

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kelly Buer (Applicant)
AND Yuan Cheng International Investment Group Ltd (Respondent)
REPRESENTATIVES John Coyle, Advocate for Applicant
Simpson Tong, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 2 May 2005
DATE OF DETERMINATION 30 May 2005

DETERMINATION OF THE AUTHORITY

Ms Kelly Buer, the applicant, says she has been unjustifiably dismissed by the respondent Yuan Cheng International Investment Group Ltd. She also says she was not provided with an employment contract despite her requests for one; and that she was not given reasons for her dismissal. The respondent denies that she was unjustifiably dismissed. It says she was employed on a casual basis and that the work simply came to an end.

Offer of Employment

Ms Buer was working for a property development company in Tauranga. In November 2003 she saw an advertisement for a PA to the director of the respondent. The rate for the job was \$1200 per week after tax. Ms Buer telephoned the company and was given an initial interview on the day she phoned with Mr Andy Lai, the Business Development Manager. She then had a second interview with the director, Mr Huang. As she noted, the interview was unusual in that a number of applicants were present. They were told Mr Huang was a very busy person and so he had decided to see everyone at the same time. Ms Buer says that Mr Lai called her on 26 November and told her she had the job. Mr Lai says he told she did not have the job.

The company's story is that although Mr Lai told her she did not have the job she continued to ring the company asking for work. Ms Buer flatly denies this and I accept her denials. Mr Lai said she kept ringing and asking if there was any work. Given that Ms Buer had a well paid and secure job in Tauranga this seems very strange.

Mr Lai went on to tell me that Mr Huang's family were coming out from China for a visit and that Mr Huang wanted someone to act as a nanny for his children. This was the position that was offered to Ms Buer. She was told that she would accompany the family sightseeing and help them out wherever she could. He said she was told that she needed to work long, flexible hours and during weekends if required as it was an informal arrangement. I note in passing that the respondent's statement from Mr Tong that it was "an informal employment relationship" has, as I

told him, no basis in New Zealand law. He told me that was what he had been told to say by Mr Huang. It was because it was to be a short term job with long hours that Mr Huang was prepared to pay \$1200 per week after tax. Mr Lai went on to say that he and Ms Buer agreed that it would not be a formal employment relationship and that any formal relationship would only be concluded after she had worked for about a month and that Mr Huang might then consider her fit for any available work. I have no hesitation in preferring Ms Buer's version.

Terms of the Contract

Ms Buer says she discussed the terms of the contract with Mr Lai. Included in the discussion was reference to the salary. She wanted to check the rate and was told it was \$1200 per week after tax. She told Mr Lai she had to give two weeks' notice and would have to make arrangements to move from Tauranga to Auckland; and that she had a holiday already planned and booked for the 12 days over the Christmas period. It was agreed that she would start in the New Year on 12 January 2004. The hours of work were to be 8.30 to 5.30 Monday to Saturday, she would be paid on a monthly basis, and would have a company car park. If overseas travel was involved all expenses would be paid by the company and days in lieu given for extra time spent overseas. It was also agreed that the contract would be reviewed after 12 months.

Failure to Provide Employment Agreement

She had told Mr Lai that she wanted a written contract prior to starting work. It is the company's legal obligation pursuant to ss.64 and 65 Employment Relations Act 2000 to provide a contract in writing before employment commences. That contract must include the rate of pay, the location at which the work is to be performed and a job description. This case is an excellent illustration of the need for such a statutory provision.

No employment agreement was forthcoming. She was told to deal with the company's solicitor, Mr Simpson Tong. She wanted the contract ready and signed before she went on her holiday. She said Mr Tong didn't seem to understand her and referred her to his secretary, who was new, and was also of no help. She followed up on the need for a contract with Mr Lai but was told that they were very busy and he would sort it out. When I asked Mr Tong about the employment contract he initially denied receiving any calls from Ms Buer. Ms Buer, however, had telephone records and the evidence produced at the Investigation Meeting showed one call to Mr Tong's cellphone. I asked Ms Buer to produce the earlier telephone records, which she did. These show that Ms Buer made a number of calls to Mr Lai and Mr Tong from her cellphone. There are calls to Mr Lai on 26 November, a call on 27 November, which she says was a call relating to her request for an employment contract. On 11 December there is a call to Mr Tong's cellphone, followed by two calls on 16 December to the number of Minter Ellison, the law firm for which Mr Tong was working. This record indicates the veracity of Ms Buer's evidence relating to her attempts to try to obtain an employment contract. There is no possible reason for her to be contacting Mr Tong and Minter Ellison in December if she had not been offered and accepted employment in November as she deposed.

Course of Employment

Ms Buer told me that when she started it was very difficult to communicate with Mr Huang who did not speak English so a Mandarin-speaking Chinese woman named Pola was employed to help her communicate. Even with this assistance, it was sometimes difficult as Pola told Ms Buer she could not ask certain things directly. Mr Lai told me that Pola was also employed as a nanny on a short term contract.

Ms Buer said that after the first week Mr Huang expected her to work longer hours than those contracted for. He wanted her to work till 9pm most nights. Pola would not raise this with him. There were also problems with payment of her wages. Although it had been agreed that her wages were to be \$1,200 per week – and the respondent did not dispute this – the payment that was actually made for the four week period was for only \$4,200 instead of \$4,800. The respondent does not deny that there was a unilateral variation. The only rationale provided was that Ms Buer was grossly overpaid.

When Ms Buer first started she did the work that she had contracted to do, for instance, she conducted property searches, interviewed suppliers, dealt with agents and endeavoured to ensure that all Mr Huang's needs and requirements were met. She said the work was similar to that she had previously been performing in Tauranga.

Mr Lai told me Ms Buer was only employed in the office before Mr Huang's family came to New Zealand as he had told Mr Huang that she kept wanting a job and Mr Huang had told him to let her do whatever was going. That an employer would pay \$1,200.00 per week on this basis is unbelievable.

She was asked to go with Mr Huang's family to the South Island. She was to look at properties. She said she was not there as the nanny; neither did Pola go on the trip. A Chinese guide had been hired but the guide's English was minimal. The only person who spoke English with any degree of proficiency was a 10 year old boy. Ms Buer said the guide would go gambling with the family until the early hours of the morning and she was left to look after the children. She felt, unsurprisingly, that her contract was being disregarded.

The Dismissal

On the day of her return to Auckland Mr Lai told her Mr Huang was going back to China. Mr Lai then spoke to Mr Huang in his office and told Ms Buer that Mr Huang had decided not to continue with the contract. This is not disputed. She said she asked Mr Lai why her contract was being terminated. He told there was no reason. She asked if he could ask Mr Huang. Mr Lai said he did not want to get into trouble. She asked if he could give any idea about the reason for the termination. He told her she thought she was perfect and did the job well and that perhaps Mr Huang had had a bad day with the office in China. Mr Lai said "Who knows. He's just like that". He told Mr Buer that she should leave.

Mr Lai said he had given Ms Buer an employment warning. Ms Buer disputed this. When I asked for the reason Mr Lai said it was because she was incompetent and spent too much time making personal phone calls. I asked Mr Lai how he knew about the personal calls. He said the maid at the Huangs' home had told him. Ms Buer said that the maid spoke no English so could have had no notion of whether calls were business or personal. Mr Lai also said initially that Ms Buer had volunteered to reduce her wages but he later resiled from this.

After the dismissal she went home and faxed a letter saying she had been dismissed and did not understand why and asked for the reasons to be put in writing. There was no response.

After the Investigation Meeting I asked the company to supply me with the time and wages records for Ms Buer and Pola. I hoped – vainly – that these might show what the two women had been employed to do as this should be stated on the records. I received a letter saying there were no records because the two women were independent contractors. This was the first time this had been raised. It was not raised in the Statement of Problem as a defence to the claim. This is simply another instance of the company's failure to comply with the law.

Decision

It is not often that accounts about what has happened are as disparate as they were in this case. Where there are disparities it is usually because people genuinely remember that particular version of events. This is one of the rare cases where I have no doubt that the company's version of events was an utter fabrication. Mr Huang did not bother to appear to give evidence or provide an affidavit. He was in China.

Ms Buer was employed on a contract of service by the respondent. She was employed as Mr Huang's PA. Her contract was breached on a number of occasions and she was unjustifiably dismissed. There was no employment warning. Furthermore, despite her requests the company did not provide her with a written employment agreement as required by the Employment Relations Act 2000. There was a failure to provide a statement of the reasons for dismissal pursuant to s.120 (2) and a failure to keep time and wages records as required by s.130. Holiday pay has not been paid. Ms Buer was paid a week's notice.

Ms Buer was unjustifiably dismissed. Ms Buer did not act in any way that contributed to the situation that gave rise to the personal grievance.

Remedies

1. Reimbursement of lost wages

Ms Buer's salary was \$1,200 nett per week (\$1,721.77 gross per week or \$89,532.04 per annum). She was paid for four weeks, but three of those weeks were at a reduced rate of \$1,000 per week. She was paid up till 8 February 2004. She obtained alternative employment on 29 May 2004.

Pursuant to s.128 Ms Buer is entitled to three months' lost remuneration. I have deducted the week's paid notice from this. Three months' remuneration would have been \$22,383.01. Deducting a week's paid notice of \$1,721.77 brings that amount to \$20,661.24.

Reimbursement above that period is discretionary. I can see no reason why Ms Buer should not recoup the total amount of her salary loss for the twelve month period for which she has claimed. She gave up a well paid job and had to take employment at a rate that was less than her job with the respondent and was also less than the job she had left in Tauranga. Her salary was initially \$43,500 raised to \$46,000 on 30 June 2004 and then to \$50,000 as of 1 November 2004.

Payment for the remaining nine months would have been \$67,149.03. Her earnings need to be deducted from that amount. For the period 29 May 2004 to 30 June 2004 her earnings were \$3,848.08. From 1 July 2004 to 31 October 2004 the earnings were \$15,392.31. From 1 November to 6 February 2005 the earnings were \$13,461.54. The total earnings from 9 February 2004 to 6 February 2005 were \$32,701.93. Deducting this from \$67,149.03 comes to \$34,447.10.

In addition to those amounts Ms Buer is to be paid \$600 nett which was the amount contracted for and unilaterally reduced.

Ms Buer is also owed holiday pay. This comes to \$288 nett.

Summary

Three months' remuneration minus one week's notice: \$20,661.24 gross

Nine months reimbursement of lost wages:	\$34,447.10 gross
Three weeks' underpaid wages @ \$200 nett per week:	\$600 nett
Holiday pay:	\$288 nett

In addition interest at the rate of 7% is to be paid on the sums of \$600 nett and \$288 nett. The interest runs from February 8 2004 until such time as those sums are paid in full.

2. Compensation for humiliation and distress

The suddenness and unexpectedness of the dismissal in a situation where the applicant had moved from Tauranga entitles her to the sum of \$5,000. This is awarded pursuant to s. 123 (c) (i) Employment Relations Act 2000.

3. Penalties

The respondent failed to provide an employment agreement pursuant to s.64(2). Section 64 (3) provides that an employer who fails to comply with s.64 (2) is liable to a penalty imposed by the Authority.

Section 130 provides that every employer must keep a wages and time record and s.130 (4) provides that the employer is subject to a penalty where there has been such failure.

The applicant has also sought a penalty for breach of s.120 – the requirement to provide a statement of reasons for dismissal. I have no jurisdiction to award a penalty for this breach. Section 133 (1) provides that the Authority has jurisdiction to deal with penalties for breaches of employment contracts and for breaches of the Act for which a penalty is provided in the particular provision. Section 120 does not provide for the awarding of a penalty.

Section 135 provides that company or corporation is liable to a penalty not exceeding \$10,000

The first time a claim for a penalty for breach of s.130 was made was in the Amended Statement of Problem dated 40 (1) (c) (i) April 2005. Actions for penalties must be commenced within 12 months after the cause of action has arisen. I am unable, therefore, to award a penalty in this regard.

I am of the view that there was a breach of s.64 (2) and that a penalty should be awarded. The respondent is to pay a penalty of \$7,000. Pursuant to s.136 (2) I order that the sum of \$4,000 be paid to the applicant and that the remaining \$3,000 be paid into the Authority which sum the Authority will then pay into the Crown Bank Account.

Costs

The parties should endeavour to resolve the issue of costs. If that is unsuccessful, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority