



**Issues**

[3] The issue for determination is whether GRL unjustifiably dismissed Mr Lin from his employment.

**Background Facts**

[4] Mr Lin commenced employment with GRL on 6 September 2011 and was employed full-time in the capacity of Truck Driver. Mr Lin had not been issued with a written employment agreement.

[5] On or before 3 August 2012 the truck that Mr Lin usually drove had been involved in an accident whilst being driven by another driver and required repairing. Mr Lin said that on 3 August 2012 he had been told by Mr Xin Feng, sole Director of GRL, to go home and to remain there until the truck repair was complete.

[6] On 9 August 2012 Mr Lin said Mr Feng had telephoned him and told him to search for another job, and had offered to write a letter to WINZ on Mr Lin's behalf to assist him in claiming income support. Mr Lin said he had requested a formal letter of dismissal from GRL to use in his application to WINZ for income support.

[7] On 10 August 2012 Mr Lin said he had attended GRL's premises and collected one week's wages and the requested letter of dismissal.

[8] The letter dated 10 August 2012 and signed by Mr Feng stated:

*Due to the fact that the truck Mr Guang Lin drives had an accident and was damaged (not his fault) and we believe it would take quite a while to have it fixed. On the other hand the company's business activities are decreasing. Therefore we have considered and decided to lay off Mr Guang Lin so he will have a chance to find a job somewhere.*

[9] At the Investigation Meeting Mr Feng said GRL had not dismissed Mr Lin explaining that the truck had taken longer to repair than had been expected, but that once it had been repaired he had asked Mr Lin to return to work.

[10] Mr Lin said that he had only been offered further work by GRL after he had written requesting certain payments which included arrears of holiday and sick pay, and compensation.

[11] In support of this claim, Mr Lin provided a copy of a letter dated 4 November 2012 addressed to Mr Feng in which he had referenced his dismissal, in respect of which he claimed GRL had not followed the correct New Zealand legal process. As a result Mr Lin had written in the letter that he required payment of wages and compensation as itemised in the letter.

[12] In response a Manager of GRL had replied in writing to Mr Lin with the agreement of Mr Feng stating: "*Mr Feng said to let you return to work tomorrow*".

[13] Mr Feng stated that the letter dated 4 November 2012 had been the third time he had requested Mr Lin to return to work, and confirmed that Mr Lin had worked one day during early October 2012 and had been asked to return to work full-time at that stage, however Mr Lin had refused to do so.

[14] Mr Lin agreed that he had worked for one day in October 2012 and confirmed that he had been paid for this day; however he denied that he had been offered a return to full-time employment at that stage, although he stated that GRL had been busy at that time.

[15] Mr Lin said that GRL had informed WINZ that he had been offered work.

[16] Mr Feng confirmed that this had been the case, and explained that because GRL had needed to recruit a truck driver he had telephoned WINZ. The purpose of the call had been to register the Truck Driver vacancy and also to ask that if Mr Lin was still be in receipt of income support, he be informed that GRL had a vacancy for a Truck Driver.

[17] Mr Lin and Mr Feng agreed that they had had discussions following the November 2012 letter exchange, which had included Mr Lin's request for a written employment agreement.

[18] The discussions had not settled matters between the parties and they had subsequently attended mediation; however they had been unable to resolve matters and Mr Lin had not returned to work.

[19] Mr Lin said he had obtained alternative employment on 21 January 2013.

**Determination**

[20] Mr Lin had been employed on a full-time basis from 6 September 2011 until he was sent home on 3 August 2012.

[21] Whilst I accept Mr Feng's explanation that no dismissal had been intended, I find that in the situation in which Mr Lin had been willing to work after 3 August 2012, but had not been supplied with work or paid by GRL until early October 2012, this was in effective dismissal from his employment with GRL.

[22] In considering whether such a dismissal was justifiable I have regard to the Test of Justification as set out at s 103A of the Employment Relations Act 2000 ("the Act") and which states:

***S103A Test of Justification***

- i. 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).*
- ii. 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.*

[23] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

[24] In respect to substantive justification, the fact that the truck normally driven by Mr Lin in the performance of his duties was not available did not justify GRL effectively dismissing Mr Lin by sending him home and failing to pay him. Moreover I consider that the letter dated 10 August 2012 and signed by Mr Feng confirms that Mr Lin had been dismissed.

[25] In respect of procedural justification I consider that the fact of merely sending Mr Lin home without prior consultation to constitute a total failure as regards satisfactory adherence to procedural requirements.

[26] I determine that Mr Lin was unjustifiably dismissed.

### **Remedies**

[27] Mr Lin has been unjustifiably dismissed and is entitled to remedies.

#### *Arrears of Annual Leave and Sick Pay Entitlement*

[28] Mr Lin is claiming arrears of annual leave entitlement in the sum of \$2,092.80, and that he is owed one day of sick leave entitlement. Mr Feng did not dispute that this was the case.

[29] I order that GRL pay Mr Lin annual leave entitlement arrears in the sum of \$2,092.80 gross and one day sick leave entitlement in the sum of \$103.00 gross.

#### *Lost Earnings*

[30] Mr Lin is to be reimbursed for lost earnings from the date of his dismissal on 3 August 2012 for a period of 13 weeks pursuant to s 128 (2) of the Act, less the amount Mr Lin received by way of income support and deductions for the monies earned by Mr Lin when he worked for GRL in early October 2012. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

#### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[31] Mr Lin is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Lin who had an unblemished employment record prior to his dismissal, suffered hurt and humiliation.

[32] In respect of the dismissal grievance, I order GRL is to pay Mr Lin the sum of \$4,000.00, pursuant to s 123(1) (c) (i) of the Act.

#### *Contribution*

[33] I am required under s 124 Employment Relations Act 2000 to consider the issue of any contribution that may influence the remedies awarded.

[34] I accept that Mr Feng made an offer of employment to Mr Lin on more than one occasion, and that the first of these took place before the letter dated 4 November 2012 in which Mr Lin asked for compensation.

[35] Although Mr Lin said he had not been offered full-time ongoing work at the time when he had worked one day in early October 2012, I consider that the fact that Mr Feng had telephoned WINZ to register a vacancy for a Truck Driver supports his evidence that he had requested that Mr Lin return to work.

[36] I take into consideration the fact that following the issue of compensation and the discussions which took place thereafter, Mr Lin suffered a loss of trust and confidence in GRL as an employer which reasonably influenced his decision not to accept any offer of employment, especially in the circumstances in which he had been requesting a written employment agreement but one had not been provided for his consideration.

[37] On the basis that I find that there was an opportunity in October 2012 for Mr Lin to mitigate his loss; I reduce the lost earnings award made to Mr Lin by 15%.

*Penalty*

[38] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 (“the Act”), which states:

***63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement***

*(2) The employer must do at least the following things:*

*(a) provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and*

*(d) consider any issues that the employee raises and respond to them*

[39] Section 65 is also relevant:

***65 Terms and conditions of employment where no collective agreement applies***

*i. The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-*

*1. must be in writing; and or her employer –*

2. *May contain such terms and conditions as the employee and employer think fit*

ii. *However, the individual employment agreement-*

1. *must include-*

i. *The names of the employee and employer concerned; and...*

6. *A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised*

[40] Further the Employer has a duty of good faith pursuant to s 4 (1A) (b) of the Act, which states at s4 (1A)(b):

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

(1A)

*(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 (emphasis mine)*

[41] In respect of Mr Lin's employment which commenced on 6 September 2011, GRL failed to supply Mr Lin with an employment agreement in accordance with the legislative requirements. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives.

[42] GRL is ordered to pay a penalty of \$1,000.00 to the Crown for the non-provision of an employment agreement to Mr Lin.

**Costs**

[43] While costs are reserved, I note here that, subject to his submissions, Mr Lin represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

**Eleanor Robinson**

**Member of the Employment Relations Authority**