

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 30
3016831**

BETWEEN ALEXANDER AN
 Applicant

AND ACCESS NEW ZEALAND
 INTERNATIONAL LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Andrea Kelleher, Advocate for Applicant
 Mark Hammond, Counsel for Respondent

Investigation Meeting: 18 January 2018 at Auckland

Submissions received: 14 December 2017 & 18 January 2018 from Applicant
 20 December 2017 & 18 January 2018 from Respondent

Determination: 31 January 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Alexander An, claims that he was unjustifiably dismissed by the Respondent, Access International New Zealand Limited (Access) on 10 May 2017.

[2] Mr An also claims that he was unjustifiably disadvantaged by Access failing to provide him with an individual employment agreement, and by failing to pay him the holiday pay accrued during his employment.

[3] Access denies that Mr An was unjustifiably dismissed and claims that he left its employment voluntarily

Issues

[4] The issues for determination are whether or not Mr An was:

- unjustifiably dismissed by Access

- unjustifiably disadvantaged by Access:
 - failing to provide him with an individual employment agreement;
 - failing to pay him holiday pay accrued during his employment
- Penalties should be awarded in respect of Access' failure to comply with the requirements of the Employment Relations Act 2000.

Background Facts

[5] Access is a small Hamilton based company working in the areas of education and agricultural support. Mr Weijun Qiu is a director and shareholder who is based in Hamilton but who normally visited the Auckland office one day a week.

[6] Following an interview with Mr Qiu and Ms Dong, the Auckland Office Manager, Mr An was offered employment on 10 February 2017 and commenced employment on 13 February 2017.

[7] During the time Mr An was employed, there were three employees in the Auckland office, Ms Dong, Mr An and Ms Vicky Ou, Customer Service Assistant, who commenced employment at Access shortly after Mr An.

The First Employment Agreement

[8] Mr An said he was not provided with an individual employment agreement until the second week of his employment, although he had requested one from Mr Qiu.

[9] He said that Mr Qiu visited the Auckland office during week commencing 20 February 2017 and presented him with an individual employment agreement (the First Employment Agreement). Mr Qiu signed it, and then gave it to Mr An who claimed that he had been given no time to consider it before he signed it.

[10] Mr Qiu said he had provided Mr An with a copy of the First Employment Agreement prior to the commencement of his employment and recommended that he took independent advice on it before signing it, in addition to considering the culture of Access.

[11] At the Investigation Meeting Ms Dong confirmed that Mr Qiu had sent the Employment Agreement to Mr An rather than handing it to him in person.

[12] The First Employment Agreement on 2017 contained the statement: “*Alex acknowledges that he has had the opportunity to seek independent advice before signing this Agreement.*” Below the statement were the signatures of Mr Qiu and Mr An, both dated 13 February 2017.

[13] Mr An said that he had not taken seriously the statement acknowledging that he had the opportunity to seek independent advice, and confirmed that it was not true because he had been given no time to seek such advice.

[14] He explained the date of his signature as being attributable to his believing that he had to date it as the same date as Mr Qiu. When questioned at the Investigation Meeting, he explained that he had believed he had to do so although it was not the actual date of signing the First Employment Agreement.

[15] The First Employment Agreement was for a fixed term period of two months stating at clause 3.2 headed ‘Agreement Duration’:

This agreement is a two-month fixed term agreement, commencing on 13 February 2017 and ending on 14 April 2017. After the contract period the Company will decide whether the position will be continued or disbanded.

[16] Mr Qiu said he had explained to Mr An that the Employment Agreement was a fixed term agreement because the Auckland office was a new venture and Access was not sure it would be viable, however he had not realised that he was required to put that explanation in writing in the Employment Agreement.

The Proposed Employment Agreement

[17] After the date for the termination of the fixed term period of employment was reached on 14 April 2017, Mr An said Mr Qiu did not discuss ongoing employment with him, although his employment continued on the same terms and conditions.

[18] Mr Qiu said he had discussed ongoing employment with Mr An before the expiry date of the Employment Agreement, presenting him with a Proposed Employment Agreement on or about the end of March 2017 (the First Proposed Employment Agreement) which stated that it was: “*an one year contract*” commencing on 13 April 2017. The salary was stated as \$33,600.00.

[19] Ms Dong said she recalled three meetings held with Mr An at which his ongoing employment was discussed, one of which took place on 20 April 2017. These were the usual

regular meetings about workflow issues, but had progressed to include discussions about Mr An's employment situation.

[20] During the first meeting, she said a further employment agreement (The First Proposed Employment Agreement) was provided to Mr An who said that he wanted an increase in salary to \$45,000.00 on the basis that: "*everyone wanted a better life*"

[21] Ms Dong said that in the second meeting Mr Qiu had increased the salary Access was offering Mr An.

[22] Mr An denied receiving the First Proposed Employment Agreement but said Mr Qiu presented a further individual employment agreement to him on 28 April 2017 (the Second Proposed Employment Agreement) and advised him to take it home and carefully consider it.

[23] The Second Proposed Employment Agreement stated it was: "*a one year fixed term agreement, commencing on 14 April 2017 and ending on 13 April 2018*" and stated the salary as \$35,000.00 p.a.

[24] Mr An took the Proposed Employment Agreement home and discussed it with his flatmate, Ms Mitsuko Nakamura. He also researched his rights in New Zealand employment law and became concerned about the fixed term nature of the employment offered.

[25] In his discussion with Mr Qiu, Mr An said he had spoken of his contribution to Access, and confirmed he had asked Mr Qiu for a small salary increase, but denied he had mentioned a specific amount. The main issue for him was to have permanent rather than fixed term employment.

[26] Mr Qiu said that Mr An had told him and Ms Dong that he had a lot of expenses and needed to have a higher salary, specifically mentioning \$45,000.00 and denied Mr An saying that he wanted to have permanent employment.

[27] Mr An sent a message to Mr Qiu via the Chinese Facebook website on 8 May 2017 which stated (as translated): "*I want to increase the salary for a little. NO other requirements (about the contract), as you see, I worked hard, and (I am) continuing to modify (my capability).*"

Meeting 10 May 2017

[28] During a meeting between Mr An and Mr Qiu in the late afternoon on 10 May 2017 Mr An said he tried to negotiate the terms of the Second Proposed Employment Agreement. He Said Mr Qiu had asked him three questions, the third of which was what he would do if he

did not continue to work for Access. In response he had replied that he would have no option but to find other employment.

[29] He had told Mr Qiu that the fixed term basis of employment had not been legally correct, and whilst he would like to continue in employment with Access, he wanted it to be on a legal basis.

[30] Mr An agreed he had asked if the salary could be increased a little, but denied he had mentioned \$45,000.00, stating that the important issue for him was to have permanent employment.

[31] He said Mr Qiu had been very unhappy at his response and told him to hand over his work to his colleagues. Mr An said he felt he had no choice but to ask Mr Qiu to pay him the monies that would be due at the termination of his employment.

[32] Mr Qiu said that during the discussion about his employment situation, Mr An had never said that he wanted permanent employment, but he had been clear that he required a salary of \$45,000.00 p.a.

[33] When he had told him that Access could only afford to pay him \$35,000.00, Mr An had left the meeting.

[34] Mr Qiu said Mr An had not said anything further although he remained in his office ready to talk further if Mr An had wanted to do so.

[35] Mr Qiu denied that he had dismissed Mr An, or that Mr An had resigned, and said he had believed they were still in the process of negotiation when the meeting had concluded.

[36] Mr An returned to his desk and began to remove his personal items, putting these into two reusable bags he kept with him in a backpack. He had downloaded work he had created during his employment onto a portable personal memory stick, and deleted all his work emails.

[37] Ms Dong said that when Mr An had returned to his desk following his meeting with Mr Qiu she had been called into a meeting with Mr Qiu, but as he had received a telephone call she had returned to her desk.

[38] Ms Dong said she had been leaving to travel overseas the following day so she had been very busy concentrating on her work when she became aware of Mr An at her side. He had referred to a computer PIN number and when she queried which PIN number, he had

gestured and she had seen a yellow post-it note on his computer screen. She had not asked why he had mentioned it.

[39] Ms Ou said she had seen Mr An taking two bags from his backpack and start packing his personal belongings when she had been called into a meeting with Mr Qiu to discuss how she was feeling as she was still relatively new in her employment with Access.

[40] After she returned to her desk Mr An asked her to come over to his desk where he told her that the materials for the design work and promotion were stored on his computer. Ms Ou said she noticed that the PIN password was written on a post-it note and attached to the computer screen. After that, Mr An had said good-bye to her and Ms Dong, and left.

[41] Mr Qiu said he had seen that Mr An had cleared his desk, and he had subsequently been told that Mr An had given Ms Dong and Ms Ou his computer PIN number, deleted his emails and had left after saying good-bye. He had therefore accepted that as Mr An's resignation.

[42] Mr An said he had been contacted by Ms Dong after he left the office on 10 May 2017 and asked to return his company key card. He had contacted Ms Ou and asked her to meet him which she did, and he returned the company key card at that time.

[43] Mr An sent an email to Access on 15 May 2017 stating that it had dismissed him on 11 May, and asking for payment of his salary for the period 20 April to 11 May 2017.

[44] Access sent Mr An payment in respect of his salary up to and including his final day of employment, but Mr An said he had not received payment in respect of accrued holiday entitlement.

Determination

Was Mr An unjustifiably dismissed?

[45] Mr An claims that he was dismissed by Access. Mr Qiu denies that he dismissed Mr An or that Mr An resigned, claiming that Mr An left his employment at Access of his own volition after he (Mr Qiu) had told him that the salary Access was prepared to offer him would not be increased above \$35,000.00 p.a.

[46] Mr An and Mr Qiu have differing recollections of what occurred at the meeting on 10 May 2017 which was the final day Mr An was employed at Access, and there were no

witnesses to that meeting. Therefore the credibility of Mr An and Mr Qiu is pivotal to determining this matter.

[47] I find the following factors to be significant in determining the credibility of Mr An and Mr Qiu:

1. Mr An claimed that he had been given the First Employment Agreement by Mr Qiu during the week after he had commenced employment at Access on 13 February 2017, however Mr Qiu's evidence was that he had provided Mr An with the First Employment Agreement prior to his commencing employment:
 - I find Ms Dong's evidence to support that of Mr Qiu in that she recalled Mr Qiu sending the First Employment Agreement to Mr An rather than giving it to him; and
 - Despite his evidence that he did not receive it until sometime in the following week, Mr An had dated the Employment Agreement 13 February 2017 which supports Mr Qiu's evidence that Mr An had received it by the time he commenced employment at Access on 13 February 2017.
2. Mr An claimed that he had been given no opportunity to obtain independent advice before signing below the acknowledgment on the Employment Agreement that he had done so, however Mr Qiu's evidence was that he advised Mr An to seek independent advice on the Employment Agreement when he had provided it to him prior to his commencing employment at Access:
 - I find Ms Ou's evidence that she had been able to take her employment agreement away to read before signing and returning it to be supportive of that of Mr Qiu; and
 - Mr An's own evidence that he was provided with a further employment agreement on 28 April 2017 and advised by Mr Qiu to take it away to carefully consider it, together with that of Ms Ou, I consider to be indicative of this being a consistent approach adopted by Mr Qiu.
3. Mr An claimed that Access had not discussed ongoing employment with him prior to the expiry of his fixed term period of employment on 14 April 2017, however Mr Qiu's evidence was that he had discussed ongoing employment with Mr An prior to

the expiry of the fixed term agreement, providing him with a further fixed term employment agreement on or about the end of March 2017:

- I find Ms Ou's evidence that she was offered a further employment agreement before the expiry of her initial 2 month fixed term agreement to be supportive of Mr Qiu's evidence in that it is indicative of a consistent manner of behaviour.
 - I find Ms Dong's evidence of an increased salary offer being presented to Mr An during one of a series of meetings during April, one of which resulted in a proposal of an increased salary, to be supportive of Mr Qiu's evidence that the discussion about ongoing employment was prior to the expiry of the Employment Agreement. This evidence of discussions in which there was an initial salary offer made which was increased, I find supports an earlier offer having been made to Mr An on or about the end of March or beginning of April 2017.
4. Mr An denied asking for more than a small salary increase, and denied mentioning a specific figure, however Mr Qiu's evidence was that Mr An had requested a salary of \$45,000.00 p.a. after he had received the First Proposed Employment Agreement on 28 April 2017:
- I find Ms Dong's evidence to support that of Mr Qiu who referred to Mr An specifically mentioning a salary of \$45,000.00, explaining the reason why he wanted this salary level.
 - Mr An, having been offered further employment at the increased rate of \$35,00.00 p.a. on 28 April 2017 sent Mr Qiu a Facebook message on 8 May 2017 in which he referred to wanting to increase the salary a little, which must have been referring to an increase above the offered \$35,000.00
5. Mr An claimed that the fundamental issue for him was having permanent employment rather than a salary increase, however Mr Qiu's evidence was that Mr An had never mentioned wanting permanent employment, referring only to a salary increase on that offered:
- I find Mr Qiu's evidence to be supported by the Facebook message sent by Mr An to Mr Qiu on 8 May 2017 which stated that he wanted to increase the salary, but that there were: "*No other requirements (about the contract)*"

[48] On the balance of probability I find Mr Qiu to be the more credible witness, and accept that he did not dismiss Mr An.

[49] There is no evidence that Mr An resigned. He did not confirm his resignation in writing. Following the meeting on 10 May 2017 Mr An did not return to Access' premises, nor did he contact Mr Qiu.

[50] Mr Qiu claims that Mr An abandoned his employment on 10 May 2017.

[51] The Court of Appeal in *E N Ramsbottom Ltd v Chambers*¹ accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee's initiative.

[52] Mr Qiu did not communicate in writing with Mr An after 10 May 2017 to clarify that he had in fact resigned, but instead sent him his final salary payment as requested.

[53] In considering therefore whether or not Mr An's employment ended at his own initiative I note that there is no evidence of a heated argument taking place between Mr Qiu and Mr An which might have resulted in Mr An making a decision to leave in 'the heat of the moment' after which he might have resiled after he had cooled down.

[54] I find Mr Qiu's conclusion that Mr An had decided to leave his employment voluntarily to be supported by Ms Dong and Ms Ou's evidence that Mr An had cleared his desk and personal items into two extra bags he had brought with him to work that day, left his computer PIN number, and deleted his work emails prior to leaving Access, but did not tell them his employment had been terminated by way of dismissal.

[55] Whilst I might accept that he felt uncomfortable doing so when in their presence at the Access offices, I find it notable that Mr An did not mention this to Ms Ou when he met her to return the Access office swipe card off site.

[56] After considering the matter I determine that Mr An was not unjustifiably dismissed, but that he voluntarily left his employment at Access.

Was Mr An unjustifiably disadvantaged by a failure to provide him with an individual employment agreement?

¹ [2000] 2 ERNZ 97

[57] Mr An was provided with the individual employment agreement dated 13 February 2017. This was a fixed term agreement which expired on 14 April 2017.

[58] Mr An said there was no further employment agreement provided until 28 April 2017, after the expiry of the fixed term Employment Agreement which is disputed by Mr Qiu.

[59] I have already set out above that I find Mr Qiu's evidence to be more credible than that of Mr An, and in this matter it is that Mr An was provided with a replacement employment agreement prior to the expiry of the first Employment Agreement.

[60] Moreover I observe that as Mr An continued in employment on the same terms and conditions of employment after the expiry of the Employment Agreement on 14 April 2017, he suffered no disadvantage.

[61] I determine that Mr An was not unjustifiably disadvantaged by a failure by Access to provide him with an individual employment agreement.

Was Mr An unjustifiably disadvantaged by the failure to provide him with holiday pay?

[62] Mr An claims that he did not receive the outstanding holiday pay entitlement after his employment at Access ended in accordance with the provisions of s 27 (b) of the Holidays Act 2003. Access accepts that this may have been the case.

[63] I determine that Mr An was unjustifiably disadvantaged by the failure to pay him his accrued holiday pay.

Should a penalty be awarded in respect of Access' failure to comply with the Employment Relations Act 2000 by the failure (i) to provide Mr An with an individual employment agreement (ii) in respect of the fixed term nature of the Employment Agreement; and (iii) the failure to provide wage and time records?

Failure to provide an individual employment agreement

[64] Employers are to provide employees with a written individual employment agreement containing the terms and conditions of employment pursuant to s 65 of the Act.

[65] I have found that Mr An was provided with a written individual employment agreement at the outset of employment and in respect of proposed ongoing employment, and therefore no penalty falls to be awarded.

Failure to comply with the requirements in respect of fixed term agreements

[66] Mr Qiu said that the reason for the fixed term was because the Auckland office of Access was a new venture, having been opened in January 2017 shortly prior to Mr An's employment on 13 February 2017. It was being funded by an overseas investor and ongoing investment was dependent on the viability of the Auckland office.

[67] Mr Qiu said the reason for the fixed term nature of the employment had been explained to Mr An at the outset of the employment, and later when discussions regarding a further fixed term of employment of 1 year's duration was being discussed.

[68] I accept that Access had genuine reasons based on reasonable grounds for the fixed term in compliance with s 66 (2) of the Act. However a fixed term employment agreement must also comply with s 66 (4) of the Act which states that the employment agreement must state in writing the way the employment will end and the reasons for ending the employment that way.

[69] The Employment Agreement did not comply with s 6(4) of the Act. Whilst this did not affect its validity² it is a breach of the provisions of the Act, and as such incurs a penalty.

Failure to provide wage and time records

[70] The Applicant appears to have requested wage and time records from Access, however the evidence on this was not clear and centred around the issue of how service at Mr Qiu's home was effected rather than at the registered office of Access which caused some distress to Mr Qiu and also caused police involvement.

[71] Given the confusion around the manner in which service was effected I find insufficient evidence to support a penalty being awarded in respect of a failure to provide wage and time records.

Remedies

Holiday Pay

[72] I understand that Mr An has now been paid holiday pay to which he is entitled. However he is unsure of the basis of calculation in order to understand if payment is correct. This matter remains to be addressed in order that Mr An is reassured that he has received all the holiday pay entitlement due to him.

² S 66 (5) of the Act

[73] I anticipate that the parties can resolve this matter between them, but if they are unable to do, they may revert to the Authority to determine the matter.

[74] Access is ordered to pay Mr An \$500.00 as compensation in respect of the later payment of holiday pay pursuant to s. 123 (1)(c) of the Employment Relations Act 2000.

Interest

[75] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum³.

[76] I consider that it is appropriate that Access is ordered to pay interest on the outstanding holiday pay entitlement which was owed to Mr An.

[77] Access is to pay interest of 5% on the outstanding sums which had been due as holiday pay entitlement to Mr An.

Filing Fee

[78] Access is ordered to pay Mr An the Authority filing fee of \$71.56.

Failure to comply with the requirements in respect of fixed term agreements

[79] Access is ordered to pay a penalty of \$1,000.00 to the Crown pursuant to s 134(1) of the Act.

Costs

[80] Costs are reserved. The parties are encouraged to resolve the matter between them. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[81] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

³ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)