

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 126
5338269

BETWEEN	FERN CHEN Applicant
AND	JASON CLAYTON First Respondent
AND	CUSTOM EMPLOYMENT EVENTS LIMITED Second Respondent

Member of Authority:	K J Anderson
Representatives:	Helen Melrose, Counsel for Applicant Jason Clayton in Person and Advocate for Second Respondent
Investigation Meeting:	7 December 2011 at Auckland
Submissions Received	22 December 2011 from Applicant Nil from Respondents
Determination:	12 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Fern Chen, claims that she was unjustifiably dismissed, effective from 9 March 2011. Ms Chen asks that the Authority find that she has a personal grievance and award her the remedy of loss of wages and compensation under s.123 of the Employment Relations Act 2000. Ms Chen also claims wage arrears in the sum of \$518 and holiday pay on the gross wages she earned, in addition to holiday pay to be awarded, if appropriate, on the reimbursement of wages claimed, the total sum of the holiday pay being sought is \$1,139.73. There are also claims for

payment for four public holidays in the sum of \$592, and for a penalty to be awarded for a failure to provide an employment agreement.

Background

[2] In November 2010, Ms Chen graduated from AUT with a degree in fashion design. During her time as a student, she worked at a local hotel bar where she met Mr Jason Clayton as a customer of the hotel. Ms Chen ceased working at the hotel bar in March 2010 but still visited it. At some point there was discussion between Ms Chen and Mr Clayton whereby she indicated that she was looking for work.

[3] Mr Clayton owns and operates a business trading under the company name Custom Employment Events Limited. One of the employment events that he had planned was an OZ Jobs Expo whereby, as the Authority understands it, New Zealand people anticipating working in Australia could meet with a number of Australian employers to discuss prospective employment opportunities in Australia. The OZ Jobs Expo (the Expo) was to be held on 12 and 13 February 2011. Mr Clayton offered Ms Chen a job where she would effectively be an assistant to Ms Helen Vincent; whom Ms Chen refers to as the “*new director*”. The role involved assisting with organising the Expo, including administrative support and maintaining the business website. Ms Chen’s evidence is that there was also some talk of using her design skills for the uniforms of staff involved in the Expo.

[4] It was orally agreed that Ms Chen would be paid \$15 per hour plus a petrol allowance of \$50 per week. The hours of work would be 9am to 5pm, Monday to Friday each week. There does not appear to have been any discussion about a written employment agreement at this stage of events. Neither is it clear whether Mr Clayton was employing Ms Chen in a personal capacity or whether she was employed by the company. But in any event, according to the Companies Office Register, Mr Clayton is the sole director and shareholder of the company and all directions pertaining to the operation of the business appear to have been made by him.

[5] Ms Chen commenced her employment on 14 December 2010. Her evidence is that she has always had an employment agreement when working in other roles and so during the week beginning 20 December 2010, she asked Mr Clayton for an employment agreement. Ms Chen says that Mr Clayton informed her that he would have one “*drawn up*” when Ms Chen returned from the Christmas/New Year holiday

break. Ms Chen says that she was asked to keep a record of her hours of work and was given a form for this purpose.

Changes in 2011

[6] The common evidence is that Ms Vincent resigned during the Christmas holiday break. Ms Chen says that when she returned to work on 5 January 2011, Mr Clayton asked her to take on most of Ms Vincent's responsibilities. In recognition for doing this, Ms Chen's rate of pay was increased to \$18.50 per hour and, Ms Chen says, "*with a promise of a new improved package*" after the Expo was completed in February. There was discussion about the hours of work, breaks for lunch etc, the petrol allowance, a work phone, travel and expense claims and a bonus on completion of the Expo. Ms Chen's further evidence is that Mr Clayton informed her that if she were to resign, he needed one month's notice as he would need to train someone to take over the role.

[7] Ms Chen says that following the departure of Ms Vincent, her role became "*sole charge*" in nature and she largely worked on her own; albeit Mr Clayton would communicate with her by phone throughout the day and he would usually come to the office each day. Ms Chen's duties encompassed undertaking all matters associated with arranging the Expo.

[8] The evidence of Ms Chen is that upon returning to work in the New Year, she inquired from Mr Clayton about the provision of an employment agreement; whereby Mr Clayton responded that he had been distracted by the resignation of Ms Vincent but informed that he would "*get onto it*". Upon a further inquiry from Ms Chen in the week of 10 January 2011, Mr Clayton told her to find a "*template contract*" and then draft an agreement consistent with the terms that they had agreed upon. Ms Chen did this but the matter was deferred by Mr Clayton until after the Expo.

[9] It seems that the working relationship between Ms Chen and Mr Clayton progressed in an amicable manner, apart from some stress related to the pressure of ensuring that the Expo came to a successful conclusion; which apparently it did. The evidence of Ms Chen is that, following a staff dinner upon the completion of the Expo, Mr Clayton sent her a text saying:

Will pay yr bonus on Tuesday. Talk about a new package Friday.

Events after the Expo

[10] Following the conclusion of the Expo, Ms Chen was paid a cash bonus of \$2,000. However, her hours of work then appear to have become somewhat irregular and, as a consequence, the pay received by Ms Chen reflected this. The evidence of Ms Chen is that, from about 28 February 2011, Mr Clayton would send her home early on some days and on other days he would ask her not to come into work at all. Ms Chen says that on one occasion Mr Clayton told her that he was: “*not going to pay me for sitting around doing nothing*”. This appears to have been towards the end of the week beginning 28 February 2011. Ms Chen says that this was the first indication she had that Mr Clayton was not going to pay her for a full week.

The dismissal

[11] On Wednesday, 9 March 2011, Ms Chen was not required to work after 1:00p.m. as there was no work available for the rest of that day. However, Mr Clayton required her to come back into work to complete a task. Ms Chen and Mr Clayton met later that day at a café. The evidence of Ms Chen is that Mr Clayton informed her that he “*needed to take some time off*” and that he did not want to enter into a full-time employment contract; and that he had told Ms Chen this from the beginning. As far as Mr Clayton was concerned, the arrangement they had was that she was doing casual work. The response from Ms Chen was that she informed Mr Clayton that they had a verbal agreement for her to work on a permanent basis.

[12] The evidence of Mr Clayton is that he asked Ms Chen to explain what she meant and Ms Chen responded:

My aunt¹ told me not to say anything. I'm just telling you how it is, we have a permanent contract whether you like it or not.

[13] Ms Chen says that Mr Clayton told her that he did not want to be threatened and then told her that there was “*no more work*” and that; “*its over, give me your phone and the key*”. Ms Chen’s evidence is that:

This took me completely by surprise. I was very distressed as we were in a public situation and he just sacked me. I had no idea this was going to happen.

¹ This a reference to Ms Melrose whom along with her husband, acted *in loco parentis* to Ms Chen.

Subsequent matters

[14] The evidence of Ms Chen is that, sometime after 9 March 2011, she received some text messages from Mr Clayton indicating that he required the password for the Facebook page of the business and also that he wished to “*serve papers*” on Ms Chen. Mr Clayton alleges that Ms Chen “*destroyed*” the link between the OZ Job website and the Facebook site and he says that he contemplated legal action, but subsequently “*cooled down*”. Ms Chen denies any destructive action as alleged by Mr Clayton.

Analysis and conclusions

[15] It is commonly accepted that the employment of Ms Chen was terminated on 9 March 2011 and that the dismissal occurred, more or less, as Ms Chen has related. Therefore, the first issue that requires determination is: Was the dismissal unjustifiable?

[16] The test that applies is provided by s.103A of the Employment Relations Act 2000 (the Act). In determining whether a dismissal or an action was justifiable, the Authority is required to consider, on an objective basis, whether the employer’s actions and how the employer acted were what a fair and reasonable employer would² have done in all the circumstances at the time the dismissal or action occurred.

[17] I conclude that the termination of Ms Chen’s employment was not what a fair and reasonable employer would have done in all the circumstances that existed at the time. While there is an issue about the nature of Ms Chen’s employment relationship, i.e. whether it was permanent or of some other nature, it was not reasonable for Mr Clayton to terminate the employment in the manner that he did without further discussion as to the merits, or otherwise, of Ms Chen’s understanding of the nature of her employment. Even if there was not a subsequent meeting of the minds after further discussion, at the very least Ms Chen was entitled to a proper period of notice of termination; for good cause.

² Because the dismissal of Ms Chen occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

[18] Furthermore, given the nature of the issue between them, mediation assistance would have been valuable in the circumstances as would, most probably, access to further advice by both parties.

[19] I find that the dismissal of Ms Chen was unjustifiable and hence she has a personal grievance.

Remedies

[20] Having found that Ms Chen has a personal grievance, pursuant to s.123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies:

[21] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then, at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[... must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

The nature of the employment relationship

[22] Before assessing the reimbursement of wages that is due to Ms Chen, I must first return to the matter of the nature of her employment relationship. Ms Chen claims that she was employed on a permanent full time basis. Conversely, Mr Clayton says that Ms Chen was employed on a casual basis. But looking closely at the available evidence, albeit there are some pieces of the puzzle missing, particularly the role of Ms Vincent in the business, I conclude that this is one of those situations whereby the employment starts off being of a particular nature, but then due to a change of circumstances, morphs into something different. It seems to me that when Ms Chen first commenced her employment in December 2010, it is most probable that she was only employed to assist with the running of the Expo. It seems more than likely that this was an arrangement that was agreed to between Ms Chen and Mr Clayton on a reasonably informal basis, given that they were acquainted. However, due to the sudden departure of Ms Vincent, the role changed considerably

and I conclude that, at this point, Ms Chen became the replacement for Ms Vincent, hence Ms Chen was reasonably entitled to conclude that her employment was of a more permanent nature. Perhaps Mr Clayton may have genuinely believed that Ms Chen's employment was casual in nature but, if this is so, unfortunately he had a mistaken understanding of the nature of casual employment. Given the hours that Ms Chen worked and the overall nature of her duties, the very least that could be said of her employment is that it was temporary or fixed term in nature, specifically for the purpose of managing the Expo and bringing it to a conclusion. But then of course the provisions of s.66(4) of the Employment Relations Act have not been met and hence s.66(6) applies.

[23] I do not accept the evidence of Mr Clayton that he told Ms Chen to produce a casual employment agreement. Rather, I think it is more probable that he did not seriously address the matter of an appropriate employment agreement as his focus was largely on running a successful expo. That is entirely understandable as this is the nature of his business. However, it should have been clear to him that, given the things that he was saying to Ms Chen about possible future prospects for the business and her prospective role in all of this, that Ms Chen had expectations of a future with the business. But once the Expo was completed, it appears that Mr Clayton no longer required her services and dispensed with them in a less than fair manner. It also may be that a person with more employment experience would have treated much of what Mr Clayton was saying about the future prospects for the business with some caution and assessed Mr Clayton's purported plans as ambitious musings. However, I accept that Ms Chen genuinely believed that there was an ongoing role for her in the business, at least for some time longer than transpired. It was not until after the Expo was finished that Mr Clayton erased this belief.

[24] In summary, I conclude that Ms Chen's expectation that she had ongoing employment was reasonable. Mr Clayton was given notice on a number of occasions that Ms Chen required an employment agreement in order to cement the terms of her employment in writing. Mr Clayton had several opportunities to be entirely candid with Ms Chen if he did not want to provide her with ongoing employment after the Expo was concluded. He did not take any of those opportunities; rather, it seems that he used the services of Ms Chen to complete the Expo and then effectively appears to have lost interest in providing her with any further employment.

Reimbursement of wages

[25] Ms Chen commenced new employment on 11 April 2011. Therefore, her loss of wages is effectively for a period of four weeks and two days. Ms Chen was being paid for 40 hours at \$18.50; being \$740 per week. Therefore, her entitlement is the gross sum of \$3,256. The rate of pay for Ms Chen's new job was \$14.75 per hour and she claims the difference between that rate and the rate of \$18.50 that she was paid before her dismissal; a sum of \$1,500. I find that it is appropriate that Ms Chen should be paid this amount, making a total of \$4,756 (gross) for reimbursement of lost wages.

Compensation

[26] I accept that Ms Chen was genuinely hurt and humiliated by the sudden termination of her employment in a public place. But unfortunately, she was not present at the investigation meeting, having now moved overseas to work. Ms Chen gave additional evidence to that in her written statement, by a telephone conference call to Paris. But of course I was unable to observe her demeanour or physical recall of the matters relating to her dismissal and for this reason, the award of compensation must be minimal; in the sum of \$2,000.

[27] I do not find that the remedies awarded should be reduced as Ms Chen did not contribute towards the situation that gave rise to the personal grievance under the provisions of s.124 of the Act.

The claim for wage arrears and holiday pay

[28] Ms Chen claims arrears of wages for 3.5 days; being 19 February 2011, 3 March 2011 and half a day for each of 15 February 2011, 28 February 2011 and 2 March 2011. The total sum claimed is \$518. I accept that there was an agreement that Ms Chen would be paid \$18.50 per hour for 40 hours per week and there is no good reason advanced by Mr Clayton as to why Ms Chen was not paid accordingly for the days set out above. Therefore, I find the claim proven and Ms Chen is entitled to be paid the sum of \$518.

[29] Ms Chen claims holiday pay for the period of her employment whereby she earned \$8,898.62. A holiday pay component is also claimed in regard to the wage arrears and reimbursement of wages awarded pursuant to s.123(1)(b) of the Act (above). The sum total of all of this is a gross sum of \$14,172.62 on which holiday

pay should be calculated. Therefore, 8% of this amount is \$1,133.80 and this is the entitlement due to Ms Chen.

Determination

[30] For the reasons set out above, I find that Ms Chen was unjustifiably dismissed. Ms Chen has also claimed for payment of four public holidays but no details have been provided and this claim is declined. Ms Chen has also sought that a penalty be awarded for the failure to provide an employment agreement. However, after due consideration of all the circumstances, I do not believe that it is appropriate to order that a penalty be imposed. I would expect that Mr Clayton is now fully aware of his legal obligations when entering into an employment relationship.

Summary of orders of the Authority

[31] The respondents, jointly and severally, are ordered to pay to Ms Chen:

- (a) Reimbursement of lost wages pursuant to s.123(1)(b) of the Act in the gross sum of \$4,756.00;
- (b) Payment of wage arrears for 3.5 days being the sum of \$518.00;
- (c) The sum of \$2,000.00 as compensation pursuant to s.123(1)(c)(i) of the Act;
- (d) Pursuant to the Holidays Act 2003, holiday pay at the rate of 8% being the sum calculated as above of \$1,133.80.

K J Anderson
Member of the Employment Relations Authority