

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 121/09  
5138674

BETWEEN                      QUI ZHANG  
   Applicant

AND                              SCENIC CIRCLE HOTELS  
   LIMITED  
   Respondent

Member of Authority:      Philip Cheyne

Representatives:              Tim Oldfield, counsel for the Applicant  
   Mike Hodges, advocate for the Respondent

Investigation meeting:      5 May 2009 at Christchurch

Determination:                4 August 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]      Qui Zhang worked for Scenic Circle Hotels at the Cotswold Hotel from March 2006 until January 2009 when she was summarily dismissed for serious misconduct. Ms Zhang says that she was unjustifiably dismissed but Scenic Circle says that M Zhang was justifiably dismissed following a disciplinary investigation into her changing rosters to give herself leave when her request for that leave had been declined.

[2]      To resolve Ms Zhang's personal grievance claim, I must explain what happened with Ms Zhang's leave request and the ensuing disciplinary investigation before applying the statutory test for justification. First it is helpful to briefly set out relevant terms of Ms Zhang's employment.

**Terms of employment**

[3] Ms Zhang worked as a night auditor but also did some receptionist shifts. When first employed Ms Zhang agreed to an individual employment agreement but she later joined the Service and Food Workers Union. From that time her terms of employment should have been as per the collective agreement and any other individually agreed but not inconsistent terms.

[4] At the relevant time Ms Zhang's actual days of work were in accordance with a roster. There is a *Staff Information Book* that says:

*Rosters are produced one week in advance and are available from your Manager .... Requests for changes will be accommodated if business and operations permit. If you wish to swap a rostered shift with someone else, you must inform your Manager or Supervisor who must approve the swap. ...*

[5] The *Staff Information Book* also says:

*... a full time employee shall be entitled to four weeks annual leave per annum after the completion of the first year of service. The timing of leave shall be by mutual agreement with your manager.*

[6] The *Staff Information Book* contains provisions about misconduct and dismissal. It says:

*SUMMARY DISMISSAL (INSTANT) May be appropriate in any one of the following situations (for example but not limited to): ...Falsification of company records. ...Other misconduct deemed to be of a serious nature.*

[7] At the time of the alleged misconduct and the dismissal Scenic Circle knew that Ms Zhang was a union member but the company did not appreciate that it had to treat her as bound by the collective employment agreement that contained a disciplinary process set out as *Schedule 2*. As does the *Staff Information Book* the collective agreement permitted summary dismissal for *Falsification of company records* and *Other misconduct deemed to be of a serious nature*. In addition, it listed factors the employer had to consider as part of disciplinary action and said *...the objective of discipline is always to return the employee to an acceptable level of behaviour or work performance. Dismissals are a last resort.*

### **The leave requests**

[8] Ms Zhang wanted leave from 24 January until 3 February 2009. At the time she was entitled to more than that in alternative holidays and she also had a significant amount of untaken annual holidays. Ms Zhang filled in a request form and left it for her manager on or about 25 October 2008. She also made a note in a leave book. On the form Ms Zhang circled *Lieu* and *Annual* and wrote *Please take lieu days first. Lieu days* is widely understood to mean alternative holidays under the Holidays Act 2003. Ms Zhang heard nothing nor did she chase up a response to her leave request but on 24 December 2008 the request form was left for her by the Cotswold's front office manager Andrew Barr. He had written on the form *UNABLE TO CONFRIM LEAVE AS OTHER STAFF ALREADY HAVE LEAVE APPROVED*. Mr Barr told me that the reasons for the delayed response were that he was waiting until the leave situation of another employee crystallized and the form was *sitting there in a pile of papers waiting to be actioned*. I do not accept there was any proper reason for the extraordinary delay in responding to Ms Zhang's leave request.

[9] Leave at the time requested was very important for Ms Zhang. It was Chinese New Year and family and/or friends were coming from overseas to visit. When Mr Barr returned to work on 29 December Ms Zhang asked him to reconsider her request and explained to him the reasons just mentioned. Mr Barr said he would reconsider the leave request and Ms Zhang returned the request form to him. In his statement of evidence Mr Barr says that he told Ms Zhang that he would try and do his best to work some time off and get back to her if it was at all possible. The last part adds something of a gloss to what was said at the time. Mr Barr said he would reconsider, a point that he accepted when questioned. Implicit in that is the notion that he would advise Ms Zhang of the result of his reconsideration. However Mr Barr did not revert to Ms Zhang. He then went on leave for a time.

[10] The roster is a word processed document. Once finalised for a particular period by the relevant manger it is printed and displayed. On 5 January 2009 Ms Zhang worked as a receptionist alongside Dallas Hema as duty manager. Ms Hema noticed that Ms Zhang was editing the roster on the computer. She asked Ms Zhang what she was doing and was told *I am putting in my annual leave so Andrew doesn't forget*. Ms Zhang's evidence is that she was told *OK, fair enough* but Ms Hema's evidence is that she told her not to change the roster. I prefer Ms Hema's evidence, it

being unlikely that she would have approved a change that was not within the scope of her responsibilities.

[11] Andrew Rhoades is the general manager of the Cotswold Hotel. There was a brief discussion between Ms Zhang and him around 7.00 am on 15 January as Ms Zhang finished her night audit shift. Sometime before then the roster for the week starting Monday 19 January and ending Sunday 25 January 2009 had been displayed and Ms Zhang was shown as on annual leave for the last day of that roster period. Ms Zhang's evidence which I accept is that she made a comment to Mr Rhoades at the time about her looking forward to her holiday and the Chinese New Year. Mr Rhoades also said at the time that he was going to do the following week's roster later that day. Mr Rhoades in his evidence accepted that it was *distinctly possible* that these things had been said although he did not specifically remember. Mr Rhoades did not say anything to Ms Zhang about the outcome of the promised reconsideration, a task which Mr Barr had left for Mr Rhoades, even though he knew then that Ms Zhang's leave request would not be granted.

[12] Ms Zhang saw Mr Rhoades again on Friday 16 January at the end of her shift. Nothing was said by them about the roster; nor had Mr Rhoades finished and published it. Ms Zhang worked again on Sunday 18 January 2009. She looked on the computer for the unfinished roster for the week Monday 26 January to Sunday 2 February 2009. Ms Zhang made changes to the roster to ensure that she received her leave and that others covered her shifts.

[13] Ms Zhang next saw Mr Rhoades on 19 January at the start of her afternoon shift. By that time Mr Rhoades had noticed the changes to his roster and he had asked and received denials from several staff including Mr Barr if they had made the changes. Mr Rhoades asked Ms Zhang if she had changed the roster on the computer and she admitted doing so. He asked her why and Ms Zhang said that she should have been on leave for the whole week. Ms Zhang mentioned that Mr Barr had told her he would reconsider her leave. Mr Rhoades said that her leave had been declined on 24 December. Mr Rhoades also said that it was not Ms Zhang's place to change the roster. She was told to change it back. Later however Ms Zhang was told by Mr Rhoades that he would make the necessary change.

[14] Ms Zhang was unwell and did not work on 20 January. Around this time she contacted a union official (Mr des Baux) who phoned and spoke to Mr Rhoades about

Ms Zhang having an entitlement to *lieu days* in excess of the leave sought. Mr Rhoades told Mr des Baux that things had gone past that point and that a formal letter would be issued.

[15] When Ms Zhang returned to work late on 21 January she received a letter asking her to attend a formal meeting on 27 January. The letter also says:

*You have confirmed that you changed a company document for your own benefit without authorisation and without consideration of the implication to the Hotel and to others.*

*The meeting will provide you the opportunity to explain your version of events and allow us to gain a full understanding of the situation.*

*Once all facts are taken into account a decision will be made as to whether or not a form of disciplinary action needs to follow.*

*Given the seriousness of the alleged offence you are entitled and we encourage you to bring a representative with you to this meeting.*

[16] Ms Zhang contacted Simon des Baux and arrangements were eventually confirmed for the meeting to be held at 8.45 am on 29 January 2009. Present were Ms Zhang and Mr des Baux, Mr Rhoades and Mike Hodges who is Scenic Circle's HR manager. There are notes made by Mr des Baux during the meeting and his more comprehensive file note made the next day. I accept Mr de Baux's evidence and notes as a fair representation of events during the meeting.

[17] It was made clear at the outset that the meeting was a disciplinary meeting about Ms Zhang changing the roster but it was never said that an outcome might be her dismissal. Mr Rhoades summarised the allegation and handed over a note by Ms Hema to the effect described above. He acknowledged that Ms Zhang had admitted the change when asked about it. She said that she had not taken leave for two years and had applied for the leave three months in advance. Ms Zhang mentioned family visiting from overseas for Chinese New Year. Ms Zhang accepted that it was wrong to change the roster without authorisation and an error of judgement on her part for which she might receive a written warning. Mr Rhoades then spoke about the importance of putting in holiday applications well in advance and mentioned Ms Zhang's intended holiday latter in 2009. Mr Rhoades said that they would adjourn but

before they broke Mr Hodges asked if Ms Zhang had disclosed another staff member's phone number to the Union solicitor and also asked her about the use of a staff voucher to obtain meals. Mr de Baux interjected, saying that he was the source of the phone number and that any additional allegations should have been signalled beforehand. Mr des Baux's evidence which I accept is that Mr Hodges was quite agitated and said that Ms Zhang had given him more trouble than any other worker and that the real question was did he really want her as an employee. Mr des Baux attempted to respond but Mr Hodges said he did not want to hear any more argument from him. There was then an adjournment. I should note that Mr des Baux sometimes spoke for Ms Zhang during the meeting.

[18] When the meeting resumed, Mr Rhoades told Ms Zhang that she was dismissed with immediate effect. He referred to her breaching trust and confidence. Mr Rhoades later wrote to Ms Zhang as follows:

*Regretfully I have decided to terminate your employment ...effective immediately.*

*My decision is based upon the facts that you knowingly altered the rosters as a means of acquiring leave that had initially been denied.*

*These alterations were made with no care or thought for other staff members or the business of the Hotel. Carol you knew it was wrong. You had been told by Dallas Hema not to, yet you went ahead and changed it regardless.*

*It is clear that this is a serious breach of company rules and given that confidence and trust are the very core of our relationship, I feel that this has now been totally destroyed.*

*The seriousness of the incident has left me with no alternative. ...*

[19] I should give some context to Mr Hodges' comments referred to above about Ms Zhang's history as an employee. As at the time of the disciplinary process Ms Zhang also had a dispute about her rostered hours that had been ongoing since late 2007. On her view of the arrangements by which she came to be doing both night audit and reception shifts she was entitled to an additional day off whenever she changed between night and day shifts. The company discontinued allowing her the

additional day off in December 2007. Ms Zhang initially disputed this through her union and later initiated proceedings in the Authority. Mediation had not resolved the problem and there was an investigation meeting scheduled for February 2009. Principally, this was the *trouble* referred to by Mr Hodges. The proceedings in relation to that dispute have been resolved.

### **Justification**

[20] Justification for a dismissal must be assessed objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[21] As noted, Ms Zhang sought alternative holidays to cover her leave request. Section 57(2) of the Holidays Act 2003 permitted Ms Zhang to determine when she would take the alternative holidays after taking into account the employer's view of when it would be convenient for her to take them. Rather than insist on her right to determine when to take her alternative holidays Ms Zhang persisted with her attempt to get her employer's agreement to her leave proposal by asking Mr Barr to reconsider her request. Ms Zhang's entitlement to the time off is one of the circumstances that would have been considered by a fair and reasonable employer but Scenic Circle did not do so.

[22] There was no timely response by Scenic Circle following Mr Barr's agreement on 24 December that he would reconsider the leave request. Mr Barr went on leave and either he did not tell Mr Rhoades about his promise to reconsider the leave request; or he told Mr Rhoades who did nothing or did not report the outcome of the reconsideration. Whatever the situation, Ms Zhang was entitled to but did not receive a definitive answer in a timely manner, especially given the long initial delay in answering her leave request. These are circumstances that a fair and reasonable employer would have considered but Scenic Circle did not do so.

[23] Scenic Circle was bound by the collective employment agreement to apply a dismissal checklist as part of reaching its decision. The collective agreement also stipulated a number of factors that must be considered as part of any disciplinary action. Mr Rhoades' evidence is that he did not apply the checklist and I find that he did not consider all the factors listed in the collective agreement either. That was because of Scenic Circle's mistaken view that Ms Zhang was bound only by her

earlier individual employment agreement. The collective agreement also provided that *Dismissals are a last resort*. A fair and reasonable employer would have applied the checklist, the list of factors and the injunction only to dismiss as a *last resort* but Scenic Circle did not do so.

[24] Scenic Circle reached a conclusion that Ms Zhang knew that she should not have made any changes to Mr Rhoades' draft roster; and that the changes were made without care or thought for other staff of the Hotel's business. Those are reasonable conclusions in the circumstances. I reject Ms Zhang's evidence that it was open for her without permission to make such changes before the roster was published. The roster was always something for the relevant manager to compile or change, not Ms Zhang.

[25] In light of Scenic Circle's failure to act how a fair and reasonable employer would have acted, there must be a finding of unjustified dismissal.

[26] Further I find that a fair and reasonable employer applying the provisions in the collective agreement properly would not have dismissed Ms Zhang. This was effectively a one off incident which did not cause any business problems because it was discovered and Ms Zhang admitted her actions before the roster was advertised to anyone else. Using the words in the collective agreement, it was an infringement of moderate severity but it did not cause any serious problem and should have been regarded as an isolated offence. There were extenuating circumstances related to how Scenic Circle handled Ms Zhang's leave application. There were no prior material warnings. In these circumstances, the disciplinary objectives set out in the agreement would have been met by a warning rather than implementing the *last resort* of dismissal.

[27] For these reasons I find that Ms Zhang has a personal grievance against Scenic Circle.

### **Remedies**

[28] In deciding both the nature and extent of any remedies I must consider the extent to which Ms Zhang contributed in a blameworthy way towards the situation that gave rise to her personal grievance and reduce any remedies accordingly.

[29] Ms Zhang should not have made the changes to the roster. However, she did not cause Scenic Circle's over-reaction to her conduct. That is probably explained by Mr Hodge's comment about *trouble* mentioned above. In these circumstances I find that both sides contributed in a roughly equivalent way to the grievance so there should be a reduction in remedies in the order of fifty percent.

[30] There are claims for distress compensation, reimbursement of lost wages, compensation for lost benefits and interest.

[31] Ms Zhang's evidence is that she was shocked immediately after the dismissal and took time to collect herself before going to the airport where she was due to meet her visitors. She was not able to tell her visitors about what had happened because to do so would have caused her to lose face. She had to pretend to be happy for the sake of her visitors. Underneath it was the worst Chinese New Year period Ms Zhang had ever experienced. Ms Zhang says (and I accept) that she feels that all her hard work for Scenic Circle is worthless and means nothing. She feels that the company took advantage of her. Ms Zhang was the income earner for herself and her husband. The loss of her income and her inability to meet their mortgage commitment has caused her Ms Zhang upset and a lot of stress.

[32] An appropriate award of compensation for these proven effects arising from the personal grievance would be \$10,000.00, to be reduced to \$5,000.00 as a result of Ms Zhang's contribution.

[33] Ms Zhang has lost remuneration as a result of her grievance. I accept that Ms Zhang has taken steps to find other employment but unsuccessfully to the date of the investigation meeting. To reflect Ms Zhang's contribution to the circumstances giving rise to the grievance I will limit any recovery of lost remuneration to three month's ordinary time remuneration from the date of the dismissal even though Ms Zhang's actual loss has exceeded that time. From that sum must be deducted the notice that was apparently paid to Ms Zhang when she was dismissed. Leave is reserved in case of any difficulty with calculations.

### **Summary**

[34] Ms Zhang was unjustifiably dismissed.

[35] Scenic Circle Hotels Limited is to pay Ms Zhang compensation of \$5,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[36] Scenic Circle Hotels Limited is to pay Ms Zhang reimbursement of lost remuneration for the period of 3 months from the date of her dismissal less any sum of notice paid to her at that time.

[37] Costs are reserved. Any claim for cost must be lodged and served within 28 days and any reply lodged and served within a further 14 days.

**Residual matters**

[38] The second amended statement of problem refers to two other claims but I understand those matters to have been resolved by the parties. They arose from Scenic Circle's misapprehension about the application of the collective employment agreement.

Philip Cheyne  
Member of the Employment Relations Authority