

Employment relationship problem

[1] The first applicant (Mr Chien) and the second applicant (Ms Chang) claim unjustified dismissal from the employment of the respondent. Mr Chien claims he was dismissed on 17 December 2013 and Ms Chang on 27 December 2013.

[2] Mr Chien also claims a number of actions by the respondent resulting in unjustified disadvantage to him during the course of his employment.

[3] Ms Chang claims unjustified disadvantage in her employment by reason of being falsely accused of theft and not being given an employment agreement.

[4] Both Ms Chang and Mr Chien also claim that they have not been paid correctly in respect of two statutory holidays which they worked. In addition, Mr Chien claims he was not paid for substantial overtime worked.

[5] The respondent denies all of these allegations and argues, in particular, that Mr Chien was dismissed in accordance with a 90 day trial period contained in his employment agreement and that Ms Chang resigned from her employment of her own accord.

[6] Shortly before the Authority's investigation meeting, the applicants' representative contacted the Authority to draw its attention to the fact that an application had been filed in the High Court at Christchurch for the putting of the respondent company into liquidation. The application is to be heard by the High Court at Christchurch on 18 September 2014 at 10am. The applicants requested that the Authority issue its determination prior to the High Court hearing, which it agreed to endeavour to do provided that sufficient information was before it in order to enable it to make its determination.

[7] The Authority considers that it can determine the main aspects of the applicants' claims on the basis of the information before the Authority. The urgency of the matter necessitates a more truncated approach to the determination that would usually be the case.

[8] The evidence of Yu Yin, a director of the respondent, who speaks Mandarin Chinese, was given mainly with the assistance of an interpreter.

Brief account of events leading to the dismissal of the applicants

[9] The respondent owns and operates a berry farm together with a boutique restaurant in Christchurch. Mr Chien formerly worked as a senior food and beverage attendant at the Langham Hotel in Auckland but accepted a job with the respondent working in Christchurch to take effect from 17 October 2013. It appears that Mr Chien dealt mainly with Mr Yin.

[10] When Mr Chien accepted the offer of employment, his partner, Ms Chang, was also offered a job as a waitress in the restaurant. Ms Chang is a graduate in statistics and Mr Yin says that he understood that she was to seek better employment elsewhere, and was taking the waitress position as a temporary measure only, and this is why he did not issue her with an employment agreement. Mr Chien is also known as Roya, Ms Chang as Debbie and Mr Yin as Eagle.

Mr Chien

[11] The job position offered to Mr Chien was that of General Manager. He was given an employment agreement which he signed on 29 September 2013. Material parts of this agreement read as follows:

1. Application

- a) *The terms and conditions herein replace any expressed terms and conditions of employment that may have applied prior to the date of this agreement.*
- b) *Nothing in this contract shall prevent the parties agreeing in writing to vary any or all of the provisions contained in this agreement.*

2. Term

This is a fixed term agreement and shall come into force on Sunday 29th September 2013 and shall remain in force for 1 year time period or until renegotiated or terminated pursuant to any provision of this agreement.

3. Title and Duties

- a) *It shall be the duty of the Employee to carry out all reasonable instructions and to undertake any work reasonably required by the company.*
- b) *The Employer may, after consultation with the Employee, amend duties from time to time.*

- c) *The Employee's Title is "General Manager – Sweethearts at Berryfields" and detail of duties are contained in the attached job description*
- d) *The company manual forms part of the employment contract and should be followed by Employees.*

Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67A(5) of the Employment Relations Act.

4. Hours of work

- a) *The annual rate for this position is \$42,000.00 per year.*
- b) *Punctuality is important in providing a proper service to clients. Accordingly, the Employee is to be prepared and ready to commence work at the appropriate starting time on each day.*
- c) *If the Employee is unable to attend at work on any day or if the Employee will be late for work, then the employee shall personally advise his or her employer as soon as possible before the first date of absence.*

5. Company Policy and Rules

...

This offer of employment includes a 90 day trial period and an assessment will be made at the end of this trial period with a meeting between the employee and employer to discuss performance over this time period.

...

7. Remuneration

- a) *All wages shall be paid weekly by direct credit to the Employee's bank account, no later than Friday of each week, or at least one clear day prior to a public holiday.*
- b) *Employees shall be supplied with details of their wage calculations.*
- c) *A dismissed Employee shall receive their final wages on the day of their dismissal or the next working day.*
- d) *The pay week is Thursday to Wednesday with payment being, made on the Friday following, each pay week.*

...

14. **Statutory Holidays**

- a) *Statutory holidays shall be taken and paid in accordance with the provisions of the Holidays Act 2003.*
- b) *The Employee shall work on such statutory holidays as the Employer shall require.*
- c) *Payment for statutory holidays shall be made in the form of a paid day in lieu during the “off season” of the business, the period from late May to early September each year or on termination of employment*
- d) *Statutory Holidays are those Public Holidays recognised by the Holidays Act. ...*
- e) *An employee will receive time and a half for working on a public holiday. This applies to all employees, including salaried employees.*

20 **Tools**

- a) *The Employer may provide the Employee with tools and equipment necessary to perform the duties for which the Employee is employed.*

...

34. **Disciplinary Procedures**

Where an act or omission of an Employee relates to misconduct or poor performance (except in cases of serious misconduct where summary dismissal is warranted) a warning procedure by the Employer will be followed. Such misconducts includes (but is not limited to) failure to wear prescribed personal protective equipment, poor attendance, poor work performance, behavioural problems and poor safety work methods. The giving of a warning is not restricted to the repetition of the same offence committed by the Employee.

The warning procedure the Employer will follow is outlined below:

First Offence:

A written warning shall be given and include –

- i) *A statement of the problem*
- ii) *Identification of any rule that has been broken*
- iii) *Any consequences which may have resulted from the breach*
- iv) *The corrective action required of the Employee*
- v) *The proposed action by the Employer if corrective action is not taken*
- vi) *A reference to the previous verbal warning(s) and the date(s) given.*

Second Offence:
(as above)

Third Offence:
Dismissal

35. **Termination of Employment**

- a) *Either party may terminate this contract in not less than four weeks' notice in writing to the other party.*
- b) *...*
- c) *Where the company terminates a contract under this clause, the Company may elect to pay wages in lieu of notice.*
- d) *The Employer may terminate this contract by giving such notice to an Employee that the Employer deems appropriate in the circumstances if, as a result of mental or physical illness an Employee is rendered incapable of the proper ongoing performance of his or her duties under this contract.*
- e) *Serious misconduct by an Employee may give rise to summary dismissal and no notice will be given to the Employee by the Employer. Conduct that may give rise to summary dismissal includes (but is not limited to):*
 - i) *Unauthorised possession of company property/equipment*
 - ii) *Falsification or being party to falsification of any company document or record*
 - iii) *Disclosure of confidential information*
 - iv) *Wilful misconduct likely to result in harm to fellow Employees*

[12] The contract also set out a *plain language* explanation of services available for the resolution of employment relationship problems and also contained a variation clause as follows:

39. **Variation clause**
This agreement may only be amended or varied by written agreement signed by both parties.

[13] Mr Chien said in evidence that, on his first day, he found there was another person who was already employed as a general manager, called Vivienne. He says that they were both confused about what they would each be responsible for. Mr Yin's evidence is that Vivienne was actually employed for front desk service, and Mr Chien was to be responsible for other areas, including farm work, kitchen duties and all other tasks relating to dealing with external relationships. Mr Chien says that

he was not given a job description despite a reference to it in the employment agreement and that he eventually wrote his own in discussion with Mr Yin.

[14] Mr Chien says that he was expected to carry out unreasonable tasks, and that these constituted part of the unjustified disadvantage in his employment. He says that the unreasonable tasks he had to carry out were:

- (a) Having to attend a meeting with Mr Yin's lawyer to interpret for him on a private matter on two occasions;
- (b) Having to operate farming machinery in the berry fields on 7 November 2013 when he did not have a licence or the experience to operate them;
- (c) Having to pick up bird faeces on several occasions, and once being told to do this in front of other staff.

[15] Mr Chien also says that he had to work up to 60 hours per week during his time with the respondent company, including a lot of work at home in addition to the tasks he had to do at work every day, because the respondent company did not provide a computer at the workplace. He therefore had to use his own desktop computer to finish work off after returning home. He says that Mr Yin refused to rectify the problem and instead told him that he should have had a laptop which he could then take to work.

[16] Mr Chien also complains that he would be told that he had to work overtime on his days off, which were Tuesdays and Wednesdays. He gives an example of 4 December 2013 (a Wednesday) when he says that Mr Yin called and sent text messages to him for the whole day to ask him to contact the supplier and to get him to read through work emails.

[17] Mr Chien also says that, on or around 6 December 2013, Mr Yin demanded that he work an extra day per week because the busy season was about to start. However, Mr Chien says he refused to do this, and did not do so. Having seen Mr Chien's translation of the email from Mr Yin to him, it appears to have been more of a request than a demand, and so I shall not consider this alleged disadvantage any further as I do not consider that a request alone constitutes a disadvantage, let alone an unjustified one.

[18] Because Mr Chien had concerns about the overtime he was being asked to work, he asked Mr Yin if he could be paid hourly wages rather than an annual salary. He says that Mr Yin agreed to this and asked him to return the copy of the employment agreement to him. Mr Chien says that he did this on 7 December 2013 but, when he gave in his timesheet showing hours he had worked, Mr Yin became angry and never provided a new contract with an hourly rate remuneration. Mr Yin says that he never agreed to pay Mr Chien hourly based pay which was why he never provided a new contract.

[19] Mr Chien says that the respondent did not provide him with a company car which had been promised to him by Mr Yin and that, consequently, he had to use his personal car regularly during work and non-working hours to collect supplies for the respondent, shop for groceries and attend to other work-related tasks and that he was never reimbursed for the cost of usage and petrol. Mr Chien says that he did not know how much petrol he used doing errands for the company but estimates that during his entire employment he used a tank of petrol, the cost of which amounts to \$70.

[20] Mr Chien says that he regularly had to remind Mr Yin to pay the staff on time and that, on Monday, 16 December 2013 they did not receive their pay as they were supposed to. Mr Chien says that he asked Mr Yin to rectify this the next day and that Mr Yin became very angry with him and asked him and Ms Chang to see him personally. Mr Chien says when he and Ms Chang turned up at the meeting with Mr Yin, Mr Yin dismissed Mr Chien on the spot without giving any reasons or discussions or providing any warnings.

[21] On 20 December 2013, Mr Chien received a letter from Mr Yin in the following terms:

Dear Roya,

This letter confirms our discussion on 17/12/2013 that your employment with Sweethearts at Berryfields Limited is terminated effective immediately.

According to our agreement signed on 29 September 2013, clause 5 "company policy and rules", the offer of employment includes a 90 days trial period and you may not apply personal grievance during the trial. Employer was not satisfied with your working attitude and performance at workplace, which is the main reason of the termination before end of the trail [sic] day.

You have been given two weeks notice of transition of your current work, and you will get paid up to 31/12/2013. Additionally, payment for your annual holidays will be included in your final salary which you will receive in our regular pay day. You will need to keep company informed of your contact information so that we are able to provide information you may need in the future.

Please let us know if we can assist you during your transition.

*Regards,
Yin Yu*

[22] Mr Chien wrote to Mr Yin on 21 December 2013 taking issue with his dismissal, effectively telling him it was unlawful, and asking for details of his work performance, listing the areas and tasks that he did not achieve or perform well in his duties. He says that Mr Yin did not respond to this email.

[23] Mr Chien says that, on 26 December 2013, Mr Yin texted him and asked him to meet with him that day. Mr Chien declined as it was Boxing Day but agreed to meet with him the following day. Mr Chien says that he and Ms Chang met with Mr Yin on 27 December 2013 and, at the meeting, Mr Yin accused Mr Chien and Ms Chang of stealing money from Mr Yin's credit card of up to \$8,000 and threatened to call the Police. Mr Chien says that he denied this and felt very humiliated and angry at being accused of being a criminal without any proof. He says that he left the building, and that Ms Chang later told him that Mr Yin had offered to apologise to Mr Chien. However,. Mr Chien declined to go and see Mr Yin as he considered that Mr Yin should have sought him out to apologise, not that he had to go back into the building to receive the apology.

[24] Mr Yin says that he told Ms Chang that if Mr Chien came and looked him in the eyes and said he had not misused his card details he would apologise to him, but Mr Chien never came to him.

Ms Chang

[25] Ms Chang's evidence is that she had been employed happily as a waitress working in the respondent's restaurant and took little part in the disagreements between Mr Chien and Mr Yin relating to the management of the company.

[26] Ms Chang confirms Mr Chien's evidence that the respondent would delay paying the staff's weekly wages and that Mr Chien had to follow up with Mr Yin to

ask for her pay. She said that on at least two occasions Mr Yin had asked Mr Chien whether Ms Chang would be willing to be paid without *GST*. It is presumed that she means deductions under the PAYE system. She says that she rejected this offer.

[27] Ms Chang says that Mr Yin had demanded that she turn up to the meeting on 17 December 2013, when Mr Chien had chased for payment of the staff's wages, and confirms that Mr Yin dismissed Mr Chien on the spot without giving any reasons. She says that Mr Yin allowed her to continue working as a waitress and that she decided to continue working because she liked the job and got along very well with the other staff.

[28] With respect to the text from Mr Yin to Mr Chien on 26 December 2013, which was in Chinese, Mr Chien says that it stated the following:

I want to confirm whether you have hand over your work, and whether Debbie needs to be in rosters, thank you.

[29] Ms Chang understood this to mean that Mr Yin was asking whether she still wanted to be employed. Ms Chang says that she sent a text message to Mr Yin telling him that she still wanted to work in the restaurant, and asking him whether *he was okay with that*. She says that Mr Yin did not reply. However, the Authority saw the email chain between Ms Chang and Mr Yin which, when translated, showed that Mr Yin had replied but that he had not addressed that question, instead offering to pay Mr Chien until 14 January 2014. Ms Chang replied asking if Mr Yin was offering to pay extra if Mr Chien agreed not to launch a claim, but Mr Yin did not reply.

[30] Ms Chang says that she was working her usual shift on 27 December 2013 and, during the day, approached Mr Yin to ask him whether he had received her text messages. She says that he replied *it all depends on Roya, if things get worse between me and Roya, then I don't think it will be good for you to stay*.

[31] Ms Chang says that, later at the end of her shift, she and Mr Chien attended the meeting with Mr Yin when Mr Yin stated that someone had used his credit card and spent around \$8,000 online. Ms Chang's evidence is that Mr Yin said he thought it was Mr Chien and Ms Chang who used the card because he thought that they hated him and wanted revenge. Ms Chang says that Mr Yin told them that if they did not accept that they had done this, he would call the Police. Ms Chang strongly denies the accusation of theft and says that she and Mr Chien left the restaurant that day

feeling hurt and humiliated. She had also noticed that day that her next shift, which had been rostered to take place on 30 December, had been crossed out.

[32] Ms Chang says that, the next day, she discovered that she was not rostered after the New Year to continue working for the respondent anymore and thereafter treated herself as dismissed.

[33] It is Mr Yin's evidence that he found out on 23 December 2013 that around \$8,000 had been charged against his credit card, and that he reported this to the bank immediately. He says that the bank advised that this was an online payment and that it was easy to pay online with only a credit card number without a security code. He says that his credit card information had been written down on one occasion when Mr Chien had paid for a job advertisement on TradeMe in November 2013. He therefore suspected that they were taking revenge at Mr Chien being dismissed. It is Mr Yin's evidence that he could tell from Mr Chien's facial expression that Mr Chien had *done it*. He said that he did not call the Police because he did not have solid evidence and he did not wish to jeopardise their future.

[34] Mr Yin also said that during his three months' employment with the respondent, Mr Chien gave him poor advice which damaged the restaurant's brand, causing a loss of profit of around \$30,000 and the ruination of the restaurant's reputation. Mr Yin also says that Mr Chien did not take full responsibility for managing the kitchen, and monitoring costs, which negligence caused severe waste with an estimated loss of \$20,000. He also says that Mr Chien did not take effective responsibility for management of the farm which resulted in a \$50,000 drop in berry sales.

[35] Mr Yin says that, as general manager, Mr Chien:

... bears the blame for all these adverse events. My comment is that he did not do what he said he would do, and that he lacked competence and a sense of responsibility.

The issues

[36] It is necessary to consider the following issues:

- (a) Whether Mr Chien was unjustifiably dismissed;

- (b) Whether Mr Chien suffered unjustified disadvantage in his employment;
- (c) Whether Mr Chien is owed unpaid wages in respect of overtime that he says that he worked; and
- (d) Whether Mr Chien is due pay for working on public holidays.

[37] With respect to Ms Chang, it is necessary to consider:

- (a) Whether she was unjustifiably dismissed;
- (b) Whether she suffered an unjustified disadvantage in being falsely accused of fraudulently using the company's credit card and not being given an employment agreement; and
- (c) Whether Ms Chang is due pay for working on public holidays.

Was Mr Chien unjustifiably dismissed?

[38] The respondent relies upon a statutory trial period to justify the dismissal of Mr Chien. Statutory trial periods are provided for in s.67A and s.67B of the Employment Relations Act 2000 (the Act). These sections provide as follows:

67A When employment agreement may contain provision for trial period for 90 days or less

(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.

(2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that—

(a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and

(b) during that period the employer may dismiss the employee; and

(c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

(3) Employee means an employee who has not been previously employed by the employer.

(4) [Repealed]

(5) To avoid doubt, a trial provision may be included in an employment agreement under—

(a) section 61(1)(a), but subject to section 61(1)(b):

(b) section 63(2)(b).

67B Effect of trial provision under section 67A

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).

(4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.

(5) Subsection (4) applies subject to the following provisions:

(a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and

(b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[39] The individual employment agreement given to Mr Chien did not contain an effective trial period as it did not comply with s.67A(2). What is missing are clear words stating that, if the employer dismissed Mr Chien during the 90 day trial period, the employee was not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. Arguably, it is also not clear that the trial period starts at the beginning of the employee's employment as required by s.67A(2)(a).

[40] Given that the purpose of s.67A and s.67B is to remove an employee's right to raise a personal grievance for unjustified dismissal, which is a fundamental right enshrined in the Act, the Authority must be completely satisfied that a respondent who seeks to rely on those sections has complied completely and unequivocally with their requirements. Given that the wording of the two sections which refer to a trial period in the employment agreement is equivocal in its meaning, and incomplete, it would not be safe to conclude that an effective statutory waiver of his rights was made by Mr Chien when he signed the agreement.

[41] In the absence of an effective trial period, the respondent is obliged to follow the requirements of ss.4 and 103A of the Act. These are set out as follows:

4 Parties to employment relationship to deal with each other in good faith

- (1) *The parties to an employment relationship specified in subsection (2)—*
- (a) *must deal with each other in good faith; and*
 - (b) *without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) *to mislead or deceive each other; or*
 - (ii) *that is likely to mislead or deceive each other.*
- (1A) *The duty of good faith in subsection (1)—*
- (a) *is wider in scope than the implied mutual obligations of trust and confidence; and*
 - (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
 - (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
 - (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

103A Test of justification

- (1) *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the court must consider—*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[42] Accordingly, given that no process whatsoever was followed in the dismissal of Mr Chien, and no fair and reasonable employer could have acted in the way that the

respondent acted in all the circumstances at the time the dismissal took place, I am bound to conclude that Mr Chien was unjustifiably dismissed.

Was Mr Chien disadvantaged in his employment?

[43] Mr Chien relies on a number of alleged acts, as follows:

- (a) He was made to act as a private interpreter for Mr Yin without pay;
- (b) He was made to operate machinery on the berry farm without a licence or training;
- (c) He was made to pick up bird faeces;
- (d) He was made to work unreasonably long hours and not paid overtime;
- (e) Having to work on his days off;
- (f) He was made to carry out computing tasks at home;
- (g) He was made to use his own car instead of a company car that had been promised and petrol had not been reimbursed;
- (h) Mr Yin had borrowed Mr Chien's car; and
- (i) Mr Yin had verbally insulted Mr Chien.

Interpreting for Mr Yin

[44] Although Mr Chien believes that this occurred in late October 2013, and so may have occurred within 90 days of the letter of personal grievance sent on behalf of Mr Chien and Ms Chang on 28 January 2014 from Prestige Lawyers, this alleged event is not referred to in that letter of personal grievance. Whilst it is mentioned in the Statement of Problem, that was not received by the Authority until 25 February 2014.

[45] I must therefore conclude that no personal grievance was raised with the respondent within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred, as is required by s.114 of the Act.

[46] Counsel for Mr Chien has made an application on behalf of Mr Chien for the Authority to grant leave for him to raise the personal grievance after the expiration of the 90 day period. However, I am not satisfied that sufficient reason has been given pursuant to s.115 of the Act to justify granting leave. Therefore, I am unable to accept this particular complaint.

Allegedly operating machinery on the berry farm

[47] Again, it seems that Mr Chien did not raise this as a personal grievance until it was referred to in the Statement of Problem which was received on 25 February 2014. Mr Chien says in his brief of evidence that he had to operate farming machinery on 7 November 2013. Therefore, raising it for the first time in the Statement of Problem occurred after the 90 day statutory period. Furthermore, insufficient reasons have been given on behalf of Mr Chien why the Authority should grant leave for a personal grievance in this respect to be raised outside of the 90 day period. I cannot consider this complaint therefore.

[48] In any event, having heard Mr Chien's evidence, it is not clear that this event amounted to a disadvantage, as he said his health and safety was not threatened and he was shown how to operate the machinery (a tractor) by the previous owner.

Was Mr Chien unreasonably required to pick up bird faeces?

[49] Mr Chien says that he was required to do this on more than one occasion, and remembers having to do it in November 2013 when he was told to do so by Mr Yin in front of other staff. It would appear that a grievance was raised in respect of this matter by Prestige Lawyers on behalf of Mr Chien and that, therefore, one or more of these incidents occurred within 90 days of the grievance being raised.

[50] Mr Yin says that he also picked up bird faeces but when he asked Mr Chien to do so as general manager he expected Mr Chien to deal with such matters one way or another.

[51] Having considered clause 3.1(a) of the employment agreement between Mr Chien and the company, I do not consider that the request made of Mr Chien was an unreasonable one. Therefore, although it may have been a disadvantage to Mr Chien (albeit not a serious one) I believe that the instructions given to him were

actions that a fair and reasonable employer could have done in all the circumstances. I therefore decline to find that this constituted an unjustified disadvantage.

Having to work unreasonably long hours

[52] Although Mr Chien says in his evidence that the terms of his employment agreement stipulated that his working hours were 40 per week, this is not evident from the document put before the Authority. In his oral evidence he says that he had an oral agreement with Mr Yin that he would work 40 hours a week, at \$20 an hour. He also says that he worked on average 60 hours a week, some of which was at home.

[53] Mr Chien says that he got paid for 40 hours a week every week, save for one week when he was paid for 47 hours, in the period between 9 and 15 December 2013. However, a copy of a payslip was shown to the Authority for Mr Chien which referred to him working 40 hours in the period between 9 and 15 December 2013. Mr Chien says that the payslip was wrong, and that, in any event, he worked 50.5 hours that week. He says that he believes that he was paid extra that week because that was the week he asked to change over to an hourly rate of pay. Mr Yin says it was because Mr Chien presented him with a time sheet showing he had worked extra hours at home that week, but that he was angry because Mr Chien had not asked for permission to work at home.

[54] The employment agreement stipulates that Mr Chien was to be paid an annual salary. There was no provision in it in relation to a minimum number of hours to be worked and, although Mr Chien gave evidence that Mr Yin had originally agreed that he would be paid for working the hours that he did on an hourly basis, this was never made part of the original employment agreement. Furthermore, the agreement states that it may only be amended or varied by written agreement signed by both parties.

[55] In view of this, I am satisfied that it was a term of the agreement between the parties that Mr Chien would be required to work such hours as were necessary. It is, indeed, generally the case that a position such as general manager is paid by reference to an annual salary and that the employee is to work such hours as are reasonably necessary to carry out all the duties, without extra remuneration.

[56] In view of this, I am unable to find that being required to work on average 60 hours per week constituted a breach of the employment agreement or an unjustified disadvantage in Mr Chien's employment.

Having to work on his days off

[57] Mr Chien says he was required to work during his days off as well, and that the days off (Tuesday and Wednesday) were rostered rather than agreed expressly with the employer. He estimates that he had to work a total of 12.5 hours during his days off, and is owed \$251.71 as a result.

[58] However, there is nothing in the employment agreement that stipulates that Mr Chien was to be paid extra for working on rostered days off. Again, his annual salary suggests that that was the totality of his remuneration entitlement. I therefore decline to award the sums sought.

Making Mr Chien carry out tasks on his own computer at home

[59] I accept Mr Chien's evidence that his role required him, inter alia, to draft documentation. Having seen some of this documentation, none of it seems unreasonable or unnecessary. Mr Yin does not deny that no computer was made available to Mr Chien in the workplace to enable him to prepare this documentation.

[60] There was no term in the employment agreement that required Mr Chien to make available his own computer or laptop and it would have been a reasonable expectation of any general manager of an enterprise such as the respondent that a work computer would have been provided. Furthermore, clause 20 of the agreement contemplates that tools would be provided to enable Mr Chien to perform his duties.

[61] I therefore accept that the failure to provide Mr Chien with a work computer to enable him to carry out some of his duties, thereby forcing him to use his own equipment, was a disadvantage to him and that no fair and reasonable employer could have required its employee to use his or her computer at home in all the circumstances.

[62] Therefore, this disadvantage was unjustified.

Was Mr Chien forced to use his own car?

[63] I accept Mr Chien's evidence that he was required to use his own car for which he did not receive any reimbursement of expenses. I also accept that being forced to use one's own personal car for work use without having the expenses associated with that use being reimbursed constitutes an unjustified disadvantage in

Mr Chien's employment as no fair and reasonable employer could have failed to have made arrangements for the reimbursement of expenses of using his own car in all the circumstances.

[64] However, Mr Chien did not keep a record of his mileage use for work purposes. It appears that he never made a quantified claim to the respondent but just handed over receipts for petrol purchases, which included his personal use. Therefore, without a quantified claim that can be verified, I do not accept that the respondent is required to reimburse an employee for unspecified petrol use.

Had Mr Yin borrowed Mr Chien's Car?

[65] Mr Chien's evidence is that he gave permission for Mr Yin to borrow his car, but Mr Yin only topped up the petrol fuel by 80% afterwards. As it is not clear how much petrol had been used by Mr Yin, I cannot take this complaint any further.

Did Mr Yin insult Mr Chien?

[66] Mr Chien's evidence is that this constituted being asked to pick up bird faeces and being accused of theft. I deal with both of these separately so will not consider this claim any further here.

Was Mr Chien subject to unjustified disadvantage when he was accused of fraudulently using the company's credit card?

[67] The allegation was made to Mr Chien on 27 December 2013. Whilst Mr Yin's termination letter to Mr Chien dated 20 December 2013 says that Mr Chien's employment was terminated immediately, Mr Chien says that he was paid until 31 December 2013 and the termination letter also says he was given two weeks' notice. I conclude from this that Mr Chien was employed up until 31 December 2013 and, therefore, was still employed when the accusation against him was made, enabling him to bring a disadvantage claim.

[68] The allegation made against Mr Chien was a very serious one and I accept Mr Chien's evidence that no proof backing up the allegation was put to him. On balance, I accept Mr Chien's evidence that the allegation was made in order to intimidate him.

[69] The making of the allegation therefore amounts to an unjustified disadvantage.

Payment for working on public holidays

[70] Mr Yin does not deny that Mr Chien worked on Canterbury Anniversary Day and Labour Day and that he was not paid time and a half. He relies on the fact that Mr Chien was a salaried employee. This, however, does not prevent Mr Chien being entitled to be paid in accordance with s.50 of the Holidays Act 2003. He is therefore entitled to be paid in respect of these two days at the correct rate.

Was Ms Chang unjustifiably dismissed?

[71] I accept the evidence of Ms Chang that Mr Yin told her that if there was any further trouble with Mr Chien it would be best if she were not employed and that, thereafter, he failed to reply to her text messages asking if she was still employed and that he failed to roster her for duties after 27 December 2013, having crossed off her shift for 30 December (or arranging to have done so).

[72] In all the circumstances, I accept Ms Chang's evidence that she was dismissed and reject Mr Yin's suggestion that she resigned.

[73] If, however, Ms Chang did resign, I find that such a resignation would constitute a constructive dismissal on the basis that Mr Yin's conduct towards Ms Chang in failing to roster her on for further shifts, in the context of the remark he had made to her and then failing to reply to her text messages, constituted a repudiatory breach of Ms Chang's contract of employment with the respondent, entitling her to resign.

[74] Such a dismissal is clearly unjustified as no fair and reasonable employer could have taken the actions that the respondent took in all the circumstances at the time.

Did Ms Chang suffer an unjustified disadvantage in her employment by being accused of theft?

[75] For the same reasons I have set out above with respect to Mr Chien, I accept that Ms Chang was subjected to an unjustified disadvantage in her employment by being accused of having fraudulently used the company credit card without any proof being given to her.

Did Ms Chang suffer an unjustified disadvantage for not having been given an employment agreement?

[76] It is clearly a disadvantage not to be given an employment agreement as it means that the employee does not know what terms and conditions she is employed under. As it is a statutory requirement, that disadvantage must be unjustified.

Payment for working on public holidays

[77] Mr Yin does not deny that Ms Chang worked on Canterbury Anniversary Day and Labour Day and that she was not paid time and a half. He says this was a mistake. Ms Chang is therefore entitled to be paid in respect of these two days at the correct rate.

Remedies for Mr Chien

[78] Section 123(1) of the Act provides as follows:

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

...:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[79] Section 128 of the Act provides as follows:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration

lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[80] Mr Chien's evidence is that he did not find new employment until May 2014, five months after his dismissal. In all the circumstances, given his skill set, I consider that he should have been able to find a new role within 13 weeks, and so will not exercise the discretion under s.128(3) to award more than three months ordinary time remuneration. That amounts to the gross sum of \$10,500.

[81] Turning to compensation for humiliation, loss of dignity and injury to his feelings arising out of the dismissal, I accept, given the evidence I heard, that the sudden dismissal would have caused Mr Chien to suffer such an effect. I believe that an award of \$7,000 is appropriate.

[82] With regard to the unjustified disadvantage suffered by Mr Chien, he suffered no quantifiable loss for having to use his own computer for the respondent's work, nor for having been falsely accused of stealing \$8,000. However, he would have suffered a financial loss for having to use his own car on the respondent's business, but cannot quantify the loss, as he did not lodge any quantified claims.

[83] However, I accept that the actions by the respondent causing unjustified disadvantage to Mr Chien caused him humiliation, loss of dignity and injury to his feelings, especially the false allegation of theft. I fix compensation for these issues at a global figure of \$3,000.

[84] Under s.124 of the Act, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[85] Having heard the evidence of both parties, I do not accept that Mr Chien contributed in any blameworthy way towards his own dismissal, nor to the disadvantages he suffered. Whilst Mr Yin appears to blame Mr Chien squarely for the respondent sustaining a loss of \$100,000, this is plainly absurd given that Mr Chien was in post for just over three months. Wild allegations without any cogent evidence

to support them do little more than to waste the time of the Authority and that of the parties.

[86] Accordingly, I decline to reduce the remedies awarded to Mr Chien.

[87] I also award Mr Chien the equivalent to one day's pay being the gross sum of \$161.52 for having worked on two statutory holidays but not having been paid time and a half for having done so.

Remedies for Ms Chang

[88] Ms Chang's evidence is that she found new employment on 20 February 2014. She was paid on an hourly basis at \$16 an hour and worked an average of 43 hours a week. This was not contradicted by Mr Yin. Her last day of work was 27 December. Assuming she was going to work on 30 and 31 December and then weekly from the week commencing 6 January 2014, she sustained a total loss of income of seven weeks' pay. At \$688 gross a week (\$16 x 43) that amounts to a loss of the gross sum of \$4,816.

[89] Turning to compensation for humiliation, loss of dignity and injury to her feelings arising out of the dismissal, I accept that she also suffered these effects and again fix compensation at \$7,000.

[90] With regard to the disadvantage suffered by Ms Chang, she suffered no quantifiable loss for having been falsely accused of stealing \$8,000. However, I accept that this allegation without proof, causing unjustified disadvantage to Ms Chang, would have caused her humiliation, loss of dignity and injury to her feelings. I fix compensation at \$2,500.

[91] I also find that not being issued with an employment agreement amounts to an unjustified disadvantage. However, I heard no evidence of any humiliation, loss of dignity and injury to her feelings arising out of this and so decline to award any compensation for it.

[92] Having heard the evidence of both parties, I do not accept that Ms Chang contributed in any blameworthy way towards her dismissal, nor to the disadvantage she suffered. Accordingly, I decline to reduce the remedies awarded to Ms Chang under s.124 of the Act.

[93] I also award Ms Chang the gross sum of \$128 in respect of having worked on two statutory holidays without having been properly remunerated.

Orders

[94] I order that the respondent awards the following sums to Mr Chien:

- a. The gross sum of \$10,500 for lost wages arising out of the unjustified dismissal;
- b. The further sum of \$7,000 under s123(1)(c)(i) of the Act for the unjustified dismissal;
- c. The further sum of \$3,000 under s123(1)(c)(i) of the Act for the unjustified disadvantage;
- d. The further gross sum of \$161.52 for one day's pay for having worked on two statutory holidays.

[95] I order that the respondent awards the following sums to Ms Chang;

- a. The gross sum of \$4,816 for lost wages arising out of the unjustified dismissal;
- b. The further sum of \$7,000 under s123(1)(c)(i) of the Act for the unjustified dismissal;
- c. The further sum of \$2,500 under s123(1)(c)(i) of the Act for the unjustified disadvantage;
- d. The further gross sum of \$128 for having worked on two statutory holidays.

Costs

[96] I reserve costs, despite the fact that the respondent company may go into liquidation within the next two days, because the applicants' counsel has not disclosed any evidence of the legal costs that the applicants have incurred. Counsel for the applicants may serve and lodge a memorandum of counsel in respect of costs within

14 days of the date of this determination, and the respondent shall have a further 14 days within which to serve and lodge any reply.

David Appleton
Member of the Employment Relations Authority