

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 188  
5627161

BETWEEN                      GARY KUO MIN CHANG  
Applicant

AND                              WORLD TV LIMITED  
Respondent

Member of Authority:        Nicola Craig

Representatives:            Shelley Eden and Elizabeth Latimer-Bell, Counsel for  
Applicant  
Emma Butcher and Angela Evans, Counsel for  
Respondent

Investigation Meeting:      29 and 30 June and 1 and 11 July 2016

Determination:                3 July 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Gary Chang (Mr Chang) was unjustifiably dismissed by World TV Limited (World TV).**
- B. World TV is ordered to pay Mr Chang within 28 days of the date of this determination the following:**
- (a) \$30,000.00 gross as lost wages or salary;**
  - (b) \$17,000.00 as compensation for humiliation, loss of dignity and injury to feelings; and**
  - (c) \$132,706.92 gross as loss of future benefits under s 123(1)(c)(ii) of the Employment Relations Act 2000.**
- C. The Authority has jurisdiction to consider Mr Chang's claims**

**against World TV regarding unpaid commission and bonuses.**

- D. World TV owes what the parties describe as pending commission to Mr Chang.**
- E. World TV is ordered to pay Mr Chang, within 28 days of the date of this determination, \$289,231.35 gross being the pending commission owing for the period to the end of March 2016. World TV also owes Mr Chang pending commission for April 2016. Leave is reserved for the parties to come back to the Authority if they are unable to agree on the quantum of pending commission owing for that period.**
- F. Mr Chang has not established that he is owed commission regarding an agreement between China Radio International (CRI) and World TV.**
- G. Mr Chang is entitled to receive from World TV a 5% bonus based on World TV's before tax profit for the years ending 31 March 2015 and 31 March 2016. Leave is reserved for the parties to come back to the Authority if they are unable to agree on the quantum.**
- H. Costs are reserved.**

### **Employment relationship problem**

[1] Gary Kuo Min Chang (Mr Chang) was originally from Taiwan. Sometime after arriving in New Zealand he established World TV Limited (World TV or the company) in 1998, along with Henry Ho, Tony Keam and Masa Sekikawa. World TV broadcasts original programmes as well as programmes obtained from several Asian countries.

[2] Mr Chang was World TV's Chief Operating Officer (COO). He managed much of the internal operations of World TV, whereas Mr Ho, as Chief Executive Officer (CEO), had more of an external focus. Over the years Mr Chang set up a number of departments then handed over direct management of them to department heads. The company grew to include seven television channels and two radio channels.

[3] A decision was made in late 2015 to take Taiwanese content off the air at World TV. This resulted in a major Taiwanese shareholder, whom Mr Chang had introduced to World TV, asking Mr Chang to sell their World TV shares. Mr Chang also decided to sell his own shares. Mr Chang informed the other shareholders, who had pre-emptive rights to purchase the shares.

[4] On 15 April 2016 Mr Chang was called into a meeting, and informed that he had been removed as a World TV director and that he was dismissed from employment with the company.

[5] Mr Chang claims that he was unjustifiably dismissed. He also claims other remedies which are in the nature of claims for arrears of money owing under his employment agreement.

[6] World TV says that Mr Chang was justifiably dismissed, and that it does not owe him any arrears, at least in the employment context.

[7] Mr Chang initially sought interim and permanent reinstatement and therefore urgency was granted to this proceeding. However, prior to the investigation meeting the claim for reinstatement was withdrawn.

[8] At the investigation meeting, evidence was heard from Mr Chang and Mr Ho and over a dozen other witnesses including most of the directors of World TV. I was assisted for part of the meeting by an interpreter of the Mandarin language.

[9] I was also assisted by the detailed submissions filed on behalf of both parties.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the

parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[11] This determination, reserved at the conclusion of four days of investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as permitted by s 174C(4) of the Act, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in s 174C(3)(a) of the Act.

### **Issues**

[12] The issues for investigation and determination are therefore:

- (i) Was Mr Chang unjustifiably dismissed by World TV?
- (ii) If so, what remedies (if any) should Mr Chang receive considering:
  - (a) lost wages and other benefits;
  - (b) compensation for humiliation, loss of dignity and injury to feelings; and
  - (c) loss of future benefits?
- (iii) Does the Authority have jurisdiction to deal with the issue of commissions and bonuses payable by World TV to Mr Chang?
- (iv) If the Authority does have jurisdiction, does World TV owe commission to Mr Chang and if so, how much, and should any interest be awarded on any sums owing?
- (v) Does Mr Chang have a claim for commission regarding the rental agreement between World TV and China Radio International (CRI), and if so, how much (if any) commission is owing in relation to that rental agreement?
- (vi) Is Mr Chang owed a bonus for two years' worth of 5% of the company's before tax profit?
- (vii) Should either party be required to contribute to the other's costs for this proceeding?

### **Multiple roles**

[13] As with several other senior executives or directors of World TV, Mr Chang could be seen as having several roles or types of relationship with the company. On the face of it he was an employee and his company contracted his services to World TV. He was also a director and a shareholder of the company.

[14] This case was notable for the absence of documentation regarding arrangements concerning senior managers, including Mr Chang. Mr Chang had no written employment contract and no written contractor arrangement.

[15] Other senior World TV executives who had titled roles in the management of the company<sup>1</sup>, who might thus have seemed to be employees, saw themselves as contractors. In some instances their own companies invoiced World TV for their management fees. They also had no written arrangement with World TV in either an employment or a contractor capacity. Some of these people were also directors and/or shareholders of World TV. One shareholder operated as a World TV employee rather than a contractor.

### **The parties' positions on roles**

[16] World TV accepts that Mr Chang was an employee, albeit suggesting that Mr Chang made his own arrangement to set himself up as an employee. In any event, the company does not attempt to deny that Mr Chang was genuinely an employee.

[17] However, World TV argues that, in addition to being a director and shareholder, Mr Chang had two arrangements with the company; one as an employee, the other as a contractor. The main significance of this for present purposes is that World TV says that any commission and bonus payments which Mr Chang, or his company Pro Media Group Ltd, were entitled to related to the contractor role and are thus not within the jurisdiction of the Authority to deal with.

[18] World TV says that the salary paid to Mr Chang was for integrated management style work under the "Chief Operating Officer" (COO) title, whereas the commission paid was for governance, strategic and consultancy style activities Mr Chang was engaged in on behalf of World TV.

[19] There is a dispute regarding whether the dual roles, suggested by World TV to the Authority, were clearly distinguishable. Mr Chang accepts that the commission and bonuses he earned were paid to his company Pro Media Group Ltd. However, his position is that the attempt to carve out his COO role into two different contractual

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<sup>1</sup> Such as general manager and chief executive officer

arrangements is artificial and that he should be able to claim any money owing through the Authority.

### **Two roles**

[20] In *Lee v Lee's Air Farming Limited*<sup>2</sup>, the Privy Council found that it was possible for a company director to perform service as both director and an employee of a company.

[21] There are taxation cases which support the possibility of a person being engaged by the same organisation as a contractor, in addition to as an employee, such as *Case S62*<sup>3</sup>. However, there the work which was found to be undertaken as a contractor was entirely separate from the taxpayer's ordinary employment and was set up on quite a different basis.

### **Mr Chang's work**

[22] Under s 6 of the Act I am required to consider the true nature of the relationship. I now go on to look in detail at whether the arrangements here really involved two distinguishable roles.

### *Payments*

[23] I look firstly at payments. These included salary, commission and bonuses. World TV now attempts to split Mr Chang's responsibilities or role as an employee (the COO day to day management role) and as a contractor (liaison with external suppliers etcetera). However, the payments do not appear to relate particularly to one type of work or the other.

[24] Mr Chang agreed that his commission and bonus payments had been paid to his company Pro Media Group Limited, rather than to his personal account. His salary was received by him directly.

[25] The agreed part of the commission was 7% of the company's total advertising revenue<sup>4</sup> and the bonus was 5% of any net profit which the company made.

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<sup>2</sup> [1961] NZLR 325

<sup>3</sup> (1996) 17 NZTC 7,393 (TRA)

<sup>4</sup> Some of this amount was withheld by agreement (see below under Commission claims)

[26] Mr Chang's external functions did not particularly appear to relate to the advertising revenue of the company. The evidence was that he was more involved in sourcing overseas programme material for transmission. It is hard to see that the commission based on advertising related to the external role suggested by World TV.

[27] The commission was not billed in relation to the hours which Mr Chang undertook. Although an invoice was raised monthly in Pro Media's name, this was based on a form supplied originally by World TV's accounts person, and simply said, for example, "Sales commission for January 2014", "quantity 1", then a total amount. Little of Mr Chang's work in either the external or the internal functions focused on sales.

*Titles and functions*

[28] There were not two roles in the sense of there being two titles. Mr Chang appeared to undertake both sets of functions, internal and external, under the COO name.

[29] There was no indication of what proportion of Mr Chang's time, if any, in any given month, was spent on which functions. No records were required to be kept of this. There were no requirements as to the proportions or minimums each required.

[30] My impression is that Mr Chang's hours were intermingled between the internal and the external functions. There did not seem to be a clear distinction between the two. At times, for example, when overseas on World TV business he may have done almost entirely external work, and yet there was no evidence that he was not paid his salary during that time. Both salary and commission payments appeared to continue regardless of actual type of work undertaken.

[31] The parties did not seem to regard Mr Chang as having two separate roles or posts in their day to day dealings.

[32] Mr Chang was not working for other companies. He did not have his own equipment. His travel and other work expenses were paid directly by World TV. His sole focus and employment was with World TV. These factors speak against a separate contractor role.

*Termination*

[33] World TV regarded Mr Chang's entitlement to commission and bonus as ending when his employment ended. One of the purposes ascribed to the termination by World TV was to save the company money. By terminating his employment, the entire relationship was terminated and all the money saved. In the dismissal letter of 15 April 2016 World TV states:

Clearly **this role is a significant expense** and we should not be spending that money on such a role unless there is justification for doing so. (*emphasis added*)

[34] Given that Mr Chang's salary was only \$60,000 per annum for a chief operating officer of a company with around 65 employees, my impression is that this reference included other payments received by Mr Chang. This was confirmed by Mr Ho in evidence.

[35] There was no attempt by World TV to cancel a contractor arrangement with Mr Chang or Pro Media, even in a without notice manner. However, Mr Ho made it clear that while he regarded Mr Chang as entitled to commissions (subject to an issue regarding hours when Mr Chang was unwell) up until mid May 2016, there would be no commission for Mr Chang after that, as Mr Chang had left the company. There was no suggestion that Mr Chang could have continued his contractor role after his dismissal. My impression is that Mr Ho and the other directors saw the employee role and the contractor roles as inextricably linked.

*Conclusion*

[36] I accept Mr Chang's argument that World TV is not able to explain how his salary, commission and bonus payments were attributable to the dual roles which World TV now attempts to superimpose. His functions and hours were intermingled. The distinction is artificial and Mr Chang can claim for his various payments as an employee.

**Mr Chang's dismissal**

[37] On 15 April 2016 Mr Chang was called into a meeting of World TV's directors. This was not a usual board meeting in that Mr Chang had not had any notice of it occurring. At the meeting were two lawyers, Ms Emma Butcher, who

appeared for World TV in this proceeding, and Mr Andrew Franicevic (who Mr Chang had met before).

[38] Mr Franicevic told Mr Chang that he and another director had been removed from the board of directors. Ms Butcher told Mr Chang that he was dismissed as the COO of World TV and handed him a letter of dismissal. Ms Butcher began an explanation of why he was dismissed, but Mr Chang said there was no need to talk any further and that he would get a lawyer to speak on his behalf.

[39] About half an hour after the meeting Mr Ho sent an email to all World TV staff telling them that Mr Chang had resigned. That evening Mr Chang's access to company buildings and work emails was blocked.

[40] The reasons for Mr Chang's dismissal, as set out in the termination letter were redundancy and what were described as "serious issues". In terms of redundancy the letter indicated that other current employees/managers could undertake Mr Chang's functions at no additional costs.

[41] The letter contained a brief description of the "serious issues", namely that Mr Chang:

- (a) demonstrated unfair behaviour and an unfair attitude towards some key employees, which have caused these employees to consider resigning; and
- (b) made a number of poor decisions and showed a lack of leadership, and that behaviour has caused damage to the interests and reputation of the company.

[42] The letter also stated that because Mr Chang had indicated to the company that he wished to sell his shares in the company, he was incompatible as a director and senior employee.

### **Justification for dismissal of senior employee**

[43] World TV argued that Mr Chang's power and authority should be amongst the factors which I consider when looking at the justification for his dismissal.

[44] In *Centre for Advanced Medicine Ltd v Sprott*<sup>5</sup> the employer argued unsuccessfully that there should be a differentiation in the way that dismissal principles were applied depending on the status of the employee, in that case a chief executive officer.

[45] Parliament clearly intended the same basic test of justification to apply to all dismissals. Under s 103A (1) and (2) of the Act, a dismissal must, when viewed objectively, be something which a fair and reasonable employer could have done in all the circumstances at the time it occurred. I am already required to consider all the circumstances, which I find would include Mr Chang's employment role and other responsibilities.

[46] In considering whether World TV acted fairly and reasonably I must consider, under s 103A(3) of the Act, whether the company:

- (a) Having regard to the resources available, sufficiently investigated the allegations against the employee before dismissing;
- (b) Raised the concerns with the employee before dismissing;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns; and
- (d) Genuinely considered the employee's explanation (if any).

### **Reasons for dismissal**

[47] The dismissal letter takes a wide, almost scattergun, approach to the reasons for dismissal. There appear to be at least four grounds identified, although largely without particulars. These include:

- (a) poor behaviour and attitude towards staff;
- (b) poor decisions and lack of leadership, damaging the interests and reputation of the company;
- (c) no longer wishing to hold shares in the company which was seen as incompatible with Mr Chang's director and senior employee status; and
- (d) redundancy.

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<sup>5</sup> Employment Court, Auckland, AC 20/05, 10/05/05

**Incompatibility**

[48] I find that the central focus of the reasons the directors gave in evidence for the decision to dismiss was incompatibility, in the sense of how could Mr Chang still be involved in the company or be the COO, if he was not a shareholder.

[49] For example, Mr Chang's decision to sell his shares was seen by the General Manager and director Mr Samson Yau as incompatibility. Mr Yau considered that if the right of pre-emption was waived it could damage minority shareholders for shares to be sold, when they could be sold to anyone. Similarly director and shareholder Mr Paul Li says that if Mr Chang sold his shares he no longer belonged to the board or the shareholder list and therefore how could he run the business.

[50] In many companies senior managers will not be either shareholders or directors of the company. The expectation from at least some of the World TV directors was that, with their company, they would be. The basis for that view was not clear from the evidence. If the argument was that some sort of loyalty was required in the form of shareholding, that was not established as an expectation that had previously been made clear to Mr Chang.

[51] I am satisfied from hearing the evidence of the directors and examining the chronology of events, that it was Mr Chang's announcement that he would sell his shares in World TV which was the predominant reason for his dismissal despite other reasons also being raised in the dismissal letter.

**The Board Report**

[52] In late January or early February 2016 a decision was made by Mr Ho and Mr Yao to arrange for a report to be compiled which would persuade other directors that Mr Chang needed to be exited. The focus was to be Mr Chang's behaviour towards staff. Mr Yau agreed to undertake the report.

[53] The report includes headings such as "Double Standard", "Insulting & Humiliating Staff", "Wrong Decision-Making Damage WTV's Reputation" and "Never Listen to Others Before Making Judgement".

[54] Mr Yau says that he was trying to keep the report simple and to the facts. However, on further questioning it became apparent that the report does not stick to the facts. For example, in the “Double Standard” section, an introduction before moving to case studies, reads “It’s always his character and practice that GC plays favouritism to those staff he likes.”. Mr Yau accepted that that was his comment. The report also includes (although not in an attributed way) Mr Yau’s personal experience of Mr Chang.

[55] In terms of the sources of information, Mr Yau says that he went across departments in the sense that one or two people from various departments provided material. It appeared that those with known concerns about Mr Chang were approached directly. Mr Yau says that he also talked to staff in a wider group chat, asking them if they had any problems with Mr Chang. This gave the impression of being a fishing expedition for negative material to put in the report.

[56] Mr Yau did not fully investigate at least some events outlined in the report. For example, the report criticises a decision regarding a gift to a staff member. Mr Yau was not aware which budget the money came from. It became apparent during the Authority process that Mr Jody Chang had authorised that expenditure, not his father Mr Gary Chang. Mr Yau accepted that he did not talk to Mr Gary Chang as part of compiling the report.

[57] Without Mr Chang’s knowledge, the report was given to a number of directors in the lead up to the decision to dismiss.

### **Behaviour towards other staff**

[58] I now consider the role which Mr Chang’s behaviour towards staff played in his dismissal. Considerable evidence was brought by World TV to show negative behaviour by Mr Chang towards other staff. A number of witnesses who worked at World TV were called to say that they had been badly treated by Mr Chang and could not continue to work at World TV if he was there.

[59] Some people considered that Mr Chang had an autocratic management style, which seemed to apply to all staff. Others considered that he focused his negative

behaviour towards particular staff members. Mr Chang brought some evidence of staff who had a more positive impression of him and his management style.

[60] There was substantial evidence from witnesses called by World TV, that Mr Chang's negative behaviour or manner towards (at least some) staff had continued for a long period. Other directors knew about the behaviour, some describing having observed it themselves. Mr Yau described behaviour occurring from time to time since Mr Yau started with World TV in 2003, including shouting and swearing at staff.

[61] Mr Ho says that he had spoken to Mr Chang about it from time to time. However, no disciplinary or performance management action had been taken by World TV.

[62] This was not a new issue. The evidence was clear that other directors, including Mr Ho, were aware of at least occasional difficulties with Mr Chang's approach towards, at least some, staff.

[63] However, very little was done about that. I find that World TV was prepared to put up with Mr Chang's behaviour or way of dealing with staff, for many years. Mr Chang was not being put on notice that his behaviour was unacceptable and what he needed to do to improve.

[64] I do not need to make a finding on whether Mr Chang's behaviour was sufficiently serious to justify a dismissal. I find that World TV put up with Mr Chang's behaviour until there was another reason to take action, in this case Mr Chang's intention to sell his shares, which motivated the company to act. Even if there were issues they were performance ones about which Mr Chang needed to be put through a proper process and that had not occurred.

### **Redundancy**

[65] World TV suggested that Mr Chang's role was redundant. However, there was very limited evidence of an assessment being made of Mr Chang's work, and what would happen to it, before the dismissal decision was made, which does support the finding that the real reason for his dismissal lay elsewhere.

[66] In the early stages of this proceeding redundancy was raised as a reason why Mr Chang should not be reinstated. He subsequently withdrew his reinstatement application.

[67] I have found that the real reason for Mr Chang's dismissal was his decision to sell his shares and not redundancy.

## **Procedure**

### *Investigation*

[68] Some of the issues with the investigation leading to the Board report have been identified above. The author started with a fixed view about Mr Chang, included his personal opinions in the report, sought out only negative comments, and did not fully and fairly investigate the instances which were mentioned in the report.

[69] The report was primarily aimed at persuading other directors that Mr Chang needed to go, rather than amounting to a fair investigation of the issues. Mr Chang was not shown and did not have a chance to comment on the report.

### *Suspension*

[70] Rather than proceed to dismissal without any process, Mr Chang could have been suspended from work and ordered not to contact other employees. World TV suggested that it could not do this because of the risk that Mr Chang would harm the company.

[71] However, my impression is that Mr Ho and Mr Yau saw that they had the balance of support from directors at that point and were worried that if they waited and followed a process in dealing with Mr Chang, that Mr Chang would be able to persuade more directors to back him. This risk was not a sufficient reason to avoid following a fair process to an employee. Mr Chang's employment rights were sacrificed to ensure that he did not have the opportunity to take control of the business.

### *Meeting*

[72] The process by which Mr Chang was informed of his dismissal could be seen as an ambush. It was clear at the Authority's investigation meeting that Mr Ho and Mr

Yau in particular had decided that it was too risky to allow Mr Chang to continue working for the company. There was little explanation offered as to why they thought this was the case.

[73] The lack of process was at least partially acknowledged by the company. Mr Ho's evidence was that instant dismissal without any prior discussion with Mr Chang was something which the Authority or the Court might find was not fair to him but they felt that they had no other choice to protect the interests of the business. It was a risk the directors felt was worth taking.

[74] Mr Chang was called to a meeting with no advance notice and no information about what the meeting was about. He was not invited to bring anyone to the meeting with him. He was confronted with the directors and two lawyers. One of the lawyers told him that he had been removed from the board of directors. The other lawyer told him that he was dismissed as COO of World TV and handed him a letter of dismissal.

[75] There was an attempt to provide an explanation of the reason/s for dismissal by a lawyer in English but World TV had not arranged for a translator to be present. Mr Chang has some English but it is not his first language. In any event the decision to dismiss had already been made and thus any explanation would not have allowed Mr Chang an opportunity to provide a response to any issues which the company or directors had.

[76] Considering the elements in s 103A(3) of the Act none of the aspects were satisfied in this case. The allegations were not sufficiently investigated, the company's concerns were not raised with Mr Chang before dismissing him, he was not given an opportunity to respond before that decision was made and thus any explanation which he might have given was not considered by World TV. I do not consider that the nature of Mr Chang's senior position in World TV was sufficient to justify these inadequacies.

[77] In conclusion World TV's actions were not what a fair and reasonable employer could have done in the circumstances at the time. Mr Chang's dismissal was unjustified.

**Lost wages or salary**

[78] I now move on to consider the remedies which Mr Chang has claimed. Firstly, he claims lost wages or salary for 12 months, running from the end of his period of notice. This period starts from 16 May 2016. As at the time of the investigation meeting Mr Chang had not obtained other employment. Mr Chang was on a salary of \$60,000 gross per annum, equating to \$5,000 gross per month.

[79] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration. I have a discretion under s 128(3) of the Act to order a sum of compensation for lost remuneration greater than the three month period.

[80] Evidence was given by an experienced recruitment adviser Kathryn Cross. Although Ms Cross was not formally qualified as an expert, I accept her ability to give evidence regarding the likelihood of Mr Chang obtaining employment in New Zealand. Ms Cross was limited to being able to comment on COO roles and other executive or human resources type positions, rather than considering Mr Chang's prospects to create his own business opportunities.

[81] In Ms Cross's experience COO roles only arise about six to ten times a year and it was not uncommon for a COO to take six to twelve months to find such a role. She was not aware of any roles like Mr Chang's COO role which were currently available.

[82] Ms Cross identified that Mr Chang's limited English and age would present an obstacle to other employment. The Chinese broadcasting or media industry in New Zealand is small. Ms Cross also considered that the nature of Mr Chang's leaving World TV and a likely lack of suitable referees would make it difficult for him to secure a similar role. Overall her assessment was that it was likely to be very difficult for Mr Chang to secure a comparable role in New Zealand.

[83] World TV argued that Mr Chang had not yet attempted to mitigate his loss and thus no reimbursement should be ordered. Mr Chang did not provide evidence of jobs

which he had applied for. However, he was in a situation where his dismissal came with no advance notice to him. He was involved in filing an application for interim reinstatement and even once that was withdrawn, in progressing his case promptly. He was also hospitalised due to ill health for a short period during that time. In *Xtreme Dining Ltd (t/a Think Steel) v Dewar*<sup>6</sup> a full bench of the Employment Court held that it is for the employer to persuade the Authority that the employee acted unreasonably in failing to mitigate the asserted loss. I am not satisfied that World TV has done so in this case.

[84] In terms of future loss World TV emphasised the prospect of Mr Chang mitigating his loss through the development of other business interests and I accept that there is some prospect of this.

[85] Recognising that English is Mr Chang's second language, his best employment prospects are limited to companies run by Chinese speakers. He also faces the challenge of finding work in his sixties. Weighed against that is his business acumen and the prospects of him developing his own opportunities through other business interests. I consider that a period of six months' lost salary would be appropriate.

[86] I order that World TV pay Mr Chang six months' lost salary, being \$30,000 gross, within 28 days of the date of this determination.

[87] I will deal with the claim for lost commission for the period after Mr Chang was dismissed below, under the loss of future benefits heading.

### **Compensation under s 123 (1)(c)(i) of the Act**

[88] Mr Chang has claimed \$25,000 for compensation for humiliation, loss of dignity and injury to feelings.

[89] Mr Chang was absolutely shocked by his dismissal as it came completely without notice or warning. The dismissal came as a complete surprise to him and he became very upset when informed of it.

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<sup>6</sup> [2016] NZEmpC 136

[90] Mr Chang feels that he has lost status and reputation in the community because of his dismissal. Although staff were told that Mr Chang had resigned, this was not what was told by Mr Yau to some other community members. Mr Chang is concerned about word of his dismissal spreading and particularly early steps taken on behalf of World TV to let some of their contacts know. Mr Yau told three people. These included the Consulate General of China as Mr Yau was concerned about the possibility of contact by Mr Chang's family.

[91] I accept that Mr Chang's position was highly regarded and visible within the Chinese community.

[92] Mr Chang says that his health is suffering as a result of the dismissal. Further he says that his family have been greatly affected by his removal from the company. The situation has been very stressful for his wife and his son. Mr Jody Chang felt that he had to resign from World TV. Although an award for compensation under s 123 (1)(c)(i) of the Act cannot be made to compensate people other than the grievant, I accept that seeing members of his family stressed is also distressing for Mr Chang.

[93] In some ways Mr Chang presented a stoic person. However, I am satisfied that the dismissal, and the manner in which it was carried out, had a very significant and damaging impact upon him. World TV was an organisation which he had played a significant part in establishing. It was a company which had a ground breaking role in bringing Asian television to New Zealand. Mr Chang had helped lead it for over 15 years. As a media organisation, it is very integrated with the Asian communities in New Zealand.

[94] I accept that some of Mr Chang's loss of dignity and injury to feelings could relate to his loss of the governance/director role which he held at World TV, which is not something which this personal grievance relates to.

[95] I award Mr Chang \$17,000 as compensation under s 123 (1)(c)(i) of the Act and order World TV to pay that to him within 28 days of the date of this determination.

**Loss of future benefits under s 123(1)(c)(ii) of the Act**

[96] Mr Chang claims for 12 months' loss of future benefits including commission. I have dealt with the issue of future salary above. I consider a six month period should also be used to determine Mr Chang's lost benefits resulting from his dismissal.

[97] As the hearing occurred relatively quickly after the dismissal due to the interim reinstatement application, there was a limited time period for which actual losses could be established.

[98] I have been unable to identify evidence regarding the quantum of bonus payments received in the past or a projection of future profits for World TV. I therefore am unable to make an award regarding lost bonus payments.

[99] The claim for future commission is made on the average of commission earned for the period from February 2014 to February 2016. The 50% pending figures averaged \$11,058.91<sup>7</sup> per month. The total claim is for \$22,117.82 per month, for June 2016 to May 2017, making \$265,413.91.

[100] Claims for future wages losses are sometimes determined on the basis of average wages when there is variability of the amount earned each pay period. On a similar basis I assess that commission on the basis of the average rate for a period before dismissal can be used to provide a basis for calculation of future losses.

[101] Six months of lost commission totals \$132,706.92 gross and I order World TV to pay that sum to Mr Chang within 28 days of the date of this determination.

**Contribution**

[102] I am required under s 124 of the Act to consider the extent to which the actions of Mr Chang contributed to the situation that gave rise to the personal

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<sup>7</sup> \$317,943.81 multiplied by 25 months, making \$12,717.75, then deducting the GST

grievance. If the actions of Mr Chang are to be taken into account they must be both causative of the outcome and blameworthy<sup>8</sup>.

[103] World TV's position was that Mr Chang's bad behaviour towards other staff contributed to his dismissal and that, if he was successful in his personal grievance claim, a reduction of remedies should be made for that.

[104] As is evident from earlier parts of this determination, I do not accept that Mr Chang's behaviour towards other staff was the real reason for his dismissal. The company had put up with Mr Chang's management style for many years, doing very little about it.

[105] The real motivation behind the dismissal was that Mr Chang wanted to sell his shares in the company. This was due to his concern about the company's lack of commitment to Taiwanese content and the resulting expression by the other Taiwanese shareholder of a desire to sell their shares. Mr Chang's behaviour to other staff was not the cause of his dismissal and therefore I do not consider it in relation to the contribution issue.

[106] The issue regarding Mr Chang's expressed desire to sell his shares was the reason for his dismissal and thus I must consider whether that requires a reduction for contribution.

[107] I do not accept that Mr Chang's desire to sell his own shares can be seen as blameworthy for the purposes of considering contribution. I therefore make no reduction in the awards for contribution.

### **Commission claims**

[108] Mr Chang claimed that he was entitled to commission on the basis of an agreement with World TV to that effect. The commission claims concerned past commissions which had yet to be paid, as well as commission which would have been earned from May 2016 onwards, had he not been dismissed.

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<sup>8</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

[109] Although the commission was claimed as a benefit which Mr Chang lost as a result of his dismissal, those relating to times before his dismissal are more appropriately dealt with as an arrears claim. Otherwise in the event that Mr Chang's dismissal was found to be justified he would be without any entitlement to this claim which related to events prior to his dismissal.

[110] World TV challenged the jurisdiction of the Authority to deal with Mr Chang's commission claim, saying that any entitlements arose under Mr Chang's contractor arrangements, not from his employment relationship with it. I have already rejected this argument.

[111] Over a number of years World TV paid Mr Chang, other directors and employees were paid commission on advertising revenue. Some directors and employees were paid commission on the basis of their particular contribution to the business, namely sales which they were personally responsible for<sup>9</sup>. However, Mr Chang and Mr Ho were both paid commissions based on the overall advertising revenue of the company. This reflected their roles in establishing World TV.

[112] In this section of the determination I consider only the annual commissions which Mr Chang had been receiving for some time. Consideration of the claim for commission on the China Radio International (CRI) agreement is in the following section.

[113] In terms of other recipients of commissions, there was a mixed picture regarding their status. Some directors who did not have any employee role received commission from World TV. Jody Chang, who was a senior employee but not a director, also received commission.

### **Pending commission**

[114] In 2013 a decision was made that those who received commission based on more than just their own direct sales<sup>10</sup> would only be paid half of their commission on the understanding that they would be paid back what was described as "pending

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<sup>9</sup> Either directly or through the team they managed

<sup>10</sup> Mr Ho, Mr Gary Chang, Mr Jody Chang and Mr Yau

commission” over a period as the company’s financial state allowed. This included Mr Chang.

[115] A World TV purchases report for Pro Media Group Ltd shows monthly entries for a payment of half the commission and a “50% Remaining Comm” payment which was then debited by a “Payable Entry for liabilities” figure for the same amount. Provision was made in the company’s accounts for the pending amounts. Mr Yau accepted that, although there was some uncertainty about when payment would be received, his own pending commission was a debt owed by World TV to Mr Yau.

[116] From 2015 the four with pending commissions began receiving payments for these pending amounts in the majority of months. These were recorded in documents headed “Payment to Management”. The oldest pending amount was paid first. So, for example, the first amount was owing for the month of July 2013, and it was paid in March 2015.

[117] Payments were made in relation to Mr Ho and Mr Yau in May 2016, but not for Mr Chang. Mr Jody Chang was paid back all his pending commissions when he resigned.

[118] Although there was some initial attempt by World TV in this proceeding to say that the pending commissions were unclear or there was no agreement to pay, the evidence did not support this. There is a paper trail, as outlined above, of the amounts not paid which were then regarded as pending, and the company’s liability for those amounts in its accounts.

[119] There was also evidence of an intention by World TV to pay shortly in the period shortly after Mr Chang’s dismissal. Mr Jody Chang gave evidence of a conversation which he had with Mr Ho after his father was dismissed. A transcript was also provided. In it Mr Jody Chang asks about the money owed to Mr Gary Chang by the company. Mr Ho says “We will pay, we will pay” and further on “To be honest with you when we decided to do all these (sic), we have prepared to give him (Gary) money”.

[120] A promise was also given by Mr Yau in his 29 April 2016 email to Mr Jody Chang, that Mr Gary Chang and Mr Jody Chang would be paid the outstanding

balance of payment (commission and wages) within four weeks. However, Mr Gary Chang was not paid.

[121] A couple of reasons were then put up by World TV for not paying. Firstly there was a suggestion that Mr Chang might not be owed the money having moved to part-time hours, or doing some monitoring of programmes from home instead of being at the office. This supports the commission payments being linked to an employment arrangement. Aside from that I did not find this argument tenable. The evidence did not support these payments being based on particular hours of work.

[122] The other motivation for non-payment was that Mr Chang issued proceedings against World TV and sought reinstatement and thus may have come back to work for the company. However, at the time of Mr Yau's email of 29 April 2016 committing to payment, Mr Chang had already raised a personal grievance claim through his lawyer in which he sought reinstatement.

[123] I am satisfied that there was an agreement to pay the pending commission and the amounts were regarded as a debt owing by World TV. I am satisfied that Mr Chang is owed the pending commission by World TV.

[124] For the sake of completeness I note that World TV did not submit that the Authority should only order payment of this money by instalments. There was evidence that the two remaining others covered by this arrangement had received pending commission payments in the period following Mr Chang's dismissal, whereas Mr Chang did not. There was also Mr Ho and Mr Yau's commitments to pay Mr Gary Chang, expressed to Mr Jody Chang. In Mr Yau's email the commitment was to pay within four weeks.

[125] Mr Chang's claims include the following:

- (a) Unpaid pending commission for the period February 2014 to February 2016 of \$317,943.81, less GST, being \$276,472.87; and
- (b) Unpaid pending commission for March 2016 being \$12,758.48.

[126] I order World TV to pay Mr Chang, within 28 days of the date of this determination, \$289,231.35 gross being the payments for those two periods above.

[127] Mr Chang also claims pending commission for on April 2016. I am satisfied that he should receive that pending commission but do not have the figures available to make an order for it. I leave that to the parties to resolve. If they are unable to do so, I reserve leave for them to come back to the Authority.

[128] Mr Chang has claimed interest on the pending commission. I am not satisfied that interest should be awarded. Clearly those covered by the pending commission agreement knew that they would be waiting for receipt of that money until such time as the company's financial position allowed it. The first payment was received in 2015, about two years after the first amount was withheld. The pending commissions were then paid out monthly but not in every month. I therefore do not exercise my discretion to award interest on the pending commission payments.

### **The CRI claim**

[129] Mr Chang claims that there is unpaid commission owing to him regarding a rental agreement for television air time, between China Radio International (CRI) and World TV. Mr Chang claims that he should have received commission for the 53 month period when the CRI agreement was in place. The claim for this CRI commission totals around US \$435,000.

[130] World TV raises the same jurisdiction argument regarding this commission, as it did with the other commission claims above, namely that if it was due (which it denies) it was due to Mr Chang in his contractor role, not as an employee. However, as decided above I am not satisfied that there is sufficiently clear segregation between the suggested dual roles and I am prepared to consider this claim. In addition, I note that this claim is largely based on Mr Chang's personal work on the CRI relationship rather than the work of a wider group.

[131] World TV also claims that the CRI agreement was not within the range of company earnings that commissions were paid on and therefore Mr Chang was not entitled to any commission regarding that agreement.

[132] In addition, Mr Chang and Mr Ho disagree about the proportions of their respective responsibility for the achievement of this rental agreement; each man claims a larger amount of responsibility for himself.

[133] Mr Ho has not claimed any commission owing to him in relation to his role in the establishment of the CRI agreement.

[134] Mr Chang appears to have made no attempt to claim for commission on this agreement from when it was set up in around 2010, until after this proceeding was commenced. Mr Chang says that he decided to sacrifice his personal gain for the good of World TV and not claim the commission in circumstances where he would have been entitled to, because the company could not afford to pay such a significant commission.

[135] Mr Chang says that he spoke to Mr Ho about it around the time the agreement was established and Mr Ho said not to worry about it as the amount would be part of his bonus. Mr Ho, when questioned, initially said that he could hardly remember discussing the CRI commission with Mr Chang. He then accepted that he had said the bonus comment as a joke or casually but that Mr Chang had never officially asked for payment.

[136] Given that the bonus was paid on World TV's total profit, Mr Chang could presumably have benefited from the CRI agreement, in the sense that the company was made more profitable by that contract.

[137] There is no evidence of documentation of the CRI commission in the same way as the pending commission payments, which were provided for as a liability in the company's accounts.

[138] I am not satisfied that the CRI agreement comes within the nature of the verbal understanding between the parties regarding what commission would be paid on. I do not consider that the discussion which I accept occurred between Mr Chang and Mr Ho, around the time that the CRI deal was done was sufficient to either vary the existing arrangement, or establish a new arrangement, which would oblige World TV to pay Mr Chang commission on the CRI contract.

[139] It was also suggested on Mr Chang's behalf that even if he was not entitled to receive 15% commission on the CRI contract, then the income from that contract should have gone into what his personal 7% commission was calculated on. As it was not, a claim was made for an amount due on that basis. However, I am not satisfied

that the CRI contract came within the advertising revenue which that 7% commission which was paid on and therefore make no award in that regard.

### **Bonus**

[140] Mr Chang claims to be entitled to an annual bonus of 5% of World TV net profit before tax.

[141] World TV raises the same issue as to the Authority's jurisdiction to deal with this matter, on the basis that the payments were made to Mr Chang in his contractor role. However, I am satisfied that these matters can be determined by the Authority.

[142] At the investigation meeting it was established that Mr Chang had been paid bonuses for the years ending 31 March 2013 and 31 March 2014.

[143] World TV's assistant accountant Nancy Cao and Mr Ho both described this bonus as "discretionary" in their witness statements. Given that Ms Cao was not a senior manager and had only been in her position since the start of 2014, I do not regard her evidence in this regard as of great assistance.

[144] Under cross-examination Mr Ho acknowledged that the bonus was payable if there was a profit, following the accounts being audited. There was very limited documentary evidence on this bonus arrangement, but the minutes of a World TV Directors' Meeting on 1 July 2003 do not specifically indicate that there is a discretion, however, the approval of the board is sought for the 5% payment as an "incentive bonus".

[145] I am satisfied that the agreement with World TV was that a 5% bonus would be paid to Mr Chang when a profit before tax was made by the company, and that this was not discretionary.

[146] Mr Chang seeks 5% of World TV's before tax profit for the years ending 31 March 2015 and 31 March 2016. I find that he is entitled to such payment in the event that there was any before tax profit in either of those years.

[147] In terms of the quantum of these bonus payments, I leave that to the parties to resolve. If they are unable to do so, I reserve leave for them to come back to the Authority.

### **Costs**

[148] Costs are reserved. The parties are invited to resolve the matter.

[149] If the parties are unable to resolve this matter Mr Chang shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. World TV shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[150] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

**Nicola Craig**

**Member of the Employment Relations Authority**