

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Guoping Zhang (Applicant)
AND Anim8 Production Limited (Respondent)
REPRESENTATIVES Guoping Zhang in person
No appearance for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 2 August 2005
DATE OF DETERMINATION 2 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gouping Zhang is a recent immigrant to our country. He says he was employed by Anim8 Productions Limited ("Anim8) as a senior storyboard artist. Mr Zhang's employment was to commence on 11 October 2004. Mr Zhang says that on his first day of employment he was sent home and has not been allowed to complete any duties for the respondent. Mr Zhang says he has been dismissed and that the dismissal was unjustified.

[2] Anim8 says in response, that discussions about employment took place with Mr Zhang in September 2004 but that due to missing out on a large contract no work became available. Anim8 says that the company was left in a financially difficult position and have had to lay off a large number of staff.

[3] The issues for determination are:

- Did the parties enter into an employment relationship?
- Was there a dismissal?
- If yes, is the dismissal justified?

Procedural history

[4] This matter was filed in the Authority on 2 December 2004. A statement in reply was filed by Mr Grant Bensley in his capacity as Studio Manager of the respondent on 20 December 2005. The parties indicated that mediation had not been attempted and therefore, on 23 December 2004 the parties were directed to mediation which was to be held before 31 January 2005.

[5] Following 31 January 2005, the Authority was unable to make telephone contact with the respondent to arrange a conference call with the parties. On 25 February 2005, the matter was set down for an investigation meeting to be held on 5 May 2005. This date was vacated after the Authority had documents returned from the registered office of the respondent. The applicant was requested to undertake personal service on the respondent.

[6] By 5 July 2005 the Authority had been unsuccessful in serving a Notice of Meeting on the respondent using the usual methods of service and the applicant had also been unsuccessful. Given that, I directed the Authority Support Officer to arrange for service to be undertaken by Baycorp Document Services.

[7] As well, on Wednesday 6 July 2005, an email was sent to Mr James Chong who is based in the Singapore office of Anim8. This email address was provided by Mr Bensley as being a contact for the respondent. That email was returned with the message "mailbox unavailable".

[8] On 12 July 2005, at 12.30pm, Baycorp Document Services served the Notice of Investigation meeting on the registered office of Anim-8 Productions Limited. In a sworn affidavit Mr Bains of Baycorp Document Services states that the premises were empty but the front door was open and the notice was affixed to an internal door.

[9] I am satisfied the respondent has been served with notification of the investigation meeting.

[10] The respondent failed to appear at the investigation meeting. No reason for its failure to attend has been provided to the Authority. I have therefore heard and determined the matter in the respondent's absence pursuant to Schedule 2 of the Employment Relations Act 2000.

Did the parties enter into an employment relationship?

[11] In the statement in reply Mr Bensley, on behalf of the company, claims that Mr Zhang was not employed by Anim8. Mr Zhang has produced a signed Employment Agreement setting out the terms and conditions of employment which would be applicable to Mr Zhang which includes a job

description. The stated parties to the agreement are Guoping Zhang and Anim8 Productions Limited.

[12] The agreement is dated 14 September 2004 and states that employment will commence on 11 October 2004. The agreement provides for Mr Zhang to work for 40 hours per week and to receive wages of \$1,000 gross per week.

[13] I am satisfied an employment relationship existed between Mr Zhang and Anim8 Production Limited.

Was there a dismissal?

[14] Mr Zhang told the Authority that when he signed the agreement Mr Bensley had told him the company was thinking of setting up a business in China. Mr Bensley asked Mr Zhang to provide information on matters relating to the costs of labour and materials, and the system for hiring staff in China. Mr Zhang put this information together from his home before 11 October 2004.

[15] Mr Zhang arrived at work as agreed on 11 October. Mr Bensley told Mr Zhang the project was not ready to be started and he should go home and have a holiday. Mr Bensley undertook to let Mr Zhang know when the project would start.

[16] Mr Zhang did as instructed. For the period 11 October to 2 December 2004 Mr Zhang contacted Mr Bensley once or twice a week enquiring about his start date for the project. At no time did Mr Bensley advise Mr Zhang that he would not be starting work for Anim8.

[17] During this time Mr Zhang received no pay from Anim8.

I find that Mr Zhang was employed and then, through the conduct of not providing work for him, Mr Zhang was dismissed by Anim8 Production Limited.

Is the dismissal justified?

[18] The Authority is required to test the justification of the dismissal pursuant to section 103A, of the Employment Relations Act 2000. Section 103A states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[19] Therefore the key issue is whether, in all the circumstances the actions of Anim8 and how Anim8 acted was what a fair and reasonable employer would have done. The emphasis provided by s.103A is on the employer.

[20] Anim8 knew the contract they had employed Mr Zhang to complete was not going ahead. The company took no steps to alert Mr Zhang that this was the case. When Mr Zhang arrived ready and willing to work on 11 October 2004 Mr Bensley sent him home and allowed him, over a period of 2 months, to continue to believe there was a job available for him. A fair and reasonable employer in the circumstances would have met with Mr Zhang and discussed openly the situation the company found itself in and tried to resolve the matter as early as the first week of the relationship.

I find that the dismissal was unjustified in all the circumstances.

Remedies

Lost wages

[21] Mr Zhang claims lost wages for a period of 2 months. I am satisfied that the lost wages came about as a direct result of the unjustified dismissal by Anim8.

Anim8 Production Limited is order to pay to Mr Zhang the amount of \$8,000 gross within 28 days of the date of this determination pursuant to section 123(b) of the Employment Relations Act 2000.

Compensation

[22] Mr Zhang was a new immigrant to New Zealand. He and his wife gave compelling evidence as to the effect the treatment Mr Zhang experienced at the hands of Anim8 had on him. As a result of the respondent's failure to pay any wages to Mr Zhang, combined with its failure to alert him to the possibility that his job was no longer available, Mr Zhang was unable to meet his financial commitments. A direct consequence of this has been a downgrading of Mr Zhang's credit rating in New Zealand. This is not something that will be easily overcome. This has been a source of considerable upset and distress to Mr Zhang and his wife who wish to establish their life in New Zealand, which includes a strong desire to own their own home.

Anim8 Production Limited is ordered to pay to Mr Zhang the amount of \$5,000 gross within 28 days of the date of this determination pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Costs

Anim8 Production Limited is further ordered to pay to Mr Zhang the sum of \$70, being the fee for filing this problem in the Authority.

Vicki Campbell
Member of Employment Relations Authority