

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 436
3037953

BETWEEN WEI (JACK) HU
Applicant

AND BIFORM LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: J Paul Young, advocate for the Applicant
Tau Aupa'au, agent for the Respondent

Investigation Meeting: 20 June 2019

Submissions Received: 20 June 2019 from both parties

Date of Determination: 23 July 2019

DETERMINATION OF THE AUTHORITY

- A. Wei (Jack) Hu was unjustifiably dismissed by Biform Limited.**
- B. Biform Limited is ordered to pay Mr Hu the following sums within 28 days of the date of this determination:**
(i) \$816.75 gross as reimbursement of remuneration; and
(ii) \$3,000.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- C. Costs are reserved and a timetable set in the event the parties are not able to agree on costs.**

Employment Relationship Problem

[1] Wei (known as Jack) Hu undertook two half days' work for Biform Limited in August 2018. Biform is a small family owned company which imports and distributes composite decking.

[2] Mr Hu claims that he was unjustifiably dismissed by Biform. Biform says that Mr Hu was not an employee as he was only on a trial, and when he did not satisfactorily undertake the trial, the company let him go.

[3] An investigation meeting was held on 20 June 2019. I heard evidence from Mr Hu, Biform's managing director Tau Aupa'au and a Biform administrator. I was assisted by an interpreter of the Mandarin language.

Issues

[4] The issues for determination are:

- (a) Was Mr Hu an employee of Biform?
- (b) If so, was he unjustifiably dismissed by it? and
- (c) If he was, what remedies (if any) should he receive?

The parties

[5] Mr Hu was studying to complete his Masters degree. His visa allowed him to work full time, rather than the more usual 20 hour limit on student visas. Unfortunately this seems to have been a source of confusion between the parties.

[6] Biform's business is seasonal, with its high season starting in October. The composite decking is made from recycled plastic and timber waste and is heavier than regular timber. The company's staff need to be physically fit and strong to handle the workload. It has in the past found it best to trial prospective employees so that they fully understand the nature of the work. Biform says that it always pays prospective employees for their trial time.

[7] The role of Biform's administrator includes clarifying matters with Chinese customers and job applicants. She speaks Mandarin.

Advertisement and interview

[8] The administrator arranged for the advertisement of a storeman role, including on Chinese social media sites. The position was advertised as being at a salary higher than the minimum rate, without an amount specified. It was described as a part-time job working 20 to 40 hours. The working time was described as 9:00 am to 3:00 pm at least three days a week, with the exact working time to be negotiable. It was noted that there were low and high seasons with more work available in the high season.

[9] On 25 July 2018 Mr Hu called the Biform office and spoke to the administrator. He came in to the workplace to have a look. Having not then received Mr Hu's curriculum vitae the administrator called and texted him the email address to send the document to.

[10] On 1 August 2018 Mr Hu sent his visa, forklift certificate, CV and driver's licence to Mr Aupa'au. The administrator arranged an interview time for Mr Hu on 8 August 2018.

[11] On 8 August Mr Hu messaged the administrator saying he could not come to the interview due to university commitments. Further, he could not come in that month and he would reapply for the job if there was still a vacancy later.

[12] The administrator messaged Mr Hu saying that another person interviewed had already been hired but that person could only work limited hours so Biform was still looking for another flexible person and asked him to keep in touch when he was available.

[13] On 20 August 2018 Mr Hu called the administrator to say he could start work now if they had some. He came in for an interview.

[14] Mr Aupa'au and Mr Hu gave conflicting evidence on various points including about whether a trial period was discussed at the interview. I found Mr Aupa'au's evidence to be more credible than Mr Hu's evidence. Mr Hu struggled to recall some events. Mr Aupa'au had better recall and his evidence was more internally consistent.

[15] Mr Aupa'au told Mr Hu that there would be a trial period. There was some difficulty identifying times when there would be sufficient work, it being the off season. Eventually it was arranged for Mr Hu to try out for two four-hour periods.

[16] No employment agreement was provided by Biform. Biform's practice is to only offer a written employment agreement once a trial period is satisfactorily undertaken, as it does not see those on short trials as being employed by the company.

Mr Hu's work

[17] There was some uncertainty about the dates when Mr Hu undertook the trial. The first day appears to have been 22 August 2018. Mr Hu then did another few hours on 27 or 29 August 2018.

[18] Mr Hu and Mr Aupa'au have different versions of what happened at the end of Mr Hu's time at Biform. Mr Hu says that Mr Aupa'au told him that he had done a good job and to come in tomorrow. He asked Mr Aupa'au whether there was an employment agreement and what the hourly rate was. He says Mr Aupa'au lost his temper and said that he was still under training and there was no salary, no employment agreement and told him he was fired and not to come back in tomorrow.

[19] Mr Aupa'au's impression was that during the trial Mr Hu was on his phone a lot and did not appear to have much forklift experience. He found Mr Hu taking selfies on the forklift which concerned him on health and safety grounds. At the end of the trial Mr Aupa'au told Mr Hu that he was not suitable and then asked him for his bank account so they could pay him for the time as they had discussed. He denies that he yelled at Mr Hu or got angry. I found Mr Aupa'au's evidence more credible.

Payment

[20] Mr Aupa'au says that the company pays for work trial hours. However, in this case it appears that there was a misunderstanding. Mr Aupa'au thought that someone else had arranged for payment to Mr Hu but the administrator and office manager were away on leave. When Mr Aupa'au discovered that Mr Hu had not been paid he arranged for payment. This occurred on 10 September 2018.

Work trial

[21] Sections 67A and B of the Act provide for trial periods under which the employee may not bring an unjustified dismissal claim if dismissed on the basis of the trial period. However, there are requirements including that the trial period is in writing. Biform cannot avail itself of these provisions as it did not provide for the trial in writing.

[22] Biform did not regard Mr Hu as its employee. In *Salad Bowl Limited v Howe-Thornley* the Employment Court had to determine whether an individual was an employee when undertaking a work trial.¹ Chief Judge Colgan observed that an interview alone between a prospective employee and employer would rarely amount to work in an employment relationship giving rise to employment rights and obligations including the expectation of payment. His Honour went on to state:

¹ *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee's activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.²

[23] I have accepted Mr Aupa'au's evidence that Biform intended to pay for the trial period. Mr Hu expected to be paid and was eventually paid for his work. The packing work undertaken was for the economic benefit of Biform, even if was not as well performed as was expected by the company. On the basis of the *Salad Bowl* decision, I find that Mr Hu was employed by Biform. When he was sent away at the end of the trial period he was therefore dismissed by Biform.

[24] Although Biform had concerns about Mr Hu's work, it made the decision to send Mr Hu away without undertaking all the steps outlined in s 103A(3) of the Act. The decision was made before discussing its concerns with Mr Hu and considering any explanations from him. These were not minor matters. Biform did not act as a fair and reasonable employer could have done. I therefore find that Mr Hu was unjustifiably dismissed by Biform. I consider remedies below.

Reinstatement

[25] Reinstatement was raised as a remedy for Mr Hu for the first time at the investigation meeting.

[26] Mr Aupa'au says that there were no vacancies at present. I accept that. This is a small business with usually only one or two warehouse staff. It is presently winter so the workload is likely to be low. I am not satisfied that reinstatement is reasonable or practicable.

² Above at n 1 at [27]

Lost wages

[27] On Mr Hu's behalf a claim of lost wages is made at the rate of 30 hours a week, being the average of the advertised 20 to 40 hours. In some cases that may be a suitable approach. However, here Mr Hu had been informed, before he was interviewed and after he had missed the 8 August 2018 interview, that another job applicant had been appointed. Any work would thus be done by the two, assuming Mr Hu was employed.

[28] The advertisement refers to at least three days a week from 9am to 3pm. With a half hour break, that equates to five and a half hours a day. At a minimum of three days a week, that is 16.5 hours a week. There was no agreement between the parties as to a rate for the job, and thus I use the minimum wage rate at the relevant time: \$16.50 gross.

[29] Mr Hu obtained other employment from 20 September 2018 which continued until three months after his dismissal. He was therefore without work for three weeks at 16.5 hours a week. The lost remuneration is thus 49.5 hours at \$16.50 per hour. I order Biform Ltd to pay Mr Hu the sum of \$816.75 gross within 28 days of the date of this determination.

[30] A claim is made for wages up to the date of the determination. However I do not consider that this is an appropriate case to exercise the discretion under s 128 (3) of the Act as the chance of Mr Hu continuing in the role for that long was small.

Compensation

[31] Mr Hu claims compensation under s 123(1)(c)(i) of the Act. There was only modest evidence of the effects of the dismissal on him, despite questioning. He says at the time he was told not to come back he was angry, his blood pressure rose and that he felt deeply hurt. He is not as trusting of employers.

[32] I order Biform to pay Mr Hu the sum of \$3,000 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[33] I have considered whether Mr Hu can be said to have contributed to the situation giving rise to his dismissal. While I accept that Biform had concerns, these were matters

which appear to have been rectifiable if discussion had occurred. I am not satisfied that Mr Hu can be said to have been blameworthy in his actions.

Costs

[34] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Hu shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Biform shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[35] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards. The daily tariff for the first investigation meeting day is \$4,500, although the hearing in this case only took half a day. That time period is likely to be reflected in any award.

Nicola Craig

Member of the Employment Relations Authority