

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 337
3006271

BETWEEN RAN DENG
 Applicant

AND DIGITAL JUNGLE (NZ)
 LIMITED
 Respondent

Member of Authority: TG Tetitaha

Representatives: Applicant in person supported by C Young and D Huang
 D Feist, Advocate for Respondent

Investigation Meeting: 31 October 2018 at Auckland

Submissions received: 31 October 2018 from both parties

Record of Oral
Determination: 1 November 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ran Deng was unjustifiably dismissed by Digital Jungle (NZ) Limited.**
- B. I order Digital Jungle (NZ) Limited to pay Ran Deng lost remuneration of \$3,750 less PAYE and inclusive of a 25% reduction for contribution. The payment is to be made within 28 days.**

- C. I order Digital Jungle (NZ) Limited to pay Ran Deng compensation of \$3,750 inclusive of a 25% reduction for contribution. The payment is to be made within 28 days.**
- D. I order Digital Jungle (NZ) Limited to pay Ran Deng 8 day's annual leave less PAYE. This payment is to be made within 28 days.**
- E. The parties are to meet their own legal costs because Ms Deng was self-represented.**

Employment Relationship Problem

- [1] Ran Deng was employed by Digital Jungle (NZ) Limited (DJL) until 9 December 2016 when she was dismissed. She alleges this was unjustified.
- [2] Ms Deng also alleged she was owed wages comprising KiwiSaver and annual leave. It is accepted the KiwiSaver has now been paid. It is accepted 8 days of annual leave has not.

Relevant Facts

- [3] DJL is a marketing company selling Chinese marketing services to New Zealand companies.
- [4] Ms Deng was employed on a two year fixed term contract as a business development manager on 18 July 2016. Her contract provided for:
- the contract to end on 17 March 2019;
 - remuneration of \$60,000 per annum paid on the 15th of each month;
 - hours of work 40 hours per week Monday to Friday between 9.00 am and 6 pm;
 - place of work DJ Auckland office “or at home with prior mutual agreement”;
 - annual leave of four weeks with two weeks required to be taken during the Christmas shutdown and
 - notice period of one month if terminated within the fixed term contract period.

- [5] Her role was to sell DJL's services to new clients. By November 2016 she had not made any sales or earned commission. She had also taken unpaid leave for three weeks in August.
- [6] Chief Operations Officer Stephen Schwalger gave evidence of his concerns about Ms Deng's performance in mid-September 2016. He had been speaking to her on a regular basis about her lack of sales.
- [7] This prompted his visit to New Zealand on 10 November 2016. Both parties evidence showed he was assessing her performance over an entire day by attending her client meetings, going over her client list and providing advice. His view was she had only one client whom may result in a sale but would not have produced sufficient revenue. He reviewed her other clients and believed they were unlikely to produce any sales. From her evidence she was aware of what he was doing at the time. Mr Schwalger admitted his approach was to encourage her to improve. He did not advise her that her employment was in jeopardy.
- [8] On 1 December Ms Deng emailed Mr Schwalger and Dr Mathew McDougall (CEO) seeking additional work in social media as opposed to sales. This raised concerns for DJL because Ms Deng had still not made any sales yet now appeared to seek a different role.
- [9] Dr MacDougal then contacted the Managing Director in New Zealand (MD). The MD advised there were no other roles for Ms Deng in New Zealand. He also raised issues about her irregular attendance at the office.
- [10] On 9 December 2016 DJL decided to terminate her employment. Ms Deng was terminated by phone and email from Mr Schwalger that same day. The reason for the dismissal was Ms Deng's unsatisfactory sales performance. DJL gave her one week's notice and required she complete a handover with the MD.
- [11] Ms Deng replied the same day. She expressed surprise at her termination and wanted to address "issues before I go" then lists a number of matters she believes prevented her from being successful. These were lack of training, online leads and resources.

- [12] Mr Schwalger called Ms Deng on 12 December 2016 about her concerns. She replied by email the same day that she was “willing to continue to work [in] this role for Digital Jungle but if you have decided to let me go, then I will hand the leads etc to [the MD] next week.”
- [13] Mr Schwalger emails her that day referring to a message he left on her phone and asking for a time to speak with her. Ms Deng replies she prefers the discussion to occur by email. There does seem at this stage reluctance to speak directly with Mr Schwalger about her issues of concern.
- [14] Ms Deng then emails Mr Schwalger on 13 December stating she was calling the Employment Relations Authority because she believed it was “unfair and unreasonable to address performance issue and dismiss employee on the same day.” The next day (14 December) she emails Mr Schwalger stating the first time she knew DJL was unhappy with her performance was 9 December. She also complains about the notice period of two weeks. She believed it should be one month as provided in her contract.
- [15] Dr McDougall replies the same day that he is following this up with HR. He asks that she undertake a handover with the MD by 16 December. She is not required to attend the office after that date.
- [16] An earlier determination found Ms Deng raised a personal grievance of unjustified dismissal on 19 December 2016.¹
- [17] On 15 January 2017 DJL paid Ms Deng a further month’s salary and 8% annual leave less 8 days for the Christmas period shutdown.
- [18] By 18 January 2017 Ms Deng alleged she had been underpaid annual leave due to deductions DJL had made for their Christmas shutdown period. She also raised concerns about non-payment of her kiwiSaver.
- [19] The parties have been unable to resolve the annual leave and personal grievance issues. The KiwiSaver contributions have now been paid.

¹ *Deng v Digital Jungle (NZ) Limited* [2017] NZERA Auckland 360.

Was Ms Deng unjustifiably dismissed?

- [20] The fact Ms Deng's employment was terminated is accepted. The onus falls upon DJL to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2) of the Employment Relations Act 2000 (Act)).
- [21] In applying this test, the Authority must consider the matters set out in s.103A(3) of the Act. 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.
- [22] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal/disadvantage being found to be unjustified.²
- [23] The process leading to dismissal was defective. There is no evidence DJL met the mandatory considerations set out in s.103A(3). There may have been investigation of the allegations by Mr Schwalger regarding performance and Dr McDougall regarding office attendance. However neither of these concerns are raised with Ms Deng before her dismissal.
- [24] Ms Deng may have suspected she was at risk of dismissal due to the lack of sales. However the onus is upon the employer to show that its actions were fair and reasonable in the circumstances. The duty of good faith requires an employer provide all relevant information to an affected employee before this action occurs. These defects were not minor and did result in Ms Deng being treated unfairly.
- [25] Ran Deng was unjustifiably dismissed by Digital Jungle (NZ) Limited.

² *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

Remedies

[26] Ms Deng has a personal grievance and is entitled to seek lost remuneration and compensation.

Lost remuneration

[27] Ms Deng seeks remuneration up until the date she started her new job. She found a new job in January 2018.

[28] Where the Authority determines an employee has lost remuneration as a result of that grievance, it must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to s128. The employee has an obligation to mitigate lost remuneration by seeking alternative paid employment irrespective of whether he/she seeks reinstatement.³ An employee who has not mitigated the loss of wages has not lost remuneration as a result of the grievance and there is no statutory requirement to order reimbursement.⁴ In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like⁵.

[29] Ms Deng's job applications showed she did not start applying for jobs until 7 February 2017. I do not accept her explanation she was seeking to preserve her job at DJL. Her email on 9 December complains about lack of training, leads and resources but the evidence suggests this was not true. There is evidence she was given training and had regular sales meetings with Mr Schwalger going over her sales leads. There were both leads and resources available to her. She failed to properly utilise the software Salesforce and was not attending the office where she had a resource in the MD to learn about sales.

[30] There were only two emails on 9 and 12 December 2016 that refer to retaining her employment. However seeking reinstatement does not defer an employee's obligation to mitigate their losses for two months. I also do not accept her explanation about the

³ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

⁴ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

⁵ *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

Christmas period preventing applications. This may result in less jobs being advertised but that does not mean she should stop searching.

[31] In the circumstances the losses are confined to one month's salary subject to any reductions for contributory behaviour.

Compensation

[32] Ms Deng seeks \$10,000 compensation. A recent Employment Court decision has defined the steps in assessing compensation.⁶ Applying those steps here I find:

Step 1: Harm

[33] There was evidence of harm financially and emotionally.

Step 2: Extent of Loss

[34] The evidence was:

- a) She was financially supporting a 19 year old child to study in the UK;
- b) She felt angry then anxious and worried about her situation following; and
- c) She did not require any medical intervention or other assistance.

Step 3: Where on the spectrum of cases does this case sit in terms of harm suffered?

[35] Relevant recent cases in the Authority include:

- a) *Zuo v 123 Casino Ltd* [2018] NZERA Auckland 271 no long lasting effects \$7,000 reduced by 20% to \$5,600
- b) *LMN v Bank of New Zealand Ltd* [2018] NZERA Christchurch 115 compensation for effects of unjustified process (substantive justification for dismissal for redundancy) \$7,500

Step 4: Where on the spectrum of cases does this case sit in terms of quantum?

⁶ *Richora Group Limited v Chen* [2018] NZEmpC 113 at [41] ff.

[36] The appropriate starting point here is less than \$10,000. In my view the evidence in this case sits well below \$10,000 and the evidence in the above cases. An appropriate compensation amount based upon the evidence I have heard would be \$5,000.

Step 5: What is a fair and just award in the present case?

[37] Under this heading I have considered the issue of contributory conduct. Section 124 of the Act requires I consider the extent to which Ms Deng's actions that contributed to the situation and reduce remedies accordingly. The actions of Ms Deng must be both causative of the outcome and blameworthy.⁷

[38] The conduct leading to dismissal was underperformance in her sales job. Even after assistance from Mr Schwalger and evidence she had been given training and leads to follow, her performance did not improve. Ms Deng's own evidence showed she was out of the office up to 2 days per week. Her email seeking a different role gives the impression of an employee whom is not engaged in performing her sales job at all. A 25% reduction in compensation is appropriate given these issues.

[39] I order Digital Jungle (NZ) Limited to pay Ran Deng to pay lost remuneration of \$3,750 less PAYE and inclusive of a 25% reduction for contribution. The payment is to be made within 28 days.

[40] I order Digital Jungle (NZ) Limited to pay Ran Deng compensation of \$3,750 inclusive of a 25% reduction for contribution. The payment is to be made within 28 days.

Annual leave

[41] Ms Deng confirmed she has not taken any paid annual leave in the period between 18 July and 9 December 2016.

[42] DJL paid her all of her leave entitlement except 8 days over the Christmas period because it required employees to take leave because the office is closed.

⁷ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at [49].

[43] This cannot apply to Ms Deng because she was dismissed on 9 December 2016. She did not return to the office after 9 December 2016, although she initially was to work until 15 December 2016 doing a handover. It was clear from the parties correspondence she was not expected to attend the office at all after that date. Neither party intended she be available to attend work from then onwards. The Christmas shutdown did not apply to her at all because she was no longer required to report for work. There was no basis for DJL to deduct her annual leave entitlement.

[44] I order Digital Jungle (NZ) Limited must pay Ran Deng 8 day's annual leave less PAYE. This payment is to be made within 28 days.

[45] The parties are to meet their own legal costs because Ms Deng was self-represented.

TG Tetitaha
Member of the Employment Relations Authority