

The High Cost of Getting it Wrong

Whitten v Ogilvy New Zealand Ltd 30 April 2010
AA200/10

The Employment Relations Authority recently awarded a former senior executive almost \$350,000.00 for her unjustified constructive dismissal following a restructuring process which did not meet the required procedural standards.

Whitten was employed by Ogilvy New Zealand from 1993 to July 2008 as a deputy managing director with international experience as a senior advertising executive. She claimed that she was unjustifiably constructively dismissed and/or made redundant. These claims were denied by her employer.

The managing director advised Whitten on 8 July 2008, by way of an impromptu meeting, that a new deputy managing director had been appointed and requested that she relinquish her title in exchange for a directorship on the Ogilvy board. This was confirmed by way of e-mail. Whitten responded by confirming that she would give the proposal serious consideration and requested more details on the directorship position.

Three days later, without any prior notification to Whitten, the staff were advised of the appointment of the new deputy managing director and further it was reported that day in national newspapers.

Whitten's shock and upset at this announcement was conveyed to the company. This prompted the company to withdraw the proposed directorship and to raise concerns regarding her performance. Several exchanges of letters occurred between the parties representatives resulting in Whitten's resignation due to Ogilvy's repudiatory breach of the employment agreement.

The Authority noted that constructive dismissal usually falls into one of 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 **Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd** [1985] 2 NZLR (CA).

It was accepted that Whitten's claim of constructive dismissal arose from the third category.

The Authority found that the proposal of 8 July 2008 amounted to a notice of restructuring of the senior management structure.

It was reasonable for Whitten to have understood that she was engaged in a consultation process and that this would be completed by the time any business or public announcement was made about the appointment of the proposed new deputy managing director.

The Authority found that the employer was in serious breach of the employment agreement due to:

- Withdrawing the offer of directorship without notice, and therefore unilaterally and unreasonably terminating the consultation process
- Asserting that Whitten had not discharged the duties of deputy managing director, when in fact she had held that position for more than 3 years
- Raising unspecified performance allegations notwithstanding the earlier offer of a directorship.

The employer then compounded these breaches by refusing to accept that it had any obligation to consult about the new structure. In these circumstances the Authority stated that Whitten's resignation was reasonably foreseeable. The Authority found further that Whitten's position of deputy managing director no longer existed in the new structure therefore she was made redundant.

The employer was ordered to pay Whitten just under \$200,000.00 for lost remuneration and benefits; \$130,000.00 redundancy compensation and \$15,000.00 for hurt and humiliation.

The employer has lodged an appeal against the Authority's determination. We will advise of the outcome in due course.

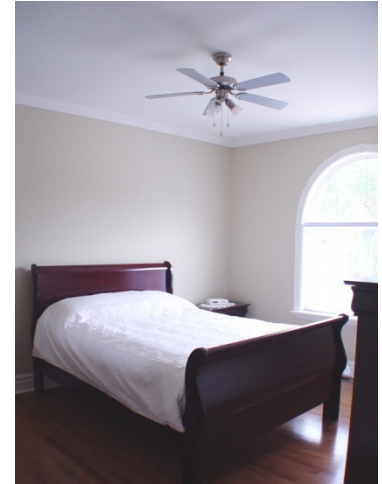
When proposing a restructure of roles it is paramount to note the following:

- Firstly establish that there is a genuine operational requirement for restructuring.
- Formulate a preliminary proposal in respect to the restructuring.
- Meet with the employee(s) affected to advise of the proposal and rationale.
- Request feedback before any final decisions are made.
- Always encourage the employee(s) to seek independent legal advice and to be represented at any subsequent meetings where the proposed restructuring is canvassed.



The Sleepover Issue – to be determined by the Court of Appeal

We have previously reported on the on-going case of *Idea Services Ltd v Dickson* as it has moved through the various employment institutions. The latest update is that Idea Services Ltd have made a successful application for leave to appeal to the Court of Appeal challenging the findings of the Employment Court. As you may recall the Employment Court accepted Dickson's claim that sleepovers were "work" for the purposes of s.6 Minimum Wage Act 1983 and therefore he was entitled to be paid the minimum wage for each and every hour of any sleepover, regardless of whether he was actually required to attend to any duties.



The important questions of law to be determined by the Court of Appeal are:

- 1) Does "work" in s.6 of the Minimum Wage Act 1983 cover the entire duration of "sleepovers" performed by the respondent given their nature, and, in particular, are the terms of the applicable collective agreement relevant to that question?
- 2) Is the applicant entitled to average the hourly rates payable to the respondent during the course of a pay period in order to achieve compliance with the Minimum Wage Act 1983?

Faced with a Disciplinary or Restructuring Issue?

The team at McPhail Gibson & Zwart Ltd have extensive experience in assisting employers with disciplinary and restructuring issues.

If you are faced with a disciplinary issue, or in the current economic environment, a need to restructure, give us a call to ensure that the correct procedures are followed in these situations and your exposure to legal action is minimised.

Our range of services include:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court Representation
- Employment Relations Strategies
- Training



This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson or Peter Zwart.

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