

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 68/10
5163514

BETWEEN NATALYA MATYAGINA
Applicant
AND MATIPO TRADING
COMPANY LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Mark McGinn, Advocate for Applicant
John Delore, Advocate for Respondent
Investigation Meeting: 30 November 2009 at Christchurch
Submissions Received: 3 December 2009 from the Applicant
11 January 2010 from the Respondent
Determination: 16 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Natalya Matyagina's employment commenced with Matipo Trading Company Limited (Matipo Trading) on 11 March 2009 and ended on 26 March 2009 when she was advised her position was redundant. Ms Matyagina was party to an individual employment agreement with Matipo Trading.

[2] Ms Matyagina says that she was unjustifiably dismissed from her employment with Matipo Trading because there was no genuine reason for her redundancy and the process of implementing the redundancy was unfair. Ms Matyagina seeks reimbursement of three months' lost wages, compensation in the sum of \$7,000 and costs.

[3] Matipo Trading, by its managing director John Delore, says that Ms Matyagina's position was genuinely redundant and the process it took in implementing the decision was fair in all the circumstances.

[4] This matter was not resolved in mediation.

The issues

[5] The Authority is required to determine, in accordance with the test for justification set out in s.103A of the Employment Relations Act 2000:

- Whether Matipo Trading dismissed Ms Matyagina for the genuine reason that her position was redundant;
- Whether how Matipo Trading acted in all the circumstances leading up to and at the time of dismissal was what a fair and reasonable employer would have done in all the circumstances;
- If the Authority does determine that Ms Matyagina was unjustifiably dismissed then what remedies is she entitled to and are there issues of contribution and mitigation;
- Was Ms Matyagina paid correctly for hours worked, notice and holiday pay?

Whether Matipo Trading dismissed Ms Matyagina for the genuine reason of redundancy

Offer of the position

[6] Ms Matyagina was interviewed by Mr Delore for the position of office administrator for Matipo Trading after responding to an internet advertisement for a vacancy at the company. Ms Matyagina was offered the role by Mr Delore following an interview on 25 February 2009. A follow up email dated 2 March 2009 from Mr Delore to Ms Matyagina formally confirmed her appointment to the position of part time office administrator. It was anticipated that the hours required to be worked by Ms Matyagina were about 20 hours per week and Mr Delore advised Ms Matyagina in his email dated 2 March 2009 that she could work those hours on days and part days from Tuesday to Saturday.

Date of commencement of work and termination date

[7] It was agreed that Ms Matyagina would commence her employment on 11 March 2009. She had emailed Mr Delore on 4 March 2009 confirming she would work the full day on 11 March 2009 and part of the day on Thursday and Friday of that week.

[8] Ms Matyagina worked seven days in her position at Matipo Trading including 11 March 2009 before she was handed a letter on Thursday, 26 March 2009 by the sales manager, Damian Vercoe, after she attended for work that day.

The letter provided:

Natalya,

This is notice that your position has been made redundant, effective immediately. Enclosed is your pay plus one weeks severance. This decision has been made for commercial reasons.

[9] It was common ground that Ms Matyagina would not have known prior to Thursday, 26 March 2009 that her position was to be made redundant. She was not aware of any proposed or actual reorganisation or restructuring of the company before that date. She was aware on 25 March 2009 that a sales employee had been made redundant on the previous Saturday 21 March 2009 although there was no discussion with her on that date about her own position.

[10] Ms Matyagina's employment agreement contained employee protection provisions in the event that her employer restructured the business so work is performed for a new employer. The clauses refer to the employer activating, where the employee chooses not to transfer or is not offered a new position, the redundancy provisions of the agreement. Having carefully considered the agreement there is no redundancy provision as such. There is a general termination clause providing that the employee or employer provide one weeks notice in writing. Clause 4 of the employment agreement refers to the obligations of employer and employee and includes both parties dealing with each other in good faith.

Reason for the decision

[11] In the Employment Court judgment of *Simpson Farm Ltd v. Aberhart* [2006] ERNZ 825 which case concerned a dismissal for redundancy, it was stated in

para.[67] that so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions of employees redundant was for the employer to make and not for the Authority or the Court, even under s.103A.

[12] The Authority does need to be satisfied from the evidence that there is an adequate commercial explanation for a termination on the basis of redundancy and in this matter, Ms Matyagina put forward three reasons why she maintains her dismissal was not for the reason of genuine redundancy.

[13] The first reason Ms Matyagina put forward was that Mr Delore preferred another applicant who initially declined the offer of the position because she had another offer that she preferred. After Ms Matyagina had been offered the role by Mr Delore, the preferred applicant then indicated that she wished to again be considered for the role at Matipo Trading. On that basis Ms Matyagina alleges that Mr Delore had no particular interest in undertaking a proper training process and/or induction of her into the workplace. I am not satisfied from the evidence about this matter.

[14] The second reason put forward is that this was a dismissal for an ulterior motive, being that of perceived poor performance on the part of Ms Matyagina.

[15] In terms of the second reason, Mr Delore does not accept that the decision to make Ms Matyagina redundant was for any other reason, including her performance. Mr Delore said that the only reason he mentioned his concerns about her performance was that she had raised them in her evidence and he was responding to that.

[16] Ms Matyagina said in her evidence about performance that over the seven days she worked before her position was made redundant Mr Delore was generally unhappy with her performance. She said that Mr Delore yelled at her and put her down and that aside from briefly showing her what to do, she received no other training or assistance from him and he was unhelpful when she asked for assistance. Mr Delore denied ever yelling at Ms Matyagina and he was supported in his evidence by Mr Vercoe who said he never heard yelling.

[17] Ms Matyagina said that after two days in the office she began receiving neck and back pain because of the stress and that on the third day Mr Delore told her that the GST work she had been doing was not right and it was because she was not good enough, that she misunderstood his instructions and that she was *dumb*. I accept

Mr Delore did consider that Ms Matyagina, who is Ukrainian, had a problem understanding English although that is not accepted by Ms Matyagina. He also, I find, did consider that she did not follow his instructions and I am left with the clear impression that it is very likely he made comments to Ms Matyagina about his concerns. Mr Delore, however, maintained that he did not show his dissatisfaction or say things to Ms Matyagina as put in her evidence.

[18] Ms Matyagina said that on the day before she was advised that her position was redundant, this being 25 March 2009, Mr Delore lost self-control and began to yell at her when she asked him for some assistance. Ms Matyagina said that he told her he was still checking mistakes on the GST records and that he had engaged her because she told him she could perform the role and that she had to be careful what she said in her job interview because she had lied to him and he would have to take her to Court.

[19] Mr Delore said that there was no reference by him to taking Ms Matyagina to Court on 25 March 2009. He described her allegation as factually incorrect and further denied losing control on the day before Ms Matyagina was advised she was redundant.

[20] Although there was a conflict in the evidence as to the manner in which Mr Delore expressed his dissatisfaction with Ms Matyagina's performance, I am satisfied that he was dissatisfied with her performance but there was no proper management of any of these concerns.

[21] I find it likely that dissatisfaction in Ms Matyagina's performance was expressed quite strongly by Mr Delore over the days she worked. I have reached that view because Ms Matyagina raised a concern with Mr Vercoe during her first week about what Mr Vercoe described as a *perceived disagreement* with Mr Delore. Mr Vercoe said that he outlined to Ms Matyagina when she expressed some concern that Mr Delore had a naturally short and abrupt manner and this was just his normal way and he did not intend it to be offensive or rude. He said that she never mentioned her headaches and neck issues to him.

[22] I am further strengthened in my conclusion that there was an unpleasant exchange on the day before Ms Matyagina was made redundant between her and Mr Delore because that exchange upset her to the extent that she was intending when

she returned to work on 26 March 2009 to resign. That is notwithstanding that she says she needed the role for financial reasons.

[23] The performance concerns that were evident from Mr Delore's statement of evidence and from Mr Vercoe's were numerous in number. Mr Delore, for example, said that Ms Matyagina had no understanding of how to compile a spreadsheet, she mixed up paperwork, had no understanding of GST and was reluctant to follow verbal requests, showed an inability to understand English and simple instructions. Mr Vercoe was also critical of Ms Matyagina's performance and said in his evidence that she had become *a drag* on his time because she asked too many questions about her job, that she crashed the entire computer system and required much supervision because she was a messy worker. In his written evidence Mr Vercoe said in the discussion that he said he had with Mr Delore before the redundancy decision was made as to Ms Matyagina's position:

John and I had discussed the big drag on our combined time that Natalya was. ... John decided that it was easier if he assumed the duties again, as not only would it save the money which was important, but it would give relief to myself and the other staff so our performance was not hindered.

[24] Ms Matyagina said that because she was not given any training and had no knowledge of how the business ran, she did ask staff for assistance on a few occasions and found them helpful. Ms Matyagina denied having ever been talked to about the computer system and having any knowledge of a crash.

[25] In terms of the ulterior motive for her termination put forward by Ms Matyagina, that of perceived performance concerns, I accept that there was for employment of such short duration an extraordinary number of concerns about performance.

[26] The third reason put forward by Ms Matyagina as to why her redundancy was not genuine was that there was no satisfactory evidence in terms of any poor financial performance of the company. One of the issues for the Authority is the short time between the employment of Ms Matyagina and her termination. In terms of the timing of that Mr Delore said that he only became aware after Ms Matyagina was employed that sales had declined to the extent that he had to look, together with Mr Vercoe, at reducing overheads of rent, advertising and wages. Mr Delore said that he considered everyone's position in Matipo Trading during the week commencing

16 March 2009. That was one week after Ms Matyagina commenced her employment. He then made the decision about the redundancy of the salesperson position which was implemented on Saturday, 21 March 2009 and then he made a final decision about Ms Matyagina's position on the evening of 25 March 2009.

[27] I have considered the evidence that relates to the financial situation of Matipo Trading. In terms of any financial records, Mr Delore provided some GST records to support declining sales. In assessing these I have put to one side the evidence from Ms Matyagina that Mr Delore did not have up to date GST records and the suggestion, therefore, that the amounts on the GST records were simply the result of a guess. I simply record that the GST records were handwritten and although Mr Delore said that his company ran MYOB there was no MYOB-produced GST report.

[28] The GST records for the most relevant period from 1 December 2008 to 31 January 2009 are dated as signed on 24 March 2009. Mr Delore said that was a mistake and he had never been late in filing returns. Mr Delore was in China from 26 February until 10 March 2009. If Mr Delore, as Mr McGinn submits, simply made a mistake about that date and that was not the date on which he lodged the GST return, then I accept he could not have failed but to see the position at the time that he offered Ms Matyagina a position. In those circumstances, it could reasonably be concluded that, in that knowledge, he offered her the position anyway.

[29] Mr Delore said in his written evidence that although the combined figures were assembled for GST in late February he did not have an opportunity to analyse the impact they may have on the business until after Ms Matyagina commenced her employment. Somewhat inconsistently with that Mr Delore said in his written evidence that he tracks the performance of his business carefully.

[30] I conclude it is somewhat unlikely that whilst Mr Delore was taking active steps to advertise and interview for the administration position he had not turned his mind to whether the company could afford to employ someone in the part-time role particularly when two other employees had been made redundant in late 2008. That does raise significant doubt as to whether the dismissal for redundancy was for a genuine commercial reason. I also accept Mr McGinn's submission that Mr Delore did not present his evidence on the basis that whilst the financial position was perilous

at the time of Ms Matyagina's appointment he was hopeful that it could be turned around but as it transpired was unable to do so.

[31] Ms Matyagina asked Mr Delore about the financial state of the company before she accepted her role. She said in her evidence that Mr Delore advised her the company did not have debts and there was a discussion about stock. Mr Delore said that he advised Ms Matyagina that the company had no *term debt* but he said that the company definitely had normal monthly debt.

[32] Mr Delore says that the reason he did not consult with Ms Matyagina during the decision making process was that it would have caused her worry and concern. Mr Delore and Mr Vercoe had some firm views on this but I am required in my role to apply the law. In *Simpson Farms* at para.[65] the Court stated:

... The statutory obligations of good faith dealing and, in particular, those under s 4(1A)(c) inform the decision under s.103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.

[33] The good faith obligations in the Employment Relations Act 2000 required Mr Delore in the employment relationship to be active and constructive and responsive and communicative about changes to the business and proposals which may impact on employees including redundancy. There was also a broad reference to good faith in the employment agreement. Ms Matyagina had no opportunity to comment on information before her dismissal as required under s.4 (1A) (c) of the Employment Relations Act 2000.

[34] A complete failure to consult with Ms Matyagina about the proposed changes to the business, in this matter casts further doubt on the genuineness of the redundancy. The process consisted of Ms Matyagina being handed a letter by Mr Vercoe advising her that her position was redundant with no prior warning. I accept that in all probability Mr Vercoe did his best to be kind in those difficult circumstances but it was not enough for me to conclude that it is what a fair and reasonable employer would have done. There were reasons put forward why Mr Delore could not at least have undertaken this task. I do not accept any of these prevented Mr Vercoe arranging with Ms Matyagina a suitable time to meet with him. There were significant procedural deficiencies.

[35] Mr Delore says that the decision to make Ms Matyagina redundant was genuine and only reached on the basis of the financial performance of the company and the need to save money. I accept that Ms Matyagina was not replaced and that the sales for Matipo Trading may well have declined. The termination of Ms Matyagina also took place during a difficult economic time in New Zealand and globally. I am not, however, satisfied from the evidence, after such a short period of employment of seven days and in circumstances where her performance was perceived by Mr Delore as poor, that Ms Matyagina was dismissed for genuine commercial reasons of redundancy.

[36] I find it more likely that Matipo Trading was motivated to terminate Ms Matyagina's employment because of perceived performance issues on her part which were never properly managed. I find that the process leading to and the decision to dismiss Ms Matyagina, notified to her on 26 March 2009, was unjustified because it was not for reasons of genuine redundancy and the process was not what a fair and reasonable employer would have done in all the circumstances.

Determination

[37] For the reasons given above, I find that the termination of employment on the basis of redundancy which was advised to Ms Matyagina on 26 March 2009 was an unjustified dismissal. Ms Matyagina has a personal grievance that she was unjustifiably dismissed from her employment with Matipo Trading and she is entitled to remedies.

Remedies

Contribution

[38] I do not find any contribution on the part of Ms Matyagina. Whilst there was some reference to performance concerns, Matipo Trading failed to address these in a proper manner with Ms Matyagina and in the absence of any process at all in this regard I cannot say that these performance issues contributed in any blameworthy manner to the personal grievance.

Lost wages

[39] Ms Matyagina said that it took her until June 2009 to find another position in order to build up the hours again. Ms Matyagina intended on 26 March 2009 to tender her resignation because she found the job had become so unpleasant. She took no steps in that regard but in terms of assessing any loss that is related to the personal grievance, I do consider that is a factor I should take into account in assessing actual loss.

[40] In those circumstances, whilst three months' lost wages is sought I am not satisfied that this relationship would have continued for that period of time and in those circumstances I am of the view that it would be appropriate to limit any reimbursement to a one month period less one week already paid for notice. The fairest way to deal with the issue of lost wages in these circumstances I find is to assess whether Ms Matyagina was paid correctly for the hours she worked, notice and holiday pay and if not make appropriate orders and then award a further three weeks lost wages on the basis of the average hours she worked for reimbursement of lost wages.

[41] Ms Matyagina worked 21.20 hours for the week ending 15 March 2009 and then 16 hours for her second week. I accept her evidence that she worked seven hours on 25 March 2009 before she was advised of her redundancy on 26 March 2009. From the first two week that is an average of 18.6 hours. I am of view it would be fair to calculate notice payment on the basis of the hours averaged. Ms Matyagina's hourly rate was \$19.00 per hour. Ms Matyagina actually worked 44.20 hours including her second to last day. I have not included payment for the day she was made redundant as she did not actually start work. Ms Matyagina should have received the sum of \$839.80 gross. She was then to be paid one week's payment for notice and on the basis of 18.6 hours that should have been \$353.40 gross. Ms Matyagina was not required to work that notice period out. Ms Matyagina was also entitled to holiday pay on the gross sums set out above at 8% of \$95.45 so that is a total gross payment of \$1288.65. Ms Matyagina was paid the sum of \$1117.00 gross so is owed the sum of \$171.65 being the shortfall.

[42] I order Matipo Trading Company Limited to pay to Natalya Matyagina the sum of \$171.65 being the shortfall as set out above for payment for hours worked, notice and holiday pay.

[43] Mr McGinn has asked for holiday pay on the amount awarded for reimbursement. I am not minded to make an award in addition to the three weekly amount for holiday pay. The three week amount is \$1060.20 gross and it is that which I shall order be paid.

[44] I order Matipo Trading Company Limited to pay to Natalya Matyagina the sum of \$1060.20 gross being reimbursement of lost wages.

Compensation

[45] Mr Delore submits that Ms Matyagina was not particularly distressed when handed the envelope by Mr Vercoe advising her that her position was redundant because she laughed and said that it saved her from resigning. Ms Matyagina on the other hand said that Mr Delore over the short period of employment had put her down and that her confidence suffered and that she was hurt by the way she was treated and that she had never been treated this way. She said that she was upset that Mr Delore did not advise her that her employment was terminated.

[46] I accept that Ms Matyagina was distressed and humiliated at the time she was advised of her dismissal.

[47] Mr McGinn has sought the sum of \$7,000. I have taken into account that Ms Matyagina was intending to leave her position and on that basis I have been careful to assess any compensation taking that into account but it is also fair to take into account that her distress was not simply confined to the termination itself. She had felt so unhappy the day prior as a result of how she considered she had been talked to by Mr Delore that she felt she had no option but to leave. I am of the view that a fair and reasonable award in all the circumstances would be the sum of \$5,000.

[48] I order Matipo Trading Company Limited to pay to Natalya Matyagina the sum of \$5000 without deduction being compensation under s. 123 (1) (c)(i) of the Employment Relations Act 2000.

Costs

[49] I reserve the issue of costs. Mr McGinn has until 30 March 2010 to lodge and serve submissions to costs and Mr Delore has until 13 April 2010 to lodge and serve submissions in reply.

Summary of findings and orders made:

- I have found that Ms Matyagina was unjustifiably dismissed.
- I have ordered Matipo Trading Company Limited to pay to Ms Matyagina the sum of \$171.65 for a shortfall on my calculation for wages worked, notice and holiday pay.
- I have ordered Matipo Trading Company Limited to pay to Ms Matyagina the sum of \$1060.20 gross being reimbursement of lost wages under s. 123 (1) (b) of the Employment Relations Act 2000. I have not awarded holiday pay on that sum although requested.
- I have ordered Matipo Trading Company Limited to pay to Ms Matyagina the sum of \$5000 without deduction being compensation under s. 123 (1)(c)(i) of the Employment Relations Act 2000.
- I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority