

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 353
3009711

BETWEEN APRIL ZHOU
Applicant

AND AXIS INTERNATIONAL
TRADING COMPANY
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Fiona McMillan and Holly Struckman, Counsel for the
Applicant
Li Hong Yang, director of the Respondent

Investigation Meeting: 26 October 2017 and 1 November 2017

Submissions received: 1 November 2017 from Applicant
4 November 2017 from Respondent

Determination: 13 November 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Axis International Trading Company Limited unlawfully received a premium of \$20,000 from the Applicant in breach of s 12A(1) of the Wages Protection Act 1983.

B. Axis International Trading Company Limited is ordered to pay \$7,000.00 by way of penalty for its breach of s 12A(1) of the Wages Protection Act 1983. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank

Account. Payment of the penalty is to be paid within 28 days of the date of this determination.

C. April Zhou suffered an unjustified disadvantage to her employment by Axis International Trading Company Limited's refusal to promptly repay the premium. However, no award of compensation is payable to her.

D. April Zhou was not constructively dismissed.

E. Axis International Trading Company Limited did not breach its duty of good faith.

F. Costs are reserved.

Employment Relationship Problem

[1] April Zhou is a highly qualified immigrant from China. She is a registered acupuncturist and holds a Bachelor's degree in medicine and a Master's degree in traditional medicine. She came to New Zealand in 2015 to study English and to find a job. After working for another entity for 6 months, she was employed by Axis International Trading Company Limited on 1 April 2016 as an acupuncturist. Axis operates as a healthcare clinic.

[2] Ms Zhou claims that nine months after she was employed by Axis she was required to pay a sum of \$20,000 to it. She says this was to secure her employment and to secure Axis' support with her application for permanent residency. She claims this payment was a premium pursuant to s 12A(1) of the Wages Protection Act 1983. In addition, she claims that the actions of Axis leading up to, and following, payment of the \$20,000 unjustifiably disadvantaged her employment and lead to her unjustified constructive dismissal.

[3] Whilst accepting a sum of \$20,000 was paid by Ms Zhou, Axis denies that this was a premium. It further denies it unjustifiably disadvantaged or unjustifiably constructively dismissed Ms Zhou.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the applicant and respondent but has stated findings of fact and law, expressed

conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issues to be determined are:

- a) Was a premium sought for the continuation of Ms Zhou's employment?
- b) If so, should a penalty be imposed and if so, in what amount?
- c) Was Ms Zhou's employment affected to her disadvantage by unjustified actions on the part of Axis?
- d) If (a) and/or (c) are established, was Ms Zhou's resignation a reasonably foreseeable result of breaches of duties owed to her by Axis such that her employment ended by way of constructive dismissal?
- e) If (a) and/or (c) and/or (d) are established, what remedies, if any, should be awarded to Ms Zhou?
- f) Did those actions also amount to a breach of the duty of good faith? If so, should Axis be ordered to pay a penalty?
- g) Should either party contribute to the costs of representation of the other party?

Background

Terms of Employment

[6] In or about February 2016 Ms Zhou responded to an advertisement for a part-time acupuncturist. Following a meeting with Li Hong Yang, Axis' sole director and shareholder, Ms Zhou was offered the job.

[7] A discussion followed where Ms Zhou indicated to Ms Yang that she wished to apply for New Zealand permanent residency. She asked if Axis would support that application and Ms Yang agreed it would. Ms Yang's agreement was conditional on Ms Zhou agreeing to work for Axis for a period of three to five years after her

permanent residency was granted. Whilst Ms Zhou says she did not agree to work for this period, I am satisfied she impliedly or expressly agreed to do so.

[8] The parties then discussed remuneration. The parties dispute what was agreed. Having reviewed, inter alia, the job advertisement, multiple emails, ACC records, the individual employment agreement and the applicant's bank statements I am satisfied, on balance, that Ms Yang's account of the agreement reached between the parties represents the true nature of the employment relationship. I find the following occurred:

- a) Ms Zhou told Ms Yang that she required a full-time position, and a salary of \$40,000, to meet her permanent residency application requirements.
- b) Ms Yang told Ms Zhou that she was only required to work part-time hours and that she would be paid on a commission basis. Commission represented 50 per cent of payments received from the Accident Compensation Corporation (ACC), less GST, for services provided by an acupuncturist. Ms Yang advised Ms Zhou that until she built up her patient numbers it was unlikely that she would earn \$40,000 commission.
- c) Ms Zhou proposed that she would pay Axis \$10,000 every three months to cover her salary and PAYE payments. This sum would be repaid to her by direct credit to Ms Zhou's bank account so as to appear to be salary payments to Immigration New Zealand (INZ). For her services, Ms Zhou would be paid a cash sum representing the commission she had earned. This arrangement was to continue until Ms Zhou was earning commission to the value of a \$40,000 salary.
- d) Axis agreed to Ms Zhou's proposal. Thereafter:
 - i. Ms Zhou paid \$10,000 in cash to Axis on 28 April 2016. This was returned by Axis to Ms Zhou, less PAYE, as follows: \$2,666.66 on 4 May 2016; \$2,904.10 on 8 June 2016; \$1,392.70 on 21 June 2016; and \$1,392.70 on 28 June 2016.
 - ii. Ms Zhou paid a further \$4,830 in cash to the company on 4 August 2016. This sum represented the difference between the agreed cash sum of \$10,000 and her commission for the period 18 June to

25 July 2016 which equated to \$5,170. The sum of \$10,000 was repaid to Ms Zhou, less PAYE, by way of payments of \$1,392.70 on 11 July 2016; 25 July 2016; 15 August 2016, 25 August 2016; 18 September 2016; and 23 September 2016.

- iii. In return for the acupuncturist services provided by Ms Zhou to Axis she received monthly payments in cash. The payments were recorded in emails sent by Axis to Ms Zhou. These emails included a reconciliation of all services rendered by Ms Zhou to ACC during the month. In addition, it provided details of the amounts paid to Axis by ACC and details of how the sum paid to Ms Zhou had been calculated. This was done by taking the amounts paid by ACC to Axis for patients seen by Ms Zhou, deducting GST, and then paying 50 per cent of the remainder to Ms Zhou. The payments received were made as follows: \$1,988.82 on 4 May 2016; \$728.37 on 23 June 2016; \$5,997.63 on 11 July 2016; \$5,170 on 4 August 2016; and \$553.37 on 5 September 2016.
- iv. No further cash payments were made to Ms Zhou after 5 September 2016. At this point Ms Yang says the commission amounts which Ms Zhou was earning averaged the fortnightly payments being made by Axis to Ms Zhou's bank account.

[9] To assist with her application for permanent residency, Ms Zhou organised for her immigration lawyer to draft the individual employment agreement (IEA). This agreement recorded that Ms Zhou was to perform 40 hours of work per week and in return would be paid the sum of \$40,000 per annum. From the evidence I heard from both parties I am satisfied that Ms Zhou did not, at any time, work 40 hours per week. Ms Zhou's normal hours of work were 9:30am to 2:00pm on a Monday to Thursday and on a Saturday. On a Friday she worked from 9:30am to 6:00pm. The IEA was duly signed by the parties with Ms Zhou starting work on 1 April 2016.

The deterioration of the employment relationship

[10] The employment relationship was uneventful until October 2016. At this point INZ contacted Axis to obtain detailed information from it to enable it to process

Ms Zhou's application for permanent residency. Axis' response to INZ was drafted by Ms Zhou and her immigration lawyer.

[11] Ms Yang says that following the provision of this information to INZ Ms Zhou's work performance deteriorated and she received complaints about Ms Zhou from another staff member. She became concerned that Ms Zhou may have been using Axis to obtain a residency visa and that once it was provided she would leave. She says she wanted to ensure this did not happen and that Ms Zhou complied with the parties' verbal agreement for her to work for Axis for three – five years.

[12] On 9 November 2016 Ms Yang spoke to Ms Zhou about her promise to work for three to five years. Ms Yang presented Ms Zhou with a handwritten document which set out their agreement but left the time period she would work blank. Ms Zhou confirmed Ms Yang left it up to her to come up with a timeframe that she was comfortable with. She says she felt three years was reasonable so wrote that time down. She said "*She wasn't pushing me. I put my baseline down*". After having further time to consider the timeframe however, Ms Zhou advised Ms Yang that she wished to change the timeframe to two years. Ms Yang agreed despite saying she felt upset by the change.

[13] Ms Yang says Ms Zhou's change, and the comments she made, heightened her concern that Ms Zhou had no intention of meeting her promise. This prompted a WeChat message exchange between the parties. The outcome of that exchange was an agreement by the parties to sign a second IEA which recorded their agreement as to the period of time Ms Zhou agreed to work for Axis.

[14] I pause here to note; a translation of the messages was provided by Ms Zhou from a recognised translation service company. However, in the course of the investigation meeting, the translator engaged by the Authority to assist in the investigation advised that the translation of one part of Ms Yang's message was incorrect. The translation read "*Thank you for helping me for such a long time, goodbye, we're still friends!*" However the correct translation was "*Thank you for helping me for such a long time, even if we say goodbye, we are still friends*".

The Second Individual Employment Agreement

[15] Following receipt of Ms Zhou's message, Ms Yang downloaded a pro-forma individual employment agreement from the internet. It provided that Ms Zhou would work 40 hours, for a five year period, and would be paid an hourly rate of \$21 per hour.

[16] On 10 November 2016 the parties signed the agreement. However, Ms Zhou advised Ms Yang that she was not happy with it. She said she wanted a lawyer to confirm the agreement was legal. Ms Yang agreed to organise this.

The lead up to the payment of \$20,000

[17] On 11 November 2016 a patient attended Axis's clinic to pay \$200 cash for two massage machines. There is a dispute between the parties as to what occurred. Having heard from the parties I discern the following occurred:

- a) Ms Yang asked Ms Zhou to collect a sum of \$200 from the patient and then pick up two machines from Ms Yang's home the following day.
- b) When the patient attended the clinic Ms Zhou refused to accept payment.
- c) Ms Zhou's primary concern was that the machines were too heavy for her to lift, despite the machines only weighing 1-2kg each. Secondly, she was uncomfortable taking cash from the patient.
- d) Ms Zhou told Ms Yang that she had had enough of working at the clinic and that her body was sore.
- e) Ms Yang told Ms Zhou that she would arrange someone to relieve her the following day.
- f) A discussion ensued where Ms Yang spoke about Ms Zhou's behaviour and performance following her providing support for her permanent residency application. She asked Ms Zhou to come to her home that evening with her husband Long Ma to discuss her future plans.

[18] On the evening of 11 November 2016 Ms Zhou and Mr Ma attended Ms Yang's home. During the meeting the parties agreed Ms Zhou would pay Axis a sum of \$20,000. The parties' respective accounts differ as to how the agreement to pay

this money arose. Ms Zhou says the amount was demanded by Ms Yang whereas Ms Yang says it was offered as a “sincerity payment”. I find the following occurred:

- a) At the meeting, Ms Yang raised concerns about Ms Zhou’s refusal to listen to her that day and her refusal to follow instructions. She also gave examples of other changes in Ms Zhou’s behaviour, particularly mood swings, refusing to see clients, conflicts with her colleagues and patients waiting to be seen. Ms Yang expressed her concerns that Ms Zhou had used her to support her permanent residency and, now that she had done this, Ms Zhou would not keep her promise. She asked Ms Zhou what her plans were. Mr Ma answered on Ms Zhou’s behalf. He confirmed Ms Zhou wanted to remain working for Axis and assured Ms Yang that Ms Zhou’s behaviour would improve.
- b) Ms Yang was not convinced. She asked Mr Ma how she could trust Ms Zhou. Mr Ma told her “*We are Chinese. We will do it the Chinese way*”. He then offered to give Axis \$20,000 to show Ms Zhou’s sincerity. He said if Ms Zhou did not work for the timeframe agreed then he would give up the money. Ms Yang said she was reluctant to accept the money but, after further discussion with Mr Ma, agreed on the condition the money was held in Axis’ lawyer’s trust account.

[19] Ms Zhou paid the \$20,000 to Axis’ lawyer’s trust account on 21 November 2017.

[20] The terms upon which the \$20,000 was to be held were recorded in a written agreement between the parties which was executed on 1 December 2016. This agreement provided:

Ms Lihong Yang offers Ms Jie Zhou a TCM Practitioner/Acupuncturist position to support Ms Jie ZHOU grant the New Zealand permanent resident visa (P.R.). Ms Jie ZHOU agrees to work for Axis Healthcare Clinic for three years (three years) after being granted NZ P.R.

Ms Jie ZHOU likes to deposit \$20,000 NZD to Eastlaw bank account, she can get the interest monthly and the whole amount back when the agreement date is expired.

The Third Individual Employment Agreement

[21] On that same day the parties signed a third individual employment agreement. I am satisfied this agreement was provided to Ms Zhou on or about 21 November 2016 enabling her sufficient time to read it and to seek legal advice if she wished.

[22] The agreement recorded the terms upon which Ms Zhou had been working since she commenced employment. Ms Zhou's hours of work were 31 hours per week, her wages were based on commission representing 50% of the gross receipts from acupuncture services (excluding GST) payable fortnightly. The agreement also recorded that it was for a fixed term being from 1 December 2016 to 30 November 2019.

Events leading up to the Applicant's resignation

[23] The parties' relationship was then harmonious until when Ms Zhou was granted a permanent residency visa on 24 February 2017. Following the grant of this visa, Ms Zhou took immediate steps to locate a lawyer to enable her to have the \$20,000 refunded to her.

[24] On 23 March 2017 Ms Zhou, through her lawyer, wrote to Axis outlining her position that the \$20,000 payment was an illegal premium. She demanded repayment by 31 March 2017. This letter made no mention of any other issues which Ms Zhou had with her employment. Ms Zhou accepted during the Authority's investigation meeting that this was because she had no other issues with her employment at this point.

[25] That same day, Ms Yang undertook a review of Ms Zhou's ACC claims. She discovered that some of the ACC claims made by Ms Zhou appeared to be incorrect. In particular, it appeared that Ms Zhou had claimed for patients seen after 2:00pm on a Saturday, which was outside of the clinic opening hours. If correct this meant that Axis, and Ms Zhou, had been paid more than they were entitled to receive.

[26] Ms Yang emailed Ms Zhou explaining this and asking her to check her patients' treatment times carefully. She also asked if Ms Zhou had made any wrong claims. She asked for feedback before 30 March 2017.

[27] No response was received from Ms Zhou. Ms Yang then asked Ms Zhou to leave the office computer on, and Team Viewer open, on Friday, 31 March. Ms Zhou did not do this. On Saturday 1 April, Ms Yang called Ms Zhou, and emailed a number of messages to which no response was received.

[28] On 13 April 2017 Axis sent a letter to Ms Zhou raising its concerns regarding her over-claiming ACC and her making false statements to INZ. It asked her to advise a time when she could meet to discuss its concerns.

[29] After getting this letter, Ms Zhou wrote that same day to Axis tendering her resignation. She provided one month's notice but did not work out this notice period. Instead she travelled to China for a planned 6 week vacation with her family.

[30] Ms Yang then messaged Ms Zhou on numerous occasions asking to meet with her to discuss the situation. She told Ms Zhou she wanted her to come back to work and that she could manage the clinic in the future if she wanted. She told her that she had not replaced her.

[31] On 12 May 2016 Ms Yang repaid the \$20,000 to Ms Zhou from her personal account. Subsequently this sum was reimbursed to her by Axis' lawyers from the trust account where the money was held.

Issue 1: Was a premium sought for the continuation of Ms Zhou's employment?

[32] Section 12A(1) of the Wages Protection Act 1983 provides as follows:

12A No premium to be charged for employment

- (1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[33] The definition of premium was recently addressed by the Employment Court in *A Labour Inspector of the Ministry of Business Innovation and Employment v Tech 5 Recruitment Ltd.*¹ That case involved the recovery of trade testing costs from carpenters recruited by Tech 5 from the Philippines. The costs of trade testing were passed on to the employees by way of a weekly deduction in order to recover the

¹ [2016] NZEmpC 167

money spent by Tech 5. The question was whether this was a premium or whether it was a genuine recruitment cost that could be recovered.

[34] In the context of s 12A(1) the Court considered that “premium” captures:²

Paying to acquire a job (that is consideration over and above the wage paid for the work performed and the wage/work bargain) as described in *Sears* and illustrated in *Tan*; specifically where a price is paid either by an employee, or potential employee, or is paid on that person’s behalf to secure employment. However, we consider “premium” extends beyond those situations to apply to an employer recouping or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer.

[35] The Court found that the feature that stood out in that case was the lack of any benefit to the employee in meeting the trade testing costs, other than getting a job. The benefit of trade testing flowed only one way, to Tech 5. The Court concluded that no benefit accrued to Tech 5’s carpenters by agreeing to pay for these trade testing costs. At best, agreeing to pay for trade testing ensured an offer of employment would be made to them. There was no benefit to these carpenters beyond the ability to be selected for employment.

[36] The legal principles from *Tech 5* were endorsed in *Holman v CTC Aviation*.³ In that case whether or not a payment was a “premium” was said to involve a two-step test.

Premium Step One

[37] Firstly, the payment is a condition for the obtaining of employment. I consider this step includes a situation where the payment is a condition for securing the continuation of employment of an existing employee. This appears clear from the wording of s 12A(1) and was specifically referred to in *Tech 5*.⁴

[38] I am satisfied the payment made by Ms Zhou was to secure her employment. This is reinforced by the parties signing the third IEA at the same time as the agreement relating to payment of the money.

² At paragraph [54]

³ [2017] NZEmpC 60

⁴ At paragraph [54]

Premium Step Two

[39] Secondly, the payment does not benefit the employee in any way other than by the obtaining (or securing) of employment.

[40] Ms Zhou's representatives submit that Axis' provision of support to Ms Zhou to enable her to apply for permanent residency did not amount to a benefit. I agree.

[41] By the time the agreement to pay the \$20,000 was made, Axis had already provided its support to Ms Zhou to obtain her permanent residency. In exchange for that support Ms Zhou had signed the second IEA. As was said by Mahon J in *Cook Islands Shipping Co Ltd v Colson Builders Ltd*⁵:

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefore, and, although by taking advantage of the necessities of his adversary he obtains a promise for more the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.

[42] The payment of the \$20,000 did not therefore benefit Ms Zhou in terms of the provision of support for her permanent residency visa. However, it was nevertheless an illegal premium. This is because it benefited Ms Zhou by securing her on-going employment which in turn enabled her to gain permanent residence. The payment of the money was consideration for her employment and therefore breaches s 12A(1) of the Wages Protection Act.

[43] I find Axis did unlawfully receive a premium of \$20,000 from Ms Zhou in breach of s 12A(1) of the Wages Protection Act.

Issue 2: Penalty for breach of s 12A of the Wages Protection Act 1983

[44] Section 13 of the Wages Protection Act makes an employer who contravenes any provision of that Act liable, upon the application of the affected employee, to a penalty imposed under the Act. Section 135 of the Act makes a company liable for penalties not exceeding \$20,000.

⁵ [1975] 1 NZLR 422

[45] The quantum of any penalty is to be determined using the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.⁶

Step 1: Nature and number of breaches

[46] Step one is to identify the number of breaches and the maximum penalty applicable. In this case Axis breached the Wages Protection Act 1983 on one occasion. This means it is liable to a maximum penalty of \$20,000.

Step 2: Severity of the Breach

[47] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[48] Factors to be taken into account when considering the first part of Step 2, aggravating factors, include whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely, the extent of any departure from the statutory requirements and any history of previous breaches. The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or steps taken to mitigate the effect of the breach.

[49] I find Axis did not breach s12A(1) knowingly and/or calculatedly. I accept Ms Yang was initially unaware that it was illegal to receive the payment of \$20,000. I take into account that the payment was not used by Axis at material times as it was made into a lawyer's trust account. In addition, upon becoming aware that the payment was illegal Axis returned the \$20,000 to Ms Zhou within a short period of time. Lastly, I take into account Axis has admitted it was wrong to accept the \$20,000.

[50] Making an allowance of 50 percent for the degree of severity the potential penalty is \$10,000.00.

⁶ [2016] NZEmpC 143

Step 3: Ability to pay penalty

[51] Step 3 is an assessment of Axis' ability to pay. Ms Yang said that Axis has ceased trading. However, it produced no evidence to support that submission. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[52] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Looking at recent Authority and Court imposed penalties I conclude an appropriate penalty is \$7,000.00. This sum is proportionate to the breaches and is sufficient to act as a deterrent to Axis.

[53] I have considered but decline to order any part of this sum to Ms Zhou. She was the initiator, and a willing participant, in this illegal activity.

[54] Axis is ordered to pay \$7,000.00 by way of penalty for its breach of s 12A(1) of the Wages Protection Act. This sum is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[55] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue 3: Did Ms Zhou suffer an unjustified disadvantage to her employment?

[56] To establish a personal grievance of unjustified disadvantage Ms Zhou must show that one or more of the conditions of her employment was affected to her disadvantage by some unjustifiable action by Axis.

[57] The onus is initially on Ms Zhou to establish that her employment condition(s) have been affected to her disadvantage. The burden then shifts to Axis to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for Ms Zhou's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[58] Ms Zhou's Statement of Problem did not particularise the grounds upon which she alleges she had suffered an unjustified disadvantage to her employment. However, during the investigation meeting she explained that she was disadvantaged by Axis' refusal to refund the \$20,000 to her and by its allegations that she had claimed amounts from ACC in excess of what should have been claimed.

Refusal to refund the \$20,000

[59] I am satisfied that Axis' refusal to immediately repay Ms Zhou the sum of \$20,000 created an unjustified disadvantage to Ms Zhou's employment. Its refusal to repay this money was not an action that a fair and reasonable employer could have done in the circumstances. This is particularly so where the payment was an illegal premium and Axis had been put on notice of this fact by Ms Zhou's lawyers on 23 March 2017.

Allegation of over-claiming ACC

[60] Ms Zhou's representatives submitted that Axis acted spitefully by contacting ACC and telling them about Ms Zhou's overcharging. Especially, they submit, in circumstances where it was Axis who lied and misled Ms Zhou to overcharge and benefited financially by enforcing this behaviour. Secondly, they say it acted unjustifiably by then initiating an investigation against Ms Zhou.

[61] Having carefully considered the evidence, and having heard from the witnesses, I am satisfied that Axis' actions, and how it acted, were what a fair and reasonable employer could have done. It did not act unjustifiably in contacting ACC and then proceeding to investigate this issue.

[62] Ms Yang explained during questioning from the Authority that she contacted ACC after noticing Ms Zhou was claiming for more hours on a Saturday than the clinic was open. I viewed documentation which supported this claim. She said she was concerned that if she didn't advise ACC of the over-charging then it may discover the issue during a random audit. This could have exposed Axis to possible penalties. The outcome of Ms Yang's contact with ACC was that Axis had to repay the overpayments which amounted to \$3,334.02.

[63] Whilst Axis did stand to benefit from the over-charging, Ms Zhou equally benefited in that she was paid for half of the charges she claimed from ACC. I

viewed documentation which showed the amounts paid by ACC to Axis for the services provided by Ms Zhou and email correspondence recording that half of this amount was paid to Ms Zhou.

Other matters

[64] In Ms Zhou's closing submissions, her representatives particularised a number of other claims for disadvantage. I am satisfied that none of these grounds created a disadvantage to Ms Zhou's employment.

[65] I confirm I considered, but do not accept, that Ms Yang created significant tension in the workplace as a result of Ms Zhou addressing the premium via her legal representative. In Ms Zhou's witness statement she said things become "very tense" between herself and Ms Yang at work in the later part of March 2017 when each parties' lawyers were corresponding with each other. When asked to explain how matters were tense she advised that Ms Yang didn't talk to her as much as before. She said that whilst Ms Yang would discuss work matters with her, they did not discuss matters of a personal nature. She also said that Ms Yang did not appear as happy as she normally did. With lawyers involved it is not surprising that Ms Yang decided to keep the parties' relationship on a strictly professional level. I do not find this disadvantaged Ms Zhou's employment.

[66] I also considered the submission that Axis' claims in the disciplinary letter that Ms Zhou made false statements to INZ disadvantaged Ms Zhou. I am satisfied they did not. The letter provided:

I am also concerned about some statements you have made to Immigration New Zealand that appeared to misrepresent the nature of our employment arrangement and would like to discuss those with you as well.

[67] For the reasons previously outlined, it is likely that Ms Zhou did make misleading statements to INZ. Axis was justified in raising its concerns with Ms Zhou.

[68] Lastly, there is a submission that Ms Zhou's employment was disadvantaged by Axis threatening Ms Zhou to stop seeking legal advice. Ms Zhou's evidence was that Ms Yang told her to stop seeking legal advice on 8 March 2017. Ms Yang denies this. Even if Ms Zhou's evidence is accepted, I am not satisfied her employment was disadvantaged by Ms Yang's request. Ms Zhou said that as at 23 March her only

issue with her employment was with the return of the \$20,000. I am aware of no threats being made by Axis about legal advice after this date.

Issue 4: Was Ms Zhou constructively dismissed?

[69] The threshold for establishing constructive dismissal is high. Constructive dismissal includes, but is not limited to, cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.⁷ Where this is established, the next question is whether the resignation was caused by this conduct.⁸ If it was, the question is whether the employer's behaviour was of sufficient seriousness to make it reasonably foreseeable that the employee would resign.⁹

[70] In response to questions from the Authority Ms Zhou explained that she had no issues with Axis, other than the non-return of the premium, when her lawyer wrote to Axis on 23 March 2017. I therefore proceed on the basis that the course of conduct upon which she relies occurred after this date. This is consistent with her letter of resignation.

[71] After 23 March 2017 the only matters I am aware of as occurring are Axis' refusal to repay the premium, it raising the concerns addressed in its letter of 13 April 2017, and it employing a new acupuncturist. There was correspondence being exchanged between the parties' lawyers around this time but I am unaware of the content of those letters as they were exchanged on a without prejudice basis. It appears from Ms Zhou's resignation letter that the letters may simply have repeated Axis' concerns regarding the over-claiming of amounts from ACC and the making of false statements to Immigration New Zealand.

Return of the money

[72] I have already found the payment of the \$20,000 to amount to an unlawful premium. I do not however accept that Axis' refusal to return the money was for the dominant purpose of coercing Ms Zhou to resign. Whilst the parties disputed a large part of the facts, they were consistent in their evidence that Axis wanted Ms Zhou to

⁷ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

⁸ *Business Distributors Ltd v Patel* [2001] ERNZ 124 (CA)

⁹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA)

work for it for a lengthy period of time. Even after Ms Zhou resigned Axis asked her repeatedly to return to work.

[73] Even if I am incorrect, I am satisfied Axis' failure to return the money immediately was not causative of Ms Zhou's resignation or, if it was, it was not reasonably foreseeable that she would resign.

[74] Ms Zhou entered into an agreement with Axis on 1 December 2016 wherein she agreed that the \$20,000 would be held by Axis for three years. Ms Zhou says this payment was to secure her ongoing employment which was a necessary element for her to secure permanent residency. Whilst Ms Zhou denies that she knew premiums were unlawful at that time, it is likely that she did. Ms Zhou is a well-educated person. She said that she "always" knew about employment law in New Zealand because she read articles and watched the news. She said she also "always" knew that an employer could not bond an employee to work for it.

[75] Notwithstanding Ms Zhou's knowledge that such payments were not permitted, she was prepared to wait until her permanent residency was granted before taking steps to have the money returned. A period of 4 months. In these circumstances it is unlikely that Axis' refusal to refund the money within the 3 weeks' between its demand and Ms Zhou's resignation was causative of her resignation.

Disciplinary Investigation

[76] I am satisfied that Axis was entitled to start a disciplinary investigation into the matters outlined in its letter of 13 April 2017. Ms Zhou has admitted she over-claimed ACC payments, albeit she says this was at the instruction of Axis. The evidence also establishes, on a balance of probabilities, that Ms Zhou also made false statements to INZ. These were important matters that a reasonable employer could decide to investigate.

[77] Ms Zhou was given sufficient notice of the disciplinary meeting, Axis asking her to "*Please provide me a date when you can meet within the next few weeks*". She was also advised that she was able to bring her lawyer or a support person with her to the meeting.

Replacement

[78] I am satisfied Ms Zhou's position was not replaced. Whilst an additional person was employed prior to Ms Zhou's departure, this was to take over the duties of Ms Yang's former husband following their separation. This employee was engaged prior to Ms Zhou demanding the return of the \$20,000 and she started working with Ms Zhou on 27 March 2017.

[79] On the balance of probabilities I therefore conclude that Ms Zhou resigned. That resignation was not a constructive dismissal.

Issue 5: Remedies

[80] Ms Zhou claims a sum of \$5,000 for the humiliation, loss of dignity and injury to feelings that she says she suffered as a result of the unjustified disadvantage she suffered. I am not satisfied that this sum is warranted in the circumstances of this case.

[81] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances whereby the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.¹⁰ The Court said:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[82] If there is misconduct by an applicant employee that is outrageous, particularly egregious or disgraceful, I should consider whether it is appropriate to award any remedies.

[83] In the present case, it is likely that Ms Zhou and Axis were parties to a sham. That sham involved misleading INZ on material aspects of Ms Zhou's employment.

¹⁰ [2016] NZEmpC 136.

This was to enable Ms Zhou to obtain a New Zealand permanent residency visa which she might not otherwise have obtained.

[84] During the investigation I established that the terms of the IEA presented to INZ did not reflect the true nature of the relationship between the parties. At material times Ms Zhou did not work the hours stated in the IEA, nor was she paid the stated salary. I have addressed the arrangement between the parties earlier in my determination.

[85] After becoming aware of the true agreement between the parties relating to Ms Zhou's salary, I invited Ms Zhou's representatives to amend the Statement of Problem to include a premium claim relating to these payments. After taking instructions, they declined to do so because Ms Zhou denied having paid monies to Axis other than the \$20,000. She also denied having received cash payments for her services.

[86] Having carefully evaluated all of the evidence, considered the inconsistencies between the witnesses' evidence, and looked at the documentation produced, I am satisfied that Ms Zhou did pay additional monies to Axis for her salary and did receive cash payments from Axis. Had the Statement of Problem been amended I would have found the payments made by Ms Zhou amounted to an unlawful premium under s 12A(1) of the Wages Protection Act.

[87] The relevance of my finding on this issue is that it calls into question Ms Zhou's credibility in relation to the other evidence she provided to me. Despite being provided with several opportunities to come clean she steadfastly denied the arrangement despite being faced with the documentary trail which supported the payment arrangement. I also found Ms Zhou's evidence during other parts of the investigation lacked a ring of truth. For example, she said she left her previous job because of the hours worked. Yet gave evidence that she did not ask Axis about the hours of work that she would be working for it. She also had a clear recollection of matters that supported her case, to the extent of providing paragraphs of italic quotations in her witness statement, yet had no recollection of other important matters such as discussions on hours and on pay. She also said Ms Yang demanded payment of the \$20,000 before the visit to her home on 11 November 2016 but her husband had no knowledge of this. It is likely she would have told him if such a demand had been made.

[88] I have earlier found that Ms Zhou offered to pay the \$20,000 to Axis. I have also found that Ms Zhou would have been aware that the payment of \$20,000 was unlawful when she offered it to Axis. The timing of her demand for its repayment within a short period of obtaining permanent residency is unlikely to be a coincidence.

[89] In these circumstances, whilst not condoning Axis' behaviour in accepting and then failing to return the \$20,000 promptly, it would be unconscionable for the Authority to reward Ms Zhou's egregious conduct by an award of damages.

[90] To conclude, I find Ms Zhou suffered an unjustified disadvantage to her employment by Axis' refusal to promptly repay the premium. However no award of compensation is payable.

Issue 6: Breach of the duty of good faith?

[91] Ms Zhou's representatives submit that Axis did not act in good faith throughout the employment relationship and, as such, did not meet the requirements outlined in s 4 of the Act. This is because, Ms Zhou says, it failed to act honestly, openly and without hidden motives, work constructively and positively with Ms Zhou, be communicative with Ms Zhou and be fully honest with her and treat her with respect.

[92] On the basis of the evidence I heard I am not satisfied that Axis breached its duty of good faith. Even if it did, any breach was not deliberate, serious, and sustained and there was no intention to undermine the employment relationship. No penalty is payable by Axis for these reasons.

Issue 7: Costs

[93] Ms Zhou has been successful in relation to her premium claim and her unjustified disadvantage claim but unsuccessful in her claim for constructive dismissal and remedies. These claims each took up an equal amount of time. I am therefore minded to let costs lie where they fall. However, if either party has an objection to that course of action then Ms Zhou has fourteen days to file a costs memorandum. Axis then has a further fourteen days to file its costs memorandum. Ms Zhou then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

Additional Directions

[94] Due to my concerns regarding the parties' conduct in relation to Ms Zhou's obtaining a New Zealand permanent residency visa, I direct a copy of this determination be provided to Immigration New Zealand.

Jenni-Maree Trotman
Member of the Employment Relations Authority