

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 91/08  
5054097

BETWEEN                      NICOLA JOY WAGHORN  
                                         Applicant  
  
AND                              THE NEW ZEALAND  
                                         ANTARCTIC INSTITUTE  
                                         Respondent

Member of Authority:      Paul Montgomery  
  
Representatives:            Sarah Townsend, Counsel for Applicant  
                                         Amanda Rooney, Counsel for Respondent  
  
Investigation Meeting:    18 and 19 October 2007 at Christchurch  
  
Submissions received:    30 October 2007 from Applicant  
                                         26 October and 2 November 2007 from Respondent  
  
Determination:             3 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant contends she suffered unjustified disadvantage in the role as Communications Advisor with the respondent and that she was unjustifiably constructively dismissed from her employment. Further Ms Waghorn alleges the respondent breached its good faith obligation to her and also breached s.12 of the Fair Trading Act 1986. The applicant seeks reimbursement of lost remuneration and lost benefits resulting from the termination of her employment, compensation for hurt and humiliation, a penalty for the alleged breach of the duty of good faith and costs.

[2]     For its part, the respondent denies each of the breaches Ms Waghorn alleges and denies she was unjustifiably disadvantaged in, or constructively dismissed from, her employment with it. Accordingly, it denies the remedies the applicant seeks.

### **What caused the problem**

[3] Ms Waghorn was interviewed following the departure of the former Communications Advisor and began her role with the respondent on 30 November 2005. In her role she reported to the Communications Manager, Ms Emma Reid.

[4] The applicant says that having been told at interview by Ms Reid and Ms Lindroos, the Personnel Advisor, that Antarctica New Zealand was a high performing culture and a happy environment, and the Chief Executive was passionate about communications, she felt she had found her “dream job”.

[5] Soon after the applicant began work, Ms Reid went on secondment to Scott Base to manage the facility during the latter half of the summer season. Ms Waghorn maintained regular contact with her manager by telephone and email, and in her absence reported to Mr Lew Sanson, the CEO and in his absence, to Mr Peter Smith, the Corporate Services Manager. It is clear that the applicant felt she had considerable support from Mr Sanson but difficulties had arisen in her relationship with Ms Reid who, she said, was assigning her low level administrative tasks which she found to be frustrating.

[6] At the heart of the applicant’s complaint is the relationship between Mr Sanson and Ms Reid which she refers to as being *extremely antagonistic* and *dysfunctional*. Ms Waghorn’s evidence was that each in that relationship had, when speaking to the applicant, referred to the other in unflattering terms although the emphasis was on the views expressed by Ms Reid. Essentially, Ms Waghorn says she was *trapped in the middle*. The applicant gave several examples of the fallout from the situation which are known to the parties and need not be traversed here.

[7] Ms Waghorn says that following Ms Reid’s return from Scott Base and before the latter went on leave in April 2006, *things had been extremely stressful in the office. It was clear to me that Emma needed a break. She was very tired and stressed and her dysfunctional relationship with Lou was making things very difficult.*

[8] In an attempt to resolve the difficulties Ms Waghorn approached the Human Resources Advisor Ms Lindroos in April. The applicant says Ms Lindroos was *candid* with her over the Sanson/Reid relationship and was sympathetic to her situation. *She also advised me to be up-front and to tell Emma that I would leave if things didn’t change as this would hit home with Emma.*

[9] As a result Ms Waghorn spoke with Ms Reid on 2 May 2006, a task she said she found difficult. She says *during the conversation, Emma was focusing on Lou and putting everything down as being his fault. I felt that she couldn't accept that she was anything to do with the problem.* Ms Waghorn summarised the position as *it was both the dysfunctional relationship between the two of them and Emma's management of me in terms of treating me like her PA and not letting me do my job which were at issue.*

[10] Matters came to a head when Ms Reid asked the applicant to write a communications strategy in two days. Ms Waghorn says this task had been given to Ms Reid in August 2005. Ms Waghorn refused to do this task but says *I was too scared to tell Emma to her face that I was not doing it as I was scared that she would think I was just defying her.* Curiously, she then says *while I did everything she asked of me, our working relationship was fine, but as I have previously said, I was worried that she would turn against me.*

[11] Given the advice from Ms Lindroos and her not wanting to resign, the applicant wrote a memo on 17 May 2006. It was addressed to Mr Sanson and copied to Ms Lindroos, but not to Ms Reid. Mr Sanson was leaving for an overseas trip on 18 May 2006, the following day.

[12] The memo is a comprehensive, three page document and addresses the applicant's concerns regarding the failure of management to follow processes, the dysfunctional relationship, the *culture of uncertainty and the push-back/can't do ethic* of the organisation. Significantly, the applicant says, *I am now requesting that some positive, workable action be taken to resolve this situation.*

[13] The memo was taken seriously by the respondent and given Mr Sanson's imminent departure for overseas, he briefed Mr Smith who initiated the meetings with Ms Shaw of Brannigans Human Capital. Ms Reid and Ms Ursula Ryan, another member of the communication team, were also spoken to by Ms Shaw.

[14] On 30 May 2006 Ms Reid and the applicant met together with Ms Shaw who the applicant says, focused on *different work styles.* Prior to the meeting Ms Waghorn advised Mr Smith that this was not the key issue but rather the failing relationship between Mr Sanson and Ms Reid impacting *down the line.* Overall, Ms Waghorn says the meeting largely missed the point of what she saw as needing to be addressed.

She concedes however, that after going through her job description *we agreed during that meeting that Emma would give me more autonomy and that I would work to my job description.*

[15] Two days later Mr Smith met with both employees to check on progress. After that discussion he sent both an email setting out the matters discussed and the agreed path forward. Ms Waghorn says *I was hopeful that if things happened as set out in the email, I would not need further external support going forward.*

[16] Regrettably, says Ms Waghorn *in practice, this never happened. I seemed to have far less to do and Emma took over even more of my duties.* Further she says, *I had been concerned that Emma would turn on me once she saw my memo to Lou, and this is what happened and felt (the process) was never going to work if Emma was not going to keep up her end of the bargain. I was becoming increasingly isolated and I felt sick at work.*

[17] The applicant again met with Ms Shaw on 20 June 2006 and told her *things have not improved and that I was at the end of my tether and that I was going to resign.* Ms Shaw, says Ms Waghorn, told her that during the earlier meeting the focus had been primarily on Ms Reid's working relationship with Mr Sanson rather than on the applicant's issues with Ms Reid as a manager. Ms Waghorn says *I explained to her it was because I was too scared to be honest about Emma's poor management in front of Emma.*

[18] The applicant says she expected as an outcome of the process conducted by Ms Shaw, *some sort of report identifying the issues ... and making some recommendations about the next steps. This never came.*

[19] Essentially, Ms Waghorn became frustrated at the lack of progress. She says *over the weekend of 24 June 2006, I made the decision to resign from Antarctica New Zealand ... . I handed in my written resignation on 26 June 2006. I worked out my notice period (rather than walking immediately) because I believed I had no choice – it was a contractual obligation ... I would have let a number of people down had I just abandoned my responsibilities at that point.*

[20] The respondent, unsurprisingly, sees matters differently. It denied it engaged in misleading conduct or behaviour likely to mislead the applicant during the interview and appointment process. Further, it says that once it became aware of the

applicant's concerns it moved to address them in spite of the timing difficulties surrounding the delivery of Ms Waghorn's memo to Mr Sanson. Its position is that it moved promptly to engage Ms Shaw to assist in resolving the issues and was prepared to continue to search for remedies at the time Ms Waghorn tendered her resignation. Finally it says, and Ms Waghorn accepts, Mr Sanson upon his return on 3 July attempted to have the applicant withdraw her resignation as the likely departure of Ms Reid would alleviate the situation. Ms Waghorn did not take up the invitation.

[21] The respondent says it acted at all times in good faith and was prepared to continue in resolving Ms Waghorn's issues. Accordingly, it says the applicant who resigned, worked out her notice period and subsequently undertook contract work for it cannot succeed in her claims given the facts of this case.

### **The issues**

[22] To determine this matter the Authority is required to resolve the following issues:

- Was the applicant deliberately misled in the course of her interview for employment; and
- Was the respondent in breach of its obligations of good faith when dealing with the applicant in both pre-employment and post-employment settings; and
- Was Ms Waghorn disadvantaged by any unjustified action on the part of the respondent; and
- Was the applicant subjected to a breach of her terms of employment on the part of the respondent so serious, that she was entitled to repudiate the agreement; and
- If any of these breaches are established on the evidence, what, if any, remedies are due to Ms Waghorn; and
- In the event that remedies are awarded what, if any, contribution did the applicant make to the circumstances of her particular situation?

**The investigation meeting**

[23] The applicant herself gave evidence before the Authority and was supported by Mr David Hawkey, her partner, who provided corroborative evidence on Ms Waghorn's state of mind over the final weeks of her employment with the respondent and the effects he observed following her departure.

[24] For the respondent the Authority heard evidence from Mr Sanson, Ms Lindroos, Mr Smith and Ms Shaw in person. Ms Reid also provided a written statement however, her evidence was taken by telephone from Wellington. The Authority was initially advised during the directions teleconference that Ms Reid was residing in Australia. In the light of that information the Authority reluctantly agreed to take her evidence by telephone. Had the Authority known the witness was as close as Wellington on the day of the investigation meeting it would have had her present her evidence in person. That is because in taking Ms Reid's evidence at a distance, the Authority was deprived of observing any interaction of this witness with Mr Sanson and the applicant.

[25] A range of significant evidence emerged from the investigation meeting including that which pinpointed the date on which the applicant chose to pursue alternative employment, her disappointment at not finding her employment "Camelot" with the respondent and her not being prepared to challenge Ms Reid about the way Ms Reid was managing her and the tasks she was assigning to the applicant.

[26] It was also of assistance that the respondent's witnesses were able to confirm the involvement of Advanced Dynamics and Investors in People with Antarctica New Zealand shortly after Ms Waghorn began her employment. The applicant became involved in these programmes and became convinced that the presence of these organisations within the workplace indicated an attempt by the respondent to resolve issues of dysfunction and mistrust within the organisation.

[27] The evidence from the respondent's witnesses made it clear that the involvement of these two organisations was to enhance Antarctica New Zealand's business planning and strategy development in working towards an internationally recognised accreditation. Having studied the relevant documents, the Authority is satisfied the project was to enhance and improve the respondent organisation not to remedy any serious and entrenched corporate malady.

**The determination**

[28] As the applicant has alleged several failings by the respondent in this matter I will deal with each separately.

***Misleading behaviour***

[29] The Authority has considered this issue in the light of *Sinclair v. Webb and McCormack Ltd* (1989) 2 NZBLC 103. The cited precedent sets the bar particularly high on this issue, particularly on the matter of intention to deceive. While the exchange at interview appears to present the respondent in a very favourable light, and appears to have omitted any reference to the Reid-Sanson relationship, I find this allegation is not made out.

***Good faith***

[30] In the face of the evidence put before the Authority this claim is not made out. Once the applicant put before Mr Sanson the concerns she had, he reacted most promptly to have them addressed. Given he was leaving the country the following day, a fact known to Ms Waghorn, he ensured Mr Smith was briefed and tasked with attending to the applicant's concerns. Following the process put in place by Mr Smith and his advising that if, following that process, the applicant had further concerns she was to bring them to him and they would be addressed, Ms Waghorn did not make such an approach.

[31] Further, having been encouraged to speak frankly with Ms Reid concerning her perceptions about how she and her responsibilities were being managed by Ms Reid, the applicant did not engage her manager on this issue at any time. That failure cannot, I find, be laid at the feet of the respondent given Ms Lindroos' encouragement that she address the matter directly with Ms Reid.

***Unjustified disadvantage***

[32] The applicant claims the disadvantage she suffered stemmed from what she describes as the *dysfunctional* relationship between Ms Reid and Mr Sanson and also from Ms Reid's disclosing to another employee the contents of a memo Ms Waghorn had sent her.

[33] In respect of the memo disclosure, the evidence was that Ms Waghorn herself had discussed this with other staff. It appears the information was known to a number of fellow staff members, several of whom had been advised by Ms Waghorn. I find that such circumstances cannot form the basis of a claim of unjustified disadvantage on the part of the respondent.

[34] Turning to the more substantial concern, the Reid-Sanson relationship was variously described as *dysfunctional*, *robust* and *good, if robust*. Considering the evidence in the round, it was quite evident that at particular points that relationship was certainly abrasive and appears, in part, to be based on Ms Reid's lack of respect for her CEO. The evidence also points to a strongly competitive element in Ms Reid's personality which it appears Mr Sanson had considerable difficulties dealing with.

[35] The Authority accepts that the difficulties between Ms Reid and Mr Sanson pre-dated Ms Waghorn's employment. However, both Mr Sanson and Ms Reid told the Authority that the relationship between them deteriorated after March 2006.

[36] While accepting that the fallout from the relationship between Ms Reid and Mr Sanson impacted on the applicant in the workplace, the actions between the protagonists were not directed, nor intended to be directed at the applicant. It is therefore difficult to see how in these circumstances, unpleasant though they were for Ms Waghorn to experience, they could constitute an unjustified action in her regard.

### ***Constructive dismissal***

[37] Regardless of the claims of the applicant and their basis in fact, Ms Waghorn, having tendered her resignation declined to withdraw it when advised by Mr Sanson that Ms Reid was about to leave the respondent's employment. Further she had already secured other employment, although I accept that it was at a lower salary. In addition Ms Waghorn worked out her notice and having done so, requested and obtained contract work for the respondent.

[38] In this situation a claim of constructive dismissal simply cannot be upheld. The employer responded promptly to the applicant's concerns having taken them seriously. Once the process was undertaken the applicant was advised she could instigate further assistance if dissatisfied. She did not. Further, Ms Waghorn as was

her right sought and obtained alternative employment but when urged to withdraw her resignation by Mr Sanson declined to do so.

[39] To have sought and obtained contract work from the respondent she claims treated her concerns with abject disregard, was at best, somewhat self-serving.

[40] Counsel for the applicant has submitted that in all the circumstances the applicant's resignation was foreseeable. I disagree because the respondent had moved to attempt resolution of the issues once made aware of them. The first time the respondent could have become aware of any likelihood of a resignation was when Ms Waghorn told Ms Shaw on 20 June 2006 that she was going to resign. This was in spite of Mr Smith's clear statement that if she had further concerns she was to advise him. Ms Waghorn's evidence was that she wrote her resignation over the weekend preceding 26 June 2006, the day on which she tendered it to her employer. While her resignation may not have come as a surprise, that falls short of being foreseeable, given the attempts to resolve the applicant's concerns.

[41] Each of the applicant's claims is dismissed. Ms Waghorn does not have a personal grievance and the Authority is unable to assist her further.

### **Costs**

[42] Costs are reserved. The parties are encouraged to resolve this issue between themselves.

Paul Montgomery  
Member of the Employment Relations Authority