

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 144/10
5273561

BETWEEN ANITA ZHAO
Applicant

AND HEALTH AND BODY CLINIC
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Amy Heinrich for Applicant
Murray Arnesen for Respondent

Investigation Meeting: 1 December 2009 at Hamilton

Further information
Received: 21 December 2009

Determination: 26 March 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Anita Zhao is a Chinese immigrant who initially came to New Zealand in February 2008 on a Student Visa to complete an English Language Course. Ms Zhao is a qualified nurse having graduated from Harbin Medical College in China in 2007.

[2] Health and Body Clinic Limited (“Health and Body”) provides a range of health and beauty services for its clients. Mr Arnesen is an owner and director of the company. Ms Zhao worked for Health and Body from June 2008 until 27 June 2009. Ms Zhao claims she was disadvantaged in her employment and unjustifiably dismissed. Health and Body denies the claims and says Ms Zhao abandoned her employment.

[3] The issues for determination are:

- whether one or more of the terms and conditions of Ms Zhao’s employment were affected to her disadvantage by an unjustifiable action of Health and Body; and

- whether Ms Zhao was dismissed; and
- if so, whether that dismissal was unjustified and what, if any, remedies should be awarded.

Unjustified disadvantage

[4] Ms Zhao claims she was disadvantaged in her employment as a result of not receiving promised or adequate training, and by having her hours unilaterally reduced.

[5] I am required to examine Health and Body's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section 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.

[6] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Health and Body's actions disadvantaged Ms Zhao in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[7] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Health and Body can establish justification for a disadvantageous action, there is no grievance.²

[8] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[9] Ms Zhao was employed by Health and Body as a Colonic/Massage Therapist on or around 13 June 2008. In the letter of offer Mr Arnesen states "...training in massage will be offered and ongoing."

[10] During September Ms Zhao was offered permanent employment at Eastcare Residential Home ("Eastcare") as a caregiver. She commenced this employment at or around 1 October 2008. The employment was subject to Ms Zhao obtaining the necessary work permit from Immigration New Zealand. After commencing her employment at Eastcare, Ms Zhao continued to work part-time at Health and Body.

[11] Ms Zhao ceased her employment at Eastcare on or about 5 November 2008 as she was unable to obtain the necessary work permit. At that time Mr Arnesen offered Ms Zhao full time permanent employment at Health and Body. Ms Zhao signed a new employment agreement on 17 November 2008 which provided for a pay rate of \$13.00 per hour plus a bonus of \$10.00 for one hour and \$5.00 for each half hour massage client or colonic client.

Training

[12] Ms Zhao says she did not receive adequate training in Colonic Hydrotherapy. Ms Zhao says the only training she received was from information sheets. Mr Arnesen told the Authority no specific training was necessary and Ms Zhao was taken through the information sheets and the use of the equipment was explained to her but that she could not undertake the work required. As a result Ms Zhao was only required to undertake massage therapies.

[13] At the investigation meeting Ms Zhao conceded that she never raised any issues with Health and Body with respect to training in colonic therapy. Further she confirmed Mr Arnesen's evidence that she undertook massage therapy only during her employment and did not undertake colonic irrigation or hydrotherapy.

Unilateral reduction in hours of work

[14] Ms Zhao claims her hours of work were unilaterally reduced by the respondent on 13 April 2009. The applicable employment agreement set out her hours of work as being Monday – Saturday 11.00am to 6.00pm.

[15] Ms Zhao has not established to my satisfaction that her hours were reduced to the extent that she claims. I have had the benefit of reviewing the wage and time

record for Ms Zhao's employment and have noted that for the duration of her employment Ms Zhao consistently worked variable hours.

[16] Between November 2008 and 13 April 2009 Ms Zhao worked an average of 32.26 hours each week. For the period between 13 April and 27 June Ms Zhao worked an average of 31.3 hours each week with similar patterns of variations apparent in the documents.

[17] I find Ms Zhao has established to my satisfaction that her hours of work were reduced on average, by 1 hour per week from 13 April to 27 June 2009. This action by Health and Body caused Ms Zhao a disadvantage and was unjustifiable.

Unjustified dismissal

[18] Ms Zhao claims she was unjustifiably dismissed on 27 June 2009. Pursuant to section 103A the Authority must scrutinise the respondents actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[19] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer⁴.

[20] Although the Authority does not have unbridled licence to substitute its decision for that of the employer⁵ it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred⁶.

[21] Ms Zhao says that on 27 June she had two appointments for massages. As she was finishing the first massage Mr Arnesen arrived at the clinic but he left soon afterwards. Ms Zhao's second client arrived around 4.45pm and as she was completing this massage Mr Arnesen returned to the clinic. Ms Zhao says that when

⁴ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

⁵ *X v Auckland District Health Board* [2007] 1 ERNZ 66.

⁶ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

the client left the clinic Mr Arnesen approached her at the reception desk and asked her to give him her mobile phone. She says she was surprised by this request and refused as it was her own personal phone.

[22] Ms Zhao says Mr Arnesen accused her of contacting clients of the clinic on a personal basis and that she was trying to take business away from the clinic. Ms Zhao says Mr Arnesen became angry with her as she continued to refuse to give him the phone and he dismissed her. Ms Zhao says Mr Arnesen wrote out a letter of dismissal and handed it to her. Ms Zhao handed Mr Arnesen her keys and left the clinic.

[23] Mr Arnesen says he observed Ms Zhao using her mobile phone to obtain a mobile number that she then wrote down on her schedule. Mr Arnesen says Ms Zhao became hostile and aggressive when he asked her if she had confidential client information on her phone.

[24] Mr Arnesen says he asked Ms Zhao to leave and return to the clinic on Monday morning so that the discussion could continue. He says he then rough drafted what may have become a termination letter and left it upside down on his desk when he left the premises an hour later. Mr Arnesen says that when he returned to his office on Monday morning a number of items were missing from his desk including the letter of dismissal. Mr Arnesen says Ms Zhao failed to turn up for work on the Monday morning and had therefore abandoned her employment.

[25] Having reviewed all the evidence available to the Authority, I have concluded it is more likely than not that Ms Zhao was dismissed on 27 June. There two reasons why I have reached that conclusion. Firstly, the letter clearly states that Ms Zhao's final pay would be made up and deposited into her bank account within three days of 27 June. I note from the wage and time records provided by Mr Arnesen that Ms Zhao's final pay (which included two weeks notice) was calculated and paid on 27 June 2009.

[26] Secondly, Mr Arnesen was expecting Ms Zhao to arrive at work at about 10.00am on the Monday. When she had not arrived by 11.00am (Ms Zhao's usual starting time) Mr Arnesen made no attempt to make any contact with her to find out why she was not at work.

[27] I find Ms Zhao was unjustifiably dismissed. Mr Arnesen did not act as a fair and reasonable employer would have acted in all the circumstances of this case. Ms Zhao is entitled to remedies.

Remedies

Lost Wages

[28] Ms Zhao has established a disadvantage grievance relating to the reduction of the hours of her work. I am satisfied Ms Zhao should be reimbursed for the money she lost as a result of her grievance and order Health and Body to pay to Ms Zhao the sum of \$143.00 gross, being 11 weeks of 1 hour calculated at the rate of \$13.00 per hour.

[29] Ms Zhao also seeks lost wages arising from dismissal. At the investigation meeting Ms Zhao told me she had only applied for one job and had made some phone calls and that she had had difficulties due to her immigration status.

[30] Ms Zhao is entitled to reimbursement of lost wages for three months following her dismissal in the amount of \$6,511.92 gross.

Compensation

[31] Ms Zhao seeks \$18,000 compensation for hurt and humiliation. Ms Zhao provided little evidence as to the effect of the dismissal on her. I accept that the dismissal caused her to be upset and that this was exacerbated by the fact that her only family resident in New Zealand, was out of the country at that time.

[32] Accordingly I accept Ms Zhao suffered injury to her feelings as a result of her personal grievance, however, the paucity of evidence relating to this claim means that any order should be at the lower end of the scale. Health and Body is ordered to pay Ms Zhao the sum of \$4,000 as compensation.

Contribution

[33] I am required to consider the extent to which the actions of Ms Zhao contributed toward the situation that gave rise to the personal grievances, and, if required, reduce the remedies that would otherwise have been awarded. I am satisfied Ms Zhao did not contribute to the situation giving rise to her grievances and therefore the remedies will not be reduced.

Summary of Remedies

Health and Body Limited is ordered to pay to Ms Zhao within 28 days of the date of this determination:

- **\$143.00 gross being reimbursement of lost wages for the unjustified disadvantage pursuant to section 123(1)(b) of the Employment Relations Act;**
- **\$6,511.92 gross lost wages pursuant to section 123(1)(b) of the Employment Relations Act;**
- **\$4,000 compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act.**

Costs

[34] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they fail to reach agreement on the matter of costs, Ms Zhao may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority