

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 123/07  
5075557

BETWEEN Jennifer Shell  
Applicant

AND Ohibro Limited (formerly called  
Gandalf Group Limited)  
Respondent

Member of Authority: Denis Asher

Representatives: David Patten for Ms Shell  
No appearance by or for the Company

Investigation Meeting: Wellington, 29 August 2007

Submissions received: Oral submissions on the day of the investigation from  
the applicant.  
No submissions from the Company

Determination: 30 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

- [1] In her statement of problem filed in the Authority on 11 June 2007 Ms Shell said that she had been unjustifiably dismissed by the Company on or about 25 September 2006, and that it had breached both the discrimination provisions (family status) of the Employment Relations Act 2000 and the Parental Leave and Employment Protection Act 1987. The

remedies sought by Ms Shell were 6 months lost wages less any earnings, payment of \$15,000 for compensation for humiliation, etc and costs.

- [2] No statement in reply has been received from the respondent.
- [3] The parties have undertaken mediation.
- [4] During a conference call convened on 23 July to which the respondent was invited to participate but did not respond or make itself available, I directed that this problem would proceed to an investigation in Wellington, commencing at 10.00 a.m. on Wednesday 29 August. Advice of that direction was communicated to the Company's registered office.
- [5] Despite the failure of the Company to attend either the preliminary telephone conference or the 29 August investigation, I was satisfied as to the appropriateness to continue with the investigation because of the clear notice of both given to the respondent. That notice included the Authority's communications to the Company's registered office but also the applicant serving copies of the Authority's record of preliminary conference and direction dated 23 July 2007 and the notice of investigation meeting of the same date on both the Company's trading address (level 1, 4 Market Grove, Lower Hutt) and its registered offices and addresses for service, communication, share register and records (248b Ohiro Road, Brooklyn, Wellington); refer to the advice of 13 August from the applicant's process servers and to the Companies Office record of 3 July 2007.
- [6] I note here that the latter address is also the listed address of the respondent's new director and only share owner, Mr Chang ("Andy") Liu.
- [7] Authority support staff also spoke to a Mr Nick Cree on a number of occasions, advising him of relevant developments: Mr Cree was the Company's chief executive at the time of the applicant's employment. He is also a former owner of the Company. Attempts to contact the respondent's new owner, Mr Liu, were unsuccessful as messages left on his telephone were never answered.
- [8] The conduct of the respondent in this matter raises serious questions as to its good faith.
- [9] During the Authority's investigation Ms Shell confirmed she was seeking \$15,000 compensation for humiliation, etc, and lost wages totalling \$1,250 nett, being a total of 5 weeks of lost employment following the termination of her employment by the Company. In

a submission received on 30 August, Ms Shell advised she was seeking costs of \$1,762.50 plus disbursements of \$211.75 (largely for a process serving fee).

## **Background**

- [10] The following uncontested summary is taken from Ms Shell's statement of problem, her witness statement and the oral evidence given during the Authority's investigation. Having questioned Ms Shell closely, and in the absence of any evidence to the contrary, I accept entirely the applicant's version of relevant events.
- [11] The respondent is a 10 year old mortgage broking company specialising in refinancing, restructuring and property investment (refer to the Company's trademe job advertisement of 30 August 2006 and attached to the statement of problem as document 3).
- [12] Ms Shell commenced employment with the respondent as an administrative assistant around September 2002, when it was known as Gandalf Group Limited (refer to her employment agreement, document 1, above).
- [13] On or about March 2005 Ms Shell was appointed to the position of loan analyst and packager.
- [14] On 6 March 2006 Ms Shell went on parental leave.
- [15] By mutual agreement Ms Shell returned to work on a flexible part-time basis after 12 weeks of parental leave.
- [16] Approximately one month after returning to work the applicant was advised by the respondent's chief executive, Mr Nick Cree, that her part-time employment was not suitable to him, and that he needed a full-time employee. Despite Ms Shell saying she wanted to retain her loan analyst position, Mr Cree made clear his intention to employ someone else to carry out the work she was doing: the applicant says she was left with no option but to accept Mr Cree's offer of job-sharing a receptionist position. The next day the applicant was dismayed to discover that the someone else was in fact two others who were appointed to job-share the applicant's former position, despite the applicant's stated preference to do the same.
- [17] On 24 August, without prior warning, Ms Shell was invited into Mr Cree's office where he told her she was to be made redundant as the Company was upgrading its telecom system:

Mr Cree handed the applicant a letter confirming the same (document 2; the letter is incorrectly dated 25 September 2006, whereas it was given to the applicant on the day of the meeting).

- [18] Ms Shell was shocked and upset by the respondent's actions, particularly as there was no consultation or consideration of alternatives, and because the applicant became aware – after seeing the trademe advertisement shortly thereafter (see par 11 above) – that an arguably suitable vacancy was available within the Company, and because she had not been asked if she was interested in the position.
- [19] Ms Shell met with Mr Cree on 25 August 2006: supporting the applicant was her mother-in-law, Ms Chris Guthrie. The two women say that, at that meeting, Mr Cree conceded he had not been accommodating as he could have and agreed to provide Ms Shell with a further two weeks' employment. As a result, Ms Shell worked out a notice period totalling 4 weeks.
- [20] Following the termination of Ms Shell at the end of September 2006 the Company advertised for a personal assistant in a local paper on 17 October (document 4, above): the applicant was not advised of the position nor invited to apply for it.
- [21] Ms Shell says that she and her family (her husband and baby) suffered considerable financial loss as a result of the actions of the Company: as a result financial and other support from her mother in law, Ms Guthrie, totalling over \$5,000 was necessary. The applicant says the respondent's behaviour made her feel worthless, gutted and unappreciated. She says Mr Cree's attitude toward her changed markedly following the birth of her child: his body language and conduct made it clear he was unhappy with her having the baby, and feeding it, in the office. She says that, unlike other staff and in marked contrast to her treatment before parental leave, she was obliged to try and maintain her productivity by way of defective equipment given to her on her return from parental leave.
- [22] .Amongst other details, information from the Companies Office record the respondent changing its name from that of the Gandalf Group Mortgage Corporation Limited to Ohibro Limited on 12 June 2007; Mr Cree's resignation, and Mr Liu's appointment, as director are both dated 1 April 2007. Mr Cree advised an Authority support officer he had sold his business to Mr Liu.
- [23] As is made clear above, questions of good faith result from the Authority's unsuccessful efforts to engage Mr Liu and the latter's unexplained refusal to participate in this process.

## Discussion and Findings

- [24] I am satisfied that Ms Shell was unjustifiably disadvantaged (i.e. unlawfully discriminated against) and unjustifiably dismissed. I reach this finding because of the uncontested evidence before the Authority that, one month after her return from parental leave, her contracted and agreed part time position as loan analyst and packager was unilaterally taken from her and Ms Shell was effectively forced to take up a position she had no wish to occupy, that of receptionist. In turn and also without consultation or exploration of alternatives, the Company then forced Ms Shell's termination with its claim her position was redundant. There is no evidence before the Authority of the redundancy being genuine: rather the evidence clearly shows that the procedure adopted by the respondent in terminating Ms Shell's employment was grossly unfair.
- [25] The Company's actions are in breach of well-known good faith obligations, in particular s. 4 (1A) of the Act.
- [26] I am also satisfied from Ms Shell's evidence that her employer's attitude toward her changed markedly, and for the worse, on her return from parental leave, and that it was because of her family status that the Company acted, unjustifiably, in unilaterally taking from the applicant her contracted position and by then, without consultation and consideration of alternatives including the position advertised in trademe on or about 30 August 2006, effected her unjustified termination on the grounds of claimed redundancy.
- [27] The respondent's actions were not those, objectively measured, of what a fair and reasonable employer would do in all of the circumstances: s. 103A of the Act applied.

## Remedies

- [28] The applicant claims \$15,000 compensation for humiliation and \$1,250 nett for lost wages. I am satisfied Ms Shell is entitled to a significant compensatory sum for humiliation, etc. I make this finding because of the applicant's uncontested evidence as to the significant level of distress occasioned her by the respondent's discrimination against her as a result of her recently changed family status – a breach of s. 105 (1) (l) of the Act – and because of the Company's callous actions in first unilaterally denying the applicant her contracted position and then effecting her termination on entirely spurious grounds and without any procedural fairness. The Company's actions took no account of Ms Shell's greater vulnerability resulting from the recent arrival of her baby or the significance of her financial contribution

to the family: Ms Shell's husband is an ACC beneficiary and receives a modest nett weekly payment of \$400.

[29] Having regard to all of the circumstances, and by way of a global approach to the applicant's justified allegations, I am satisfied Ms Shell is entitled to the entire sum she seeks, i.e. \$15,000.

[30] I am also satisfied that, having promptly mitigated her losses, Ms Shell's claim for 5 weeks lost remuneration of \$1,250 should also be met in full.

### **Contributory Fault**

[31] There is no evidence before the Authority of the applicant's actions in any way contributing to the situation that gave rise to her personal grievance: s. 124 of the Act applied.

**Determination**

- [32] For the reasons set out above the Company is to pay Ms Shell \$15,000 (fifteen thousand dollars) compensation for humiliation, etc and \$1,250 nett (one thousand, two hundred and fifty dollars nett) compensation for lost wages.
- [33] Ms Shell seeks costs and disbursements of \$1,974.25. This claim has been brought speedily and economically by the applicant. In all the circumstances I am satisfied that the costs award sought is appropriate and direct the respondent to pay that sum to Ms Shell as a fair and reasonable contribution to the applicant's costs.

**Denis Asher**

**Member of the Employment Relations Authority**