

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 272  
3001407

BETWEEN

JINQI GE  
Applicant

A N D

RENAISSANCE ASSETS  
MANAGEMENT LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person  
John Macdonald and Majka Cherrington, Counsel for  
Respondent

Investigation Meeting: 08 , 09, 10 and 28 May 2018 at Auckland

Submissions Received: 06 October 2017 from Applicant  
05 June 2018 from Respondent

Date of Determination: 24 August 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Ge was employed by Renaissance Assets Management Limited (“RAM”) as a market researcher/data analyst.

[2] Mr Ge claimed he was unjustifiably disadvantaged and unjustifiably constructively dismissed on 25 November 2016. RAM denied that and said it dismissed Mr Ge on 20 December 2016 for serious misconduct.

[3] Mr Ge also claimed that RAM required him to pay an unlawful employment premium for his job, so Mr Ge sought to recover that payment from RAM.

[4] Mr Ge withdrew claims for wage arrears, a breach of good faith relating to failure to pay his final pay in full upon termination and for a penalty arising from that failure.

*Unlawful employment premium claims*

[5] Mr Ge claimed Mr Ziming (“Eric”) Li, who is a shareholder and director of RAM, told him (Mr Ge) that he had to pay a “*deposit of RMB ¥161,000*” before he could sign an employment agreement. Mr Ge said that payment was an unlawful employment premium in breach of the Wages Protection Act 1983 (WPA).

[6] Mr Ge said he mistakenly paid RMB ¥165,000 (instead of RAM ¥161,000) so he sought;

- (a) to recover that full amount from RAM;
- (b) a penalty be imposed on RAM for breaching the WPA by requiring him to pay an unlawful employment premium to get his job;
- (c) that some or all of any penalty imposed on RAM be paid to him (Mr Ge) instead of the Crown.

*Unjustified disadvantage claims*

[7] Mr Ge claimed that he was unjustifiably disadvantaged in his employment because;

- (a) RAM made false and misleading accusations about him (Mr Ge) misrepresenting his academic credentials;
- (b) RAM failed to adequately investigate Mr Ge’s complaint about Mr Mai;
- (c) RAM required him to pay an employment premium to get his job;
- (d) RAM mislead him to work for Renaissance Group Holdings Limited instead of RAM;
- (e) RAM unjustifiably suspended him on 25 November 2016.

[8] RAM denied disadvantaging Mr Ge. RAM said that even if Mr Ge was disadvantaged (which it denied) any disadvantage was justified.

*Unjustified dismissal claims*

[9] Mr Ge claimed Mr Chris Mai dismissed him (Mr Ge) on 25 November 2016. Mr Mai is the General Manager of Renaissance Capital Investment and Finance Group Limited (“RCIF”), a subsidiary company of Renaissance Group Holding Limited, of which Mr Li is a shareholder.

[10] RAM is also a subsidiary of Renaissance Group Holding Limited. Mr Ge acknowledged that Mr Mai was not his (Mr Ge’s) employer. Nor was Mr Mai ever employed by RAM.

[11] Mr Ge claimed that Mr Mai was a close friend and associate of Mr Li and that Mr Li had asked Mr Mai to dismiss Mr Ge. Mr Li and Mr Mai denied that. I accepted their evidence about that.

[12] RAM said Mr Ge was not dismissed on 25 November 2016 but was told to work from home while the business was moving premises. RAM said Mr Ge remained on its payroll and continued to be paid until it dismissed him for serious misconduct by letter dated 20 December 2016.

[13] RAM’s stated grounds for dismissing Mr Ge in December were;

- (a) Dishonesty relating to a claim in Mr Ge’s employment resume and job interview and indications given during his employment that he held a Dr of Philosophy from Massey University when he did not;
- (b) Harassing Mr Li by preventing and obstructing him from leaving RAM premises; and
- (c) Threatening to damage the RAM’s reputation.

[14] Mr Ge denied all the disciplinary allegations against him.

[15] Mr Ge said that after his dismissal by Mr Mai on 25 November he (Mr Ge) asked Mr Li to repay the employment premium Mr Ge had paid to get the job.

[16] Mr Ge said the disciplinary action against him was retribution for his insistent requests that Mr Li reimburse him for the unlawful employment premium Mr Ge had paid for his job.

[17] Mr Ge said that whether he was dismissed in November or December of 2016, his dismissal was still procedurally and substantially unjustified.

### **Issues**

[18] The following issues are to be determined:

- (a) Did RAM require Mr Ge to pay an unlawful employment premium in breach of the WPA?
- (b) If so, should RAM be ordered to reimburse Mr Ge for the employment premium he paid?
- (c) If WPA was breached, should a penalty be imposed on RAM for its breach of the WPA?
- (d) If so, should some or all of any penalty imposed on RAM be paid to Mr Ge?
- (e) Did RAM unjustifiably disadvantage Mr Ge in his employment? In particular:
  - (i) Regarding accusations it made about Mr Ge academic credentials;
  - (ii) By failing to investigate Mr Ge's complaint about Mr Mai;
  - (iii) By requiring Mr Ge to pay an unlawful employment premium to get his job;
  - (iv) By misleading Mr Ge to do work for Renaissance Group Holdings Limited;
  - (v) By unjustifiably suspending Mr Ge on 25 November 2016.
- (f) If Mr Ge was unjustifiably disadvantaged in his employment, what if any remedy should be awarded?
- (g) What date was Mr Ge dismissed?
- (h) Was Mr Ge's dismissal justified?

- (i) If not, what if any remedies should be awarded?
- (j) What if any costs and disbursements should be awarded?

**Did RAM require Mr Ge to pay an unlawful employment premium in breach of the WPA?**

*What is an unlawful employment premium?*

[19] Section 12A of the WPA prohibits an employer or person engaged on the employer's behalf from seeking or receiving any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

*What does Mr Ge allege?*

[20] Mr Ge claimed that when Mr Li offered him (Mr Ge) the job on 28 April 2016, he (Mr Li) handed Mr Ge a handwritten note (in Mandarin) which had a bank account number for a bank account in China, the account name "*Mr Guo*", and the amount of Chinese RMB ¥161,000.

[21] Mr Ge said Mr Li told him that Mr Guo was the General Manager of RAM and that Mr Guo was in China, which was why the payment had to be deposited into a bank in China.

[22] Mr Ge called his father Mr Wanguo Ge who was in China and asked him to make the payment because he would not be allowed to sign an employment agreement until the money had been paid. Mr Ge said he thought it was standard practice to pay for his job with RAM, so he told his father that.

[23] Mr Ge's father went to the Tianmu East Road Branch of the Industrial and Commercial Bank of China (ICBC) and deposited the amount of RMB ¥165,000. This receiving bank account was with ICBC Harbin Guixiang Sub – Branch.

[24] Mr Ge and his father both said they think that Mr Ge's father misheard the amount of the amount was to be paid which is why Mr Ge's father paid RMB ¥165,000 instead of RMB ¥161,000.

[25] Mr Ge's father has tried to recover the money he paid in China but the bank and police there say they won't deal with it because it is a New Zealand employment issue so it needs to be resolved in New Zealand.

[26] Mr Ge's father remains out of pocket. Mr Ge seeks to recover the amount his father paid on the basis it was an unlawful employment premium that breached s.12A of the WPA.

*Mr Li's response*

[27] Mr Li denied any knowledge of the money Mr Ge's father paid. Mr Li said he did not ask for an employment premium or for a deposit to be paid. Nor did anyone else from RAM do so.

[28] Mr Li denied that it was his handwriting on the piece of paper that Mr Ge produced to the Authority. Mr Ge tried to get an expert handwriting analysis done on the piece of paper he said Mr Li gave him but Mr Li failed (despite being ordered to do so) to provide enough handwriting for an analysis to be done.

[29] Mr Li said he does not know who Mr De Shan Guo (the bank account holder in China) is and that Mr Guo does not have any connection with RAM. RAM confirmed that Mr Guo has never been RAM's General Manager or employed by RAM or any associated companies.

*Does s.12A of the WPA cover a payment made in China?*

[30] The Employment Court in *Mehta v Elliott (Labour Inspector)*<sup>1</sup> held that s.12A of the WPA had no extra-territorial application. The Court in *Mehta* examined whether the charging of the premium for work in New Zealand was unlawful when that transaction took place outside New Zealand.

[31] The question here is whether the fact that the alleged employment premium was paid by Mr Ge's father in China to a bank in China in Yen puts the transaction beyond the reach of the WPA and therefore the Authority's jurisdiction.

[32] I find it does not.

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<sup>1</sup> 1 ERNZ 451.

[33] The Court's decision in *Mehta*<sup>2</sup> can be distinguished from the current matter. In *Mehta* the employer (M) had two businesses in New Zealand and one business in India. M was in India at the time he made the offer of employment to the employee who was also in India.

[34] The request for an unlawful employment premium was made in India and the amount requested was paid in India to M's Indian partnership. Although the offer of employment was for employment in New Zealand all elements of this transaction took place in India.

[35] This matter is different because the alleged request for an employment premium was made in New Zealand by a New Zealand based employer to a New Zealand based employee for employment that would occur in New Zealand. The only extra territorial action that occurred in this case was the payment of Yen into a bank account in China.

[36] The mere fact that the employment premium was paid in Yen in China does not put it beyond the reach of the WPA. I am therefore satisfied that the Authority has jurisdiction to investigate Mr Ge's claim that Mr Li charged him an unlawful employment premium for his employment with RAM.

#### *Onus of proof*

[37] Mr Ge bears the onus of establishing on the balance of probabilities his claim that Mr Li told him he (Mr Ge) had to pay a "*deposit*" of RMB ¥161,100 before he would be allowed to sign an employment agreement or start work with RAM.

[38] Mr Ge also bears the onus of proving to the required standard that the money his father paid into the China based bank account was a "*deposit*" to secure employment in order for it to be a prohibited premium under s.12A of the WPA.

#### *Assessment of credibility*

[39] I have resolved the material conflicts in the evidence regarding the payment of an alleged unlawful employment premium in favour of Mr Ge.

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<sup>2</sup> *Supra*.

[40] I have been guided by what I consider to be corroborating evidence for Mr Ge's account of events, particularly the records of phone calls which I discuss later.

[41] I also consider that Mr Ge gave a clearer and more coherent account of the material timeline than Mr Li did. I was concerned that Mr Li's evidence lacked clarity regarding the circumstances of the offer of employment made to Mr Ge because it changed over the course of the Authority's investigation meeting.

[42] Mr Li also could not adequately explain Mr Ge's phone records.

[43] Mr Ge said that Mr Li offered him employment in person, and Mr Ge accepted the offer, during a meeting held on the afternoon of 28 April 2016. It was during this meeting that Mr Ge claimed Mr Li told him he (Mr Ge) had to pay the specified "*deposit*" before he could sign an employment agreement.

[44] Mr Li then wrote the amount of the "*deposit*" and bank account name and number on a slip of paper and handed it to Mr Ge, who produced it to the Authority.

[45] At 14:07 on 28 April 2016 Mr Ge called his father and asked him to transfer the money in accordance with the handwritten note he said Mr Li had given him.

[46] At 16.56 on 28 April Mr Ge's father called Mr Ge to confirm that the money had been transferred to the bank account written on the slip of paper Mr Ge says Mr Li had given him.

[47] The timing of the deposit into the China based bank account aligns with Mr Ge's evidence about the "*deposit*." The transaction receipt for the payment of the money into the nominated bank account in China was issued at 10:50 a.m. in China, which at that time was 14:50 p.m. New Zealand time.

[48] At 17:02 on 28 April Mr Ge called Mr Li to confirm that the money had been transferred. Mr Li then arranged for Mr Ge to come into the office and sign the employment agreement.

[49] Mr Li was unable to satisfactorily explain why Mr Ge would have to call him back after having received an offer of employment if it was not to confirm that the deposit requested had been paid. Mr Li had no other explanation for the telephone conversation.

[50] I also consider that Mr Ge's account of paying an employment premium is corroborated by the actions that he took to recover the employment premium as soon as he believed that he had been dismissed on 25 November 2016.

[51] At that point Mr Ge was not aware of the WPA and had not received any legal advice about the illegality of the payment of an employment premium. Nevertheless Mr Ge's actions were consistent with his belief that he had paid Mr Li for the job because when Mr Ge believed he had been told to leave that job he immediately sought repayment from Mr Li of the amount he (Mr Ge) had paid.

[52] Mr Ge asked Mr Li to return the deposit many times. I consider it significant that Mr Li did not immediately respond to Mr Ge's requests to refund the deposit by denying money had been paid for the job. That was not discussed until the carpark meeting on 27 November 2016. Instead Mr Li appears to have been avoiding communicating with Mr Ge about the money issue.

[53] The disciplinary actions that were taken by RAM against Mr Ge occurred after Mr Ge started asking Mr Li for the unlawful employment premium to be repaid.

[54] It was only after Mr Ge had asked Mr Li with escalating insistence to return the deposit that Mr Ge had complaints about poor performance raised against him and he was given warnings and then put through a serious misconduct disciplinary process which resulted in his summary dismissal.

[55] Mr Ge communicated with Mr Li via WeChat. On 27 November 2016 at 3.36pm Mr Ge wrote to Mr Li attaching a copy of the handwritten note with the bank account details and amount on it.

[56] Mr Ge stated to Mr Li *"this is what you write in your own handwriting, this is your handwriting. By this evidence, it can result in investigation. Please think carefully first. Give me reply."* (sic - this has been translated from Mandarin into English).

[57] Mr Ge and Mr Li met on 27 November 2016 to discuss Mr Ge's position that he was to be repaid the deposit he had been charged by Mr Li because he believed he had been dismissed.

[58] Mr Ge sent Mr Li another message via WeChat at 3.46 p.m. on 27 November 2016. This second message states “*today we met. You refused to admit you charged me a deposit. The property of your behaviour has changed which is a crime of defraud of money. You will be heavily punished by law.*”

[59] Mr Ge’s personal grievance letter dated 21 December 2016 referred to his claim that Mr Li had charged him a deposit for employment, that Mr Ge sought immediate return of.

[60] Mr Ge’s father travelled from China to attend the Authority’s investigation meeting in person. He gave uncontested evidence that he did not know who owned the bank account.

[61] Mr Ge’s father said that he paid the money into Mr Gou’s bank account in China because that was the name and account number he was given by his son. Mr Ge’s father said that he believed he was paying that money so that his son could obtain employment with RAM.

[62] I consider the discrepancy in the amount Mr Ge said he was asked to pay and the amount his father actually paid tends to support their evidence that they were making the payment at RAM’s request in return for it employing Mr Ge. If they had conspired together to defraud RAM it is more likely that they would have agreed on a specified amount.

[63] I am satisfied that Mr Ge has discharged the onus of establishing on the balance of probabilities that RAM (via the person of Mr Li) requested him to pay an unlawful employment premium in order to obtain employment.

**Should RAM be ordered to reimburse Mr Ge the unlawful employment premium he paid?**

[64] Section 12A(2) of the WPA provides that any person who has paid an unlawful employment premium may recover it from the employer who received that money in breach of s.12A(1) of the WPA.

[65] Mr Li said that he did not know the person who owns the China bank account who received the money. Mr Ge and his father also said that.

[66] If Mr Gou and his bank account were in New Zealand the Authority could investigate that payment further and possibly uncover any connections that may exist between Mr Gou and Mr Li and/or RAM.

[67] However because the bank account and holder of the bank account are in China that is not possible. The Authority must therefore assess the available evidence and make a decision based on that evidence.

[68] This is a fundamental conflict in the evidence. I have resolved credibility issues in favour of Mr Ge. I therefore accept his evidence and the uncontested evidence of his father that neither of them know or have any connection with Mr Gou.

[69] It therefore seems logical that the payment into Mr Gou's bank account was done at the instruction of RAM (via Mr Li) and for no other personal or other reason unrelated to the offer of employment from RAM to Mr Ge.

[70] I am therefore satisfied that Mr Ge has discharged the onus of proving on the balance of probabilities that Mr Li (on behalf of RAM) asked Mr Ge to pay RMB 161,000 for his job.

[71] That was then paid (plus another RMB ¥4000 due to the misunderstanding about the amount requested) to RAM by Mr Ge's father via Mr Gou's bank account in China.

[72] It is appropriate that RAM be ordered to reimburse Mr Ge for the full amount he paid (via his father). Although the amount actually paid was RMB ¥4,000 (approximately NZ\$1000) more than what Mr Ge said Mr Li told him he had to pay for Mr Ge's job with RAM.

[73] It is therefore appropriate for RAM to reimburse the full amount that was paid as the employment premium.

[74] Within 28 days of the date of this determination RAM is required to pay Mr Ge the equivalent of RMB ¥165,000 which is to be paid in New Zealand dollars based on the foreign exchange rate which is being advertised publically by the Bank of New Zealand on the date of this determination.

**Should a penalty be imposed on RAM for its breach of the WPA?**

[75] A penalty would normally be imposed on an employer or other person engaged on behalf of an employer who has sought or received an unlawful employment premium.

[76] Although Mr Ge claimed a penalty neither party gave evidence or submissions on penalties during the Authority's investigation because at that point liability had not been established.

[77] It is therefore appropriate to timetable a separate 'on the papers' investigation into the penalty claim. The penalty issues will therefore be addressed with the parties outside of this determination.

**Did RAM unjustifiably disadvantage Mr Ge in his employment?**

[78] Mr Ge claims that he was unjustifiably disadvantaged in his employment in five ways. Each of his alleged disadvantages are addressed below.

*(i) Allegations that Mr Ge mislead others about his academic credentials*

[79] This was a legitimate employment related concern that RAM raised with Mr Ge first informally and then via a disciplinary process. The mere raising of these concerns with Mr Ge did not disadvantage him. Even if he was disadvantaged it would have been justified.

[80] The manner in which such concerns were raised, and how the concerns about Mr Ge's academic credentials were addressed by RAM, forms part of Mr Ge's unjustified dismissal claim. It is therefore dealt with as part of that cause of action.

*(ii) Failure to investigate Mr Ge's complaint about Mr Mai*

[81] This related to Mr Ge's claim that Mr Mai had called him (Mr Ge) a dog. Mr Ge raised this with Ms Sun. She investigated it by asking Mr Mai to respond to the complaint.

[82] Ms Sun also asked Mr Ge to attend a meeting with her in person on 30 November 2016 to discuss his concerns. Instead of attending the meeting Mr Ge emailed Ms Sun to tell her that he has "no dispute" with anyone in the company.

[83] Ms Sun concluded that the issue had likely occurred due to a misunderstanding because Mr Ge and Mr Mai spoke different regional dialects. That meant that the way Mr Mai pronounced Mr Ge's name had unintentionally caused offence to Mr Ge who heard it as "dog" when that was not the word used.

[84] Ms Sun did investigate Mr Ge's complaint about Mr Mai so Mr Ge's claim to the contrary does not succeed.

*(iii) Requiring Mr Ge to pay an employment premium*

[85] The requirement to pay an employment premium was a pre-condition to employment and has already been dealt with as a separate claim. Mr Ge's claim that this is a separate unjustified disadvantage therefore does not succeed.

*(iv) Misleading Mr Ge to work for Renaissance Group Holdings Limited instead of RAM*

[86] Mr Ge's claims about this were not proven to the required standard. Mr Ge was concerned that RAM is a holding company for Renaissance Group Holdings Limited. However, Mr Ge's employment was with RAM. He was allocated work to do under his employment agreement with RAM and he was paid by RAM.

[87] Whether or not the work Mr Ge produced was used by other companies that were related to RAM and/or were within the Renaissance Group Holdings Limited group of companies did not disadvantage Mr Ge.

[88] It was up to RAM as to how it wanted to use Mr Ge's work and if it provided Mr Ge's work to other related entities it was closely associated with, that was within RAM's rights to do. How RAM decided to use Mr Ge's work was outside his control so his claim does not succeed.

*(v) Alleged unlawful suspension of Mr Ge on 25 November 2016*

[89] I am satisfied on the balance of probabilities that Mr Ge was not suspended. He was therefore not unjustifiably disadvantaged in that regard.

[90] RAM and its related group of companies were in the process of moving premises so all staff were invited to work from home while the move was occurring.

[91] There was an intervening period between the businesses leaving the current premises and obtaining new premises during which RAM and associated companies did not have a physical office for employees to work from. Staff were therefore told to work from home for that intervening period until the new office space became available.

[92] While Mr Ge viewed Mr Mai's instruction to him to "go home" as an unjustified suspension and/or unjustified dismissal that was not in fact what occurred.

[93] Mr Ge was not disadvantaged. There was no physical office for him to work from so he was told to work from home. Mr Ge continued to do the same work as always and he was paid as normal over this period so this claim does not succeed.

### **Was Mr Ge's dismissal justified?**

*What date was Mr Ge dismissed?*

[94] Mr Ge claimed he was constructively dismissed by Mr Mai on 25 November 2016. RAM said Mr Ge was summarily dismissed by letter dated 20 December 2016 for serious misconduct.

[95] Mr Ge was dismissed on 20 December 2016, not 25 November 2016. It is more likely than not that Mr Ge misunderstood Mr Mai's instruction to go home as a suspension or dismissal.

[96] Mr Mai had no authority to dismiss Mr Ge. They did not work for the same employer. Although Mr Mai told Mr Ge to "go home," which Mr Ge took to be a dismissal it was not a sending away that amounted to a dismissal in law.

[97] What Mr Mai more likely than not meant when he told Mr Ge to go home was for Mr Ge to go and work from home because there was no office available due to the office move.

[98] Mr Mai accepted he probably communicated this message to work from home to Mr Ge somewhat abruptly because Mr Ge was not Mr Mai's employee, and Mr Mai was focused on discussing the implications of the office move with his own staff.

[99] It is understandable that Mr Ge may have been confused about the effect the office move would have on his work location because that was never properly discussed with, or explained to, him until after he complained about it.

[100] At that point RAM made it clear his employment was on-going, he was not suspended and was required to work as normal but just had to do his work from his home and not the RAM office, which had closed.

[101] The fact that Mr Ge continued to work and be paid as normal and engaged in every way in an on-going employment relationship from 25 November until 20 December 2016 fundamentally undermined Mr Ge's claim that he had been dismissed on 25 November.

[102] It is also significant that RAM responded to Mr Ge's concern he had been dismissed by clarifying that he had not been dismissed so was expected to continue working and attend meetings and provide information as normal.

*Was Mr Ge's dismissal justified?*

[103] RAM bears the onus of establishing on the balance of probabilities that its dismissal of Mr Ge on 20 December 2016 was justified in accordance with the justification test in s.103A of the Employment Relations Act 2000 ("the Act").

[104] The justification test required the Authority to objectively assess whether RAM's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Ge was dismissed.<sup>3</sup> That had to be done for each of the examples of serious misconduct RAM identified in its dismissal letter dated 20 December 2016.

[105] A fair and reasonable employer is expected to comply with its statutory obligations. These include its good faith obligations and the procedural fairness tests in s.103A(3) of the Act. Failure by an employer to adhere to its statutory obligations is likely to fundamentally undermine its ability to justify a dismissal.

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<sup>3</sup> Section 103A(2) of the Act.

*Good faith*

[106] Section 4(1A) of the Act required an employer that is proposing to dismiss an employee to provide the employee with relevant information and an opportunity to comment on it before they are dismissed.

[107] RAM had relevant information that it did not share with Mr Ge. This included specific details about the matters he was being disciplined for and witness statements that were adverse to him that influenced RAM's decision making.

[108] RAM's failure to provide Mr Ge with all relevant information or an opportunity to comment on that information before it dismissed him breached its good faith obligations under s.4(1A) of the Act.

[109] This breach of good faith fundamentally undermined RAM's ability to justify Mr Ge's dismissal.

*Procedural fairness test*

[110] Section 103A(3) of the Act identified four minimum procedural fairness tests that an employer must meet to ensure that a fair and proper process is followed before it dismisses an employee.

[111] RAM has failed to discharge its onus of establishing that it complied with any of the four procedural fairness tests in s.103A(3) of the Act. This failure fundamentally undermined its ability to justify Mr Ge's summary dismissal.

*Section 103A(3)(a) of the Act*

[112] RAM's failure to comply with good faith requirements regarding the provision of relevant information and its associated failure to give Mr Ge an opportunity to comment on all relevant information before he was dismissed meant that RAM did not sufficiently investigate its concerns.

[113] RAM's failure to sufficiently investigate its concerns about Mr Ge's conduct before it dismissed him breached s.103A(3)(a) of the Act.

*Section 103A(3)(b) of the Act breached*

[114] RAM also breached its obligations under s.103A(3)(b) of the Act by failing to raise its concerns with Mr Ge before he was dismissed.

[115] RAM's disciplinary letter dated 08 December 2016 identified the following three concerns which it said were serious misconduct allegations, namely:

1. You dishonestly claimed in your employment resume and job interview that you held a Dr of Philosophy from Massey University.
2. You have harassed Eric Li by preventing and obstructing him from leaving the Renaissance premises; and
3. You have by email threatened to damage the company's good reputation.

[116] No specific information was given regarding any of these allegations nor were any details about the identified allegations provided to Mr Ge.

[117] These failures resulted in there being considerable uncertainty about what it was that RAM was actually concerned about and what information it was relying on to support each of its disciplinary concerns.

[118] The lack of detail and/or supporting information about the disciplinary allegations meant that RAM failed to raise its concerns with Mr Ge before dismissing him.

*Section 103A(3)(c) of the Act*

[119] RAM also failed to give Mr Ge a reasonable opportunity to respond to its concerns before he was dismissed in breach of its obligations under s.103A(3)(c) of the Act.

[120] Mr Ge did not attend the disciplinary meeting scheduled for 19 December 2016. He had asked for this meeting to be adjourned because information that he wanted to present was not at that point available. RAM declined Mr Ge's request for an adjournment and instead proceeded in his absence.

[121] Because RAM had failed to provide Mr Ge with all relevant information it relied on, Mr Ge was not given a reasonable opportunity to comment on RAM's specific concerns before he was dismissed.

[122] Considerable time was devoted during the Authority's investigation meeting to clarify what each disciplinary allegation related to and what evidence RAM had at the time it decided to dismiss Mr Ge regarding each of these allegations.

[123] In its own evidence RAM's witnesses were unclear about the dates on which the alleged behaviour occurred and/or about what specific information supported each disciplinary allegation.

[124] This lack of clarity shows that Mr Ge was not fully or properly informed of what it was he had to respond to, thereby depriving him of a reasonable opportunity to respond to the disciplinary concerns before he was dismissed.

*Section 103A(3)(d) of the Act*

[125] RAM failed to meet its obligations under s.103A(3)(d) of the Act because it failed to adequately consider Mr Ge's explanation.

[126] RAM failed to consider Mr Ge's explanation because it had not provided him with all relevant information, it had not made it clear what its disciplinary concerns related to and it did not agree to Mr Ge's request for an adjournment so that he could provide further information. Mr Ge did not attend the disciplinary meeting in person and proceeded in his absence.

*Section 103A(4) of the Act*

[127] Section 103A(4) of the Act provides for the Authority to consider other appropriate factors. Two other appropriate factors are the motivation for the disciplinary process and Mr Li's involvement as the decision maker.

[128] Mr Ge had been actively pursuing Mr Li to recover the unlawful employment premium Mr Ge said Mr Li had made him (Mr Ge) pay. Mr Li had Ms Sun make an informal complaint about Mr Ge to the police on Mr Li's behalf.

[129] One of the disciplinary allegations related to claims that Mr Ge had harassed Mr Li. Mr Li was also personally upset by what he categorised as “*threatening behaviour*” because Mr Ge said he was at Mr Li’s home waiting to speak to him.

[130] In these circumstances it was not fair or reasonable for Mr Li to have been the sole decision-maker in Mr Ge’s disciplinary process.

[131] Although Mr Li was assisted during the disciplinary process by Ms Sun, RAM confirmed to the Authority that Mr Li was the decision-maker, not Ms Sun. Ms Sun was only involved in providing administrative support to Mr Li.

[132] Mr Li had a conflict of interest that made it inappropriate for him to be both the most critical witness against Mr Ge and the decision-maker. Mr Li also had a personal motivation to end Mr Ge’s employment because Mr Ge had been insistently attempting to get Mr Li to repay the unlawful employment premium and threatening legal action against him (Mr Li).

[133] The failure by RAM to provide details of Mr Ge’s alleged harassment of Mr Li was an example of how Mr Li’s involvement was unfair to Mr Ge. Mr Li knew in his own mind what he was concerned about but that was never shared with Mr Ge, who was therefore deprived of an opportunity to respond to the specific concerns.

#### *Improper motivation*

[134] It is more likely than not that RAM’s disciplinary actions against Mr Ge were motivated by Mr Li’s attempt to shut down Mr Ge’s attempts to recover his unlawful employment premium from Mr Li.

[135] The timing of disciplinary action started immediately after Mr Ge began asking Mr Li to repay the unlawful employment premium as a result of what Mr Ge believed was his dismissal on 25 November 2016.

[136] Warnings were subsequently unilaterally imposed on Mr Ge without any disciplinary processes being undertaken.

[137] On 25, 26 and 27 November Mr Ge asked Mr Li to return the unlawful employment premium. Mr Ge phoned and texted Mr Li about this. Mr Ge and Mr Li

also met in the RAM carpark on 27 November 2016 to discuss it, during which time Mr Li refused to return the premium.

[138] On 28 November 2016 Mr Li issued Mr Ge with his first warning letter for attendance and performance issues. Mr Ge disputed the warning.

[139] On 30 November 2016 Ms Sun issued Mr Ge with an “*oral warning*.” It was unclear what exactly the warning was for but it looked like it was for taking sick leave without following the appropriate reporting process and/or without providing a medical certificate.

[140] On 01 December Ms Sun confirmed the warnings Mr Ge had been given and noted that RAM considered Mr Ge had been underperforming.

[141] On 02 December 2016 Ms Sun threatened to impose more warnings on Mr Ge and warned he could be dismissed.

[142] On 05 December 2016 Ms Sun’s email to Mr Ge stated that was hard to trust Mr Ge because of his PhD misrepresentation.

[143] On 06 December 2016 Ms Sun raised leave concerns with Mr Ge and threatened to give him another warning about his attitude and performance. Mr Ge was also told that Mr Li would be making a decision about his (Mr Ge’s) “*dishonest behaviour*” that afternoon.

[144] A disciplinary letter was sent to Mr Ge on 08 December 2016, which resulted in his dismissal on 20 December.

*Section 103A(5) of the Act*

[145] Section 103A(5) of the Act does not preclude the Authority from finding that Mr Ge’s dismissal was unjustified because the process defects that occurred were not minor and they did result in substantial unfairness to Mr Ge.

*Substantive justification*(i) Alleged misrepresentation of academic credentials

[146] Ms Sun met Mr Ge at a café on 30 December 2016 for an informal chat over coffee. Ms Sun said during this chat she asked Mr Ge if he had a PHD and he claimed he did. Mr Ge disputed that. He said Ms Sun asked him if he had studied for a PhD not if he had obtained a PhD.

[147] Ms Sun did not tell Mr Ge she was asking him about his PhD because RAM thought he may have been lying about his academic credentials before and during his employment. After the café conversation Ms Sun emailed Mr Ge asking for a copy of his CV.

[148] Ms Sun emailed Mr Ge on 02 December 2016 asking for his further explanation about “*your misrepresentation on your academia achievement*”. Ms Sun’s letter claimed that Mr Ge had told the company “*on many different occasions*” that he had a PhD.

[149] Ms Sun stated that RAM had not acquired Mr Ge’s CV during or after his job interview because he had been referred to RAM by a friend. Ms Sun also recorded her view that Mr Ge’s CV was misleading so was serious misconduct that could lead to Mr Ge’s immediate dismissal.

[150] Mr Ge responded that his CV was not fake and it was written following the official format of his official academic record, as granted by Massey University.

[151] Mr Ge also stated that he had provided Mr Li with a copy of his CV before he was interviewed by RAM for a job. Mr Ge also said that both Mr Li and the other person who interviewed him (Claire) had Mr Ge’s CV in front of them during his interview.

[152] Mr Ge provided proof to the Authority that he and his friend (who had referred him for the job) had both separately provided a copy of Mr Ge’s CV to Mr Li before his job interview occurred. A screen shot shows that Mr Li responded “*okay*” after he received Mr Ge’s CV.

[153] The CV Mr Ge provided prior to being interviewed and or being offered his job by RAM does not mention a PhD at all. RAM knew that before Mr Ge was employed.

[154] The second CV that Mr Ge emailed Ms Sun on 01 December 2016 (after their café meeting) recorded in bold on the third page:

**“Dr of Philosophy (PhD), Massey University, 2012 – 2013  
Transfer from PhD to Master of Philosophy (MPhil) 2014 –  
2015.”**

[155] RAM’s concern was that Mr Ge had not actually obtained a PhD. Mr Ge admitted he did not have a PhD. He started studying for a PhD but then changed to study a Master of Philosophy.

[156] RAM said it offered Mr Ge employment based on the fact he had a PhD. However, RAM’s witnesses admitted that they did not advertise the role so there was no job specification or person criteria advertised to Mr Ge prior to him applying for the job that said a PhD was required.

[157] Mr Ge said he was never asked if he had a PhD before he was employed. It did not come up at the job interview or at the meeting when Mr Li offered Mr Ge the job.

[158] There were no notes of Mr Ge’s interview. There was no evidence that RAM ever said or did anything to alert Mr Ge to the fact that RAM required the person who was appointed to Mr Ge’s position to have had a PhD. If it was a requirement then RAM knew from receiving Mr Ge’s CV, before it even offered to interview him, that he didn’t have a PhD.

[159] It is significant concerns about the PhD issue only arose after Mr Ge had asked Mr Li to repay the unlawful employment premium.

[160] The Employment Court has recognised that there is no duty on an employee to volunteer information that might influence an employer’s decision about whether or not to employ them.

[161] Mr Li was obviously on notice about the content of Mr Ge’s CV which did not mention a PhD. Notwithstanding that Mr Ge was still interviewed and offered the job. The evidence did not establish that Mr Ge told Mr Li or RAM or anyone else prior to offering and accepting the job that he had actually obtained a PhD.

[162] RAM said one of the reasons it dismissed Mr Ge was because of his dishonesty about his CV. This conclusion could not be substantively justified. The available evidence established that the information Mr Ge provided about his PhD status was factually correct.

(ii) Alleged harassment of Mr Li

[163] Even after three days of investigation meeting time RAM was not clear about what evidence it relied on to support the allegation that Mr Ge had harassed Mr Li.

[164] For example, RAM was unable to be clear about when the alleged harassment occurred, what the alleged harassment consisted of, why it was considered to be harassment or what the alleged obstruction related to.

[165] On the fourth day of the investigation meeting, having had some 2 ½ weeks to reflect on the matter and take advice from its lawyers, RAM provided further information about this disciplinary concern. I consider that was unsatisfactory.

[166] It also demonstrated that RAM was not substantively justified in reaching the conclusion that it did on 20 December that Mr Ge had harassed or obstructed Mr Li because it should have had that information at that time. RAM's inability to provide it to the Authority during the first part of this investigation showed it did not.

[167] The breaches of good faith and procedural fairness that occurred meant that RAM only had Mr Li's perspective on this issue, so RAM was not in a position to make a fair or reasonable decision about this allegation in terms of whether or not harassment had occurred.

[168] RAM was unable to substantively justify this disciplinary allegation.

(iii) Alleged threats to damage RAM's reputation

[169] RAM failed to provide Mr Ge with a copy of the email it claimed threatened its good reputation. Mr Ge's alleged threat related to an attempt to exert his legal rights.

[170] The exact sentence that RAM was relying on was a statement by Mr Ge that said

*“if you keep breaking laws, making an irresponsible decision, what I suffered from in the company during the period of half year will be made know through the internet. The person who breaks the law must be punished. Don’t be such a bully which results in lifting a rock only to drop it on your own feet. You heavily hurt me. I must be against you by law.”<sup>4</sup> (sic)*

[171] RAM’s breaches of good faith and procedural fairness meant that Mr Ge was not clear about why RAM was concerned about this email or why it saw his attempt to recover the unlawful employment premium as a threat. Mr Ge was therefore deprived of any opportunity to provide the decision-maker with his comments on the allegation before he was dismissed.

[172] RAM also had to consider the context of this email but there is no evidence it did so. At the time Mr Ge believed he had been unjustifiably dismissed. He was attempting to recover the unlawful employment premium. Mr Ge had also been on the receiving end of two unjustified warnings. The email can therefore be seen as an expression of his frustration.

[173] RAM was not substantively justified in concluding that Mr Ge had engaged in serious misconduct by threatening RAM.

#### *Outcome of unjustified dismissal claim*

[174] RAM’s actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances as required by the s.103A(2) justification test.

[175] RAM has therefore failed to procedurally and/or substantially justify Mr Ge’s dismissal on 20 December 2016. Accordingly, Mr Ge’s unjustified dismissal personal grievance claim succeeds.

#### **What if any remedies should be awarded?**

##### *Mitigation*

[176] Mr Ge was under a legal obligation to take appropriate steps to mitigate his loss. However mitigation is not an issue in this case because Mr Ge was on a work

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<sup>4</sup> This is the English translation of what Mr Ge wrote in Mandarin.

visa that expired when he was dismissed. Since his dismissal Mr Ge has been on a visitor's visa that prohibited him from working.

*Lost remuneration*

[177] Mr Ge sought lost remuneration from 20 December 2016 until his work visa with RAM expired on 11 May 2018. Mr Ge has not earned any income over this period. Mr Ge's dismissal meant he lost his work visa and had to replace it with a visitor's visa which prohibits him from working

[178] I am satisfied that Mr Ge did lose remuneration as a result of his unjustified dismissal. RAM is therefore ordered within 28 days of the date of this determination to pay Mr Ge six months' lost wages under s.128(3) of the Act.

[179] Mr Ge has not been awarded his full lost remuneration up to 11 May 2018 because there was sufficient credible evidence presented to the Authority that suggested that there were some relationship and work issues that were likely to have been addressed by RAM had Mr Ge not been dismissed.

[180] If such issues had been properly addressed there was a high likelihood that Mr Ge's role may not have continued. That view is based on evidence presented to the Authority that the analysis and information Mr Ge was providing RAM as required by his role was not being used by RAM in the way they had anticipated it would be.

[181] It is therefore likely RAM would have reviewed its resourcing needs if the work Mr Ge was doing was not in fact being utilised by RAM or its associated entities. That is likely to have had an adverse impact on Mr Ge's ongoing employment.

[182] Assuming that RAM complied with all of its employment obligations to Mr Ge, and that the employment premium issue had not occurred, then it was objectively unlikely that Mr Ge's employment would have continued for more than six months because the work Mr Ge was hired to produce was not in fact being used by RAM.

*Distress Compensation*

[183] It is clear that Mr Ge has suffered considerable hurt and humiliation as a result of his unjustified dismissal.

[184] Mr Ge lost his work visa as a result of his unjustified dismissal so he has had to rely on his family to support him financially. The loss of a valid work visa was a significant detriment to Mr Ge.

[185] Mr Ge has also effectively been deprived of the opportunity of earning a living or gaining work experience after he got his qualification because he was deprived of the opportunity to work when his visa expired because he was dismissed.

[186] RAM is ordered to pay Mr Ge \$12,000 under s.123(1)(c)(iii) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

[187] RAM is ordered to pay \$12,000 distress compensation to Mr Ge within 28 days of the date of this determination.

*Contribution*

[188] Having established that Mr Ge has an unjustified dismissal grievance, s. 124 of the Act required the Authority to assess the extent to which Mr Ge's actions contributed to the situation that gave rise to his unjustified dismissal. Contribution denotes blameworthy conduct which is proven on the balance of probabilities.

[189] The breaches of good faith by RAM and the failure by RAM to follow any of the minimum procedural fairness requirements in the Act resulted in it being unable to substantively justify any of the disciplinary allegations that it relied on to dismiss Mr Ge.

[190] Therefore RAM's submission that Mr Ge engaged in blameworthy conduct did not meet the evidential standard required to establish contribution by Mr Ge.

[191] It appeared that Mr Ge's difficulties with RAM arose after Mr Ge formed the (incorrect) conclusion that he had been dismissed on 25 November, and he complained about that, and about how Mr Mai had treated him.

[192] Mr Ge's attempts to obtain repayment of the unlawful employment premium from Mr Li appear to have been the underlying catalyst for RAM's disciplinary actions against him.

[193] If Mr Ge's performance had been of such concern it is surprising that it was only raised for the first time with him on 29 November 2016, after Mr Ge had started aggressively pursuing repayment of the employment premium from Mr Li.

[194] Remedies are not reduced on the grounds of contribution because RAM failed to prove, to the required standard of proof, blameworthy conduct by Mr Ge.

**What if any costs and disbursements should be awarded?**

[195] Costs are reserved pending the outcome of the penalty claim for the breach of s. 12A of the WPA.

**Rachel Larmer**  
**Member of the Employment Relations Authority**