

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 200/10  
5134016

BETWEEN                      MARGARET WHITTEN  
   Applicant  
  
AND                                OGILVY NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:                Susan Hornsby-Geluk, Counsel for Applicant  
   Chris Patterson, Counsel for Respondent  
  
Investigation Meeting:        17 and 18 February 2009  
  
Information and  
Submissions Received:        25 February, 3, 10 and 31 March 2009  
  
Determination:                 30 April 2010

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**DETERMINATION OF THE AUTHORITY**

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[1]     Mrs Whitten is a senior advertising executive with extensive experience in New Zealand and overseas. She was employed by Ogilvy New Zealand and its predecessors from 1993 until July 2008 when her employment ended. At this time she held the title of deputy managing director.

[2]     Mrs Whitten says she was unjustifiably constructively dismissed from her employment with Ogilvy and/or made redundant.

[3]     Ogilvy says Mrs Whitten was not made redundant and not constructively dismissed.

## The events around 8 July 2008

[4] On 8 July 2008 Greg Partington, Ogilvy's managing director, asked Mrs Whitten if she had time for a 10 minute meeting. He then advised her he had appointed a new deputy managing director and asked her to relinquish her title in exchange for a directorship on the Ogilvy board. Mr Partington told Mrs Whitten if she would not relinquish the title her role would no longer be national and would extend to Auckland only. There is no dispute as to the content of this discussion.

[5] Later that day Mr Partington confirmed the offer to Mrs Whitten in the following email:

Margaret

Thank you for considering the proposition I put to you today.

In summary:

1. Fraser Holland has been appointed Deputy MD, Ogilvy New Zealand. He'll be based initially in Wellington but will have a national role.  
It is envisioned that Fraser will assume the role of MD, Ogilvy New Zealand in due course. There is no timeframe around this but succession planning is upper most in STW's mind...
2. There is no pressure on you to relinquish the title of Deputy MD, but obviously, it would be preferable if you did.
3. In exchange for releasing the title, I'd like to offer you a Directorship in Ogilvy New Zealand... This is an onerous responsibility, one which will require you to take legal advice... I offer this Directorship to you by way of acknowledgement of the contribution you have made to our business in recent times. I'm anxious that any change of title reflects only positively on you. I think it also reflects the vital importance of Sanitarium to our business.
4. I know you've been wanting more involvement in key agency decisionmaking. Up until now, there hasn't been a forum for this. From later this month, and every month thereafter, the National Board will meet monthly, without fail. The lack of such a decisionmaking mechanic has been a weakness in our organisation...I'd like to invite you to join this team and contribute as you see fit. Indeed, as a Director, this is your right and obligation.

Please let me know how you feel about this.

Regards

[6] Mrs Whitten replied the following day that she would give the proposal careful consideration and confirmed her desire to contribute to company-wide decision making and have her contribution recognised and rewarded. Mrs Whitten then asked for more detail of the company shareholding and directorship structure and confirmed she would seek legal advice and get back to Mr Partington at the earliest opportunity.

[7] Mr Partington answered Mrs Whitten's query that day and agreed to deal with any further questions Mrs Whitten may have.

[8] Mrs Whitten then sought legal advice about the directorship and relinquishing her position title.

[9] On Friday, 11 July, staff were advised of Mr Holland's appointment as deputy managing director and the appointment was reported that same day in national newspapers. Mrs Whitten was not aware this announcement would be made and, at this stage, had not responded to Mr Partington about his proposal.

[10] Mrs Whitten's legal advisor wrote to Mr Partington that day expressing Mrs Whitten's shock and upset at the announcement, reiterating her desire to continue to explore the directorship offer and seeking further information in order to consider the offer further.

[11] On 16 July Ogilvy's legal advisor responded by way of letter:

Deputy managing director

- (i) the announcement of Mr Fraser's appointment did not undermine Mrs Whitten's position in the business;
- (ii) that Mrs Whitten's title of deputy managing director was merely a title;
- (iii) that Mrs Whitten had never held a 2iC position in the business and *had only ever been a strategic planner in respect of two...clients*;
- (iv) that duties and responsibilities are determinative of position;
- (v) the title of deputy managing was not a title exclusive to Mrs Whitten;
- (vi) Ogilvy would prefer Mrs Whitten relinquish the title to avoid confusion but that the decision was hers to make; and
- (vii) Mr Holland's appointment will have no impact on Mrs Whitten's position.

Directorship offer

- (i) Mrs Whitten had had a fair opportunity to consider and respond to the directorship offer;

- (ii) The offer was now withdrawn because the shareholders believe it would no longer be in the best interests of the business;

Performance

- (i) Ogilvy wished to raise performance concerns with Mrs Whitten.

Ongoing relationship

- (i) Ogilvy wished to explore in good faith options for Mrs Whitten's ongoing involvement in the business.

[12] On 20 July Mrs Whitten's legal advisors wrote to Ogilvy's legal advisors on a without prejudice basis including:

- (i) Ogilvy's conduct, including the withdrawal of the directorship offer 10 days after it was made, indicates the offer was not bona fides;
- (ii) No performance concerns have ever been raised with Mrs Whitten;
- (iii) After lengthy negotiations the parties reached agreement as to Mrs Whitten's position and title;
- (iv) Mrs Whitten has delivered on the specifics of her position as determined by Mr Partington;
- (v) Mrs Whitten has strong grounds for personal grievance claims on the grounds of redundancy and constructive dismissal and would agree to exit the business on terms outlined.

[13] This letter was replied to by letter dated 30 July:

- (i) Ogilvy had no obligation to consult with Mrs Whitten regarding Mr Fraser's appointment;
- (ii) The directorship offer was bona fides and Mrs Whitten's reaction to Mr Fraser's appointment caused the offer to be reconsidered;
- (iii) Mrs Whitten's role is substantially the same as when first employed by Ogilvy;
- (iv) Mrs Whitten can retain the position title;
- (v) Mrs Whitten is a valued senior employee;
- (vi) The without prejudice offer is rejected; and

- (vii) Mediation was accepted in order to negotiate Mrs Whitten's exit from the business without the payment of any money to Mrs Whitten from Ogilvy.

[14] On 4 August Mrs Whitten's legal advisor advised:

- (i) Mrs Whitten's immediate resignation following Ogilvy's repudiatory breach of the employment agreement;
- (ii) The basis upon which mediation was proposed was rejected; and
- (iii) Mrs Whitten's position had substantially changed giving rise to an entitlement to redundancy compensation.

### **Was Mrs Whitten unjustifiably constructively dismissed?**

[15] Claims of constructive dismissal usually fall into the following categories – an employer gives an employee a choice between resigning or being dismissed, an employer had followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and/or a breach of duty by the employer causes the employee to resign<sup>1</sup>.

[16] Mrs Whitten says her constructive dismissal arises from the third of these categories. I accept that is the correct categorisation of her claim.

[17] Having categorised the claim I turn now to the tests against which the evidence must be assessed. The first question is whether, having regard to all the relevant circumstances, Mrs Whitten's resignation was caused by a breach of duty owed to her by Ogilvy and the second, whether that breach of duty was sufficiently serious to make it reasonably foreseeable that Mrs Whitten would resign<sup>2</sup>.

[18] Ms Hornsby-Geluk submits that in the face of Ogilvy's two letters Mrs Whitten had no option but to resign - the 4 August letter advising of Mrs Whitten's resignation asserts Ogilvy's repudiatory conduct has brought the employment agreement to an end and that she (Mrs Whitten) had no option but to resign.

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<sup>1</sup> *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) 2 NZLR (CA)

<sup>2</sup> *Cooke P in Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 168, at pg 169

[19] Mr Patterson submits there are no grounds for a claim of constructive dismissal; Ogilvy did not want Mrs Whitten to resign, wished to work constructively with her to remain in the business and repeatedly told her this.

[20] The background to the events around 8 July show the relationship between Mrs Whitten and Mr Partington was such that she was required to continually assert her position within and across the business. I accept on the evidence that Mrs Whitten's role within the business was marginalised and sidelined through her employment punctuated with florid acknowledgements of her contribution.

[21] I find Mr Partington's proposal of 8 July amounts to notice of a restructuring of the senior management structure. Mr Partington told Mrs Whitten, confirmed later in writing, that a new deputy managing director had been appointed with national responsibilities and the following options were available for her consideration – that her position as deputy managing director would move from national to regional responsibilities or she could relinquish the deputy managing director title and accept a directorship on the Ogilvy's board.

[22] Mrs Whitten reasonably understood she was engaged in a consultation process, that she would have an opportunity to ask questions about Mr Partington's proposal and have time to take advice on the implications for her employment as well as the significant legal obligations involved in a directorship.

[23] It was reasonable for Mrs Whitten to understand this consultation process would be completed by the time any business or public announcement was made about Mr Fraser's appointment. That appointment had obvious implications for her position within the business. Mr Partington states this in his email of 8 July (“...*obviously it would be preferable if you did*”) and emails from colleagues following the announcement confirm Mrs Whitten's concerns.

[24] When the announcement was made Mrs Whitten was entitled to raise her concerns about the process and the implications for her current role and the consultation process the parties were engaged in. The letter of 11 July properly

records those concerns and continues, consistent with a consultation process, to seek further information to enable Mrs Whitten to consider Mr Partington's offer.

[25] In *Master Builders' Assn (Auckland) Inc v Doe* [1999] 1 ERNZ 311 the Court upheld a claim of constructive dismissal in a restructuring setting. At pg330 Judge Travis noted:

“there were a number of proven breaches of the appellant's contractual duty not to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence, of sufficient seriousness to make it reasonably foreseeable that the respondent would not be prepared to work in the new position and would resign.”

[26] In that case the found breaches of duty were unilaterally varying the employment contract, offering redundancy and then withdrawing it and failing to consult about restructuring.

[27] In its letter of 16 July Ogilvy unilaterally and unreasonably terminated the consultation process when it withdrew the directorship proposal without notice, asserted its view that it had *certainly never regarded your client as being required to or, in fact, ever discharging the duties or responsibilities of a Deputy MD* in the face of Mrs Whitten having held that position for 3 and a 1/2 years and raised unspecified performance allegations, notwithstanding the earlier offer of a directorship. These were serious breaches of the employment agreement.

[28] Ogilvy then compounded these breaches with its 30 July letter wherein it clarified the basis for withdrawing the directorship offer was Mrs Whitten's assertion of Ogilvy's consultation obligations and denied any obligation to consult about the new structure notwithstanding Mr Partington's 8 July invitation to Mrs Whitten to consider the proposal and request further information.

[29] Ogilvy's actions backed Mrs Whitten into a corner – she was on notice her existing position had significantly changed, the directorship option had been unilaterally withdrawn and Ogilvy's conduct towards her had undermined her trust and confidence that she would be fairly treated. In such circumstances Mrs Whitten's resignation was readily foreseeable. Mrs Whitten was unjustifiably constructively dismissed.

**Was Mrs Whitten's position redundant?**

[30] The evidence shows that in January 2005 Ogilvy and Mrs Whitten concluded detailed negotiations for the position of deputy managing director with a 2iC function and specific responsibility for consumer brands and PR. The evidence also shows that Mrs Whitten held that title for the remainder of her employment with Ogilvy.

[31] Mr Partington accepts Mrs Whitten's recollection of their meeting on 8 July. Significant to the question of redundancy was Mr Partington's advice to Mrs Whitten that if, after Mr Holland's commencement, she retained the title of deputy managing director the position would relate only to the Ogilvy Auckland office and would not be a national role.

[32] It is clear Mrs Whitten's position of deputy managing director no longer existed in the new structure - her redeployment options, as outlined by Mr Partington, were taking up the directorship or accept a reduced role. The directorship offer was unfairly withdrawn and the reduced role was significantly different to that she had held.

[33] I have no hesitation in finding Mrs Whitten's position had been made redundant.

[34] In support of Ogilvy's position Mr Patterson places considerable weight on the allegedly empty title of deputy managing director. This argument does not advance Ogilvy's position. The title is a contractual and binding term between the parties. Its change, as with any other, required the agreement of the parties. What duties were executed under that title were reasonably within the direction of Ogilvy. There is no evidence Mrs Whitten did not execute all duties as directed.

**Redundancy compensation**

[35] I have found Mrs Whitten's position was made redundant. She asserts an entitlement to redundancy compensation arising from her 1993 employment agreement. Ogilvy says the applicable employment agreement is that offered to Mrs

Whitten after the merger which created Ogilvy, when her employment transferred by way of technical redundancy.

[36] Post merger the parties were unable to conclude the terms of a written employment agreement. Three iterations of the document were presented to Mrs Whitten from 2004 to 2007 and each time she raised detailed concerns that the proposed agreement did not reflect her existing terms of employment.

[37] There was no evidence Mrs Whitten forfeited any terms of employment at merger or subsequently or that her service was not treated as continuous. In the absence of agreement between the parties otherwise, I find the redundancy provisions pre-merger are the relevant terms of employment between the parties.

[38] Accordingly, Mrs Whitten is entitled to payment of redundancy compensation as provided in the agreement dated 20 October 1993:

Ogilvy & Mather is committed to maintaining and developing permanent employment opportunities for all staff. However, in the event that a restructuring of the company is unavoidable and you become redundant, Ogilvy & Mather will pay you 4 weeks salary as redundancy compensation for the first complete 12 months, and 2 weeks for each additional complete 12 months.

[39] For the avoidance of doubt Mrs Whitten's service with Ogilvy & Mather and its successors was continuous, her salary at date of dismissal was \$209,000 per annum and the multiplier 32 weeks.

[40] **I order Ogilvy New Zealand Limited to pay to Margaret Whitten the gross sum of \$128,615.38 as redundancy compensation under the 1993 employment agreement.**

## **Remedies**

### **(i) hurt and humiliation**

[41] Mrs Whitten has given detailed evidence of the shock and upset she experienced as a consequence of her dismissal and Ogilvy's conduct towards her which gave rise to her dismissal. She has also given evidence of the significant

impact her dismissal has had on her health and the difficulty she has experienced finding new employment. I accept this has been a distressing and difficult time for Mrs Whitten.

[42] The following factors mean a high level of compensation for hurt and humiliation is warranted in this case – Mrs Whitten’s long service and seniority within the business, the highly public nature of her departure and Ogilvy’s vindictive reaction to her assertion of rights in withdrawing the directorship offer, raising unspecified performance concerns in the face of the offer of a directorship and the demeaning characterisation of her contribution to the business.

[43] These factors in favour of a high level of hurt and humiliation are compounded by Ogilvy’s threat of High Court proceedings for malicious institution of civil proceedings and malicious process made two weeks prior to the Authority’s investigation and attempts to prevent Mrs Whitten’s witnesses giving evidence in particular Al Dickman.

[44] **I order Ogilvy New Zealand Limited to pay Margaret Whitten \$15,000 as compensation under section 123(1)(c)(i) of the Act.**

**(ii) lost wages**

[45] Mrs Whitten seeks lost wages from date of dismissal to determination. I accept the submission that redundancy compensation and compensation for lost wages have different purposes and that it is open for the Authority to consider and award both redundancy compensation and lost wages.

[46] But for Ogilvy’s gross disregard for the obligations owed to Mrs Whitten the consultation process may have continued satisfactorily and Mrs Whitten may have had the opportunity to negotiate a satisfactory redeployment option within the business. Mrs Whitten had proven her ability to carve out a place for herself in the business.

[47] I accept Mrs Whitten has taken reasonable steps to mitigate her losses and find alternative employment and that this has proved difficult in the current economic

climate. Given the circumstances of this case it is appropriate for the Authority to exercise its discretion and make an award of lost wages greater than 3 months<sup>3</sup> which I set at 8 months.

**[48] I order Ogilvy New Zealand to pay to Margaret Whitten the gross sum of \$193,333 (8/52 x \$209,000) plus holiday pay at the rate of 8% of earnings as compensation under section 123(1)(c)(b) of the Act.**

**(iii) lost benefits**

[49] Mrs Whitten is entitled to reimbursement of contractual benefits she would have obtained if her grievance had not arisen.

[50] The benefits for which reimbursement are sought are the provision and use of a cell phone, petrol for personal use and medical insurance. The calculation provided has not been challenged and I accept it as accurate – cost of cell phone \$369, monthly cell phone use \$150, monthly personal petrol \$400 and medical insurance \$196.95 per month.

**[51] I order Ogilvy New Zealand to pay to Margaret Whitten the gross sum of \$6344.60 (8/12 x contractual benefits) pursuant to section 123(1)(c)(ii) of the Act.**

**(iv) future lost wages and benefits**

[52] I accept there are significant difficulties for Mrs Whitten to obtain suitable alternative employment however, there is no evidence that it is not possible for her to obtain such employment. This claim is declined.

**Contribution**

[53] Section 124 of the Act requires me to consider what, if any, blameworthy conduct on the part of Mrs Whitten contributed to the circumstances which gave rise to her personal grievance.

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<sup>3</sup> Section 128 of the Act

[54] I am satisfied no blameworthy conduct of Mrs Whitten's contributed to the circumstances which gave rise to her personal grievance. She has demonstrated to the Authority that throughout her employment with Ogilvy she maintained the obligations owed to her employer to be active, responsive and communicative. Ogilvy has not.

### **Penalty**

[55] Mrs Whitten seeks the award of a penalty against Ogilvy for failure to conduct itself fairly and reasonably towards her and failing to pay redundancy compensation due and owing.

[56] Robust findings have been made against Ogilvy for these breaches and remedies awarded. I am not minded to impose a punitive response to this employment relationship problem.

[57] The penalty claim is declined.

### **Relevance of applicant's supporting witnesses**

[58] I am satisfied that all evidence presented by Mrs Whitten's witnesses was relevant to the Authority proceedings and that there was no malice apparent to the Authority in the calling or giving of that evidence.

[59] It should not be inferred that evidence received by the Authority in the course of these proceedings and not recorded in this determination was not relevant.

### **Costs**

[60] Costs are reserved. If the parties are unable to resolve this matter between them, then Ms Hornsby-Geluk is to file and serve a memorandum as to costs within 14 days of the date of this determination. Mr Patterson has a further 14 days in which to file and serve any reply.

Marija Urlich

Member of the Employment Relations Authority