

[5] The issues for the Authority are whether Ms Li:

- raised her personal grievance for unjustified dismissal within 90 days;
- if so, was she unjustifiably dismissed;
- if so, what remedies, if any, should be awarded; and
- is owed unpaid wages and commission payments.

90 Day Issue

[6] Ms Li wishes to have her personal grievance for unjustified dismissal heard and determined by the Authority. Sky Tours says Ms Li's grievance was raised outside 90 days and it has not consented to her raising her grievance outside the statutory time frame.

[7] Section 114 of the Employment Relations Act deals with the raising of a personal grievance and requires the grievance to be raised within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. A grievance is raised:

...as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[8] The necessary elements of raising a grievance are:

- an allegation of a personal grievance;
- made by the employee;
- known to the employer; and
- a desire by the employee to have the grievance addressed by the employer.

[9] An employer should be given sufficient information to enable it to address the grievance. The information, either provided orally or in writing, should allow it to respond to the grievance on its merits with a view to resolving it soon and informally, at least in the first instance¹.

¹ See *Creedy v Commissioner of Police*, unreported, 23 May 2006, AC 29/06, Colgan CJ; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60.

[10] The test is whether to an objective observer the communication was sufficient to elicit a response from the employer².

[11] Ms Li says she was dismissed from her employment on 3 September 2008 when she was called into Ms He's office and told Sky Tours was no longer supporting her application for a work permit. At the time of her initial engagement Ms Li held a temporary work permit which expired at the end of October.

[12] Ms Li contacted Mr Lim following the end of the employment relationship and asked him about her outstanding wages. Mr Lim told her he could not deal with it but advised he would pass a message on to Ms He. After receiving no communication from Ms He, on 27 October 2008, Ms Li emailed Ms He requesting payment of wages from 1 to 3 September together with the payment of a bonus, all totalling approximately \$800. Ms Li asked Ms He to confirm and transfer the amount as soon as possible.

[13] Ms He responded on 29 October by advising Ms Li that she had made mistakes worth about \$2,000 and invited her to help sort the problem out. Ms Li did not respond. There is no mention in this correspondence that Ms Li believed her employment had been terminated unjustifiably and she did not raise a personal grievance through this correspondence.

[14] There is no dispute that the next correspondence was on 8 December 2008 from Ms Reed on behalf of Ms Li. That letter was, again, concerned with the unpaid wages and commissions. There is no mention in that letter that Ms Li contends her dismissal to be unjustified or that she is raising a personal grievance with regard to the termination of her employment.

[15] With regards the dismissal, the letter states:

...On 3 September 2008 our client was suddenly called into your office to be told to pack up and leave this employment permanently. Your explanation was you were not able to continue with the sponsorship for her work permit application.

Since our client's sudden dismissal, she has been in contact many times to receive her final pay and bonuses due finally on 29 October, you officially emailed to refuse her entitlements.

² Ibid.

[16] At the investigation meeting Ms Li confirmed that she asked her lawyer to contact Ms He for the salary and commission payments. This is consistent with her evidence with regards to the contact she made with Sky Tours following the end of the employment relationship.

[17] Ms Li says Sky Tours consented to the raising of the grievance outside the 90 day period when Ms He agreed to try and resolve the matters. Ms He did advise Ms Li's representative that she was keen to resolve the matters, however, it seems to me that the focus in the correspondence from both parties was on the resolution of the claim for outstanding wages and commission payments and was not about a claim for unjustified dismissal.

[18] My finding is supported by Ms He's evidence and in particular the email sent to Ms Li's representative on 12 December where she attached a sales report for Ms Li's approval. Ms He explains that she withdrew the support for Ms Li's work permit and that it was a wise choice for Ms Li to find another alternative as soon as possible. Ms He does indicate that she was keen to get matters sorted out before she headed back to Australia on 19 December. I am satisfied it is more likely than not that this was with regard to the claim for outstanding wages and commission.

[19] There is no reference to a personal grievance in any of the December correspondence, from either party.

[20] On 6 January Ms Li lodged a personal grievance in the Authority claiming unjustified dismissal and breach of contract. On 8 January Ms He responded saying she did not consent to the personal grievance being raised outside the 90 day period.

[21] I am satisfied that the first time Ms Li raised a personal grievance for unjustified dismissal was on 6 January 2009 when she lodged this application in the Employment Relations Authority. Until then there had been various references to the termination of Ms Li's employment but those references did not provide sufficient information to allow Sky Tours to respond fully to a contended grievance on its merits.

[22] A liberal test applies to the raising of a personal grievance. However, the timeframes have been set to ensure matters are progressed diligently and within a timeframe that will allow employment relationship problems to be disposed of promptly. Where there are inordinate delays in raising a personal grievance there is a

real possibility of prejudice to a respondent due to the lapse of time, loss or disposal of relevant documentation and key witnesses moving on.

[23] Ms Li left her employment on 3 September. 90 days from 3 September is 2 December. Even if I had concluded that Ms Reed's letter of 8 December raised a personal grievance, the letter was already 6 days out of time.

[24] The Authority does not have before it, any application by the applicant to raise her grievance outside the 90 day period. I find Ms Li did not raise her grievance within 90 day period and therefore the Authority has no jurisdiction to hear her claim for unjustified dismissal.

Arrears of wages

[25] Ms Li claims she is owed outstanding wages and commission payments in the amount of \$1,061.50.

[26] In January Mr Tremewan forwarded a cheque to Ms Reed for Ms Li's use in the amount of \$1,027.27. This cheque was said to cover the payment of Ms Li's outstanding commission and holiday pay. Accompanying the cheque was a spreadsheet showing how the commissions were calculated. There is no evidence to indicate that Ms Li does not agree with this schedule as far as it shows all the sales she made during her employment. However, I am not satisfied the cheque covered the outstanding holiday pay. It reflects the gross commissions minus PAYE deductions only.

[27] Ms Li says she worked a total of 51 days which equates to a total payment of \$2,550 nett based on \$50.00 nett per day. Ms Li produced a schedule showing the payments she had received during her employment at Sky Tours. The schedule shows Ms Li received payments for the first four full weeks of her employment of \$350.00 nett per week (which is equivalent to working seven days each week) and for the final four weeks of her employment she received \$300 nett per week (being payment for six days worked each week).

[28] In her evidence Ms Li acknowledged that she worked six days each week and that for weeks four and eight she worked only five days per week instead of six. The schedule produced by Ms Li shows Ms Li was paid a total of \$2,800 in wages for the period of her employment. As already stated, based on the days she says she worked,

Ms Li should only have received \$2,550, for the period of her employment. Ms Li was therefore overpaid by \$250.00.

[29] I am satisfied Ms Li received all payments for wages to which she had become entitled and that she received commission payments as promised (albeit, only after she raised the matter following the ending of the employment relationship).

[30] Ms Li claims she has not been paid the appropriate holiday pay due to her. I am satisfied Ms Li has not been paid the correct holiday pay. Ms Li's total nett earnings including commissions were \$3,827.77. Holiday pay on that amount is \$306.22. Ms Li is entitled to an award of \$306.22 nett being unpaid holiday pay.

Minimum wages

[31] In submissions lodged in the Authority on behalf of Ms Li, it was argued that Ms Li had the basis of a claim for unjustified disadvantage and set out a new claim for the minimum wage. Having carefully examined the documents lodged in the Authority including the Statement of Problem, I can find no claim for disadvantage or the minimum wage as set out in submissions.

[32] Claims must be properly before the Authority before the Authority has jurisdiction to investigate them. Submissions are not the appropriate place to raise new personal grievances or claims.

[33] Having said that, I have considered whether Ms Li was paid at least the minimum wage for the hours she worked during her employment at Sky Tours.

[34] Based on a gross minimum wage of \$12.00 per hour for each hour Ms Li worked, Ms Li ought to have received not less than \$4,632.00 gross. The nett figure is approximately \$2,965.70. Given that Ms Li's nett income, including commissions was \$3,827.77 I am satisfied Ms Li was paid more than the minimum wage for the period of her employment.

[35] Determination

[36] I have found Ms Li did not raise her personal grievance within 90 days of the ending of her employment and in the absence of any application for leave to raise the grievance outside the 90 days I am unable to assist Ms Li further in her claim.

[37] I have found Ms Li was paid the agreed daily rate for the period of her employment and that post employment she was paid in full for all commissions earned. However, Ms Li has not received her holiday pay.

ANZ Sky Tours Limited is ordered to pay to Ms Li outstanding holiday pay of \$306.22 nett within 28 days of the date of this determination.

Costs

[38] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Li may file and serve a memorandum as to costs within 28 days of the date of this determination with any replies within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority