

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 347
3111313

BETWEEN

SHIRALEE HANSEN
Applicant

AND

UNITED FLOWER GROWERS
LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Sam Houliston, counsel for the Applicant
Jeff Goldstein, counsel for the Respondent

Investigation Meeting: 28 and 29 July and 8 August 2022 at Auckland

Submissions Received: Up to and including 5 April 2023

Date of Determination: 30 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Shiralee Hansen, says that the termination of her employment on 1 July 2020, on the basis of a redundancy, was unjustified. She says this is because:

- (i) United Flower Growers Limited (UFG) breached its duty of good faith to her by repeatedly refusing to provide all information relevant to the restructuring process it was undertaking;
- (ii) UFG failed to consider her feedback during a period of consultation, namely that her role of National Trading Manager was not materially different to the new role created as a result of the structure;
- (iii) UFG pre-determined its decision to disestablish Ms Hansen’s role prior to completing the requisite consultation; and

- (iv) The process contained a number of procedural defects and in any event there were no genuine reasons to disestablish Ms Hansen's role.

[2] Ms Hansen claims the following:

- (a) A sum of \$40,000 for the humiliation, injury to feelings and loss of dignity she says she suffered as a result of the manner of her termination;
- (b) Loss of income of some \$79,271.34 (net);
- (c) The KiwiSaver contribution that would have been payable but for the unjustified termination of her employment; and
- (d) Compensation for the loss of chance which arose as a result of UFG depriving Ms Hansen of her ability to reduce her liability under a personal guarantee she gave over her company The Flower People Limited's debt to UFG through the incentive agreement that formed part of her employment agreement.

[3] UFG denies Ms Hansen's claims, saying termination of Ms Hansen's employment on the grounds of redundancy was a decision open to it to make, and was made after carrying out a fair process. It says that Ms Hansen's terms and conditions of employment were set out in an employment agreement dated 23 September 2019 and that after a process in which it fully consulted with Ms Hansen, gave Ms Hansen extensive time within which to provide feedback, her employment was ended. It says further Ms Hansen at no time during the process, which ran from 3 June 2020 until the termination of employment on 1 July 2020, provided any feedback on the restructure proposal.

[4] UFG says Ms Hansen failed to communicate in regard to anything to do with the restructure throughout the process and was provided with all relevant non-confidential information upon which UFG was relying on in terms of its decision. UFG further says that Ms Hansen failed to apply for any of the roles in the new structure.

The Authority's investigation

[5] The investigation meeting in respect of the employment relationships was held in Auckland on 28 and 29 July and 8 August 2022. As allowed pursuant to clause 16 of Schedule 2 to the Employment Relations Act 2000 (the Act) a change has taken place in the Member constituting the Authority.

[6] The Authority held a conference call with the representatives of the parties. Having heard extensively from them, it was subsequently agreed with the parties that this matter would be determined without the Authority rehearing the matter.

[7] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made, but has not recorded all the evidence and submissions received by the Authority.

Background

[8] Ms Hansen has had a long history in the flower industry and in January 2002 incorporated the company Hansens – the Flower People Limited (Hansens). By April 2019, Ms Hansen was considering winding up Hansens but over the time, Hansens had incurred a debt to UFG of some \$30,000. Ms Hansen was concerned about the debt and Mr O'Brien on behalf of UFG advised he would discuss the situation with UFG's General Manager at the time, Tony Hayes. UFG stayed in touch with Ms Hansen and ultimately in August 2019 approached her regarding her taking the National Trading Manager role which was a new role created within UFG. As a result of this approach, Ms Hansen decided to take up an offer of employment with UFG as its National Trading Manager. Ms Hansen says she was assured by Mr O'Brien that it was a job for life.

[9] Ms Hansen remained concerned about the debt her company owed to UFG and in her evidence she says she requested that her business be valued independently and the true value of it be used as a forgiveness of debt with the remaining value to be the basis of an incentive programme. Her evidence is that UFG refused to look at this. Ms Hansen signed an employment agreement with UFG and that agreement sets out the terms and conditions of employment. The employment agreement did to an extent deal with Ms Hansen's trading debt. UFG put into place an incentive programme by which any benefit earned by Ms Hansen was used to decrease UFG's debt.

[10] When the COVID level-4 lockdown started, UFG ceased trading. Mr Hayes gave evidence that he and Mr O'Brien were preparing forecasts for the Board and providing information so that the Board could make informed decisions on the future operation of the company.

[11] In early April 2020, plans were being discussed at Board level to significantly restructure the UFG operation in order to reduce all costs, including labour costs. Ms Hansen was not part of those discussions.

[12] On 18 May 2020, Mr Hayes was appointed as CEO of UFG.

[13] In May 2020, following instructions from the Board, Mr Hayes commenced a consultation process which formally commenced on 3 June 2020 when he held a meeting with Ms Hansen. He provided Ms Hansen with a copy of the restructure proposal and he says Ms Hansen immediately responded by saying “So I'm going to lose my job”. He says that he explained it was a proposal document only and that she would have plenty of time to come back to him with any thoughts, questions or ideas.

[14] The restructure process did away with Ms Hansen’s role but created new roles of Wholesale Manager, Assistant Wholesale Manager, and Wholesale Flower Trader.

[15] There was a consultation period which ran from 3 June 2020 until 9 June 2020.

[16] On 3 June 2020, Ms Hansen texted Mr Hayes advising she was leaving work. The next day, Mr Hayes received a text from Ms Hansen concerning a complaint and concerns about another person and events at the Auckland site. Mr Hayes said he invited Ms Hansen in to meet to discuss and resolve any issues, however, this did not happen.

[17] On 5 June 2020, Mr Hayes sent an email to Ms Hansen which included attachments for the proposed roles. Later that day Ms Hansen replied, sending a number of emails about the roles seeking clarification. Finally that day, Ms Hansen emailed expressing her devastation at her position being disestablished.

[18] On 7 June 2020, Mr Hayes emailed Ms Hansen extending the time for feedback by 24 hours until 10 June 2020. Ms Hansen did not provide feedback on the proposal, instead UFG received a letter from Ms Hansen’s lawyers on 10 June 2020. This letter sought further information relevant to the restructure proposal. The letter mentioned three aspects of the proposal that Ms Hansen required clarification on.

[19] These included her view that the Wholesale Manager role and Assistant Wholesale Manager role were very similar if not identical to the role Ms Hansen had occupied. She sought an explanation as to how it could be her role would become surplus under the circumstances.

Secondly, the letter stated that the proposal did not provide the financial or other information to support the forecasts relied on in respect of sales/demand. A proposal had been made in respect of the Christchurch and support office operation, however no information in respect of those proposals had been provided to Ms Hansen. Thirdly, Ms Hansen complained that there had been no selection criteria.

[20] The following day he received a text from Ms Hansen advising she wished to take personal time that morning. He emailed back advising her that he was proposing to meet with everyone the following day to let them know if the restructure was going ahead. He told Ms Hansen that he would see her first. Mr Hayes says at that stage he identified that Ms Hansen's work email inbox was full, so the email did not go. He instructed IT to clear Ms Hansen's box and the email was sent at 5:21 on 12 June, the same day that Mr Hayes responded to Ms Hansen's lawyer's letter.

[21] The meeting did not proceed as planned because Ms Hansen wished to have legal representation, but it did proceed on 12 June 2020. Ms Hansen's representative had noted that there was no indication of the remuneration for the new Auckland Wholesale Manager role, nor a position description for the various proposed roles. At the meeting Mr Hayes advised Ms Hansen and her representative that the proposal as provided to her was proceeding and later that day indicative remuneration amounts for the proposed positions of Wholesale Manager and Assistant Wholesale Manager were given.

[22] On 16 June 2020 Ms Hansen again requested further information which had not been provided to her. She was advised that the information was only available at an additional cost because UFG were reducing costs and the expense was not warranted. Further, the information Ms Hansen was requesting was said by UFG to be highly confidential.

[23] Mr Hayes accepted that he had not sent Ms Hansen the selection criteria but did forward it on later on 16 June 2020.

[24] By 17 June 2020, Ms Hansen through her lawyer had raised a personal grievance claim for an unjustified disadvantage. By 18 June, UFG halted the restructure process of the trading division on the basis that it had decided to remove some of the duties that were to be performed by the new Wholesale Manager roles and because of the late provision of the selection criteria and indicative remuneration. There was also a slight change to the overall restructure with a proposal that some of the duties of the two new senior roles would be contracted out. On

23 June 2020, Mr Hayes wrote to Ms Hansen and other trading division staff advising that UFG were now considering disestablishing seven roles and creating three roles in Auckland. Ms Hansen and the trading division staff were then provided with additional information along with new position descriptions. The time for feedback was extended until 5 pm 24 June 2020.

[25] Mr Hayes confirmed that during the restructure process, Ms Hansen (through her representative) had asked for information that UFG was relying on for the proposal. Mr Hayes said he was instructed by the UFG Board not to provide any additional information because it was confidential and commercially sensitive. In addition, Mr Hayes said he was aware that Ms Hansen had access to the Auckland wholesale financial information.

[26] On 25 and again on 30 June 2020, Mr Hayes wrote to Ms Hansen asking whether or not she intended applying for the Wholesale Manager role but did not receive a reply. The new structure was confirmed on 26 June 2020. UFG says that at no stage did Ms Hansen indicate she was interested in any of the newly created roles.

[27] On 1 July, Mr Hayes told Ms Hansen that her position had been disestablished and there were no redeployment options available. He confirms he told her that UFG would pay four weeks' wages instead of her having to work out her notice period and that her employment would end due to redundancy on that day.

Evidence and analysis

Reason for the restructure

[28] It was open to UFG to consider its overall financial position and to proceed with the restructure. The Board was faced with challenging times. Prior to 2009 UFG ran its business on the basis that each branch was a separate cost centre. There were branches in Auckland, Wellington, Christchurch, Dunedin and Invercargill. Even prior to Covid, company sales had been declining. I accept the evidence that the Board was focusing on improving its operation to achieve long term business sustainability.

[29] In March 2020 when the Covid-19 pandemic hit New Zealand UFG found its business changing dramatically. It was not a provider of essential services and could not operate from the commencement of lockdown level 4. A business continuity plan for the 2020/2021 years was prepared for UFG's bank as it needed to secure financial support and ensure access to

additional funding through the Government Loan Scheme. Part of the information available to the Board included:

- (a) February 2020 Trading Report;
- (b) February 2020 Profit and Loss Report for all trading sites;
- (c) March 2020 Profit and Loss Report;
- (d) May 2020 Trading Report;
- (e) March 2020 – June 2020 budget versus actual company consolidated accounts;
- (f) July 2019 – June 2020 budget versus actual company consolidated accounts;
and
- (g) July 2020 – June 2021 budget versus actual company consolidated accounts.

[30] Other relevant information included Board Minutes:

- (a) 20, 27, and 30 March 2020;
- (b) 9, 14, 17 and 24 April 2020;
- (c) 1 and 8 May 2020.

[31] The difficulty for UFG is that the information it relied on in making its decisions, was in part not provided to Ms Hansen who only received financial data in redacted form.

[32] Bruce O'Brien and Tony Hayes provided the financial forecasts along with a number of other forecasts. Mr O'Brien and Mr Hayes then provided the Board with options which were approved by the Board.

[33] The restructure proposal was provided to Ms Hansen by way of a one on one meeting which was held on 3 June 2020. The position descriptions for the proposed new roles were provided to her on 5 June 2020.

[34] Ms Hansen confirms she was presented with the restructure proposal document. She says she was simply told to read the first page, and read the rest in her own time. Ms Hansen was concerned with statements that there had been a significant impact on profitability and cashflow for UFG. She was also aware that the proposal planned to disestablish her role as National Trading Manager. Although the proposal referred to new position descriptions, no

further information had been provided about the roles. As mentioned above she received these two days later on 5 June.

[35] Feedback on the proposal was required by 9 June however when requested, Ms Hansen was given a 24 hour extension on the basis there had been a delay in providing the position descriptions.

[36] Ms Hansen was concerned that in order to properly partake in consultation, she needed further information and was of the view that key information was missing. In particular, she wanted an explanation as to why her role was surplus to requirements given the similarity of two other roles, namely a proposed Wholesale Manager role and an Assistant Wholesale Manager position. She also wanted the financial and other information to support the forecasts UFG was relying on to support its statements regarding the significant impact on profitability and cashflow for the business.

[37] On 12 June 2020, Ms Hansen received confirmation from another colleague that the proposal was to go ahead. It transpired that UFG had told all other employees regarding the proposal but that was at a meeting she was not present at.

[38] Ms Hansen had wished to provide feedback on the proposal but had made it clear she could not do so without the further information she had requested. Although some further information was forthcoming, she did not receive the financial information on the grounds that it was confidential. Ms Hansen took the view that as the basis of the restructure was for financial reasons, and was based on forecasts, she should have that information. She noted that she had had some limited access to this information before through her role.

[39] On 15 June 2020 Ms Hansen met with Tony Hayes who confirmed that UFG was proceeding with this proposal and her position would be disestablished. She had however not been provided with all the information she had requested. The evidence given by UFG seems to agree with this fact, but UFG was of the view it had provided sufficient information and its grounds for withholding further information on the grounds of commercial sensitivity and confidentiality were valid.

[40] After the decision to proceed with the proposal was confirmed, Ms Hansen received an apology from Mr Hayes because she had not received selection criteria. Ms Hansen was left confused about why she simply could not slot into the new Wholesale Manager role as to her

mind it was essentially the same. In any event, it is difficult to see that that role would not at the very least have been a redeployment option for Ms Hansen.

Was the dismissal justified?

[41] It is clear however Ms Hansen did not have access to all the financial information. UFG declined to provide this information to her, because it considered the information was commercially sensitive and confidential. UFG did not want that information out in the market place where it could be used for the commercial benefit of third parties.

[42] UFG also considered that Ms Hansen would have had direct access to the financial information of the Auckland trading division as she was in charge. The problem that UFG faces in that regard however, is that it is difficult to accept that just because the information was commercially sensitive and confidential, that it should not be given to Ms Hansen in a redundancy situation. She was after all a senior employee and certainly should have been someone who could be trusted with that information. To the extent the company had concerns about its disclosure, steps could have been taken to protect it if necessary.

[43] I do not accept that providing the financial information to a senior employee such as Ms Hansen, would have created an unreasonable prejudice to UFG's commercial position.

[44] The restructure process was driven by finances. Ms Hansen had not been provided with all the relevant information.

[45] UFG's justification for the redundancies is inextricably tied to the contention that it had grounds for not sharing some financial information with Ms Hansen despite her role as a senior employee. The difficulty with that approach is that on 1 December 2004, s 4(1A) was inserted into the Employment Relations Act 2000. Its intention was to alter and prescribe the tests of justification for disadvantage in dismissal from employment in general. The amendment enacted information sharing provisions. They set out a fair and reasonable employer's minimum obligations where redundancy may ensue and now form part of the s 103A tests of justification. Section 4(1A) provides:

- 1(A) The duty of good faith in subsection (1)—
 - (a) is wider in scope than the implied mutual obligations of trust and confidence; and
 - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment

relationship in which the parties are, among other things, responsive and communicative; and

- (c) without limiting paragraph (b), 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 1 or more of his or her employees to provide to the employees 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 the decision is made.

[46] UFG did undertake a level of consultation. However, s 4(1A) of the Act contains an explicit requirement for the disclosure of information and consultation in redundancy situations. When I assess UFG's actions in terms of s 103A of the Act, the non-disclosure of information effects the quality of the consultation. By not providing Ms Hansen the information she requested, she was not in a position to properly engage in consultation and certainly not in a position to avoid her redundancy.

[47] It is possible she may have been dismissed on the basis of wrong information when access to that information in a more robust consultation may have corrected that.

[48] As the Court of Appeal noted in *Grace Team Accounting Ltd v Brake*¹ the fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore genuine) did not alter the fact that s 103A was breached.

[49] Ms Hansen also questions whether the Trading Manager role was redundant in the sense it may still have existed in the Wholesale Manager position description. Whilst I have noted the evidence and submissions in that regard, it seems to me they form part of a factual matrix where certain information and/or explanations were not made available to Ms Hansen and formed part of her complaint that she was not given sufficient information to make an informed decision.

[50] Information was deliberately not given to Ms Hansen and this was on the basis that it was commercially sensitive. At the time, however, that was not the explanation given by UFG, which seemed to simply say that the reason for the refusal was that the information was confidential. Obviously at the time Ms Hansen requested the information, she was an employee of UFG and accordingly, subject to obligations of trust, confidence and fidelity.

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

Throughout her employment, it appeared she had access to confidential information and there was no evidence to suggest she had acted inappropriately or had breached confidentiality at any time during her employment.

Conclusion

[51] The redundancy process undertaken by UFG lacked transparency and robustness. This was in respect of not only the similarity of the new role created to Ms Hansen's own, but also the selection criteria and of course Ms Hansen's lack of access to information. It follows that as Ms Hansen was unjustifiably dismissed, the issue then arises what remedies should flow. Ms Hansen's employment ended on 1 July 2020 and she received one month's pay in lieu of her notice period. Her salary at termination was \$100,000 per annum and I am told that from the date of dismissal to the date of the hearing, her accountants estimated she would receive a provisional EBIDT result of \$43,886.76. They noted her taxable income would likely be less than that amount.

[52] Ms Hansen claims that her total loss up to 29 July 2022 was some 102 weeks and three days and that her loss of income totalled \$79,271.34 net. In considering Ms Hansen's claim under this heading, there must be some uncertainty as to how long her employment would have continued under the circumstances. I think it appropriate that Ms Hansen be awarded a further three months' salary. It is appropriate that UFG's employer KiwiSaver contribution be added to any amount awarded.

[53] Ms Hansen made other claims including a claim for the loss of benefit of the company vehicle and payments of a Southern Cross premium of some \$76 per month. There was also a claim for loss of chance arising from the fact that Ms Hansen's dismissal deprived her of the ability to reduce her potential liability under a personal guarantee given over Hansen's – The Flower People's Limited debt to UFG which she had planned to reduce through the incentive agreement. However I consider that the loss of chance is difficult to compensate for as there is no guarantee that the incentive agreement would have resulted in any further payments to Ms Hansen.

Orders

[54] United Flower Growers Limited must pay Shiralee Hansen:

- (a) Three months lost wages of \$25,000 (less PAYE);

- (b) United Flower Growers Limited contribution to Ms Hansen's KiwiSaver account for that three month period;
- (c) A sum of \$25,000 for humiliation, injury to feelings and loss of dignity Ms Hansen suffered because of her unjustified dismissal.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Geoff O'Sullivan
Member of the Employment Relations Authority

²

www.era.govt.nz/determinations/awardingcosts-remedies