

[5] At an investigation meeting the Authority and the parties' representatives examined the evidence of Ms Li, Mr Bhashkar Prasad who is a director of Deans International, and Mr Sam Kumar, Administration Manager of the Ellipse Institute.

[6] The claim for arrears of wages relates to the first week in which Ms Li performed work after her engagement. I find from the wage records that she started on Thursday 24 January 2008 and worked the next four week days except Monday 28th which was the Auckland Anniversary public holiday. There is no dispute that she was not paid for the four days worked or the public holiday.

[7] Mr Prasad claimed there was no obligation to pay as Ms Li had been engaged for her first week in unpaid training. The written employment agreement provided that from 21 January 2008 the first 12 weeks of employment were to be a probationary period. The agreement also provided that Ms Li was to be paid \$12 per hour for ordinary hours and any overtime worked.

[8] I accept Ms Li's evidence that she did not agree to work without pay for her first week. There was therefore no variation of the employment agreement allowing for that, and no variation in writing and signed by both parties as required by clause 18 of the agreement.

[9] I find that Ms Li is entitled to recover one weeks pay for that first week of her employment which included a statutory public holiday. Deans International is ordered to pay \$480 as wages and holiday pay for those five days. I order interest to be paid on that sum at 4.5% from 8 July 2009, the date the claim was first made by lodging a statement of problem in the Authority.

[10] Ms Li claims that she was required to work for three hours on the afternoon of Auckland Anniversary Day, 28 January, and therefore became entitled to an additional ½ time for her wages that day (as well as time off in lieu). As I am not satisfied this was done at the request or requirement of Mr Prasad or Mr Kumar, I disallow this particular claim.

[11] The agreement provided that Ms Li's ordinary hours of work were to be 8.30am to 5.00pm. She claims that between commencement in January 2008 and the end of that year she worked a total of 39.5 hours overtime and that this was at the request of Mr Prasad and/or Mr Kumar. In particular she claimed that overtime was

required in the evenings from 5pm to 8pm, when she assisted with the delivery of ESOL lessons on occasions recorded by her.

[12] I am not satisfied that the overtime claim is valid. There are discrepancies in the various records of start and finish times and Mr Prasad and Mr Kumar have denied that any overtime was approved by them. It is not clear whether Ms Li attended the ESOL classes to facilitate or interpret, or simply to improve her English language skills as she had been requested to do. I disallow the claim.

[13] In her final pay a deduction was made for 7½ days sick leave the employer claimed she had taken in addition to her yearly statutory entitlement of five days. Ms Li claims that she took only 4½ extra days and so is owed pay for the balance of three.

[14] I disallow this claim as her neglect in not signing the attendance record when she began and finished on some days has caused doubt as to what the amount of leave taken.

[15] The Authority is in no doubt from its investigation that Ms Li's personal grievance must be upheld, as she was unjustifiably dismissed I find.

[16] I accept Ms Li's evidence that on 19 December when she asked him, Mr Prasad told her that day would be her last of work for the year. Upon asking when she was required to start again in the New Year, Mr Prasad simply told her to wait for his phone call. She went to see him at the Ellipse office later that day as he had requested but Mr Prasad did not meet her. Neither did he ring her, as he had said he would.

[17] Mr Prasad's evidence is that by a "*Termination Letter*" dated 18 December 2008 he sent to Ms Li's home address, she had been advised:

... we are not in a position to continue your employment with Ellipse or its subsidiary company. We have done our best to get you to do professional development which is getting your English to the standard required by us but you have refused to take up this task.

[18] I find that whatever Mr Prasad may have intended to say to Ms Li about the continuation of her job, she did not hear about her termination, by dismissal, until 2009 when the Service and Food Workers Union took up her case. She had been led

to believe at the end of 2008 that her employment would be continuing and that the start date in the New Year would be advised by Mr Prasad.

[19] Dismissal in circumstances where an employee is not made aware of the termination for several weeks cannot be justified under the test of s 103A of the Employment Relations Act 2000.

[20] There is also no evidence of any formal warnings having been given to Ms Li and there was, of course, no meeting with her prior to the dismissal to consult with her about any proposal the employer might have had to discontinue her employment. Consultation for that purpose is a requirement under s 4(1A) of the Act, in relation to the good faith obligations of an employer.

[21] The Termination Letter signed by Mr Prasad referred to misuse of the internet and her failure to improve her English as required.

[22] Much earlier in the employment the employer had not invoked the 12 week probation period, as it could have done up to 17 April if dissatisfied with her “*competency, behaviour and conduct*” in any respect. That option was available to extend the probation period for any shortcomings to be addressed and standards to be met.

[23] In a performance review signed by Mr Prasad and Mr Kumar the feedback from management was “*Lina (Na Li) is sincere, honest. Very reliable, follows instructions but lacks problem solving skills.*” This is in contradiction to entries in the log produced by Deans International recording that in the previous month of March she had been warned and told that instead of being dismissed she was to look for another job. It seems that despite this advice she was allowed to continue her employment for a further nine months, during which the employer transferred her to perform a variety of work in the panel beating business of Mr Prasad’s son.

[24] Mr Oldfield in submissions for Ms Li referred to the requirement for an employer to specify the shortcomings found by an employer of an employee and allow a reasonable period in which improvement to standards made clear could be measured. Minimum requirements of fairness were not adequately met in this case I find. The employer had ample time between March/April and the end of 2008 to implement a performance management or monitoring programme if it had wanted to.

[25] I find that Deans International was quite loose about the nature of Ms Li's role in the business, even seconding her to work for a panel beater later in 2008. It was uncertain about its expectations of her in conduct and performance, and then finally as to whether or not her employment was being continued or ended.

[26] I find that the dismissal was not justified under s 103A of the Act and that accordingly Ms Li has a personal grievance. The actions of the employer and how it acted were not what a fair and reasonable employer would have done in all the circumstances, which include the prolonging of the employment without properly addressing perceived deficiencies in performance or conduct.

[27] I find that in the absence of proper warnings by the employer after nine months or so of employment, Ms Li did not contribute to the situation which gave rise to her personal grievance.

[28] I am not satisfied that Ms Li made reasonable attempts to find other work, given what seems to me to be her qualifications and general employability. The loss of remuneration attributable to the grievance but not the failure to mitigate her loss, I consider to be seven weeks pay of \$3,360, which Deans International is ordered to reimburse Ms Li. Interest at 4.5% is to be paid on that sum from 8 July 2009.

[29] Pursuant to s 123(1)(c)(i) of the Act, as compensation based on the evidence Ms Li gave of the hurt feelings and humiliation she suffered as a result of this dismissal, she is to be paid \$2,750 by Deans International.

[30] Deans International is to reimburse to \$70 fee paid on behalf of Ms Li to lodge her claim. Cost are reserved. Any application is to be made in writing by Ms Li, depending on whether she incurred any expense through having union representation.