

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 174
3107373

BETWEEN DENG WANG
 Applicant

AND L.W ARCHITECTURE
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Matt Robson, counsel for the Applicant
 Kate Henry, counsel for the Respondent

Investigation Meeting: 29 July 2021 at Auckland

Submissions received: 12 August 2021 from the Applicant
 25 August 2021 from the Respondent
 3 September 2021 from the Applicant

Determination: 3 May 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Deng Wang (Mr Wang) challenges his former employer L.W Architecture Limited's (LWA) decision to terminate his employment for redundancy because it received the Government's COVID-19 wage subsidy on his behalf and because it failed to consult with him before making the decision. He complains too that LWA forced its employees to clean bathrooms every week, he was never provided with payslips and was not paid correctly. LWA denies the experience Mr Wang describes and regrets that his employment ended because of project delays and cancellations due to the COVID-19 lockdown.

[2] The parties were unable to resolve the employment relationship problem between them by the use of mediation. Mr Wang now asks the Authority to resolve the

employment relationship problem by granting him orders for reimbursement and compensation.

The investigation

[3] The Authority investigated this employment relationship problem by receiving written statements of evidence from various relevant persons. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave closing submissions.

[4] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The facts

[5] LWA's business was founded in 2013. It specialises in the design of single family residential and light commercial properties. Its sole director is Mr Peng Li (Luke Lee) (Mr Li). Mr Li's wife Ruiguang (Lucy) Wang (Ms Wang) manages LWA's administrative and payroll functions.

[6] Mr Wang holds a Bachelor of Architecture degree from Zheng Zhou University in China and he studies for a Master of Architecture (Professional) at Unitec, Auckland. He was employed by LWA under the terms of an individual employment agreement signed on 15 October 2019. His role was Architectural Designer reporting to Mr Li on a salary of \$40,000.00. Mr Wang successfully completed a 90 day trial period contained within the agreement. His salary was increased to \$45,000.00 in February 2020.

[7] Mr Wang worked with clients on the design and layouts for buildings and landscapes. He worked under Mr Li's supervision working with clients to gather design requirements, specifications, and budgets on client building projects.

[8] Mr Wang performed his duties satisfactorily and enjoyed good relations with clients.

[9] Against the background of the COVID-19 pandemic, LWA's clients began cancelling and placing house designs on hold from about 23 March 2020. Between

April and July 2021 about 25 LWA jobs (57 house designs) were placed on hold indefinitely.

[10] The New Zealand Government announced an Alert Level 4 lockdown that was to commence at midnight Wednesday 25 March 2020 for the following four weeks. The Government also announced the introduction of a COVID-19 wage subsidy scheme for business the purpose of which was to allow employers to maintain connections with their employees.

[11] The original wage subsidy permitted employers to apply on the basis of predicted revenue loss. LWA applied for and was granted the wage subsidy scheme for a period of 12 weeks on the basis that its revenues would decline by at least 30%. The wage subsidy was passed on to LWA employees.

[12] On 30 March 2020 Mr Wang was notified that he would thereafter be paid 80% of his salary in an email which stated:-

Due to the proliferation of covid 19 virus in New Zealand and the large impact of the lockdown brought on to the economic activities of each business. People's uncertainty about the future of the market has prompted developers to reconsider the progression of investment resulting in a rapid decline in the company's business volume. Design tasks have obviously become not enough to arrange work of everyone in the Company.

[13] On Friday 29 May 2020 by email in Chinese (Mandarin) sent at 7.36pm, Mr Wang was informed (translated):-

Because of the impact of pandemics, and current blight of construction market, there are not enough business. In accordance with personal business and specifications of Company Agreement, this is to inform you today (29 May 2020), two weeks from now, (which is 12 June 2020), this Company is going to terminate the relationship or employment with you. Please complete the relevant tasks of designing within the period of 2 weeks after receiving this Notice, and complete relevant jobs of handing over. Thank you very much for hard works in this Company. In the mean time, we wish you have a better development in the future. Kind Regards! Luke Lee Director

[14] Mr Wang was away from work on 2 June 2020 because he claimed he was sick. He was on claimed sick leave again from 8 to 12 June 2020. Mr Li says he tried to call Mr Wang around 12 June but was unable to get through because Mr Wang had blocked his calls.

[15] LWA says its employees shared the task of keeping the bathroom clean. It says too that fluctuations in Mr Wang's salary were due to his taking of sick leave.

[16] Mr Wang was not at work when his employment terminated for redundancy on 12 June 2020.

The issues

[17] The issues requiring investigation and determination are these:

- (a) was Mr Wang's dismissal for redundancy and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?—
 - (i) was there a genuine reason for his redundancy?
 - (ii) did LWA treat Mr Wang fairly and sensitively?
- (b) if LWA's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (i) lost wages (subject to evidence of reasonable endeavours by Mr Wang to mitigate his loss); and
 - (ii) compensation under s123(1)(c)(i) of the Act.
- (c) if any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Wang that contributed to the situation giving rise to his personal grievances?
- (d) should either party contribute to the costs of representation of the other party?

Unjustifiable dismissal

[18] Was Mr Wang's dismissal for redundancy and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?

[19] Mr Wang's employment agreement provides as follows:-

10.4 Definition of Redundancy

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.

10.5 Notice of Termination due to Redundancy

In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with **two weeks** notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.

[20] Mr Li gives evidence that at 4.35pm on 19 May 2020 he telephoned Mr Wang. That call was not outside of Mr Wang's working hours. Mr Li says that he told Mr

Wang that due to clients placing projects on hold due to the pandemic and lack of confidence in the future market, they (LWA) may have to reduce the number of Architectural Designers. He says Mr Wang expressed his disappointment during the call but told Mr Li he “understood” the company’s position. Mr Wang does not agree with Mr Li’s evidence.

[21] Mr Li gave evidence that once the contract for a project is signed off, the specifications for the design are provided to the Architectural Designers to create initial drawings. In this process, the Planner may liaise with the Architectural Designers regarding the requirements of the design, but it is the Architectural Designer that initiates the project. The conclusion is that it would be the work of the Architectural Designers that would be impacted prior to other roles in the business. It is advisedly for this reason that LWA disestablished the role performed by Mr Wang as opposed to one of the other roles in its business.

[22] LWA justifies the disestablishment of Mr Wang’s position not on the basis of financial records, rather, it was due to the number of cancellations and placing on hold of design jobs it had received from its clients because of the Covid-19 pandemic. It argues it formed the view that the workload would decrease and it would be necessary to disestablish Mr Wang’s position. It did not have its accountant’s financial analysis at the time it made Mr Wang redundant.

[23] I prefer Mr Wang’s evidence that the very brief call on 19 May 2020 from Mr Li of only 1 -2 minutes was actually about a client project and there was no discussion about redundancy. I consider it very unlikely and improbable that the call as short as it was also included consultation with Mr Wang relevant to the continuation of his employment. I am persuaded by Mr Wang’s evidence too because of a lack of any independent corroboration of Mr Li’s assertion which I would expect there would likely be if correct. I find that Mr Wang was not notified that LWA considered it may be necessary to disestablish his position or that it may have to reduce the number of Architectural Designers.

[24] Mr Wang was not presented with any documentation or information supporting any proposal to disestablish his role.

[25] I find LWA did not tell Mr Wang what it tells the Authority now. It was obliged to provide Mr Wang with access to information relevant to any proposed decision that might adversely affect the continuation of his employment. It was also obliged to

provide him with an opportunity to comment on the information before the decision was made.

[26] LWA did not share with Mr Wang its conclusion that the jobs being cancelled or put on hold would result in a reduction in workload. It did not put to Mr Wang that it considered it would be the work of the Architectural Designers that would be impacted by an expected downturn in business before other roles in the business. It did not invite him to comment on that information. While Mr Wang may well have known the downturn in business LWA was experiencing, that is entirely different from him being fixed with knowledge that there was a proposal that the position he held might be disestablished.

[27] Nor did LWA provide Mr Wang with any information about the criteria for selection it would use to decide which of its three employee Architectural Designer positions was or would become surplus to its requirements. As well, it did not tell him why it had decided to disestablish one of the single house Architectural Designer positions. It did not share information with him about why it preferred the role performed by the employee Alton Yuhao Wu over his. If it regarded him (Mr Wang) too junior it did not tell him that. He was never informed nor invited to comment on that information. He was not given information of the application of criteria and nor was he invited to comment or have input into the completed assessment. None of what LWA now tells the Authority was ever put to Mr Wang for him to comment on by way of the consultation required.

[28] I find that the email to Mr Wang on Friday 29 May 2020 terminating his employment for redundancy was the first he ever knew of any suggestion his position was proposed to be disestablished. I find that there was no consultation which proceeded that notice of termination. Mr Wang was not treated fairly or sensitively.

[29] There was never any consultation with Mr Wang that it was his role that was proposed to be disestablished. He was not asked to comment on that proposal or given the opportunity to challenge it to save his employment. That was not fair to Mr Wang.

[30] Once the decision was made that Mr Wang's position was to be disestablished, there was a further consultation exercise to be undertaken, in good faith and in fairness to Mr Wang. Redundancy is a last resort. A fair and reasonable employer will do all that it can to avoid redundancy.

[31] LWA was obliged to actively give consideration and identify options and alternatives to Mr Wang's employment being terminated. I find that once it decided to disestablish his position, it did not give any consideration to alternatives to redundancy. It did not engage with him or invite consultation with him for that purpose. That was not fair to Mr Wang. A fair and reasonable employer would have given that consideration.

The result

[32] For the foregoing reasons I conclude that LWA's decision to terminate Mr Wang's employment for redundancy and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Wang has a personal grievance for unjustifiable dismissal.

The resolution

[33] Mr Wang is entitled to formal orders to resolve the personal grievances I have found.

[34] I must first consider whether there was any blameworthy conduct on Mr Wang's part which contributed to the situation that led to the personal grievances I have found. I find that there was no such blameworthy conduct on Mr Wang's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to him.

Reimbursement

[35] Mr Wang's evidence is that he was out of employment from the time of his redundancy on 2 July 2020 until he found alternative on 14 October 2020. That is a period of 15 weeks.

[36] I am satisfied that Mr Wang has lost remuneration as a result of the personal grievance of unjustifiable dismissal I have found. I am not prepared to find that Mr Wang ought not be entitled to an award of reimbursement because his redundancy was genuine. The genuineness of the disestablishment of the position performed by Mr Wang is by no means certain. I also consider that had LWA properly carried out an enquiry about alternatives to redundancy it may be that Mr Wang would not have lost remuneration.

[37] I consider Mr Wang is entitled to be reimbursed the remuneration he would otherwise have earned had he not been unjustifiably dismissed. I am satisfied that he acted to mitigate his losses. He gave evidence that he applied for over 50 positions. As

a condition of his continuing entitlement to a job seekers benefit, he remained available to accept employment and he was actively seeking employment.

[38] I order L.W Architecture Limited to pay the gross sum of \$12,978.00 (Twelve thousand nine hundred and seventy-eight dollars) to Deng Wang as reimbursement and to do so within 28 days of the date of this determination.

Compensation

[39] Mr Wang gave evidence that the termination of his employment came as a shock to him and caused him enormous stress. He said that he suffered gout and developed a scar on his face because of it.

[40] I am satisfied that Mr Wang has suffered hurt and humiliation, loss of dignity and injury to his feelings as a result of his unjustifiable dismissal.

[41] Having regard to the nature of the personal grievance, the circumstances of it, the period of the employment and the particular evidence given by Mr Wang I order L.W Architecture Limited to pay to Deng Wang the sum of \$7,500.00 (Seven thousand five hundred dollars) as compensation and to do so within 28 days of the date of this determination.

Costs

[42] The parties are encouraged to resolve any issue of costs between them. If they are not able to do so Mr Robson is to lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Henry will have 14 days to lodge any reply memorandum. I will not consider any memorandum submitted out of time without leave.

Leon Robinson
Member of the Employment Relations Authority