

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**This determination is
subject to non-
publication
orders**

[2017] NZERA Auckland 328

5635365

BETWEEN ANITA WAUGH
Applicant

AND OGILVY NEW ZEALAND
LIMITED
Respondent

5651626

BETWEEN OGILVY NEW ZEALAND
LIMITED
Applicant

AND ANITA WAUGH
Respondent

Member of Authority: Vicki Campbell

Representatives: Robert Bryant for Ms Waugh
Susan Hornsby-Geluk for Ogilvy New Zealand Limited

Investigation Meeting: 27 and 28 June 2017

Submissions Received: 11 July and 1 August 2017 from Applicant
25 July 2017 from Respondent

Determination: 19 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ogilvy New Zealand Limited did not breach its obligations of
good faith toward Ms Waugh.**

- B. Ms Waugh's dismissal for reason of redundancy was justified.**
- C. Ms Waugh breached her obligations of good faith however the application for a penalty is declined.**

Employment Relationship Problem

[1] In September 2016 Ogilvy New Zealand Limited began searching for a new Group Account Director (GAD) to manage its Brand Group. Ms Waugh came to mind for the vacant position after Ms Barbara Andrew Executive Director HR had seen her while out socially one night. Ms Andrew knew Ms Waugh, having previously both worked at the agency in the 1990's. Ms Waugh had also worked for Ogilvy on a fixed term project in 2007 and in October 2012 had contacted the agency enquiring about whether there were any projects she could pick up on a contract basis.

[2] Ms Andrew checked Ms Waugh's LinkedIn profile and saw that she had experience in business development, strategic development and brand development. These were all skills applicable to the vacant GAD role. Ms Andrew contacted Ms Waugh via LinkedIn and invited her to meet to discuss the opportunity of working for Ogilvy.

[3] After a number of meetings, and negotiations about the remuneration package, Ms Waugh started work on 9 November 2015. On 16 June 2016 Ms Waugh was dismissed for reason of redundancy.

[4] Ms Waugh says her dismissal was unjustified and claims Ogilvy breached its obligations of good faith toward her. Ogilvy has lodged its own claim against Ms Waugh claiming she breached her good faith obligations.

Issues

[5] To resolve this employment relationship problem I must determine the following issues:

- a) Did Ogilvy breach its statutory duty of good faith and if so what, if any, penalty should be imposed?

- b) Was the dismissal unjustified?
- c) If the dismissal was unjustified, what if any remedies should be awarded?
- d) Did Ms Waugh breach her statutory duty of good faith and if so what, if any, penalty should be imposed?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Waugh and Ogilvy 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.

Non-publication orders

[7] On 28 November 2016 Member Larmer issued a determination ordering interim non-publication orders applying to the commercially sensitive information contained in the pleadings and the evidence of the witnesses.¹ These interim orders are now permanent.

[8] On 24 May 2017 I issued a determination ordering non-publication orders to protect the name of Ms Waugh's witness and any information that may lead to the witness being identified.²

Business structure

[9] The Ogilvy structure within New Zealand is made up of a number of business units called groups. Each of these account groups is responsible for a specific function or client area.

[10] Employees working within each of the account groups are responsible for servicing their own portfolio of clients. The relationship with clients is viewed as an important asset of the group. Each group is led by a GAD who is responsible for managing the staff within the group and who is ultimately responsible for managing the relationships with clients.

¹ *Waugh v Ogilvy New Zealand Limited* [2016] NZERA Auckland 390.

² *Waugh v Ogilvy New Zealand Limited* [2017] NZERA Auckland 153.

[11] Each group is treated as its own separate business unit when assessing the financial viability of the group. Financial viability is determined taking into account the group's revenue relative to the staff costs within the group. Individual GAD's are responsible for monthly reporting on the financials for their groups. Ms Waugh was employed to lead the Brand Group.

Breach of good faith

[12] Ms Waugh claims Ogilvy has breached its obligations of good faith and seeks the imposition of a penalty. Ms Waugh says she was induced into the employment relationship and Ogilvy made representations to her regarding the accounts she would be managing that were not correct.

Inducement to enter employment

[13] Ms Andrew made contact with Ms Waugh via her LinkedIn profile on 1 October 2015. The two women agreed to meet to catch up the following week.

[14] At that time Ms Waugh had just completed a fixed term employment arrangement with a client while continuing to operate her business. Ms Waugh operated her own company, Beacon AW Limited, and offered services as an independent contractor providing brand development and marketing consulting services to a number of businesses.

[15] Discussions took place between Ms Waugh and Ogilvy from 1 October to 3 November 2015. During these discussions Ms Waugh suggested she be employed on a fixed term basis but this was rejected by Ogilvy because the role was a permanent role.

[16] After meeting with Ms Andrew and in an email dated 22 October 2015 Ms Waugh expressed her enthusiasm for working with the agency to build momentum. Ms Waugh asked if she and Ms Andrew should look to get a job description and contract together. Ms Andrew told Ms Waugh that she would deal with the job description and contract and invited Ms Waugh to meet one of the two major clients with whom she would be working closely. For the purposes of this determination I will refer to the client as XMP. Ms Waugh agreed that was a good idea because she was aware XMP was a key client of the Brand Group and she understood the importance of building good relationships.

[17] Ms Waugh was offered the GAD position in writing. The remuneration package offered to her included payment of a salary and an annual bonus. Ms Waugh rejected the offer. She wished to further negotiate the salary and the position title.

[18] On 30 October 2015 Ms Andrew increased the offer of the salary and the bonus to make the offer more attractive. The increased offer was based on Ms Waugh's feedback. The role offered by Ogilvy was also broadened to include additional responsibilities and opportunities.

[19] Ms Waugh rejected the increased offer of remuneration including the new bonus structure. Ms Waugh text Mr Wade Kirkland, Ogilvy's Chief Financial Officer, suggesting a higher salary with a review of performance six months into the employment relationship together with the payment of a bonus on performance at that six month point. Mr Kirkland emailed Ms Andrew with Ms Waugh's text raising concerns about the rejection of the offer and questioning whether Ms Waugh was too expensive.

[20] Ms Andrew emailed Ms Waugh with a third offer setting out two options. The first option had the same salary as previously offered plus a bonus of up to \$105,000 which would be paid quarterly. The second option had a slightly higher salary with a bonus of up to \$30,000 to be paid six monthly.

[21] On 3 November Ms Waugh emailed Mr Kirkland and Ms Andrew accepting the second option of the higher salary and lower bonus. Ms Waugh offered to start the following week. Ms Andrew forwarded a copy of the proposed employment agreement to Ms Waugh that same day and suggested a start date of 9 November 2016.

[22] After receiving the proposed employment agreement Ms Waugh questioned a clause prohibiting her from undertaking other employment without Ogilvy's written consent. She also questioned the bonus structure. Ms Waugh pointed out that she had one client from her business who had asked if she could manage the design and production of their digital templates and formats for a new branding project. In respect of the bonus Ms Waugh asked to have the performance and bonus review at three months and again at six months.

[23] In response Ms Andrew reminded Ms Waugh that of the options outlined to her previously, option one offered the payment of a quarterly bonus, and option two (which Ms Waugh accepted) paid the bonus every six months. Ms Andrew advised that as a benchmark almost all agency bonuses were paid 12 monthly and only after the agency reached its profit budget so Ms Waugh was already enjoying a significantly better arrangement.

[24] Ms Andrew also asked about Ms Waugh continuing to work in her business while engaged with Ogilvy in a full time role. She was concerned about how that would work in practice and whether the work would put Ms Waugh into direct conflict with Ogilvy. Ms Andrew asked Ms Waugh to agree on guideline rules so that they could find a way that worked for both parties.

[25] Ms Waugh accepted the bonus structure as presented in the second option and advised Ms Andrew that where her business generated work required her time during the day she would talk that through at the time but that she would look at bringing opportunities for work into Ogilvy.

[26] The terms of the employment agreement were accepted by Ms Waugh and confirmed on 5 November 2015. Ms Waugh requested a change to her job title from “Business Director” to “Brand Director”.

[27] I find on balance Ogilvy did not induce Ms Waugh into employment with it. Rather, the parties entered into negotiations over both the terms of employment and the role Ms Waugh would undertake.

Misrepresentations

[28] Ms Waugh says that before she accepted the offer of employment she was led to believe that two key client accounts were stable accounts with no reasonably foreseeable issues. The two clients were XMP and PMX.

XMP

[29] Ms Waugh says the relationship between XMP and Ogilvy was toxic and the client had become frustrated with frequent changes to employees managing its account and was unsatisfied with the service delivery. She says XMP had indicated to Ogilvy prior to her commencing work that Ogilvy may no longer retain its advertising services.

[30] It was common ground that the relationship between Ogilvy and XMP was difficult. However, that was being addressed. Meetings with the client were held in December 2015 and February 2016. Ms Waugh was present at the December meeting and the subsequent report identified that the client was looking for reassurances that the services provided by Ogilvy would improve. By February 2016 the Managing Director, Mr Greg Partington was satisfied the account was secure and while the client was unhappy prior to Christmas 2015 things had noticeably improved.

[31] It was common ground that Ms Waugh did not get on with the client and she requested that the client be removed from her group to another group as she no longer wished to manage the client. The implication of Ms Waugh's decision to have the client removed to another group was that the significant revenue for this client would no longer be attributed to the Brand Group.

[32] The evidence shows that at the time Ms Waugh entered into the employment relationship this client while difficult, was still positive about the relationship and the amount of work the client was putting with Ogilvy was increasing.

PMX

[33] Ms Waugh says Ogilvy failed to advise her about impending significant reductions in fees associated with its client PMX in circumstances where a significant reduction was or ought to have been known by Ogilvy.

[34] PMX had moved to a "lift and apply" arrangement with Ogilvy in New Zealand. The change meant that the majority of the strategic work, brand development and planning was coming out of PMX Australia. The role for the New Zealand PMX team was to execute those plans. This in turn meant Ogilvy's role was to provide options to assist PMX to deliver on its plans.

[35] At the time Ms Waugh was appointed to her role and as a result of the change to "lift and apply" PMX client fees had been estimated through Ogilvy's forecasting process. The forecast was based on information it had available to it at the time. The forecast applied a slight downgrade from the previous year.

[36] At a meeting on 11 November the actual scope of work for the client for 2016 was tabled. A “scope of work” is a document listing the projects Ogilvy will be involved in with the client. Each project is allocated a budget. The budget is to cover account service and creative time with all other production costs charged in line with an agreement between Ogilvy and PMX.

[37] The scope of work document PMX tabled for 2016 showed a significant reduction to the forecast budget. There was a dispute about when the scope of work document first became available to Ogilvy. Ms Waugh says she received a copy of it on her first day of employment (9 November). Ogilvy says it was not available to it until it was tabled at the 11 November meeting.

[38] On balance I have concluded it is more likely than not that the scope of work document was first available to Ogilvy through it being tabled at the meeting on 11 November. In a handover document dated 13 October 2015 the previous GAD advised that the Scope for 2016 was in development at that time and reported that it was often not complete until within the actual year. That the scope of work document was tabled on 11 November seems logical if it was in development in October.

[39] On 10 December 2015 Ms Waugh was provided with a copy of the Group Revenue Forecast for 2016 which showed the expected revenue for 2016 for all accounts including PMX. Ms Waugh was invited to reforecast any changes. No changes were identified by Ms Waugh despite now having the scope of work document for PMX.

[40] On 10 February 2016 Ms Waugh advised that she had not seen any agreement or document that advised/confirmed the PMX 2016 retainer. It was not until April 2016 that confirmation was received from PMX. That confirmation resulted in a substantial downgrade to the revenue forecast for PMX.

[41] Until April 2016 Ogilvy had forecast a reduction in PMX client fees at a level that would have no significant impact on the group. It was not until April that Ogilvy discovered the actual budget was to be significantly reduced.

Conclusion

[42] For the following reasons I find Ogilvy did not mislead Ms Waugh during the recruitment process in relation to either client XMP or PMX.

[43] Ogilvy has acknowledged that XMP was a difficult client. The issues Ms Waugh has identified about Ogilvy's relationship with XMP were matters that came to Ogilvy's attention after Ms Waugh had started working with the client. The issues were addressed by Ogilvy and by February the client was happy that the relationship was improving. The issues raised by Ms Waugh were not known to Ogilvy before her employment started so it could not be in breach of any duty in not raising them with her at that time.

[44] At the time Ms Waugh was offered employment by Ogilvy the forecast revenue for PMX had been reduced to take into account the change to lift and apply. In December Ogilvy's forecast for PMX remained at the level forecast in September 2015. It was only in 2016 that the true impact the change to lift and apply would have on the revenues for PMX became apparent.

[45] Ms Waugh has failed to establish to my satisfaction that Ogilvy has acted in breach of its statutory obligations of good faith. It follows that Ogilvy's application for penalties for breach of good faith is declined.

Unjustified dismissal

[46] Ms Waugh's role was disestablished and she was given notice of the termination of her employment for reason of redundancy on 16 June 2016. Ms Waugh claims her dismissal was unjustified.

[47] In order for a redundancy to be justified Ogilvy must demonstrate that the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether Ogilvy met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[48] The Court of Appeal considered the application of section 103A in a redundancy setting in [*Grace Team Accounting Limited v Brake*](#).³ That decision upheld the earlier Employment Court decision where the Court confirmed employers

³ [2014] NZCA 541.

must show that a decision to make an employee redundant is genuine and based on business requirements.⁴ This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[49] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

Genuineness

[50] On 26 May 2016 Ms Andrew emailed Ms Waugh expressing concerns about the financial viability of her group and whether its structure was appropriate, when viewed against the revenue attributed to other groups. Ms Andrew requested a meeting the following day to discuss her concerns.

[51] As planned the two women met on 27 May 2016 and discussed Ogilvy's assessment of the economic viability and the structure of the Brand Group. This was followed on 30 May 2016 with confirmation in writing from Ms Andrew that the company was reviewing all business units to ensure they were appropriately structured.

[52] While Ms Andrew accepted Ms Waugh's group was very lean she advised that an alternative structure may be considered. Ms Andrew confirmed that Ogilvy may need to consider restructuring Ms Waugh's group, although that would be avoided if possible.

[53] Ms Andrew invited Ms Waugh to a meeting the following day at which time Ms Andrew would provide more details relating to the assessment of the continuing economic feasibility of Ms Waugh's group structure and the criteria for the basis of the review.

⁴ [2013] NZEmpC 81.

[54] Ms Andrew and Ms Waugh met as scheduled on 1 June. After that meeting Ms Andrew confirmed in writing the discussions that had taken place including setting out the concerns Ogilvy held about its forecast profit line. Ms Andrew set out for Ms Waugh the key changes that had impacted on the agency and which had led to the downgraded profit result together with the steps already taken by Ogilvy to limit the impact of lost revenues. Ms Andrew set out four options for consideration:

- Absorb the team in Restaurant Brands;
- Restructure the Brand Director role to a Senior Account Director;
- Reassign Brand Director responsibilities into an existing Group Account Director.

[55] Ms Waugh met with Ms Andrew on 9 June 2016 and provided a written response to the proposal for restructuring. Ms Waugh acknowledged that events had happened that had affected the forecasted profitability in the current financial year and understood that the proposed restructure was financially driven and not based on her personal performance.

[56] Ms Waugh raised concerns that a number of the financial factors relied on by Ogilvy in its proposal were well known to it at the time Ms Waugh was offered and accepted employment.

[57] With respect to XMP Ms Waugh describes the relationship with this client as “toxic” and after three months of attempting to work with the client, advised Ogilvy that she no longer wished to manage the account. Ms Waugh acknowledged her decision had a direct impact on the viability of her group. Ms Waugh argued that that impact of the reduced revenue was offset by savings made as a consequence of the disestablishment of a position within the Brand Group.

[58] Ms Waugh set out the successes she had achieved in obtaining new business during her short time and stressed the need for a senior person to be across several of the client accounts. Ms Waugh set out her view that any cost savings in restructuring would be outweighed by reduced client satisfaction and might result in putting revenue forecasts at further risk.

[59] A further meeting was held on 16 June. During this meeting Ms Andrew responded to Ms Waugh's concerns and discussed the implication of retaining her role. Ms Andrew acknowledged the contribution Ms Waugh had made to Ogilvy during her employment.

[60] Ms Andrew advised Ms Waugh that Ogilvy was satisfied all of the points raised by Ms Waugh in her response to the proposed restructuring could be accommodated within the company. Ms Andrew maintained that it was difficult to substantiate having a Business Director when the work being done by Ms Waugh could be absorbed into other agency groups without compromising efficiency or delivery.

[61] Ms Andrew advised Ms Waugh that her position would be disestablished and she was given notice of redundancy.

Procedure

[62] As set out above, discussions about the restructuring took place from 26 May to 16 June 2016.

[63] At the final meeting on 16 June Ms Waugh was advised her position would be disestablished with effect from that day and her employment would terminate by reason of redundancy in four weeks. Ms Waugh was offered the opportunity to work away from the office during the four week notice period if that was her preference and was asked to complete a full and comprehensive handover during that period.

[64] At the meeting on 16 June 2016 Ms Waugh was invited to give feedback on how she wanted her departure reported to clients and staff. Ms Waugh advised that she wanted it reported correctly. That is, that her role was disestablished and she was given notice of redundancy.

[65] This was important to Ms Waugh because she was concerned that she had only been in the role for six months and she did not want clients or colleagues thinking that she had failed to commit to a long term employment relationship.

[66] Ms Waugh has raised concerns that the decision maker in this process was actually Mr Partington and not Ms Andrew. If this was the case then Ms Waugh says she did not have the opportunity to meet with the decision maker.

[67] Ogilvy says Ms Andrew was the decision maker but she conferred with Mr Kirkland and Mr Partington including providing them with Ms Waugh's written feedback on the restructuring. Ms Andrew says their views were included in the responses Ms Andrew gave to Ms Waugh during the restructuring process.

Conclusion

[68] Ogilvy has established to my satisfaction that the disestablishment of Ms Waugh's role was based on genuine business requirements. The forecasted revenue for the Brand Group had decreased by almost 50%. Part of the reduction was due to PMX's change to lift and apply. However, a significant portion of the reduction in revenues was as a result of Ms Waugh's request that the XMP account be moved to another group. These two factors had a significant impact on the financial viability of the Brand Group.

[69] Overall I find the process used by Ogilvy was fair and reasonable. Ms Waugh was provided with a full opportunity to be heard and have her views considered before the decision to terminate her employment for redundancy. I am satisfied the decision maker was Ms Andrew but that she did consult with Mr Partington and Mr Kirkland.

[70] Ms Waugh was justifiably dismissed for reason of redundancy.

Breach of employment agreement

[71] Ms Waugh seeks the imposition of a penalty based on a claim that Ogilvy NZ breached the implied terms of her employment agreement when it failed to treat her fairly and reasonably.

[72] This claim has not been established and the application for a penalty is declined.

Counter-claim – breach good faith

[73] On 17 June 2016 Ms Waugh advised at least one client of her impending departure from Ogilvy. Ogilvy claims this communication breached her statutory obligations of good faith. In particular Ogilvy claims Ms Waugh mislead and/or deceived Ogilvy when she:

- a) Acted contrary to an express or implied direction and/or expectation that she would not communicate with clients about her departure until a communications plan was agreed; and
- b) Communicated her departure to a client (LPN) in a manner that was highly likely to damage Ogilvy's relationship with that client; and
- c) Appears to have intentionally kept the communications with LPN secret and the adverse consequences that had resulted.

Direction/expectation that there would be no notification to clients until a plan was agreed

[74] Ms Waugh says there was no express or implied agreement or direction or expectation that she would not communicate with clients until a plan was agreed.

[75] During the meeting on 16 June 2016 Ms Andrew asked Ms Waugh how she would like her pending departure communicated to clients. During the meeting Ms Waugh says she advised Ms Andrew that she had a meeting with client LPN which was scheduled for the following day.

[76] From the evidence it seems that discussion prompted Ms Andrew to invite Ms Waugh to consider contracting her services to Ogilvy to continue working on the project with LPN. There is no dispute that Ms Waugh's contribution had been a key factor in achieving the contract to provide services to LPN and Ogilvy was keen to continue her involvement.

[77] Ms Waugh's uncontested evidence is that she told Ms Andrew the client ought to be told that her employment had ended by way of redundancy and she would no longer be working on the project. This was because of her key role in securing the client. Ms Waugh wanted the client to know that she was not leaving of her own volition. She was concerned about the professional ramifications of appearing to be

leaving the client in the lurch when the client had made it clear from the beginning that it wanted continuity of project management.

[78] Ms Andrew wrote to Ms Waugh after the meeting on 16 June and confirmed in writing that her employment would end by way of redundancy. In her 16 June letter Ms Andrew advised Ms Waugh that she had asked Mr Partington to consider the best way forward to communicate her departure to clients and to Ms Waugh's team and will advise accordingly.

[79] On 20 June Ms Andrew raised concerns with Ms Waugh about her communication with clients about her impending departure. Ms Andrew asked Ms Waugh to refrain from announcing her departure to clients until they had met to discuss and agree on how the communications would be managed.

[80] I find it is more likely than not that at the time Ms Waugh contacted LPN no specific instruction or direction was given to Ms Waugh in respect of communicating with clients.

[81] There was no acknowledgement by Ms Andrew in her 16 June letter that Ms Waugh had an important client meeting the next day, nor did she provide any directions about what the client should be told. Further, in an email from Ms Andrew to Ms Waugh on 17 June Ms Andrew notes that she had spoken to Mr Partington and he suggested they talk about Ms Waugh's "...preference..." in terms of communicating to clients, the team and the wider agency. Ms Andrew was already aware of Ms Waugh's "preference". It was that clients and staff be told accurately of the situation – that is, that her role had been disestablished and she was being made redundant.

[82] The email from Ms Andrew on 20 June is the first time Ms Waugh was instructed not to announce her departure to clients.

Did Ms Waugh communicate her departure to LPN in a way that was highly likely to damage Ogilvy's relationship with the client?

[83] On Friday 17 June Ms Waugh cancelled the scheduled meeting with LPN and advised the client she had been made redundant and would be leaving the agency. Ms Waugh disclosed to LPN that she had been offered the opportunity to consult to

Ogilvy for the project work and told the client she would need to consider whether she could commit personal time for such an extended period.

[84] Following Ms Andrew's email to Ms Waugh on 20 June, Ms Waugh received an email from LPN with the subject line "anxious for feedback". This email notified Ms Waugh that if she was not going to be able to consult for the client senior management at Ogilvy owed the client some communication and requested a meeting as soon as possible. Ms Waugh forwarded this email to another member of the project team (Ogilvy employees) and copied the email to Ms Andrew.

[85] At about this same time Ms Andrew had received a letter from Ms Waugh raising a personal grievance. The letter recorded comments made to Ms Waugh by LPN in their email exchanges on 17 June that LPN reserved its right to review matters if the team changed substantially. This email exchange occurred on 17 June and had not been shared with Ms Andrew.

[86] Ms Andrew demanded an explanation from Ms Waugh about her communications with LPN. Ms Waugh told Ms Andrew she had simply advised LPN about the restructuring and that she was leaving due to redundancy. Ms Waugh told Ms Andrew she had told LPN she would be working with Ogilvy about her departure date and handover and that Ogilvy would keep the client informed in the coming weeks.

[87] Ms Waugh assured Ms Andrew that she had not, and would not say anything disparaging about Ogilvy and nor did she intend to cause reputational damage.

[88] Concurrently the Chairman of the Board for LPN emailed Ms Waugh asking her to pass on his email to the appropriate person. The two emails from LPN (the "anxious for feedback" email and the email from the Chairman of the Board were addressing the issue about whether Ms Waugh was going to contract to undertake the clients work. They were not concerned about Ms Waugh leaving Ogilvy. The two emails were seeking clarification about the project given the changed circumstances.

[89] The concerns of LPN were escalated to Mr Partington from the client directly on 22 June where the client, for the first time, expressed distress over Ms Waugh's

redundancy. In its email the client expressed concerns that no one from Ogilvy had been in contact with it to discuss a potential alternative project leader.

[90] Ogilvy moved quickly to present an acceptable alternative to LPN to allow the project to progress. This was done in the absence of any affirmative notification from Ms Waugh that she intended to take up the contracting opportunity. On 24 June Ms Waugh was advised that the option for her to pick up the contracting work was no longer available to her.

[91] Between 17 and 24 June (6 working days) Ms Waugh had notified one client of her impending departure. I have accepted that Ms Waugh made the disclosure in a way that was intended to limit damage when cancelling an important client meeting the day after being given notice of her redundancy.

[92] However there were steps Ms Waugh could and should have taken to keep Ogilvy fully informed on her disclosure so that it could limit any potential damage. Ms Andrew was aware the meeting was taking place but was not told by Ms Waugh that she had planned and then did cancel the meeting.

[93] Neither was Ms Andrew kept informed of the telephone conversation Ms Waugh had with the client where she disclosed both the fact of her impending departure and the option for her to contract back to keep working with the client.

[94] Ms Waugh copied other members of the project team into some of her correspondence with the client on 17 June but not Ms Andrew. That omission was not sufficiently explained during the course of the investigation meeting.

[95] Ms Waugh was aware that communication of her impending departure to clients and how that was handled was a concern to Ogilvy. Her failure to communicate openly with Ms Andrew with respect to her communication with LPN was a breach of her obligation to be active and constructive in maintaining a productive employment relationship.

Did Ms Waugh intentionally keep the communications with LPN secret and the resulting adverse consequences

[96] Ms Waugh forwarded the “anxious for feedback” email to Ms Andrew on 21 June and shared it with other members of the project team on 17 June. On 22 June Ms

Waugh provided the client with Mr Partington's contact details so that the client could make direct contact with him to discuss its concerns.

[97] As stated earlier in this determination Ms Waugh should have done more to ensure Ms Andrew and Mr Partington were fully informed about all communications she had had with LPN. However, I am not satisfied Ogilvy has established its claim that Ms Waugh intentionally kept her communications with LPN secret.

Penalties

[98] I have found Ms Waugh breached her obligations of good faith when she failed to communicate openly with Ms Andrew with respect to her communication with LPN. Ogilvy seeks the imposition of a penalty for this breach.

[99] Before I am able to impose a penalty I must be satisfied the breach of good faith was deliberate, serious and sustained or was intended to undermine the employment relationship.⁵

[100] While Ms Waugh's breach was serious Ogilvy has not established it was deliberate or sustained or that it was intended to undermine the employment relationship.⁶

[101] I am not satisfied Ogilvy has established Ms Waugh's breach meets the high threshold required and the application for a penalty is declined.

Costs

[102] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ogilvy shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Waugh shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

⁵ Employment Relations Act 2000 s 4A.

⁶ *Radius Residential Care Ltd v NZ Nurses Organisation Inc.* [2016] NZEmpC 112.

[103] 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 require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority