

Authority's file an affidavit of service of the Statement of Problem on the employer, Tan Pacific dated 15 April 2014.

[5] When the Authority's initial investigation meeting proceeded on 30 June 2014, Tan Pacific was not represented. I took Ms Zhang's evidence at that time but felt I was obliged to give Tan Pacific a further and final opportunity to be heard on the matter in case Tan Pacific had not received notification of the Authority's investigation meeting.

[6] Accordingly, Ms Finau, counsel for Ms Zhang, again attended to service of a notice of hearing for the continuation of the Authority's investigation into Ms Zhang's claim, that notice of hearing referring to the hearing set for 11 July 2014. The affidavit of service in respect of that document on the Authority's file is dated 4 July 2014.

[7] At the appointed time for me to interview witnesses for Tan Pacific, there was again no appearance for the company.

[8] I am satisfied that the Authority has done everything it reasonably can to advise Tan Pacific of the claim against it and to give it a proper opportunity to be heard in relation to the claims that Ms Zhang makes against it.

[9] I do not think it proper that I delay further in the disposition of this matter. I am satisfied this is a case where, in reliance on the power conferred on the Authority in Schedule 2 clause 12 of the Employment Relations Act 2000 (the 2000 Act) I can proceed to deal with the matter as if the employer, Tan Pacific, had attended.

[10] Ms Zhang told me that she was employed by Tan Pacific at its café business styled BB's Café located at 2 Tapora Street in Auckland's central business district.

[11] Ms Zhang said that she came to New Zealand in 2003 on a student visa, and studied for and completed a Bachelor of Business at Auckland University of Technology, from which institution she graduated in July 2009.

[12] She also studied for a Diploma in Professional Cookery at the Cornell Institute of Business and Technology from April 2011 and she graduated from that institution in April 2012. Her student visa was due to expire the following month (May 2012).

[13] Ms Zhang saw the job advertised at BB's Café as a full time chef and began her engagement with the employer from April 2012, and was employed there from June 2012.

[14] Her evidence is that during the course of the interview with Tan Pacific's William Tan, she of necessity disclosed to Mr Tan that her visa was about to expire and he told Ms Zhang that he was able to assist her by providing her with the job offer and also getting her a work visa application but that she would have to pay him money.

[15] Ms Zhang says that Mr Tan justified the payment as a bond to ensure that she would continue working at the café for two years because he was concerned about staff coming to work for him but then leaving again soon thereafter.

[16] Ms Zhang gave evidence that Mr Tan told her to pay him \$10,000 upfront and then the remaining \$13,000 once she got her work visa approved. She says that she offered to make those payments to Mr Tan by bank transfer but that he refused saying that he would only accept cash payments.

[17] Accordingly, on 19 April 2012, Ms Zhang made a cash payment to Mr Tan of \$10,000. She asked for and obtained a receipt for that payment. She has provided a copy of that receipt in evidence to me.

[18] On 14 May 2012, Ms Zhang's work visa issued and on 20 May 2012 Ms Zhang made a second cash payment of \$13,000 to Mr Tan and again received a receipt for the payment. Again I have sighted a copy of that receipt.

[19] During the employment, Ms Zhang's evidence is that she worked a weekly roster but that the variation in hours and days to be worked was dramatic and that in the month of June 2012, for instance, she worked every day of the month without a break.

[20] Ms Zhang was also summoned to work by Mr Tan on top of the hours that she was actually rostered to work for a particular week. Because of the proximity of the café to Vector Arena, the café was very busy when there were shows on at the venue.

[21] Conversely, when there was nothing playing at Vector Arena, the café could be very quiet and Tan Pacific arbitrarily reduced Ms Zhang's hours to meet the

shortfall in demand. She says that from 21 January to 17 February for example, her work hours were reduced to three days a week and for most of July only one day a week was worked.

[22] Another separate issue was the failure of Tan Pacific to pay Ms Zhang in accordance with the employment agreement between the parties. On many occasions there was a delay of several months in receiving payment and Ms Zhang's evidence is that she was never paid in full in terms of the operative employment agreement. At the end of the employment, Ms Zhang had a medical problem but because she had not been paid at all by Tan Pacific for some months she simply could not afford to see a doctor.

[23] Eventually, Ms Zhang went to see the doctor anyway, was given a medical certificate which precluded her from working but notwithstanding that, she says Tan Pacific insisted that she was required at work and she endeavoured to go back to work but was effectively too ill to do anything useful.

[24] The last day of Ms Zhang's employment was 6 October 2013, the period just referred to when she was too ill to work but was forced to attend at the workplace by Tan Pacific.

[25] On 8 October 2013, Ms Zhang's lawyer raised a personal grievance with Tan Pacific and demanded payment of wages due and owing but there was no reply from Tan Pacific.

Issues

[26] The Authority will need to consider the following three questions:

- (a) Is the payment by Ms Zhang a premium in terms of s.12A of the Wages Protection Act 1983;
- (b) Has Ms Zhang been unjustifiably dismissed;
- (c) Is Ms Zhang owed wages?

Has Ms Zhang paid a premium for employment?

[27] Section 12A of the Wages Protection Act 1983 (the 1983 Act) enacts a prohibition on any person demanding a premium for the employment of any other

person. In order to establish whether the 1983 Act applies in the current case, I need to be satisfied that there was a payment or payments made by Ms Zhang and I need to be satisfied that the purpose of the payment or payments was to secure employment.

[28] Dealing with the question whether any payment was made, I am satisfied on the evidence I received that Ms Zhang made two payments totalling \$23,000. I thought Ms Zhang was a credible witness who had gone to some considerable trouble to present her evidence in an orderly fashion despite the challenges of speaking English as a second language. I am sure she was assisted by her able counsel, but nonetheless the evidence before the Authority was primarily produced by Ms Zhang herself.

[29] As well as her testimony that she made two payments totalling \$23,000, there are the copies of receipts given to Ms Zhang by William Tan, the director of Tan Pacific.

[30] The first of those receipts relates to an amount of \$10,000 paid by Ms Zhang to Tan Pacific on 19 April 2012 and the second relates to a payment made by Ms Zhang to Tan Pacific of \$13,000 on 20 May 2012.

[31] The first receipt is in the following terms:

*Here received \$10,000 from Lin Zhang on 19 April. William Tan
and a signature*

[32] The second receipt is in the following terms:

*Here received \$13,000 from Lin Zhang For assistance with Job offer,
application from Permanent residency. William Tan bbs Café-Plus
Quba
20/05/2012 and a signature*

[33] Of course, as I have already noted, I have no evidence from Tan Pacific but given that I have satisfied myself that it has had every opportunity to engage in the Authority's investigation, my conclusion is that it has chosen not to be involved. On the evidence available to me then, I am satisfied, on the balance of probabilities, that payments were made by Ms Zhang to Mr Tan of Tan Pacific and that the copies of the receipts provided to the Authority evidence those payments being made.

[34] The signatures on those receipts appear to me to be similar to the signature of Mr Tan on Ms Zhang's employment agreement.

[35] The next question to address is what the payments made were for. In that regard, Ms Zhang herself says that the payment was both for the offer of a job and for the application for a work visa.

[36] Moreover, the receipts, the detail of which I have just recited, add to that picture, or more accurately, the second one tends to confirm Ms Zhang's evidence. The first receipt gives no indication as to what the money is for whereas the second one refers both to "*assistance with job offer*" and the application for what is referred to as permanent residency.

[37] Given that I am satisfied on the evidence I heard that there were two payments made and that they were made for the same purpose (Ms Zhang's evidence), I think it reasonable to conclude that while the first receipt makes no mention of the purpose for which the money was paid, the second receipt does and I am satisfied I can link the two payments together because of Ms Zhang's testimony that they were both part of one transaction emanating from her recruitment by Tan Pacific.

[38] On the face of it, Ms Zhang says that the payments were made in part for assistance with the provision of a job which is precisely the mischief that s.12A of the 1983 Act is designed to ameliorate.

[39] Of course, it is also true that Ms Zhang's evidence and the only receipt which identifies the purpose of the money also refer to Ms Zhang's application for permanent residence. If that were all that Tan Pacific was providing by way of "*service*" to Ms Zhang, the Authority would have no jurisdiction to consider the matter because whether or not such a payment is appropriate for immigration purposes is not something within the Authority's remit.

[40] But it seems to me axiomatic that since this payment was made for both purposes, and as a matter of fact Ms Zhang was given employment by Tan Pacific, it is difficult not to see the two aspects of the payment inextricably linked the one to the other.

[41] Given that the reason that these parties met together was because Ms Zhang was applying for a job that was advertised by Tan Pacific and as a consequence of that meeting of the principal protagonists a job offer was made, it would be strange indeed if Tan Pacific was simply seeking payment for immigration services.

[42] In order for me to conclude that that was all that was involved, I would need to somehow explain the words on the second receipt, which refer to the job, and explain how Ms Zhang's evidence was mistaken on the point. Ms Zhang was very clear that Mr Tan had told her that he could assist her with her job offer and her work visa application but only if she paid him money.

[43] I am satisfied then that the basis on which the payment by Ms Zhang was made to Tan Pacific was in return for a promise of employment and assistance with a work visa application. I conclude also that the two must be inextricably linked because logic suggests that a work visa would not be granted by the immigration authorities unless and until there is a job offer in place.

[44] I am satisfied then that the payment by Ms Zhang of \$23,000 to Tan Pacific is a breach of s.12A of the 1983 Act and as a consequence Ms Zhang's claim to have that money returned to her in terms of s.12A(2) of the 1983 Act is made out.

Was Ms Zhang unjustifiably dismissed?

[45] I have no hesitation in concluding that Ms Zhang was unjustifiably constructively dismissed from her employment. Ms Zhang was treated disgracefully by Tan Pacific throughout the employment and on her evidence was simply taken advantage of.

[46] There were constant demands for Ms Zhang to work additional hours on top of already rostered shifts, often with little or no notice and in addition there was always a significant amount of unpaid wages outstanding.

[47] On Ms Zhang's evidence, there was never an occasion when she was paid in full during the employment and the hours that she was required to work when the café was busy were so onerous on occasion as to provide her with no opportunity to have any rest and recreation nor even any opportunity to have meal breaks or morning and afternoon tea breaks.

[48] Of most importance though in terms of the justification for the constructive dismissal was the employer's requirement that Ms Zhang turn up to work and perform her duties even where she had a medical certificate requiring that she not work. This is oppressive conduct of the worst kind by an employer and I am satisfied on the evidence before me that Tan Pacific's behaviour was so outrageous as to effectively

create a breach or breaches of the employment agreement of sufficient seriousness to entitle Ms Zhang to repudiate the agreement and resign her employment.

[49] In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, the Court identified that the first question that must be addressed in these kinds of cases is whether the resignation was caused by the employer's breach of duty and if the answer to that question is in the affirmative, the second question is whether it was reasonably foreseeable that the resignation would follow the breach of duty. For the sake of clarity, I refer to these questions respectively as the causation question and the foreseeability question.

[50] As to the causation question, I am clear that the resignation was a direct consequence of Tan Pacific's requirement that Ms Zhang work notwithstanding that she had a medical certificate saying that she could not. There were other subsidiary issues as well such as the failure to pay her in accordance with the employment agreement but the dominant cause of the resignation I am satisfied was the medical issue.

[51] Turning to the foreseeability question, it is difficult to imagine circumstances in which any reasonable person would not regard it as absolutely foreseeable that a sick employee required to work when a medical certificate said that she could not, might resign her employment.

[52] I am satisfied then that Ms Zhang has a personal grievance by reason of having been unjustifiably constructively dismissed.

Is Ms Zhang owed wages?

[53] Ms Zhang gave evidence to the Authority that she was short paid for the whole period of the employment.

[54] She also gave evidence that for the first two months of the employment, she was paid at half rates and thereafter, she was never paid in full and on time, apparently because of cash flow issues.

[55] The short point is that Ms Zhang worked diligently over the employment, often performing very elongated shifts with little time for rest and recreation, and was not paid for her efforts in accordance with the operative employment agreement.

[56] Ms Zhang has provided a significant amount of documentary evidence to justify her computation of the sums owed to her and I am satisfied that in the absence of any evidence offered by Tan Pacific I am able to rely on the material Ms Zhang has filed with her application: s.132 of the Employment Relations Act 2000 applied.

[57] Accordingly, I direct that Tan Pacific is to pay to Ms Zhang the sum of \$25,160.89 net.

Determination

[58] I am satisfied that Ms Zhang has paid a premium for her employment by Tan Pacific in breach of s.12A of the Wages Protection 1983 Act and the amount that she has paid as a premium is to be returned to her. Tan Pacific Limited is directed to repay to Ms Zhang the sum of \$23,000.

[59] There is no application for a penalty and therefore none is awarded.

[60] I am satisfied that Ms Zhang has suffered a personal grievance in that she has been unjustifiably constructively dismissed from her employment. She is entitled to the consideration of remedies. I am satisfied that she has done nothing to contribute to the circumstances giving rise to the personal grievance: s.124 of the Employment Relations Act 2000, applied.

[61] Accordingly, I direct that Tan Pacific Limited is to pay to Ms Zhang the sum of \$8,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act, 2000 the Authority being satisfied that Ms Zhang has suffered hurt, humiliation, loss of dignity and injury to her feelings as a consequence of the way that she has been treated by the employer.

[62] I am satisfied Ms Zhang is owed wages for work that she has performed but has not been paid for and the total net amounts that she is entitled to are: \$21,880.39 in ordinary wages, \$2793 in holiday pay, and \$487.50 in sick pay. Those sums are to be paid by Tan Pacific Ltd to Ms Zhang.

[63] To facilitate enforcement, a Certificate of Determination is to issue with this determination.

Service

[64] In the unusual circumstances of this particular case, I am persuaded that, in order to be absolutely certain that the respondent employer is aware of the orders made by the Authority, service of the Authority's determination in this matter is to be effected by Ms Zhang's counsel as soon as practicable after the issue of this determination.

Costs

[65] Costs are reserved but in the event that costs are unable to be resolved between the parties, Ms Zhang is to file and serve an application for costs and Tan Pacific has 14 days from its receipt of that costs memorandum to file its response.

[66] The Authority's determination on costs will then proceed on the papers.

James Crichton
Member of the Employment Relations Authority