

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 216/09  
5143129

BETWEEN                      JYOTIKA SHAHI  
   Applicant  
  
AND                                DIGITAL  
   COMMUNICATIONS  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              J Shahi, in person for applicant  
   A Sipka, agent for respondent  
  
Investigation Meeting:        29 June 2009  
  
Determination:                1 July 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Jyotika Shahi was employed by Digital Communications Limited (“DCL”) on a fixed term employment agreement to cover the position of an employee who was taking parental leave. The employment relationship was terminated early, in circumstances Ms Shahi says were an unjustified dismissal.

[2] Ms Shahi also seeks a penalty for breach of the employment agreement.

[3] DCL says Ms Shahi’s position became redundant, and that the employment relationship was terminated by agreement.

**The termination of the agreement**

[4] The agreement was expressed to expire on 14 November 2008. The position was described as ‘office assistant’. According to a document headed ‘Job Description

and Key Performance Indicators' - which Ms Shahi denied receiving - the aim of the position was to provide professional office assistance and customer service. It included handling customer enquiries and cold calling customers, data entry (including accounts data entry), office administration and housekeeping, and reception duties. Maureen Dean, the employee taking parental leave, also provided a list of tasks to Ms Shahi. Many of the tasks were concerned with data entry and accounts data entry, as well as general clerical tasks.

[5] Ms Dean also carried out preparatory and support work for the preparation of the year end accounts for DCL and some associated organisations. In or about June 2008 those and associated tasks again fell due for completion.

[6] Also in June 2008, Ms Dean contacted DCL's manager (who was also a director) Alex Sipka to ask whether she could return to work early. As she was about to leave for several weeks overseas the matter was not finalised at the time, but her husband contacted Mr Sipka again shortly before her return in early August 2008.

[7] By then Mr Sipka had decided to agree to an early return. He told Ms Dean's husband that he needed Ms Dean, and her husband passed on that information. Mr Sipka contacted Ms Dean directly in August 2008. A return date of 1 September 2008 was agreed.

[8] Mr Sipka's decision was significantly influenced by his dissatisfaction with Ms Shahi's work on the completion of the reports and reconciliations for the year end accounts, and his view that she had admitted to being unable to do substantial parts of the year end work. Indeed he discussed with Ms Dean that she was to finalise the reports on her return.

[9] Accordingly, on 1 August Mr Sipka met with Ms Shahi to discuss her future. Ms Shahi said in evidence he assured her that her employment would continue to the agreed date of 14 November, while Mr Sipka said he told Ms Shahi her employment would be terminated in four weeks. He also said he told Ms Shahi he would ask Ms Dean to return early in order to finalise the year end accounts. Finally, he said he told Ms Shahi that, since she was unable to do the work required in association with the

financial accounts and there were no other duties to offer her, her position would be redundant. He said Ms Shahi agreed to terminate her employment early on that basis.

[10] Ms Shahi denied all of this, saying in addition that she was assured through August and early September that her employment would continue until 14 November.

[11] Regarding the actual date of termination, Mr Sipka said that the initial indication of four weeks from 1 August was later extended for two weeks until 12 September. Ms Shahi also denied this, saying she was told on 11 September that her employment would end on 12 September while being reassured she would be paid until 14 November.

[12] Ms Shahi's employment ended on 12 September. She was, in effect, paid until 25 September in circumstances to which I return later in this determination.

### **Determination**

[13] As noted, there were extensive conflicts in the evidence. On Ms Shahi's account, she was unjustifiably dismissed.

[14] However even if I determine this matter on the basis of Mr Sipka's evidence alone, then the arguments he advanced are unsustainable. On his account Ms Shahi's position was not in law redundant. There was a concern about her performance, and in particular there was a view that she was unable to carry out certain tasks associated with her position. That does not amount to a redundancy. The position continued to exist, and the adequacy of the incumbent's performance is an entirely different matter. Further, the way in which the concern about performance was addressed was not fair or reasonable.

[15] Secondly, Ms Shahi did not agree to end her employment early even on Mr Sipka's account. She was faced with a statement about the date of termination, in which she could and did do no more than acquiesce. That does not amount to an agreement to an early termination. There was no mutual wish to end the employment relationship early.

[16] Mr Sipka did not rely on the provisions of the Parental Leave and Employment Protection Act 1987. Even so I note that s 48 provides:

“Where a temporary employee is employed to replace an employee who is on parental leave, the employer shall, before employing the temporary employee, inform the temporary employee in writing –

- a. that the temporary employee is being employed on a temporary basis in the place of an employee who is on parental leave; and
- b. that the employee may return to work, in accordance with s 45 of this Act, before the date on which the employee is required to return to work at the end of the parental leave.”

[17] Ms Shahi was aware of the basis of her temporary employment as it was specified in the parties’ written employment agreement. However there was no written notice that the employee on leave may return early in the circumstances set out in s 45. While I observe that Ms Dean did not provide the notice of early return required under s 39, I consider the failure to provide the advice set out at s 48(b) is significant given the need to balance Ms Dean’s rights with Ms Shahi’s. Ms Shahi, for example, has rights under s 66 of the Employment Relations Act 2000.

[18] Most importantly, I do not construe the combined effect of the above provisions as allowing an employer to act as, on his account, Mr Sipka has. Ms Shahi was still entitled to fair treatment which she did not receive.

[19] For these reasons I find that the early termination of the employment relationship did not occur by agreement and was not justified.

## **Remedies**

### 1. Payment to 14 November

[20] Ms Shahi is entitled to the reimbursement of remuneration lost as a result of her grievance. She quantified it as the amount she would have received had she continued to be employed to 14 November, less her earnings from part time employment from 25 September. The calculation is:

7 weeks x \$720/week =	\$5,040
Less	\$2,140
Total	\$2,900

[21] DCL is ordered to pay to Ms Shahi \$2,900 (gross).

## 2. Compensation for injury to feelings

[22] Ms Shahi and Ms Dean prepared a written calculation of the final pay owed to Ms Shahi on 12 September. Mr Sipka had Ms Deans add to the document the notation '4 weeks notice for contract termination was given on 01/08/08. Alex agreed to extend for 4 more weeks of which 2 weeks being full time employment and 2 weeks as goodwill payment.'

[23] Ms Shahi said she refused to sign the document with that amendment. Not only did Mr Sipka want her to acknowledge the payment in the above terms, he exerted pressure on her to annotate the document further. She did so first by writing 'this calculation is OK' and when that was not satisfactory she wrote 'Received 2 weeks working wages and annual leave and 2 weeks good will payment.' She said further that Mr Sipka asked her to sign that she would not go to court or take the matter any further. When she refused to do so Mr Sipka became abusive. Ms Shahi felt intimidated and became very upset. She also felt belittled and humiliated.

[24] Mr Sipka denied Ms Shahi's account. Ms Dean, who was within earshot at the time of the alleged exchange, was able to tell the Authority only that she did not hear anything as she was concentrating on her work. Ms Shahi's former colleague, Vesna Spasich, was not present at the time but returned shortly afterwards. She gave evidence that Ms Dean commented to her at the time about an altercation between Mr Sipka and Ms Shahi, and that she later spoke to Ms Shahi on the telephone. Ms Shahi was still upset, but was calmer.

[25] I do not accept Mr Sipka's denial of Ms Shahi's account. I did not find it credible, particularly as he has continued to argue that Ms Shahi agreed to an early termination when that was clearly not so.

[26] Mr Sipka's conduct aggravated the circumstances of Ms Shahi's personal grievance. I reflect this in the award of compensation for injury to her feelings caused by the grievance. DCL is ordered to compensate Ms Shahi for injury to feelings in the sum of \$5,000, being the amount Ms Shahi has sought.

### **Penalty**

[27] The statement of problem did not identify the breach of agreement for which a penalty was sought. Ms Shahi's support person indicated at the investigation meeting that the breach concerned disciplinary and dismissal procedures. I take the indication as a reference to breaches of obligations regarding notice, as set out in a letter dated 23 October 2008 raising Ms Shahi's grievance.

[28] I have taken breaches of that kind into account in finding there was an unjustified dismissal. There will be no further penalty.

### **Summary of orders**

[29] DCL is ordered to pay to Ms Shahi:

- a. \$2,900 (gross) in respect of remuneration lost as a result of the unjustified dismissal; and
- b. \$5,000 as compensation for injury to Ms Shahi's feelings.

### **Costs**

[30] Costs are reserved. If either party seeks an order for costs from the Authority there shall be 28 days from the date of this determination in which to file and copy to the other party a statement setting out what is sought, and why. The other party shall have a further 14 days in which to file and copy a response.

R A Monaghan

Member of the Employment Relations Authority