

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 619
3289619

BETWEEN

ZHONG WEN
Applicant

AND

DIRECT KITCHEN LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: May Moncur, advocate for the Applicant
Rebecca Zhang, representative for the Respondent

Investigation Meeting: 25 July 2024

Determination: 15 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zhong Wen was employed by Direct Kitchen Limited (DKL) from 20 April 2022 until, he says he was dismissed when he tried to return to work after a period of leave taken between 29 January and 10 March 2023. He says the actions of DKL unjustifiably disadvantaged him in his employment and that he was unjustifiably dismissed. He seeks remedies to compensate his lost income and injury to feeling suffered consequent to his dismissal and a contribution to costs.

[2] DKL denies that Mr Wen was unjustifiably dismissed or unjustifiably disadvantaged in his employment. It says he abandoned his employment when he took unauthorised leave without prior approval and did not notify DKL of his departure or return dates.

The Authority's investigation

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Wen, Yutao Pan, the owner of DKL and Qilin Sun, an employee of DKL. The Authority was assisted by an interpreter of the Mandarin language.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[5] On 21 April 2023 Mr Wen instructed his representative to lodge an application for unjustified dismissal and unjustified disadvantage in the Authority. This application (matter number 3225279) was served on DKL on 27 April which lodged a statement in reply on 10 May. On 29 August the parties attended mediation. On 29 September, Mr Wen's representative wrote to the Authority advising the matter had settled, and the application was withdrawn. On 14 November, Mr Wen's representative wrote again to the Authority, copying in DKL, that the matter had been erroneously withdrawn, stating the cause of the error was confusion with another matter which had settled in mediation, which Mr Wen's had not. It was requested that the Authority file be updated accordingly, and the matter treated as ongoing.

[6] On 24 November DKL wrote to the Authority – it had been informed the matter (3225279) was withdrawn and objected to the matter proceeding. On 8 April 2024 Mr Wen lodged a new application (matter number 3289619) against DKL for unjustified dismissal and unjustified disadvantage. On 24 April 2024 DKL lodged a statement in reply. The statement in reply raises no objection on the basis of the earlier withdrawn matter. There is no information before the Authority that the matter is resolved either by way of a record of settlement under s 149 of the Act or by accord and satisfaction. Mr Wen's application (3289619) is before the Authority to investigate and determine and with which the parties have cooperated including filing relevant information and attending the investigation meeting.

[7] For completeness, Mr Pan's witness statement raised an objection that Mr Wen's personal grievances had not been raised within 90-days due to the withdrawal

of the application in September 2023. The raising of Mr Wen's personal grievances was an action completed when, at least, the statement of problem was served on DKL on 27 April 2023.¹

The issues

[8] The issues identified for investigation and determination are whether:

- i. Mr Wen was unjustifiably disadvantaged and/or unjustifiably dismissed?
- ii. If so, is Mr Wen entitled to a consideration of remedies sought including:
 - a. Reimbursement of lost wages (to be quantified) under s 123(1)(b) of the Act;
 - b. Compensation of under s 123(1)(c)(i) of the Act;
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Wen which contributed to the circumstances which gave rise to her grievance?
- iv. Is either party entitled to an award of costs?

Relevant law

The test for justification

[9] When the Authority considers justification for the actions of DKL including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of DKL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[10] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations set out in s 4 of the Act. Failure by an employer to comply with these obligations may fundamentally undermine its ability

¹ Employment Relations Act 2000, s 114.

to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.²

Background

[11] DKL is a manufacturer of kitchen cabinets and benchtops. Mr Wen was recruited to work with DKL in April 2022 having worked for another similar business for the preceding 10 years. He was approached directly by Mr Pan who offered him an increased hourly rate and travel costs. There is no dispute DKL did not provide Mr Wen with a written employment agreement. Mr Wen worked about 55 hours per week Monday to Friday and sometimes Saturday depending on work demand. The circumstances of this employment relationship problem arise when Mr Wen took unpaid leave from his employment at DKL to visit his elderly mother in China in early 2023. For the avoidance of doubt, he makes no claim for payment for the period he was away.

[12] Mr Wen has visited his mother every year, COVID-19 restricted years aside, early in the year for the past 16 years. He says he told Mr Pan in early 2022, before he agreed to work for DKL, of the significance to him of this annual visit and his intention to continue to do so. He says he next discussed this with Mr Pan in October or November 2022. Mr Wen says during that discussion he told Mr Pan of his strong need to visit his mother, that this would be possible when China lifted COVID-19 travel restrictions and that Mr Pan had expressed support and understanding of the situation.

[13] Mr Pan denies these conversations occurred. He says he did not know Mr Wen had an elderly mother who he travelled to visit until the application was lodged in the Authority. He also says DKL was very generous with Mr Wen’s annual leave requests – he was granted a week’s leave in July 2022 for a family holiday in the South Island and took time off during the Christmas/New Year shut down period.

[14] In early January 2023, when the relevant travel restrictions were lifted, Mr Wen promptly booked a return flight to China leaving New Zealand on 27 January and returning on 9 March. He says he told Mr Pan on 7 January of his travel plans and Mr Pan raised no objection. Mr Wen says he can be certain of the date he told Mr Pan

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

because he booked the ticket the day before. He says based on his understanding of their earlier discussions including Mr Pan's acknowledgement of the importance of his visits to his mother, he understood the leave was approved. Mr Wen said he had never completed a written leave request for DKL and was not asked to do so for the January trip. He also says after he left on the trip the next contact, he had with DKL was on his return to New Zealand when he telephoned Mr Wen to say he would be back at work on Monday.

[15] Mr Pan's recollection is very different. He says Mr Wen asked him for the leave 2 days before he was to go on the trip, that he (Mr Pan) did not agree to the request and asked him to delay his trip because the business was very busy at that time and he needed all employees working, including Mr Wen. He said Mr Wen's absence from work meant contracts were unable to be met and this has had a negative impact on the business. It is accepted this was a very busy period in the workplace. Mr Pan said when Mr Wen did not attend work the following week, he was not sure where he was, but thought he might be in China because Mr Wen had said he was going to China. Mr Pan also thought he might have got another job. Mr Pan said he tried to contact Mr Wen when he did not attend work and was told he was in China. He was unable to tell the Authority with whom he made this inquiry.

[16] Mr Wen's scheduled 27 January flight was delayed until 29 January due to the extreme weather Auckland experienced over that long weekend. His return flight was then pushed out to return to New Zealand on Thursday 10 March. Mr Wen did not tell Mr Pan about the delay or the change of return date. He said it would not have made any difference because Mr Pan knew he would return to work when he got back from his trip and the extended period fell within the already advised envelope of leave.

[17] On Sunday 12 March Mr Wen rang Mr Pan to say he would be at work on Monday and Mr Pan said there was no work. He then sent Mr Pan a text message advising him he would be at work the following day. Mr Pan replied [translated], "I am sorry, I don't have any work for you". Mr Wen then sent him text messages asking if he was dismissed and if so for what reason. When Mr Wen did not receive a reply, the following day, Monday 13 March he texted Mr Pan [translated] "Boss Pan, I've waited for a whole day, and you haven't replied to me. Since it's come to this, the process should be followed". Mr Pan did not reply.

[18] Mr Wen understood he was dismissed and, as he had indicated to Mr Pan he raised personal grievances.³

Discussion

Did Mr Wen abandon his employment?

[19] The Court of Appeal found an employee abandons their employment when there is clear evidence they intend to end their employment.⁴ In that judgment, noting it was decided before enactment of the statutory good faith obligations, the Court held an employer should be cautious in drawing the inference that an employee had abandoned their employment:⁵

...the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.

[20] DKL says Mr Wen abandoned his employment and it did not dismiss him. DKL says this must be the case because Mr Wen failed to complete a leave application form as required and absented himself from work for some weeks without its consent and in the face of its objection to his going on leave. It says when he did not attend work as expected it attempted to contact him and was told he was in China.

[21] The parties had not agreed what the circumstances of abandonment of employment might be. This is likely because DKL failed in its fundamental duty as an employer to provide a written employment agreement, which could have contained such a provision.⁶ In the absence of an agreed provision dealing with abandonment, an objective assessment of whether Mr Wen's employment had ended because he abandoned it must be made.

[22] Mr Wen's recollection of events is preferred to that of Mr Pan's – it is more credible that Mr Wen would have raised a significant annual request for leave and sought agreement when the parties were bargaining their employment agreement, raised

³ The information before the Authority is Mr Wen's personal grievances were raised with DKL when the statement of problem was served on 27 April 2023.

⁴ *E N Ramsbottom Ltd v Chambers* (2000) 2 ERNZ 97 (CA).

⁵ Above at [26].

⁶ Employment Relations Act 2000, s 63A.

the issue again some months before the intended travel and then again on booking of the tickets when travel restriction slighted, than to have announced such an absence from work two days before he was to travel. Consistent with this more credible narrative is Mr Wen's evidence that he told Mr Pan he was going to China for about a month and gave Mr Pan his flight details. There was no credible information before the Authority that Mr Wen had acted before in the highhanded manner DKL describes. DKL provided no information to the Authority to support its claim that it tried to contact Mr Wen as to his whereabouts for example telephone or WeChat message logs. This indicates DKL likely knew Mr Wen was on the trip as he had advised. Little weight is put on the evidence of Mr Sun who was unable to give any detail of the conversation he overheard different to that provided by DKL.

[23] It is unfortunate Mr Wen did not record the discussions with Mr Pan about his leave in writing at the time they occurred. However, the effect of that failure is limited when contrasted with DKL's failure to meet its legal duty to ensure it provided Mr Wen with a written employment agreement. If DKL had provided Mr Wen with a written employment agreement which included terms and conditions the parties thought fit, including abandonment of employment or how leave could be applied for and taken, the difficult issues the parties now face may have been avoided. Further, DKL's failure to provide Mr Wen with a written employment agreement is inexplicable and compounded by the evidence before the Authority that it was aware of at least this obligation towards its employees, from at least mid-2023 when it applied for accreditation as an employer under the accredited employer work visa scheme. Such accreditation requires compliance with New Zealand employment law. DKL was granted accreditation and recruited workers from overseas who commenced employment in first quarter 2023. In addition, Mr Sun gave evidence that he had a written employment agreement.

[24] With regard to the requirement that Mr Wen complete a leave request form, Mr Pan confirmed there was no written policy document which set out how leave should be applied for, but that Mr Wen knew because it had been discussed at meetings. There was no evidence before the Authority Mr Wen had completed a leave request form for the South Island trip or the Christmas/New Year shut down. There are no minutes or other record of the meetings referred to though it is accepted other staff had requested leave in writing. Given Mr Wen's clear evidence he was unaware of the requirement,

and the matters set out above, it is not accepted Mr Wen knew DKL required him to complete a leave request form to commence the leave approval process.

[25] For these reasons Mr Wen did not abandon his employment.

Was Mr Wen unjustifiably dismissed from his employment?

[26] As set out above, Mr Wen contacted Mr Pan on Sunday 12 March and advised he would be back at work the following day. Mr Pan replied there was no work and when Mr Wen asked if he was dismissed there was no reply which he then followed up the next day. DKL did not reply. This was a sending away and amounts to a dismissal.

[27] DKL cannot demonstrate its actions were justified that is that they were those a fair and reasonable employer could have taken in all the circumstances.⁷ There is no or little evidence DKL investigated its concerns into Mr Wen's leave. Its concerns about Mr Wen's absence were not put to him in a way which he could fairly respond to, and he was not given a reasonable opportunity to comment on whether dismissal was fair and reasonable. These were not minor deficiencies and they have resulted in Mr Wen being treated unfairly – he was not provided a fair opportunity to understand DKL's concerns or provide comment. Even if Mr Wen had taken leave as DKL describes – with two days' notice and in the face of Mr Pan's objection - its actions cannot meet the statutory justifiability test, though Mr Wen's contribution to the circumstances of the personal grievances would have likely been a significant feature.

[28] DKL is not a large business, and it did not access professional assistance to deal with the employment issue with Mr Wen. However, the information before the Authority suggests DKL can deal with complicated employment matters including recruiting employees from offshore. The flaws in how it dealt with Mr Wen and his employment coming to an end were not technical or minor. Mr Wen was unjustifiably dismissed. His personal grievance for unjustified disadvantage relates to a s 4 good faith breach arising from the circumstances of his dismissal. The factual basis of that grievance is not sufficiently different to that of the unjustified dismissal to warrant separate findings.

⁷ Employment Relations Act 2000, s 103A.

Remedies

[29] Mr Wen has established a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement of lost wages

[30] After reviewing the evidence of loss and Mr Wen's attempts to mitigate that loss the Authority is satisfied he is entitled to an award of lost wages of three months being \$23,100.⁸ Holiday pay is to be calculated and paid on the of \$1,848 (gross) calculated on that sum.⁹ I am not minded to exercise my discretion and make an award of lost wages greater than three months. Personal factors which Mr Wen said likely contributed to his difficulty in finding work are not matters to which DKL has contributed.

Compensation for humiliation, loss of dignity and injury to feelings

[31] The circumstances of Mr Wen's personal grievance have had a profound and negative impact on him. He gave compelling evidence of its ongoing negative impact including the distress caused because he was unable to meet obligations to his family including dependent children and his elderly mother. He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$16,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Wen that contributed to the situation giving rise to his grievance?

[32] No deduction from the remedies awarded is to be made under s 124 of the Act. The Authority has found Mr Wen did not abandon his employment and his version of events leading up to his taking leave has been accepted. He has not contributed in a blameworthy manner to the circumstances of his dismissal.

[33] There are no deductions from the monetary remedies for reasons of contribution.

⁸ Mr Wen's hourly rate of \$35 x his usual hours of 55 per week x 12 weeks = \$23,100 (gross).

⁹ Holidays Act 2003, s 23.

Summary

[34] The following orders are made in Zhong Wen's favour:

- a) Within 21 days of the date of determination Direct Kitchen Limited is to make the following payments to Mr Wen:
 - i) \$16,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
 - ii) \$23,100 (gross) pursuant to section 123(1)(b) of the Employment Relations Act; and
 - iii) \$1,848 (gross) holiday pay calculated on the lost remuneration award pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

[35] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[36] If they are not able to do so and an Authority determination on costs is needed Mr Wen may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Direct Kitchens Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[37] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Marija Urlich
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.