



[4] If I find Ms Choi was employed by Harmony Realty then the next issue to be determined is whether she was unjustifiably constructively dismissed. There is also an issue regarding outstanding wages.

[5] Harmony Realty was not represented at the investigation meeting. Unsuccessful attempts were made to contact Mr Zhu prior to the scheduled start time. I commenced the investigation meeting satisfied that Harmony Realty had been properly served with the notice of investigation meeting and was aware of the meeting. Apart from not attending the investigation meeting Mr Zhu has provided information on request by the Authority.

### **What was the nature of Ms Choi's employment with Harmony Realty?**

[6] Ms Choi says Harmony Realty had an obligation to employ her and it has breached that obligation. She relies on a conversation with a director of North Harbour Realty Limited a day or two before Mr Zhu's company took over the business on 23 February 2008. Ms Choi said this conversation was the first formal advice she had received of the sale of the business in which she was employed. She said the director told her the business had been sold to Mr Zhu and that she would work for the new company.

[7] Ms Choi also relies on a letter received from her former employer, the relevant part provides:

*Maxwell agreed to take all existing staff members on, excluding Barry Dobson and Sean Chen. A copy of your employment contract was given to him for this purpose.*

[8] The letter is dated 20 February 2008. Ms Choi did not receive it until 29 February 2008; 8 days after Harmony Realty took over the business.

[9] Harmony Realty, in its statement in reply and in documents filed with the Authority prior to the investigation meeting, deny making any offer of employment to Ms Choi prior to taking over the business and deny it entered any agreement with North Harbour Realty Limited to offer employment to Ms Choi. It has provided an excerpt of the relevant sale and purchase agreement which includes:

20. *The business will continue to run as it is currently and transfer will be completely smooth to ensure the smooth transaction of the contract, including advertising and commission structures, all the existing salespersons except Barry Dobson and Sean Chen shall be remained to the new company.*

[10] The Authority made request of North Harbour Realty Limited, pursuant to section 161 Employment Relations Act 2000, to comment on this material. In a letter dated 17 November 2008 North Harbour Realty Limited has responded:

- (i) Ms Choi's holiday pay has not been paid and this was an oversight which will be rectified;
- (ii) the sale of the business did not settle until 20 February 2008, a letter was then organised for Ms Choi to advise Harmony Realty had purchased the business;
- (iii) Mr Zhu did not say he would not employ Ms Choi; and
- (iv) Mr Zhu ran the business as manager from November 2007 during which time Ms Choi was employed as a receptionist.

[11] In a statement filed with the Authority prior to the investigation meeting Mr Zhu stated the day he took over the business he raised a job share proposal with Ms Choi and she said she would come back to him later. The parties then entered a negotiation phase where offers and counter-offers were made over the succeeding days. Ms Choi confirmed this.

[12] Ms Choi resigned by email dated 9 March 2008:

*To Maxwell  
I tender my resignation effective immediately from 9 March 2008 due to your refusal to honour my employment and existing work conditions without proper negotiation and consulting. Your actions have put me under enormous stress and worry. All salary owed, leave, sick pay and other monies owing to be paid on full by Thursday 13<sup>th</sup> March close of business. I will return the office key and other property in my possession to you by post.*

*Kelly Choi*

## Determination

[13] I find there was no agreement between the vendor and purchaser that Ms Choi would be offered identical terms and conditions of employment with the purchaser. I note that Ms Choi's employment agreement with North Harbour Realty Limited contained an employee protection provision<sup>1</sup>. I find there was no representation from Harmony Realty to Ms Choi that she would be offered employment when it took over the business. Ms Choi therefore had no reasonable basis to assert her employment had transferred to Harmony Realty Limited.

[14] I find Harmony Realty acted in good faith towards Ms Choi in offering her employment on proposed terms and seeking to reach agreement on those terms; that Ms Choi continued on identical hours and rate of pay during this negotiation phase does not mean a permanent employment agreement was entered by the parties. I find the parties entered an arrangement conditional on the negotiation and agreement of Ms Choi's terms of employment.

[15] The ending of Ms Choi's employment as a consequence of failure to agree terms of employment was pre-empted by her resignation. For the reasons set out above Ms Choi had no reasonable basis to believe her employment transferred from North Harbour Realty Limited to Harmony Realty on identical terms and conditions. These are not circumstances which could be said to give rise to an unjustified constructive dismissal<sup>2</sup>.

[16] Ms Choi also claims that Mr Zhu unlawfully discriminated against her on racial grounds. In support of this claim she says he told her he wanted to employ a receptionist with a "white face". In his correspondence to the Authority Mr Zhu denies making any comment to Ms Choi that he wished to employ a receptionist with a white face. There is no dispute that Mr Zhu offered Ms Choi a part-time receptionist role; Mr Zhu wrote to Ms Choi on 6 March offering her this position.

[17] On balance I find Mr Zhu did not unlawfully discriminate against Ms Choi on racial grounds. The 6 March letter states Mr Zhu wished to employ a receptionist

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<sup>1</sup> Section 69OH Employment Relations Act 2000

<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168

who spoke Mandarin and Cantonese. Ms Choi does not speak either language. It is not unlawful to have a genuine need for a specific language requirement for a position. I do not accept Mr Zhu told Ms Choi he wished to employ a receptionist with a white face; such a statement is inconsistent with all the other evidence around this issue. Mr Zhu's letter to Ms Choi clearly sets out his reasoning for wishing to employ a Mandarin/Cantonese speaker – that most of the clientele are Asian and the majority of those clients Chinese and that he wished to focus his business on the *Chinese market*. Such discrimination is not unlawful.

### **Unpaid wages**

[18] I am satisfied that outstanding wages of \$424.29(net) are due and owing Ms Choi by Harmony Realty for work performed during the week beginning 3 March 2008.

[19] **Harmony Realty Limited is ordered to pay Kelly Choi wage arrears totalling \$424.29 (net).**

### **Costs**

[20] Costs are reserved. Mr Whitehead may apply to the Authority to set a timetable for the filing of costs memoranda.

Marija Urlich

Member of the Employment Relations Authority