

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 22
5432868

BETWEEN CONNIE MATEHAERE
 Applicant

AND PRINTSTOPPLUS LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for the Applicant
 Lawrence Evans, on behalf of the Respondent

Investigation Meeting: 11 February 2014 at Wellington

Submissions Received: At the investigation meeting

Determination: 3 March 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Connie Matehaere has applied to the Authority to determine her claim that she was unjustifiably dismissed by her employer Printstopplus Ltd (Printstopplus).

[2] Ms Matehaere says she was advised by Printstopplus that her position was disestablished. She says Printstopplus later became aware that her contractual entitlement to redundancy compensation is equal to 6 months' pay. She says it then attempted to renegotiate her entitlement to compensation and when she resisted this approach Printstopplus sought to retract notification of her redundancy.

[3] Ms Matehaere alleges that the process undertaken to make her redundant was substantially and procedurally unfair. She seeks payment of redundancy compensation according to the employment agreement, compensation for humiliation and loss of dignity, costs, and recovery of the Authority's filing fee.

[4] Printstopplus states there is no substance to Ms Matehaere's claims. It denies Ms Matehaere was ever advised she was redundant, or that her role has been disestablished. Printstopplus says Ms Matehaere has not been dismissed and her position remains open and available to her.

Issues

[5] To ascertain whether Ms Matehaere was unjustifiably dismissed the Authority is required to determine firstly whether Ms Matehaere was dismissed. An examination as to whether Ms Matehaere was dismissed by reason of redundancy on 23 July and/or 8 August 2013 is necessary. If the evidence obtained about those meetings does not establish that Ms Matehaere was dismissed I must consider whether there is any other information to support Ms Matehaere's claim.

[6] If Ms Matehaere is found to have been dismissed then I will need to examine whether that action was justifiable.

Relevant information

[7] Printstopplus provides a range of specialist printing products and services. Mr Lawrence Evans provided evidence to the Authority, and is the Managing Director and sole shareholder of Printstopplus.

[8] Before commencing her employment with Printstopplus in June 2011 Ms Matehaere signed a written individual employment agreement containing the following provision:

In the event of a redundancy you will be entitled to compensation based on 26.4 weeks' salary or average weekly wage.

[9] Ms Matehaere was later promoted to Manager of Accounts Payable but continued on the same employment agreement.

[10] In September 2011 Ms Matehaere and another colleague discussed the redundancy compensation pay-out clauses in each of their respective individual employment agreements. Ms Karen Harkness, employed at that time as the Management Accountant, was also involved in that conversation. The evidence is that all participants to the discussion agreed that the recorded compensation amount was unusual.

[11] On 3 November 2012 Ms Matehaere injured her shoulder. She worked intermittently under ACC cover until March 2013. In May 2013 she underwent surgery.

[12] During her rehabilitation Ms Matehaere would, on occasion, meet with Ms Harkness, who has since been promoted to Financial Manager, to catch-up on work and personal matters. In late June 2013 Ms Matehaere indicated that, dependent on her specialist's advice, it was likely she would soon be able to return to work. Arrangements were made for Ms Matehaere, Ms Harkness and Mr Evans to meet and discuss, amongst other things, Ms Matehaere's return to work plan.

Meeting of 23 July 2013

[13] A meeting was held on 23 July 2013. There is considerable dispute about what exactly was said at this time.

[14] It is agreed that the meeting commenced with Ms Matehaere reporting that she was due to see her surgeon later that week. She anticipated she would be given clearance to begin gradually returning to full time work. The parties canvassed how Ms Matehaere's workload had been managed over the previous 9 months. Mr Evans says he updated Ms Matehaere on changes within the print industry and the affects these had on Printstopplus, including changes to how work was performed in the financial team and the need to reduce costs.

[15] Ms Matehaere says Mr Evans told her that her job had been shared amongst staff and that the distribution had worked well. She says he then advised that redundancies needed to be made and told her "*on at least five occasions*" that her job was gone. Ms Matehaere says she was unhappy to hear that her role was disestablished but accepts she did not raise concerns about the lack of forewarning or consultation about the decision. She says she regarded Mr Evans as having already made up his mind on the matter and states she did not think it worth protesting.

[16] Both Ms Harkness and Mr Evans reject Ms Matehaere's account. They say that having discussed the need for Printstopplus to reduce costs, Mr Evans foreshadowed the possibility that redundancies across the company might occur before Christmas, and that every role was being examined.

[17] Ms Harkness and Mr Evans both say that at this point Ms Matehaere's demeanour changed and she appeared eager to progress this aspect of their discussions. They each say Ms Matehaere asked a number of questions including which work groups were affected, how many people would be redundant and who, and if her role was amongst those.

[18] Mr Evans says he was unable to answer Ms Matehaere's inquiries as no proper evaluation had been concluded and Printstopplus was in the process of "*number crunching*" with KPMG (its accountants). He says he told Ms Matehaere that as yet nothing was certain and no decisions as to whether Printstopplus would be making redundancies had been made.

[19] Mr Evans and Ms Harkness each attest that Ms Matehaere's interest was such that Mr Evans asked Ms Matehaere if she was interested in taking redundancy. They both agree that Ms Matehaere did not respond directly to the question but say Ms Matehaere stated that if her position was to go she wanted to have the matter addressed before she returned to work.

[20] Mr Evans and Ms Harkness were each resolute in their evidence that at no point was Ms Matehaere told her position was redundant or that anything was said that would have reasonably allowed Ms Matehaere to form that conclusion.

[21] It is accepted that the meeting concluded with agreement that the parties would meet again in a week. What is not agreed is the purpose of that meeting. Ms Matehaere says she anticipated the meeting was to discuss whether she would work out her notice period and if so what work she would undertake. Mr Evans and Ms Harkness say they thought the meeting was to finalise a return to work programme following any recommendations Ms Matehaere's surgeon may make during Ms Matehaere's consultation later that week. Mr Evans agrees he advised Ms Matehaere that he was happy to further discuss the possibility of redundancy if she wanted to.

[22] That afternoon Ms Matehaere sent a text message asking Ms Harkness to scan and email a copy of her employment agreement.

Events between 23 July and 8 August 2013

[23] On 26 July 2013 Ms Harkness received a phone call from Ms Matehaere's physiotherapist to discuss a 'return to work' plan commencing 12 August 2013. In an

email dated 28 July 2013 Ms Matehaere confirmed her surgeon had agreed she could commence a gradual return to work starting 12 August 2013. In addition, the email stated:

Can a meeting please be arranged between Lawrence, yourself and I before the 12th to discuss the disestablishing of my job (Manager of Accounts Payable) and what I will be doing on my return to work.

[24] On 30 July 2013 Ms Matehaere sent a further email to Ms Harkness as follows:

Can you please advise me when the next process will be done for the redundancy? When will we be having the next meeting (Lawrence said in a week and its been a week now) and when will I receive everything in writing.

...

[25] Ms Harkness says she regarded the emails as an indication that Ms Matehaere wished to pursue redundancy as an option. Ms Harkness says she was unsure exactly what it was that Ms Matehaere wanted in writing.

[26] On 2 August 2013 Ms Matehaere sent an email to Mr Evans stating:

Can [you] please advise me when we will be having the next meeting and when I will received (sic) the paper work about the redundancy.

[27] Mr Evans responded. A meeting was scheduled for Thursday 8 August 2013.

[28] On 6 and 7 August 2013 there was an exchange of text messages between Ms Matehaere and Ms Harkness. Ms Matehaere asked if Mr Evans had seen her employment agreement and when advised that he had not, sent a text stating: “*okay it is going to be interesting*”. Ms Matehaere says this comment was made because she thought Mr Evans would “*change his mind about making me redundant*” when he became aware of the redundancy compensation payable under the employment agreement.

[29] Ms Harkness says that upon receipt of these texts she recalled the content of Ms Matehaere’s employment agreement with respect to redundancy compensation and advised Mr Evans of the matter.

[30] The evidence is that Mr Evans was unaware of Ms Matehaere’s redundancy provisions, but once informed he considered the provision to be a typographical mistake. Mr Evans says he thought Ms Matehaere would agree that the provision was

clearly an error and advised Ms Harkness that he would discuss the issue with Ms Matehaere at the meeting scheduled for the following day.

Meeting of 8 August 2013

[31] The parties met again on 8 August 2013. The meeting commenced with a conversation about Ms Matehaere returning to work the following Monday (12 August 2013) in accordance with the recommended 'return to work' plan. Ms Harkness says the discussion quickly progressed to whether Printstopplus would be making redundancies. She says Mr Evans emphasised that no decisions had been made about which roles within Printstopplus might be redundant but asked Ms Matehaere what her views were about her position and what would work best for her, especially whilst receiving ACC.

[32] Ms Matehaere does not accept Mr Evans' or Ms Harkness' account of the meeting. She says she was told by Mr Evans that she was "*redundant as of today*".

[33] There is no dispute that the validity of the redundancy provision was examined. Mr Evans asserted that the provision stated in the employment agreement was a clerical mistake and should record 4 weeks, whereas Ms Matehaere advised she was entitled to what was contained in the agreement. It is clear there was a debate as to when Ms Matehaere became cognisant of the redundancy provisions. During the meeting Ms Matehaere advised it was only after she was employed that she became aware that her redundancy provision was unusual.

[34] Ms Matehaere says that Mr Evans offered to pay her 8 weeks tax free redundancy compensation. She says she advised "*no thanks I will have what's in my contract*".

[35] Ms Harkness and Mr Evans both deny Ms Matehaere was offered 8 weeks' redundancy compensation. Mr Evans says that in support of his view that the redundancy compensation provision was a misprint, he canvassed with Ms Matehaere his understanding of redundancy compensation norms within the print industry, stating 8 weeks was considered at the high end of what would be offered.

[36] One of the few areas of agreement between the parties is that the meeting was concluded when Mr Evans advised he was uncertain about the status of the redundancy clause and that he would seek external advice. He advised he would get

back to Ms Matehaere in the near future. Tentative arrangements were made to meet on 13 August 2013.

Events after 8 August 2013

[37] Mr Matehaere travelled to Auckland on 9 August 2013 for a holiday weekend, but was unexpectedly admitted to hospital during this time.

[38] At 6.58am on 12 August 2013 Ms Matehaere sent a text message to Ms Harkness stating she was in Auckland, and on doctor's orders was unable to fly. She advised she would be back in Wellington in a few days. Without knowledge of this communication Mr Evans sent Ms Matehaere a text message at 7.40am stating "*Hi Connie. You don't need to come in today. Will call you for following meeting.*"

[39] On 14 August Mr Evans contacted Ms Matehaere to arrange to meet and became aware she was in hospital which precluded any immediate conversation about Ms Materhaere's employment agreement.

[40] Following her return to Wellington on 23 August 2013 Ms Matehaere sent Mr Evans an email on 26 August 2013. The material portions of the email state:

I assume by your text received on the 11-08-13¹ that I am not to return to work at all as my job has been disestablished and no longer available and you are making me redundant. I have still not received anything in writing. ...

...I would like to know if you would like to meet on the 28-08-13 Wednesday at 10am to discuss my redundancy pay out. Please confirm if this time works for you.

[41] Mr Evans responded within seven minutes and advised the following:

No you have not been made redundant.

I am waiting until you are able to attend the meeting that I requested. If Wednesday is suitable then I suggest we have our follow up meeting then.

[42] Ms Matehaere replied:

At our last meeting you offered me eight weeks redundancy and advised that I was made redundant and there was no job for me. Now you say I have not been made redundant?

Please put it all in writing, what the meeting is about.

...

¹ In evidence Ms Matehaere noted that the date referred to should have stated "12/08/2013"

[43] Mr Evans set out a brief summary of the communications held between the parties and advised no agreement as to redundancy had been made.

[44] The meeting scheduled for Wednesday 28 August 2013 did not go ahead.

[45] Ms Matehaere raised a personal grievance on 10 September 2013. The parties later attended mediation but were unable to resolve the matter.

Was Ms Matehaere dismissed?

[46] As permitted by s.174 of the Employment Relations Act, this determination has not set out all the information furnished but states findings of facts and law and expressed conclusions on matters requiring determination.

[47] The factual basis of Ms Matehaere's claim centres on her assertion that she was told she was redundant on 23 July 2013 and that her dismissal was confirmed on 8 August 2013.

[48] It has been difficult to evaluate what was said in the meetings on 23 July and 8 August 2013 in circumstances where there is substantial disparity between the parties' respective accounts and where no other contemporaneous evidence is available such as meeting notes. It was notable during the Authority's investigation meeting that each witness remained unwavering as to his or her version of the content of the meetings despite extensive questioning.

[49] Direct evidence alone has not allowed me to determine with certainty what exactly was communicated between the parties during each of the meetings. In these circumstances I have carefully examined extrinsic evidence made close to the time of the meetings to assist my assessment about what happened on the balance of probabilities, i.e. what is more likely than not to have occurred.

[50] Looking firstly at the communication between the parties following the meeting of 23 July 2013, I am not persuaded Ms Matehaere's account is supported by the evidence. If Ms Matehaere had been informed she was redundant as alleged, I consider it more likely than not, that Printstopplus would have formalised that decision in writing relatively soon after it had been verbally conveyed. In the 15 day period between 23 July and the meeting of 8 August 2013 there is no documentation authored by Printstopplus that indicates Ms Matehaere had been declared redundant. I

regard Printstopplus' omission to confirm the purported redundancy in writing is a persuasive factor in concluding that Ms Matehaere had not been advised she was redundant in the meeting of 23 July 2013.

[51] A significant aspect of Ms Matehaere's claim is that Printstopplus sought to renegotiate and/or retract the notified redundancy when it became aware of her corresponding contractual entitlement. It does not appear to be disputed that Mr Evans was unaware of the contents of Ms Matehaere employment agreement until 7 August 2013, 14 days after Ms Matehaere says her redundancy was verbally notified. In these circumstances I am unable to accept that a delay to confirm the asserted redundancy by Printstopplus was a result of concerns about the potential cost associated with making Ms Matehaere redundant.

[52] In the emails of 28 July, 30 July and 2 August (refer para. [23], [24], [26] respectively) Ms Matahaere refers to either the "*disestablishing*" of her role or makes inquiry about what is happening with respect to "*the redundancy*". In each example she refers to the matter in the present tense. No reference is made to the decision having already occurred or been finalised. I find this correspondence better supports Printstopplus' evidence that the prospect of Ms Matehaere becoming redundant was under discussion. I do not find these emails establish, as a matter of fact, that Ms Matehaere had already been made redundant.

[53] Ms Matehaere countered against a finding that Printstopplus' omission to communicate on the matter is indicative that no notification of redundancy had occurred on 23 July 2013. She says following the meeting she consistently asked Printstopplus to confirm her redundancy in writing. She referred to her email of 30 July where she requested "*when will I receive everything in writing*" and an email dated 2 August 2013 when she asked for "*paper work about the redundancy*".

[54] I accept Printstopplus could have made better inquiry with Ms Matehaere to ascertain what exactly she required. It may be that any misunderstanding between the parties could have been resolved at that point. I do not consider the words used within these two emails, on any objective assessment, establish that Ms Matehaere had been declared redundant in the meeting of 23 July. In this respect I accept Ms Harkness' evidence that without further specific detail set out in the relevant emails she was unaware what exactly Ms Matehaere wanted in writing.

[55] I note also that all the correspondence between 23 June and 8 April 2013 containing the word “*redundancy*”, was initiated by Ms Matehaere. Although I do not regard this observation as wholly determinative, it does tend to support evidence given on behalf of Printstopplus that it was Ms Matehaere who was keen to progress a decision about whether she would be redundant or not.

[56] The Authority received six sworn affidavits in support of Ms Matehaere’s application. Each of these documents attested to conversations Ms Matehaere had with various family members and friends in or around 23 July 2013 where she reported she had been made redundant. At best these documents can only support Ms Matehaere’s belief that she had been advised she was redundant. None of those witnesses attended either of the two material meetings and in this respect their affidavits do not advance my inquiry as to whether, in fact, Printstopplus had notified Ms Matehaere that this was the case.

[57] Ms Matehaere further submits that she advised Mr Evan’s during the meeting of 8 August 2013 that she had understood she had already been made redundant. She says Printstopplus did not contradict her belief. In contrast, Mr Evans and Ms Harkness say Ms Matehaere asked whether she was being made redundant and attest Mr Evans had advised that KPMG were appraising the business and nothing was final.

[58] An assessment as to whose description better reflects the true content of the meeting of 8 August 2013 suffers the same difficulties as those encountered with the meeting of 23 July.

[59] I consider it relevant then that Ms Matehaere’s email to Mr Evans of 26 August 2013 appears to purport that she considered her position to have been disestablished on 12 August 2013 when he sent a text message advising she did not need to attend work that day. Ms Matehaere was unable to adequately explain on what basis she formed that belief, and this assertion appears to depart from her evidence that notification of redundancy occurred on 23 July 2013.

[60] The law provides that where a claim of unjustifiable dismissal is made, the onus rests with the employee to prove, on the balance of probabilities, that he or she was dismissed.

[61] Looking at the totality of evidence provided, on balance I am not satisfied that Ms Matehaere has sufficiently established that she had been declared redundant by Printstopplus on 23 July and/or 8 August 2013. It follows that I am unable to conclude that Ms Matehaere was dismissed and therefore I do not need to determine whether that action was justifiable. Ms Matehaere's claim is dismissed.

[62] During the Authority's investigation Ms Matehaere indicated she remained in receipt of full weekly ACC compensation but that her eligibility was due for review later in the month. She also stated in evidence that she no longer had trust and confidence in Printpstopplus, however I consider the parties remain in an employment relationship. I recommend the parties seek assistance from the Mediation Service to resolve their differences.

Costs

[63] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority