

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 288  
3123073

BETWEEN	LI (LEO) XU Applicant
AND	SKY STONE CONSULTING LIMITED First Respondent

Member of Authority:	Marija Urlich
Representatives:	Stephen Langton and Rebecca White, for the Applicant Simon Mitchell, for the Respondent
Investigation Meeting:	15 February and 30 March 2022
Submissions and information received:	At the investigation meeting, from the Applicant At the investigation meeting, from the Respondent
Determination:	30 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] From 16 March 2020 Li (Leo) Xu was employed by Sky Stone Consulting Limited (SSCL) in the position of financial manager. He is an accountant. When and how his employment ended is one of the issues to be determined by the Authority. He says he was unjustifiably constructively or actually dismissed or, in the alternative unjustifiably disadvantaged. He seeks a range of remedies including reinstatement, lost wages and benefits, compensatory damages, wage and holiday pay arrears, interest on arrears and costs. He denies any wrongdoing on his part and says his actions were at all times authorised and/or reasonable.

[2] SSCL denies Mr Xu was unjustifiably dismissed or unjustifiably disadvantaged. It says the COVID-19 lockdowns impacted on its work and required changes to the way its employees' performed their duties including Mr Xu. It says if Mr Xu establishes a personal grievance that factors to be taken into account in assessing any remedies include wage payments it made to Mr Xu until 13 December 2021 and his later discovered misconduct in providing information to a third party without its knowledge. SSCL says the claim has a sense of unreality.

### **The Authority's investigation**

[3] During the investigation meeting the Authority received evidence from Mr Xu, his wife Yanfei (Jennifer) Lian, Weicheng (Victor) Zou, a colleague of Mr Xu's and Xin (Shane) Zhou, a director and shareholder of SCCL. The Authority's investigation of this employment relationship problem 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. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

### **Issues**

[5] The issues identified for investigation and determination are:

- a) Was Mr Xu unjustifiably constructively dismissed or actually dismissed?
- b) In the alternative, was Mr Xu unjustifiably disadvantaged in his employment by unilateral reduction in working hours, being misled as to the range of employees to whom the reduction in hours applied and being placed in a position where it was impossible to perform his role?
- c) Is Mr Xu entitled to a consideration of remedies sought including:
  - i. Reinstatement?

- ii. Reimbursement of monies lost pursuant to section 123(1)(b) of the Act?
  - iii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Xu which contributed to the circumstances which gave rise to his grievance?
- e) Is either party entitled to an award of costs?

## **Background**

*October 2019 – early March 2020*

[6] SSCL is one of a number of companies in the wider Sky Stone property development business. There is no dispute SSCL is the entity which employed Mr Xu.

[7] Mr Xu first became involved with the Sky Stone group of companies (the Group) in mid-October 2019 when he entered a contractor arrangement to provide financial and tax consulting services. From October to December 2019 Mr Xu understood Mr Zhou to be the effective owner and controller of the Group. However, that changed when he was advised by Mr Zhou that a new manager (the new manager) would manage the Group starting after Chinese New Year 2020. The new manager started working officially at the Group in mid-February. Mr Xu's evidence is the new manager acted as the general manager of the Group but, as the new manager directed, he did not have an official title or official presence in the Group documentation.

[8] In early March 2020 Mr Xu was offered and accepted employment with SSCL. The parties' executed an individual employment agreement which records a start date of 16 March 2020. The employment agreement also includes a 'schedule 1' which records specific details of his employment including that Mr Xu was a full-time, permanent employee, with normal working hours of 40 per week, specified salary, that SSCL was his employer, the place of work was a specified address in central Auckland "and/or any other locations within Auckland" and that he reported to "the director (Xin Zhou) and/or any other person designated by the director. Mr Xu's employment

agreement also includes a position description for the role of 'Accountant Manager' and a description of duties.

*25 March 2020 – Level 4 lockdown*

[9] From this date Mr Xu worked from home and continued to do so into the Level 3 lockdown setting. SSCL required employees to continue to work at home during the Level 2 and Level 1 lockdowns.

*May 2020 – Mr Xu's hours of work and salary are reduced*

[10] On 19 May Mr Zhou telephoned Mr Xu and advised him that due to SSCL's financial circumstances all employees were required to work from home and that their hours of work and salary would be reduced by half. Mr Xu told Mr Zhou he did not agree to this reduction in respect of himself because he had the same amount of work to do to which Mr Zhou said it was fairer to apply the same reduction to all staff across the business and that when the business's financial position was better his hours of work and salary would return to normal.

[11] From 20 May Mr Xu's salary was reduced by half. He received his last full salary on 13 May 2020.

[12] From 20 May Mr Xu's salary was reduced by half. He received his last full salary on 13 May 2020.

[13] Notwithstanding Mr Zhou's direction that all employee's hours of work and salaries were to be reduced by half on 26 May, while reviewing outgoing SSCL payments in the ordinary course of his duties, Mr Xu was surprised to see three employees were still being paid for full time working hours. He queried this with one of the employees who said their full payments had been approved by the new manager. He did not raise this concern with Mr Zhou or the new manager.

[14] As he had advised Mr Zhou, Mr Xu was unable to reduce his working hours to 20 per week because of the demands of his role. His evidence was he continued to work much more than 20 hours per week which is accepted.

[15] Over this period Mr Xu raised a number of concerns with co-workers about the new manager's conduct in the business which he characterises as 'financial irregularities'.

*17 August 2020 – retrospective variation*

[16] On 17 August, SSCL's human resource manager contacted Mr Xu to advise the company had received legal advice and wanted all employees to retrospectively confirm their agreement to reduced working hours. A letter was then sent to Mr Xu under Mr Zhou's name referencing a purported discussion between them on 11 May and seeking his agreement to a reduction in working hours to 20 per week. It is not clear on the face of the letter that the agreement extended to a concomitant reduction in salary. The letter refers to future Government wage subsidies and "...you will be paid at least the full value of the relevant subsidy rate...". It also invited any questions to be directed to Mr Zhou or to confirm agreement by signing and returning it to him by 19 August.

[17] Mr Xu signed and returned the letter varying his employment agreement as the letter proposed. He said he felt he had no choice because his salary and hours had already been reduced.

*30 August 2020*

[18] On 30 August the new manager asked Mr Xu to meet him the following day at SSCL's offices. At the meeting the new manager asked Mr Xu to change back to a contractor arrangement and reduce his working hours to 15 per week because the business had financial issues. Mr Xu told the new manager he did not agree to this, that he could not complete his duties within the current 20 hours and if his working hours were further reduced he could not guarantee the quality of his work. There was further discussion and then, to Mr Xu's surprise the new manager said he was supported by "powerful forces in the background" and if he (Mr Xu) did not agree to the proposal there would be consequences for Mr Xu. Mr Xu said he felt threatened.

[19] On 2 September the new manager called Mr Xu and demanded he agree to move to a contractor role at \$50 per hour for 15 hours per week. To 'buy time' Mr Xu told the new manager he needed to get some advice and needed the details of the proposal which the new manager said would be provided.

[20] There then followed a series of discussions with the human resource manager who:

- later on 2 September contacted Mr Xu and told him he had to resign and his final day as an employee would be 1 October 2020;
- contacted him on 3 September and asked him again to change to a contractor from an employee;
- on 3 September sent him a form to complete titled “resignation application”;
- on 25 September called and asked if he had completed the form;
- later that day called him again and said he should work from the company premises for 4 hours per day, that he was to clock in and out of the premises and this was the new manager’s instruction; and
- that evening called Mr Xu again to discuss his return to work in the office.

[21] Mr Xu recorded these calls with the human resource manager. He said he did so because he felt threatened. The translated transcriptions of the calls have been provided to the Authority.

[22] On 25 September Mr Xu found his access to the work systems had been revoked. He contacted Mr Zhou and spoke with him about the situation. Mr Zhou said he was not clear what had happened between Mr Xu and the new manager and he (Mr Zhou) no longer had control of the company. Over the next week Mr Zhou suggested Mr Xu meet with the new manager which Mr Xu was reluctant to agree to because he felt threatened by the new manager and did not feel he was properly authorised to represent the company.

[23] At this time Mr Xu says Mr Zhou authorised him to continue his investigations into the new manager’s actions at SSCL. Mr Zhou denies he authorised Mr Xu to undertake any such investigation and did not authorise him to share any SSCL material with a third party. The transcriptions of the conversations Mr Xu recorded with Mr Zhou at this time have been provided to the Authority. The discussions are opaque and ambiguous.

[24] Mr Xu’s says on the basis of this authorisation he continued his investigations into his concerns about the new manager’s conduct within the business and that this led him to seek an introduction to a director and shareholder (the third party) of a corporate

entity which invested in a property development undertaken by the Group. This occurred in late September 2020. It is evident Mr Xu quickly formed a close association with this third party. Mr Xu filed an affidavit dated 10 December 2020 in support of a High Court application brought by the third-party's investing company against entities associated with or part of the Group. In the affidavit Mr Xu avers the investor asked him questions about the Group's structure and that he "...assisted him where I could with information and showed him [the Group] organisational chart." He also avers that he provided the investor with a document Mr Xu had prepared at the new manager's direction in March 2020. Mr Xu's wife incorporated a company in November 2020 for the purpose of assisting the third party to avoid paying GST on immigration advice he received. The shareholders of that company are a company Ms Xu's wife owns and a company the third party owns which is the entity which brought the High Court proceedings against the Group.

[25] On 4 October by social media message Mr Xu raised a personal grievance with Mr Zhou arising from his treatment by the company and his concern about being required to return to the office. The message included if SSCL wanted him to deal with the new manager he needed this in writing and confirmation that the new manager could legally work for SSCL. Mr Xu did not receive a response to raising his personal grievance.

[26] Mr Xu and Mr Zhou met on 14 October in a café to discuss the situation further in particular Mr Xu's concerns about the new manager's conduct within the business.

[27] On 28 October 2020 Mr Xu lodged an application in the Authority raising his claim of unjustified dismissal (constructive or actual) and the alternative claim of unjustified disadvantage. On 10 December 2020 SSCL filed a statement in reply denying Mr Xu had been dismissed (or unjustifiably disadvantaged in his employment) and that he remained on the payroll. SSCL continued to pay Mr Xu his usual pay, that is, half his salary, until 13 December 2021. Mr Zhou said the payments continued because it was unclear as to Mr Xu's employment status. Mr Xu said he understood the payments were a gift.

## Discussion

[28] Mr Xu says SSCL unjustifiably constructively dismissed him or actually dismissed him or, in the alternative, its actions unjustifiably disadvantaged him in his employment.

*Was Mr Xu dismissed?*

[29] Mr Xu was unable to perform most of his duties for SSCL from 25 September 2020 when his access to its systems was revoked. I am satisfied this occurred as part of steps SSCL were taking to secure Mr Xu's agreement to move from employment to a contracting arrangement despite Mr Xu's clear statements that he did not wish to become a contractor. There is little wonder given this action and the new manager's blatant threat of "powerful forces" that Mr Xu raised the personal grievance he did in the 4 October message. This however, was not a resignation, as would usually occur in a claim of unjustified constructive dismissal.

[30] I am satisfied the employment relationship remained on foot until 28 October 2020 when Mr Xu lodged a statement of problem in the Authority which made clear he believed he had been unjustifiably constructively dismissed. It was on this date that the option SSCL had left Mr Xu with – resign or be dismissed - crystallised.

(i) *Was Mr Xu unjustifiably constructively dismissed?*

[31] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.<sup>1</sup>

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<sup>1</sup>*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

[32] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow or, in this case that Mr Xu would leave his employment.<sup>2</sup>

(ii) *Did SSCL breach the terms of the employment agreement causing Mr Xu to leave his employment?*

[33] The actions SSCL took in attempting to move Mr Xu from an employee to a contractor breached the obligations owed to him under the parties' employment agreement to treat him fairly and reasonably. The proposal was not fairly put to him to consider. It was not fair or reasonable to then give him an option to accept the proposal having not provided details as he requested or resign. It was not fair or reasonable to raise with Mr Xu "unknown forces" which he reasonably apprehended as a threat to his wellbeing. It was not fair or reasonable to insist he return to work in the office when this suggestion could only reasonably be seen as a way to put further pressure on him to accede to the contractor proposal. It was not fair or reasonable to revoke his access to work systems which meant he was unable to perform most of his duties.

[34] These breaches were further compounded by SSCL's actions in failing to take reasonable steps to consider and respond to the serious concerns Mr Xu raised by way of personal grievance.

(iii) *If so, was reasonably foreseeable that Mr Xu would leave his employment given the nature of the breaches?*

[35] Yes. Mr Xu made clear in the 4 October personal grievance message that he considered he had been bullied and threatened. Notwithstanding, he proposed a way to engage with SSCL to return to work in the office, as indeed it had earlier insisted. While it is accepted he had some limited discussion with Mr Zhou about these issues and Mr Zhou's evidence is accepted that he took the issues seriously, there was insufficient evidence that SSCL engaged in a meaningful way – it did not respond to Mr Xu's personal grievance and there was scant evidence that any concrete steps had been taken to look into the serious issues he had raised. It is also clear that Mr Zhou's attention

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<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

was focussed on how the situation could be used to remedy his position within the company.

[36] Given this, Mr Xu had a reasonable basis to be concerned that SSCL did not intend to be bound by the terms of the parties' employment agreement. In the circumstances of the found breaches it was reasonably foreseeable that he would leave the employment relationship, which I have found he did by lodging a statement of problem in the Authority on 28 October 2020.

[37] Mr Xu was unjustifiably constructively dismissed.

### **Remedies in relation to the personal grievance**

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

#### *Reinstatement*

[39] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>3</sup> The remedy of reinstatement is to the employee's former position or one no less advantageous.<sup>4</sup> It must be awarded wherever practicable or reasonable to do so.<sup>5</sup>

[40] Mr Xu submits reinstatement to the payroll is reasonable and practicable given SSCL was content to continue to treat him as an employee until December 2021 continuing to make payments to him and include him on the list of employees when applying for the COVID-19 wage subsidy.

[41] SSCL says Mr Xu should not be reinstated because to do so is not practical or reasonable. It submits the claim of reinstatement appears to be for the purpose of increasing an award for compensation. Further, it submits given Mr Xu's criticism of SSCL and the allegations of impropriety he has made against it, reinstatement would be impossible.

[42] On the information before the Authority it appears the relationship has totally broken down. Mr Xu has raised serious issues about SSCL including with external

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<sup>3</sup> Section 123(1) Employment Relations Act 2000.

<sup>4</sup> Section 123(1)(a).

<sup>5</sup> Section 125(2) Employment Relations Act 2000.

agencies. In his evidence he said he viewed the wage payments a 'gifts' and was clear his view was there was no employment relationship. Having considered all the relevant circumstances Mr Xu's claim for reinstatement is unsuccessful.

#### *Reimbursement*

[43] Mr Xu seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim is for the period until the notional termination date at his full salary rate set off from the payments he received.

[44] After reviewing the evidence of loss and Mr Xu's attempts to secure employment, the Authority is satisfied he is entitled to an award of five months lost remuneration to be calculated from 29 October 2020 at the salary rate agreed in the employment agreement less the payments he has received from SSCL in this period.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[45] Mr Xu said his dismissal and the circumstances leading up to it was an extremely difficult time in his life. He has experienced anxiety and sleeplessness for which he has been prescribed medication. His family relationships have suffered and he is worried about his future and his ability to provide for his family. Mr Xu gave evidence that the impact of the loss of his job has meant he has had to ask for help to support his family and this has caused him embarrassment and humiliation because he never expected to be in that position. He also said he has been fearful for the safety of his family consequent to the threat made to him during his employment and having received an anonymous text message containing a further threat some months after his employment ended. Ms Lian's evidence set out the negative emotional and mental effect of the employment situation on her husband and the family.

[46] As part of this claim for compensation Mr Xu says the damage to his career is evidenced by having to lodge a claim against SSCL, the amount of time he has been out of work and the stigma faced as a job applicant who is out of work and involved in Authority proceedings. He says his complaints about SSCL to external agencies and his involvement with the third-party litigation were driven by his professional obligations in the face of alleged wrongdoing. It is wholly accepted Mr Xu is sincere in his concerns about the alleged wrongdoing he observed at SSCL and he has acted as he

thought best. However, none of the allegations he has raised are independently supported by for example a finding by one of the agencies with which the allegations were raised and under questioning before the Authority, it seems there were further options he could reasonably have taken to test the conclusions he had reached. It is not possible for the Authority to make further findings regarding his concerns in such circumstances. It follows the loss benefit claim for reimbursement of costs associated with the complaints to external agencies does not succeed.

[47] It is accepted Mr Xu has found it difficult to find another job and that proceedings before the Authority in which he is involved may have caused one recruitment agency not to engage with him. That is an extraordinary situation and Mr Xu may well consider raising a concern with the professional body for recruitment agents or other appropriate body.

[48] The Authority is satisfied Mr Xu has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation.<sup>6</sup> Having regard to the particular circumstances of this case, including the serious matter of the threat made to Mr Xu during his employment, I consider that an award of \$25,000 under section 123(1)(c)(i) is appropriate.<sup>7</sup>

### *Contribution*

[49] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[50] SSCL says Mr Xu's actions in providing documents to a third party are relevant matters to the assessment of compensation because they amount to misconduct and were discovered after Mr Xu's dismissal occurred. SSCL relies on *Salt v Fell* [2008] NZCA 128.

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<sup>6</sup> *Richora Group Limited v Cheng* [2018] NZEmpC 113.

<sup>7</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

[51] The period Mr Xu provided SSCL documents to a third party, as he has averred, occurred in the opaque period after SSCL pressured him to alter his employment status to contractor, he raised a personal grievance which included concerns about threats and bullying and he engaged in detailed discussions with Mr Zhou about the new manager's activities in the business from which the new manager had displaced Mr Zhou. This situation was ambiguous and highly distressing for Mr Xu. It is not a situation where a finding of misconduct within the Group can reasonably be made.

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

### **Wages arrears**

#### *Are arrears of wages due and owing?*

[53] Mr Xu agreed to reduce his hours of work. It is not clear on the face of the variation agreement that he agreed to reduce his salary as well. SSCL seeks to rely on the cover letter to the email to the variation agreement, the general proposition that hours would not be reduced without a concomitant wage reduction and Mr Xu's lack of complaint about the reduction in his wages.

[54] While it is accepted SSCL suffered financial difficulties over the COVID-19 period and this led it to seek to reduce its overheads including wages it was incumbent on it to ensure any variation to terms of employment were fairly reached with effected employees and expressed accurately. On the information before the Authority this did not occur and there is insufficient information before the Authority that Mr Xu agreed to vary his terms and conditions of employment to reduce his salary by half. He is entitled to be paid his salary rate as set out in his employment agreement at 16 March 2020.

[55] SSCL is ordered to pay Mr Xu wage arrears to the salary rate provided in the parties' employment agreement dated 16 March 2020 for the period 26 May 2020 to 28 October 2020.

### *Holiday pay*

[56] As an employee Mr Xu was entitled to holiday pay on wages earned.<sup>8</sup> He has not received any holiday pay.

[57] Mr Xu is entitled to be paid holiday pay on all wage arrears and the wages paid after the employment relationship ended from 29 October 2020 until 13 December 2021 calculated at eight per cent of total gross earnings.

[58] SSCL is ordered to calculate and pay Mr Xu holiday pay entitlements within 14 days of the date of this determination.

### *Interest*

[59] Mr Xu is entitled to an award of interest on the wage arrears awarded including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[60] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[61] SSCL is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:<sup>9</sup>

- (i) Interest on wage arrears and holiday pay due at 28 October 2020 from that date until the date payment is made in full; and
- (ii) Interest on the balance of holiday pay accrued between 29 October 2020 and 13 December 2021 calculated from 13 December 2021 until the date payment is made in full.

[62] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

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<sup>8</sup> Holidays Act 2003, s 27.

<sup>9</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

## Summary of orders

[63] The Authority orders as follows:

Within 14 days of the date of determination Sky Stone Consulting Limited is ordered to pay Li (Leo) Xu the following sums:

- (i) \$25,000 under s 123(1)(c)(i);
- (ii) Five months lost earnings under s 123(1)(b) and s 128;
- (iii) to calculate and pay wage and holiday pay arrears;
- (iv) to calculate and pay interest on total arrears.

[64] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and a contribution to costs is sought, Mr Xu should file and serve a costs memorandum within 14 days of the date of this determination. SSCL should file any reply memorandum within 7 days of receipt of such.

Marija Urlich  
Member of the Employment Relations Authority