



# Employment Court of New Zealand

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## Best Health Foods Limited v Zhou [2021] NZEmpC 200 (19 November 2021)

Last Updated: 25 November 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 200](#)

EMPC 72/2021

IN THE MATTER OF a challenge to a determination of  
the Employment Relations  
Authority  
BETWEEN BEST HEALTH FOODS LIMITED  
Plaintiff  
AND YI ZHOU  
Defendant

Hearing: 4 November 2021 (Heard at  
Christchurch)  
Appearances: Y Gu, agent for plaintiff  
Y Zhou, defendant in person  
Judgment: 19 November 2021

### JUDGMENT OF JUDGE K G SMITH

[1] On the morning of 23 January 2020, shortly after midnight, Yi (Robin) Zhou was dismissed by his employer, Best Health Foods Ltd. The dismissal was effected by a letter emailed to him by Best Health Foods' director, Yuan (James) Gu.

[2] Mr Zhou was informed by this letter that he did not need to attend work on 23 January 2020 and that he would be paid for the three days' notice period that applied under the employment agreement between him and Best Health Foods. The letter wrongly assumed that Mr Zhou's employment was subject to a 90-day trial provision under [ss 67A](#) and [67B](#) of the [Employment Relations Act 2000](#) (the Act).

[3] Mr Zhou had no warning that his employment was in jeopardy. Best Health Foods had not raised with him any concerns about his work and he had not met Mr Gu,

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or the other principal director of the company, Yali Li, to discuss his performance. The letter arrived "out of the blue" and took Mr Zhou by surprise.

[4] Mr Zhou raised a personal grievance for unjustified dismissal. That grievance was investigated by the Employment Relations Authority and, in a determination released on 1 February 2021, it concluded he was unjustifiably dismissed.<sup>1</sup> The Authority ordered Best Health Foods to pay Mr Zhou lost wages of \$4,230.77 and compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act of \$10,000. Mr Zhou was also awarded a contribution towards the fees he incurred and the company was ordered to reimburse his lodgement fee.

[5] Best Health Foods challenged the determination in a limited way. The challenge did not dispute the whole determination but, instead, it initially placed in issue the findings or conclusions in paragraphs [29], [33], [35] and [36].<sup>2</sup> The relief claimed by Best Health Foods was:

- (1) Assess the damages caused by the defendant;
- (2) Determine seriousness of the defendant's negligence and damages caused by the defendant;
- (3) Determine which errors made by the defendant are not food industry specific transactions to which the defendant may not be familiar with;
- (4) Determine if the behaviour and actions demonstrated by the defendant met what are expected or required in the job advertisement, the defendant's resume and the Employment Agreement signed by both the defendant and the plaintiff.

[6] Despite those pleadings, in a telephone directions conference on 27 April 2021 Mr Gu confirmed that the issues raised by the company were confined to the remedies awarded by the Authority.

### **The Authority's determination**

[7] Before considering Best Health Foods' claims it is necessary to describe what the Authority decided.

1 *Zhou v Best Health Foods Ltd* [2021] NZERA 35 (Member Cheyne).

2 [Employment Relations Act 2000, s 179\(4\)](#).

[8] The Authority found that Mr Zhou started work as an accountant for Best Health Foods on 20 January 2020.<sup>3</sup> As has already been mentioned, he was dismissed by Mr Gu in a letter dated 22 January 2020 sent by email in the early morning of 23 January 2020.<sup>4</sup> That letter assumed the employment agreement contained a 90-day trial provision. The Authority recorded the company's contentions that one was omitted in error and Mr Zhou had seriously and persistently breached the employment agreement.<sup>5</sup>

[9] The Authority's investigation dealt with the formation of the employment agreement. It concluded that a draft of the agreement was sent to Mr Zhou shortly before he started work on 20 January 2020. It was signed by both parties at around 10 am that day, about an hour after work started.<sup>6</sup> The Authority accepted Mr Gu's evidence that the trial provision clause was omitted because of the company's error. It concluded, however, that in the absence of a trial provision Best Health Foods could not rely on the protection from a personal grievance conveyed by the Act.<sup>7</sup> The Authority noted that Best Health Foods did not apply for relief under the [Contract and Commercial Law Act 2017](#) relating to the alleged mistake.<sup>8</sup> In any event, the Authority was satisfied that, if such an application had been made, it would have been unsuccessful.

[10] The Authority did not doubt Mr Gu's evidence that he developed concerns about Mr Zhou's work.<sup>9</sup> The evidence before the Authority was that the dismissal letter did not refer to those issues because highlighting them would have caused offense. That was why the explanation given to Mr Zhou only referred to the trial provision.

[11] The Authority then considered whether the dismissal was justified objectively. It did so by asking whether Best Health Foods' actions, and how it acted, were what a

3 At [1].

4 At [1].

5 At [3].

6 At [8].

7 [Employment Relations Act 2000, s 67B\(2\)](#).

8 At [9].

9 At [12].

fair and reasonable employer could have done in all the circumstances at the time.<sup>10</sup> It found that Best Health Foods did not raise concerns with Mr Zhou about his work before dismissing him so he had no opportunity to respond to them.<sup>11</sup> Those defects were held to be more than minor and went to the fundamental issue of fairness.<sup>12</sup>

[12] The conclusion was that Best Health Foods' decision was not what a fair and reasonable employer could have done in all the circumstances at the time.<sup>13</sup>

[13] The Authority then determined the losses Mr Zhou incurred. He was unemployed for four weeks and was awarded lost remuneration for that time, calculated at just over \$4,000.<sup>14</sup> He sought compensation for humiliation, loss of dignity and injury to his feelings of \$15,000 under [s 123\(1\)\(c\)\(i\)](#) of the Act, emphasising that he was dismissed just before the Chinese New Year, the celebration of which is of particular significance to him, his family and community.<sup>15</sup> The Authority fixed that compensation at \$10,000; although not referred to in the determination that amount is in band 1 used by the Court to

assist in assessing this compensation.<sup>16</sup> The Authority declined to make a finding that Mr Zhou had contributed to the circumstances leading to his dismissal.<sup>17</sup>

## The issue

[14] The only issue in this case is whether there was a material error of fact or law in the Authority's determination relevant to its conclusion about remedies.

[15] Before considering whether there was any error, a preliminary matter needs to be addressed which arose because of the way Mr Gu presented submissions for Best Health Foods. In his submissions Mr Gu returned to the unsuccessful argument the

10 At [14] and see [Employment Relations Act 2000, s 103A](#).

11 At [15].

12 At [16].

13 At [17].

14 At [20].

15 At [21].

16. *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

17 *Zhou v Best Health Foods Ltd*, above n 1, at [33].

company raised in the Authority, that a clerical error was made by it and the employment agreement should have contained a trial provision. He was attempting to seek relief for that mistake.

[16] Mr Gu said that there was an error because, instead of using the company's standard version of employment agreement containing a 90-day trial provision, the one signed was based on an amended agreement for another employee who had worked for more than 90 days. To illustrate the existence of that error, and presumably to show that the company's intention was to include a trial provision in the agreement with Mr Zhou, Mr Gu pointed to the dismissal letter and to two paragraphs in the employment agreement. The letter referred to the employment ending "under the 90- day trial period clause".

[17] The passages in the employment agreement were paragraphs 21.2 and 21.3. Paragraph 21.2 stated what the notice period would be once the trial and/or probationary period was completed and reads:

Following completion of your trial and/or probationary period, at any time during the operation of the Agreement, the Employer may terminate your employment by providing four weeks' written notice.

[18] Paragraph 21.3 reads:

Following completion of your trial and/or probationary period, you may terminate this Agreement at any time by providing the Employer with four weeks' written notice.

[19] The employment agreement did not otherwise refer to a trial and/or probationary period.

[20] Mr Gu placed weight on his statement that Best Health Foods always employed staff on a 90-day trial and there was no reason for an exception to be made for Mr Zhou.

[21] Despite those submissions (and the subject not being raised by the pleadings) there is no basis on which Best Health Foods could obtain relief under the Contract

and Commercial Law Act.<sup>18</sup> There was no evidence that Mr Zhou knew the company had mistakenly signed an employment agreement it did not intend to sign because the trial provision was omitted, or that both of them intended to enter into an agreement containing a trial provision but signed the wrong one by mistake, or that in some way they were influenced to enter into the agreement by different mistakes about it.

[22] In fact, the evidence points the other way. Mr Zhou's evidence, which I accept, was that he arrived to begin work on 20 January 2020 at 8.45 am. Shortly beforehand he received an email from Mr Gu providing the employment agreement in draft. That timing meant the proposed agreement was not read by Mr Zhou before he began work. The agreement was signed sometime after 10 am that morning, and he was under pressure to sign it immediately. There were no discussions before the offer of employment was made, or as the agreement was being signed, to the effect that a trial period was to apply. Consequently, there is no basis on which it could be concluded that a mistake was made that is susceptible to correction.

[23] There is also a fundamental problem facing Best Health Foods' argument. Section 67A of the Act provides for trial provisions to be entered into by a small-to- medium-sized employer, and an employee who has not previously been employed by that employer.<sup>19</sup> There was no evidence about the size of Best Health Foods but, for the purposes of this analysis, I am prepared to accept that it is a small-to-medium- sized employer.<sup>20</sup>

[24] A strict approach to compliance with ss 67A and 67B is taken, because a trial provision removes longstanding employee protections, access to dispute resolution and to justice.<sup>21</sup> The problem is that Mr Zhou's employment began more than an hour before the employment agreement was signed. Even if the agreement subsequently signed had contained a trial provision, signing it after employment began was too late

<sup>18</sup> [Contract and Commercial Law Act 2017, s 24.](#)

<sup>19</sup> [Employment Relations Act 2000, s 67A\(1\)](#); the section was amended on 6 May 2019 by [s 36](#) of the [Employment Relations Amendment Act 2018](#).

<sup>20</sup> An employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into: s 67A(2).

<sup>21</sup> See, for example, *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48]; and *Senate Investment Trust through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45, [2021] ERNZ 133 at [38].

to provide the protection sought by Best Health Foods. By the time the agreement was signed Mr Zhou was already an employee which status took him outside the scope of s 67A.

[25] Turning to Best Health Foods' challenge to the remedies ordered by the Authority, Mr Gu said the root cause for the termination of Mr Zhou's employment was his poor-quality work. That work was variously described as rough, negligent or careless handling of data entry into the company's Xero accounting system. This claim was based on an assertion that the company had provided all essential information to Mr Zhou to enable him to perform the task but that he made an unacceptable number of errors which either caused the company substantial difficulty or exposed it to some risk. The nature of that risk was only vaguely and inconclusively described. Mr Gu's contention was that Mr Zhou ignored essential information supplied to him many times and repeated the same mistakes in the very short time of his employment.

[26] The total number of data entry transactions Mr Gu was referring to in the three days of Mr Zhou's employment came to 1,067. It was common ground that the data entry task was incomplete when the dismissal took place, because there were about 100 transactions left unreconciled on 22 January 2020. Mr Gu was concerned about "at least 20" errors. That said, 10 of them involved repetition.

[27] Mr Gu said the errors were significant and required many hours of correction. His calculation was that it was necessary for the company to review each one of the 1,067 entries made by Mr Zhou. That task was said to be time-consuming, amounting to over 80 hours of work and ran a risk of incurring expense.

[28] There was no dispute that when Mr Zhou started work he was asked to update and reconcile Best Health Foods' "bank feed transactions". That task involved significant work because it had not been undertaken since the start of the 2019 financial year. The timing of the dismissal meant he was unable to complete the task, or review what he had done and make any necessary corrections.

[29] Mr Zhou called an expert witness to explain what might reasonably be expected of someone in his position performing this data entry task. Robert Balloch is an accountant and IT manager at a Christchurch accounting firm. He has worked as an accountant for 32 years with previous employment as a financial controller for several software companies. Before working as an accountant, Mr Balloch was a purchasing and production manager for a large company, a cost controller for a chain of retail stores, and a financial administration manager for a group of finance companies. Mr Balloch has used a number of accounting systems including Xero, MYOB and QuickBooks. He is a certified Xero advisor.

[30] The thrust of Mr Balloch's evidence was that it is not unusual for coding errors to occasionally be made when reconciling bank information, especially when someone is new to a business. So far as the errors attributed to Mr Zhou were concerned, he said that the reconciliation task assigned had not been undertaken for a considerable time, much longer than in his experience would be usual. He explained that in his experience updates are undertaken each week or fortnight, but not over the interval Mr Zhou was dealing with. From that evidence the invited inference was that the magnitude of the task

made some initial errors almost inevitable.

[31] Mr Balloch agreed that one of the more important functions within a company is to ensure bank information is regularly reconciled to enable accurate cashflow information to be obtained, but said that any coding errors created at the point Mr Zhou had reached when he was dismissed would be unlikely to be damaging to the company. He said it would only be when GST returns were filed, if they contained significant errors, that there could be difficulty with the Inland Revenue Department. In this case, Mr Zhou did not file GST returns and there was no evidence that the information he processed was used in one. Nor did Mr Zhou prepare any financial statements, relying on the uncorrected data, that might have been tendered to a third party such as a bank.

[32] Mr Balloch said that once the data has been entered in Xero, it is usual for it to be reviewed and compared against other information as a cross-check for accuracy. Two examples given were about checking payment of local council rates and insurance. Both were among the mistakes attributed to Mr Zhou. Mr Balloch said it

is well known that local council rates are normally payable in four instalments during the year. On carrying out a cross-check, if additional payments were wrongly entered for those rates that error would be noticeable and easily changed. A similar cross-check would identify if the number of payments for insurance was out of step. His opinion was that there was nothing unusual or extraordinary in what Mr Zhou had done to the point in time when he was dismissed. He also thought the magnitude of the errors was overstated.

[33] I consider Best Health Foods' concerns were overstated. The task was incomplete and there was no reason to assume that, on completion, any remaining errors would not be dealt with. The incomplete nature of the task also means the information processed by Mr Zhou was not used or relied on in any way by the company. It was also difficult to understand why Mr Gu referred to the company running the risk of incurring expense when the remedial work was performed by him. As was noted by the Authority, that work was done over a month after the errors were identified by Mr Gu calling into question how significant they were.

[34] Finally, while Mr Gu said a significant amount of time was required to review and correct the work, that assertion was inconsistent with Mr Balloch's opinion. Mr Balloch said that where some of the errors were just repetitions of an earlier error, it would be a simple matter to recode transactions using a "find and recode function" in Xero which would enable a global change to be made.

[35] I prefer Mr Balloch's evidence over what Mr Gu said about the mistakes attributed to Mr Zhou including the significance of them and how long they took to address. I do not accept Best Health Foods' argument that significant mistakes were made by Mr Zhou or, in some way, they showed he was unfit for employment as an accountant.

[36] The Authority held that Best Health Foods failed to satisfy s 103A.<sup>22</sup> Under s 123 of the Act, where the Authority or Court determines an employee has a personal grievance, remedies can be provided. Under s 128(2), when the Authority considers

<sup>22</sup> *Zhou v Best Health Foods Ltd*, above n 1, at [17].

ordering the payment of lost remuneration it is required to award the employee the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration. The Authority ordered the company to reimburse Mr Zhou under s 123(1)(b) of the Act, the sum equal to the whole of the wages lost by him as a result of the grievance. It also assessed, under s 123(1)(c)(i), that it was appropriate to order Best Health Foods to compensate Mr Zhou for the humiliation, loss of dignity and injury to his feelings he suffered.

[37] Mr Gu argued that the Authority's errors in relation to these remedies included failing to take into account Mr Zhou's contributory behaviour as evidenced by the mistakes that had to be corrected and to consider the impact of an offer of re-employment. As to the award for humiliation loss of dignity and injury to feelings, the submission was that any impact of the dismissal on Mr Zhou was a result of his own failure to perform adequately rather than because of the company's actions.

[38] I am satisfied the Authority did not make an error of fact or law in concluding that Mr Zhou was entitled to payment for the remuneration actually lost by him. There was no dispute that he was unemployed for four weeks after being dismissed and the award in his favour appropriately applied ss 123(1)(b) and 128(2) of the Act.

[39] The Authority did not make an error of fact or law in concluding compensation should be awarded to Mr Zhou under s 123(1)(c)(i), or in fixing the amount of it. Mr Gu's submissions invited putting aside Mr Zhou's evidence about how he felt on receiving the dismissal letter in the early hours of the morning and the subsequent distress caused to him. There is no basis for doing that.

[40] Under s 124 of the Act, the Authority was required to consider whether Mr Zhou had contributed to the dismissal and, if

so, to reduce the remedies it might otherwise have awarded him. The Authority declined to reduce remedies. I agree with that conclusion. Mr Zhou was not provided with any induction into the company to enable him to understand the nature of its business and to bring that information to bear in the decisions that went into handling the data entry tasks. As has already been discussed, the mistakes attributed to him were not as significant as the company

claimed and were likely to have been corrected had he been allowed to complete the assigned task.

[41] While not expressed in this way by Mr Gu, the company may have been intending to argue that it accepted it did not use a fair procedure in dismissing Mr Zhou, but the nature of the mistakes meant dismissal was inevitable. Such a counterfactual analysis might have a bearing on the remedies awarded. If that was the intended argument, for the reasons given in paragraph [40], I do not accept it. There are no circumstances in which it might be inferred that Mr Zhou's dismissal was more or less inevitable.

[42] That leaves for assessment Best Health Foods' challenge to the remedies by taking into account an offer made by Ms Li, at about midday on 23 January 2020, to re-employ Mr Zhou. The offer was declined. It is now relied on by the company as going some way towards explaining its challenge and to either removing or reducing the compensation ordered by the Authority.

[43] The reason Mr Zhou gave for rejecting the offer was that he did not want to be the cause of any tension between Ms Li and Mr Gu. The offer lacked specifics, but at the hearing Mr Gu confirmed it was to a junior position, with a supervisor, rather than to the position in which Mr Zhou had originally been employed.

[44] I am not satisfied that the offer should be given any weight. It transpired that the offer did not involve reinstatement to the position Mr Zhou previously held. It was not accompanied by any acknowledgment from Mr Gu that his concerns about the quality of Mr Zhou's work were misplaced. There was no explanation as to how the company moved in a matter of a few hours from thinking his work was so deficient that he should be dismissed to accepting that he should be re-employed. Those positions are difficult to reconcile and Best Health Foods did not attempt to explain how it could have performed such a U-turn so quickly, leaving a sense that the offer had more to do with attempting to reduce its potential exposure to liability than accepting it had been wrong and genuinely trying to correct what it had done.

[45] The last matter to address relating to remedies is Mr Zhou's request for an increase in compensation under s 123(1)(c)(i) of an additional \$5,000. He did not challenge the determination to seek an increase in compensation. Further, the additional amount claimed was not linked to any impact on Mr Zhou not already addressed in the Authority's assessment. It follows that there was no basis for considering an uplift in compensation.

[46] The Authority was right to conclude that Mr Zhou was unjustifiably dismissed. I also agree with the Authority's assessment of remedies.

[47] Before concluding this decision it is necessary to comment on another claim made by Best Health Foods as part of its challenge and then abandoned. Initially, it sought to rely on an allegation that there had been a risk of a breach of confidentiality by Mr Zhou. The claim arose from a disputed accusation that he did not use a company-issued computer but chose, instead, to use his private laptop. During the hearing, Mr Gu refined the company's case to concentrate on the data entry mistakes. This refinement meant the company did not seek to rely on the proposed evidence of Tom Zhan, the company's assistant accountant, about what computer was used by Mr Zhou and why.<sup>23</sup>

## Conclusion

[48] The challenge by Best Health Foods is unsuccessful and is dismissed.

[49] Both parties represented themselves, but Mr Zhou had expenses in retaining an expert witness and may have had additional costs for professional advice relating to the challenge. He is, therefore, in a position to apply for costs to seek reimbursement. Mr Zhou may make submissions on costs within 20 working days. Best Health Foods may reply within a further 15 working days.

23. It also meant it was not necessary to consider adjourning the hearing because Mr Zhan was unavailable through illness.

[50] A stay of the Authority's determination was granted by consent on 30 April 2021.<sup>24</sup> It was conditional on the amount Best Health Foods was ordered by the Authority to pay Mr Zhou, totalling \$16,552.33, being paid to the Registrar of this Court. That money is being held by the Registrar in an interest-bearing account. I direct the Registrar to disburse that money and accumulated interest to Mr Zhou.

K G Smith Judge

Judgment signed at 10.30 am on 19 November 2021

24 *Best Health Foods Ltd v Zhou* [2021] NZEmpC 60.

