

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 133
5315084**

BETWEEN XIANGDONG WANG
 Applicant

AND AEQ GLOBE BUSINESS GROUP
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Advocate for Applicant
 Owen Harold, Counsel for Respondent

Investigation Meeting: 27 & 30 March 2012 at Auckland

Submissions received: 2 April 2012 from Applicant
 9 April 2012 from Respondent

Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Xiangdong Wang, claims he has been unjustifiably dismissed by the Respondent, AEQ Globe Business Group Limited (“AEQ”).

[2] AEQ deny that Mr Wang was unjustifiably dismissed and claim that Mr Wang abandoned his employment.

Issues

[3] The issues for determination are:

- Whether Mr Wang was dismissed or whether he abandoned his employment with AEQ.
- If Mr Wang is deemed to have been dismissed, whether such dismissal was a justifiable dismissal.

- Whether the failure to provide Mr Wang with an employment agreement constituted a disadvantage in employment to Mr Wang.
- Whether the failure to provide Mr Wang with wage and holiday time records and to pay him owed holiday pay in a timely manner constituted a disadvantage in employment to Mr Wang.

Background Facts

[4] AEQ is a furniture retailer operating from a central store and warehouse in central Auckland and a store on the North Shore. AEQ has approximately 15 employees and at the time Mr Wang was employed by AEQ he worked with one other employee in the warehouse at the central store, and subsequently carried out driving duties with one other employee.

[5] Mr Wang reported to Mr Ken Cui, the Duty Manager of AEQ, who worked predominantly in a sales position in the show room part of the Auckland store. Mr Jianyu Duan, the owner of AEQ, was present at the central store on an irregular basis.

[6] Mr Wang said that he had been interviewed by Ms Irene Huang, General Manager of AEQ, in June 2010 and offered a full-time position as a Warehouse Management Assistant. Mr Wang was told that he was to be employed for furniture assembly and despatch duties.

[7] Although terms of employment were discussed, Mr Wang said that he had not been provided with a written employment agreement or an offer letter, despite having requested an employment agreement; nor had he been given a job description.

[8] Ms Huang explained that Mr Wang had not been given an employment agreement as he could not read English, and on that basis it was not the company policy to issue employment agreements to the Chinese employees in AEQ.

[9] Ms Huang stated that Mr Wang had been employed subject to a trial period of 90 days. This was disputed by Mr Wang who said that a trial period had not been discussed with him.

[10] No trial period had been agreed in writing prior to the commencement of employment.

[11] Mr Wang said he had commenced employment on 7 June 2010 and for the first two days he had worked in the warehouse, offloading and assembling furniture. Mr Wang said he had explained at his interview that he had virtually no experience in furniture assembly, but despite this he had been provided with no training in furniture assembly by AEQ.

[12] Mr Jianyu Duan, the owner of AEQ, said that he had provided training to Mr Wang by offering him some verbal advice, instructing him to follow the relevant instruction manuals, and to ask for advice from the other, senior, employees engaged on furniture assembly.

[13] Mr Duan said that Mr Wang was very slow at assembling furniture and therefore he had been asked to carry out driving and delivery duties.

[14] Mr Wang confirmed that after the initial two days of his employment he was asked to undertake driving and furniture delivery duties. Mr Wang said occasionally he undertook deliveries on his own, but as the majority of the deliveries comprised large pieces of furniture, he usually worked in conjunction with another employee who was senior to him and known as 'the other David', Mr Wang himself being referred to as 'David' in the AEQ business.

[15] Mr Wang said that he often worked over-time hours when requested to do so, for which he was paid.

Furniture Delivery

[16] Mr Wang explained that he delivered the furniture in accordance with what had been detailed in a delivery note, and that he always removed the packaging from the furniture upon delivery and that the customers would examine the pieces and sign a receipt form which had to be submitted to AEQ upon completion of the delivery.

[17] Mr Cui said that within a very short time after Mr Wang started the delivery duties he had received complaints from customers about damage to the furniture which had been delivered to them. Mr Cui said that as Mr Wang worked in conjunction with the other David, he had warned both of them that there had been complaints and they needed to be more careful when making deliveries.

[18] Mr Cui said that he had also warned Mr Wang on other occasions but that none of the complaints from customers, nor any of the warnings he had given Mr Wang, had been made in writing, all had been verbal.

[19] Mr Cui said he had informed Mr Duan and Ms Huang about the alleged damage to the furniture and had told them of the individual value of the allegedly damaged pieces as soon as the complaint had been reported to him.

[20] Ms Huang said that on 10 July 2010 Mr Wang had damaged a sofa which had been delivered to a customer called Jenny. Ms Huang said that she had questioned Mr Wang who had denied causing the damage. Ms Huang said that she and Mr Duan had given Mr Wang a serious verbal warning in connection with this incident.

[21] Ms Huang stated that on 25 June 2010 Mr Wang had delivered 2 beds and mattresses to a customer. Ms Huang said that Mr Wang had telephoned her to inform her that the customer had complained that the beds were mouldy and that they wished to cancel the order. Ms Huang said that she had reprimanded Mr Wang for not checking the state of the beds prior to delivery. Ms Huang said that the cancellation of this order had lost AEQ approximately \$1,750.00.

[22] Ms Huang stated that on 2 July 2010 Mr Wang had delivered and damaged a lounge suite, following which Mr Duan had verbally warned him that if there was any further damage, Mr Wang would be dismissed or his trial period would end.

[23] Ms Huang stated that a few days later there had been another lounge suite damaged during delivery to the value of \$4999.00.

[24] Mr Cui said that by the time Mr Wang's employment had finished at AEQ, the cumulative value of the damage for which he had allegedly been responsible had totalled some \$10,000.00.

[25] Mr Wang said Mr Duan had not warned him or told him about any damage to the furniture which he had delivered. Mr Wang said that there had been only one occasion when anything had been mentioned to him about damage and this was when Mr Cui had spoken to him and the other David and advised them to be more careful when delivering the furniture. There had been no specific details provided of any damage at that time.

[26] Mr Wang said he had not been advised of the details of any of the alleged complaints, and he had not been given any formal warnings about any damage to furniture. Mr Cui and Mr Duan both agreed that there had been no formal disciplinary process or warnings given to Mr Wang.

[27] Mr Wang stated that if a customer had observed any damage at the time of delivery and inspection, the customer would not have signed the receipt form.

[28] Ms Huang and Mr Cui stated that at the beginning of July 2010 a customer had telephoned AEQ and during that call had mentioned that she had paid Mr Wang \$20.00 for taking down a door during delivery. Ms Huang said that she had questioned Mr Wang about this issue and he had denied having received the money.

[29] Mr Wang when questioned on this issue at the Investigation Meeting explained that the customer in question had been pleased with the work carried out during the delivery of furniture and had offered him and the other David \$20.00 to get a cup of tea.

[30] As he had not been sure what to do and as he was working with David, the more senior employee, Mr Wang said he had deferred to David on the matter. Mr Wang said that David had told him it was a tip, that he had previously been given tips and that this was quite acceptable. Mr Wang said that David had given him \$10.00 and they had both bought a cold drink with the money.

Events on 12 July 2010

[31] On 12 July 2010 Mr Wang said he had arrived at the warehouse at the central store and collected the delivery sheet which Mr Cui had left on the counter as was the usual practice. Mr Wang said he had loaded the furniture in accordance with the delivery note and had departed for AEQ's North Shore store.

[32] Mr Wang said that upon arrival at the North Shore store he had unloaded the furniture and reloaded some other stock in accordance with another delivery sheet. Mr Wang said he had then set off to return to the AEQ central store. As he was returning he had received a call from Mr Cui who informed him that he had forgotten a piece of furniture.

[33] Mr Wang said he had been almost back at the central store at this point. When he had arrived he explained that as Mr Cui was very angry with him, he had gone immediately back to the North Shore store to collect the item of furniture and deliver it.

[34] Mr Cui stated that he had been very angry as the item of furniture which Mr Wang had omitted to collect was to have been delivered to a customer who had specifically requested delivery by a certain time, and the resulting delay had caused problems with the customer.

[35] Mr Cui said that he had told the other employees at the central store about what had happened, but could not recall if he had told Mr Duan and Ms Huang. However Ms Huang stated that Mr Cui had told her about this incident.

[36] Mr Wang said that he had returned to the central store at approximately 5 p.m. on 12 July 2010. Upon his return Mr Wang said he was called into an office by Mr Duan, who had informed him that his employment was being terminated on the basis that he was not fast enough at furniture assembly.

[37] Mr Wang said he had asked Ms Huang who had been present during the meeting with Mr Duan, for payment of his outstanding annual leave entitlement, but she had informed him that he was not entitled to it as he had worked for AEQ for less than 12 months.

[38] Mr Duan denied that he had dismissed Mr Wang. Mr Duan stated that as Mr Wang had not been competent to undertake any of the jobs AEQ required him to do, and had caused a large loss to AEQ, he had been required to temporarily cease working at AEQ.

[39] Ms Huang said that she had told Mr Wang that she would telephone him when a container arrived and required unloading.

[40] Mr Duan said he would not have dismissed Mr Wang without seeking legal advice, and that Mr Wang had agreed with the temporary cessation of his employment at the meeting held on 12 July 2010.

[41] Mr Duan said that some time later a container had arrived and he had telephoned Mr Wang to ask him to come and offload it, however Mr Wang had told him that he had found alternative employment.

Determination

Was Mr Wang dismissed or did he abandoned his employment with AEQ?

[42] I consider that, there being a lack of confirmatory independent evidence, this is a case in which credibility of the parties is central.

[43] Mr Wang stated that he had been dismissed by Mr Duan at the meeting on 12 July 2010; Mr Duan denied that he had dismissed Mr Wang, stating that he had sent him

temporarily away until there was work available that he considered Mr Wang was competent to undertake. Ms Huang supported Mr Duan's version of events.

[44] Mr Duan claimed that he would not dismiss Mr Wang without obtaining legal advice, and he had obtained none prior to speaking to Mr Wang at the meeting held on 12 July 2010.

[45] I do not accept this statement as being wholly credible. AEQ had by its own admission had scant regard for the requirement in s 63A of the Employment Relations Act 2000 ("the Act") that employees be provided with an employment agreement. This non-adherence to the legal requirements I consider belies to a large extent Mr Duan's assertion that he would not take dismissal action without first obtaining legal advice.

[46] Further Mr Duan asserted that he had never dismissed an employee, however Mr Cui said in evidence that Mr Duan's practice was to consult him before dismissing an employee.

[47] The Authority asked Mr Duan to produce employee records to substantiate his statement that he had not dismissed any employees, but these were not produced despite a repeated request.

[48] I also find Mr Duan's credibility on this issue to be undermined by a consideration of the circumstances in which the meeting held on 12 July 2010 took place, these being:

- AEQ had found Mr Wang to be too slow at furniture assembly and as a result had moved him to driving and delivery duties;
- Ms Huang's statement that she had reported all the alleged incidents of damage to Mr Duan, and AEQ claimed that Mr Wang had caused it to lose significant amounts of money through customer complaints and the need to replace damaged furniture;
- Mr Duan's view that Mr Wang had caused AEQ "*a large economic loss*" and had damaged AEQ's reputation;
- Mr Duan's statement that he believed Mr Wang to be employed on a trial period at the time of the meeting on 12 July 2010; and
- Mr Duan's statement that Mr Wang had not been competent to undertake any of the jobs AEQ required him to do.

[49] In all of these circumstances I consider that when Mr Duan met with Mr Wang on 12 July 2010 it would be more likely than not that he had dismissed him rather than had temporarily ceased his employment.

[50] I am supported in this view by the fact that Mr Duan stated at the Investigation Meeting that the reason for him giving Mr Wang a few days off was that he was entitled to time off in lieu for the over-time he had worked, however Mr Wang had said that earlier he had been paid for all the overtime he had worked and none was outstanding.

[51] I find that Mr Wang was dismissed by AEQ and had not abandoned his employment.

Was Mr Wang justifiably dismissed by AEQ?

[52] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”

[53] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

Substantive Justification

[54] AEQ, whilst asserting that it did not dismiss Mr Wang, claims that if it had dismissed Mr Wang such a dismissal would have been justifiable on the basis of misrepresentation by Mr Wang that he was competent to do the work which he was offered; recklessness and/or gross carelessness in the performance of his duties; and dishonesty.

Misrepresentation

[55] Ms Huang said that Mr Wang had told her and Mr Duan at the job interview that he had had experience assembling kitchen furniture. Mr Wang said that he had told Ms Huang he had assembled office chairs but not furniture and she had told him there was no difference.

[56] Mr Duan stated that he had not wanted to employ Mr Wang at the outset because he had no little or no experience assembling or delivering furniture, however he had agreed to give Mr Wang employment on a trial period basis upon Ms Huang's insistence that AEQ were short of staff at the time.

[57] I do not find that Mr Wang misrepresented his skills regarding furniture assembly at his job interview with Mr Duan and Ms Huang in June 2010.

Recklessness and/or gross carelessness

[58] AEQ claimed that Mr Wang had damaged furniture to the value of approximately \$10,000.00

[59] I find it surprising that, given the alleged number of customer complaints about the damage to furniture which had been delivered during Mr Wang's period of employment, and the alleged value thereof, no formal warnings had been issued to Mr Wang.

[60] Furthermore the evidence at the Investigation Meeting established that, apart from the incident involving the beds with mould, there had been no proper investigation into whether or not Mr Wang had been responsible for the alleged damage, particularly in circumstances in which:

- Mr Wang had made the deliveries accompanied by the other David;
- AEQ had not established whether either Mr Wang or the other David had caused the alleged damage;
- In at least 2 of the alleged instances of damage, third parties had been present at the time of delivery or had claimed to have discovered the damage some time following the delivery.

[61] Furthermore Mr Wang claimed that the customers had usually inspected the furniture at the time of delivery, as was the case regarding the beds with mould, and signed the delivery slips.

[62] I find that in these circumstances the fair and reasonable employer would not have found grounds establishing that Mr Wang was responsible for the alleged damage.

[63] Whilst Mr Wang may have been at fault in not having checked the mouldy beds prior to making the delivery, there is no evidence substantiating that it was part of Mr Wang's duties to do so, particularly in circumstances in which it was accepted by the parties that the furniture to be delivered was usually wrapped in protective packaging.

[64] Moreover I consider that one isolated episode would not be held by a fair and reasonable employer to constitute recklessness or gross carelessness.

[65] I find that a fair and reasonable employer in these circumstances would not have found grounds establishing that Mr Wang had committed acts of recklessness or gross carelessness.

Dishonesty

[66] The alleged dishonesty concerns the acceptance of a tip (gratuity). Irrespective of the quantum involved I accept that an employer needs to have complete trust in the honesty of its employees.

[67] In this case, Mr Wang said he had not been sure of the correct procedure to be applied when the customer had offered him the sum of \$20.00 as a tip, and so he had therefore deferred to the judgement of the more senior employee, a course of action he had been advised by Mr Duan to adopt at the start of his employment with AEQ.

[68] Mr Wang said that the customer had given the money to David and that he had accepted the small sum of money subsequently offered to him by David on the basis that David, the more experienced employee, had advised him that it was acceptable to do so.

[69] Mr Wang explained that Ms Huang had asked him if the customer had given him and David additional payment for carrying out extra work on the delivery, but as the small sum of money had been a tip for a job well carried out, Mr Wang said he had denied receiving any money on that basis.

[70] I do not find that the fair and reasonable employer would have found Mr Wang guilty of dishonesty on this set of facts.

[71] I determine that AEQ had no substantive grounds for terminating Mr Wang's employment.

Procedural Fairness

[72] Whilst I accept that AEQ were a small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted in terminating Mr Wang's employment which cannot be explained merely by the fact that AEQ was a small employer.

[73] I find that the dismissal of Mr Wang fell so far short of the requirements of procedural fairness and the concept of natural justice as to be considered as virtually no procedure at all. Specifically:

1. There was no investigation of the damage allegations. Mr Wang had not been provided with details of any of the allegations that he had damaged furniture which he had assisted in delivering or of any of the other allegations which have been relied upon by AEQ as justifying a dismissal.
2. Mr Wang had not received any formal warnings that his performance was not acceptable prior to the meeting with Mr Duan on 12 July 2010;
3. Mr Wang was not advised of the disciplinary nature of the meeting on 12 July 2010; or provided with the details of the allegations against him, or that he could have a support person with him at the meeting;
4. There is no evidence that Mr Wang was provided with an opportunity to provide an explanation.

[74] I determine that Mr Wang was unjustifiably dismissed.

The failure to provide Mr Wang with an employment agreement

[75] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 ("the Act"), which states:

63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(2) *The employer must do at least the following things:*

(a) *provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and*

(d) *consider any issues that the employee raises and respond to them*

[76] Section 65 is also relevant:

65 Terms and conditions of employment where no collective agreement applies

i. *The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-*

1. *must be in writing; and or her employer –*

2. *May contain such terms and conditions as the employee and employer think fit*

ii. *However, the individual employment agreement-*

1. *must include-*

i. *The names of the employee and employer concerned; and*

1. *A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised*

[77] Further the Employer has a duty of good faith pursuant to the Act, which states at s4 (1A)(b):

4 Parties to employment relationship to deal with each other in good faith

(1A)

(b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*

[78] I find that AEQ acted in breach of the good faith requirement by not providing an employment agreement pursuant to s65 of the Act.

[79] AEQ had said that Mr Wang had been employed subject to a trial period. Mr Wang had said that no trial period had been mentioned at his job interview or thereafter and therefore I find he suffered no disadvantage on this basis.

[80] However the fact that at no time could Mr Wang verify his terms and conditions of employment against a written employment agreement, and in particular had no information: “*of the services available for the resolution of employment relationship problems*” pursuant to s 65 (2)(vi) of the Act, I hold did constitute a disadvantage to Mr Wang, especially in light of the meeting on 12 July 2010.

[81] I find that the failure to provide Mr Wang with a written employment agreement was a deliberate act on the part of AEQ who had decided not to provide an employment agreement either in English, which would have given Mr Wang the opportunity to seek a translation, or translated into Chinese at AEQ’s expense.

[82] It is a matter of public policy that employers do not flaunt the legislative requirements, rather they should adhere to the legislative requirements. I determine that AEQ have failed to so adhere, and a penalty is applicable.

The failure to provide Mr Wang with wage and holiday time records and to pay him owed holiday pay in a timely manner

[83] Mr Wang stated that he had received his outstanding holiday pay on 5 May 2011, some 9 months after he was dismissed.

[84] Mr Wang further stated that no wage or time records were provided to him prior to the Investigation Meeting.

[85] Mr Wang stated that this situation had directly disadvantaged him and caused him additional stress and financial disadvantage.

[86] I find that AEQ deliberately failed to provide the requested records, or to pay him in a timely manner, and as such s130 (4) of the Act applies and a penalty is applicable.

Remedies

[87] Mr Wang has been unjustifiably dismissed by AEQ and he is entitled to remedies.

Reimbursement of Lost Wages

[88] Mr Wang was able to obtain full-time employment three weeks after the termination of his employment at AEQ.

[89] At the time of the termination of his employment Mr Wang stated he had been employed for 40 hours per week at the rate of \$12.75 per hour. Mr Wang is to be reimbursed for the three weeks during which he was unemployed.

[90] I make the following award: Mr Wang is to be paid the sum of \$1,530.00 gross in respect of lost wages.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[91] Mr Wang is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Wang suffered humiliation, distress and stress which were heightened by the anxiety occasioned by the counterclaim sought by AEQ which had a value of \$130,000.00.

[92] The value of the counterclaim was based on the losses resulting from the alleged damage to furniture delivered by Mr Wang but was not supported by any attempt to realistically estimate any resultant damage and/or the costs of remedial work..

[93] This latter aspect also caused distress for Mr Wang's mother, which in turn heightened Mr Wang's own feelings of hurt and humiliation.

[94] I order that AEQ pay Mr Wang the sum of \$5,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[95] I have considered the matter of contribution as I am required to do under s124. Mr Wang did not contribute to the situation which gave rise to the personal grievance. There is to be no reduction in remedies.

Penalty

[96] AEQ is ordered to pay a penalty of \$4,000.00 to the Crown for the non-provision of an employment agreement to Mr Wang, of which \$3,500.00 is to be paid to the Crown and \$500.00 to Mr Wang in recognition of the disadvantage he has suffered.

[97] AEQ is ordered to pay a penalty of \$3,000.00 for the non-provision of wage and time records, of which \$1,500.00 is to be paid to the Crown and \$1,500 .00 is to be paid to Mr Wang in recognition of the disadvantage he has suffered.

Costs

[98] Costs are reserved. I encourage the parties to resolve the issues of costs themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority