

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 433
3039792

BETWEEN QISHAN HUANG
 Applicant

AND INDEPENDENT PROSPERITY
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ben Hinchcliff, counsel for the Applicant
 Callum McLean and subsequently Jesse Nguy, counsel
 for the Respondent

Investigation Meeting: 12 February, 19 and 20 June 2019 at Auckland

Submissions Received: 20 June 2019 from the Applicant
 20 June 2019 from the Respondent

Date of Determination: 22 July 2019

DETERMINATION OF THE AUTHORITY

- A. The applicant, Ms Qishan Huang was unjustifiably dismissed from her employment by the respondent, Independent Prosperity Limited (Independent Prosperity).**
- B. To settle Ms Huang's employment relationship problem, Independent Prosperity is to pay her the following sums within 28 days of the date of this determination:**

(a) \$30,000 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to Ms Huang's feelings;

(b) \$13,846.15 gross lost remuneration under s 128(2) of the Act.

C. Independent Prosperity breached provisions of the Act in unlawfully requiring Ms Huang to repay her wages and by not paying her wages due to her. Within 28 days of the date of this determination, Independent Prosperity is to reimburse Ms Huang wages repaid by her in the sum of \$22,108 net together with 14 weeks in unpaid wages totalling \$13,461.53 gross.

D. Independent Prosperity breached provisions of the Holidays Act 2003 in failing to pay Ms Huang annual leave. Within 28 days of the date of this determination, Independent Prosperity is to pay Ms Huang the sum of \$4,548.07 gross pursuant to the Holidays Act.

E. Costs are reserved.

Employment Relationship Problem

[1] Independent Prosperity is in the business of selling insurance products to clients. Ms Angela Churchill is the sole director and shareholder. From the end of October 2016 until her summary dismissal on 2 August 2018, Ms Huang was employed by Independent Prosperity. Initially, Ms Huang undertook training regarding the various insurance products being sold by Independent Prosperity. Subsequently, she was employed as an insurance broker.

[2] Following a discussion between Ms Huang and Ms Churchill on 27 July 2018, Ms Huang says that she was threatened that, if she did not sign an independent financial/insurance adviser agreement with Independent Prosperity, it would take steps to have her work visa cancelled. When Ms Huang refused to sign the contract, she was dismissed. Ms Huang says her dismissal was unjustifiable.

[3] Ms Huang says during the course of her employment by Independent Prosperity, she was paid a base salary plus commission. Ms Huang says Ms Churchill informed her that the

income generated by her from the sales of insurance products did not meet the sales target set for her nor did it cover her base salary.

[4] Ms Churchill demanded that she repay Independent Prosperity the amount she had been “overpaid”. Ms Huang says a sales target was never agreed with her and she denied owing money to Independent Prosperity. Ms Huang says from early November 2017 to late June 2018, she “repaid” a total of \$22,108 net demanded of her by Ms Churchill. Ms Huang says she did not receive her weekly salary for a total of 14 weeks, totalling \$13,461.53 gross, during the period from mid November 2017 until the date of her dismissal on 2 August 2018. This was because Ms Churchill was of the view Ms Huang had been “overpaid”.

[5] Ms Huang says she repaid wages to Independent Prosperity because she feared that if she did not do as Ms Churchill asked, her work visa would be cancelled, and she would no longer be able to remain in New Zealand.

[6] Ms Huang says she is owed holiday pay of \$4,548.07 gross which Independent Prosperity has refused to pay her.

Independent Prosperity’s response

[7] Independent Prosperity disputes Ms Huang’s claims. Ms Churchill says sales targets were agreed and that Ms Huang failed to reach the targets because of ongoing absenteeism and poor performance.

[8] Ms Churchill says Ms Huang was required to pay Independent Prosperity back the overpayment of salary when she failed to reach sales targets. Ms Churchill accepts the sum paid back by Ms Huang amounted to \$22,108 net. Ms Churchill also accepts that Ms Huang was not paid salary for 14 weeks. Ms Churchill says both amounts were to repay Independent Prosperity the overpayment of salary to Ms Huang. Ms Churchill says Ms Huang still owes Independent Prosperity the sum of \$2,424.28 which she was overpaid in salary.

The investigation meeting

[9] The investigation meeting into Ms Huang’s claims took just over 2.5 days in the Authority. The investigation meeting on 12 February 2019 was adjourned after almost one full day. This was because Independent Prosperity disputed the translation of an audio

recording made by Ms Huang. It obtained its own transcript. The meeting was rescheduled. The rescheduled meeting was adjourned when Independent Prosperity engaged new counsel.

[10] The investigation meeting resumed on 19 June 2019 for a full day and just over half day on 20 June 2019.

[11] Ms Huang filed a witness statement. For Independent Prosperity, Ms Churchill, Director, filed a witness statement as did Mr Jian (James) Zhang, a Mortgage and Insurance Financial Advisor and Mr Jiayu (Rick) Li, Insurance Advisor, both engaged by Independent Prosperity.

[12] Each of the witnesses giving evidence before the Authority either swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[13] The Authority was assisted by an independent interpreter fluent in the Mandarin language.

[14] As permitted under s 174E of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

The issues

[15] The issues for determination by the Authority are as follows:

- (a) Was Ms Huang unjustifiably dismissed by Independent Prosperity?
- (b) If Ms Huang was unjustifiably dismissed, what remedies are available to her?
- (c) If Ms Huang's dismissal was unjustified, was her conduct a contributing factor which requires a reduction in remedies awarded under s 124 of the Act?
- (d) Is Ms Huang entitled to reimbursement of wages repaid by her to Independent Prosperity and to wages not paid to her by Independent Prosperity?
- (e) Is Ms Huang entitled to outstanding holiday pay?

Relevant facts**Ms Huang's arrival in New Zealand**

[16] Ms Huang is a young migrant from Guangdong Province in China. Ms Huang has a Bachelor of Finance degree from the University of Guangdong. In August 2014, Ms Huang arrived in New Zealand to undertake study at the Auckland University of Technology. In July 2016, Ms Huang completed a Master's degree in Applied Finance.

[17] Ms Huang says she had an open visa to undertake her study in New Zealand. It was due to expire on 8 April 2017. Ms Huang says she was very keen to obtain employment and to eventually obtain a work visa and possibly permanent residence in New Zealand. On 3 May 2017, Ms Huang obtained a two-year work visa on the condition that she "only work as Insurance Broker for Independent Prosperity Limited in Auckland."

Interview for role

[18] In October 2016, Ms Huang applied for an insurance broker position being advertised on the internet by Independent Prosperity. Ms Huang attended an interview with Ms Churchill at Independent Prosperity's offices and was offered the position.

Training

[19] Ms Huang says she was required to and did undertake training in the various insurance products being sold to clients by Independent Prosperity. The training took place at Ms Churchill's home between 25 October 2016 and 30 January 2017. At the end of the training Ms Huang sat online exams, for the purpose of certification by the Financial Markets Authority (FMA). Ms Huang was not paid a salary during her training. She was given a few days' work as Ms Churchill's personal assistant during this time, for which she was paid \$100 a day.

Ms Huang's employment by Independent Prosperity**First written employment agreement (January agreement)**

[20] On 30 January 2017, Ms Huang was provided with an individual employment agreement and asked by Ms Churchill to sign it (January agreement). The Authority was provided with a copy of the January agreement signed by both Ms Churchill and Ms Huang. Both Ms Churchill and Ms Huang agree that the January agreement applied to the employment relationship at that time.

[21] Ms Huang was employed in the role of insurance broker. Ms Huang continued working as Ms Churchill's personal assistant after signing the January agreement but was not remunerated for this work.

Relevant clauses in the January agreement

Wages

[22] Wages were \$33,280 plus commission per annum. Wages were payable fortnightly into Ms Huang's bank account. In addition, it was agreed that Ms Huang's wages would be reviewed on the twelve-month anniversary of the employment agreement.

Performance objectives

[23] In consultation with Ms Huang, Independent Prosperity was required to set "Employee objectives" on an annual basis. Those objectives were to be taken into account when assessing Ms Huang's performance.

Performance reviews

[24] Performance reviews were to be held at least annually.

Hours of work

[25] 40 per week between the hours of 9.00 am and 5.30 pm Monday to Friday. Any overtime would not be compensated, it would be covered by the salary being paid.

Probationary period

[26] There was a probationary period of three days during which time the employee was to "prove that they are suitable for the position".

Second written employment agreement (April agreement)

[27] Ms Churchill says a fulltime employment agreement was entered into with Ms Huang on 18 April 2017 (April agreement). Ms Huang never signed this agreement and says she did not know it existed until the documents were filed in the Authority in relation to the investigation of her claim. Ms Churchill signed it, says it applied to the parties and that she began paying Ms Huang salary at the rate of \$50,000 on the basis of that agreement.

[28] The April agreement commenced on 13 May 2017. Ms Huang's role is described as "Senior Service & Risk Manager". The April agreement has a "trial period" during which time Ms Huang was to be paid \$50,000 "annual compensation" "and only if you meets an annual target of NZD90,000. 2. The annual sales target will be measured on a monthly basis, requiring the employee to achieve NZD7,500 in sales each month. 3. If and only if these sales targets are being met, payment of the annual compensation of NZD50,000 will take place on a weekly basis. 4. The sales targets must be met within two months of the employee commencing employment."

Third written employment agreement (May agreement)

[29] Ms Huang performed well and says she was offered a new employment agreement by Ms Churchill on 1 May 2017. The Authority was provided with an original copy of the May agreement and it appears to have been signed by both Ms Huang and Ms Churchill.

[30] The salary increased to \$50,000 salary plus commission per annum, payable weekly.

[31] Ms Churchill says the May agreement was not signed by her and that the signature on it is not hers, and she saw it for the first time when Ms Huang brought her claim. Ms Churchill denies the May agreement ever applied to the parties.

[32] Ms Huang began receiving salary of \$50,000 into her bank account on a weekly basis.

Fourth written employment agreement (July agreement)

[33] In February 2018, a further employment agreement was entered into between the parties. On Ms Churchill's instruction this agreement was backdated to 1 July 2017. The salary remained at \$50,000 plus commission. The Authority was provided with an original of the July agreement. Both Ms Huang and Ms Churchill appear to have signed the document. Ms Churchill denies signing the July agreement. She says the signature on it is not hers and she saw it for the first time after Ms Huang brought her claim in the Authority.

[34] Ms Huang says that Ms Churchill asked her to sign a new employment agreement in February 2018 and back date it to 1 July 2017. This was because the Immigration Service was asking Ms Churchill for verification of all employees by Independent Prosperity, and Ms Churchill wished to ensure that the employment agreements were all consistent. Ms Huang did as requested.

Credibility

[35] Under each of the January, May and July agreements, Ms Huang is described as an insurance broker, her role is full-time, and she is paid a salary and commission. Each of the agreements has been signed by both parties. Ms Churchill and Ms Huang both agree they signed the January agreement and that it applied up until the end of April 2017. Ms Huang says the 1 May 2017 agreement which stated her salary to be \$50,000 applied and she was paid salary accordingly. The 1 July 2017 agreement, which was identical, was signed by both parties in February 2018 and was in the same terms as the 1 May 2017 agreement.

[36] I do not accept Ms Churchill's evidence that the May and July agreements are not authentic, she had never seen them, and it is not her signature on those agreements. Ms Churchill's signatures are on each of the January, May and July agreements and are almost identical on each. Ms Huang's signatures also appear identical on each of the signed agreements.

[37] The originals of the May and July agreements had original signatures on them which looked exactly like those of Ms Churchill and Ms Huang. Ms Churchill attempted to persuade the Authority, without any basis for doing so, that the signatures on the May and July agreements were not hers and that her signature had been forged. Ms Churchill's signatures on those agreements are almost identical to her signatures on the January agreement which she accepted applied, and to the April agreement. This is one of a number of occasions in which I find Ms Churchill's evidence to be unreliable.

First Issue

Was Ms Huang unjustifiably dismissed by Independent Prosperity?

[38] During the course of her employment, Ms Huang says she attempted to build up her client base, but it was difficult to do so. She was new to the business and had not developed relationships with clients. Ms Huang says she was also still working as Ms Churchill's personal assistant which restricted her ability to build client relationships. Ms Churchill began asking that she pay her salary back in cash because she was receiving more income than the income being generated from sales of insurance products to her clients. Ms Churchill relied on the terms of the April agreement to require Ms Huang to reimburse Independent Prosperity.

[39] Ms Huang says that she felt obliged to pay the cash back to Ms Churchill because if she did not do so, she feared her work visa would be jeopardised.

[40] From 3 November 2017 to 25 June 2018, Ms Huang made several payments to Independent Prosperity totalling \$22,108. Ms Huang says she borrowed this money from her mother. The Authority was provided with a schedule on an Independent Prosperity spreadsheet which set out the payments made. Ms Churchill accepted that Ms Huang had repaid Independent Prosperity the amount of \$22,108 but was satisfied that she was entitled to do this because Ms Huang had failed to generate income to cover her salary.

[41] Ms Huang was not paid salary for a total of fourteen weeks between 7 December 2017 and 25 January 2018, 8 February 2018, 22 March 2018 and 19 July 2018 and 2 August 2018. At a gross salary of \$50,000, fourteen weeks in unpaid wages totalled \$13,461.53 gross. Again, Ms Churchill claimed that Independent Prosperity had not paid Ms Huang fourteen weeks of wages on the same basis that she had required Ms Huang to repay wages. Because the income generated by Ms Huang had not covered her own salary and under the terms of the April agreement, Independent Prosperity was entitled to reclaim the overpayment from her.

[42] Ms Churchill says that Ms Huang was very capable of generating sufficient income not only to cover her own salary but to generate enough income to be paid commission. She says Ms Huang, however, was often absent from work and was not performing at a level which would enable her to cover her income and commissions.

[43] Ms Churchill says she issued two warnings on 5 and 6 March 2018 in relation to her performance. Ms Huang denies that she ever received warnings informing her that her employment was in jeopardy. She says there were discussions about her attendance at work. Ms Huang says she was trying to develop client relationships so that she was able to generate income. This meant she needed to be out of the office a large part of the time in order to meet clients and to build relationships.

[44] At the Authority's investigation meeting, two financial advisers engaged by Independent Prosperity gave evidence. The first financial adviser gave evidence that he worked mainly outside of the office premises because he visited clients. He confirmed that there was no system in place in which the company would know what he was doing out of the office. Another financial advisor who was employed by Independent Prosperity gave

evidence that he worked outside the office regularly and was not required to inform Ms Churchill of his whereabouts. This evidence supports Ms Huang's evidence that she had to be out of the office to generate leads; it was not a case of her simply being absent as alleged by Ms Churchill.

[45] I have reviewed the emails dated 5 and 6 March 2018 and they do raise issues concerning Ms Huang's performance, but they do not constitute warnings that her employment may be in jeopardy if she does not meet Ms Churchill's expectations. Further, the emails do not set expectations for Ms Huang. Rather, they are statements concerning Ms Huang's supposed poor attendance rate.

[46] On 6 March 2018, Ms Churchill sent a further email to Ms Huang as follows:

...I agreed you should run out the office to build up the relationships with your clients, and we do not have strong rules to keep the Advisers stay in the office all the times BUT look at your sales performance report which is you prove to the company YOURSELF in last eight months (1 July 2017 til 28 Feb 2018), yours had issued total business 18,724,63 in ten cases which is 20.81% of your yearly sales target. I could not work out the time matching to the very lower sales numbers, EIGHT months for TEN sales...Anyway, it's your responsibility to control and avoid all the work visa risk and the responsibilities to achieve your yearly target, when or if the visa officer comes to do the research that will be also your obligations and responsibilities to fix up the incredible vulnerability. As you prompted and your understanding of the job description, we should update the employee agreement as you are on a freelance commission base adviser I would like to set up the time in this next week, in this week to renew your contract, the new employment agreement will not pay attention to your working hours, please make a time for us to have the contract done this week, that will be good for you to maintain the work on your own way and timetable.

[47] No further employment agreement was entered into between the parties following these communications. However, on 27 July 2018 Ms Churchill sent a further email to Ms Huang referring to the warnings which she had issued on the 5th and 6th March 2018 and referring again to her failure to reach her sales targets. At the end of the email she states:

Because you do not attend the workplace regularly and you do not present any notice for each absence, also you do not have a plan for how to reach your sale goals, I apologise that I have no ability to help you to keep the position. We need to replace the Employment Contract Immediate after the new contract signed you will become a commission base insurance adviser, your earnings will be based on the commission rate and how much a policy is sold by you, the tax code will be 20% WT not PAYE. It is my responsibility to inform the Immigration Department of changes in our employment relationship. I will send an email to the Immigration service for the new

contract with a print of the letter email, or the print of this email with you refuse to make a change.

[48] Ms Huang was provided with a draft independent financial/insurance adviser agreement. Ms Huang says Ms Churchill was applying pressure on her to sign an independent contract. Ms Huang was concerned that that would jeopardise her work visa and informed Ms Churchill that she did not wish to sign it.

End of July 2018

[49] Ms Huang says that she was asked to attend a meeting on 27 July 2018 by Ms Churchill at Independent Prosperity's offices in New Lynn. At that meeting, she was asked to sign a new independent contractor agreement. Ms Huang says she did not feel comfortable signing it and said so. Ms Huang says that Ms Churchill was not happy with her response and indicated consequences to her if she did not sign it.

Dismissal letter

[50] Ms Huang says that early on 3 August 2018, she received an email from Ms Churchill which had been sent at approximately 11:00pm on 2 August 2018. A dismissal letter was attached. The letter states that it is a dismissal letter, refers to three previous warnings which stated that if she did not improve her attendance at work and her duties that her employment agreement may be replaced by a "freelance or commission based insurance adviser or update your current contract or maybe terminated".

[51] The letter refers to meetings on 27 and 31 July 2018 in which Ms Huang indicated she was not happy to make a change in her employment agreement. It states that Ms Huang requested Ms Churchill to pay for her work visa and threats allegedly made by Ms Huang that, if Ms Churchill did not support her job offer or visa, there would be consequences for Independent Prosperity. Ms Huang's employment was terminated immediately.

[52] Ms Churchill says that when she met with Ms Huang in late July to discuss the signing of the independent contract, Ms Huang asked if she could pay Ms Churchill money to secure her work visa. Ms Churchill says the conversation was held in the office and was heard by her colleagues. She was of the view that Ms Huang was threatening that, if Independent Prosperity did not support her with her work visa, then she would do some "bad things" to Independent Prosperity. Ms Churchill considered this behaviour to constitute serious misconduct. On 2 August 2018 Ms Churchill sent the letter to Ms Huang informing

her that she was being dismissed. The letter was received by Ms Huang early on 3 August 2018. The reasons for the dismissal in the letter are unclear. However, at the Authority's investigation meeting, Ms Churchill said that the dismissal was because Ms Huang had threatened that, if Independent Prosperity did not support her with the job offer or the visa, she would do some bad things, "then run back to China where no one can catch you ...". The letter informed Ms Huang that the Immigration Service would be informed that her employment had ended.

[53] Ms Huang says she received the dismissal letter on the morning of 3 August 2018 and did not agree that she had ever threatened Independent Prosperity or Ms Churchill.

[54] The decision to dismiss Ms Huang in the circumstances was not that of a fair and reasonable employer. It is my view that Ms Huang was unjustifiably dismissed.

Second Issue

If Ms Huang was unjustifiably dismissed, what remedies are available to her?

[55] Ms Huang says she was very distressed and worried about whether she would be able to stay in New Zealand. Ms Huang says that she found the situation very difficult, was in a dire financial situation and felt humiliated about borrowing money again from her mother to pay for rent and food. At the Authority's investigation meeting, Ms Huang was visibly upset when recalling this evidence. She was unable to find another job for approximately three months.

[56] In the circumstances, I consider an award of \$30,000 compensation under s.123(1)(c)(i) of the Act, for humiliation, loss of dignity and injury to feelings suffered by Ms Huang, to be appropriate.

[57] Independent Prosperity is ordered to pay Ms Huang the sum of \$30,000 within 28 days of the date of this determination.

Loss of Remuneration

[58] Ms Huang claims lost remuneration for the period between her dismissal on 2 August 2018 until she obtained a new position on 12 November 2018. This was fourteen weeks and two working days after being dismissed from Independent Prosperity. During this time, Ms Huang sent out her resume seeking work to more than one hundred potential employers.

Under s 128(3) of the Act, the Authority may, in its discretion, order an employer to pay to an employee lost remuneration totalling more than three months lost remuneration.

[59] I order Independent Prosperity to pay Ms Huang lost remuneration of \$13,846.15 gross. This amount is to be paid by Independent Prosperity to Ms Huang within 28 days of the date of this determination.

Third Issue

If Ms Huang's dismissal was unjustified, was her conduct a contributing factor which requires a reduction in remedies awarded under s 124 of the Act?

[60] I do not consider that Ms Huang contributed to the situation giving rise to her grievance. There will be no deduction in the awards of compensation payable by Independent Prosperity.

Fourth Issue

Is Ms Huang entitled to reimbursement of wages repaid by her to Independent Prosperity and to wages not paid to her by Independent Prosperity?

[61] Ms Huang was required to reimburse Independent Prosperity Limited the sum of \$22,108 for "overpayment" of salary. In addition, Ms Huang was not paid wages for fourteen weeks during the course of her employment on the basis that she had been "overpaid". This action by Independent Prosperity was unlawful.

[62] A key provision of the Act is that of good faith behaviour in employment relationships, particularly by acknowledging and addressing the inherent inequality of power in employment relationships. Ms Huang was a vulnerable migrant worker and in my view was being treated unfairly by Ms Churchill who was in a strong position of power which she was using to her advantage and to Ms Huang's disadvantage. Ms Huang borrowed money from her mother to repay Independent Prosperity claimed overpayments in salary. This was because she was concerned that if she did not repay the money she would not continue to receive a regular salary and she may lose her job and, as a consequence, her work visa.

[63] Ms Churchill's actions in requiring repayment of salary were in breach of Ms Huang's employment agreement and the moneys deducted are to be repaid. I order

Independent Prosperity to reimburse Ms Huang payments made by her totalling \$22,108 net within 28 days of the date of this determination.

[64] Further, within 28 days of the date of this determination, I order Independent Prosperity to reimburse Ms Huang fourteen weeks wages which were not paid to her on the basis that she had been “overpaid”. This amounts to \$13,461.53 gross.

Fifth Issue

Is Ms Huang entitled to outstanding holiday pay?

[65] Ms Huang was not paid all her holiday pay accrued while working at Independent Prosperity Limited. Ms Churchill gave evidence that Ms Huang worked for approximately one year and ten months and took about five weeks holiday. If that is the case, Ms Huang had accrued 7.33 weeks of holidays. I accept Ms Huang’s evidence that she took two weeks and three days holiday during her period of employment by Independent Prosperity. In total, Ms Huang is entitled to 4.73 weeks of holidays which amounts to \$4,548.07 gross in outstanding holiday pay. I order Independent Prosperity to pay Ms Huang the sum \$4,548.07 gross in outstanding holiday pay within 28 days of the date of this determination.

Costs

[66] Costs are reserved. Ms Huang has fourteen days from the date of this determination to file a memorandum as to costs. Independent Prosperity has fourteen days within which to file a memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority