

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 410  
5429676

BETWEEN

HUAN WANG  
Applicant

A N D

VENT GROUP LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: David Liu, counsel for Applicant  
Ramend Narayan, advocate for Respondent

Investigation Meeting: 6 September 2013

Date of Determination: 11 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Application for interim reinstatement**

[1] The applicant Mr Huan Wang (known as Lawrence Wang) was an employee of the respondent Vent Group Ltd until he was dismissed on 15 August 2013. At the same time, payment of one week's salary in lieu of notice was made to him.

[2] The dismissal followed notification to Mr Wang that after conducting a disciplinary investigation Vent was satisfied he had breached his employment agreement and also a Code of Conduct, a Policy Statement relating to the Fair Trading Act and a Franchise Agreement. Vent told Mr Wang it found he had breached a "zero tolerance" policy in relation to that Franchise Agreement, which he had previously confirmed in writing he would comply with.

[3] Upon being dismissed Mr Wang immediately raised a personal grievance in that regard and another, of unjustifiable disadvantage, in relation to being suspended without pay at the commencement of the disciplinary investigation.

[4] Pursuant to s 127 of the Employment Relations Act 2000 he applied to the Authority for interim reinstatement, on 20 August 2013.

[5] As required by s 127, an undertaking was given by Mr Wang to abide by any order of the Authority to pay damages sustained by Vent through the granting of his application for interim reinstatement.

[6] Mr Wang and Vent attended mediation on 28 August 2013 but they were unable to resolve the grievance claims.

[7] Mr Wang seeks orders from the Authority for reinstatement to his previous position of employment with Vent, reimbursement of lost remuneration including bonus payments, and compensation for emotional distress caused by the dismissal and suspension, pursuant to s 123(1)(c)(i) of the Act.

### **Mixed or multiple relationships**

[8] The employment relationship between Mr Wang and Vent was not as straightforward as many where the employee is an executive or senior manager of a company, as in this case. As well as being an employee under an employment agreement, Mr Wang had rights and obligations under a franchise agreement in relation to the business of Vent and under a shareholders agreement in relation to the ownership of the company. He was also a director of Vent.

[9] In some circumstances the performance of obligations arising from collateral relationships upon which the employer's business or enterprise is structured, may be found to be the subject of terms to be implied if not already expressed in the employment agreement.

### **The employment**

[10] Mr Wang commenced employment with Vent as a salesperson in March 2008. In recognition of his performance, in June 2010 he was offered the opportunity to acquire a 21.6% shareholding in the company and be promoted to the position of Sales Director. He accepted both. A promotion to Chief Executive Officer followed in February 2012.

[11] Mr Wang retained his shareholding in June 2012 after the balance of Vent's shares were sold and bought by new owners who included Ms Janet Jackson as a

trustee of a family trust. At the same time, Ms Jackson was appointed the Human Resources Manager of Vent.

[12] Ms Jackson advised Mr Wang in May 2013 that Vent was seeking to disestablish his position as CEO. A 'termination at will' provision in the Independent Contractor Agreement Mr Wang had purportedly entered into when he became CEO, was relied upon to permit the proposed restructuring. When Mr Wang contended in response that the real nature of his relationship with Vent was not as held out by the independent contractor agreement but was one of employment, Ms Jackson accepted that was correct and advised him the proposed abolition of the CEO position would not proceed.

[13] To formalise the employment nature of the relationship, Mr Wang and Ms Jackson discussed the terms and conditions set out in a draft individual employment agreement. Some changes had been agreed to before Mr Wang was dismissed. There is a dispute as to whether all of the terms in that document had been agreed to by him at the time he was suspended without pay, an action taken by Vent in purported reliance on an express term of that employment agreement. The unpaid suspension is the subject of Mr Wang's unjustified disadvantage personal grievance.

[14] At a Board meeting on 16 July 2013 which Mr Wang attended, he was confronted with serious allegations about his performance and conduct. He obtained representation from Mr Liu over the next four weeks while a disciplinary investigation took place until advised of his dismissal. That investigation outwardly appears to have been intensive and thorough and has been well documented.

### **Vent Group Ltd**

[15] The employer company was incorporated in April 2008, at about the same time Mr Wang first became employed by it. He was a director of it when he was dismissed, one of three on Vent's Board.

[16] The Shareholders Agreement was entered into in June 2012. Mr Wang as a party to it was required to advance funding of \$150,000 to Vent, which the company continues to hold on his account.

[17] The Shareholders Agreement states that the purpose of Vent is to own and operate HRV franchises. HRV is a nationally marketed brand of heat pump used to

recover from the ceiling cavity of a building warm or cool air, which is then filtered back into the living area to control condensation and temperature.

[18] Vent employs about 40 people. Its only business is selling and installing the HRV system. To enable it to do that Vent was granted a franchise and a license for a particular territory in the Auckland region.

[19] The Franchise Agreement, which was entered into in May 2010, provides that Mr Wang is a Guarantor, guaranteeing to the franchisor “the due and full performance” by Vent of all its obligations as franchisee.

[20] The Franchise Agreement also provides that Mr Wang as guarantor is liable as a principal party and that the franchisee’s obligations under it are also his as well.

[21] One such obligation is at clause 12.1.12 of the agreement;

*Conduct all of its affairs in compliance with all applicable laws and to the highest professional and ethical standards.*

[22] The circumstances under which the franchisor may terminate the franchise agreement for default and the consequences of termination, are set out comprehensively in the agreement. Under the agreement high standards of conduct and performance are required of a franchisee.

[23] Under both the Shareholders Agreement and the Franchise Agreement, Mr Wang purported to bind himself to a restraint of trade covenant of 12 months duration and covering the Auckland area. There is a similar provision in the draft employment agreement, although Mr Wang contends that its terms were still being negotiated at the time of his dismissal.

[24] To some extent, his unjustified dismissal grievance may be finally determined not by resolving any great differences of fact between the parties but more from consideration of the conclusions Vent reached, that Mr Wang’s performance or behaviour amounted to serious misconduct sufficient to justify a dismissal by meeting the test of justification at s 103A of the Act.

[25] There are though some differences as to factual matters, such as whether particular premises for which HRV equipment was sold by Mr Wang were occupied by tenants, or had even been built at the time of sale. Also, there are differences as to

whether either of two identified employees had complained of bullying, intimidation or harassment by Mr Wang in the performance of their work.

[26] There is also a question as to whether a document proffered in the course of business by Mr Wang, materially and seriously misrepresented a matter of fact, or was likely to mislead. The document, which he used several times, had his name, position and contact details printed at its foot, but above that was the indecipherable but normal signature of another person who had no knowledge it had been used.

### **Tests to be applied in s 127 applications**

[27] Section 127 of the Act requires the Authority in determining interim reinstatement applications to apply the law relating to interim injunctions, having regard to the object of the Employment Relations Act. Counsel Mr Liu and advocate Mr Narayan are in agreement that the present application must be decided by the Authority applying standard tests, being:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

[28] Following usual procedure, the evidence taken by the Authority was confined to affidavit evidence sworn or affirmed by Mr Wang and other witnesses including Ms Jackson the Human Resources Manager and a part owner of Vent.

[29] In considering the affidavit evidence for the purpose of answering the four tests, the Authority has kept it in mind that evidence in this form has not been examined and will not be until the substantive determination of the personal grievances. This means that any findings of fact by the Authority in this determination are provisional only and may change later, once the claims have been fully investigated and all witnesses have been tested on their evidence.

[30] For now, the Authority must assume that the evidence given by each witness will be established and accepted by it, following an investigation meeting held to hear

and determine the substantive claims. Some material issues of fact remain in dispute from the evidence presented to this stage.

### **Arguable case**

[31] I am satisfied that there is an arguable case to at least the relatively low threshold required that Mr Wang was unjustifiably dismissed having regard to the test of justification at s 103A of the Act. In relation to this I refer to the adequacy of Vent's investigation and the reasonableness of its conclusions.

[32] I consider it is arguable that some of the conduct alleged against Mr Wang did not occur at all and that other conduct which did occur was not sufficiently serious as to justify dismissal. I refer to the matter of complaints by two employees that they had been bullied or intimidated in the way claimed, and also the question of whether particular dwellings were tenanted at the time Mr Wang made sales in respect of the premises.

[33] Differences in the evidence presented when resolved may lead to a finding that Vent's investigation had not been sufficiently thorough to establish the true facts. This may have a bearing on the way s 103A is to be applied and whether that test will be satisfied.

[34] Another matter is in relation to the allegations that a standard form being used by Mr Wang as part of the sales process contained misleading or deceptive information, in that above the name of Mr Wang and position and contact details clearly printed on the form was the signature of another person who had had no involvement or knowledge of the particular transaction. The issue here will involve consideration of the purpose of a signature and whether any misrepresentation that may have occurred was material or serious enough, or sufficiently likely to mislead, to justify dismissal.

[35] I am satisfied from the evidence that the particular claim of predetermination raised by Mr Wang is only faintly arguable. So too is the allegation that the attempt to disestablish his CEO position in May indicated an agenda of Vent's new owners to get rid of him. The evidence for Vent seems to answer the allegations that his office had been cleared out and others appointed to do his job, before the decision was made to dismiss Mr Wang. By executing the independent contractor arrangement Mr Wang

had purported to bind himself to an at will termination provision relied upon by Vent, at least to begin with. He cannot complain if Vent initially thought it was binding.

[36] It seems to me strongly arguable that before the unpaid suspension was imposed, by his conduct Mr Wang had entered into the employment agreement on the terms recorded but with the changes made as requested by him. One of those expressly allowed for unpaid suspension. He may be on firmer ground claiming he was not consulted before the suspension but should have been in the circumstances.

[37] I am not however satisfied to the level of an arguable case that if, following a substantive investigation, Mr Wang is found to have been unjustifiably dismissed, he will be reinstated as one of the remedies available to him from the Authority. In this regard I refer to the decision of the Employment Court in *Cliff v. Air New Zealand Ltd* AC6A/05, Colgan J, 24 February 2005, where at para.[12] he held:

*So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.*

[38] The existence in this case of mixed or multiple relationships – employment, guarantor/franchisee, shareholder/director – leads me to predict at this stage that permanent reinstatement will not be considered practicable or reasonable, which under s 125 of the Act it must be before the Authority can award that remedy.

[39] Having been dismissed Mr Wang is arguably now unable to perform his obligation under the Franchise Agreement at clause 12.1.12, to ensure Vent is conducting its affairs in compliance with law and all professional and ethical obligations. Reinstatement may be found to present the risk that he will breach his obligations as a Guarantor and jeopardise the franchise and the business of Vent in which some 40 people are employed. The parties did not address the question of what is to become of Mr Wang's role in that regard. It may become the subject of civil proceedings or may be settled between them.

[40] It is more strongly arguable in favour of Vent that to a 'zero tolerance' level Mr Wang was in breach of the Fair Trading Act prohibition against misleading or deceptive behaviour, by proffering a document knowing the signature on it was not his. In that regard he arguably breached an undertaking expressly given in November

2012 to comply at a 'zero tolerance' level with applicable legal obligations including those he had under the Franchise Agreement.

[41] While cases have shown that 'zero tolerance' is often viewed warily in employment law as a standard of care or compliance by an employee, in the present circumstances it seems arguable that the proper and full performance by Mr Wang of his Guarantor's obligations was an implied term of his employment agreement, given the interrelationship of his several roles as employee, franchise guarantor, shareholder and director.

[42] The basis for implying such a term may be the business efficacy approach as taken by in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC), or the approach that underlying the employment agreement there was an assumption on which it was concluded, as taken by the Court of Appeal in *Attorney General v NZ Post Primary Teachers Association* [1992] 1ERNZ 1163.

[43] If the standard applying to Mr Wang as an employee was 'zero tolerance', any material misrepresentation or any conduct likely to mislead may have been sufficient to amount to serious misconduct justifying dismissal.

[44] From the evidence, Mr Wang apparently bound himself to meet a high standard of compliance with applicable law including the Fair Trading Act, and mere carelessness as an explanation for omissions acknowledged by him may not be found sufficient to excuse his conduct or performance.

### **Balance of convenience**

[45] With the existence of some uncertainty as to how Mr Wang will be able to continue as a Guarantor, whether the Franchisor will move to terminate the franchise for default or whether Mr Wang's shares will be compulsorily sold for breach of the shareholders agreement (failing to comply with his employment obligations), the balance of convenience I find is strongly in favour of leaving the present situation as it is in the interim.

[46] There needs to be urgent mediation on a multi-relationship basis and the status quo should not be upset while this takes place.

[47] Mr Liu and Mr Narayan, on behalf of their respective clients, have indicated their availability for an early substantive hearing within the next three or four weeks and this is a factor to be taken into account in assessing the balance of convenience. I must also weigh up the fact that Vent is at risk of losing its business if Mr Wang breaches his undertakings given to Vent and given on behalf of Vent to the franchisor who or which may exercise a right to terminate the franchise. In that event, some 40 people are likely to lose their jobs and the co-owners of the company their investment.

[48] While as a co-owner of Vent himself Mr Wang is likely to be careful about complying with his obligations, in case any failure leads to the loss of his employment and loss of value of his investment, it is more convenient and safer for now to leave things as they are until a full investigation has been completed.

### **Adequacy of other remedies**

[49] Damages and remedies available in the civil courts in my view will be adequate and more appropriate as remedies, addressing the multiple relationship problems widely rather than narrowly only in connection with the employment relationship.

[50] Overall I consider that the balance of convenience and the availability of monetary remedies favours Vent and are factors against ordering reinstatement before the substantive hearing of the matter can take place and be determined.

### **Overall justice**

[51] This should be viewed holistically in this case and not in just in respect of one part of all the relationships across the board. In considering what a fair and reasonable employer could do, it is arguable that such an employer is entitled to be concerned about the preservation of its business and the preservation of other employees' employment. Mr Wang was also the most senior employed member of the company and some weight should be given to that factor.

[52] The arguable case of unjustified dismissal is made out, but not of reinstatement as a likely remedy. The balance of convenience favours Vent and other remedies such as damages seem more appropriate to this complex relationship between Mr Wang and Vent.

[53] For those reasons I consider the overall justice of the case does not favour interim reinstatement. It would be only a part-fix lasting a relatively short term and which may do more harm than good.

[54] The parties' representatives are now to arrange with an Authority Support Officer and Member for this case to proceed to a substantive investigation meeting in the near future.

**Further mediation**

[55] The parties are strongly recommended to urgently seek further mediation at which they can endeavour to resolve all problems in the several work and non-work related relationships they have.

**Costs**

[56] Costs are reserved to be determined after the investigation has been concluded and the claims finally determined.

A Dumbleton  
**Member of the Employment Relations Authority**