

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 177
5354220

BETWEEN

SHUI TAK CHOW
Applicant

A N D

TDA IMMIGRATION AND
STUDENT SERVICES
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Tuariki Delamere, sole director of Respondent

Investigation meeting: 18 April 2012 at Auckland

Submissions Received 30 April 2012 from Applicant
2 May 2012 from Respondent

Date of Determination: 29 May 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Shui Tak (Teddy) Chow was unjustifiably dismissed from his employment with TDA Immigration and Student Services Limited (TDA).**
- B. TDA is ordered to pay Mr Chow:**
- (a) \$4,000 distress compensation;**
 - (b) \$8,788.04 lost remuneration;**
 - (c) \$71.56 for his filing fee.**

Employment Relationship Problem

[1] Mr Chow is a qualified lawyer with over 20 years legal experience. He commenced employment with TDA as a legal policy analyst on 2 May 2011. His role required him to prepare documentation for TDA's clients in support of their immigration applications.

[2] Mr Delamere, Managing Director of TDA, said he was concerned about the poor quality of Mr Chow's written work from the outset of his employment. Mr Delamere says he was required to redraft Mr Chow's work before it was sent to Immigration New Zealand (INZ) because it was so substandard it could not be submitted without substantial amendments being made to it.

[3] On Saturday 30 July 2012 Mr Delamere reviewed a submission Mr Chow had prepared for XC¹ which Mr Delamere believed was so poorly drafted he decided Mr Chow should be dismissed for poor performance.

[4] On the evening of Sunday 31 July 2012 Mr Delamere texted Mr Chow that his employment had been terminated. He also emailed Mr Chow a letter dated 31 July which confirmed *your employment is terminated effective immediately* and that he would be paid two weeks' pay in lieu of notice.

[5] Mr Chow alleges his dismissal was substantively and procedurally unjustified. He admits to making some grammatical and typing mistakes in his work but otherwise says Mr Delamere's criticisms of his work are unsubstantiated. He attributes Mr Delamere's concerns to mere differences in writing styles.

[6] Mr Chow denies his performance was so far below an acceptable standard that dismissal was justified. He claims he did not receive any prior warnings about his performance, was not assisted by way of a formal performance improvement process, was not supported or given the training he says he needed to do his job, and was not put on notice that his ongoing employment was in jeopardy as a result of performance concerns.

¹ TDA's client's initials have been used to protect their privacy.

[7] TDA says dismissal was justified because Mr Chow was not competent to undertake the requirements of his role. TDA says it followed a fair process because Mr Chow was dismissed after many discussions and warnings about his performance not being at an acceptable level. TDA says any process defects that may have occurred were minor and did not result in any unfairness to Mr Chow.

Issues

[8] The issue to be determined is whether Mr Chow's dismissal was justified. If not, then remedies, including issues regarding contribution will need to be assessed.

[9] Whether Mr Chow's dismissal was justified is to be assessed in light of the s.103A justification test in the Employment Relations Act 2000 (the Act) which came into effect on 1 April 2011. This requires the Authority to objectively assess whether TDA's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Chow was dismissed.

[10] The full Court of the Employment Court in *Angus and McKean v. Ports of Auckland*² identifies how the justification test is to be applied. The Authority must consider the specific factors set out in s.103A(3) of the Act. It may also consider other appropriate factors under s.103A(4) of the Act.

[11] Section 103A(5) of the Act prevents the Authority from determining that Mr Chow's dismissal was unjustified solely because of minor process defects which did not result in him being treated unfairly.

[12] In order to assess whether Mr Chow's dismissal was justified the following issues must be determined:

- a. Did TDA follow a fair process before it dismissed Mr Chow?
- b. If not, were any process defects minor and if so did they result in any unfairness to Mr Chow?
- c. Did TDA have a good reason for dismissing Mr Chow?

² [2011] NZEmpC 160.

- d. Could a fair and reasonable employer have dismissed Mr Chow in all the circumstances?

Did TDA follow a fair process before it dismissed Mr Chow?

[13] TDA says it discussed its performance concerns with Mr Chow on many occasions because it told him the documents he drafted were not up to the required standard. It also says it gave him a number of warnings before he was dismissed.

[14] Whilst I accept that Mr Delamere had been critical of Mr Chow's work, I find that the criticisms he communicated to Mr Chow were general in nature and were only raised informally. No specific performance concerns were documented and TDA did not embark on a formal performance improvement process.

[15] I do not accept that Mr Chow received any warnings about his performance prior to his dismissal because he was never involved in a disciplinary process. TDA did not put any specific allegations or concerns to Mr Chow to respond to. Mr Chow was never advised that any discussions about his performance were disciplinary in nature, or that he had the right to be represented, or that a disciplinary sanction was a possible outcome. Nor was a warning ever actually recorded as having been imposed on Mr Chow.

[16] Prior to his dismissal Mr Chow was not informed of the specific criticisms of his work that Mr Delamere identified during the Authority's investigation. That was unfair to Mr Chow because it meant he did not fully or properly understand what aspects of his performance were causing concern. It also meant he did not have a clear understanding of what he had to do to improve to the required standard or how any improvement would be assessed.

[17] Although Mr Delamere informed Mr Chow that he had redrafted his work he did not explain why that had been necessary. Mr Delamere should have explained the changes he had made and why they were required to Mr Chow. However, instead of doing so he merely gave Mr Chow the amended version to review in hope that a comparison of the two documents would improve the quality of Mr Chow's work. That was ineffective way of improving Mr Chow's performance.

[18] Mr Chow was not given any training to assist him to improve his performance because Mr Delamere expected him to be able to meet the requirements of the position from the outset of his employment. That was unfair because although Mr Chow was an experienced lawyer he was inexperienced in immigration matters.

[19] Having employed Mr Chow without a trial period, TDA was obliged to ensure he received appropriate training and support to enable him to perform to the required standard. It also should have given Mr Chow a reasonable time and opportunity to develop his immigration expertise before it proceeded to dismiss him for poor performance.

[20] Mr Chow was not given notice that his XC submission had put his ongoing employment in jeopardy. If that had occurred then it may have encouraged Mr Chow to take Mr Delamere's criticisms about his written work more seriously.

[21] TDA failed to comply with any of the s.103A(3) factors in the Act. It failed to sufficiently investigate its concerns about Mr Chow's XC submission because it dismissed him without undertaking any prior investigation into that issue. TDA's concerns about the quality of Mr Chow's XC submission were never raised with him, so he was deprived of a reasonable opportunity to respond to them, which meant TDA dismissed him without first considering Mr Chow's explanation to its concerns.

[22] TDA failed to comply with its statutory good faith obligations because it failed to provide Mr Chow with access to information relevant to its consideration of his ongoing employment. That meant that Mr Chow was deprived of the opportunity to comment on information relevant to his ongoing employment before the decision was made to dismiss him, contrary to the requirements of s.4(1A)(c)(i)&(ii) of the Act.

[23] I find that TDA did not follow a fair or proper process before it dismissed Mr Chow.

Were the above process defects minor and if so, did they result in any unfairness to Mr Chow?

[24] Mr Delamere submits that any process defects were minor.

[25] I do not accept that. TDA's process was fundamentally flawed from the outset. It failed to comply with its statutory good faith or natural justice obligations. TDA's process defects were not minor; they were pervasive and resulted in substantial unfairness to Mr Chow.

Did TDA have a good reason for dismissing Mr Chow?

[26] TDA says Mr Chow's performance was so bad that dismissal was appropriate.

[27] I find it was unfair and unreasonable for TDA to have dismissed Mr Chow without first undertaking a formal performance improvement process to assist him to improve his performance. Dismissal was therefore not an outcome that could have been available to a fair or reasonable employer in TDA's situation.

[28] I find that a fair and reasonable employer could not have dismissed Mr Chow before it had given him a genuine opportunity to improve his performance and unless it had clearly informed him that the consequence of a failure to improve was likely to be dismissal. That did not occur.

[29] A fair and reasonable employer could not have concluded dismissal was appropriate without having first adopted a graduated warning process in response to its performance concerns. It was unfair and unreasonable for TDA to have decided on dismissal as the first disciplinary sanction it imposed on Mr Chow in response to its concerns about his performance.

Could a fair and reasonable employer have dismissed Mr Chow in all of the circumstances?

[30] Dismissal was not a response that was available to a fair and reasonable employer in all of the circumstances.

[31] Mr Chow's dismissal was substantively and procedurally unjustified. TDA's actions, and how it acted, were not what a fair and reasonable employer could have done in all circumstances at the time that Mr Chow was dismissed.

Remedies

Lost remuneration

[32] Whilst employed by TDA Mr Chow also continued to work for his former employer, Ross Holmes Lawyers LP (Ross Holmes), on a part time basis after office hours and during weekends. He did not undertake any immigration work for Ross Holmes over that period.

[33] After he was dismissed by TDA Mr Chow returned to work for Ross Holmes on a full time basis. Mr Chow also gave evidence of other full time positions he had unsuccessfully applied for. I am therefore satisfied he has attempted to mitigate his loss.

[34] Mr Chow's salary when employed by TDA was \$40,000 gross per annum. He is now employed by Ross Holmes on a commission only basis. Mr Chow's remuneration since he returned to work for Ross Holmes full time has been less than he would have earned had he remained employed by TDA.

[35] Mr Chow claimed lost remuneration from the date of his dismissal to the date of the Authority's investigation meeting of \$13,412.73.

[36] I am not prepared to award him more than six months' lost remuneration. I am satisfied that from 1 August 2011 to 31 January 2012 Mr Chow lost remuneration of \$10,985.05. I therefore consider it appropriate to award him \$10,985.05 under s.128(3) of the Act.

Distress compensation

[37] I accept that Mr Chow was hurt, upset, and humiliated about his dismissal. I also consider his distress was increased by the impersonal manner of dismissal which occurred via a text message. However, an award of distress compensation must be based on evidence of Mr Chow's distress, which I find was minimal.

[38] Mr Chow did not need to seek medical treatment. He told me the only physical effects his dismissal had on him was a recurrence of eczema in his ear, which he said he had previously suffered when stressed.

[39] From Mr Chow's evidence it appeared that he was well supported by his wife and by both of their extended families. That has no doubt assisted him to deal with the emotional effects of his dismissal.

[40] I also recognise that Mr Chow had the benefit of obtaining full time work immediately because he increased his work with Ross Holmes from part time to full time as soon as he was dismissed. I consider that was likely to have reduced the adverse non monetary effects of dismissal on him in comparison with many other employees who often face a long struggle to find alternative work.

[41] I consider an award of \$4,000 under s.123(1)(c)(i) of the Act is appropriate to compensate Mr Chow for the hurt, humiliation, and injury to his feelings that he has suffered as a result of his unjustified dismissal.

Contribution

[42] Having determined that Mr Chow has a personal grievance, under s.124 of the Act I am required to consider the extent to which Mr Chow's actions contributed to the situation which gave rise to his dismissal grievance, and if appropriate, reduce remedies accordingly.

[43] I find that Mr Chow contributed to the situation which gave rise to his personal grievance in two ways; his performance was substandard and he refused to accept valid criticisms of his written work.

[44] TDA produced evidence of Mr Chow's work which satisfied me that its concerns about Mr Chow's poor drafting skills had merit. I consider Mr Chow's written work fell below the standard that could reasonably be expected of a qualified lawyer with his experience.

[45] I also consider that Mr Chow created problems for himself when he unreasonably and inappropriately dismissed Mr Delamere's legitimate concerns about the standard of his written work as mere differences in writing style. Mr Chow should have taken Mr Delamere's criticisms more seriously.

[46] I have therefore concluded that Mr Chow engaged in blameworthy conduct which warrants a reduction in the remedies he would otherwise have been

awarded. I consider Mr Chow's award of lost remuneration should be reduced by 20% to reflect his contribution.

Summary

[47] TDA's dismissal of Mr Chow was unjustified.

[48] TDA is ordered to pay Mr Chow:

- a. \$4,000 pursuant to s.123(1)(c)(i) of the Act; and
- b. \$8,788.04 (being \$10,985.05 less 20%) pursuant to s.128(3) of the Act.

Costs

[49] The parties represented themselves so there is no issue as to costs. However, Mr Chow has incurred the cost of the filing fee, so TDA is required to reimburse him \$71.56 for that.

Rachel Larmer
Member of the Employment Relations Authority