

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 119  
5429676

BETWEEN

HUANG WANG  
Applicant

A N D

VENT GROUP LIMITED (In  
Liquidation)  
Respondent

Member of Authority: James Crichton

Representatives: David Liu, Counsel for Applicant  
Ramendra Narayan, Advocate for Respondent

Investigation Meeting: 3 and 4 December 2013 at Auckland

Date of Determination: 2 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Wang) alleges that he was both unjustifiably suspended from his employment thus creating a personal grievance for disadvantage and unjustifiably dismissed from his employment, thus creating a personal grievance for unjustified dismissal.

[2] Those claims are both resisted by the employer (Vent).

[3] This is an unusual case because the matter concerns a respondent which is now in liquidation, and the Authority's investigation has been allowed to conclude by way of its determination of the issues, with the specific permission of the liquidator pursuant to his powers under the Companies Act 1993.

[4] The liquidation took effect after the Authority's investigation meeting had concluded and after the closing submissions had been filed, while the Authority was working on the draft determination.

[5] As soon as the notification from the liquidator was received in the Authority, counsel for the applicant was advised of the position by the Authority and told that the permission of the liquidator would be required if the matter was to proceed.

[6] By email dated 14 March 2014, the liquidator subsequently advised the Authority that he consented to the matter being concluded by way of the issue of a determination and in consequence, the Authority has been able to complete its deliberations and issue this determination.

[7] Mr Wang was the Chief Executive Officer/Sales Director of Vent at the time of his dismissal. He had commenced employment with Vent as a salesperson in March 2008 and effective 29 June 2012 Mr Wang acquired a 21.6% shareholding in Vent as a consequence of which he became a director of the company and was promoted to the position of sales director. Subsequently in February of 2012, he became Chief Executive Officer of Vent as well.

[8] On 1 June 2012, the shareholders in Vent other than Mr Wang sold their shareholding and as a consequence of that change, Ms Janet Jackson and Mr Craig Wales became directors as well as being appointed to the management team of Vent in the positions of Human Resource Manager and Installation Manager respectively.

[9] By letter dated 17 May 2013, Ms Jackson purported to terminate the engagement of Mr Wang on 24 hours' notice in reliance on Mr Wang's contract with Vent which described him as an independent contractor rather than an employee.

[10] Mr Wang responded through counsel by letter dated 20 May 2013 resisting the contention that Mr Wang was a contractor and requiring further and better particulars of the proposed restructure which was implicit in the Vent proposal.

[11] By letter dated 5 June 2013, Vent withdrew its proposed termination and accepted that Mr Wang was an employee.

[12] Then around 11 July 2013, Mr Wang advised Ms Jackson that he was planning to travel to China on 18 July 2013 to visit his mother who was ill and at about the

same time Vent provided Mr Wang with a new draft individual employment agreement for his consideration.

[13] Mr Wang, having perused the draft individual employment agreement, indicated he sought changes.

[14] At the next board meeting on 16 July 2013, Mr Wang was advised that Vent required explanations of alleged misconduct by him and immediately following the board meeting, Mr Wang was suspended without pay in reliance on a clause in the draft individual employment agreement recently provided to Mr Wang. Mr Wang was also summoned to a disciplinary meeting on 18 July 2013.

[15] Mr Wang caused his counsel to write to Vent claiming the suspension was unlawful, that he could not attend the proposed disciplinary meeting because he was travelling to China as previously advised and suggesting a reschedule of the disciplinary meeting to 8 August 2013.

[16] Vent agreed to the proposed change to the disciplinary meeting date but persisted with its position on the other matters. A more detailed set of allegations against Mr Wang issued.

[17] Prior to the disciplinary meeting on 8 August 2013, Mr Wang alleges that his office was cleaned out by Vent and that a new employee was engaged to take over Mr Wang's duties.

[18] At the disciplinary meeting on 8 August 2013, and subsequently in correspondence from counsel, Mr Wang responded to the allegations made by Vent but despite that, by letter dated 14 August 2013, Vent advised its decision to summarily terminate Mr Wang's employment.

[19] A personal grievance was promptly raised both in regard to the allegedly unjustified dismissal and the alleged deficiencies in the suspension without pay. An early claim for interim reinstatement was dealt with in [2013] NZERA Auckland 410.

## **Issues**

[20] The two matters that the Authority must investigate are Mr Wang's complaints around the suspension process and his allegations concerning the dismissal.

[21] The issues in play relating to the suspension are essentially procedural in nature while the alleged unjustified dismissal concerns a significant number of allegations of misconduct as well as an underlying allegation of predetermination.

[22] It will be convenient then if I consider the following broad questions:

- (a) Was Mr Wang suspended in accordance with the law; and
- (b) Was Mr Wang unjustifiably dismissed?

**Was Mr Wang suspended from his employment in accordance with the law?**

[23] I am satisfied that Mr Wang was not suspended from his employment in accordance with the law and therefore has a personal grievance in that he has suffered a disadvantage because of unjustified actions taken by Vent in its decision to suspend him.

[24] I note first that Mr Wang maintains that Vent predetermined not just his dismissal from employment but also his suspension. I have dealt with the issue of predetermination especially in relation to the dismissal and I do not propose to repeat the discussion here. It is enough for me to say that my considered conclusion is that the suspension is unjustifiable without any need to rely on the alleged predetermination of the matter. In essence, what Mr Wang says on the issue of predetermination is that Ms Jackson on behalf of Vent set about a determined approach to rid Vent of Mr Wang and that the facts demonstrate that conviction. However, as I have just noted, I am satisfied that the suspension was unjustified without any need to rely on the contention that Vent predetermined the matter.

[25] The first basis on which I conclude that the suspension was an unjustified action is that, even on Vent's evidence, there was no proper notification to Mr Wang that suspension was being considered. It is apparent that the suspension decision arose out of the board meeting held on 16 July 2013. At para.17 of Ms Jackson's affidavit dated 30 August 2013, she said that Mr Wang was advised by email of the agenda for the 16 July 2013 board meeting. In the preceding paragraph of the same affidavit, Ms Jackson says that there were "*only two items on the agenda, the compliance advice letter (about which more later) .. and other matters*". But the short point is that notwithstanding the evidence Mr Wang had to deal with the compliance advice letter ( insofar as it concerned him ), there was no suggestion in the

advice prior to the board meeting that the directors were considering or proposing a suspension of Mr Wang. That does not give him a fair opportunity to consider his position and, for example, to take advice.

[26] Just because Mr Wang is a director of Vent and a significant shareholder, does not obviate the obligation on the part of Vent as employer to treat Mr Wang appropriately in accordance with its obligations as a good and fair employer. Put another way, while Mr Wang is a director and a shareholder of Vent, he is also an employee and as an employee he is entitled to be treated in exactly the same way as every other employee, that is, in accordance with the protections provided by the Parliament in the Employment Relations Act 2000 (the Act).

[27] By not giving Mr Wang explicit notice that a suspension of him from duty was contemplated or indeed would be discussed at the directors' meeting, Vent failed in its obligation to be a good and fair employer and acted in a way that a good and fair employer could not act in the particular circumstances of the case.

[28] Moreover, I am not persuaded that there was any need for Mr Wang to be suspended. This is because, by common consent, it was known that Mr Wang was to head overseas two days after the board meeting to be with his sick mother. His return date, while uncertain, was certainly not going to be immediate and it would have been apparent to a good and fair employer that Mr Wang's absence from the workplace would have been sufficient opportunity for Vent to conduct whatever inquiries it thought were precluded by Mr Wang's continued presence at work.

[29] Furthermore, while it is of less importance than the other factors, I note for the sake of completeness Vent's reliance on the draft individual employment agreement's provision at clause 17 (which gave a right to suspend the employee without pay). Reliance on that provision is entirely misplaced because the terms of that document were not agreed between the parties. Employment relationships are bilateral in nature and a unilateral imposition of an employment agreement of this sort is simply not binding on the parties to the relationship. This is particularly so when it is apparent on the evidence that Mr Wang made it abundantly clear that he disagreed with various parts of the proposed employment agreement and so had signalled his unwillingness to execute it in its submitted form.

[30] Vent tries to rely on the fact that Mr Wang did not object particularly to the suspension provision as evidence for the view that that provision still applied. But that cannot be right. Either the agreement applies or it does not and, given that there was never any meeting of the minds between the parties in relation to this document, the agreement does not apply and therefore cannot be relied upon.

[31] That said, the absence of a specific provision does not of itself preclude the possibility of suspension from duty being contemplated, but there must be a proper justification for such suspension and there must be a proper opportunity for the employee to consider the matter and make submissions on it. None of that happened in the present case and accordingly I am satisfied that the suspension was an unjustified action.

[32] The only other question that I must consider is whether the suspension caused Mr Wang any disadvantage. It is plain that it did; Mr Wang was suspended without pay. The loss of remuneration is an obvious deficit. Moreover, a suspension of a chief executive officer, effectively depriving that individual of his leadership role in the employer, of necessity creates a disadvantage and could only be contemplated where the employer's actions had been amply justified.

[33] For reasons just advanced, I am satisfied that Mr Wang has suffered a personal grievance by reason of having been disadvantaged by the unjustifiable actions of Vent in suspending him from duty without pay and he is entitled to have me consider compensation for the wrong done to him.

### **Was Mr Wang unjustifiably dismissed?**

[34] The Authority is satisfied that Mr Wang was unjustifiably dismissed from his employment by Vent because the decision that Vent made to dismiss was not one of the dispositions available to a fair and reasonable employer in the particular circumstances of the case.

[35] First, I want to deal with the alleged predetermination. One aspect of that allegation clearly does not come up to proof. In his statement of problem, Mr Wang maintained that after the suspension but before the disciplinary meeting which resulted in his dismissal, Vent cleared out his office and employed somebody to fulfil his responsibilities. Those allegations, I am satisfied, are not made out. As to the clearing out of the office, it is true that happened but it has an innocent explanation.

Vent says that it agreed some 12 months previously to sublease a portion of its space which included Mr Wang's office. Incidentally, it also included Ms Jackson's office. In oral evidence to the Authority, Mr Wang accepted that those arrangements had been made and even acknowledged that he himself had shown real estate agents through the area some 12 months prior to the end of the employment. I conclude therefore that while Mr Wang's office was cleared out, so was Ms Jackson's and so the suggestion that there was something sinister about the emptying out of Mr Wang's office is simply misplaced.

[36] Moreover, Vent denies hiring a new person to take over Mr Wang's duties and I accept that evidence at face value.

[37] However, those concessions do not dispose of all the evidence of predetermination. The first piece of evidence in time, according to Mr Wang, is the attempt by Ms Jackson to terminate Mr Wang's engagement by letter dated 17 May 2013. I have already referred to this aspect but it will be recalled that Ms Jackson sought to give Mr Wang 24 hours' written notice in reliance on a provision in the contract between Mr Wang and Vent which, amongst other things, described him as an independent contractor.

[38] There is argument between the parties as to whose idea this independent contractor arrangement was, with Vent maintaining it was Mr Wang's idea and so it was a bit rich of him to subsequently complain about it when the employer sought to rely on the provisions of the agreement.

[39] But wherever the idea emanated, the short point is that as a matter of law the arrangement between these parties was an employment relationship and that was agreed by both of them after an exchange immediately following Ms Jackson's attempt to bring Mr Wang's engagement to an end.

[40] For present purposes though, Mr Wang alleges that this action by Ms Jackson, purporting to rely on a term in the then subsisting agreement, is evidence for his view that she was "*out to get him*". Certainly I agree that the decision Ms Jackson made was ill advised. Even if it had been possible legally to rely on the terms of the agreement (as Ms Jackson sought to do), it seems an extraordinary letter to write to an individual who, by common consent, was Vent's Chief Executive Officer and a major shareholder in his own right in the employer.

[41] Against those conclusions I must balance Ms Jackson's evidence that she had no personal animosity towards Mr Wang and was simply endeavouring to address matters with him in the interests of Vent.

[42] But if that is right, and if, on Vent's evidence, the reason for the attempt to dispense with Mr Wang's services was financial stress, surely a good and fair employer acting in accordance with the good faith obligation would engage with its chief executive officer on a consensual basis and seek to have that officer's input into the future of the enterprise going forward.

[43] Accordingly, I confess to finding it most difficult to understand why Ms Jackson would have written the letter that she did, in the circumstances in which she wrote it, unless there was some personal animus between her and Mr Wang. I think on the balance of probabilities, it is more likely than not that the attempt to dispense with Mr Wang's services on 24 hours' notice was indeed the first attempt by Vent to terminate the relationship between itself and Mr Wang and given the extraordinary nature of that attempt and Mr Wang's position as Chief Executive Officer, it is difficult not to think there is some truth in his claim that this is the first evidence of predetermination from Vent.

[44] More importantly though for our purposes, is the clear evidence the Authority heard from Mr Aaron Pearce, whose evidence in essence was that he was a confidant of Ms Jackson and that in that capacity, Ms Jackson had made admissions to him the burden of which was that she wanted to get rid of both Mr Wang and a friend of Mr Wang, Mr Farmer, who was then the Sales Manager for Vent.

[45] Not only does Mr Pearce maintain that there were "*many ... secret meetings ...*" between himself and Ms Jackson, but he also contends that, within two weeks of the initial admission by Ms Jackson, Mr Farmer had been dismissed from his employment. Mr Pearce then goes on to say that immediately after Mr Farmer's dismissal, Ms Jackson "*called me into her office where we had a lengthy discussion about how she was going to get rid of Lawrence [Mr Wang]*".

[46] The thrust of Ms Jackson's plan for removing Mr Wang, it seems, was a restructure wherein Mr Wang would have his position disestablished and be offered a lesser role which Ms Jackson felt sure he would not accept.

[47] Then Mr Pearce indicates that Ms Jackson made various statements to the effect that she had spent significant periods of time with “*the lawyer*” and suggestions were made to the effect that Ms Jackson was following a plan devised by the lawyer. Mr Pearce told the Authority that he was asked by Ms Jackson to assist Vent by giving it any evidence that would assist it to help “*get rid of*” Mr Wang but that he refused to be involved and at about that time the regular passage of information between Ms Jackson and him ceased.

[48] It goes without saying that this is immensely damaging evidence from Vent’s perspective, assuming it is accepted. Not surprisingly, Ms Jackson denies it absolutely. First, she denies predetermination in its widest sense and points out that Vent’s board had agreed on a new and generous remuneration package for Mr Wang at the board meeting on 27 June 2013 and that that decision made no sense if Vent was trying to get rid of him. Moreover, Ms Jackson makes the point that both she and the balance of the new shareholders in Vent had no knowledge or experience of the business that Vent was in (the marketing of HRV ventilation systems) when they bought into the business and they needed Mr Wang because of his expertise.

[49] Furthermore, there is no evidence before the Authority that Vent, as employer, had a predetermined view about Mr Wang; the evidence of predetermination relates exclusively to Ms Jackson. To put that point another way, there is no evidence before the Authority that the Vent board ever discussed issues that would give a reasonable person cause for concern about predetermination.

[50] All of that makes sense as far as it goes and the Authority must conclude that if there was predetermination, it was not predetermination from the employer but only predetermination from one of the other directors (Ms Jackson) albeit that she represented a significant block of shareholders within the ownership of Vent.

[51] In dealing with the evidence of Mr Pearce, Ms Jackson took the position of simply denying that she had confided in Mr Pearce, denying that they had had secret discussions and denying that she had ever sought information from him which would have assisted Vent to “*get rid of*” Mr Wang. But the Authority must observe that Mr Pearce’s evidence, if that evidence is not to be relied upon, is an extraordinary and complex invention for which there would appear to be no obvious benefit. Mr Pearce was a salesperson with Vent and according to Vent not a very good one. The evidence the Authority heard does not suggest that Mr Pearce and Mr Wang were

particularly close, other than the fact that they were work colleagues. Vent's attack on Mr Pearce's credibility during the investigation meeting did nothing whatever to shake his resolve that the evidence that he was tendering to the Authority was truthful.

[52] When the Authority puts together Ms Jackson's earlier extraordinary decision to seek to bring Mr Wang's engagement with Vent to an end on 24 hours' notice (which at best has to be a display of poor judgement) with the implacable evidence of Mr Pearce that he was confided in inappropriately by Ms Jackson on the subject of getting rid of Mr Wang, I am persuaded that it is more likely than not that Mr Pearce's evidence is truthful and can be relied upon.

[53] It is interesting that in the closing submissions for Vent, the thrust of the points made on this particular matter are to try to interest me in the proposition that Mr Pearce's evidence is irrelevant rather than the alternative proposition that his evidence is wrong or cannot be believed. Vent says that Mr Pearce's evidence is irrelevant because the issue must be whether Vent, as employer, predetermined the matter and by implication, that Ms Jackson's behaviour on its own is not enough to bind Vent.

[54] I am not persuaded by that submission. The difference between Vent as the employer and Ms Jackson as its human resources manager, a director and the representative of a significant block of shares, is more apparent than real. Ms Jackson was the author of Vent's letters to Mr Wang during the disciplinary process and even before that when she purported to rely on the independent contractor agreement to have Mr Wang exit the business on 24 hours' notice so it is difficult to see how Ms Jackson's behaviour in the matter is not absolutely relevant to whether Vent predetermined the issue or not.

[55] As the Authority has already observed, Mr Pearce was unshakeable in his evidence before the Authority despite the earnest endeavours of Mr Narayan, and Ms Jackson's approach to resisting Mr Pearce's evidence is no more than a bare denial. Her rebuttal evidence would have been more credible if she had sought to respond point-by-point to Mr Pearce's evidence, but she chose simply to say that it did not happen.

[56] Mr Pearce's evidence is supported by the evidence of another staff member, Mr Onesti, who was referred to in Mr Pearce's evidence and who generated an email which was available to the Authority confirming some parts of Mr Pearce's evidence.

[57] The Authority also heard from Ms Vivian Yu, who was the Asian Direct Marketing Manager when she resigned her employment with Vent in September 2013. Ms Yu's evidence is in summary, that correspondence between her and Mr Wang, which was supplied to Vent to justify a bonus payment from Vent, was used without her sanction to support an allegation by Vent against Mr Wang, of troubled staff relationships.

[58] Ms Yu repeats in her evidence in more than one place the fact that she had no wish to complain about Mr Wang but she also was quite explicit that Ms Jackson had approached her to see if she (Ms Yu), knew of any wrongdoing by Mr Wang and also whether Vent could operate without Mr Wang.

[59] While Mr Narayan was able to extract some concessions from Ms Yu in cross-examination, he was unable to shake her conviction that she had not wanted to complain about Mr Wang nor was she prepared to vary her evidence that Ms Jackson had tried to get information from her about whether Mr Wang was dispensable and/or whether he was guilty of wrongdoing.

[60] From my perspective, what is important about these two witnesses is first that both seem to be disinterested third parties without any axe to grind one way or the other, and second, both of them say that Ms Jackson was trying to obtain information from them about Mr Wang's alleged bad behaviour in March or April of 2013. That date is significant because Ms Jackson's evidence is that she only became interested in investigating what Mr Wang was allegedly up to when she got a complaint from Vent's franchisor (about which more later), and that complaint was dated 12 July 2013.

[61] On the balance of probabilities then, I have been persuaded that Vent was predetermining its engagement with Mr Wang at least to the extent that the evidence before the Authority suggests that Ms Jackson had formed a negative view about Mr Wang at a reasonably early stage and was trying to build a case against him before she acknowledged there was a disciplinary process in train, that is, after receipt of the franchisor's letter of complaint dated 12 July 2013.

[62] The problem of course with this sort of behaviour is that it tends to suggest a closed mind, an unwillingness to accept the other party's viewpoint and precisely because the engagements just described between Ms Jackson and other staff were secret, or at least were kept from Mr Wang, there was never any ability for him to respond to allegations or have any positive impact on the thinking that must have been developing within Vent around a very negative nucleus about him. That then is the first reason that I am satisfied that Mr Wang has suffered an unjustified dismissal because a good and fair employer in my opinion would not behave in the way that I am satisfied Ms Jackson did in seeking to put together a case against Mr Wang before he was even aware there was an issue.

[63] Before moving to the next reason that the Authority is not persuaded that the dismissal can stand, I want to comment on the evidence I heard about the cumulative nature of the allegations made against Mr Wang. Ms Jackson was absolutely clear that the dismissal rested on a combination of reasons which, taken together, formed a cumulative totality that justified the dismissal. She specifically rejected that there was any single reason for the dismissal and by implication rejected that there was any principal reason for the dismissal.

[64] In that regard, both parties refer me to the Employment Tribunal decision in *Henderson v. Zendel Consumer Products Ltd* [1991] 3 ERNZ 956 which considered a similar factual matrix where a decision to dismiss was based on findings of fault concerning a number of separate allegations. I am not persuaded that that decision helps me particularly. The current test for justification is set out in the statute and has been subject to helpful judicial analysis since its enactment. The Authority must look at the totality of the complaints made against Mr Wang, set against the totality of his responses made at the time to Vent, and decide whether what Vent did in dismissing Mr Wang was what a fair and reasonable employer could have done in the particular circumstances of that case.

[65] A minute analysis based on each separate allegation is not going to assist me to arrive at such a conclusion and I am reinforced in that view by Ms Jackson's very clear evidence that it was the totality of the alleged wrongdoing by Mr Wang which resulted in the decision to dismiss.

[66] I begin my analysis of the reasons for the dismissal by observing that three allegations were made against Mr Wang at the board meeting on 16 July 2013, after

which he was suspended from duty. The thrust of the allegations dealt with at the 16 July 2013 board meeting were contained in a letter dated 12 July 2013 from Vent's franchisor. The letter is styled a Compliance Advice letter. In essence, Vent is a franchisee of a particular product/service the HRV system. As one of a large number of franchisees across the country, Vent is bound by the terms of the franchise agreement to operate in accordance with that agreement and, inter alia, to obey the law of the land.

[67] The context of the Compliance Advice letter was earlier difficulty with the HRV brand involving breaches of the franchise agreement, breaches of statute law including the Fair Trading Act, and examples of unethical commercial behaviour. Some of that material was canvased in a TV3 *Campbell Live* programme.

[68] As part of its remedial action, the franchisor sought commitments from franchisees (including Vent) to abide by the arrangements made.

[69] It is important for the present proceedings that I note that the complaints about the brand aired on TV3's *Campbell Live* programme and the general concern of the franchisor was not directed primarily at either Vent or Mr Wang.

[70] In any event, at the board meeting on 16 July 2013, Vent sought comment from Mr Wang in respect of the franchisor's Compliance Advice letter dated 12 July 2013 which was certainly directed exclusively at Vent. The letter alleged breaches of the franchise agreement and emphasised the seriousness of those breaches in the context of the history of the matter, which the Authority has already referred to.

[71] It was because Vent was dissatisfied with the "*off the cuff*" responses of Mr Wang to the Compliance Advice letter that it determined to suspend Mr Wang at the end of the 16 July 2013 board meeting.

[72] But it would seem inevitable that an employer placing an employee in the situation Vent placed Mr Wang at that meeting, would be dissatisfied with the responses. Mr Wang's evidence, which I accept, was that he was unaware that the focus of the board discussion was going to be a disciplinary focus directed at him. It is apparent on the evidence that he knew about the letter because it had been disclosed to him the day before the meeting by Ms Jackson. But what he did not know was that the board would treat the Compliance Advice letter as a disciplinary matter focused on him. And of course Mr Wang was entitled to know that. While he was a director

and a shareholder of Vent, he was also an employee and as such he was entitled to proper notice of the meeting, proper notice of the allegations he faced, the ability to bring a support person and all the usual protections available to an employee confronting allegations of wrongdoing by an employer. None of those protections were available to Mr Wang at the board meeting on 16 July 2013 and as a consequence, Vent breached its obligations to Mr Wang.

[73] The disciplinary meeting proper did not take place until 8 August 2013 and the allegations made during the board meeting of 16 July 2013 were effectively repeated. The deficits that the Authority has identified in the process adopted by Vent at the board meeting were not repeated in the subsequent disciplinary meeting.

[74] Amongst other things, Vent reduced to writing the complaints made and between the board meeting and the disciplinary meeting that followed, by common consent, provided all of the documents which Mr Wang needed to review in order to mount his defence. A process was agreed between the parties about how the disciplinary matter was to be attended to and the subsequent process of the disciplinary matter through to its conclusion seems to me perfectly appropriate and standard.

[75] What I must say, however, is that the engagement of the parties around the disciplinary meeting of 8 August 2013 was in my judgement tainted by the exchanges between the parties at the board meeting held on 16 July 2013 when there was no proper process and, worse than that, the evidence from Ms Jackson in particular suggested that Vent had already formed views about Mr Wang's honesty and integrity which of necessity would have coloured its subsequent engagement with him at the disciplinary meeting proper. Given the failure of Vent to provide a proper process at the board meeting on 16 July 2013, it was inevitable that Mr Wang's responses to some of the matters put to him would at best have seem confused, and it is simply unfair of Vent to engage in a disciplinary process by stealth at the board meeting, reach conclusions having caught Mr Wang unawares, and then allow those conclusions to form part of its subsequent decision-making process on the dismissal. The taint from the board meeting in my judgement removed any prospect of the subsequent disciplinary meeting being a fair one. That then is my next reason for concluding that the evidence supports a finding of an unjustifiable dismissal.

[76] It is now necessary for me to consider briefly each of the particular matters which were of concern to Vent and see whether the conclusions that Vent reached were the conclusions that a fair and reasonable employer could have reached in the particular circumstances of the case.

[77] The first of those allegations is the allegation that Mr Wang was responsible for making “*out of territory*” sales. It will be remembered that Vent is a franchisee. As such, it has a territory. That territory is central and east Auckland. Moreover, selling activities of the branded product may only take place in accordance with not just the area prescribed by the franchise agreement but also the terms and conditions of that franchise agreement.

[78] One of the allegations which Mr Wang faced was that he made commercial sales outside of the terms prescribed by the franchisor.

[79] Broadly, the franchisee’s obligation was to sell HRV systems into domestic homes. However, for a period of one year, there was an arrangement entered into, the thrust of which was that commercial sales, that is sales by Vent to a commercial business or premise rather than a domestic home, was to be allowed, in effect as an experiment.

[80] The letter of agreement setting out this arrangement is dated 30 September 2011 and is issued on the letterhead of the franchisor. The critical term of the letter of agreement is to provide that commercial sales may be made by Vent for the 12 month period commencing on 10 October 2011.

[81] It is common ground that that commercial sales opportunity expired by effluxion of time 12 months after its commencement date.

[82] Notwithstanding that, the evidence I heard seemed to confirm Mr Wang’s claim that, notwithstanding the end of the commercial sales opportunity window, other employees continued making commercial sales. Mr Wang claimed that this was with the specific connivance of the franchisor. In that regard, Mr Wang gave very clear evidence of commercial sales having been undertaken after his suspension from employment.

[83] There is also other evidence before the Authority of commercial sales being undertaken outside of the window allowed by the letter of agreement from the franchisor.

[84] The evidence of Mr Farmer strongly suggests that he was involved, with other personnel from Vent, in making commercial sales independent of Mr Wang. Mr Wang plausibly argues that the reason that the franchisor turned a blind eye to these commercial opportunities was that it had disestablished its own commercial selling team. Previously, commercial sales were made by the franchisor and not by the franchisees. Whether that contention is true or not is beside the point; it was not dealt with effectively in rebuttal by Vent.

[85] So the summary position is that Mr Wang accepts that he made commercial sales after the end of the prescribed period, but his defence is that the prohibition was more apparent than real and that other employees of Vent (and, he suggests, Ms Jackson herself), were involved in commercial selling. I have to note that Ms Jackson vehemently denies personal involvement, but as I say, the weight of evidence before me suggests that it is more likely than not that Mr Wang's position is the correct one that while commercial selling might have been technically against the rules, everyone was doing it.

[86] On balance then, a finding of fault against Mr Wang in this regard would seem unfair unless everybody else who was also making commercial sales is going to be similarly disciplined. The only issue is whether Mr Wang as Chief Executive Officer ought to have set a higher standard.

[87] Next, I want to consider the allegation that Mr Wang provided incorrect producer statements to a local authority. Producer statements are documents generated by the franchisee to confirm the nature of the installation it has made on behalf of the client, reliance on which enables the client to apply for a code of compliance with the local authority.

[88] Undoubtedly, there are deficiencies in the producer statements provided by Mr Wang. The most graphic of these is that the document he supplied in a large number of cases was not signed by him at all but signed by a previous employee of Vent. Further, there were some examples where, according to Vent, producer statements were issued that did not tally with the internal records of sales made by

Vent. Further, Vent says that the producer statements prepared by Mr Wang deceived the local authority.

[89] Mr Wang denied wrongdoing and said simply that he had adopted the template document that was there before he joined Vent but failed to change the signature. He also told the Authority that he had gone into an extensive consultation process with the local authority at the beginning of his employment with Vent to ensure that the producer statement met the local authority's requirements. He said that he changed the producer statement to meet those requirements. The claims about the paperwork not marrying with the producer statements is explicable, according to Mr Wang, by a variety of factors, but he denies any attempt at deception.

[90] The bottom line with this allegation is that the evidence I heard suggested that, contrary to the view advanced by Vent, the local authority was not concerned about the matter and certainly did not feel deceived.

[91] I turn now to the allegation that Mr Wang sold an extended warranty in breach of the franchise agreement. Mr Wang concedes that he did this, said he did it for commercial reasons (presumably to get the sale) and was *“under the impression that the matter could have been dealt with by way of [Vent] on-paying the extended warranty fee of \$230 to the franchisor and the matter was in fact dealt with on that basis”*.

[92] Mr Wang further deposed that this was the only extended warranty that he sold, that he was told not to do it in future, that he had abided by that instruction, and told the sales staff to follow the same approach. Mr Wang says he made no financial gain out of the transaction.

[93] Vent says that Mr Wang, knowing that he was not allowed to sell extended warranties, went ahead and made the sale with an extended warranty and that it is not correct that Mr Wang did not benefit from the transaction because he of course was paid a commission for the sale.

[94] It seems appropriate for me to observe that this particular complaint against Mr Wang would seem to be made out, that he did do what he was alleged to have done, that it was in breach of the franchise agreement, that he knew that, and that as part of the ordinary commercial imperative, he was paid commission for the sale and so cannot be heard to say that he did not benefit from it.

[95] Mr Wang was subject to some complaints from customers. That much is common ground, but Mr Wang told me that he had the lowest complaint rating within the HRV group and that evidence was not challenged by Vent.

[96] Looked at in a commonsense way, it is difficult to see how you could sell any product or service in the marketplace and not receive complaints from time to time. Moreover, the complaints appear to me to be all historical having been dealt with some 12 months before the termination of Mr Wang's employment. Worse than that, I heard evidence from customers who had allegedly complained about Mr Wang saying they did not make the complaints and that they appreciated what Mr Wang had done for them.

[97] Finally, Mr Wang is accused of bullying staff. There are two purported examples, Ms Yu and Mr Jejendranath Jejendranath. Both of those people gave evidence before me. I have already commented on Ms Yu's evidence earlier in this determination but the short point is that she felt set up by Ms Jackson and did not want to make a complaint about Mr Wang.

[98] Mr Jejendranath also gave evidence before me but his evidence was more equivocal than Ms Yu's. He did confirm under cross-examination that a letter of support that he wrote for Mr Wang was genuine but equally he told me in answer to one of my questions *"I am very soft so bullying me is easy"*.

[99] Even if I am to accept that Mr Jejendranath felt bullied, Ms Yu is now trying to be very clear that she does not want to be seen as complaining about Mr Wang and as I noted earlier in this determination, she provided the material that she did to Ms Jackson not to complain but in order to get her entitlement to a bonus payment. More importantly, Ms Yu was adamant that she felt put upon by Ms Jackson to produce evidence of wrongdoing by Mr Wang.

[100] Accordingly, I am forced to conclude that even if Mr Jejendranath's complaint of bullying is absolutely genuine and needs to be treated appropriately by Vent, the *"complaint"* by Ms Yu is not in the same category and indeed that whole process by which Ms Yu became a complainant against Mr Wang has to be called into question because what Ms Yu is saying on affirmation is that she did not voluntarily complain and that Ms Jackson sought evidence from her to use against Mr Wang. I accept Ms Yu's evidence on those points.

[101] It follows from that conclusion that the evidence against Mr Wang for bullying co-workers, like the employer's overall process in dealing with this disciplinary matter, is tainted by the improper way in which Vent attempted to get the evidence it needed to use against Mr Wang.

[102] In my considered view, a good and fair employer could not conclude that Mr Wang was guilty of serious misconduct based on a proper analysis of these complaints. First we have Ms Jackson's clear acknowledgment that the allegations against Mr Wang were cumulative in their effect. Second my conclusion, in effectively auditing the employer's process, and leaving aside entirely the issue of predetermination, is that there is insufficient basis for a finding of serious misconduct relating to the commercial sales allegation, and the customer complaints allegation. In respect of the allegation of workplace bullying, as I have just indicated, I am forced to conclude that the whole of that inquiry is tainted by the inappropriate process used in seeking to obtain one of the complaints. It may be that Mr Jejendranath felt bullied and therefore it was entirely appropriate for Vent to undertake inquiry, but by virtue of the way it went about that, it created an obvious unfairness for Mr Wang and as a consequence I am not persuaded that that allegation could be used to support, in a partial sense, a finding of serious misconduct.

[103] I think the evidence that Mr Wang sold an extended warranty is made out and I do not accept his evidence that he made nothing out of that inappropriate conduct. But I cannot see how that allegation, even aggregated with others, can result in a finding of serious misconduct. There was no loss to Vent, either financially or in terms of reputation, and it seems to me that at best this would be an example of ordinary misconduct which might be dealt with by way of an admonishment. Mr Wang, after all, was the Chief Executive Officer of Vent, and so while it was important that he set a good example, on this particular matter where plainly he went too far, it seems common ground that this was a one-off situation and on his unchallenged evidence, he emphasised to his staff that in future they were not to sell extended warranties.

[104] In summary then, in my opinion, a single error of judgement by a senior executive is not an example of serious misconduct in these circumstances.

[105] Finally, the allegation that Mr Wang produced incorrect producer statements to the local authority is also an allegation which he accepts in part. He agrees that the

document that was used did not have his signature on it; he explains that it was a template that had been used prior to his arrival in the business and that he simply continued using it. He agrees that he ought to have changed the signature but he points out quite properly, and the Authority has seen the documents and verified that this evidence is truthful, that the same documents also have, as well as the inaccurate signature, Mr Wang's details, his title and how to get hold of him.

[106] Other allegations under this general head of producing incorrect producer statements seem to amount to bad recordkeeping and while that is not acceptable, it is also difficult to see how that can fundamentally damage the fabric of trust and confidence that must exist between a chief executive officer and his or her employer. What is more, the evidence the Authority heard was that Mr Wang, on taking up his sales director role, had discussed matters with the council to ensure that the producer statements met the council's needs and as a consequence of that discussion had made some changes. Moreover, while there was some contention about this point, the evidence I heard suggested that the local authority was not troubled by the documentation problems but even if that is not right, it is difficult to see how this could fundamentally impugn the integrity of the employment relationship which is essentially what is required for serious misconduct to be found. It is simply a succession of mistakes which no doubt in a perfect world ought not to have happened, but it is difficult to see how Mr Wang benefited in any way from these errors and I am not persuaded that they could contribute to a finding of serious misconduct.

### **Determination**

[107] In summary then, I am satisfied that Mr Wang has proved two personal grievances. The first is a personal grievance wherein he has suffered a disadvantage because of the unjustified actions of Vent in the way in which it suspended him without pay from his duties. He is entitled to have compensation considered in respect to that finding.

[108] The second personal grievance is one of unjustifiable dismissal and again I am satisfied that Mr Wang has proved, on the balance of probabilities, that he was unjustifiably dismissed from his employment. I do not consider that the cumulative effect of the allegations made by Vent against Mr Wang amount to a proper finding of serious misconduct because I conclude that a fair and reasonable employer in Vent's

position could not have concluded that Mr Wang's behaviour, taken cumulatively, was so grave as to justify a finding of serious misconduct.

[109] I am also particularly troubled by the appearance of predetermination, first in the thoroughly inappropriate process wherein the disciplinary issue was first raised at the board meeting of 16 July 2013 and subsequently in the apparent attempt by Vent to gather evidence about Mr Wang's alleged wrongdoing from a co-worker.

[110] I am forced to the conclusion that even if all of the allegations of misconduct were made out against Mr Wang and they were of sufficient magnitude to justify a finding not just of ordinary misconduct, but of serious misconduct, the dismissal might still have been unsafe if Vent had undertaken the same unsatisfactory process at the commencement of the disciplinary engagement and in the attempt to obtain evidence of Mr Wang's supposed wrongdoing from a staff member.

[111] It follows that in relation to the second personal grievance of unjustified dismissal, Mr Wang is entitled to the consideration of remedies as well. I observe that Mr Wang seeks a very large award of compensation and the figure of \$80,000 is mentioned. That is completely outside the Authority's normal practice. The law on the matter is clear and the Authority is circumscribed in its awards by the guidance of superior Courts. Such an amount would simply be outside that remit.

[112] That said, the evidence of Mr Wang's distress at his suspension and subsequent dismissal is palpable. He saw doctors in China and in New Zealand for stress related complaints, such as anxiety and sleeplessness, and was prescribed anti depressants in both countries. At the time of the Authority's investigation meeting he remained anxious and was particularly troubled by the fall from grace which his dismissal represented in the Chinese community in Auckland, especially as he had effectively been the personification of the HRV brand in the Auckland Chinese community.

[113] That said, I must now consider whether in relation to either of the personal grievances, Mr Wang has contributed in any way to the circumstances giving rise to his grievance, as I am required to do by s.124 of the Act. I am satisfied that in neither case has Mr Wang contributed in any way to the circumstances giving rise to the particular grievance.

[114] In respect to compensation, I award Mr Wang the total sum of \$20,000 as compensation under s.123(1)(c)(i) of the Act, \$15,000 of which relates to the unjustified dismissal and \$5,000 of which relates to the unjustified disadvantage.

[115] Mr Wang also seeks his normal salary payment during the suspension (which was unpaid) and accepting the calculation supplied by Mr Wang, I order that he is to be paid a further \$9,534.25 gross in that regard.

[116] Mr Wang also seeks payment of his bonus for July 2013. It appears to be common ground that Mr Wang achieved his July 2013 target notwithstanding that he only worked up to and including 16 July 2013. Vent says that he is only entitled to a pro rata payment up to 16 July 2013, because he did not work the balance of that month. But that cannot be right. He was still in the employment in the second half of July, even although he was not being paid (although as the Authority has now determined, he should have been), and accordingly I direct that Mr Wang is to be paid the balance of the bonus that he is entitled to for July 2013 (having been paid half the bonus on Vent's flawed logic already), and on that footing Mr Wang is to be paid the sum of \$3,000 to conclude his bonus entitlement.

[117] There remains finally a claim for reimbursement of wages lost because of the dismissal. This has not been quantified and in the hope that the parties can agree this amount between them, I direct that the representatives are to engage with each other with a view to dealing with that matter as well as the issue of costs which now fall for determination. In the event the parties are unable to reach agreement in respect to those matters, both the reimbursement of wages issue and the costs issue can be dealt with by memoranda to the Authority.

### **Costs**

[118] As I have just intimated, if the parties are unable to resolve the issue of costs between them, Mr Wang is to file a submission in the Authority and serve that on Vent, such application dealing first with costs and secondly with reimbursement of lost wages, and Vent is to have 14 days from the date of its receipt of those submissions for filing a response in the Authority.

[119] The Authority will then deal with those matters on the usual principles.

James Crichton  
Member of the Employment Relations Authority