

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 248  
5391630

BETWEEN                      LIHUA DONG (also known as  
   LILIAN DONG)  
   Applicant

A N D                              KIWISPORTS PRESCHOOL  
   LIMITED Trading As  
   KIWICARE PRESCHOOL  
   Respondent

Member of Authority:      TG Tetitaha

Representatives:            Applicant in person  
   P Swarbrick/M McGoldrick, Counsel for Respondent

Investigation Meeting:     21 February 2013 at Auckland

Submissions Received:    28 February 2013 from Applicant  
   4 March 2013 from Respondent

Date of Determination:    12 June 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.    Ms Dong was unjustifiably dismissed.**
- B.    Kiwicare shall pay \$3,520 to Ms Dong for lost remuneration under s123(c)(ii).**
- C.    Kiwicare shall pay \$8,000 to Ms Dong as compensation under s123(c)(i).**
- D.    Kiwicare shall pay \$71.56 towards Ms Dongs costs.**

## **Employment relationship problem**

[1] Lihua Dong aka Lilian Dong, was employed as pre-school teacher by Kiwicare Preschool (Kiwicare). Ms Dong was dismissed for redundancy in February 2011.

[2] Ms Dong submits the redundancy was not genuine and the dismissal was unjustified. She refers to an argument with another staff member as the motivation for redundancy.

[3] Kiwicare disagrees. It submits the redundancy was due to funding changes and the need to reduce the number of qualified staff, inclusive of Ms Dong. These were discussed with or made known to Ms Dong between July 2010 and February 2011. It denies any improper motive.

## **Issues**

[4] The following issues arise:

- (a) Was Ms Dong's dismissal for redundancy justified?
- (b) What remedies should be paid to Ms Dong?

### ***Was Ms Dong's dismissal for redundancy justified?***

[5] Ms Dong submits there was an argument on 11 February 2011 with her associate teacher. Prior to this argument, she had worked very hard and enthusiastically. Later that afternoon she was told she was terminated. She submits she had no knowledge redundancy of her position was a possibility. She had not been consulted and had understood there were no redundancies being made post May 2010. She had also been offered permanent employment in July 2010.

[6] Kiwicare submits Ms Dong was or should reasonably have been aware that employees within the Avondale Centre were being made redundant from May 2010 up until February 2011. Funding from the Ministry of Education had been reduced and only allowed 80% qualified staff. Kiwicare had more than 80%, requiring a reduction in the number of qualified staff employed. Ms Dong was one of the staff

affected. Transitional funding arrangements between May 2010 and February 2011 allowed Kiwicare to retain Ms Dong until redundancy could be occur.

[7] Kiwicare submits the selection of Ms Dong for redundancy was based on evolving criteria settled in January/February 2011. The situation was fluid - employees were leaving and transitional arrangements were required until funding was confirmed. Ms Dong's employment was one transitional arrangement.

[8] Kiwicare accepts consultation with Ms Dong was not a formal structured process, but was sufficient in the context of its situation. Ms Dong was aware of the possibility of redundancy and it is inherently unlikely she was oblivious to the notion she may be made redundant. It denies any argument between staff motivated the dismissal.

### ***Legal Framework***

[9] The decision whether to make redundancies is part of the management's prerogative. It is not for the Authority to substitute its judgment for that of the employer.<sup>1</sup> Although an employer may assert this was a genuine business decision, the Authority may still review it to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.<sup>2</sup>

[10] The duty of good faith requires consultation with affected employees in a situation of threatened redundancy whenever that was reasonably practicable. In some contexts, the duty can extend to providing the employee criteria on which choice would be made and required incorporating a readiness to listen to whatever the employee wished to put before the employer concerning factors relevant to their situation.<sup>3</sup>

[11] There is a substantial conflict of evidence between the parties. This requires express findings of credibility upon the evidence given by brief and orally at hearing.

[12] Credibility can be assessed upon two bases – the witness personally and the story the witness tells. Relevant factors to personal credibility are inconsistencies and

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<sup>1</sup> *GE Hale & Son Ltd v. Wellington etc. Caretakers etc. IUOW* [1991] 1 NZLR 151

<sup>2</sup> *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53]-[54]

<sup>3</sup> *Coutts Cars Limited v. Baguley* [2001] ERNZ 660, 681, paras.[83]-[84]

contradictions; prevarication; concessions made where due, despite risk to the witness's own credibility in giving evidence.

[13] Credibility of the story is an assessment if it was in the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?

[14] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities situation. Bearing this framework in mind, the Authority turns to consider the matter before it.

[15] The Authority accepts Kiwicare had been affected by the new funding regime which came into being on 1 February 2011. It was required to reduce the number of qualified teachers, which included Ms Dong.

[16] There is little or no evidence Ms Dong was dismissed due to the argument with her associate teacher. This was a conclusion Ms Dong drew due to her belief she was not eligible for redundancy.

[17] There was inadequate consultation with Ms Dong about redundancy. The consultation process was unstructured and appeared to favour senior staff Kiwicare wished to retain, as opposed to junior staff such as Ms Dong. Kiwicare's director, Heather Anderson, confirmed she met with some senior staff who had been employed longer to reassure them about the redundancies. She did not meet with Ms Dong on a similar basis.

[18] Kiwicare relied upon two staff meetings and an email from Ms Anderson dated 21 May 2010 posted upon the staff noticeboard, to make staff including Ms Dong aware of the possibility of redundancy. The staff meetings attended by Ms Dong seemed informative at best, but did not seek comment on the proposal for redundancy.

[19] The email dated 21 May 2010 confused matters about redundancy. It stated some employed students (which Ms Dong was at the time) will be made redundant but "*Kiwicare will let everyone who will potentially be made redundant or change positions know by next Wednesday.*" Ms Dong was not advised the following

Wednesday she would be made redundant. She was instead offered employment in July 2010.

[20] There is a dispute about the conversation between Ms Dong and Ms Anderson about the offer of employment made in July 2010. Ms Dong asserts she was informed she was a permanent employee working 16 to 40 hours per week. She denies being told she may be made redundant. Ms Anderson disagrees. She says Ms Dong was a casual employee working 0 to 40 hours per week. She alleges she told Ms Dong “*you may well be redundant*” at the meeting. This statement was not in Ms Anderson’s brief of evidence filed and confirmed at hearing. It also contradicted her earlier confirmation that everything she said to Ms Dong at the meeting was set out in her brief at paragraphs 23 to 29.

[21] The individual employment agreement between the parties states Ms Dong may work “*up to 40 hours per week.*” The Advice to Support Officer of New Employee produced at hearing by Kiwicare has Ms Dong’s notation “*16 hours*” and next to it another handwritten note “*up to 40 hours*”. Ms Dong received a letter dated 26 October 2010 referring to her as a “*permanent Kiwicare team member.*” Another Kiwicare Director, Michael Clark, gave evidence he drafted the agreement from a template and cannot recall if he was instructed to put 0 to 40 hours but it was unlikely he would have put the hours in his letter dated 22 July 2010 to Ms Dong.

[22] The Authority accepts Ms Dong’s evidence she was not told about redundancy at the meeting in July 2010 with Ms Anderson. Ms Anderson’s evidence was inconsistent with other evidence and contradictory. The secondary evidence of the agreement and letters dated 22 July and 26 October 2010 support Ms Dong’s belief she was intended to be a permanent staff member. This is further supported by Ms Anderson’s email dated 21 May 2010 and the lack of advice to Ms Dong she was being made redundant.

[23] Although Ms Dong may have been peripherally aware of redundancies, it is more probable than not she assumed after May 2010, all redundancies that were to occur had happened or the affected persons advised. This is especially when she was offered permanent employment in July 2010.

[24] The selection criteria for redundancy were settled in January/February 2011. It appears Ms Dong was not made aware of the selection criteria until hearing.

[25] At the investigation meeting Ms Dong gave evidence of her teaching experience which met some, if not all, of the selection criteria applied to the decision to dismiss her for redundancy. This information may have affected the decision to dismiss her for redundancy. She was never given the opportunity to provide this information prior to the dismissal occurring.

[26] It is unsurprising she was shocked to be told on 11 February 2011 that she was being dismissed for redundancy.

[27] Given the above, the Authority determines Kiwicare's actions were not what a fair and reasonable employer could have done in all the circumstances. Ms Dong's dismissal was unjustified.

## **Remedies**

### *Lost Remuneration*

[28] One of the remedies for personal grievance is recovery of lost remuneration. s.128(1) sets a cap on lost remuneration of ... *the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration* (s.128(2)). Three months ordinary time remuneration is \$10,556 gross. Ms Dong seeks lost remuneration of wages for a period of 26 weeks, totalling \$22,000 gross.<sup>4</sup>

[29] The respondent submits if Ms Dong's redundancy was substantively justified, any failures by Kiwicare would be in the way it communicated with the applicant and consulted her about the redundancy only. Any award of lost remuneration could only be for the period during which further consultation took place.

[30] The dismissal was not substantively justified. Ms Dong was not given the chance to retain her employment. However this case was not put on the basis of a lost chance, but rather the genuineness of the redundancy. Even if proper consultation had occurred, Ms Dong may still have been made redundant in any event. No evidence of the probabilities of Ms Dong being made redundant and the consequential lost remuneration was produced.

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<sup>4</sup> These amounts are calculated at the rate of \$880 gross per week

[31] Assessment of compensation in this area must have regard to the actual loss suffered by the employee.<sup>5</sup> At best the Authority can use its knowledge of the employment arena to estimate the length of time further consultation would have taken as possible loss for recovery. If a further period of consultation had taken place it would most likely have been for one month.

[32] The Authority determines Ms Dong is entitled to lost remuneration under s123(c)(ii) for the estimated period of consultation of one month being \$3,520.

### *Hurt and humiliation*

[33] Ms Dong seeks an award of compensation of \$8,000 for damage to feelings. There is no contributory fault reducing remedies pursuant to s124. The dismissal was abrupt and without prior consultation. Ms Dong deposes to shock and humiliation at the dismissal, especially when she believed it was for grounds other than redundancy.

[34] Where a redundancy dismissal is carried out in a defective manner, distress compensation in the range of \$10,000 to \$15,000 may be reasonable.<sup>6</sup>

[35] An award of \$8,000 is appropriate for Ms Dong's shock and for the defective manner in which the dismissal was carried out.

### **Costs**

[36] As the successful party Ms Dong is entitled to a contribution towards her costs. She was self-represented but incurred disbursements such as the filing fee of \$71.56. Kiwicare is ordered to pay \$71.56 as a contribution towards her costs.

**Tania Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>5</sup> *Telecom New Zealand Ltd v Nutter* (CA, 21/07/04) [2004] 1 ERNZ 315, 331 at [81]

<sup>6</sup> See above at [94]; *Wellington College of Education v Scott* [1999] 1 ERNZ 98 (CA) at 103; *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA) (where an award of \$50,000 made at first instance was reduced to \$15,000 on appeal).