date upon which notice of dismissal became effective.

[63] In this regard I totally accept Mr Ross's submissions. The employment clearly commenced on a public holiday. That is stated in the agreement and the evidence is Ms Spence worked that day on a pressing issue. In the absence of wage and time records which comply with the Act that claim must be accepted.[10] Similarly I accept, for the reasons submitted by Mr Ross, notice could not apply until brought to Ms Spence's attention. That was on 22 December and in the interim she had been on sick (domestic) leave to which she was entitled and should have been paid.

[64] It follows I also accept Mr Ross's quantification of the amount owing - $3,220. Interest was also sought and is appropriate as it is to recompense someone for an inability to use money that was rightfully theirs as is the case here. The Ministry of Justice interest calculator advises the amount is $110.04.

Conclusion and Costs

[65] For the above reasons I conclude Ms Spence has a personal grievance in that she was unjustifiably dismissed. Unpaid wages also require payment.

[66] As a result I order the respondent, Paldene Limited, pay the applicant, Claudene Spence, the following amounts which have been adjusted as a result of the contribution finding;

a. $11,400.00 (eleven thousand, four hundred dollars) gross as recompense for wages lost as a result of the dismissal; and

b. A further $3,750.00 (three thousand, seven hundred and fifty dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i);

c. A further $3,220.00 (three thousand, two hundred and twenty dollars) being wages unpaid as at termination; and

d. A further $110.04 (one hundred and ten dollars and four cents) being interest on the amount in (c) above.

[67] The counterclaim fails with the issue canvassed therein having been considered when assessing contribution.

[68] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

[10] Section 132 of the Employment Relations Act 2000