

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 84
3019080

BETWEEN YAN ZHANG
Applicant

AND TELCO ASSET MANAGEMENT
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: The applicant in person
Keith Mitchell on behalf of Respondent

Investigation Meeting: 18 January 2018

Submissions Received: 30 January 2018 for the Applicant
24 January 2018 for the Respondent
28 February 2018 "In Reply" for the Applicant and 28
March 2018 correspondence.

Determination: 25 September 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Yan (Johnny) Zhang was employed by Telco Asset Management Limited (Telco) at its Wellington office for almost 5½ years until 14 April 2017 when his position was disestablished.

[2] Mr Zhang says the decision to make him redundant was based on false information and he was unjustifiably dismissed. He alleges that he was unjustifiably disadvantaged by the process leading to his dismissal and Telco did not act in good faith.

[3] Separate to the claims regarding the dismissal, Mr Zhang says Telco breached his employment agreement by its failure to conduct a salary review in 2016.

[4] Mr Zhang seeks remedies for both matters.¹

[5] Telco says Mr Zhang's redundancy was justified where it no longer had sufficient suitable work to sustain his position, and was carried out in a procedurally fair manner.

Summary of Relevant Information

[6] Telco was one of a group of 7 companies which formed the Telco group (the group).

[7] Between August 2015 and early 2017 three companies were divested from the group including Isys Corporation Ltd (Isys) which was sold on 31 January 2017.

Mr Zhang's role

[8] Mr Zhang worked as an Assistant Accountant within Telco's finance team. The team comprised seven positions in total, including Chief Financial Controller, Ms Mee Yen Sim.

[9] Evidence on behalf of Telco is that Mr Zhang's position was unique within the team. His role was primarily focused on financial document processing.

[10] Mr Zhang rejects any suggestion that his role was limited to data processing but agreed during the Authority's investigation meeting that document processing was a significant portion of his role.

[11] Immediately prior to February 2017 Mr Zhang's workload was predominantly spread between providing invoice processing work for Isys and for an external client, Event Cinemas. The work undertaken for Event Cinemas was supplied under Telco's Financial Bureau Service (the bureau).

[12] Mr Zhang also undertook some additional administrative work for the balance of the group companies and debt recovery work for Isys.

¹ Mr Zhang also sought lost wages over the period of 2015/16. He claimed his work volume had increased over this timeframe but that his salary had not. In a case management call Mr Zhang was advised the Authority does not have powers to fix terms and conditions of employment, and this matter was not pursued.

Initiation of the restructure

[13] In February 2017 Ms Sim undertook an evaluation of the workload within the financial team as a consequence of the loss of the 3 companies over the recent past, and the successful implementation of on-going process efficiencies. She formed the view that Mr Zhang's position was the most affected by the changes. She says no other role in the finance team was materially affected by the Isys sale or involved in comparable processing work.

[14] In late February Ms Sim received approval from the managing director of the group, Mr Keith Mitchell, to restructure the finance team. She met with Mr Zhang on 27 February 2017 and informed him of the proposal. She provided him with the following letter:

Proposal to Reorganise Telco Finance Team

Telco is proposing a reorganisation of its finance team.

We have developed some ideas on a proposed new structure following the Telco sale of Isys Corporation Limited and the earlier sale of Spatia in Australia.

The reason for the proposal is that the work volume previously undertaken by the Telco finance team has now been significantly reduced with the sale by Telco of the above two companies. The reduced work volume in the Telco finance team means there is insufficient work volume to continue to employ all staff in the finance team in full time roles. In particular, the majority of work undertaken by the Telco finance team for Isys Corporation was undertaken by one person, and that work volume was the majority time component for that role.

The key aspects of the proposal are:

- The existing role presently performed by Johnny Zhang would be disestablished, being that role previously responsible for the Isys Corporation work within the Finance Team.
- The existing roles within the Finance team would be unchanged.

Would you please provide me with your feedback in writing by 4 pm on Friday 3 March? Please include in your feedback any changes to the above proposal and reasons for those changes. After 3 March we will consider and review any feedback you have provided and thereafter we will respond with the next steps.

[15] No other information was provided to Mr Zhang at this stage. The time frame was later extended at Mr Zhang's request.

The exchange of correspondence and information

[16] Between 6 and 9 March 2017 a number of email messages between Mr Zhang, Ms Sim and Mr Mitchell were exchanged including two written responses from Mr Zhang regarding the proposal.

[17] Mr Zhang's first response was sent on 6 March 2017 to Ms Sim, copied also to Mr Mitchell and another director. He said Isys work was neither a majority component of his role, nor did it comprise a majority portion of the work undertaken by the finance team for Isys. He said the bulk of Isys work was performed by Ms Sim herself and another staff member. He stated all team members should be considered for redundancy.

[18] In addition to his reply concerning the proposal, Mr Zhang made a range of accusations concerning Ms Sim's practice as a chartered accountant. He said Ms Sim had purposely distorted information on which the proposal was premised and intimated she frequently "*abused accounting standards*" when reporting information. He questioned why she was employed and recommended Mr Mitchell investigate her activities across the wider group. Mr Zhang concluded his response by advising he was reserving his right to complain to CAANZ, Ms Sim's professional regulatory body.

[19] Mr Mitchell is based in Auckland. He provided a relatively lengthy response to Mr Zhang's correspondence the following day. His correspondence is summarised as follows:

- The restructure was genuine. The sale down of various businesses over the past year impacted on Mr Zhang's role the most and there was a limited requirement for the deployment of his skill set within the finance team.
- Measured by the processing data in Telco's SAP finance platform:
 - there had been an overall decline in work (estimated at approximately 50 hours per week) for the finance team,
 - just under 40% of Mr Zhang's role was dedicated to the Isys business, and was approximately 80% of work undertaken by the team for Isys each month.
- The balance of the existing roles in the finance team were held by team members with either tertiary qualification skill sets in accounting and/or finance, or specialist expertise not evident in Mr Zhang's skill sets.

- Mr Zhang's role was largely limited to data processing which had dramatically reduced with the sale of Isys leaving him with only the data processing work he performed for Events Cinemas as the bulk of the data processing work.
- The restructuring proposal was formulated on grounds that the reduced work volume in the finance team still required the standard or qualifications held by the four individuals with finance/accounting qualifications whereas the remaining data processing work undertaken by the team (being approximately 40% of Mr Zhang's present role i.e. Event Cinema and balance miscellaneous other work for other group companies), could be shared across existing roles within the finance team.
- The restructuring proposal was a matter between Mr Zhang and Ms Sim. Mr Mitchell advised he did not wish to intervene in the process further but extending the period by which Mr Zhang could respond to the proposal until 4 pm on Thursday 9 March.
- The allegations against Ms Sim were very serious where Mr Zhang alleged Ms Sim had engaged in financial practices which disadvantaged or discriminated between shareholders. Mr Mitchell asked Mr Zhang to provide further detail regarding the complaint which he would then investigate. Any investigation was separate to and did not affect the proposal process.

[20] Mr Zhang subsequently sought to verify Mr Mitchell's analysis regarding the distribution of Isys work. There was a disagreement about the appropriateness of some material he requested and whether this had been authorised by Mr Mitchell. Ms Sim says Mr Zhang was provided access to all material on which the proposal to restructure was based.

[21] Ms Sim supplied Mr Zhang with a table setting out the number of Isys coded transactions entered into SAP by each position over the 13 months prior to 31 January 2017 (the transaction volume). Almost every member of the team posted at least one financial document concerning Isys work over the previous year. Three team members, including Mr Zhang, routinely engaged in Isys matters. The data input of the remaining staff appears to have been irregular and limited in volume. Mr Zhang's role is recorded as uploading 2,733 Isys related documents over the material timeframe – over 3.5 times more than the next most frequent user.

[22] Mr Zhang furnished his final written response to the proposal on 9 March 2017. He referred to a range of diplomas he held in accounting as well as a certificate in computer language. He disputed both Mr Mitchell's appraisal regarding the

apportionment of Isys work and Ms Sim's transaction volume assessment. He included two tables he had devised.

[23] The first table removed the quantum of transactions Mr Zhang regarded as wrongly apportioned. Applying the now revised table he said his work on Isys amounted to approximately 10 hours per month. The second table was said to reflect the proportion of time he engaged in Event Cinema work as 77.31% compared to 22.69% on Isys work.²

[24] Mr Zhang commented on the number of chartered accountants who had been imprisoned in New Zealand and advised Ms Sim should be removed from the register. He warned again that he reserved his right to complain to CAANZ.

[25] Mr Zhang finalised his second response to the proposal by agreeing there were good reasons to downsize the finance team but that there was no genuine reason to disestablish his role. He proposed that Telco fire Ms Sim for incompetency, internally promote an experienced accountant as finance manager, and work allocated to another staff member several years earlier be returned to him.

[26] On 14 March 2017 Ms Sim wrote to Mr Zhang. The material points follow:

... the company does not agree with the analysis set out in your feedback. We maintain that the company's analysis provided to you more accurately reflects the work volume distribution and required skill sets across the Finance team in particular the role that you currently perform within the Finance team. Your feedback did not address the commercial reality presently facing the company that there has been a substantial decline of work volumes specifically the role you presently perform and there is insufficient remaining work volume within the finance team to suit or to retain your skill sets in a full time position.

...your position with the company has been disestablished. Unfortunately, and for the reasons discussed the position you hold is no longer required by Telco and is surplus to Telco's requirements. Regrettably we are unable to offer you any other alternative position within Telco and, as a result, your employment with Telco will also end.

Your notice period, in accordance with your employment agreement is one month effective from today.

²

The two tables allow for a logical conclusion that Mr Zhang's total work for both Isys and Event Cinema could be conducted in less than 3 hours per working day. In evidence Mr Zhang said the calculations in the second table were made in error but appeared to be unaware of the matter until questioned on it during the Authority's investigation.

[27] Mr Zhang's employment ended on Friday 17 March 2017. He was paid 3 weeks' salary as compensation for redundancy in accordance with his contractual entitlement as well as the balance of his notice period and any outstanding wages and holiday pay.

The Authority's investigation

[28] Both parties were self-represented. Mr Zhang, Mr Mitchell and Ms Sim each provided written and oral evidence. With the assistance of an interpreter and allowing a period of time to see if the parties could resolve their differences the Authority's investigation took one full day.

[29] In final submissions both parties sought to introduce additional evidence or expand on the evidence already provided.

[30] Mr Zhang referred to various SAP records at various points within 2963 documents furnished to the Authority prior to the investigation. Those matters had not been specifically referred to during the Authority's investigation meeting nor was I able to identify with any certainty the transactions he sought to rely on.

[31] In any event I can only give limited weight to the matters each party sought to expand on where I am unable to test those matters.

[32] This determination has been issued outside the timeframe set out at s 174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.³ As permitted by 174E of the Employment Relations Act 2000 (the Act) not all the material heard or received has been recorded in the body of this determination. Instead I have expressed conclusions on the issues necessary to dispose of the matter.

The relevant law

[33] It is convenient to set out the material portion of Mr Zhang's employment agreement at this juncture as follows:

21 Redundancy

21.1 The company may terminate your employment where your position is disestablished or where, in the opinion of the

³ Employment Relations Act 2000, s 174C(4)

Company, the Company is no longer able to provide you with a position appropriate to your skills and experience.

[34] Where a claim of unjustified dismissal is made, including where the dismissal is said to be due to redundancy, the Authority has to determine whether the employer's actions satisfy the statutory test of justification.⁴

[35] The Authority's inquiry focuses on the employer's reasons for the dismissal, and the process it used to make that decision. The two assessments often overlap. If some or all those actions are found to be not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred then it is likely the dismissal will be unjustified. However, the Authority should determine a dismissal or an action to be unjustifiable solely due to defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[36] Section 4(1A)(c) of the Act is particularly important where a redundancy is proposed. An employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, must provide to the effected employee access to information relevant to the continuation of the employees employment. Mutual obligations of good faith require parties to an employment relationship to deal to be responsive and communicative with each other.

The issues

[37] At issue in this matter is whether Mr Zhang was fairly selected for redundancy.

Was the Mr Zhang fairly selected for redundancy?

[38] Each party's approach to the restructuring process was problematic, although different in nature and substance.

[39] Addressing firstly the approach taken by Telco, I am satisfied that the basis for selecting Mr Zhang for redundancy was premised on its view that the loss of Isys had materially impacted on his workload. The Authority is therefore required to assess, whether, at the time Mr Zhang was dismissed, Telco had reasonably established that proposition.

⁴ Employment Relations Act 2000, s 103A

[40] Mr Zhang's prime contention is with Telco's assertion that Isys comprised 40% of his workload and 80% of overall finance team input on Isys. He says Telco was required to ensure the figures were correct but had not. On this basis he says his dismissal was unjustified.

[41] Mr Zhang has taken an unduly literal approach to the content of Telco's initial analysis. Firstly, it is couched in words and phrases that indicated the analysis was an approximate overview only. There is nothing in Mr Mitchell's analysis which asserts Isys activities are precisely 40% of Mr Zhang's workload or that his work comprises exactly 80% of the total finance teams input into Isys work.

[42] Telco's view regarding Ms Zhang's Isys workload had been modified by the time the Authority's investigation began but had not changed dramatically. Similar to Mr Mitchell's analysis, the figures that informed Ms Sim's view regarding Mr Zhang's workload were largely extracted from Telco's SAP platform.

[43] According to SAP Ms Sim says Mr Zhang's Isys processing work occupied 30%-35% of his total workload. She estimates 2 hours per day on average was likely apportioned to that work. Event Cinema activities were assessed as 50-60% of Mr Zhang's workload and undertaken over 3 hours per day. She says a further two hours per day were likely occupied by recovery of Isys debts (not recorded in SAP) or other tasks. Ms Sim accepts SAP does not provide a 100% scientific measure of all work but says it is highly suggestive of work task volume – particularly with Mr Zhang's role which was proportionally high in financial document processing.

[44] In stark contrast to Ms Sim's evidence, Mr Zhang asserts, as set out in his first table supplied to Telco, that the average time he spent on Isys work per month was 10 hours (in effect approximately 6-7% of his workload). The essence of his argument is that there is no correlation between the number of transactions recorded in SAP – the work volume - and the amount of time required to complete a particular transaction. There is force to Mr Zhang's contention.

[45] Ms Sim conceded that she did not make inquiries about the length of time needed to complete Mr Zhang's Isys functions.

[46] Other than to state it did not accept his analysis, Telco did not directly respond to this aspect of Mr Zhang's opposition to its workload evaluation at the time of the restructure.

[47] The problem for Telco is that when faced with a significant disparity between its analysis and that of Mr Zhang in respect of his Isys work, a fair and reasonable employer could be expected to review its assessment to ensure it was correct before proceeding to conclude Mr Zhang's workload had materially diminished. Unfortunately Telco did not. That procedural failing means it could not be certain what proportion of time Mr Zhang's worktime comprised of Isys activities. In turn it was then also unable to assess whether the loss of Isys impacted on his position.

[48] Mr Zhang's assessment also presents difficulties. By his own analysis, his Isys workload was very limited prior to it being sold. That information tends to support a conclusion that this aspect of this workload had already diminished, likely as a result of Telco's ongoing programme of implementing improved efficiencies.

[49] However the onus sits with an employer to establish that the reason for the dismissal was on grounds it could reasonably hold at the time the dismissal occurred.

[50] There was no alternative evidence, separate to that of the SAP data which, I find, does not provide a reliable gauge of Mr Zhang's Isys workload, to demonstrate Mr Zhang's position was materially affected by the sale of Isys. Telco has been unable to establish that the grounds on which it wishes to rely as the substantive cause for Mr Zhang's dismissal. It follows his dismissal was unjustified.

[51] The procedural requirements on an employer when undertaking a restructuring can be challenging, particularly where there are a number of positions and employees from whom the employer must choose for redundancy. I have identified an additional flaw in Telco's restructuring process.

[52] It is clear the restructure was prompted by an overall decline in work for the finance team. A better approach would have been for Telco to notify all team members of the prospect of restructure, the reasons for it and allow all staff to comment on the proposal and suggest alternatives. If, following that process, Telco remained of the view there was insufficient work to sustain the current number of

positions in the finance team it was entitled to assess what skills amongst staff it required and/or no longer needed.

[53] I accept it was reasonable of Telco to want to retain employees with graduate degrees. However there were 3 positions, including that of Mr Zhang, held by staff without degree qualifications. Each role involved invoice processing work. One position in particular undertook work that Mr Zhang had, in part, previously performed.

[54] As a fair and reasonable employer Telco could have been expected to advise each of these employees of the criteria by which it intended to select who was best suited to perform the remaining processing work and allow each employee an opportunity to promote his or her respective skills and attributes to Telco for its consideration.

[55] By considering at the outset only Mr Zhang for redundancy, Telco avoided conducting a transparent selection process. I note there is some evidence that the two other employees had expertise relevant to particular clients. At the completion of a transparent selection process it may be that Telco could have reasonably concluded Mr Zhang did not have the breadth of skills to perform the remaining work. But that conclusion can only be speculative. Telco's omission to allow Mr Zhang any possibility to contest for the work, albeit he may not have been considered a strong contender, was not the action of a fair and reasonable employer and was unjustified.

[56] I am unable to regard Telco's procedural failings as minor. They are sufficiently defective to preclude it from justifying both the reason for Mr Zhang's dismissal as well as the means by which it reached that conclusion. I must therefore conclude the dismissal was substantively and procedurally unjustified.

[57] I find Telco's approach to the restructuring process was misguided but there is no evidence that it was constructed to mask an ulterior motive to terminate Mr Zhang's employment as was alleged.

Did Telco fail to conduct a remuneration review in 2016 and if so should a penalty be awarded?

[58] The parties' employment agreement provides:

6. Remuneration Review

- 6.1 Your remuneration will be reviewed annually in terms of the Company policy and adjustment will take account of both performance in the position and market conditions. Any review will not necessarily result in an adjustment to your remuneration. ...

[59] The evidence on this matter was scant. Telco's omission to undertake a remuneration review in 2016 with Mr Zhang appears to have been an oversight.

[60] The failure to conduct a remuneration review was not a minor or technical breach where there was a clear obligation on Telco to conduct its review according to contractual terms agreed between the parties. Mr Zhang did not bring this matter to Telco's attention until two months after his dismissal and almost a year after the time by which he could expect the review to have occurred.

[61] I am satisfied however that the omission made no material difference to Mr Zhang where no staff member received a salary increase in 2016.⁵ No evidence of harm was provided. I decline to impose a penalty in all the circumstances.

Remedies

Lost wages

[62] Mr Zhang seeks 6 months' lost wages. He provided evidence of applications made over 6 months' to obtain alternative employment. I am satisfied he has sought to mitigate his loss.

[63] This is not a case where it would be appropriate to exercise my discretion under s 128(3) of the Act, and make orders for lost wages beyond the 3 month period set out at s 128(2). Mr Zhang's complaint alleging professional impropriety by Ms Sim was particularly serious. He was asked to supply further details about his complaint but did not. I have no doubt his unsubstantiated claims fractured the employment relationship. But for his dismissal Telco would have been entitled to commence a disciplinary inquiry into the matter. I consider it unlikely that the employment relationship would have lasted beyond the 3 month timeframe and it is unlikely that any additional wages lost would have been as a result of the personal grievance.⁶

⁵ Testimony given by Mr Mitchell

⁶ Employment Relations Act 2000, s 123(1)(b)(i)

[64] In the lead up to the end of his employment Mr Zhang's annual salary is recorded in various payslips as \$48,925. He is entitled to be paid 3 months' remuneration. Subject to contribution, that sum equates to \$12,231.25 minus PAYE.

[65] I note the each of the payslips supplied to the Authority indicate that a salary adjustment was made to Mr Zhang's monthly pay which reduced the quantum of salary he could have otherwise expected. If the deduction was a result of an ongoing lawful agreement between the parties Telco is entitled to treat the order for payment of wages in the same manner it would have had the employment continued.

Compensation

[66] Mr Zhang requests \$40,000 in compensation. The actions that disadvantaged him form part of the factual matrix leading to his dismissal and therefore I have treated the remedy of compensation on a global basis.

[67] In evidence Mr Zhang denied his statements concerning Ms Sim were the product of an emotional outburst in response to the proposal. Those matters therefore do not inform my assessment as to the impact the dismissal (and surrounding process) had on him.

[68] I do accept however Mr Zhang felt humiliated and embarrassed by his dismissal and in particular that he had to notify his wife of the circumstances. An award of \$10,000 as compensation is appropriate, subject to contribution.

Contribution

[69] Actions by an employee that contribute to the situation that gave rise to the dismissal and which are blameworthy may reduce remedies that otherwise could have been awarded.⁷

[70] A redundancy is regarded as a no-fault dismissal; the employee, through no fault of their own, has lost his or her job. But in this case I find Mr Zhang's conduct substantially contributed to his dismissal.

[71] I accept he was concerned that his position would be disestablished. But the nature of the allegations he made against Ms Sim, coupled with threats and inferences

⁷ Above, s 124

to report her to external bodies, was malicious and inexcusable. Undoubtedly they were aimed to intimidate Ms Sim, and discredit her reputation.

[72] When questioned by the Authority Mr Zhang stated he stood by his allegations and that he understood the gravity of these against a chartered accountant. He continued to allege serious professional impropriety by Ms Sim albeit he was unable to describe a single instance of the kind of conduct he had asserted.

[73] As previously noted Mr Zhang's counter assessment of his workload, both as to Isys and Event Cinema, was at a significant variance to that of Telco. Telco's failure to explore the disparity between them on this matter has led to my finding the dismissal was not substantively justified.

[74] Given, however, that Mr Zhang's analysis sat alongside the allegations he had made, it is understandable Ms Sim perceived his information to be unreliable. It is further understandable that she considered there could be no productive discussion between them on the issue. Ms Sim says she was upset by Mr Zhang's correspondence. My impression is that she has understated the effect his complaints had on her.

[75] Mr Zhang must take responsibility for creating a situation where it was reasonable of Telco to form a view he was unwilling to engage with it in good faith. Mr Zhang's conduct was both blameworthy and, in part, causative of his dismissal. I assess his contribution as 50%.

Penalties

[76] Mr Zhang seeks penalties against Telco. The primary aspect of this portion of his claim concerns Mr Mitchell's analysis of his workload. I have already indicated Mr Mitchell's analysis was never intended to be an exact appraisal of Mr Zhang's workload. That is not a matter for which I am willing to impose a penalty.

Orders

[77] Telco Asset Management Ltd is to pay Mr Yan Zhang the following;

(a) \$6,115.26⁸ (minus PAYE and any other lawful deductions agreed between the parties⁹) as reimbursement of lost wages, pursuant to s 123(1)(b) and s 128(2) of the Act;

(b) \$5,000¹⁰ pursuant to s 123(1)(c)(i) of the Act.

Costs

[78] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁸ \$12,231.25 minus 50%

⁹ As referred at [65]

¹⁰ \$10,000 minus 50%