IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 525/10
5148979

	BETWEEN	Robert Wenduo Peng
	AND	Drapac Ltd

Member of Authority:	Yvonne Oldfield
Representatives:	Royal Reed for applicant Dr Quan Shu, Director, for Respondent
Investigation Meeting:	13 July and 15 September 2009
Further information received	27 September 2009, 17 June 2010, 18 June 2010
Submissions received:	6 November 2009, 15 December 2009, 4 June 2010 from Applicant
	30 November 2009 from Respondent
Determination:	23 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Peng worked for the respondent (Drapac) for approximately two years until he was dismissed in January 2009. He is a scientist by profession and it was primarily in that capacity that he was employed. He claims personal grievances in relation to the dismissal which he says was unjustified, and in relation to a series of alleged disadvantage grievances associated with matters such as changes to his duties, poor working conditions and under-resourcing. He also claims compensation for what he says were consecutive "illegal" employment agreements which purported to be fixed term but did not set out the reasons for that as required by section 66 of the Employment Relations Act.

[2] Finally Mr Peng claims arrears of wages for a period when he first went to work for the respondent, payment in relation to a contractual bonus entitlement and unpaid statutory and annual holiday pay.

[3] Dr Shu denies any unjustified actions or disadvantage to Mr Peng. He also says there were genuine reasons why each of the employment agreements had a fixed term. Acknowledging that Mr Peng's employment was terminated before the expiry of the final fixed term agreement, he now says it was justified for poor performance which he says he repeatedly brought to Mr Peng's attention.

[4] Dr Shu says that no arrears of wages are owed to Mr Peng. He says payment of the bonus was dependent on certain criteria being met and they were not. Dr Shu says that up until the last six months of employment it had been agreed that holiday pay be included in the hourly rate. For this reason, he said, when Drapac paid out holiday pay at termination it was only in relation to that six month period.

Issues

[5] The issues for determination relate to the following matters:

i. A claim for wages for the period November 2006 to January 2007 during which Mr Peng worked without any payment;

ii. Allegations of disadvantage including a claim for compensation arising out of the alleged failures to comply with section 66 of the Employment Relations Act;

iii. The allegation of unjustified dismissal (which if successful will lead to a secondary question of remedies);

iv. The bonus claim, and

v. The claim for holiday pay.

(i) Wage claim, November 2006 to January 2007

[6] Mr Peng first began working for Drapac in November 2006 but did not enter into a written employment agreement, or receive any payment, until January 2009. When Mr Peng first lodged his employment relationship problem in the Authority it included a claim for arrears for the intervening period. (This was the first time Mr Peng had claimed wages for the period in question.) Ms Reed has never quantified the loss alleged and made no reference to the claim in her closing submissions. However she has not formally withdrawn it.

[7] At the investigation meeting Dr Shu's evidence was that in late 2006 he was not in a position to hire Mr Peng. He told Mr Peng that he would apply for a Work and Income subsidy for Mr Peng's wages and if the application was successful there would be a job for him. Meanwhile, he said, Mr Peng started coming in to work at Drapac to gain experience. During this time he remained on the unemployment benefit. Wages were not discussed until the subsidy was approved in January 2007. On reaching agreement the parties signed their first employment agreement and when the subsidy came through, Mr Peng got his first payment.

[8] None of this evidence is in dispute, although there is a dispute about the number of hours Mr Peng worked. Mr Peng says it was significant but could not provide the Authority with any specifics. To dispose of the matter I record that the evidence was not sufficient to establish that wages were owed for the period before the parties entered into a formal employment agreement. No orders will be made in respect of that claim.

(ii) Disadvantage grievances

[9] The applicant's claims of disadvantage were made only after the investigation meeting had been convened. I queried with Ms Reed whether these grievances had been raised with the employer and if so when. She advised that Mr Peng raised the grievances by email before his employment ended. Ms Reed said this was established in the large body of email correspondence which had already been presented to the Authority in evidence, but did not direct the Authority to any specific references in that material.

[10] I have therefore checked it all carefully and while it is correct that Mr Peng does (in places) raise issues of concern to him, I can find nothing that amounts to the raising of a disadvantage grievance or grievances in terms of section 114 of the Employment Relations Act. There being insufficient evidence to be satisfied that these grievances were properly raised, I am unable to consider these claims.

Breaches of section 66

[11] Ms Reed has also approached the alleged breach of Section 66 of the Employment Relations Act as a disadvantage claim, seeking $9,000.00 compensation by way of remedy for the fact that each of three successive employment agreements lacks any reference to the reasons for its fixed term.

[12] Section 66 (4) b provides:

> "66 *Fixed term Agreement*
>
> *(1) An employee and an employer may agree that the employment of the employee will end –*
>
> *a. at the close of a specified date or period; or*
>
> *b. on the occurrence of a specified event; or*
>
> *c. at the conclusion of a specified project.*
>
> *(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must–*
>
> *a. have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in this way; and*
>
> *b. advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way…*

(3) …

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing-

a. the way in which the employment will end; and

b. the reasons for ending the employment in that way."

[13] The first employment agreement was dated 19 January 2007 and expressed to be for a period of six months (until 18 July 2007.) The second was expressed to be for a period of one year (from 19 July 2007 until 18 July 2008) and the third, dated 28 July 2008, was for the period 1 August 2008 until 31 July 2009. None of the contracts gives a reason for being fixed term and therefore each fails to comply with section 66.

[14] However, as with the other disadvantage grievances, there is no evidence that this matter was raised as a personal grievance and I am therefore unable to investigate any personal grievance arising out of the non-compliance. For completeness I note that even if the non-compliance with subsection 66 (4) had been raised as a grievance there was no evidence of disadvantage arising as a result. Employment continued after the end of each of the first two agreements and Dr Shu is not relying on the fixed term nature of the third agreement as a defence to the claim of unjustified dismissal.

(iii) The dismissal for poor performance

[15] There was some indication in communications between Dr Shu and Mr Peng (at the time) that the dismissal was for redundancy. This was consistent with prior advice from Dr Shu to all staff concerning the loss of a lease and a decision to close down parts of the business in order to reduce operating costs. Subsequently, however, in his evidence to the Authority, Dr Shu has characterised the dismissal as being for poor performance.

[16] Slightly different duties were required of Mr Peng in each of the three periods of employment. There is no dispute that the primary focus of the third and final period (from 1 August 2008) was the preparation of an application for Drapac's NZQA registration. (At the time, Dr Shu was involved in supervision of graduate students and wished to become able to confer degrees directly.) The deadline for completion and submission of the application was February 2009.

[17] Mr Peng's evidence was that up to January 2009 he had reported to Dr Shu on the progress of the application at intervals when requested. He was not told that Dr Shu wanted anything different from him. On January 14 Dr Shu emailed reminding him of the deadline. Then, later that day, he emailed again as follows[1]:

> *"I do not think we can submit the application in the right level by the end of January?*
>
> *After reviewing the reports you emailed to me and carefully thinking those against the requirements and standards in place. I feel that the documents you prepared so far is far not good enough in two ways: the quatities [sic] and the qualities (actually the documents are quite poor.) The documents must be improved in large extend to meet the requirements and standards. based on the work you have done so far, I do not think you can deliver the documents up to the right level even by spending another three months …*
>
> *Accordingly, do we really need to continue spending time on the application facing the current situation?*
>
> *My answer is no. We need to wrap up the institute application immediately.*
>
> *Of course this will affect your employment unless we can justify other suitable job within our company. Let me know your thought."*

[18] The next day, Dr Shu emailed again, saying:

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[1] English is not the first language of either Dr Shu or Mr Peng and interpretation services were used at the investigation meeting. Throughout this determination any communication from either of them which is in English has been quoted verbatim.

> "*Based on the present situation, I am regretful to write to you that Drapac is no longer be able to provide you for continuing employment for the agreement we signed in last year starting from 01 August 2008. This is a termination notice of our agreement based on our agreed termination clause. Although I have been trying very hard to not to write you such as notice, I have failed to do anything better than this. The termination date is the last day of January 2009."*

[19] Dr Shu now says that Mr Peng failed to provide satisfactory reports of the progress of the application and by January it had become clear that an application of the required standard would not be ready by February 2009.

[20] Dr Shu does not profess to have held any formal performance management or disciplinary meetings with Mr Peng. He does however maintain that prior to the dismissal he had several conversations with Mr Peng about his concerns. He said Mr Peng either could not or would not respond by producing what was needed for the application. In Dr Shu's submission:

> *"The applicant's poor performance and refusal to improve and the ignorance of the Applicant to the respondent's advice, suggestions, warnings resulted in the termination of the employment by giving two weeks notice in advance according to the agreed termination clause."*

[21] In the period leading up to the termination the primary means of communication between Dr Shu and Mr Peng was by email. As noted already, the Authority was provided in evidence with a large body of this email correspondence. In submissions Ms Reed drew the Authority's attention to the fact that it contained only two examples where Dr Shu spoke to Mr Peng about the NZQA application.

[22] In the first, dated 10 November 2009, Dr Shu said:

> "*I am worrying and concerning the quality and progress of Drapac Institute Registration. I hope that this to be moved quickly and efficiently."*

[23] In the second he said:

> *"I am expecting that you concentrate on Drapac institute application and I can get two reports a week as requested previous many times, as I can see the progress on it."*

[24] Ms Reed concedes that these emails make it clear that Dr Shu had concerns and raised them, but she argues that they fall well short of what could be called warnings.

Determination

[25] In circumstances where an employer seeks to justify dismissal on the basis of poor performance, the law requires warnings which are clear and precise about both the shortcomings in the work and in the improvements sought. The email references do not meet the standard for formal employment warnings. There is no other specific evidence to establish that warnings were given. Ms Reed's submission is therefore accepted. It follows that the dismissal on grounds of poor performance has not been justified.

Remedies

[26] In respect of the unjustified dismissal Mr Peng has claimed three months lost earnings (a total of $12,500.00) and compensation of $10,000.00. Mr Peng gave evidence of the distress he felt as a result of the suddenness of his dismissal and the hardship he saw his family face because he had lost his job. This evidence is accepted. In the circumstances I consider an award of $7,000.00 to be appropriate pursuant to section 123 (c) (i).

[27] Mr Peng gave very little evidence about his efforts to mitigate his loss. He did however tell the Authority that he was unemployed for an extended period after his employment ended and I accept that the specialised nature of his skills as a research scientist made it difficult for him to find suitable work. I accept that an award of three months lost earnings is appropriate pursuant to section 128 (2).

[28] Pursuant to section 124 of the Employment Relations Act 2000 I am obliged to consider whether remedies should be reduced on the basis that the actions of the employee contributed towards the situation that gave rise to the grievance. In circumstances where the respondent did not take proper steps to manage or address any purported poor performance it is not possible to identify whether in fact any shortcomings in Mr Peng's work did contribute to the situation Dr Shu alleges. I therefore make no reduction for contributory conduct.

(iv) The Bonus

[29] The final employment agreement provided (at clause 7 (2)) as follows:

> *"Merit bonus: $10,000.00 (taxable) for successfully get NZQA registration of Drapac PhD, MSc and postgraduate diploma by the end of February 2009, which allows Drapac Institute has the authority to award PhD, MSc and postgraduate diploma independently by the end of February 2009. This bonus will not be available if the registration is not achieved by the time. The bonus shall be available to the employee if the registration was not successfully achieved within the timeline, which is due to Drapac or associated organisations do not meet the standards of NZQA for awarding qualifications (except paperwork and application merits.)"*

[30] As things turned out, of course, the application was never submitted. There is no dispute that even if Mr Peng had continued work on it until the end of February, it would not have been completed in that time. There is also no dispute, now, that Drapac's facilities fell short of what was required to meet NZQA standards, and that there was no chance of accreditation at that time.

[31] Mr Peng told me that he understood that the bonus provision meant that provided the application was properly put together and submitted on time he would get his bonus even if the company did not meet the conditions for approval. He says, therefore, that it does not matter that the application could never have succeeded.

[32] He also says that the fact that it could not have been completed on time was not his fault. He says that at the time he signed the third employment agreement the

respondent had indicated that work was already well underway on the application, but in fact very little had been done. He also says that his work on the application was impeded by the fact that he was required to complete other duties as well. In these circumstances, he says, he should still get his bonus.

[33] There can be no question of the contractual entitlement in clause 7(2) being enforced in circumstances where the application was incomplete. Possibly for this reason, Ms Reed has argued the bonus claim as a further personal grievance of disadvantage. As before, there has been no evidence that the matter was raised in terms of Section 114, although the respondent was on notice of the claim by the time the bonus fell due at the end of February 2009, the employment relationship problem having been lodged in the Authority during that month.

[34] Had it been the case that the application would have been completed and presented but for the dismissal, it would indeed have been possible to consider remedies pursuant to section 123 (1) (c) (ii). This section relates to loss of a benefit which the employee might reasonably have been expected to obtain if the personal grievance had not arisen. As noted already, however, there is no dispute that the application was never going to be ready in time. Mr Peng cannot say, therefore, that he could have reasonably expected to obtain the benefit of the bonus if the dismissal had not intervened.

[35] The bonus claim fails.

(v) **Holiday pay entitlements**

[36] When Mr Peng's claim was first lodged he sought holiday pay in respect of the entire period of employment. During the course of the Authority's investigation Dr Shu asserted that Mr Peng had taken some annual leave during the period of employment covered by the third employment agreement and received the balance of holiday pay owed upon termination. Ms Reed was able to confirm, on Mr Peng's behalf, that this was correct.

[37] Dr Shu says that the first two employment agreements provided that holiday pay should be included in the hourly rate, and therefore he is not obliged to make any further payment for statutory or annual holidays.

[38] It is correct that both agreements are expressed in that way. The question is whether the existence of these provisions does relieve Drapac of its obligations under relevant holidays' legislation.

[39] Section 28 (1) of the Holidays Act 2003 provides as follows:

> "*…an employer may regularly pay annual holiday pay with the employee's pay if*
>
> 1. *the employee*
>   i. *is employed in accordance with section 66 of the Employment relations Act 2000 on a fixed-term agreement to work for less than 12 months; or*
>
>   ii. *works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with …annual holidays…*
>
> 2. *the employee agrees in his or her employment agreement; and*
>
> 3. *the annual holiday pay is paid as an identifiable component of the employee's pay;*
>
> 4. *the annual holiday pay is paid out at a rate not less than 8% of the employee's gross earnings."*

[40] Thus holiday pay may be paid on a "pay as you go" basis in two situations. The first is where the employment is genuinely casual, which clearly does not apply here. The other category is in situations of fixed term employment (in accordance with section 66 of the Employment Relations Act 2000) where the term of the agreement is less than twelve months.

[41] Since the second agreement is for a full twelve months, it follows that holiday pay could not be paid out with Mr Peng's regular pay during that period of employment. As for the period under the terms of the first employment agreement (which was for a period of less than twelve months) it has already been established (above) that this agreement did not comply with the requirements of section 66 of the Employment Relations Act.

[42] It follows that Mr Peng is entitled to holiday pay in respect of the periods covered by the first and second employment agreement. The claims are as follows:

	Annual holidays	**Statutory holidays**
First agreement: 6% of gross wages for period 19/01/07 to 31/03/07 8% of gross wages for period 01/04/07 to 18/07/07	 $288.00 $682.40	 $576.00
Second agreement 8% of gross wages from 19/07/07 to 18/07/08	 $3,308.08	 $2,395.80
Total	**$4,278.48**	**$2,971.80**

[43] Dr Shu has not disputed the way these amounts have been calculated. These amounts are now payable to Mr Peng.

Summary

[44] The respondent is ordered to pay to Mr Peng the following sums:

i. $12,500.00 lost earnings pursuant to section 128 of the Employment Relations Act;

ii. $7,000.00 compensation for hurt and humiliation pursuant to section 123 (c) (i) of the Employment Relations Act 2000;

iii. $4,278.48 in respect of unpaid annual holidays, and

iv. $2,971.80 in respect of unpaid statutory holidays.

Costs

[45] The question of costs is reserved. Any application for costs should be made no later than 28 days from the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority