

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 28
3015151

BETWEEN

WAI YING CHENG
Applicant

A N D

RICHORA GROUP LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: E Reilly for Applicant
M Moncur for Respondent
Investigation Meeting: 25 January 2018 at Rotorua
Oral Determination
Delivered: 25 January 2018
Written Determination
Delivered: 26 January 2018

ORAL DETERMINATION OF THE AUTHORITY

- A. Wai Ying Cheng was unjustifiably dismissed by Richora Group Limited.**
- B. I order Richora Group Limited to pay Wai Ying Cheng the sum of \$20,000 pursuant to s123(c)(i) Employment Relations Act 2000.**
- C. I order Richora Group Limited to pay Wai Ying Cheng the sum of \$3,663.19 wage arrears for 21 January to 6 March 2017.**
- D. I order Richora Group Limited to pay Wai Ying Cheng \$2,250 as contribution to her legal costs.**

Employment relationship problem

[1] Wai Ying Cheng also known as Melody alleges she was unjustifiably dismissed by her employer Richora Group Limited. It alleges Ms Cheng was employed on a casual basis. Although there were discussions about permanent

employment she refused to sign the employment agreement offered and then never returned to work. Richora Group Limited accepts it owes her wages for work from 21 January to 6 March 2017, but denies it dismissed her.

Relevant Facts

[2] Ms Cheng is a Hong Kong national. She travelled to New Zealand 14 years ago with her husband Horlick Hon. She has resided in New Zealand since.

[3] Richora Group Limited (RL) is an exporting business based in Rotorua. One RL director is Nina Li who operated the company with her husband, Jerry Li.

[4] The Li's were approached in 2016 about Ms Cheng becoming a sales consultant. She would sell their products through her web based business and receive 10% commission. In January 2017 RL agreed to her providing independent contracting services.

[5] By 21 January 2017 it is accepted Ms Cheng had become an employee (either casual or permanent).

[6] By March 2017 the parties were discussing a draft employment agreement. They had agreed to pay \$19.72 net per hour but it is accepted she had not received any wages for her work from 21 January. RL also provided Ms Cheng with a draft employment agreement for permanent employment as a sales assistant commencing 1 March 2017.

Unjustified dismissal

[7] The Li's were travelling to Auckland for business on 7 March 2017 when they received a call from their accountant. He advised someone had made a complaint to the Inland Revenue Department (IRD) that RL was not paying wages or taxes for an employee. The Li's believed the complainant was Ms Cheng.

[8] Mr Li then received a call from a security person in Rotorua. He was told someone had entered the company's building. Mr Li authorised the changing of the locks. He alleges he viewed camera footage showing Ms Cheng's husband, Horlick Hon had entered the building. This was never provided to Ms Cheng.

[9] Ms Cheng went to the business premises that evening. She discovered she had been locked out.

[10] On 8 March 2017 Mr Li contacted Ms Cheng's husband Mr Hon seeking a meeting. Mr Li told Mr Hon Ms Cheng could not be trusted and had reported RL to IRD. Mr Hon denied his wife had made the complaint to IRD.

[11] Ms Cheng subsequently become unwell and did not return to work. RL did not meet with Ms Cheng to discuss its concerns.

[12] On 20 March 2017 Ms Cheng's solicitor wrote to RL alleging she had been unjustifiably dismissed by the lock out and subsequent threatening behaviour. The letter stated:

By changing the locks on the business premises without notice to our client, and requesting a meeting with Ms Cheng's solicitor in which you raised [the above] accusations, we consider that you have terminated Ms Cheng's employment. In your communications with Ms Cheng's husband since 8 March 2017 you have repeatedly threatened our client and her husband with respect to the continued operation of Horlick's business. You have stated that you will "destroy" Ms Cheng and her husband's life in Rotorua and also their business, and that you will take court proceedings against Ms Cheng. You have also said that you will ensure that nobody in Rotorua will employ Ms Cheng in the future.

[13] The allegations made against Ms Cheng in the letter were accusations she had reported RL to IRD about the following matters:

- The company was avoiding its taxation obligations
- The company has not paid Ms Cheng her salary
- The company has not paid other businesses in Rotorua for services it had received
- The company was in breach of immigration requirements and could not employ any other employees.

[14] In the letter Ms Cheng denied making any contact with IRD regarding the operation of the company or any other matter. She had requested evidence but noted RL had not provided this.

[15] After receipt of the above letter, Mr Li posted information on 21 March 2017 to a WeChat website forum. This forum had a membership comprising at least 48 Rotorua Chinese businesspersons whom received the postings. An English translation of Mr Li's postings (and one reply) are set out below:

The Rotorua Chinese Community of Commerce

21/03/2017 3:36 PM

Jingrui - RICHORA

Dear President and Secretary General of the Community

As a new member of the Community who has just arrived in Rotorua, I have some thoughts to share. Should we set some basic requirements for the business integrity and ethical standards of the members of the Community? The case is as follows: We just established a company. A member from the Community *** recommended his wife to work at my company and told me how tragic his wife was and how she was bullied by others, which resulted in her long term recuperation at home. I agreed and promised to provide lots of training so she can improve. After reaching the basic level she could work part-time, and if she really made progress, then she could naturally work full-time. During the training period, I could also pay some remuneration. After all, this is greatly helpful for such a family. I even helped the member carry out business related promotion in local market with no personal gain! During the Chinese New Year his wife was alone in Rotorua. I even invited her to come to my home and get together with us, giving her care in every possible way! After the Chinese New Year as per his wife's request, we provided a sample employment agreement, clarified the past remuneration and asked her to provide the bank account number and IRD number, so the company could pay her salary! But something I would never expect happened.

She had no sense of gratitude and turned back on us after everything I have done for her, and reported us to IRD, claiming that we haven't paid wages nor settled partners accounts. She also claimed to have abundant evidence of us on tax fraud and wanted to file a lawsuit against us so that we can no longer hire employees! I couldn't even believe that on the day she reported us, she send me a greeting message through WeChat in the morning.

I really appreciate the natural environment in New Zealand and the working environment is great for the hard working Chinese, but I really cannot imagine in such a beautiful city, there is such a despicable and shameless person, looking gentlemanly on the surface but villainous underneath. This member is in our Community. I received his lawyers letter today which is totally nonsense. Therefore,

I hope we can jointly condemn this kind of disorder with the support for my lawyer from the Community.

Jingrui - RICHORA

Horlick the cameras you have installed at my home have broken for three times just within a few months. There are also many cameras which do not work. If this problem cannot be resolved by this Friday I will sue you!

21/03/2017 3:46 PM

Jingrui - RICHORA

Haha, you even said that before we employed her, we knew she had suffered from mental illness, and our threats and other actions caused her to fall ill again. Now she has to receive treatment and has trouble sleeping every night.

21/03/2017 3:56 PM

Frank

@ Jingrui - RICHORA Hello, I am sorry to advise that since the establishment of the Community, we insisted not to involve in any personal and business disputes. Please consult with professionals and I hope you can reconcile.

Jingrui - RICHORA

Therefore, friend in Community, it is really not easy to start a business in New Zealand. As business owners, we not only need to concern about the sales and the business, but also pay extra attention to employees. People who are not normal and positive or defective in moral and ethics really shall not be employed. They just want more money by using this abnormal approach. I hope everyone could take it as a warning.

[16] On 31 March 2017 RL's lawyers wrote to Ms Cheng's lawyer conceding she was employed on a casual basis at \$19.72 (net) per hour. The relevant part of the letter is set out below:

Ms Cheng was not a permanent employee. She was engaged on a casual basis to assist the business during its busy start to 2017. Richora would like to pay Ms Cheng for the duties she has performed for the company from 21 January 2017 to 6 March 2017, at the agreed hourly rate of \$19.72 (net). Richora have asked Ms Cheng for her bank account details on multiple occasions, however she has not provided them.

We are in receipt of your firm trust account details. If you are unable to provide Ms Cheng's bank account details, please confirm that you have authority to receive payment for Ms Cheng's wages into your trust account.

[17] On 11 April 2017 Ms Cheng's lawyers raised a personal grievance of unjustified dismissal. Proceedings were filed in the Authority and mediation has been unsuccessful. The matter now requires determination.

Hearing

[18] This matter has proceeded on the fast track system being trialled in the Auckland Registry. No briefs of evidence were required to be filed. The hearing proceeded on the basis both parties accepted their evidence and information in support of their claims was contained in the statements of problem and reply and its attachments and the English translations of the WeChat forum postings.

[19] The parties sought a decision being made without hearing further oral evidence. Both were given an opportunity to make submissions before the oral determination was delivered.

Was Ms Cheng dismissed?

[20] Given the Lis' accepted they believed Ms Cheng complained to IRD, changed the locks after discovering Mr Hon's entry on the premises and Mr Li's behaviour on 8 March, there is little doubt RL did not intend to continue her employment.

[21] Even if Ms Cheng was initially casually employed, she had presented for work on the day she was locked out. She expected to be working on 7 March and RL had offered her permanent employment.

[22] I accept there was behaviour by Mr Li that was intended to threaten or intimidate Ms Cheng on 8 March. The threatening behaviour on 8 March was detailed in her lawyer's letter dated 20 March 2017. This behaviour was repeated in the WeChat postings of Mr Li. This behaviour combined with the lock out was sufficient for Ms Cheng to reasonably conclude she had been dismissed by RL as at 8 March 2017.

[23] Once a dismissal is proven, the employer must justify it and show its actions *were what a fair and reasonable employer could have done in all the circumstances at*

*the time the dismissal occurred.*¹ Justification of dismissals requires consideration of the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal. None of this happened here.

[24] Although RL raised its concern she had complained to IRD, Ms Cheng clearly denied she had made any contact with IRD. Despite this denial, RL made no further investigations before dismissing Ms Cheng. It provided no evidence she was the complainant. Its suspicions she had complained were speculation. Even if RL had further evidence, it did not provide this to Ms Cheng to comment upon before dismissal.

[25] This dismissal was not fair or reasonable in the circumstances. Wai Ying Cheng was unjustifiably dismissed by Richora Group Limited.

Remedies

[26] Having proven she has a personal grievance of unjustified dismissal, Ms Cheng is entitled to seek remedies of lost remuneration and compensation.

[27] There was evidence she was casually employed over a six week period. She cannot expect ongoing work for casual employment. Therefore she has no claim to lost remuneration. She has also been unwell and unable to work. In the circumstances I do not award any lost remuneration.

[28] However compensation for the damage caused by this dismissal is appropriate. There is medical evidence linking the dismissal action to Ms Cheng's subsequent ill health. Ms Cheng's doctor saw her on 9 March 2017 with an "acute stress reaction and suicidal intent the night before". Her doctor recorded that this was in relation to "an incident at work". She had been diagnosed with "general anxiety disorder."

[29] Mr Li's actions in publicising Ms Cheng's illness and making derogatory remarks about her character were also directly linked to her deterioration in health. The WeChat postings also evidenced Mr Li was aware she had suffered because of its dismissal actions and continued to suffer at the time of the posting 13 days later.

¹ Section 103A(2) Employment Relations Act 2000.

There is no doubt this dismissal detrimentally affect Ms Cheng's mental health and wellbeing. Despite this being employment of a short duration (6 weeks) which would normally warrant a lower band of compensation, the damage caused by this behaviour warrants middle band of compensation from \$10,000 to \$50,000.

[30] The Employment Court has made a recent award of \$20,000 compensation to an employee considered "fragile" within the middle band of compensation.²

[31] This case has a vulnerable employee whose previous difficulties with stress and bullying was known to RL prior to the dismissal. There was continuing and escalating damage caused by the WeChat forum postings. Although Mr Li did not name Ms Cheng, the postings gave sufficient detail to ensure anyone in the forum who knew Ms Cheng's husband Horlick could easily identify her. The postings were obviously in retaliation to her lawyer's letter. The WeChat postings went to a significant number of local Chinese businesspeople – there are at least 48 forum members. It can be easily inferred the intent of the postings was to ensure both Ms Cheng and her husband could not find employment or work in Rotorua. This dismissal and subsequent behaviour had a detrimental effect upon Ms Cheng's relationship, family and finances.

[32] An award of \$20,000 is appropriate here. I order Richora Group Limited to pay Wai Ying Cheng the sum of \$20,000 pursuant to s123(c)(i) Employment Relations Act 2000.

Wage arrears

[33] It is accepted there are wages owed for the period of 21 January to 6 March 2017. There was agreement to payment an hourly rate of \$19.72 net per hour.

[34] There are no wage records. Section 132 Employment Relations Act 2000 provides that where there is a failure to keep wage records I may accept as proven the employees claims unless there is evidence to the contrary. The only evidence contradicting Ms Cheng was working was the fact the business closed during Chinese New Year 2017. I have determined this would have been for a period of 1 week not the 2 weeks suggested around 27 January 2017.

² *Waikato DHB v Archibald* [2017] NZEmpC 132.

[35] Ms Cheng alleges she worked 56 hours per week between 21 January and 10 February 2017. I have determined with Chinese New Year she would have worked for 2 weeks during this period or 112 hours @ \$19.72 totalling \$2,208.64. Ms Cheng alleges 20 hours per week for a further 3 weeks between 10 February to 6 March 2017 (\$1,183.20). There are wages owing of \$3,391.84 plus 8 percent holiday pay of \$271.35.

[36] I order Richora Group Limited to pay Wai Ying Cheng the sum of \$3,663.19 wage arrears for 21 January to 6 March 2017.

Costs

[37] After hearing from the parties, I award a half days costs for today's fast track hearing. I order Richora Group Limited to pay Wai Ying Cheng \$2,250 as contribution to her legal costs.

T G Tetitaha
Member of the Employment Relations Authority