

Employment relationship problem

[1] Ms Zheng is the sole director of the respondent, Northern Legal Limited (Northern Legal). Ms Zheng is also the majority shareholder in Northern Legal.

[2] Northern Legal operates a law firm on the North Shore, Auckland. Legal services provided include immigration, real estate, business, separation and relationship property, employment, estates and wills, trusts, asset protection, personal planning and other legal services.

[3] In August 2014, Mr Eketone-Te Kanawa, applied for a position advertised at Northern Legal for an “*associated solicitor*”. Mr Eketone-Te Kanawa was appointed to the role and began work on about 20 October 2014.

[4] On the morning of 21 September 2015, Ms Zheng and Mr Eketone - Te Kanawa discussed a client matter. Ms Zheng and Mr Eketone - Te Kanawa had differing views about the manner in which the client matter should be dealt with. Ms Zheng was not happy with Mr Eketone - Te Kanawa’s attitude during the discussion.

[5] Mr Eketone- Te Kanawa says that later in the day, as he was leaving work, Ms Zheng asked to speak with him briefly. Ms Zheng informed Mr Eketone- Te Kanawa that she was giving him “*4 weeks notice*”. Mr Eketone- Te Kanawa asked for an explanation. Ms Zheng told him that she had spoken with her colleagues and felt he was losing clients for the firm. Mr Eketone- Te Kanawa asked Ms Zheng to give him her reasons in writing. Mr Eketone- Te Kanawa says he did not receive an explanation in writing and understood that his employment had been terminated.

[6] Ms Zheng says she did not give Mr Eketone- Te Kanawa 4 weeks’ notice, she says she told him she was “thinking” of doing so. Ms Zheng says Mr Eketone- Te Kanawa stopped taking on work and left Northern Legal of his own volition on 16 October 2015.

Issues

[7] The issues for the Authority to determine are as follows:

- Was Mr Eketone- Te Kanawa dismissed by Northern Legal?

- If so, was Mr Eketone-Te Kanawa's dismissal justified?
- If the answer is no, what remedies, if any, is Mr Eketone- Te Kanawa entitled to?
- Did Mr Eketone-Te Kanawa contribute to his dismissal?

Investigation meeting

[8] The parties resolved issues concerning unpaid commission, wages, lost wages and holiday pay which comprised part of Mr Eketone-Te Kanawa's employment relationship problem. This part is subject to a consent determination by the Authority¹.

[9] This determination deals with the remaining portion of Mr Eketone-Te Kanawa's employment relationship problem relating to the termination of his employment.

[10] As permitted under s.174E of the Employment Relations Act 2000 (the Act), the Authority has not set out all the evidence received. Findings will be made in order to dispose of this matter as efficiently as possible.

[11] The investigation meeting took half a day in the Authority. Submissions were filed by both parties at the conclusion of the investigation meeting on 1 March 2016.

[12] For the Authority's investigation meeting, witness statements were filed by the applicant, Mr Eketone-Te Kanawa and for the respondent, Northern Legal, by Ms Zheng, Ms Sunny Sun, Mr Ng Tak Lee and Ms Madelaine Wang. A further witness statement was filed by Mr Trevor Little, who was not present at the meeting.

[13] However, the evidence Mr Little was to give related to the portion of the employment relationship problem that was resolved between the parties. Therefore, there was no evidence from Mr Little before the Authority for consideration in relation to the issue to be determined by it.

[14] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

¹ [2016] NZERA Auckland 61

First issue**Was Mr Eketone-Te Kanawa dismissed by Northern Legal?****Employment at Northern Legal**

[15] In August 2014, Northern Legal wished to engage the services of a solicitor for its busy legal practice. An advertisement was placed on Trade Me seeking an “*associated solicitor*”.

[16] Mr Eketone-Te Kanawa graduated from the University of Otago with a BA/LLB degree and in July 2009 was admitted as a barrister and solicitor of the High Court. Mr Eketone- Te Kanawa had been employed as solicitor, primarily undertaking family law work. Mr Eketone- Te Kanawa was looking to expand his legal experience and wanted more flexibility as he had a young family.

[17] Mr Eketone- Te Kanawa saw the advertisement placed by Northern Legal and on 12 August 2014 he responded to the advertisement with a covering letter and his curriculum vitae.

[18] An interview was arranged and Mr Eketone-Te Kanawa met with Ms Zheng on 15 August 2014 to discuss the role. Mr Trevor Little, Northern Legal’s practice manager, was also at the interview.

[19] Following correspondence between Ms Zheng and Mr Eketone-Te Kanawa and a further meeting, Mr Eketone-Te Kanawa was offered the position of associated solicitor. It was agreed that Mr Eketone-Te Kanawa was to have some flexibility in his hours of work as he had a young family and his wife was pregnant with their third child. It was also agreed that Mr Eketone- Te Kanawa would be paid a 50% commission of fees generated for any matters worked on by him.

Agreement for Services

[20] Initially, Ms Zheng provided Mr Eketone-Te Kanawa with an agreement entitled “*Agreement for Services*” which envisaged an independent contractor arrangement. However, following further discussions between Ms Zheng and Mr Eketone-Te Kanawa, it was evident that such an arrangement would not be in accordance with the New Zealand Law Society’s regulations. Mr Eketone-Te Kanawa

was not qualified to practice law on his own account and therefore could not be an independent contractor, rather he was required to be employed by Northern Legal.

Employment Agreement

[21] Accordingly, Ms Zheng prepared a draft employment agreement which she says was a modification of templates she had obtained from the Department of Labour.

[22] A draft employment agreement was sent by Ms Zheng to Mr Eketone-Te Kanawa on 7 October 2014.

[23] Mr Eketone-Te Kanawa read over the agreement and was happy with it. On 13 October 2014 Mr Eketone-Te Kanawa and Ms Zheng met at the offices of Northern Legal to sign the offer of employment and the employment agreement. Their signatures were witnessed by another solicitor at Northern Legal, Mr Lee.

[24] Ms Zheng emailed a copy of the signed offer of employment and the employment agreement to Mr Eketone-Te Kanawa on 14 October 2014.

Mr Eketone-Te Kanawa's employment

[25] Mr Eketone-Te Kanawa initially worked five days a week with some flexibility to enable him to start work later and leave work earlier in the event he was required for family reasons.

[26] Subsequently, Ms Zheng and Mr Eketone-Te Kanawa agreed that he would not work on Tuesdays but that he would be in the office on Mondays, Wednesdays, Thursdays and Fridays. Mr Eketone-Te Kanawa said that from time to time he would also work in the weekends to complete client matters. Mr Eketone-Te Kanawa was initially paid a commission on fees generated on matters he was working on, on a fortnightly basis. Subsequently, and at the time of the conclusion of his employment, Mr Eketone-Te Kanawa was being paid on a weekly basis.

[27] Ms Zheng accepted at the investigation meeting that she had employed Mr Eketone-Te Kanawa but that he was being paid on a commission basis.

[28] I find that Mr Eketone-Te Kanawa was employed on a full time basis by Northern Legal with flexible hours to accommodate his family arrangements and was paid a regular commission.

Morning of 21 September 2015

[29] On the morning of 21 September 2015, Mr Eketone-Te Kanawa was working in his office when Ms Zheng came in to talk to him about an urgent client matter. The matter was an estate matter for a Chinese client of Ms Zheng. Ms Zheng wanted Mr Eketone-Te Kanawa's views on the best way in which the client matter which she was working on, should be dealt with. Mr Eketone-Te Kanawa gave his view which he said Ms Zheng was unhappy about. Mr Eketone-Te Kanawa said Ms Zheng became agitated.

[30] Ms Zheng says Mr Eketone-Te Kanawa insisted that the matter should be dealt with in the manner he had suggested. Ms Zheng said she became upset and asked Mr Eketone- Te Kanawa how many client matters of a similar nature he had done before. As he had only completed two similar client matters, she felt he did not have a good attitude.

[31] Mr Eketone-Te Kanawa says the way in which he suggested the client matter should be dealt with was the way in which he had been trained. Mr Eketone-Te Kanawa says he did not insist the matter be done in this way, it was Ms Zheng's client.

[32] The discussion ended and Ms Zheng had back to back client meetings for the rest of the day.

Late afternoon - 21 September 2015

[33] Towards the end of the day, Ms Zheng was at the reception talking with some other staff. As Mr Eketone-Te Kanawa approached to leave the office for the day, Ms Zheng offered him an apple pie from McDonalds that she had bought for staff when she had taken a late lunch.

[34] Ms Zheng asked to speak to Mr Eketone-Te Kanawa for a few minutes. Mr Eketone-Te Kanawa explained that his wife was waiting in the car and Ms Zheng told him it would only take a few minutes.

[35] Mr Eketone-Te Kanawa and Ms Zheng went to a nearby office and Mr Eketone-Te Kanawa says as soon as they got into the office, Ms Zheng told him that she was giving him four weeks' notice. Mr Eketone-Te Kanawa says he was shocked and asked for an explanation and was told by Ms Zheng that she had discussed the issue with colleagues and that she thought he had been responsible for losing new clients.

[36] Mr Eketone-Te Kanawa asked for more details but Ms Zheng did not provide any. Mr Eketone-Te Kanawa asked Ms Zheng to put her reasons into writing so that he could understand why he was being given notice.

[37] Ms Zheng's version of events differs. Ms Zheng says she told Mr Eketone-Te Kanawa that she wanted him to have a better attitude and that they could not work together if he did not have a better attitude. Ms Zheng says she then told Mr Eketone-Te Kanawa that she was "thinking" about giving him four weeks' notice. Ms Zheng insisted at the Authority's investigation meeting that she did not actually give Mr Eketone-Te Kanawa four weeks' notice at the meeting.

Correspondence following discussions on 21 September 2015

[38] Mr Eketone-Te Kanawa says that Ms Zheng had never raised any issues with him about his work and did not do so on 21 September 2015. Mr Eketone-Te Kanawa says Ms Zheng's news, that he was being given four weeks' notice, caught him completely by surprise. Shortly after the meeting on 21 September 2015, Mr Eketone-Te Kanawa sent Ms Zheng a text message, the contents of which are as follows:

Text message today 1630

Hi Puhān. Sorry I cannot send an email as I don't have internet connection. I guess I am surprised that you suddenly told me I was being given 4 weeks' notice to end my employment with Northern Legal. I am at a complete loss to understand the decision as I am unaware of any issue at work and you did not provide any reason. If my understanding is correct you are terminating my employment effective in 4 weeks' time? Could you please clarify and provide a written explanation? Thank you. Nick

[39] Ms Zheng denied giving Mr Eketone-Te Kanawa four weeks' notice. When questioned about why she did not clarify the situation after receiving the text message, Ms Zheng said that she was completely booked with clients on 22 September 2015

and did not have time to respond. Ms Zheng did not telephone or speak to Mr Eketone-Te Kanawa in the office on 22 September 2015.

[40] At 7.13pm, Ms Zheng sent Mr Eketone-Te Kanawa an email. The email is as follows:

Hi Nic

Thank you for your message.

I did not say that I was giving you 4 weeks' notice. I said I was thinking about ending your contract and that I was thinking about giving you 4 weeks' notice.

I think there is a misunderstanding between us. You are not an employee of Northern Legal. You are an independent contractor. The only reason I agreed to your request that we enter an employment agreement is because you did not want to be seen to be in business on your own account. Everything about our business relationship shows that you are an independent contractor. You are GST registered and every month you invoice me for the legal services you have provided.

In the 11 months you have provided services to Northern Legal you have taken sick days but you have never requested or been paid sick pay. You have not requested or been paid for any public holidays nor have you requested or been paid any annual leave.

*Because you are an independent contractor, I do not need a reason to terminate our business relationship. My only obligation is to provide you with reasonable notice. **I believe that in this case 4 weeks' notice is more than reasonable.***

Kind regards,

[41] Mr Eketone-Te Kanawa responded early the next day on 23 September 2015. Mr Eketone-Te Kanawa said in his email:

... as you recall you initially provided me with a contract agreement then withdrew it because the Law Society requires independent contractors to be able to practice on their own account. I am not qualified to practice on my own account so you suggested an employment agreement. You definitely gave me four weeks' notice on Monday this week and in your email below I believe you are confirming that fact

[42] Mr Eketone-Te Kanawa requested Ms Zheng's agreement to seek the services of the Department of Labour (now MBIE) to resolve the employment issue between them.

[43] Mr Eketone-Te Kanawa then followed up his email on 23 September 2015 formally raising a personal grievance claim.

[44] On 24 September 2015, Ms Zheng responded, reiterating that she had not given Mr Eketone-Te Kanawa four weeks' notice, rather she had been "thinking" about giving him four weeks' notice. Ms Zheng also accepted in the email that Mr Eketone-Te Kanawa was an employee even though she believed their intention was otherwise.

[45] Ms Zheng's email included comments which, in my view, were unacceptable and irrelevant. Ms Zheng referred to gifts she supposedly gave to Mr Eketone-Te Kanawa and his family and makes what can only be described as personal comments which were unhelpful and not relevant to the claim. Ms Zheng finished her email as follows:

I confirm again that I did not give you notice. We do not need a mediation yet since I am not intent to dismiss you. According to the agreement, you should still be being employed on an as required basis, you has no fixed hours of work, nor any minimum number of hours. The hours of work and days to be worked will be as agreed between Northern Legal and you from time to time. Please note that you should take all reasonable steps to be available when required.

[46] This appeared to be a new arrangement and not one agreed to or discussed with Mr Eketone- Te Kanawa. The parties had agreed Mr Eketone- Te Kanawa's hours of work and remuneration and Mr Eketone- Te Kanawa had been working in accordance with the agreement during the course of his employment by Northern Legal.

[47] At the investigation meeting, Ms Zheng attempted to claim Mr Eketone- Te Kanawa was a "casual" employee who worked "*as and when required*". This was not the case and not the arrangement in practice. In any event, clause 11 of the employment agreement permitted Northern Legal to terminate Mr Eketone- Te Kanawa's employment "*for cause, by providing **one month** notice in writing...*"

[48] I prefer the evidence of Mr Eketone-Te Kanawa about the events of 21 September 2015. I did not find Ms Zheng to be a credible witness, her evidence was contradictory. At the investigation meeting, Ms Zheng repeatedly failed to answer questions put to her about the evidence and repeatedly referred to irrelevancies in an attempt to discredit Mr Eketone- Te Kanawa and put herself in a good light.

[49] I find that Ms Zheng terminated Mr Eketone-Te Kanawa's employment when they met at her request on the afternoon of 21 September 2015. Ms Zheng informed

Mr Eketone-Te Kanawa that she was giving him four weeks' notice and Mr Eketone-Te Kanawa correctly, in my view, took that to mean that he was being dismissed in four weeks' time. Mr Eketone-Te Kanawa attempted to clarify the situation but Ms Zheng was too busy to respond or to meet. I find this surprising. It would have been very easy for Ms Zheng to clarify the situation, she did not do so.

[50] When Ms Zheng did respond, her first email response was that she felt four weeks' notice in the circumstances was reasonable. I agree with Mr Eketone-Te Kanawa that Ms Zheng was confirming that she was giving him four weeks' notice. Subsequently, in my view, Ms Zheng realised that Mr Eketone-Te Kanawa was an employee, not a contractor, and attempted then to say that she had not dismissed him. I do not accept Ms Zheng's evidence. Ms Zheng dismissed Mr Eketone-Te Kanawa on 21 September 2015.

Second Issue

Was the dismissal justified?

[51] Section 103A(1) of the Act provides that employers must justify their decisions to dismiss. Whether a dismissal was justifiable must be determined, on an objective basis, by applying the test in subsection (2) which states:

- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[52] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. Under the test, the question of whether the dismissal of Mr Eketone-Te Kanawa was justifiable must be determined, on an objective basis, by considering whether Northern Legal's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[53] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3), as well as any others it thinks appropriate.

[54] The test is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

[55] Ms Zheng did not inform Mr Eketone-Te Kanawa why she wanted to meet with him on the afternoon of 21 September 2015. Ms Zheng simply informed Mr Eketone-Te Kanawa that she wanted to speak with him for a few minutes. At the meeting, after informing Mr Eketone-Te Kanawa that he was being given four weeks' notice, Ms Zheng failed to provide him with any reasons for doing so. Mr Eketone-Te Kanawa requested reasons on more than one occasion and did not receive a response.

[56] If Ms Zheng had concerns with any aspects of Mr Eketone-Te Kanawa's performance, she should have raised them in a proper manner with him. She did not do so. In my view, Ms Zheng became angry with Mr Eketone-Te Kanawa earlier in the day when she asked him about a client matter that he was working on for her. Ms Zheng was not happy with Mr Eketone-Te Kanawa's attitude.

[57] Ms Zheng believed that Mr Eketone-Te Kanawa was an independent contractor and that she was able to terminate his services by giving him four weeks' notice, without cause. This is what Ms Zheng did on the afternoon of 21 September 2015.

[58] Ms Zheng subsequently confirmed this in her email of 22 September 2015 to Mr Eketone-Te Kanawa in which she said:

Because you are an independent contractor, I do not need a reason to terminate our business relationship. My only obligation is to provide you with reasonable notice. I believe that in this case 4 weeks' notice is more than reasonable.

[59] Northern Legal's actions in terminating Mr Eketone-Te Kanawa's employment were not those of a fair and reasonable employer. Mr Eketone-Te Kanawa's dismissal was unjustified, both substantively and procedurally.

Third Issue

What remedies, if any, is Mr Eketone-Te Kanawa entitled to?

[60] Mr Eketone-Te Kanawa gave evidence of the hurt and humiliation he suffered as a result of his dismissal.

[61] Mr Eketone-Te Kanawa says he could not sleep worrying about whether he would be able to secure another position in a law firm in the period of time leading up

to Christmas. Mr Eketone-Te Kanawa found this very stressful and he became anxious as he had a young family and a very young baby. Mr Eketone-Te Kanawa visited his local Doctor shortly after his dismissal and was prescribed a short course of sleeping medication and a period of leave.

[62] Mr Eketone-Te Kanawa says his stress was compounded by Ms Zheng's treatment of him during the period of time that he was working out his notice. Northern Legal stopped paying Mr Eketone-Te Kanawa's remuneration and on 2 October 2015, after checking his bank account, he emailed Ms Zheng asking if there was something preventing him being paid.

[63] Mr Eketone-Te Kanawa also described the hurt and humiliation he suffered as a result of his dismissal and treatment by Ms Zheng.

[64] Mr Eketone-Te Kanawa seeks the sum of \$10,000 compensation for the hurt and humiliation he suffered. I consider the claim to be reasonable. Accordingly, I award \$10,000 compensation for humiliation, loss of dignity and injury to feelings suffered by Mr Eketone-Te Kanawa. This sum is to be paid by Northern Legal to Mr Eketone-Te Kanawa within 14 days of the date of this determination.

[65] Mr Eketone-Te Kanawa was fortunately able to obtain another position shortly after his dismissal. However, Northern Legal's response to his personal grievance claim has been unacceptable. Northern Legal communicated with Mr Eketone-Te Kanawa's new employer making allegations which, when probed at the investigation meeting, were clearly not true.

Fourth Issue

Did Mr Eketone- Te Kanawa contribute to his dismissal?

[66] Due to the mandatory language of s.124 of the Act, I am required to consider whether there was any conduct by Mr Eketone-Te Kanawa which contributed to the situation that gave rise to the grievance. If I find there was contributory behaviour, then I am bound to reduce remedies accordingly.

[67] I find there was no contributory conduct.

Costs

[68] Mr Eketone-Te Kanawa seeks reimbursement of the filing fee of \$71.56 on his application. I order payment of \$71.56 by Northern Legal within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority