

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 457/09
5127349

BETWEEN BIN (BOBBY) XU
 Applicant0

AND ANZ SKY TOURS LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Stephen Corlett, for Applicant
 Paul Tremewan, for Respondent

Investigation Meeting: 9 December 2008 and 13 May 2009

Information and
Submissions Received: 22 and 29 May 2009

Determination: 17 December 2009

DETERMINATION OF THE AUTHORITY

[1] Sky Tours specialises in inbound and outbound tour packages in New Zealand and Australia. The business is owned and managed by Ms Sherry He. Mr Xu worked with Ms He in the businesses' Auckland office. He worked as a travel consultant until December 2006 when he commenced a role as an outbound travel manager. This is the position Mr Xu held at the time he says he was dismissed.

[2] Mr Xu was employed by Sky Tours from March 2005 until 26 April 2008. He says he was unjustifiably constructively dismissed and that Sky Tours failed to provide a safe workplace. In the alternative Mr Xu says he was unjustifiably disadvantaged in his employment. He also says he has not received bonus payments and holiday and public holiday pay due and owing under the terms of his employment agreement and that unauthorised deductions have been made from his wages. He

seeks orders accordingly.

[3] I record that the investigation of this employment relationship problem was assisted by a translator of the Mandarin language.

Was Mr Xu unjustifiably constructively dismissed?

[4] Mr Xu says his resignation followed years of bullying and unfair treatment from Ms He and other repeated breaches of his employment agreement. He says the totality of Sky Tours actions through his employment, culminating in the events of 12 April 2008, lead to his resignation.

[5] Constructive dismissals typically fall into the following categories – an employer gives an employee a choice between resigning or being dismissed, an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and/or a breach of duty by the employer causes the employee to resign¹.

[6] Mr Xu says his constructive dismissal arises from the last of these categories. I accept that is the correct categorisation of his claim.

[7] Having categorised the claim I turn now to the tests against which the evidence must be assessed. The first question is whether, having regard to all the relevant circumstances, Mr Xu's resignation was caused by a breach of duty owed to him by Sky Tours and second whether that breach of duty was sufficiently serious that it would be reasonably foreseeable that Mr Xu would resign². These tests must be read with the statutory test for justifiability set out in section 103A of the Act.

Breaches of duty?

(i) Why did Mr Xu resign?

[8] Mr Xu tendered the following letter of resignation on 14 April 2008:

¹ *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) 2 NZLR 372 (CA)

² *Cooke P in Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 168, at p169

Dear Sherry

I would like to inform you that I am resigning from my position. My last day will be Saturday, 26 April 2008.

Thank you for the professional and personal development you have assisted me with over the last three years. I consider just about everyone I have met to be friends of mine and I will miss you all.

However, between my day to day work, career has taken a different direction and I feel (sic) is time to move onto new opportunities and challenges.

Regards,

Bobby Xu

[9] On the same day he emailed Ms He a detailed and heartfelt resignation in Mandarin. The translation of which is worth setting out in full:

Dear Sherry

Thank you for the three years you spent training me and developing my skills. I also hope that, the Skytours travel agency always continues to be a top performer in the tourist industry. I hope you will be able to read the following in a calm frame of mind.

My wanting to leave is not for any other particular reason; you are the boss, if you say the money should be calculated in that way, that's the way it should be calculated, and I don't disagree in any way with that.

But what I could not stand is you saying that I am selfish!

We have worked together for three years; do you know how much hardship I have had to put up with during this time?

Do you remember the time you went to Australia? I went and cooked meals for your son, took him to his classes and accompanied your mother when she went shopping for food.

The first time I went to Australia, you wanted me to stay on an extra two months because the company had a problem: do you know what it feels like to spend Christmas New Year in a place, far away from one's home, where one has no friends?

The second time I went to Australia, because Cindy had gone back to China, I had to arrive at the office at 7am Australian time, and leave at 5in the evening. I worked from Monday until Saturday. Look at what Kathy does, now.

But when did I ever complain about these things?

I also recall Christmas that year, over ten people didn't have tickets, and I spent every evening on the internet helping the company to look for some. Finally, one Saturday evening, I found some cheap ones; have Qiaoqiao or Cindy ever worked their guts out for you in the same way? When did I ever not keep them company till 8 or 9 at night, but when I was busy, who helped me out?

When they first arrived, I took them by the hand and taught them airplane ticketing; when I first arrived, you yelled at me loudly the very first day, I will truly never forget that day, but I still felt that you were alright at heart.

There is heaps of stuff similar to what I have just mentioned, but perhaps you don't remember; for me, however, it is still very much alive in my memory.

That day, when you told me I was selfish, I really felt so disappointed. I never imagined, after three years, after all that I had done for the company, that that sentence would be what I would get in return.

But when one thinks about it, those amounts of commission are all money I have earned by the sweat of my row. Why shouldn't I try and claim them? Perhaps what you say is true, I am not worth such a high salary.

Sherry, think about this carefully: when did I ever go to you and ask for an increase in salary, wasn't it you who sought me out each time and told me you were going to increase my money? It was because I believed you to be a fair and just employer.

But, sometimes, truly, you did disappoint me. But this is all for later.

Actually, you really did not need to say that to me today, all I did was to send a schedule to the mailbox of a friend. Why did you think I was sabotaging something? Do you know why my computer is slow, because the system configurations are three years old – it is now 2008. Your computers are all new, you know that Windows updates itself automatically everyday, installing new things; the world is moving on, computers are doing the same thing. And you can ask someone who understands computers – the Norton Anti-virus installed on my computer is the kind that most uses up computer RAM, so everything runs slowly.

Why couldn't my computer print out things? It's because that's how things are with the new printer that has been installed. Every time there is a problem you know to come and ask me, but I don't know this stuff either, why then did you say it was I who was sabotaging it? Was there the same problem with the previous printer? You need to think very calmly and soberly about that.

Every time something goes wrong with Sabre, wasn't it me who sorted it? This time you said what I was doing was sabotage. I felt we were all one family, and trying to earn money for the company was what we should all be doing.

I was wholeheartedly behind the company, but what I got in return was your mistrust. So all the heaps of stuff I did in the past, was for what exactly?????

I don't want to explain all of this to you, because I know now that you don't have any trust in me. But I, BIN XU, have always been open and above board in the way I conduct myself and in what I do.

Quoting what old ZHOU said, perhaps the two of us have come to the end of our pathways together, and also, I don't want everyone to get in such an unhappy state as was the case today.

My writing this letter was not to explain anything to you, I just wanted you to understand, what kind of person I, XU BIN, am.

I hope, Sherry, that you can appreciate and treasure each person who works in the company.

Finally, I want to thank you for your support over these three years, and also for the time you took to read this letter.

I have applied for a job at Qantas, and if they give me the job, I hope that we will have an opportunity to work together; I also hope we are still friends.

If I don't get the job, I plan to go back for a period of time, its been over three years, and I feel I need to rest a little, so could I ask for your help in calculating the remaining amount of my commission as soon as possible?

If any matter crops up at the company, please get in touch with me at any time, because, as long as I have the time, I will do what I can to help.

Bobby Xu

[10] What is Mr Xu saying in this resignation letter? He says he is very disappointed that despite his hard work and dedication to the business and his tolerance of Ms He's sometimes volatile conduct over the course of his employment, he has been accused firstly of being selfish in relation to the calculation of commission payments and secondly of sabotaging the computer system. He offers an explanation in response to the computer allegation – the company system was too slow and he was sending a schedule to a friend to print because the work printer was unusable.

[11] The resignation letter concludes with statements that Ms He does not trust Mr Xu, a personal reflection that the parties may have reached the end of the road and an

outline of Mr Xu's plan to pursue a position with Qantas or return to China for a holiday. Mr Xu then requests Ms He look at the calculation of his commission payments again and makes an offer of help for the future.

[12] Mr Xu says his resignation followed an altercation with Ms He two days earlier

when he had tried to discuss the calculation of commission payments for a particular hotel and ticket booking. He says Ms He responded by saying he was earning too much and taking advantage of the company. When he tried to explain the break down of the commission he says she became violent, pointing and shouting at him so aggressively that her partner dragged her from the room where, from behind a closed door, she could still be heard shouting and banging the door with her fists. Mr Xu said he felt frightened and intimidated.

[13] Mr Xu said he tendered his resignation because he could not endure any more of Ms He's behaviour. He said he was concerned to secure his commission and drafted his resignation letter in such a way as to not aggravate Ms He any further.

(iii) bullying behaviour and unfair treatment

[14] Mr Xu says the 12 April incident was not the first outburst he had experienced from Ms He during his employment with Sky Tours. He says from the first day of employment Ms He subjected him to bullying behaviour and unfair treatment. He gave the following examples:

- on the first day of his employment, having taken a long time to complete a booking, Ms He yelled at him in Mandarin *how dare you, don't you know how to make a booking, are you a pig or stupid;*
- At Chinese New Year 2005, in front of a customer, Ms He called Mr Xu a *bastard stupid student* after he had confused a tentative booking for a firm booking and, he says, this abuse continued after the passenger had left;

- In June 2006 Mr Xu made a mistake on a rental car booking. Ms He told him to *shut up* in front of the customer and after they had left pointed her finger, shouted at him that he was *stupid* and did not give him a fair opportunity to explain his actions. When he did try to explain himself Ms He said if you want to argue with me you can get out now. As a result of this incident \$670 was deducted from Mr Xu's pay without his consent;
- Following his resignation Ms He complained to the police that Mr Xu had stolen company financial records;
- Ms He would threaten Mr Xu with dismissal if he did not obey her and call him useless or tell him he knew nothing;
- Mr Xu would be punished by being removed from answering the telephones for a period of time.

[15] Other than the 12 April incident these matters were described in sketchy terms. Mr Xu was unable to give details of the context of the events. He had no contemporaneous notes recording the details of these exchanges.

[16] Mr Xu produced a conversation with Ms He that he recorded on 19 April 2008 after his resignation. He says the recording supports his claim that he was subject to bullying and unfair treatment. The conversation concerns Ms He raising a ticketing issue with Mr Xu. Ms He accepted the voice on the tape is hers but says it has been modified. She was unaware the conversation was being taped.

[17] The translator assisting the Authority's investigation listened to the recordings. She commented that Ms He's voice was louder and faster and the tone higher than that used in the Authority investigation and that she could not comment if it was threatening or not. Given these comments and having read the transcript I find the recording does not support Mr Xu's claim.

[18] Also recorded is a conversation with Ms He and another employee in mid 2007. The conversation concerns a \$150 lobster meal paid for by the company and ordered by the employee's friend. It is clear from the transcript that Ms He had not authorized that level of expenditure on one meal and that she expected the employee to get the friend to repay the sum or pay it herself. It is also clear Ms He is angry – she calls the employee a scoundrel and accuses her of lying. This conversation has nothing to do with Mr Xu. It has limited probative value.

[19] Ms Qu Qiao Qiao gave evidence in support of Mr Xu's claim. She worked in the same office as Mr Xu as a book keeper from April 2005 until November 2007. She said she observed Ms He shouting at and abusing staff on many occasions. She recalled Ms He shouting at Mr Xu, hitting the table with her hands and calling him a *stupid pig, idiot* and *bastard* in mandarin. She said this shouting and yelling towards Mr Xu became more frequent during the later part of 2005, mid 2006 and early 2007. Ms Qu overheard Ms He shouting at Mr Xu in front of customers and recalled the rental car incident and Ms He telling Ms Xu to *shut up* in front of the customer.

[20] Ms He denies yelling words such as *pig, idiot* or *bastard* to Mr Xu. She says errors Mr Xu made in his work caused her concern and she took reasonable steps to address those concerns. She accepted she called Mr Xu *selfish* during the 12 April incident. She told the Authority she had had an operation a few days before and was unwell.

[21] Ms He says Mr Xu was not subject to bullying or unfair treatment during his employment with Sky Tour. She relies on Mr Xu's instant messaging record available from the Sky Tour computer. She says prior to his resignation it contains no hint that he was suffering from bullying or unfair treatment at work, that it is likely he would have disclosed this to his parents (with whom he was messaging) if it had occurred and that the record demonstrates he was frustrated with his co-workers and was actively considering a range of alternatives after he left Sky Tours. Ms He says Mr

Xu was motivated to retain his position with Sky Tours until he gained permanent resident status in New Zealand.

[22] I accept Ms He had a combative style and reacted strongly to stressful situations. There is no evidence Mr Xu raised any concern with Ms He, a co-worker or friend or family member about concerns about his treatment at work prior to his resignation. This can be contrasted with complaints he made about colleagues to family members whilst instant messaging.

[23] There is no evidence Mr Xu was a particular target for Ms He's venting. There was evidence that Ms He acted in this manner to other staff.

[24] It appears Mr Xu was prepared to accept a degree of volatility in the office until he came directly into conflict with Ms He about the calculation of his commission payments in April 2008. This is clear from the second resignation letter. It is also clear that the commission issue had been brewing for some time - the commission payments had changed in November 2007 – and that Mr Xu had taken no steps to clarify how his commission was calculated. Having heard Ms He's 12 April reply he could have disputed her interpretation and sought resolution of that dispute through one of the mechanisms set out in the employment agreement. Instead he resigned.

[25] For the foregoing reasons I find Ms He did not subject Mr Xu to bullying or unfair treatment during his employment. The claim of an unsafe work environment is not accepted.

(iv) commission

[26] The parties are in dispute over the calculation of commission payments. They agree the commission formula but dispute its application. The formula is as follows:

- 2% of all inbound domestic and Australian tour packages;
- 50% of the company's net profit for international airline ticket sales;
- 50% of all domestic and international hotel bookings.

[27] The commission formula is not in or referred to in the employment agreement. Mr Xu's duties as outbound travel manager are clearly set out in the position description attached to that document.

[28] Mr Xu says he is owed a total of \$10,422.32 for unpaid inbound and outbound commission earned for February, March and December 2007 and January - April 2008. In the statement of problem filed in June 2008 he asserts a verbal agreement with Ms He that on a monthly basis he would receive 2% of total invoiced amounts in excess of salary and that this was unilaterally varied from November 2007.

[29] Mr Xu says this is the method of payment that had been used always and there was no reasonable basis for it to change.

[30] Ms He says it was not until November 2007 that it came to her attention (having returned from setting up a business in Sydney) that commission was being calculated incorrectly and she took steps to change it because it was clearly wrong. She says the calculation was incorrect because it paid commission on air fares included in tour packages plus another commission on the same air fares. Ms He also says Mr Xu was not entitled to commission payments on domestic tours when his job description changed to outbound tour manager in December 2006.

[31] The parties' December 2006 employment agreement is silent on commission payments. It is clear the way in which commissions were paid changed after November 2007 on Ms He's return from Sydney.

[32] Clause 23 of the employment agreement – *Entire Agreement* – has limited application; the parties agree the commission payment was verbally entered prior to

December 2006 and continued past that date. What they do not agree on is the application of the commission formula.

[33] I find there was no reasonable basis upon which to remove inbound tour sale commissions from Mr Xu after the December 2006 employment agreement was entered. The employment agreement is silent on this matter - it does not say Mr Xu is not to sell inbound tours or that he will not receive commissions on sale of such tours. It is not implicit in the role of outbound tour manager that sales of inbound tours would not occur. Given the small size of the office it is common sense that Mr Xu would remain involved in a wide range of activities across the business. If the parties had intended to exclude inbound sales from the commission formula then that would have to have been agreed. There is no evidence such agreement was reached.

[34] I agree with Ms He that commission cannot be double paid on the same air fare sale.

[35] **If the parties are unable to resolve this issue themselves given the above findings, leave is granted to provide further evidence and submissions to the Authority to calculate outstanding commission payments.**

(v) unpaid holiday pay

[36] Mr Xu received no holiday pay during his employment with Sky Tours. He says he is owed \$6,625 in unpaid holiday pay entitlement.

[37] Sky Tours accepts there are outstanding holiday pay entitlements due and owing to Mr Xu. It says the outstanding entitlement is less 5 days annual leave Mr Xu took after a period working in the businesses' Sydney office. It says Mr Xu did not take any other paid holiday during his employment because he refused to take holidays when he was asked. Sky Tours asks the Authority take into account a 10-day

tour of the South Island taken by Mr Xu and his parents. Ms He says the cost of this tour was met by Sky Tours and the total cost to the business was \$3510.

[38] Mr Xu says he was not given the opportunity to take any annual leave. He says his parents were given the South Island tour by Sky Tours in recognition of his dedication to the business and that he attended to familiarise himself with the tours the business was selling.

[39] There is no evidence Mr Xu refused to take annual leave or that he was directed to take annual leave.

[40] Notwithstanding the unlawfulness of such a scenario there is no evidence, other than Ms He's assertion, of an agreement between the parties to off set the South Island tour costs against Mr Xu's annual leave entitlement.

[41] Sky Tours was unable to produce complete holiday records for Mr Xu. Section 81 Holidays Act 2003 requires employers keep a holiday and leave record in written form or a form easily convertible to written form. There was no reasonable explanation given as to why Sky Tours had failed to maintain this statutory obligation. I accept the failure to maintain an accurate holiday record has prevented Mr Xu from making an accurate claim. In such circumstances the Authority may accept as proved Mr Xu's claim for holiday pay entitlement³

[42] **I am satisfied Mr Xu's annual leave entitlement of \$6,625 is outstanding and that it is due and owing.**

(vi) public holidays

[43] Mr Xu says he worked one Easter public holiday in either 2006 or 2007. He claims \$201.92 for unpaid public holiday pay entitlement. He says as there are no

³ Section 83 Holidays Act 2003

accurate holiday records he is unable to be any more precise and Sky Tours failure to maintain accurate holiday records should not defeat his claim.

[44] I accept the failure to maintain accurate holiday records should not defeat a claim. However, a claim must amount to more than a bare assertion. This is the case here. The claim is declined.

(vii) unauthorised deductions

[45] Mr Xu claims reimbursement of approximately \$1500 in deductions he says Sky Tours unlawfully made from his wages.

[46] Sky Tours failed to provide complete wage and time records for Mr Xu. There are no pay slips or bank records to support the claim.

[47] Mr Xu is able to recall one deduction in detail. He says in June 2006 \$670 was unlawfully deducted from his wages following a mistake with rental car hireage. He says the mistake was unintentional and that he had received no training in procedures for rental car bookings.

[48] Ms Qu said Ms He had directed her to make deductions from Mr Xu's wages on occasions and that these deductions were for penalties received from airlines or suppliers due to incorrect bookings or missed deadlines.

[49] Sky Tours says it had occasion throughout Mr Xu's employment to have concerns about his performance and accepts a deduction was made in relation to the rental car hireage.

[50] **Mr Xu's claim for the \$670 is successful – there is no evidence the deduction was lawfully made.** The written employment agreements contain no

provision regarding deductions. Ms He's evidence as to reasonableness of the deduction was unconvincing.

[51] There is insufficient evidence to reconstruct the alleged circumstances of the remaining deductions and the alleged sums to a bare threshold. Those claims are declined.

Was Mr Xu's resignation foreseeable?

[52] I have found a number of breaches of the employment agreement have been made out.

[53] Are any of these breaches sufficiently serious to have made Mr Xu's resignation foreseeable? A number of the breaches are historical. There is no evidence Mr Xu took steps to raise the breaches at the time they occurred. Ms He's conduct during 12 April was not reasonable and it is clear that conduct caused Mr Xu concern as detailed in the second resignation letter. However, it is not clear why Mr Xu did not raise his concerns directly with Ms He and ask her to address them particularly given the commission issue had been extant from November 2007 and given, on Mr Xu's evidence alone, Ms He had behaved in this way in the past and Mr Xu had taken no steps to raise his concerns. I find in the circumstances of this case resignation was not foreseeable.

Unjustified actions

[54] In the alternative Mr Xu says the following conduct amounts to personal grievances for unjustified actions causing disadvantage⁴:

- in December 2007, the unilateral withdrawal of Mr Xu's right to be paid commission for inbound sales;

⁴ Section 103(1)(b) Employment Relations Act 2000

- in February and March 2007 and from December 2007 to April 2008 the company failed to pay Mr Xu's earned commission when due;
- the failure to pay annual leave entitlement throughout Mr Xu's employment;
- Easter 2006 or 2007 failure to pay time and a half and a day in lieu as statutorily required;
- Unlawful deductions;
- 15 – 26 April 2008 preventing Mr Xu from earning commission; and
- Subjecting Mr Xu to bullying and unfair treatment.

[55] Such claims concern two aspects – an established breach of the employment agreement plus consequent disadvantage in employment. Again this test must be read with the statutory test for justifiability.

[56] As with any personal grievance, claims of unjustified disadvantage must be raised within 90-days of the action occurring or having come to the attention of the effected employee⁵. Mr Xu first raised a personal grievance in relation to these issues in mid-June 2008 when Mr Xu lodged a statement of problem with the Authority accompanied by a detailed letter setting out the grounds for his personal grievance.

[57] The following asserted grievances were raised outside the 90-day limit:

- December 2007, the unilateral withdrawal of Mr Xu's right to be paid commission for inbound sales;

⁵ Section 114 Employment Relations Act 2000

- February and March 2007 and December through February 2007 alleged failure to pay Mr Xu's earned commission when due; and
- Unlawful deductions.

[58] In the absence of leave to raise these grievances outside the 90-day time limit (as is the case here) the Authority does not have jurisdiction to consider them further.

[59] I have found the alleged bullying and unfair treatment does not amount to breaches of the employment agreement. I have also found the Easter public holiday claim was not made out.

[60] In relation to the annual leave entitlement there is no evidence Mr Xu applied to take annual leave during his employment. Accordingly, there are no grounds for a personal grievance.

[61] The issue of earned commission within the claim period remains before the Authority (refer paragraph 35 above).

[62] Mr Xu says Ms He prevented him from earning commission during his notice period 14 to 26 April 2008 by directing him to train other employees and that this amounts to an unjustified disadvantage. Ms He was entitled to direct Mr Xu's work within the reasonable parameters of his position description. There was no condition of employment requiring Sky Tour provide Mr Xu with duties in order to earn commission payments. The claim is declined.

Interest

[63] Mr Xu's claim for outstanding holiday pay entitlements and unlawful deduction of \$670 was successful. He has been unfairly deprived of monies due and owing under his employment agreement.

[64] Interest is to be calculated on those sums from due date until date of payment at today's 90-day bill rate plus 2%: schedule 2 clause 11 Employment Relations Act 2000.

Penalty

[65] I have made findings that Sky Tours failed to adequately maintain accurate holiday records and that this has disadvantaged Mr Xu's ability to accurately quantify his claims before the Authority. I also record Sky Tours unexplained failure to provide holiday records upon request of Mr Xu's counsel in a timely manner.

[67] A penalty is warranted which I set at \$500, half of which is to be paid to the Crown by way of the Authority and half to Mr Xu⁶.

[68] A penalty is also warranted for failure to maintain adequate wage and time⁷ records in relation to deductions⁸ from Mr Xu wages which I have found were unauthorized and for which no adequate explanation was given. I set a total penalty of \$250 to be paid directly to Mr Xu.

[69] The other penalty claims are declined – I accept a genuine dispute existed between the parties as to the appropriate application of the commission formula.

Costs

[70] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted to request a timetable be set for the filing of such within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority

⁶ Section 75 Holidays Act 2003

⁷ Section 130(4) Employment Relations Act 2000

⁸ Section 30 Wages Protection Act 1983