

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 208
5361884

BETWEEN

CATHERINE TAN
Applicant

AND

MORNINGSTAR INSTITUTE
OF EDUCATION LIMITED
t/as MORNINGSTAR
PRESCHOOL
Respondent

Member of Authority: R A Monaghan

Representatives: G Pollak, counsel for applicant
P Pa'u, advocate for respondent

Investigation Meeting: 16 April 2012

Determination: 19 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Catherine Tan says her former employer, Morningstar Institute of Education Limited (Morningstar), dismissed her unjustifiably on the ground of redundancy.

[2] Ms Tan seeks remedies in respect of her unjustified dismissal, as well as penalties for unspecified breaches of her employment agreement and of good faith.

[3] Morningstar says it commenced a consultation process in respect of a possible redundancy but Ms Tan terminated her employment before the process was completed. In those circumstances there was no dismissal.

[4] Morningstar denies any breaches of its obligations.

Background

[5] Morningstar operates an early childhood centre, offering early childcare services incorporating a bilingual Mandarin/English approach. It employed Ms Tan, who was a registered early childcare teacher, as the head teacher.

[6] The centre's manager, Stephen Tan (who is not related to Ms Tan), gave evidence that, from the beginning of 2011, he and the directors were becoming concerned about the financial position of the centre. In 2011 the government announced changes to the funding of early childcare centres which meant Morningstar's income would reduce, while at the same time its operating costs were increasing. Because the centre serviced a niche market the roll was not increasing, creating more pressure as funding was based on student numbers. In order to continue operating the shareholders were injecting money into the business.

[7] In or about July 2011 Mr Tan referred to these difficulties when he advised Ms Tan the centre could not afford to close down over the Christmas period. One of Morningstar's directors, Nina He, had a similar discussion with Ms Tan. In June 2011 Ms He had also raised the state of Morningstar's finances with Ms Tan during a discussion about the reimbursement of expenses, when she advised Ms Tan's claim for reimbursement could not be met because Morningstar was in financial difficulty.

[8] At a staff meeting in or about June or July 2011 Mr Tan raised the possibility of reducing the hours of work of staff members in order to relieve the financial pressure. Morningstar employed three full time qualified teachers, including Mr Tan and Ms Tan, and four part time teachers' assistants. Ms Tan told Mr Tan at the meeting that the employment agreements of the full timers provided for 40 hours' work per week, and these hours could not be cut. She did not make any alternative suggestions herself regarding ways of meeting the financial difficulties, as she said that was not her job.

[9] Cuts to the hours of work of some of the part time staff members were implemented, but were not sufficient to address the difficulties.

[10] In early August 2011 a drop in student numbers was projected, and Mr Tan and the directors decided a significant reduction in operating costs was necessary if the centre was to remain open. When Ms He reviewed rents, operating costs and wage costs she found the only remaining area in which cuts were possible was the costs associated with the full time qualified teachers.

[11] Morningstar decided Ms Tan's position should be disestablished, because it carried the highest salary and was the greatest cost. Further, Mr Tan was paid at a lower rate than Ms Tan, yet carried out additional duties as centre manager and worked for longer hours. The other teacher had already accepted a lower rate in negotiations at the commencement of employment. The preferred approach overall was to address one position rather than all three.

[12] The parties' written employment agreement included provision for redundancy. The provision read:

30. Redundancy

3.1 In the event the employer considers that the employee's position of employment could be affected by redundancy or could be made redundant, the employer shall, except in exceptional circumstances, consult with the employee regarding the possibility of a redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the employer shall provide to the employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the employee with an open mind before making a decision as to whether to make the employee's position of employment redundant. If no such opportunities exist, with the result that the employee's position is redundant, the following possibilities will be considered by the employer:

- career advisory or other counselling services for the employee*
- time off for the employee for job search purposes*
- the extent, (if any) to which pay in lieu of notice may be provided by the employer, enabling early release of the employee from employment.*

[13] The directors recognised they had an obligation to consult with Ms Tan before making a final decision, and planned to do so. They prepared a document dated 12 August 2011 which summarised the causes of the financial pressures and said:

After weighing up all the factors that make Morningstar the place it is and the possible options for balancing the budget, the management decided that the only realistic way to cover the significant drop in our income was to consider making one full time qualified teacher position redundant.

The management feels that the fairest way to approach this situation is to use the highest-pay employee as the criteria for possible redundancy.

[14] The document then set out a time line under which Morningstar would meet with the 'affected staff member' on 12 August to advise of the proposal, then again on 19 August to obtain the employee's feedback to the proposal, and finally to advise of the outcome on 22 August. The document included a request that feedback be provided in writing before the 19 August meeting, and invited an approach to Mr Tan if further information was sought.

[15] A meeting was arranged for Friday 12 August. Although Morningstar's intention was to go through the matters set out in the document, Ms Tan was not told in advance of the purpose of the meeting.

[16] Two of the three directors attended with Mr Tan and Ms Tan.

[17] Ms He opened the meeting by identifying the reasons why Morningstar was under financial pressure. She also said it was necessary to cut costs and that staff salaries were too high.

[18] Ms Tan asked if Ms He was suggesting a cut in pay (Ms He's version) or asked Ms He if she wanted a pay cut (Ms Tan's version), and Ms He responded she was, or did, not. Even if Ms Tan's account of the discussion regarding a possible cut in pay was the more accurate, I do not accept her assertion in evidence that she made an offer to take a cut in her pay that was rejected out of hand. I find it likely that, at that point in the conversation, the matter was being raised as a question of clarification and not as a suggested alternative to redundancy which was rejected. I am reinforced in this view by the attitude to cuts in pay which Ms Tan had expressed several weeks earlier.

[19] Ms He said she went on to advise Ms Tan her redundancy was being considered. Ms Tan replied by saying she understood, and that as the highest paid person it made sense for her position to be made redundant. Discussion turned to possible marketing initiatives. According to Mr Tan, at that point he sought to return to the matter of redundancy, and showed Ms Tan the 12 August document.

[20] Ms Tan said in a written statement of evidence that she was simply handed the 12 August document and told she was to be made redundant. Plainly there was more to the conversation than that, although the accounts of it were in conflict. One of the areas of conflict concerned Ms Tan's denial that she told Ms He that she 'understood' that the selection of her position to be made redundant was appropriate since she was the highest paid teacher. My view of Ms Tan's evidence overall means I consider it likely she made that comment, and likely that her denial was intended to address any suggestion that, in making it, she was resigning.

[21] Mr Tan said that after he showed Ms Tan the document he went on to say that she was not being asked for a decision, and she should not rush as there was to be a further meeting on 19 August where she could provide her thoughts. Ms Tan responded with a comment Mr Tan said he did not understand, but his account of the comment suggests it was to the effect that Ms Tan doubted whether a further meeting would make any difference. For her part Ms Tan did not recall the exchange, but Mr Tan's account was credible and I accept it.

[22] Ms Tan said she gave the 12 August document a 'quick skim' when it was handed to her, and that she read the 'opening bits'. There was no suggestion that she queried the difference between the contents of the document and her view that she had just been told her redundancy was already decided. I find it likely that at best Ms Tan did not read the document carefully, and that she considered her redundancy a fait accompli on 12 August and reacted accordingly.

[23] Ms Tan's evidence was also that, when she was given the document, she asked when she was 'to finish' and Mr Tan replied 'next Friday'. Ms Tan said a check confirmed that the date on the following Friday was 19 August, and the parties agreed on it as the termination date. Mr Tan told Ms Tan she would be paid to 23 September, and would not be required to attend work.

[24] Mr Tan and Ms He denied discussing and agreeing that Ms Tan's employment would terminate on Friday 19 August. The direct evidence about the conversation on 12 August left me unable to determine the matter on the basis of that evidence, other than to say there was a conversation of some kind about the following Friday. However the evidence of Mr Tan and Ms He about their subsequent actions leads me

to find it likely they did not understand the outcome of the 12 August meeting to be an agreement that employment would terminate on that Friday and that Ms Tan would receive payment to 23 September. They still intended to follow the timeline in the 12 August document.

[25] The last relevant area of conflict in the evidence concerned whether Ms Tan indicated she had plans to move out of Auckland for family reasons. Ms Tan denied doing any more than indicate she planned to visit her son. I am also unable to determine the content of the conversation on the parties' respective accounts alone. However I accept Morningstar understood Ms Tan to have conveyed such an intention, while I also accept Ms Tan was planning no more than a visit.

[26] It was common ground that the meeting ended with a discussion about what information would be given to the staff. Ms Tan said she asked about this, and told Morningstar she did not want the staff to be told she had resigned because that was not the case. Mr Tan denied any mention of resignation. He said Ms Tan asked that there be no announcement of redundancy, and advised she would make an announcement to the staff herself.

[27] In the light of the chronology of events, I find it unlikely that either party had formed the view on 12 August that Ms Tan's employment was being terminated by her resignation and even less likely that word was used on 12 August. I prefer Mr Tan's evidence on that point.

[28] Ms Tan continued to perform her duties from 12 – 19 August. She said that, in accordance with her understanding that 19 August was to be her last day of work, she did not report for work after that date.

[29] Mr Tan said although he had planned to follow the timeline in the 12 August document, Ms Tan advised him on the morning of 19 August that she had decided to finish and her last day was that day. The response did not surprise him both because another of the directors had advised of a conversation of a few days earlier in which Ms Tan had said she was leaving, and because of the understanding that Ms Tan was planning to move out of Auckland.

[30] Thus Mr Tan assumed that, during the meeting timetabled for 19 August, Ms Tan would confirm her intention to leave. From his point of view, she did. For her part Ms He said she also took it that Ms Tan was resigning.

[31] However there was nothing to indicate the beliefs about Ms Tan's actions were correct, and I accept Ms Tan's denials that she resigned.

[32] On 23 August Ms Tan came to the centre to request a reference. She also told Mr Tan she had not yet received a 'decision letter'. Mr Tan said there was no letter as Ms Tan had made the decision to leave.

[33] Ms Tan had prepared a letter herself, which she gave to Mr Tan to sign. She did so because of her belief that parents of the children at the centre had been told she had resigned, and she wanted the correct position recorded. I accept she had that belief and acted accordingly.

[34] The letter was dated 19 August 2011 and read:

Following on the redundancy letter dated 12th August 2011 from the Morning Star Preschool management, and the following meeting between the management and Catherine Tan, the head teacher, on the 12th August 2011, this letter confirms the following:

- 1. Morningstar Preschool advised Catherine Tan that her employment was made redundant due to financial crisis.*
- 2. There will be no redundancy paid out as per the employment contract. The date of redundancy will take effect with a month's notice from 22 August 2011. Therefore the last day of employment would be on the 23rd September 2011.*
- 3. Morningstar preschool offered to let Catherine take one month's fully paid leave to look for alternative employment, including any outstanding annual leave owing. Catherine has accepted this offer.*
- 4. The centre manager advised the employee's final pay will be deposited on the 23th August(sic) 2011.*

[35] If Ms Tan's evidence that the contents of the letter were based on the meeting of 12 August was intended to mean the letter was an accurate record of what occurred at the meeting, I do not accept that. The letter embodied Ms Tan's interpretation or understanding of what had happened and of her entitlements under the employment agreement.

[36] Mr Tan signed the letter. His doing so was not an acceptance of Ms Tan's account of the 12 August meeting. Rather the letter records, and the signature acknowledges, the arrangements implemented in respect of the termination of Ms Tan's employment.

Was there a dismissal

[37] The question of whether Ms Tan was dismissed is concerned with the source of the initiative for the termination of Ms Tan's employment.

[38] The initiative began with Morningstar's proposal to make Ms Tan's position redundant, which it conveyed to her on 12 August. Ms Tan neither wished nor planned for her employment to end. Instead Morningstar's proposal led it to embark on a process which, subject to Ms Tan's responses, would probably lead to the termination of her employment on the ground of redundancy.

[39] From Morningstar's point of view a consultation phase was to precede any final decision. The phase was to culminate in a meeting on 19 August during which Ms Tan would provide her feedback on the proposal. From its point of view Ms Tan's feedback was that she was leaving.

[40] Morningstar says this amounted to a termination of Ms Tan's employment at her initiative. Ms Tan's reacting to Morningstar's proposal by taking the stance that a decision on the proposal had already been made could be said to be so premature that the initiative for the termination of her employment moved to her. However I find on the facts here that the prospect of redundancy was too real, and Ms Tan's actions too strongly influenced by this, to amount to a new initiative from her. Her responses are relevant, instead, to the adequacy of the consultation process.

[41] For these reasons I find the initiative for the termination of employment remained Morningstar's.

[42] In turn I conclude that Ms Tan did not resign, rather that she was dismissed on the ground of redundancy.

Was the dismissal justified

[43] Morningstar was in financial difficulty, as a result of which there was a genuine redundancy situation affecting Ms Tan's position.

[44] To justify any resulting dismissal Morningstar was obliged as a matter of fairness and good faith to consult in a meaningful way with Ms Tan about the matter, and more particularly on the prospect of her employment being terminated by reason of redundancy arising out of the financial difficulties. It sought to do so according to the plan set out in the 12 August document.

[45] I have found that Morningstar did not convene the meeting of 12 August with the intention of advising Ms Tan that her position had been made redundant, and that no final decision to end her employment had been made. It sought to explain why a redundancy was necessary and why it was proposing that Ms Tan's position be made redundant. It intended to give her an opportunity to consider its proposal and the reasons for it, and to meet again for a further discussion a week later. I have also found that Mr Tan and Ms He interpreted her reaction as a form at least of acquiescence in the proposal, and that even so Mr Tan advised Ms Tan not to rush any decision on the matter as there was to be a further meeting about it.

[46] Since Ms Tan had been given a document containing that same information, and at least appeared to have looked through it, there was no reason to believe she did not understand it. She should have read the 12 August document more carefully, if not during the meeting then certainly after it. Moreover, when discussing it with her flatmate in what her evidence suggests was the following week, she should have reconsidered her construction of the meeting and in turn whether Morningstar was attempting act in accordance with the document. Her account of her discussion with her flatmate suggests the discussion centred on a view that the termination had already been decided and that Ms Tan had been deprived of her rights, to the exclusion of the possibility that Morningstar had been attempting to initiate a consultation with her.

[47] Ms Tan's taking that view meant she did not take the opportunity for input which had been offered. She did not take the opportunity to propose alternatives - or

seek more information to assist her to make any proposal - and I have rejected her assertion that, on 12 August, she proposed taking a reduction in her pay.

[48] For those reasons I conclude that Morningstar attempted to observe its obligation to consult with Ms Tan, but that Ms Tan's reaction meant it could take matters no further than it did.

[49] Accordingly I conclude that the dismissal was justified.

Penalties

[50] The above findings mean there are no grounds on which to consider any order for the payment of a penalty.

Costs

[51] Costs are reserved.

[52] The parties are invited to agree on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority