

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 294
5547896

BETWEEN JELENA CRAMOND
Applicant

A N D YOUR PUBLICATIONS
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Max Whitehead, Advocate for the Applicant
Blair Edwards, Counsel for the Respondent
Investigation Meeting: 16 September 2015 at Auckland
Submissions Received: 17 September 2015 from the Applicant
17 September 2015 from the Respondent
Date of Determination: 25 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Jelena Cramond, was employed by the Respondent, Your Publications Limited (Your Publications), as a Marketing and Design Associate until her position was terminated by reason of redundancy on 23 February 2015.

[2] Ms Cramond claims that she has been unjustifiably dismissed on the basis that the redundancy was a sham and that the procedure adopted was unfair and unreasonable.

[3] Your Publications claims that Ms Cramond's termination was based on sound operational reasons and after due process was followed.

Issues

[4] The issue for determination is whether or not Ms Cramond was unjustifiably dismissed by Your Publications.

Background facts

[5] Your Publications is a small publishing business which at the time of Ms Cramond's employment consisted of Ms Dyane May, General Manager, Ms Cramond, and Mr Richard Wilson, Design and Sales Associate who worked for Pex Publications Pty Limited, an associated business.

[6] Ms Cramond commenced employment with Your Publications initially in the position of Marketing Manager with Pex Publications Pty Limited. Her position subsequently changed to that of Marketing and Design Associate for Your Publications although her duties did not change at this time.

[7] Ms Cramond and Ms May signed an individual employment agreement on 12 August 2014 (the Employment Agreement) which provided that the employer was Your Publications, the position Marketing and Design Associate, working hours 40 per week, and her salary \$63,000.00 per annum.

[8] At clause 15.1 of the Employment Agreement it stated: "*The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*"

[9] Ms Cramond said that she had not been happy at the change in her job title but she did not make any complaint or raise any concern about the change in job title.

[10] Ms Cramond's responsibilities for Your Publications included:

- (a) The design and production of two new newsletters, one called *Your Chiropractor* which was produced every two months, and one called *Your Vet* which was produced every three months;
- (b) Writing articles for *Your Vet*; and
- (c) Managing the layout of another weekly publication report, *Stock Analysis*.

Your Publications Issue

[11] Ms Cramond said that five weeks prior to the publication date she had sent the five articles which she had written for *Your Vet* to a vet who would review the articles for her, this was the usual process. However, on this occasion the vet was late sending them back.

[12] As a result, she forwarded the articles to Ms Dyane May, the General Manager of Your Publications on 6 November 2014 to review. Ms May said that Ms Cramond had not

sent the *Your Vet* articles until one week prior to publication which was very late notice as the articles were due to go to print on 7 November 2014 and the layout for the articles still needed to be confirmed. Mr Wilson confirmed that this was the case.

[13] Ms May said she had previously instructed Ms Cramond to submit two to three articles each month to avoid the last minute pressure and immediately expressed her concern and disappointment that this advice had been ignored on this occasion.

[14] On 7 November 2014, Ms May said she telephoned Ms Cramond to further discuss her concerns about the *Your Vet* articles. This was an informal conversation and no disciplinary action was intended or taken as a result.

[15] During the telephone discussion she said Ms Cramond advised her that she did not enjoy writing the *Your Vet* articles, had never enjoyed writing the articles and no longer wanted to do so. As a result, Ms May said she had proposed outsourcing the work, and Ms Cramond did not object to this.

[16] Ms May said that following their conversation, she started to look for another editor to undertake the work Ms Cramond no longer wanted to perform. This would represent a cost to the business of approximately \$2,000.00 for each edition, \$8,000.00 per year.

Meeting held on 18 November 2014

[17] On 18 November 2014, Ms May telephoned Ms Cramond to advise her of a meeting later that day. Following the meeting Ms May confirmed in an email to Ms Cramond dated 18 November 2014 that she wished to clarify certain issues, these being

1. *Your Vet articles – As you confirmed on 7 Nov, you no longer want to do this task and agree it would be beneficial to outsource. The management process and production was also raised again as a risk to the business. The company has been able to source another editor effective immediately. There will be a substantial cost to the business for this resource.*
2. *Marketing – We agreed last year that you would undertake online marketing training to upskill into your role and show commitment to this part of the role. The company paid for access to online courses however to date no training has taken place. We agreed to change your title to Design/Marketing, as you accepted you do not have the relevant skills or experience to justify the title of Marketing Manager.*
3. *Salary – Last year you were given a salary increase based on the understanding and agreement that you would take on more responsibility, train and upskill. However due to the recent change in your tasks and still no training undertaken, it was discussed today that a review of your salary should take place.*

[18] The email concluded:

I have asked you to take time to seek advice, let me know your thoughts and if you have any suggestions, concerns or queries.

Online Training

[19] Ms Cramond said that the training which had been offered to her by Your Publications was through an online resource which she had examined and felt that it was not suitable for her requirements in that it provided had no way of quantifying her achievements or providing any form of qualification. She had therefore decided not to proceed with the training. However, she had contacted Massey University and enrolled for a marketing course.

[20] Ms Cramond took the decision unilaterally and had not, as would be expected of an employee, informed Ms May her manager of her decision at that time. Ms May had only become aware of the situation when she realised that Ms Cramond had only completed 22% of the course for which Your Publications had paid.

Salary Reduction

[21] In regard to the suggestion as confirmed in the email dated 18 November 2014 that her salary be reduced, Ms Cramond had not been in agreement with this and had responded in an email dated 19 November 2014, on the issue of salary, *"I do not accept any reduction"*.

[22] Ms May responded by email that same day advising:

The task of writing articles has been out-sourced for the following reasons:

-You advised that you have never enjoyed doing the task, and confirmed that you no longer want to do the task

-The quality of the articles has not been of a high standard, which you have acknowledged.

-The management of the task has put the business at risk. This has happened on more than one occasion. You were offered support and instruction on how to improve, but as you told me, you prefer your own process and didn't see why you should change it.

[23] Ms May reassured Ms Cramond that the other tasks in her role were unaffected, and acknowledged Ms Cramond's view that she should retain her existing salary level. Ms May

concluded the email by suggesting that the meeting was postponed until the following week to give Ms Cramond time to think and reconsider any options.

[24] Ms Cramond said she and Ms May met on 21 November 2014 to try and resolve the issues, although Ms May does not recall a meeting taking place on that date.

[25] Ms Cramond said that she requested that mediation take place on or about that date. Ms May said that as a result of the Christmas period being very busy for Your Publications, and Ms Cramond's impending wedding, she suggested that Ms Cramond's request for mediation be revisited in January 2015.

Meeting 23 January 2015

[26] Ms May said that she had noticed a decline in Your Publication's revenue during November 2014, and had embarked upon a review of the business operation. She said that as part of that process she sought feedback from Ms Cramond and Mr Wilson.

[27] Ms May said she and Ms Cramond met on 23 January 2015 to discuss strategies required in order that Your Publications could progress in light of its inability to sustain the existing structure due to increasing costs, non-delivery of key projects, and declining revenue.

[28] Following the meeting, Ms May confirmed by email to Ms Cramond what had been discussed, stating:

... Some suggestions/topics we spoke about are:

- Some form of restructure.*
- Jelena's role changing to Designer/Creative (or other) – you are welcome to offer alternatives.*
- As we currently only justify a part time position for your publications (YP), an option is to work approximately half time on YP, and approx half time on secondment for fusion tasks. This option offers upskilling in web design. It would need to be reviewed after two months to ensure productivity is at a sustainable level.*
- The majority of the marketing to be handled by Kristin.*
- Jelena would like to study for approximately four hours on one day each week. The options discussed:
 - o Reduce weekly hours to 36.*
 - o Make up the shortfall by working extra time during the week.**
- ...*
- A new editor for Your Vet has already been outsourced*
- A salary reduction to 55k, with a review after three months (to 60k based on productivity).*

[29] Ms May concluded the email: *“If you have any other thoughts, comments, suggestions, please let me know. No final decisions have been made.”*

[30] Ms Cramond responded to this email later that same day, 23 January 2015, saying:

Thanks for that. Just one minor alt – could you please change that 55k to 55/58 as we were discussing today? Sorry to be picky, I know it’s just notes, but the \$5 number give me the shivers.

By the way – super glad we could have an open and flexible discussion today. Very positive!

[31] During the following week, Ms Cramond requested that Ms May organise a Department of Labour mediation, but provided no other response to the request in the email dated 23 January 2015 other than that referring to the salary level contained in the email dated 23 January 2015.

[32] Ms May had contacted the MBIE help desk in January 2015 to enquire about Your Publications obligations when undertaking a restructure and was advised:

- (a) To include the parties in the conversations;
- (b) That Your Publications needed to have a valid business reason to restructure;
- (c) That there was no specific process or timeframe to follow; and
- (d) It was up to the parties involved to make a fair and reasonable decision for the business.

[33] On 3 February 2015, Ms Cramond requested that Ms May respond to her request for mediation because she had not had a response. Ms May said she believed she had already responded and had advised Ms Cramond that as soon as the newsletters were completed and Mr Wilson, had completed his tasks, he would be able to manage the phones in order that mediation could take place.

[34] On 4 February 2015, Ms May advised Ms Cramond that the suggestion of web designer tasks which had been made in the meeting and email on 23 January 2015 was not viable so that it was necessary to think of other options. This was confirmed in an email dated 4 February 2015.

[35] In the email, Ms May asked Ms Cramond to advise her of any thoughts or ideas she had had in connection with the matters discussed in the meeting held on 23 January 2015, and reiterated that she was trying to reach a good outcome for all.

Mediation Requests

[36] On that same date, 4 February 2015 Ms May confirmed to Ms Cramond that an MBIE mediator would be in contact with her, but advised that the mediation service could not provide a timeframe at that time.

[37] Ms May said that, other than the salary issue Ms Cramond had raised, she was not aware of what Ms Cramond wished to discuss at mediation, and therefore she emailed her on 10 February 2015 and asked if she could clarify her specific concerns.

[38] Ms Cramond responded the next day, 11 February 2015, by saying:

What I would like is for my employment agreement to be complied with and an assurance I will be provided with my contractual entitlements.

[39] In response, Ms May asked if Ms Cramond could be more specific as she was not sure to what she referred, and stated that the only issue of which she was aware was the salary issue.

[40] Ms Cramond referred in a further email on 4 February 2015 to:

... multiple issues that had not been able to be resolved, including salary, procedure, role etc since our meeting at the end of November last year.

[41] In response, Ms May emailed Ms Cramond stating:

From my point of view, you requested the mediation meeting when you didn't like the salary offered. There was no mention of anything else and nothing has been raised in our meetings of your other concerns.

Restructuring proposal

[42] Following the initial meeting held on 23 January 2015, Ms May invited Ms Cramond to a meeting on 16 February 2015 to further discuss the restructuring situation. Ms May said she had asked Ms Cramond if she would be comfortable taking on the majority of Mr Wilson's tasks and she had agreed that she would accept it.

[43] On 23 February 2015, Ms May invited Ms Cramond into her office and advised that further to their conversations, her position had been made redundant as a result of:

- (a) A continuing fall in sales and revenue;
- (b) The option to outsource the majority of all of the tasks was a sustainable one for the business; and

(c) Justification for part time casual hours.

[44] Ms May explained that Your Publications only had enough tasks that matched Ms Cramond's skill level to offer her a part time position.

[45] Ms May confirmed the decision to make Ms Cramond's position redundant on 23 February 2015. In the letter confirming the decision Ms May stated:

This is to advise that the position you have with us is hereby made redundant.

Reasons: The reasons have been set out at our previous meetings, and follow careful consideration of all the matters raised by you at the same meetings. I do not consider that there are any other viable options other than to make your position redundant.

The reasons set out in our previous correspondence remain, and while we thank you for your input they do not provide or result in a sustainable outcome.

- 1. Continuing fall in sales and revenue*
- 2. Restructure of the company*
- 3. Sustainable option to outsource the majority or all of the tasks*
- 4. Justification for part-time hours*

[46] In the letter, Ms May confirmed that pursuant to para.13.1 of Ms Cramond's written employment agreement, she would be paid out her notice period of 10 working days. The effective date for the redundancy and termination of employment was 23 February 2015.

[47] Ms Cramond said she had been shocked and upset as she had received no warning of redundancy and she had felt that Ms May's issues with her and her reluctance to accept a salary reduction were the reasons behind her dismissal. She said the fall in sales, restructure, outsourcing and justification of part time hours were all factors that had not been discussed with her prior to the meeting on 23 February 2015.

[48] On 2 March 2015, Ms Cramond raised a personal grievance with Your Publications. Mediation subsequently took place but was not successful in resolving the matter.

Determination

[49] Ms Cramond was dismissed on the basis that her position was redundant. Justification for dismissal is as stated in the Employment Relations Act 2000 (the Act) at s.103A, the Test of Justification:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[50] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[51] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

- “(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and*
- (ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).*

Was the redundancy genuine?

[52] Ms May said she had noticed a decline in *Your Publication's* revenue in November 2014 and this was the reason for the restructuring situation. During the Investigation Meeting, Ms Cramond accepted that she was aware Your Publications had declining revenue at the time of her discussions with Ms May in early 2015.

[53] Although there were performance issues raised with Ms Cramond concerning her management of *Your Vet*, these were not a disciplinary matter and I find that there had been agreement between Ms May and Ms Cramond to outsource the publication. However the associated proposal that Ms Cramond's salary be reduced as a consequence of the costs to Your Publications of outsourcing *Your Vet* was not agreed.

[54] In accordance with clause 15.1 of the Employment Agreement, Ms Cramond's consent to a change in her terms and conditions of employment was required before any change could take place, however at no time prior to the termination of her employment on 23 February 2015 had the matter been resolved, nor had any date been agreed for the requested mediation to discuss that matter, amongst others.

[55] I consider that the lack of agreement with Ms Cramond concerning a salary reduction proposal was an issue for Your Publications given the declining revenue and the cost of outsourcing the *Your Vet* publication.

[56] This may have had the effect of increasing the financial liability situation of Your Publications and therefore contributing to the restructuring and subsequent redundancy of Ms Cramond's position, but I do not find that it constituted a reason of itself for terminating Ms Cramond's employment.

Was there a fair and reasonable process followed?

[57] The restructuring proposal was discussed during the meeting on 23 January 2015. Following the meeting Ms May set out in an email what had been discussed, including suggestions that Ms Cramond's role change to a design and/or creative role; that she work part-time for Your Publications and part-time for an associated company of Your Publications,; her weekly hours be reduced to 36 in order to accommodate study requirements; and her salary be decreased.

[58] I find that the proposals were varied and there was a lack of clarity concerning the possible outcome, being the termination of Ms Cramond's employment, should any of these proposals not be adopted.

[59] Whilst I accept that the fair and reasonable employer would have asked, as did Ms May in the email dated 23 January 2015, for Ms Cramond to provide feedback on the proposals, I find that the fair and reasonable employer would also have advised Ms Cramond that the redundancy of her position was a possible outcome.

[60] Further the 23 January 2015 meeting took place within the context of the proposed outsourcing of the *Your Vet* publication, the associated proposed reduction in Ms Cramond's salary, and Ms Cramond's repeated requests for mediation. The context made it even more important that Ms May was transparent about the redundancy of Ms Cramond's position being a possible outcome.

[61] Ms Cramond's email later on 23 January 2015 refers to the salary reduction, but makes no reference to possible redundancy, which I would have expected had redundancy been suggested as a possible outcome.

[62] On 4 February 2015 Ms May sent an email to Ms Cramond to advise her that one of the options discussed on 23 January 2015, namely the suggestion of web designer tasks, was no longer available. Although Ms May asked Ms Cramond for thoughts and ideas for "*other options*" she again does not advise Ms Cramond that the redundancy of her position was a possibility.

[63] I note that Your Publications is a small employer without a Human Resources department or recourse to legal advice in-house, and that pursuant to s 103A (3)(a) of the Act, the Authority should have regard to the resources available to the employer, and that the Authority is, pursuant to s 103A (5) of the Act, is not to determine a dismissal unjustifiable solely because of defects in the process followed by the employer if the defects were: (a) *minor* and (b) *did not result in the employee being treated unfairly*.

[64] However I find that the defects in the process followed by Your Publications, notably the failure to advise Ms Cramond of the possible redundancy of her position, was a major defect in the process followed.

[65] I determine that Ms Cramond was unjustifiably dismissed by Your Publications.

Remedies

[66] Ms Cramond has been unjustifiably dismissed and she is entitled to remedies.

Lost wages

[67] In a genuine redundancy situation lost wages are not normally awarded on the basis that the employment would have ceased by reason of redundancy. However in this situation I am not convinced that Ms Cramond's employment would have ceased at 23 February 2015 had one or more of the options suggested by Ms May been adopted.

[68] Ms Cramond is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act. Ms Cramond has provided evidence to the Authority of her efforts to mitigate her loss following the termination of her employment with Your Publications and of income earned during the 13 week period.

Deductions

[69] Ms Cramond's employment was terminated on 23 February 2015 and she was paid two weeks salary in lieu of notice.

[70] Ms Cramond was paid the sum of \$2,423.08 gross (calculated as \$1,211.54 gross * 2 weeks) as salary in lieu of notice). This amount is to be deducted from the amount to be awarded as lost wages.

[71] During the period 23 May to 12 May 2015 Ms Cramond was claiming a WINZ benefit and had income of \$525.00 from WINZ (10 weeks * \$52.50 per week). I take into consideration the fact that Mr Cramond also received the same amount of \$525.00 from WINZ during the same period which he only received by virtue of the fact that Ms Cramond was no longer employed at Your Publications and as a couple they had lost the benefit of two incomes.

[72] This amount of \$1,050.00 is to be deducted from the amount to be awarded as lost wages.

[73] Also during that period, Ms Cramond worked and earned income from a publication called Stock Analysis. Although she chose not to invoice the amounts earned until 14 May 2015, I find that this money totalling NZ\$105.45 was earned during the 13 week period and could have been invoiced and received during the 3 month period..

[74] This amount is to be deducted from the amount to be awarded as lost wages.

[75] Ms Cramond obtained alternative employment on 4 May 2015, albeit at a lesser remuneration rate than that she earned at Your Publications.

[76] During that period Ms Cramond earned \$1,115.40 gross, and this amount is to be deducted from the amount to be awarded as lost wages.

[77] I order that Your Publications pay Ms Cramond the sum of \$11,056.07 gross in respect of lost wages, (calculated as \$15,750.00 minus the deductions set out above) pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[78] Ms Cramond is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Cramond suffered distress, which financially impacted on her new married life.

[79] Ms Cramond explained that she suffered depression and anxiety as a result of the dismissal, although she sought no medical intervention.

[80] I order Your Publications pay Ms Cramond the sum of \$6,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[81] I have considered the matter of contribution as I am required to do under s124.

[82] Employers and employees are under a duty pursuant to s 4 of the Act to act in good faith to each other, in particular they are required pursuant to s 4(1A)(b) to be: “*responsive and communicative*”.

[83] Ms Cramond described the meeting held on 23 January 2015 as “*open and flexible*” and following it Ms May emailed further details of what had been discussed concerning employment options for Ms Cramond to consider.

[84] Ms May asked Ms Cramond for feedback on the options and proposals made to her on 23 January 2015 and again on 4 February 2015. Ms Cramond did not provide feedback on either occasion, other than querying the level of salary on 23 January 2015.

[85] Clause 14.1 of the Employment Agreement states: “*If any employment issues arise, those should be raised with the Employer as soon as possible so they can be resolved.*” Ms May offered Ms Cramond several opportunities to raise her concerns, however she failed to do so.

[86] Whilst Ms Cramond requested mediation, I find that this was the second stage set out in clause 14.1 of the Employment Agreement to be accessed: “*if the matter cannot be resolved*”, however I observe that Ms Cramond utilised this stage before she engaged with the first stage for employment issue resolution.

[87] Moreover, despite a number of requests from Ms May for specifics of her concerns to assist the mediation discussions, Ms Cramond failed to provide Ms May with details of the

specifics of her concerns, other than in connection with the salary reduction proposal of which Ms May was aware.

[88] I find that Ms Cramond was not “*responsive and communicative*” despite the repeated requests and opportunities from Ms May provided for her to offer comments and suggestions. I do not consider that this was acting in good faith or that Ms Cramond was “*active and constructive in maintaining a productive employment relationship*”.

[89] I find contributory fault on the part of Ms Cramond and reduce the remedies awarded by 50%.

Costs

[90] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority