

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 531

3173083

BETWEEN

CHANGYONG ZHANG
Applicant

AND

JRL CULTURE MEDIA
LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: May Moncur, advocate for the Applicant
Amy de-la Cruz, advocate for the Respondent

Investigation Meeting: 26 & 27 April 2023 at Auckland
15 June by AVL

Submissions and other: 15 June 2023 from Respondent.
material received:

Determination: 15 September 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Changyong Zhang is a professionally trained news presenter and radio host who previously worked for various TV and Radio stations in China before coming to New Zealand. Mr Zhang began working for FM 90.6 Chinese Radio (FM 90.6) which is owned by JRL Culture Media Limited (JRL) in early 2019 as a radio host. His employment with JRL ceased on 4 May 2022.

[2] Mr Zhang claims that:

- (a) he was unjustifiably disadvantaged during his employment as he was subject to ongoing workplace bullying and discrimination.
- (b) he was unjustifiably dismissed by JRL.
- (c) he is owed wage arrears by JRL.

[3] Mr Zhang seeks compensation for his personal grievances, lost remuneration arising from his unjustified dismissal, wage arrears and reimbursement of legal costs. Mr Zhang also seeks penalties against JRL for various breaches of good faith.

[4] JRL does not agree that Mr Zhang was unjustifiably disadvantaged, is owed wage arrears, or was unjustifiably dismissed. JRL says Mr Zhang resigned from his position.

The Authority's Investigation

[5] I investigated Mr Zhang's claims by receiving written statements and other documents from Mr Zhang. For JRL I received written statements and supporting documents from Ms Stella Xian, a volunteer at FM 90.6 and Ms Yapping Feng, a director of JRL. At the investigation meeting on 1 May 2023, I heard evidence from witnesses who answered questions asked by myself and the parties' representatives.

[6] 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. I have not recorded all of the evidence and submissions received. In determining this matter, I have carefully considered all the material, including all the evidence by the parties and their submissions.

Issues

[7] The issues for determination are:

- (a) Whether Mr Zhang has personal grievances for unjustifiable disadvantage by JRL management discriminating against him and /or bullying him?
- (b) Whether Mr Zhang has a personal grievance for unjustifiable constructive dismissal?

- (c) If Mr Zhang has a personal grievance or grievances, what remedies should be awarded, considering:
 - i. reimbursement of lost wages under s123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate his loss); and
 - ii. compensation under s123(1)(c)(i) of the Act.
- (d) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Mr McCollum that contributed to the situation giving rise to his grievance.
- (e) Whether Mr Zhang is owed wage arrears.
- (f) If a breach of good faith is established are penalties warranted.
- (g) Should either party contribute the cost of representation of the other party.

Background

[8] JRL is a media company based in Auckland which operates FM 90.6. It broadcasts 24 hours a day, 7 days a week serving the New Zealand Chinese community with news, current affairs, and music. JRL took over the operation of the radio station in August 2020.

[9] Mr Zhang began working for FM 90.6 in early 2019 as a Radio Host. He was working as a “contractor” when JRL took over running FM 90.6 in early August 2019. On 10 August 2020 Mr Zhang signed a new agreement with JRL and continued working as a radio host for FM 90.6 until resigning on 4 May 2022. Although the agreement was headed up “individual contractor’s agreement”, JRL accepts that Mr Zhang was an employee of JRL for the period of his employment and his employment status is not an issue. The agreement is referred to as an individual employment agreement (IEA).

[10] Initially Mr Zhang worked part-time hours on an evening show, for 2.5 hours per day from 4 pm to 6:30 pm, Monday to Friday, totalling 12.5 hours per week. The IEA specified a flat rate of \$70 per show slot (\$350 per week), which was converted to \$28 per hour for 12.5 hours in the payroll system.

[11] In 2021 the morning radio host left FM 90.6 and Mr Zhang took over the morning radio host slot. From Monday, 27 September 2021, to Friday 4 March 2022, Mr Zhang worked both morning (2.5 hours) and evening show slots (2.5 hours) totalling 25 hour a week.

Unjustifiable action causing disadvantage.

[12] Section 103(1)(b) of the Act, states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[13] Mr Zhang claims he was unjustifiably disadvantaged during his employment as Ms Feng exhibited several instances of unjustifiable behaviour. He alleged Ms Feng made discriminatory comments towards him on the basis of his sexual orientation. Mr Zhang alleged in addition to the discrimination there were other insensitive behaviours that he had to put up with. He alleged Ms Feng repeatedly belittled, scolded, and reprimanded him creating a negative work environment and undermining his confidence and job satisfaction. Mr Zhang states this was a breach of good faith which affected his employment and was detrimental to his mental and emotional well-being. He alleged that there was an ongoing failure to provide a safe and respectful working environment for Mr Zhang which was a breach of the good faith obligation.

[14] I accept that Mr Zhang, based on his experience, might have inferred some comments or actions may have been disparaging to him. However, when questioned regarding the alleged discrimination and bullying behaviour he was unable to recall specific details of these incidents, or when they occurred over the past two years of his employment. Other witnesses could not recall any incidents of such behaviour.

[15] There was also no evidence that Mr Zhang had raised the issues of alleged bullying or discrimination with Ms Feng, or station Manager Ms Irene Du. Mr Zhang said he raised the issues with Ms Xian who was a volunteer and not a member of the JRL management team. As Mr Zhang did not raise the issues with JRL management, JRL was not given an opportunity to investigate any alleged issues or take steps to address the alleged behaviour.

[16] Ms Feng strongly denied that she or Ms Du ever discriminated against Mr Zhang, or bullied him. Ms Feng presented some transcripts of WeChat conversations which could be described as collegial discussions.

[17] I find Mr Zhang was not disadvantaged by JRL's unjustifiable actions, in regard to the allegations of discrimination against, and bullying of Mr Zhang. Mr Zhang's personal grievance for unjustified disadvantage is not made out and is unsuccessful.

[18] Whilst making submissions Mr Zhang raised a further ground of disadvantage in that JRL's decision to ask Mr Zhang to work both the morning and afternoon shifts without any additional compensation, was an unreasonable and unfair action, which disadvantaged Mr Zhang.

[19] The late raising of this issue is outside of the 90-day limit for raising a personal grievance and cannot proceed. The issue of working both morning and afternoon shifts, without receiving additional compensation, will be dealt with under the heading of wage arrears.¹

Unjustifiable dismissal

[20] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[21] In this case then the question is, was Mr Zhang dismissed or did he resign?

[22] If Mr Zhang resigned then the next issue is, was the resignation such that it should be treated as a dismissal; known as a constructive dismissal?

[23] If Mr Zhang was dismissed, either actually or constructively, then the third issue is, was the dismissal justified?

Was Mr Zhang unjustifiably dismissed, or did he resign?

[24] On Wednesday, 4 May 2022 Mr Zhang was concerned regarding the circumstances surrounding a friend and colleague leaving the radio station. Mr Zhang texted Ms Feng's daughter Ms Du via WeChat regarding the for the departure of a colleague and to find out what had happened. He then contacted Ms Xian asking the same questions. Mr Zhang said Ms Xian told him that she had just had a conversation with Ms Feng who was unhappy with Mr Zhang, as Ms Feng blamed Mr Zhang. Mr Zhang was upset that he had been wrongly blamed for his colleague's resignation.

¹ Employment Relations Act 2000, s114.

[25] Mr Zhang went looking for Ms Feng to confront her about the alleged comments she had made about him. He could not find Ms Feng so went back to the recording room and phoned Ms Feng's daughter Ms Du and asked her why her mother made such an allegation and comment about him.

[26] Ms Feng was allegedly standing outside the recording room at the time and overheard the conversation. Mr Zhang said Ms Feng began to yell at him saying "Do you want to quit?" She repeated this question twice while shouting at him.

[27] Mr Zhang said at this stage he was shaking and said to Ms Du over the phone, "Your mum's asking me whether I want to work here anymore. I want to tell you I may not." At this point Ms Feng came into the room and attempted to grab Mr Zhang's phone off him. Mr Zhang was sitting there and raised the phone beyond her reach.

[28] Ms Feng stated she was not shouting, however stated the conversation could be described as being robust. Ms. Feng admitted to accidentally touching Mr Zhang's hand while attempting to retrieve the phone from him,

[29] It is unclear what happened next, but in a recording of the incident played at the investigation meeting both Ms Feng and Mr Zhang can be heard shouting and some form of physical altercation took place, with Mr Zhang complaining Ms Feng was pinching him and a chair can be heard crashing to the ground.

[30] Both Mr Zhang and Ms Feng were in highly agitated states, and Mr Zhang was clearly traumatised by the events. After hearing the recording and reading the transcript of the meeting I prefer Mr Zhang's version of events.

[31] Shortly after the incident Ms Du came to the station and the three of them had a meeting. Mr Zhang said he was still in shock at the time and spoke in a very low voice during the meeting. Mr Zhang said he remembers one comment Ms Feng made that he considered a very derogatory remark from the Chinese point of view. However, he did accept that during the meeting with Ms Du he stated that "the misunderstanding was resolved".

[32] Ms Feng and Ms Du's view was that the parties had had a robust discussion regarding the former colleague's departure but had been able to resolve their differences.

[33] Mr Zhang said he left the premises feeling very sick and troubled. When he got home, he felt overwhelmed with sadness and despair. He decided to resign from the job and sent in his resignation the same day via WeChat. He said the symptoms were severe, to the extent that he had physical as well as mental pain. There was some medical evidence to support his claim.

[34] In the circumstances I do not find that Ms Feng's actions amounted to an actual dismissal of Mr Zhang; there was no sending away by her.² My conclusion is, therefore that Mr Zhang resigned.

Was Mr Zhang's resignation a dismissal in any event?

[35] In some circumstances a resignation may amount to a dismissal.³

[36] The Court of Appeal has listed three non-exhaustive situations where a constructive dismissal may occur.⁴

[37] One of these is where a breach of duty by the employer results in an employee resigning. That is the ground on which Mr Zhang relies. Mr Zhang said he was forced to resign due to Ms Feng's grossly disrespectful conduct, as the workplace became intolerable after the incident on 4 May 2022. He claimed that the trust and confidence between himself and JRL was destroyed, he felt the workplace was unsafe and it was not possible for him to continue working at FM90.6.

[38] The correct approach the Court of Appeal has stated in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter, all the circumstances of the resignation must be examined and not simply the communication of the resignation. I need to assess whether the breach of duty, if one is found by the employer, and whether there is a causal link between the employer's conduct and the tendering of the resignation, and the possibility of resignation in response to that conduct should be foreseeable.

[39] I find that JRL has breached its duty of good faith to Mr Zhang, and this has resulted in him resigning. I find it was entirely foreseeable in the circumstances of this case that the breach

² *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

³ *Wellington Clerical Union v Greenwich* (Court of Appeal) [1983] ACJ 965 at 975

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

of good faith would cause Mr Zhang would leave his employment. I find it likely that Mr Zhang left the workplace distressed after Ms Feng spoke and behaved aggressively at the meeting on 4 May 2022, shouting at Mr Zhang and physically handling him. Mr Zhang was left traumatised by the incident. Mr Zhang said he was in a state of shock over what had happened. It was entirely foreseeable that he would not put up with this course of conduct or could feel safe returning to the workplace.

[40] My conclusion is therefore that whilst Mr Zhang resigned this is a dismissal by JRL.

Was Mr Zhang's dismissal justified?

[41] The final step in Mr Zhang's unjustified dismissal claim is to establish of the dismissal by JRL was justified.

[42] Given that the dismissal arises out of a breach of good faith and JRL did not follow any sort of process leading up to the dismissal, JRL actions cannot be justified.

Conclusion on unjustifiable dismissal

[43] Mr Zhang was unjustifiably dismissed by JRL.

Remedies

[44] As Mr Zhang has been successful with his unjustified constructive dismissal personal grievance, I will turn to consider what remedies he is entitled to.

Reimbursement of Lost Wages

[45] Mr Zhang seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal. Mr Zhang was unemployed for a period of time, despite reasonable attempts to find employment. In the circumstances it is reasonable that Mr Zhang be paid 3 months' salary as reimbursement of wages, being (12 x \$700) \$8,400 gross and holiday pay of \$672 gross.⁵

Compensation for humiliation, loss of dignity and injury to feelings

⁵ Employment Relations Act, s 128(3).

[46] Mr Zhang gave evidence about the effects the dismissal had on him. He stated the dismissal caused significant stress, both physical and mental. Mr Zhang was left traumatised by the incident and said he was in a state of shock over what had happened. He said he found it hard to get over how he had been treated and it had damaged his confidence. The incident triggered his depression, which required him to take medication. Mr Zhang gave evidence of the difficulty of finding employment in his chosen profession and his attempt to mitigate his losses. I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$20,000.00. JRL is ordered to pay to Mr Zhang compensation of \$20,000.00 gross.

Contribution

[47] As I have awarded compensation to Mr Zhang, I must now consider whether Mr Zhang contributed to the situation that gave rise to his grievances.

[48] Section 124 of the Act requires blameworthy conduct that has been established to the required standard of proof. Mr Zhang admitted being upset and going looking for Ms Feng to confront her over what she had allegedly said about him. There was a heated exchange at the 4 May 2022 meeting in which he shouted at Ms Feng. Mr Zhang's unprofessional behaviour at the meeting was blameworthy conduct that contributed to the situation that gave rise to his personal grievance. His conduct therefore required a deduction to be made from the compensation he would otherwise have been awarded.

[49] I consider that a 10 percent reduction to the award of compensation is appropriate in the circumstances. Accordingly, Mr Zhang's compensation for unjustified dismissal is reduced from \$20,000 to \$18,000 to reflect contribution.⁶

Wage arrears

Recovery of contractual entitlement

[50] Mr Zhang was not paid the correct hours during his employment; Mr Zhang should have been paid \$28.00 per hour for the hours he worked weekly. From Monday, 27 September

⁶ Employment Relations Act, s 124.

2021, to Friday 12 March 2022, Mr Zhang worked both morning (2.5 hours) and evening show slots (2.5 hours) due to the departure of the morning show host.

[51] Mr Zhang is entitled to recover the contractual rate of \$28.00 an hour for the hours he worked from 9 September 2021 to 12 April 2022. This is to include the month notice period of his termination under the IEA.

[52] The parties' representatives are to consult with each other to calculate the amount Mr Zhang can recover. In the event that they cannot agree leave is granted after 14 days to return to the Authority to calculate the amount. The failure to pay Mr Zhang correctly will affect Mr Zhang's holiday pay entitlement and this must be taken into account when calculating the gross amount.

Claim to recover wages from Ms Feng

[53] Mr Zhang has sought leave to bring a claim that wages should be able to be recovered from Ms Feng as being a person who "directly or indirectly, knowingly concerned in, or party to, the breach" pursuant to s142W (1)(c) of the Act. Ms Feng was not a named respondent in the proceedings and this claim was not included in the statement of problem lodged. I do not in fairness allow it to be raised at this late stage. Leave is declined.

Interest

[54] Mr Zhang can recover interest on his contractual entitlement as set out in paragraphs [45] and [51] above, from the date of dismissal, being 4 May 2022, until the date of payment.⁷ The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by JRL using the Civil Debt Interest Calculator.⁸

Penalties

[55] In his statement of problem lodged on 19 May 2022 Mr Zhang claimed a penalty against JRL for a breach of good faith. At paragraph [39] I found that JRL had breached its duty of good faith in relation to the incident on 4 May 2022. When assessing a penalty is appropriate to take into account the principles governing the imposition of a penalty.⁹ However having

⁷ Holidays Act, s84.

⁸ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

⁹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson and Ford* [2018] NZEmpC 132.

regard to s 133A of the Act, awarding a penalty would be disproportionate in my view. It suffices to record that JRL had the good faith obligations set out in s 4 of the Act which requires all parties to an employment relationship to deal with each other in good faith.

[56] The purpose of penalties is to deter, not to compensate. However, the award I have granted for compensation is sufficient in all the circumstances.

[57] For these reasons I decline to exercise my discretion to impose penalties for the breach of good faith.

[58] During submissions a further claim for a penalty was made for breaches of the Minimum Wage Act 1983. This claim was not included in the statement of problem lodged, and I do not in fairness allow it to be raised at this late stage.¹⁰

Summary of orders

[59] Mr Zhang was unjustifiably constructively dismissed for which remedies have been awarded. His claims for wage arrears have been upheld. I make the following orders:

- (a) Within 28 days of the this of determination JRL is ordered to pay Mr Zhang the following sum:
 - (i) Reimbursement of lost wages being 3 months' salary being \$8,400 and holiday pay of \$672; and¹¹
 - (ii) Compensation for humiliation, loss of dignity and injury to feelings of \$18,000; and¹²
 - (iii) The amount of arrears agreed by the parties' (noting that leave is granted to return to the Authority after 14 days to calculate the amount if the parties cannot agree) to Mr Zhang; and
- (b) Within 28 days of the date of determination JRL is to calculate and pay Mr Zhang interest as awarded in paragraph [54] above.

¹⁰ Employment Relations Act, s 135(5).

¹¹ Employment Relations Act, ss 123(1)(b) and 128.

¹² Employment Relations Act, ss 123(1)(c).

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Zhang may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum JRL would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[61] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.¹³

Andrew Gane

Member of the Employment Relations Authority

¹³For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.

