

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 327/09  
5137467

BETWEEN                      CHIA CHENG  
   Applicant  
  
AND                              BASE PROJECTS LIMITED  
   (IN LIQUIDATION)  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:              Simon Blackwell for Applicant  
   Gene Paul for Respondent  
  
Investigation Meeting:      24 March 2009 in Auckland  
  
Determination:                10 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      The Authority has investigated Chia Cheng's claim that she was unjustifiably dismissed by Base Projects Limited (BPL) on 1 September 2008 after three years work as a project manager.

[2]      There is no dispute Ms Cheng was told to leave BPL's offices that morning. However BPL denies Ms Cheng was dismissed. Instead it says she was sent home until she was ready to attend a meeting to discuss employment issues. She had refused three requests from her manager David Lokes to meet with him that morning. She subsequently did not return to work in the following days and BPL treated her absence as a resignation.

[3]      On the morning of 1 September Ms Cheng and Mr Lokes had what she described in her oral evidence to the Authority as an "*email war*". She also told Mr Lokes she was "*too busy*" to speak to him. During this period she also forwarded

copies of emails from Mr Lokes to friends working in other businesses, including at least one customer of BPL. In one email to a friend she described Mr Lokes as “*such a fuckwit*” and in another described their exchanges as “*hilarious*”.

[4] On the afternoon of 1 September Ms Cheng sent Mr Lokes an email referring to her “*instant dismissal*”. Mr Lokes responded half an hour later with an email denying she was dismissed and asking her to contact him “*to make a time to meet with me in the next 24 hours to discuss your ongoing employment properly*”.

[5] Instead Ms Cheng instructed counsel who raised a grievance with BPL on her behalf on 3 September.

[6] The matter was not resolved between the parties or in mediation.

[7] In its evidence replying to Ms Cheng’s application to the Authority BPL raised new allegations that she had breached her employment agreement by using BPL time and resources to do work for personal clients and preparing to set up her own company. Ms Cheng denied those allegations.

### **The investigation**

[8] Written witness statements were lodged by Ms Cheng, her former flatmate and BPL colleague Jason Burt, Mr Lokes, BPL director Gene Paul, Mr Lokes’ personal partner and former BPL administration clerk Linde Schwarz, and BPL accountant Yatin Nagarkar. Each witness attended the investigation meeting and answered questions from the Authority member. The parties’ representatives had the opportunity to ask additional questions and provide oral closing submissions.

### **The issues**

[9] The issues for resolution are:

- a. whether Ms Cheng was unjustifiably dismissed from her employment on 1 September 2008; and
- b. whether prior to the end of her employment, during work time and using the resources of BPL, Ms Cheng breached duties of trust and

- confidence and confidentiality by working for other parties and setting up her own company; and
- c. if any personal grievance is found, what remedies are due to Ms Cheng after allowing for mitigation, contribution and subject to whatever findings are made regarding alleged breaches of duty while Ms Cheng was employed by BPL.

### **Was Ms Cheng dismissed on 1 September?**

[10] Following a performance review in June 2008 BPL had agreed to increase Ms Cheng's salary. There was also discussion about providing her with a company car in the coming months but meanwhile she was to continue using her own car for transport on BPL business. She sought a monthly allowance of between \$700 and \$750 for use of her own car along with BPL paying for the service of her car and replacement of tyres. Mr Lokes proposed a monthly allowance of \$500 along with BPL paying for a service and tyres. Ms Cheng accepted that proposal in an email on 26 June 2008 saying "*OK. This sounds fine*".

[11] In the following weeks Mr Lokes was annoyed to discover Ms Cheng had charged more expenses for her car than he expected and also paid for lunch for her boyfriend on a BPL credit card she was lent to use to pay for those vehicle costs.

[12] In late July Mr Lokes tried to arrange a meeting with Ms Cheng to talk about aspects of her performance and attitude to her work. She had walked out of an earlier meeting. No further meeting had been arranged by 1 September.

[13] The course of events on the morning of 1 September can be partly traced from a number of emails between Ms Cheng and Mr Lokes.

[14] They begin with an email at 9.33am from Mr Lokes attaching a copy of his BPL credit card account. He asked about an \$89.50 car grooming cost charged to the card on a day that Ms Cheng had his card. At 9.35am Ms Cheng replied she had provided a receipt for "*a valet for my car*". At 9.44am Mr Lokes replied he did not have any receipt, had not agreed to that cost and asked Ms Cheng for a cheque to reimburse BPL for that cost. At 9.47am Ms Cheng replied insisting she had told Mr

Lokes she “*was going to get a valet from the get go*”. At 9.59am Mr Lokes replied saying Ms Cheng knew he did not agree to that and saying she would have to pay for \$600 “*overspent*” on the arrangement for meeting her vehicle expenses.

[15] At 10.06am Mr Lokes forwarded Ms Cheng copies of earlier emails from him on 5 July and 26 June setting out the arrangement for meeting her vehicle expenses. The 26 June email was the one she had replied to by saying “*Ok. Sounds fine*”.

[16] At 10.07am Ms Cheng replied saying the earlier emails were “*bullshit*” because they were sent after she had work done on her car. Mr Lokes replied at 10.11am saying he was “*keeping this [email] on record because it is bullshit from you*” and refers to the arrangement set out 26 June email – to which she had agreed. He ended with the statement: “*Please just sort out the payment and this ends the subject*”.

[17] At 10.15am Ms Cheng replied that she knew what she had said and did not need Mr Lokes sending her “*endless emails about this. Get over it.*”

[18] At 10.24 am Ms Cheng forwarded her 10.15 am email to friends at five email addresses – one at a large law firm which was a client of BPL, one at an international recruitment consultancy, one at an oil exploration firm, one at an international pharmaceutical company and one at a gmail address. She included the following note about the chain of emails between her and Mr Lokes: “*Bahahahahahahahahahah (sic) This is hilarious.*” One of her friends replied by email five minutes later and Ms Cheng sent a further email to that friend at 10.35am saying: “*He’s such a fuckwit .. so annoying*”.

[19] During the hour between 9.35 and 10.35am Ms Cheng sent four emails to Mr Lokes and two to friends outside BPL and received four from Mr Lokes. In her evidence she also confirmed that she spent some time talking with Mr Burt about the exchange of emails – or what she called her “*email war*” with Mr Lokes. Mr Burt had a desk next to Ms Cheng’s desk in an open plan area of BPL’s offices.

[20] During that hour Mr Lokes came into the open plan office area three times to speak directly with Ms Cheng. On each occasion he walked from his office – a

distance of around 10 metres away.

[21] There is some conflict of evidence between Ms Cheng and Mr Lokes about what was said in each of those three conversations. Mr Burt, Ms Schwarz and Mr Nagarkar gave evidence about their memory of what they heard, each hearing and remembering the words said to different extents although they were all present in the open plan office or adjacent reception area. Relying largely on what is agreed between the witnesses, I find the following as most likely what happened.

[22] Mr Lokes twice asked Ms Cheng to come to his office and was twice told she was too busy. On the second occasion Ms Cheng replied that she was uncomfortable with Mr Lokes standing over her. He responded by walking back to his office and saying loudly that he was “*sick of your fucking attitude*”. Shortly after he returned for third conversation, and repeated his request that Ms Cheng come to his office for a meeting immediately. He says he was “*emphatic at that stage*”. She refused and said “*no, I’ve already told you I’m busy*”.

[23] Mr Lokes then told Ms Cheng that she was endangering her employment and told her to “*go home and think about your attitude*”. Ms Cheng responded by standing up and saying “*that’s fine*”. As she walked towards the door Ms Cheng says she said to Mr Lokes: “*You have no fucking right to talk to me like that*”. Ms Schwarz recalls Ms Cheng’s words as: “*I don’t need you David to treat me like shit*”.

[24] Ms Cheng contends that, before sending her home, Mr Lokes also said to her: “*I’m terminating your contract*”. Mr Burt recalls the same words while Ms Schwarz is equally clear those words were not used. Mr Nagarkar just remembers shouting and hearing Mr Lokes say: “*Go home and think about what you are doing*”.

[25] On the balance of probabilities I doubt Mr Lokes did refer to terminating Ms Cheng’s employment agreement in that way. I find support for that conclusion in Mr Lokes’ email sent to Ms Cheng around four hours later. I consider that a close examination of its contents, written so close to the events, is more reliable than the later and inevitably partisan recall of the witnesses.

[26] At 2.17pm Ms Cheng had sent Mr Lokes an email with the heading

*“Dismissal”* and referring to her *“instant dismissal”* as *“very unprofessional”*.

[27] His reply at 2.48pm unequivocally rejects the notion that Ms Cheng was dismissed. The rest of its contents confirms his view at the time that the employment relationship remained on foot, albeit pending a discussion about Ms Cheng’s *“approach and attitude”*. She was expressly invited to attend a meeting in the next 24 hours to discuss her *“ongoing employment properly”*.

[28] Accordingly I find that Ms Cheng was not dismissed on 1 September 2009. However she subsequently elected not to attend a disciplinary meeting with the company and effectively abandoned her employment, preferring instead to raise a personal grievance. Her preference for ending her employment relationship with BPL was confirmed by having quickly sought and obtained another better-paid job that she started two weeks later.

[29] However I also find that Ms Cheng was suspended on 1 September 2009 and how BPL – through the actions of Mr Lokes – went about imposing that suspension was not justified. In doing so I apply the test of justification set by s103A of the Employment Relations Act 2000 (the Act) in assessing the actions of BPL.

[30] Ms Cheng’s written employment agreement made no provision for suspension. However, even without an express contractual provision, suspension may be justified in unusual cases such as where the employer has a good reason to believe the employee’s continued presence in the workplace will or may give rise to some other significant issue.<sup>1</sup>

[31] A fair and reasonable employer would have talked first with Ms Cheng about the prospect of suspension and the terms on which it was to occur. BPL, through Mr Lokes, did not properly identify at the time an issue of sufficient significance that would justify Ms Cheng being removed from the workplace while his concerns were investigated. Rather Mr Lokes – exasperated by his email exchange with Ms Cheng and frustrated in his attempts to arrange a meeting with her – acted rashly in sending her home without a reasonable discussion about the suitability of such an arrangement. Either he or another manager (such as BPL director Mr Paul who was

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<sup>1</sup> *Singh v Sherildee Holdings Limited* (EC, AC 53/05, 22 September 2005, Judge Couch) at [91].

on the premises at the time) should have had that discussion with Ms Cheng.

[32] It is also clear from a letter later sent to Ms Cheng, dated 3 September, that the concerns Mr Lokes would canvas with her in the meeting he sought on 1 September were likely to range into areas that were disciplinary in nature. In those circumstances she was entitled to more notice of such a meeting and the opportunity to arrange for a representative to attend with her if she chose.

[33] Accordingly Ms Cheng does have a personal grievance not for unjustified dismissal, but for two unjustified actions of BPL on that day.

### **Did Ms Cheng breach her terms of employment by working for competitors**

[34] After Ms Cheng raised her personal grievance BPL alleged it had discovered she was working for competitors and setting up her own company in work time and with BPL's resources.

[35] Three examples were given by Mr Paul as instances supporting this allegation. Ms Cheng does not dispute she took steps to register a company, but that, of itself, is not a breach. Another example concerns work Ms Cheng was aware of which was secured by a former employee and present competitor of BPL. Another involves her pricing of a job.

[36] The evidence of a breach on each instance was thin, particularly on the point of whether any of the alleged breaches occurred during working hours. Even if such breaches were established they were at the minor end of the scale and there was no reliable evidence of loss resulting to BPL. No orders are necessary.

### **Remedies**

[37] Having found that Ms Cheng has a personal grievance for unjustified disadvantage, I must now consider remedies.

[38] The nature of the grievance found means the question of lost wages need not be considered. Ms Cheng would however be entitled to an award of compensation for

hurt and humiliation. I accept she was distressed by the circumstances of being told to leave the office in the hearing of her colleagues. An award of \$4000 would be the appropriate level of compensation however I make no order requiring the payment of that amount due to my conclusion on the issue of contribution.

[39] Under s124 of the Act the Authority must consider the extent to which Ms Cheng's own actions contributed towards the situation giving rise to her grievance and, if those actions require, reduce remedies that would otherwise be awarded accordingly.

[40] To a large degree Ms Cheng was the author of her own misfortune and failed to act in good faith in her dealings with Mr Lokes. I find that her following actions were sufficiently blameworthy contributions that the prospective remedy of compensation is to be reduced by 100 percent:

- a. Ms Cheng has plainly agreed to a regime regarding vehicle expenses – by email on 26 June – but proceeded to act as if she had not or its terms were different. This appears to be motivated by her belief that she was entitled to a higher salary and should have been provided with a company car. Paying for the valet cleaning of her car on the company's credit card, in addition to the agreed service and warrant costs, was a breach of trust by her.
- b. Ms Cheng, on the balance of probabilities, was not "*too busy*" to discuss Mr Lokes' reasonable concerns about her spending on a company credit card – rather she was spending the time talking to Mr Burt, forwarding emails to friends and conducting her "*email war*" with Mr Lokes.
- c. her emails to Mr Lokes – who was her direct manager – telling him to "*get over it*" and that his views were "*bullshit*" inflamed the situation and, to some extent, provoked his rash response.
- d. Ms Cheng acted irresponsibly in sending emails to her friends at various work addresses in which she treated Mr Lokes concerns as a joke and calling him a "*fuckwit*". While this conduct was discovered afterwards, it may be taken account of in considering contribution.

## **Summary of determination**

[41] Ms Cheng was not unjustifiably dismissed as alleged but was unjustifiably disadvantaged by her suspension on 1 September 2008 and being requested to attend what was really a disciplinary meeting earlier that day without proper notice or an opportunity to arrange a support person or representative if she wished to have one accompany her to such a meeting.

[42] However the remedy of compensation for distress arising from that disadvantage is reduced by 100 per cent because of Ms Cheng's blameworthy conduct contributing to the situation giving rise to her grievance.

## **Costs**

[43] The demands of other Authority matters have delayed my preparation of this determination. In the interval between the investigation meeting and the issue of this determination BPL has gone into liquidation. Because of the conclusion reached Ms Cheng has not been deprived of the opportunity to secure a remedy awarded as none has been ordered in this case.

[44] However because of the liquidation I cannot deal with any issue of costs, if Ms Cheng were to seek them against BPL, without her first securing the consent of the liquidator. If that consent were provided, Ms Cheng may lodge an application for costs. She should do so within 28 days of the date of this determination and the liquidator would then have 14 days to reply.

Robin Arthur  
Member of the Employment Relations Authority