

BETWEEN

PHILLIPPA WHAANGA
Applicant

AND

SHARP SERVICES LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Greg Bennett, Advocate for Applicant
Respondent in person

Investigation Meeting: 20 June 2013 at Auckland and 5 August 2013 by telephone
conference

Submissions received: 25 June and 15 July 2013 from Applicant
28 June and 9 July 2013 from Respondent

Determination: 9 August 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Phillippa Whaanga, claims that she was unjustifiably dismissed on 14 August 2012. Specifically Ms Whaanga claims that the restructuring exercise undertaken by the Respondent, Sharp Services Limited (SSL), which resulted in the termination of her employment on the grounds of redundancy, was not genuine and the consultation process was inadequate and defective.

[2] In the alternative Ms Whaanga claims that she was unjustifiably constructively dismissed by being given a choice of resigning rather than being made redundant.

[3] SSL denies that Ms Whaanga was unjustifiably dismissed and claims that it had genuine reasons for the restructuring exercise, and that it followed a fair and proper process.

[4] SSL denies that Ms Whaanga was unjustifiably constructively dismissed by being asked to resign.

[5] SSL claims that Ms Whaanga is in possession of SSL property, being two iPhones and a laptop.

Issues

[6] The following issues require determination whether:

- a. Ms Whaanga was unjustifiably dismissed by SSL by way of redundancy, specifically did:
 - SSL have genuine reasons for the restructuring exercise
 - SSL follow a fair and proper process
- b. If Ms Whaanga is not found to have been unjustifiably dismissed by way of redundancy, whether she was unjustifiably constructively dismissed by SSL
- c. Ms Whaanga was unjustifiably disadvantaged by SSL
- d. Ms Whaanga has without due authorisation retained property belonging to SSL

Background Facts

[7] SSL is a small electrical contracting company which contracts to larger companies and carries out work primarily on Housing New Zealand homes.

[8] Ms Whaanga was initially employed by SSL in August 2003 in a part-time capacity to deal with the accounts and paperwork. Ms Whaanga's place of work during the first year of her employment had been located at a property owned by Ms Audrey Sharp, one of the directors of SSL.

[9] Ms Whaanga explained that for personal reasons, it had been her and her husband's preference for her to be able to work from home and, with effect from 2004, it had been agreed that she could work from her home. Ms Whaanga explained that although SSL had a property which could have been utilised as office accommodation, Mr Clifford Sharp, Managing Director of SSL, had preferred for personal reasons not to use this property.

[10] Ms Whaanga said that following the agreement for her to work from home, the SSL office was effectively based at her home, and as a result of SSL employing two additional

administrative employees, an extension had been added to her home, and she agreed that SSL had contributed to this cost.

[11] Ms Whaanga said that despite the intrusion on the family privacy that having the SSL office based at her home represented, the arrangement had been easier for her as a mother of young children, and that her husband had preferred having her working from the family home.

[12] Ms Whaanga said that she had met all the running costs of having the SSL office based at her home. Mr Sharp refuted this, stating that the expenses associated with the SSL office being based at Ms Whaanga's home had been paid by SSL and he submitted evidence in support of this claim.

[13] Ms Whaanga said, and Mr Sharp agreed, that from the end of 2011 a friendship had developed between them and Mr Sharp would send her text messages of a personal nature, some of which she had found unwelcome, however she had not spoken to him about them.

[14] Mr Sharp said that Ms Whaanga would send him multiple text messages, and that these were also personal in nature.

[15] Mr Sharp confirmed that he had provided Ms Whaanga with an SSL fuel card for her own personal use and that of any other employee who used petrol in the commission of SSL business. Mr Sharp also agreed that he gave permission for Ms Whaanga's husband to use the SSL fuel card in respect of his own personal petrol usage.

[16] At some time later Ms Whaanga said that Mr Sharp had also issued her personal housekeeper/cleaner with a fuel card to be used for an amount of \$100.00 per week, and had told her (Ms Whaanga) that this was to represent a 'pay rise' to her.

[17] Ms Whaanga said that during her employment with SSL Mr Sharp had promised her and her husband a new motor vehicle; however Mr Sharp refuted this explaining that he had been considering purchasing a new vehicle for himself, and he had on two occasions test driven cars.

[18] Mr Sharp explained that Ms Whaanga had asked if she could test drive one of the vehicles and that she may have misconstrued a comment he had made to the effect that hard work made such acquisitions possible.

[19] Ms Whaanga said that in March 2012 she and her husband had been provided with a return trip to Bali at SSL's expense.

[20] Mr Sharp said that during the first few months of 2012 he had decided that due to an increase in company growth, it was necessary to restructure the business and to set up better systems. As a result, he held two meetings with the employees in April and July 2012.

[21] Mr Sharp said that his intention initially had been to make Ms Whaanga the overall manager of the administration of the SSL operation, however during the period between April and July 2012 he had formed the view that the two other office employees had been carrying out much of the work Ms Whaanga was employed to do.

[22] As a result Mr Sharp said he had decided to move the office base from Ms Whaanga's home to the property owned by SSL in order to provide a more formal environment which would also allow him to monitor the work Ms Whaanga was carrying out.

[23] Ms Whaanga said she had been instructed to organise the transfer of the office equipment from her home to the new location, and to set up the office whilst the two other office employees had continued to work from their home bases, and Mr Sharp had been absent on an overseas trip.

[24] Ms Whaanga said she had telephoned Mr Sharp on 9 August 2012 and asked him if he wanted her to leave SSL, and on the following day she had received a text message from Mr Sharp which stated:

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's what you want, put it in writing and I will accept.

[25] During the Investigation Meeting Mr Sharp confirmed that he had at some time on or about 9 August 2012 asked Ms Whaanga to resign from SSL.

[26] On 10 August 2012 Ms Whaanga discovered that she had been locked out of SSL's computer system as a result of the passwords having been changed and that the SSL telephone line had been disabled. Ms Whaanga said she had emailed Ms Sharp on or about 13 August 2013 and explained the problem, and shortly after this she had been able to access the system.

[27] On 13 August 2012 Ms Whaanga had not attended for work due to sickness and had been provided with a medical certificate stating that she would be unfit to attend for work until 27 August 2012.

[28] Ms Whaanga said that on 14 August 2012 she had received a letter from Mr Sharp which stated:

As you are aware, I have been taking a more active role in the business, and have already been changing the way we operate. 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 2 pm, 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.

[29] Ms Whaanga said she had concluded from the wording of the letter that Mr Sharp had already taken the decision to make her position redundant and on that basis she did not attend the proposed meeting with Mr Sharp, and her employment had subsequently been terminated.

[30] Mr Sharp said he had not postponed the meeting with Ms Whaanga as he had not believed her sickness to be genuine.

[31] The parties attended mediation but this did not resolve the issue, and on 5 November 2012 Ms Whaanga filed a Statement of Problem with the Authority.

Determination

Was Ms Whaanga unjustifiably dismissed by SSL by way of redundancy?

1. Did SSL have a genuine reason for the redundancy of Ms Whaanga's position as Office Manager?

[32] Mr Sharp said he had embarked upon the restructuring exercise as a result of company business growth and that he had initially had the intention of increasing Ms Whaanga's duties and responsibilities to the extent that she became the overall manager of the administration of the overall SSL operation

[33] I find this explanation to be at variance with that contained in an email dated 23 August 2012 from Mr Philip Kotze, at that time legal advisor to Mr Sharp, to Mr Bennett, advocate for Ms Whaanga. The explanation provided by Mr Kotze in the email of 23 August 2012 stated:

In view of the precarious financial state of the company the matter is extremely urgent and Cliff intends taking over Pip's role with immediate effect".

[34] According to Mr Sharp's version of events the position of Office Manager would not become surplus to requirements, but would in fact expand to reflect the growing administration requirements of SSL.

[35] However it is clear from the evidence that during the restructuring process Mr Sharp had become concerned at the manner in which Ms Whaanga had been fulfilling her existing duties, highlighted by Mr Sharp's statement that: "...she was becoming a liability to the company", and this had led to the situation in which her resignation as Office Manager had been requested by Mr Sharp.

[36] I find that SSL did not have a genuine reason for the redundancy of Ms Whaanga's position as Office Manager.

2. Did SSL follow a fair and proper process?

[37] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[38] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[39] Although Mr Sharp gave evidence to the effect that he had held meetings in April and July 2012 with the SSL employees to discuss the proposed restructuring, there was no evidence provided to establish whether or not Ms Whaanga had been advised that her position was at risk of redundancy.

[40] There was no evidence provided to establish that Ms Whaanga had been provided with any information relevant to the continuation of her employment with SSL or provided with an opportunity for consultation prior to a decision being made about the continuation of her employment.

[41] The letter advising of a possible redundancy situation had been received by Ms Whaanga on 14 August 2012, when she had been absent and in receipt of a medical certificate stating that she was unfit for work until 27 August 2012. The letter proposed a meeting to be held the following day stating that the matter was urgent.

[42] I observe that Mr Sharp’s reason for not postponing the meeting was that he did not believe Ms Whaanga’s sickness to have been genuine rather than because the restructure was required urgently. I consider that if Mr Sharp had any reason for believing that Ms Whaanga’s sickness was not genuine, he should have raised this issue with Ms Whaanga and sought her permission to make the proper enquiries of her medical practitioner.

[43] I do not find that SSL followed a fair and proper process in making Ms Whaanga’s position redundant.

[44] I determine that Ms Whaanga has been unjustifiably dismissed by SSL.

Was Ms Whaanga unjustifiably constructively dismissed by SSL?

[45] As I have found Ms Whaanga to have been unjustifiably dismissed by SSL, this issue does not fall to be determined.

Has Ms Whaanga without due authorisation retained property belonging to SSL?

[46] Mr Sharp claimed that Ms Whaanga had retained 2 iPhones and a laptop belonging to SSL after her employment had been terminated, and that she had refused to return these to SSL when she had been requested to do so.

[47] Ms Whaanga agreed that she had retained an iPhone 4s but said that Mr Sharp had gifted an iPhone 4 to her son and that she had returned the laptop to SSL.

[48] Mr Sharp confirmed that he had gifted the iPhone 4 to Ms Whaanga's son and did not dispute Ms Whaanga's statement that she had returned the laptop to SSL.

[49] I determine that the iPhone 4s, the property of SSL, has been retained by Ms Whaanga without authorisation from SSL and order that it be returned to SSL within 7 days of this determination.

Remedies

[50] Ms Whaanga has been unjustifiably dismissed by SSL and is entitled to remedies.

Reimbursement of Lost Wages

[51] Ms Whaanga provided no evidence at the Investigation Meeting of the efforts she had made to mitigate her loss, stating that she had these details on her laptop which she did not have with her. Ms Whaanga was requested to provide the confirmatory evidence of mitigation to the Authority subsequent to the Investigation Meeting, however she has not done so.

[52] Employees are under a duty to mitigate their loss and in this case there was insufficient evidence presented to the Authority to support the fact that Ms Whaanga had made a real effort to mitigate her loss. As Chief Judge Colgan made clear in *Allen v Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")*¹:

¹ (2009) 6 NZELR 530, par 78

... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[53] Ms Whaanga has not established evidence to support her efforts to mitigate her loss and in these circumstances I find that there is no compensation for lost wages is payable to her.

Reimbursement of Holiday Pay

[54] Ms Whaanga claims that she is entitled to payment in respect of unpaid annual leave, and Mr Sharp disputes that Ms Whaanga has any entitlement to unpaid leave. However no convincing evidential basis has been provided to assist in resolving this matter.

[55] Whilst SSL is responsible for maintaining time and wages records, Ms Whaanga as the payroll clerk had prime responsibility for this task and so must accept that she has contributed to the situation in which there is no evidence to substantiate or invalidate her claim for payment to accrued annual leave.

[56] What is agreed between the parties is that Ms Whaanga cashed-up 12.5 days of annual leave in her final entitlement year.

[57] In accordance with the Holidays Act 2003 s.28A(2)(b) an employee is allowed to cash up annual leave entitlement per entitlement year to a: “..maximum of 1 week”. I find that the cashing-up entitlement amount paid to Ms Whaanga had been exceeded by 7.5 days for the entitlement year ended 4 August 2012.

[58] Whilst making such a payment is not in accordance with the Holidays Act 2003 Ms Whaanga conceded that she received the 12.5 days cashed-up amount, and moreover that making such a payment was her responsibility. Accordingly I find that Ms Whaanga has suffered no loss, and award no payment in respect of the 7.5 days cashed-up in error

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[59] Ms Whaanga is entitled to compensation for humiliation and distress. I find that in respect of her unjustifiable dismissal, Ms Whaanga has experienced humiliation, loss of dignity and injury to feelings.

[60] In respect of the dismissal grievances, SSL is to pay Ms Whaanga the sum of \$2,500.00, pursuant to s 123(1) (c) (i).

Contribution

[61] I have considered the matter of contribution as I am required to do under s124. Although Mr Sharp believed that Ms Whaanga had not performed her duties at SSL to an acceptable standard on the basis of information provided to him during 2012, there is no evidence that these concerns were put to Ms Whaanga, or that she had been provided with an opportunity to address them, or that a formal process in relation to them had been undertaken by SSL. On this basis there is to be no reduction in remedies.

Costs

[62] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority