

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 501
5463646

BETWEEN BRETT TODD
Applicant

A N D OPA ARCHITECTS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Helen White, Counsel for the Applicant
Lin Zhu, Advocate for the Respondent

Investigation Meeting: 5 November 2014 at Auckland

Date of Determination: 5 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Todd) alleges that he was unjustifiably dismissed from his employment by the respondent (OPA) on 14 April 2014.

[2] Mr Todd was employed by OPA as an intermediate architectural designer and commenced his employment on 9 September 2013.

[3] It seems common ground that immediately prior to the termination of the employment (however caused), there was pressure to progress certain projects that OPA was responsible for.

[4] On the morning of 14 April 2014, it is common cause that Mr Todd arrived at work to find two emails from Lin Zhu, the principal of OPA, the thrust of which was that Lin Zhu had promised delivery of a particular outcome on a project by a certain date.

[5] There was then an exchange of emails between Mr Todd and Lin Zhu over that morning, and around 1pm that day there was a discussion between the two men.

[6] It is about the construction of that meeting that the dispute between these parties turn. Both parties say that the discussion concerned the progress of two OPA architectural projects, one in Churchill Road and one in Seacliffe Avenue.

[7] Mr Todd's evidence is that Lin Zhu asked him if the design work for those projects would be available by certain dates and Mr Todd said words to the effect "*realistically maybe not*".

[8] Mr Todd says that Lin Zhu responded by telling him that "*my time with the company is finished*".

[9] Then, when there was some resistance from Mr Todd to leaving the office directly (which Mr Todd says Lin Zhu appeared to require), Lin Zhu said something to the effect that if Mr Todd did not leave as requested, Lin Zhu would get the Police.

[10] Lin Zhu's account of the discussion is somewhat different. He agrees with the subject matter but says that the discussion became heated very quickly and Mr Todd became "*emotional*". He says that he was frightened by Mr Todd's behaviour and feared for the safety of his staff and for the safety of the assets of his business.

[11] Lin Zhu agrees that he did refer to the Police but that was because he was so frightened by Mr Todd's behaviour. Lin Zhu says that he told Mr Todd to go home to think about things, hoping that he would cool off, but also hoping to get him out of the office where Lin Zhu thought Mr Todd could potentially do damage.

[12] Lin Zhu also told me in his oral evidence that after he got a response from Mr Todd to the effect that Mr Todd could not produce the work by the dates that Lin Zhu had specified, Lin Zhu had said something to the effect:

If you can't make those dates, I have nothing else for you to do.

[13] Mr Zhu protested that all he was saying was that the projects that the two men were discussing were the projects that Mr Todd was working on and if he was not going to work on those, then it was difficult for the business to produce other work for him to do. Mr Zhu said this was not a dismissal but simply a statement of the factual position.

[14] In any event, whatever the intention of the parties, Mr Todd did leave the workplace and go home. Mr Todd says that he packed up his personal things before he left, asked to take some drawings (to assist with future employment) and had that request refused by Lin Zhu. Lin Zhu also required Mr Todd to leave his office key when he departed the premises.

[15] After Mr Todd's departure from the office, there were, by common consent, a succession of attempts by Lin Zhu or other members of the OPA staff to contact Mr Todd. Mr Todd refused to take the telephone calls but sent a message by text and email to the employer inviting the employer to put in writing what the employer wanted to say.

[16] On 22 April 2014, Mr Todd signed an employment agreement with his new employer and the following day an email was received by Mr Todd from Lin Zhu which, because of its significance to the present proceeding, I now set out in full:

Hi Brett,

I don't know what happened. My last email wasn't sent and I just realised it.

Firstly I would like to sincerely apologise for what I said to you the other day in the office. It's definitely not my intention to say what I have said. I was too stressed emotional and said them on impulse. I feel myself was really stupid at that time.

Secondly, OPA has been always valuing you as a good staff who contributes to OPA greatly. We do always feel lucky to have you in this office. Although sometimes we have different opinions about works and office systems. I do appreciate these different opinions and I do believe that's the power to drive our business towards a brighter future. I do thank you for what you have suggested us so far.

Thirdly, after considering your different opinions about the projects you had been working on, I have a solution, which is to have Li Hao as your full time assistant for the projects to make sure everything will be on schedule.

Fourthly, I would like to write a letter to all our colleagues to apologise for what I had said to you, following that I will apologise to you in front of all our colleagues when I come back to Auckland on 13 May 2014. [Lin Zhu was then in China on an extended visit.]

Fifthly, after I come back to Auckland, we need to go through all our different opinions about projects and office systems so as to reach consensus between us.

Sixthly, OPA would like to make up a plan and support your registered architect application in late 2015 or earlier if possible.

I do sincerely ask you to come back to office and restart projects and move forward. Meanwhile I do also hope that we should understand and communicate with each other in a better way while both under stress in the future.

Look forward to your quick reply and please feel free to let me know your opinions on this matter.

We do hope to see you in the office tomorrow.

*Sincerely,
OPA Architects Limited
Lin Zhu
Director*

[17] Mr Todd responded by saying that Lin Zhu needed to direct his correspondence to Mr Todd's legal team, who he identified, and Lin Zhu's response was to say he had "*no interest*" in corresponding with "*your dear solicitor or barrister*" and for the first time alleged that Mr Todd had abandoned his position.

[18] Mr Todd promptly raised a personal grievance, having told Lin Zhu prior to leaving the office on 14 April 2014 that he would have to consult a lawyer, and having reiterated that his lawyers were involved when he sought agreement from Lin Zhu for OPA to correspond only with his legal team.

[19] In the Statement in Reply which was filed by OPA, as well as resisting Mr Todd's claim of unjustified dismissal, OPA also alleged that the employment agreement had never been terminated, that Mr Todd had abandoned his employment (which I have to observe would have terminated the employment relationship, if true, in any event), and that Mr Todd was guilty of "*serious misconducts, including dishonesty and serious failure to follow reasonable instructions, refusing to communicate and collaborate with project team*".

Issues

[20] There are two issues that I need to determine. The first is whether Mr Todd was unjustifiably dismissed from his employment and the second is whether, if the Statement in Reply is to be read as including a counterclaim, that counterclaim is made out on the evidence.

[21] Accordingly, I propose to consider the following questions:

- (a) Was Mr Todd unjustifiably dismissed from his employment; and

(b) Is any counterclaim made out?

Was Mr Todd unjustifiably dismissed?

[22] I have no hesitation in concluding that Mr Todd was unjustifiably dismissed from his employment. Even on Lin Zhu's evidence, it is difficult not to construe the conclusion of the 14 April 2014 meeting as a sending away in legal terms.

[23] Lin Zhu confirmed to me in his oral evidence that he did tell Mr Todd to leave the office, that he did say something to the effect "*if you can't make those dates, I have nothing else for you to do*", that he did allude to the Police being called if Mr Todd did not leave and his email of 23 April 2014, after the fateful meeting, has to be construed at the very least as a fulsome apology for the employer's behaviour with an offer to further apologise to Mr Todd in front of staff and with various other inducements to try to encourage Mr Todd to come back.

[24] While I accept Lin Zhu's evidence that the 23 April 2014 email was his attempt to "*fix the relationship not restore the employment*", it is difficult not to interpret it as at least an acknowledgment that OPA got the 14 April 2014 meeting hopelessly wrong.

[25] Moreover, it is common cause that when Mr Todd exited the office after the meeting, he asked to take some drawings to assist him with re-employment and was forbidden to do that and he was told to return his office key.

[26] Lin Zhu tries to explain those two actions away but it is difficult not to construe them as supportive of Mr Todd's claim that he was dismissed from the employment, that he was "*sent away*" from his job.

[27] Lin Zhu says that there was no need for Mr Todd to have an office key and that he did not have one. But if that is so, why did he choose this day to ask Mr Todd to return the key? Mr Todd says it was because the employment had come to an end. A reasonable observer, looking at a request by an employer for an employee to return an office key after an altercation in the office, when both parties acknowledge that each of them got excited, and both parties acknowledge that the employer told the employee, at the very least, to go home, and both parties acknowledge the threat of involving Police, would think that a dismissal had happened.

[28] The evidence relating to the plans is not quite as persuasive; Lin Zhu says that he would not allow any staff member to take plans home because they were OPA's property and he regarded it as important they remained in the office. But in the particular circumstances of this case, it is certainly at least unfortunate that Lin Zhu prevented Mr Todd from removing drawings after the pair had had their altercation because it again tends to suggest to Mr Todd anyway that the employment relationship had come to an end.

[29] On the subject of the email Lin Zhu sent, his evidence is that the email discloses only his wish to "*fix the relationship not restore the employment*" because, on his evidence, the employment did not need restoring, having just somehow been "*paused*" while Mr Todd composed himself.

[30] But that evidence is not consistent either. By the time this email was written, Mr Todd had been absent from the office for almost 10 days and it is difficult to see how that is consistent with the employment continuing.

[31] Moreover, Mr Zhu's evidence is inconsistent with his very next email sent on 24 April 2014 where he first of all refuses to engage with Mr Todd's lawyers, and secondly accuses Mr Todd of abandoning his employment.

[32] My considered view is that Mr Todd believed his position had come to an end and indeed in his evidence to the Authority he was adamant that that was what Lin Zhu had told him in words to that effect. Lin Zhu denies absolutely saying that Mr Todd was dismissed but he does acknowledge saying that if Mr Todd could not meet the dates for the two projects, there was no other work for him. Lin Zhu also acknowledges threatening to call the Police if Mr Todd would not leave.

[33] In my opinion, even if Mr Todd is mistaken in his conviction that he was told he had been dismissed in so many words, the various observations which Mr Todd remembers and which Lin Zhu acknowledges are sufficient to make any reasonable person think that the employment relationship had come to an end, that there had been a sending away.

[34] It is common cause that Lin Zhu said these two projects were the only ones that he had for Mr Todd to work on, said that Mr Todd was to leave the office, told Mr Todd to go home to "*think about things*", threatened to call the Police when Mr Todd seemed reluctant to go, refused to let Mr Todd take drawings, asked

Mr Todd to return his office key, and then after around 10 days, wrote to Mr Todd electronically, apologised for what he said "*the other day in the office*" and offered to apologise again in front of the staff as well as seeking to offer Mr Todd inducements to return.

[35] Accordingly, it is my considered view that a good and fair employer could not have acted in the way that OPA acted towards Mr Todd and that therefore Mr Todd has a personal grievance for unjustified dismissal.

[36] I need also to observe, however, that the position might be otherwise if the 23 April 2014 email had been forwarded closer in time to the events in the office. It is clear law that an employer who makes a mistake in its engagement with an employee may, in some circumstances, be able to remedy that default and in the particular circumstances of this case, if Lin Zhu had been more prompt in his apology and expressions of regret, at least ensuring that Mr Todd was aware of his change of heart prior to Mr Todd obtaining alternative employment, then OPA's position would have been a great deal stronger.

Is any counterclaim made out?

[37] I am not satisfied that OPA has made a counterclaim in a legal sense but it has made a number of unhelpful allegations against Mr Todd, none of which is supported by the vaguest shred of evidence and indeed all of which are counteracted by the various positive comments about Mr Todd's contribution to the firm and its desire to have him return.

[38] The short point is that this counterclaim, if any, is not properly pleaded. Even if it were, no evidence to support the allegations is offered, and the evidence there is, including from OPA itself, suggests that Mr Todd was well thought of.

[39] Accordingly, I conclude there was no counterclaim raised, there were some intemperate allusions to problems Mr Todd allegedly caused, but there is no evidence to support those claims and indeed the evidence from OPA itself is that Mr Todd was well regarded by it and that it sought to have him return to the office.

Determination

[40] I am satisfied on the evidence I heard that Mr Todd has a personal grievance for unjustified dismissal because what OPA did in its conduct of the 14 April 2014 meeting and its subsequent behaviour was not what a fair and reasonable employer could do in those circumstances.

[41] Because I am satisfied that Mr Todd has a personal grievance, I must now consider whether he contributed in any way to the circumstances giving rise to his dismissal. I am satisfied that he is blameless in that regard. It is true that he became excitable during the meeting on 14 April 2014; given the circumstances I have canvassed in this determination, I think that is the sort of response that any person would make in those circumstances.

[42] Mr Todd gave evidence to me of the hurt that he had suffered as a consequence of the dismissal. He said he *“suffered a great deal of stress as a result of [the] dismissal”*, that he was *“shocked”* and *“embarrassed”* by the dismissal and he told me that *“it wasn’t very nice that evening when my wife came home to tell her that I had lost my job and then having to explain that evening to my parents-in-law and immediate family thereafter”*.

[43] Mr Todd also said that he found it challenging going for job interviews to explain why he had left OPA and that when he read the Statement in Reply that further upset him because it made personal attacks on him which he regarded as untrue.

[44] I have no hesitation in concluding that Mr Todd has suffered hurt, humiliation and injury to his feelings which is compensatable. He seeks \$8,000 in compensation.

[45] I direct that OPA Architects Limited is to pay to Mr Todd the following sums to remedy his personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$7,500;
- (b) Lost wages in the sum of \$6,496 gross being the four weeks’ wages I am satisfied Mr Todd was promised by OPA on 14 April 2014 together

with the smaller sum he lost as a consequence of being briefly without employment;

- (c) The filing fee of \$71.56.

Costs

[46] Mr Todd seeks costs and as the successful party is entitled to a contribution to his costs from OPA Architects Limited. The parties are urged to try to resolve costs on their own terms but if that is not achievable, Mr Todd is to file and serve a submission as to costs in the Authority, OPA is to have 14 days from the date of its receipt of that submission to file submissions of its own, and I will then fix costs, on the papers.

James Crichton
Member of the Employment Relations Authority