

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 158  
ARC 69/13**

IN THE MATTER OF challenge to a determination of the  
Employment Relations Authority

BETWEEN PHILLIPPA WHAANGA  
Plaintiff

AND SHARP SERVICES LIMITED  
Defendant

Hearing: 5-6 May, 23 and 29 July 2014

Appearances: G Bennett, advocate for plaintiff  
M Keating, counsel for defendant (5-6 May 2014);  
A Sharp representative for defendant (29 July 2014)

Judgment: 1 September 2014

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] Mrs Whaanga was employed by Sharp Services Limited (Sharp Services) as an office manager. She was dismissed on 14 August 2012. While the company said that the dismissal was the outcome of a genuine restructuring exercise, she did not accept that.

[2] Mrs Whaanga pursued a personal grievance alleging unjustifiable dismissal. That claim was investigated and upheld by the Employment Relations Authority (the Authority).<sup>1</sup> She was awarded \$2,500 by way of compensation for hurt and humiliation. The Authority declined to order anything by way of lost wages, concluding that Mrs Whaanga had failed to establish that she had taken adequate steps to mitigate her losses; and declined to order any reimbursement for unpaid

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<sup>1</sup> *Whaanga v Sharp Services Ltd* [2013] NZERA Auckland 354.

annual leave. Mrs Whaanga filed a de novo challenge to the Authority's determination.

### **The facts**

[3] Sharp Services is a small electrical contracting company. Mr Clifford Sharp is the managing director. The company's office was located at Mrs Whaanga's home, in a relocatable building that the company had moved onto the site. The office was subsequently moved to commercial premises.

[4] In her role, Mrs Whaanga had responsibility for the administration of the company's accounts and payroll for staff. She worked closely with both Mr Sharp and his sister, Ms Sharp, who was also a director of the company.

[5] Mr Sharp and Mrs Whaanga got on well, at least initially. They exchanged text messages, including of a personal nature. Mr Sharp extended a number of benefits to Mrs Whaanga, including permission for her and her husband to use the company's fuel card in respect of petrol usage. He also arranged for Mrs Whaanga and her family to have an expenses-paid trip to Bali in early 2012, depositing \$1,000 into her personal bank account beforehand.

[6] Around March 2012 the company was experiencing financial difficulties. Mr Sharp described it as a "financial crisis", requiring an extension to the company's overdraft facility, with the remortgaging of Ms Sharp's property as collateral. He turned his mind to restructuring the company and had two "consultation" meetings with staff, in May and June 2012.

[7] By 11 July 2012 Mr Sharp had reached what he called a "preliminary view" as to which staff would be made redundant. He said that this followed the earlier meetings. There was conflicting evidence about these two meetings. I am satisfied that while Mr Sharp emphasised the need for staff to consider possible efficiencies, he did not make it clear that redundancies might arise as a result of a restructuring of the business. And he accepted, more particularly, that he had not told Mrs Whaanga

that her position was at risk of redundancy. This is consistent with Mrs Whaanga's evidence.

[8] It appears that while Mr Sharp had initially contemplated Mrs Whaanga being given an expanded role within the restructured company, this changed following discussions with other staff. He became concerned from the feedback he was receiving that Mrs Whaanga may not be coping with her role. It is also apparent that he had concerns about whether Mrs Whaanga was working as hard as she said she was, based on what her colleagues were telling him.

[9] Towards the end of July, a decision was made to relocate the company's offices out of Mrs Whaanga's home and into an office in Warkworth. Mr Sharp asked Mrs Whaanga to organise the relocation of the office while he was overseas. Mr Sharp returned on 8 August to find that the relocation process was not as advanced as he had hoped. His frustrations fed into the way in which a subsequent meeting with Mrs Whaanga developed. Mr Sharp said that he tried to discuss his restructuring proposals with Mrs Whaanga but that she refused to do so. He also said that she offered to resign, that he declined to accept that offer and simply asked her to engage in the process to discuss her role within the company. Mrs Whaanga had a different perspective. She said that Mr Sharp got very angry with her and that this led to a breakdown in the meeting.

[10] Mrs Whaanga's evidence is broadly consistent with what Ms Sharp had to say. She gave evidence that Mr Sharp was very angry about the state of the office and with Mrs Whaanga's perceived failure to oversee the move in his absence. She said that he was so upset about it that she advised him to defer discussions about the restructuring proposal until he had calmed down. I accept her evidence. While it might have been Mr Sharp's intention to discuss the restructuring proposals with Mrs Whaanga at the office on his return from overseas, that discussion did not occur and the discussion that did occur was fraught.

[11] The next day Mr Sharp rang Mrs Whaanga. She says that it was during the course of this telephone conversation that the reference to resignation arose, rather than during the meeting in the new office. Mrs Whaanga's evidence was that:

[Mr Sharp] was asking me some questions about my role and again he wasn't letting me answer and I said to him, "Is what you're saying – are you telling me that you are wanting me to leave?" And he said, "Yes I think that's best for the company. I think you should fall on your sword."

[12] While Mr Sharp was adamant that he had not asked Mrs Whaanga to resign, I am satisfied that he made it clear to her that he wanted her to. In this regard he gave the following evidence in cross examination:

Q. Do you recall the comment "falling on her sword"?

A. Yeah, that's correct.

...

Q. Do you recall comment being made in the Authority of "falling on her sword"?

A. Correct.

Q. And is it not true that you said yes, you had made that comment to her to resign?

A. No.

Q. So are you saying that the [A]uthority member has got it wrong when she took your comment that you had asked Ms Whaanga to resign, that you didn't mean that?

A. Absolutely.

Q. Why then would you say ... to Ms Whaanga she should fall on her sword to resign if you didn't mean it?

A. It was a play on words. It was how I was feeling at the time and she was feeling at the time, so yeah, it was a play on words.

Q. If you were an employee and somebody told you that, do you think that the employer would be wanting you to leave?

A. No, but as a good samurai I'd most probably offer it.

[13] On 10 August Mrs Whaanga discovered a 'trashed' email in the office computer system. It was a request from Mr Sharp to one of Mrs Whaanga's office staff, asking that she type up a hand written note which was attached to the email and forward it to his son's external email address. The note referred to a meeting with a subcontractor that Sharp Services dealt with and was entitled "Restructure business". The first listed item was "Asked office manager to resign from Sharp Services".

[14] In somewhat confused evidence, Mr Sharp characterised this notation as “musings”. While this suggests that Mr Sharp was pondering a resignation request, such a characterisation is at odds with usage of the past tense in the notes. And it appears from the cover email, asking that the notes be typed up to enable Mr Sharp to take them to the meeting, that they were intended as an aide memoire. The way in which the notes were crafted supports Mrs Whaanga’s version of events. I am left with no doubt that Mr Sharp made it clear to Mrs Whaanga that she should tender her resignation from the company, and that Mrs Whaanga reasonably interpreted his comments in this way.

[15] The same day Mrs Whaanga sent Mr Sharp a text message saying that she was sick. He replied, advising that a restructuring was essential and that he needed to review her role within the company. The following text message exchange then ensued:

Mrs Whaanga: I hope you are certain this is what you want to do, and the path you want to take ☺

Mr Sharp: Restructuring and reviewing everybody’s job is what I need to do to better the business. You verbally offered your resignation. I did not ask for that. You need to think about that and if that is what you want, put it in writing and I will accept.

Mrs Whaanga: No, no, no, did not offer, asked you if that was what you were after, as the meeting for you to discuss things on Wed last, never happened. Please send job description for me to reapply for new structured position ☺

Mr Sharp: Pip, hand on heart, are you really sick today? Or just having a day off at my expense? Because you seem to be able to lots of texting and ringing for someone who is sick.

Mrs Whaanga: I am sorry you feel that. I would do something like that as I never have done so in all the 9 years I have been at your side.

Mr Sharp: I don’t need a doctor’s certificate, I just need you to be honest. Face up to what is really going on. You are treating me like a fool, which is unfair and I have made it clear you are manager and you are responsible for the office. Wake up and stop pointing the finger at anyone but yourself.

[16] By this stage Mrs Whaanga had formed the view that Mr Sharp did not want her to continue working at Sharp Services. This was unsurprising, and largely informed by her previous conversation with Mr Sharp and the note she had discovered on the company’s computer system. I pause to observe that Ms Sharp

made it clear in evidence that there had been no desire to oust Mrs Whaanga from the company. I accept that that was so from her perspective, and that she took steps to engage constructively with Mrs Whaanga.

[17] Mrs Whaanga tried to access the company's computer system for work-related purposes but discovered that she was unable to do so. She was concerned that this had been deliberate and raised it with Ms Sharp. Ms Sharp confirmed that she did not know why access was problematic and immediately took steps to remedy the situation. This was done on 11 August. On 13 August Mrs Whaanga obtained a medical certificate, confirming that she would be unfit for work until 27 August 2012. Despite this advice Mr Sharp wrote to Mrs Whaanga the next day, stating that:

...

I've now come to the stage where I wish to take over the management of the business entirely, which would make your position redundant. ...

Before I make any final decision, I would like to meet with you to discuss the matter, and propose to do so on Wednesday 15 August 2012 at 2pm, at the new office in Warkworth. I have received your medical certificate. *As the matter is urgent, I cannot wait until your return to work, and intend to make a decision by Friday this week. ... Please note that I will make a final decision without your input if you do not attend this meeting.*

At the meeting we will jointly explore options available to us, and I will also discuss what notice and redundancy compensation I propose to pay, should I go ahead with the redundancy.

(emphasis added)

[18] Mrs Whaanga gave evidence that she read the letter as further proof that Mr Sharp was forging ahead with a predetermined plan to terminate her employment. In cross-examination Mr Sharp confirmed that by 14 August 2012 he had decided that Mrs Whaanga's position would be made redundant and that, if she was to continue to work in the company, she would need to "reassure [him]... we could utilise her somewhere else in the business".

[19] Mrs Whaanga's concerns about predetermination are also supported by the fast-track process that Mr Sharp adopted, despite Mrs Whaanga being off on sick

leave. I accept that the company was facing financial difficulties, but I do not accept that it was in a position that it had to move in such a hasty fashion.

[20] Mrs Whaanga did not attend the proposed meeting. She advised that she was unable to do so because she was unwell. During the course of evidence it became apparent that there was a parallel reason why she had not attended the meeting, namely because she had been advised that she should have no direct contact with Mr Sharp. But for her medical condition (which I accept) this approach would have presented significant difficulties for her claim. In the event the meeting did not take place and the parties subsequently attended mediation.

[21] On 24 August 2012 Mr Sharp did what he said he would do – he terminated Mrs Whaanga’s employment.

## **Analysis**

[22] The plaintiff’s case focussed on the decision to dismiss Mrs Whaanga for redundancy, although it was also submitted that she had been constructively dismissed.

[23] The latter submission can be dealt with briefly. Mrs Whaanga did not resign. She went on sick leave with a return date of 27 August 2012. In the event her anticipated return was overtaken by her dismissal. In these circumstances the claim of constructive dismissal fails.

[24] There are obvious difficulties with the way in which Mr Sharp conducted the restructuring process, including in relation to his engagement with Mrs Whaanga. He gave evidence that he did not believe that Mrs Whaanga was genuinely sick and unable to attend the meeting of 15 August to discuss the restructuring proposal but he did not raise this concern squarely with her, and she had a medical certificate to support her position. He says that he went to her home, caught sight of her and another person moving around, and that she hid from view. This, he said, reinforced his suspicions that she was not genuinely ill. He did not however explore his concerns with Mrs Whaanga. In the event he simply carried on with the process,

despite her ostensible inability (for medical reasons) to engage in the meeting that had been scheduled.

[25] As I have already observed, while Mr Sharp asserted in his letter of 14 August that the matter was urgent, I do not accept that it was so urgent that final decisions had to be made so quickly. It is telling that the redundancies relating to other employees were not finalised until early 2013, some months later. Mr Sharp should not have immediately proceeded to terminate Mrs Whaanga's employment in circumstances where she had advised that she was not in a position to attend the meeting, given her medical condition and without first having taken appropriate steps to satisfy himself that she was malingering.

[26] It was submitted that Mrs Whaanga refused to engage in the process and that such a refusal cannot then be used to justify allegations about lack of consultation. It appears that Mr Sharp intended to discuss his restructuring proposals with Mrs Whaanga on his return from overseas but became angry about the state of the office, and the intended discussion did not take place. Mr Sharp subsequently rang Mrs Whaanga to progress the matter but that conversation was derailed. Mrs Whaanga declined to attend the scheduled meeting on 15 August, but in circumstances where a medical certificate had been provided to Mr Sharp. I accept that communications between Mr Sharp and Mrs Whaanga became difficult; however these difficulties need to be viewed in context. I do not accept that the difficulties that Mr Sharp says he encountered justify the deficiencies in the process in the circumstances.

[27] It is clear that Mr Sharp had become concerned (from feedback he received from other staff members) about Mrs Whaanga's ability to undertake her role and her attendances in the office. These concerns fed into the way in which the redundancy process unfolded, effectively 'speeding' up the process, as Mr Sharp accepted in evidence.

[28] The company received advice and support throughout the process. However, as the Authority found, Mrs Whaanga was not given sufficient information relevant to the decision or an adequate opportunity to comment on it before the decision to terminate was made. While there were two staff meetings, I accept Mrs Whaanga's

evidence that she attended those meetings not knowing that her position was at risk. The message that Mr Sharp emphasised was the need to become more efficient; but the proposal to restructure the company, and possible implications for Mrs Whaanga, was not clearly articulated.

[29] As s 103A(5) of the Act makes clear, a dismissal must not be found to be unjustifiable solely because of defects in the process followed by the employer if those defects were minor and did not result in being treated unfairly. That is not the situation here. The way in which Mr Sharp approached the process was seriously deficient and materially prejudiced Mrs Whaanga. The company's actions and how it acted were not what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The decision to dismiss was unjustifiable.

## **Remedies**

### *Lost remuneration*

[30] Mrs Whaanga seeks reimbursement of lost earnings in the form of 24 weeks' lost wages, the period of time she says that she was without work following termination of her employment.

[31] It is clear that the company was in financial difficulties but I do not accept that Mrs Whaanga's employment would have come to an end within the claimed period had the matters giving rise to the personal grievance not occurred. I am fortified in that view by the process followed in respect of other employees whose positions were ultimately made redundant. I accept that Mrs Whaanga took adequate steps to mitigate her loss, and that she made several attempts to find alternative employment. It emerged that she had been self employed in a business from October 2012, some two months following her dismissal, although the details were not before the Court in evidence. In the circumstances I am satisfied that an award of reimbursement equivalent to two months' lost remuneration is just.

### *Compensation for hurt and humiliation*

[32] I accept Mrs Whaanga's evidence that she suffered hurt and humiliation as a result of her unjustified dismissal. Having regard to the particular circumstances I consider that an award of \$4,500 is appropriate.

### *Contribution*

[33] I do not accept the company's submission that Mrs Whaanga contributed to the situation she found herself in. While there might have been broader concerns relating to Mrs Whaanga's attendance and performance these cannot sustain a decrease in the remedies that she would otherwise have been entitled to. Nor do I accept that her level of engagement in discussions with Mr Sharp, in the circumstances as they emerged in evidence, warrants a decrease for contribution.

### *Reimbursement of holiday pay*

[34] There was a dispute between the parties as to the extent to which Mrs Whaanga was entitled to outstanding leave. Resolution of the dispute is not assisted by the records that were before the Court.

[35] As part of her role, Mrs Whaanga was responsible for ensuring that accurate leave records were kept. It appears that the records were not left in a comprehensive state. This was identified at a very early stage by the company, following Mrs Whaanga's departure. In the event the company has been obliged to recreate them for the purposes of trying to ascertain what Mrs Whaanga's entitlements are.

[36] The parties were at odds as to the basis on which the holiday in Bali was to have been taken – whether as 10 days' annual leave or not. It was not recorded as annual leave, and Mrs Whaanga's evidence was that this was consistent with Mr Sharp's instructions that it not be taken as leave. Mr Sharp said that there was no discussion about whether it was annual leave or not. However, Mr Sharp did say in cross-examination that he made it clear to Mrs Whaanga that the trip was in recognition of all of the time she had put in to the company. Having considered the

evidence, I conclude that the arrangement, while indisputably generous to Mrs Whaanga, was part of a suite of other informal benefits extended by Mr Sharp, consistent with the nature of their relationship at around this time; and which she had no contractual entitlement to. I reach the same conclusion in relation to a one-day trip to Pauanui. It follows that the 10 days in Bali and one day in Pauanui are not to be deducted from any outstanding leave entitlement.

[37] The company submitted that Mrs Whaanga had taken a number of other days of leave that had not been accurately recorded. This submission was advanced on the basis of notes taken by another staff member from around the time of the second staff meeting, identifying days when Mrs Whaanga was allegedly away from the office and not working. Because such issues were not raised with Mrs Whaanga at the time, despite having been advised to Mr Sharp by the staff member concerned, it is very difficult to assess the accuracy or otherwise of the dates that are now being relied on by the defendant. Unsurprisingly, Mrs Whaanga was at something of a disadvantage in trying to explain what might or might not have occurred on these dates. In the circumstances, I am not prepared to draw the adverse conclusions advanced on behalf of the company in relation to these dates. Mrs Whaanga did however accept that it was likely that she took 27 January 2012 as leave, and I am satisfied that it should be reflected in a reduction to the outstanding leave balance.

[38] It was submitted on Mrs Whaanga's behalf that she became entitled to an additional 20 days' leave just prior to her dismissal, and that this period ought to be reflected in any relief granted. Mr Sharp accepted in evidence that it appeared that Mrs Whaanga was entitled to this leave. I agree that she is entitled to the 20 "rolled-over" days of annual leave accrued during the previous 12 months.

[39] According to the recreated payroll records, Mrs Whaanga was entitled to 29.5 days annual leave as at 12 August 2012. In closing submissions Mr Bennett conceded that 12.5 days should be deducted to reflect a quantity of leave that Mrs Whaanga had "cashed up". Deducting one further day (27 January) leads to a figure of 16 days' outstanding annual leave.

## **Conclusion**

[40] In summary, the challenge is successful. Sharp Services is ordered to pay to Mrs Whaanga:

- Two months' lost wages
- Reimbursement of 16 days' annual leave
- Compensation of \$4,500 under s 123(1)(c)(i) of the Act.

[41] By operation of s 183(2) of the Act the determination of the Authority is set aside and this judgment stands in its place.

## **Costs**

[42] Subject to any matters of which I am unaware, costs should follow the event. That means that Mrs Whaanga is entitled to a reasonable contribution to the costs she has incurred in bringing the challenge. The parties are encouraged to agree costs. If that does not prove possible there can be an exchange of memoranda, with the plaintiff filing and serving a memorandum and supporting material within 20 working days of the date of this judgment and the defendant within a further 20 working days.

Christina Inglis  
Judge

Judgment signed at 3.30pm on 1 September 2014