

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 240/08
5107129

BETWEEN KEVIN LIU
 Applicant

AND MAGGIE CHEN
 First Respondent

 MCFINANCE AGENCY
 LIMITED
 Second Respondent

Member of Authority: Marija Urlich

Representatives: Ben Molloy, for Applicant
 Chris Tomaszuk, for First and Second Respondent

Investigation Meeting: 14 May 2008

Submissions and further 19 May and 2 July 2008
information received:

Determination: 8 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kevin Liu was employed for three months as an insurance broker in Ms Chen's insurance brokerage business. He says his dismissal on 2 July 2007 was unjustified. He seeks payment of outstanding bonus payments and car allowance, compensation for lost wages and distress consequent to his dismissal and a finding of and penalty for failure to provide a written employment agreement pursuant to section 65 of the Employment Relations Act 2000. He also seeks a determination as to the identity of his employer.

[2] The statement in reply, filed on behalf of both respondents, says Mr Liu was employed by McFinance Agency Limited, that his position was genuinely redundant, his dismissal followed a fair process, that he has been paid in full for all salary and

holiday pay entitlements and there are no commission payments due under the employment agreement.

[3] To determine this employment relationship problem I must decide:

- (i) The identity of the employer;
- (ii) The terms of employment;
- (iii) Whether the position was genuinely redundant;
- (iv) Whether the dismissal for redundancy was fair and reasonable in all the circumstances; and
- (v) If the respondent failed to provide a written employment agreement within the terms of section 65 of the Act and if so whether that gives rise to a claim for penalty.

[4] I record that my investigation of this employment relationship problem was assisted by a translator of the mandarin language.

Identity of the employer

[5] Ms Chen is a director and shareholder of McFinance Agency Limited, an insurance brokerage operating under the brand “Team Maggie”. This business has operated since June 2005 and has a close relationship with EuroCapital Finance Company Limited, a company providing mortgage and financial services. Ms Chen is a shareholder of EuroCapital and now holds a directorship in that company which she did not during Mr Liu’s employment.

[6] In the statement in reply the respondents say:

My Company McFinance Limited is a contractor of the Eurocapital Finance Company. It is part of the contract with Eurocapital Finance Company Limited that our employees are entitled to hold themselves out as employees of the Eurocapital Finance Limited Contractor’s Company.

[7] In her oral evidence Ms Chen said that McFinance offered insurance brokerage services and EuroCapital provided mortgage and finance services. In further affidavit evidence provided to the Authority Ms Chen provided a copy of the

agreement she (trading as McFinance) has with EuroCapital. This agreement is titled *Insurance Broker Contracting Agreement* and provides that the relationship between Ms Chen trading as McFinance and EuroCapital, is that of an independent contractor. The agreement does not provide that employees of McFinance can hold themselves out as employees of EuroCapital.

[8] In her affidavit Ms Chen says the agreement with EuroCapital was that employees of McFinance could hold themselves out as being associated with EuroCapital; hence, the use of EuroCapital letterhead and cards by staff (including Mr Liu).

[9] Ms Chen says McFinance Agency Limited employed Mr Liu. In support she has provided a draft employment agreement for Mr Liu, with the employer named as McFinance, and a pay slip for Mr Liu generated in the name of McFinance.

[10] While I appreciate the apparent confusion as to the identity of his employer I am satisfied that McFinance operated the business in which Mr Liu was employed, that that company was his employer and is properly named as the respondent.

Terms of employment

[11] Mr Liu and Ms Chen dispute whether he was entitled to a bonus and reimbursement of petrol used for work-related purposes under the terms of his employment agreement.

[12] Mr Liu says the terms of his employment were agreed during his second meeting with Ms Chen when she offered him employment. He says she asked him his remuneration expectations and he told her a \$30,000 salary per annum, a car allowance, mobile telephone and bonus and that she agreed to the following:

- (i) \$30,000 salary;
- (ii) company telephone provided for cold calling clients;
- (iii) work related petrol use reimbursed on presentation of petrol receipts;
- (iv) bonus to be paid for sales over \$10,000 per month, the amount of the bonus to be discussed later.

[13] Ms Chen says she agreed to pay Mr Liu a \$30,000 salary and set a sales target of \$10,000 per month. She says no bonus was agreed and the purpose of the sales target was to motivate Mr Liu. She says further that Mr Liu was to work from the company office where a land line telephone was provided for cold calling potential clients and that Mr Liu was expected to use his personal car for work-related business but that no agreement was reached about reimbursement of petrol. Ms Chen never received a request for reimbursement of petrol from Mr Liu.

[14] On Mr Liu's evidence the bonus was discretionary; for sales over \$10,000 the bonus would be discussed later. This is what occurred when Mr Liu made a large sale during his employment - a commission payment was negotiated with Ms Chen. I find this was the term agreed between the parties. The most Mr Liu can claim is a chance to discuss the bonus.

[15] In the absence of evidence that, other than the sale for which he received a bonus, Mr Liu made sales beyond \$10,000 per month during his employment, there can at this stage, be no assessment of the lost chance. I have formed a tentative view that other than the instance where he did receive a bonus, Mr Liu did not exceed the monthly sales target and no basis for a bonus discussion existed. There is no evidence he approached Ms Chen to discuss a bonus on any other occasion. **Notwithstanding, Mr Liu has leave to provide further evidence to the Authority as to his sales figures to enable this issue to be determined.**

[16] During his employment Mr Liu did not present a petrol receipt to Ms Chen seeking reimbursement of petrol used performing work duties. He did not provide the Authority with any petrol receipts or a record of car use for work-related purposes. I find it is unlikely any agreement was reached with Ms Chen as to petrol reimbursement. If such a term had been agreed then Mr Liu would have kept his petrol receipts and a mileage log.

Failure to provide written employment agreement

[17] Section 63A of the Act provides that when bargaining an individual employment agreement an employer must:

- (i) provide a copy of the intended employment agreement;
- (ii) advise the employee they are entitled to seek independent advice about the intended agreement;
- (iii) give the employee reasonable time to do so; and
- (iv) consider and respond to any issues raised by the employee.

[18] This did not occur. Ms Chen said she instructed her solicitor to draft a written employment agreement for Mr Liu after he commenced employment with her company. The document was drafted between May and June 2007 and referred to Ms Chen for perusal. The document was never presented to Mr Liu. Ms Chen said this did not occur because by the time the draft was prepared events had overtaken her and Mr Liu was made redundant.

[19] Mr Liu seeks a penalty be awarded against his former employer for failure to provide a written employment agreement.

[20] Mr Tomaszuk submits there is no factual basis on which a penalty can be awarded because Ms Chen's instructions to her solicitor to prepare an employment agreement for Mr Liu show she intended to comply with section 63A and 65 of the Act.

[21] The proposed employment agreement, or part of that agreement, must be provided to the employee during the bargaining of the individual employment agreement¹. This did not occur and the explanation provided by the respondent is unsatisfactory. The prepared document was never presented to Mr Liu despite his repeated requests for a written employment agreement. The breach is not merely technical. If the respondent had complied with its legal obligation to provide a proposed agreement (or part of the proposed agreement) prior to employment being

¹ Section 63A Employment Relations Act 2000

entered then Mr Liu's terms of employment would have been clear and the dispute as to terms and identity of the employer would not have arisen.

[22] For these reasons, a penalty is appropriate. I set the penalty payable by the respondent at \$500 which is 5 percent of the maximum penalty of \$10,000 for a breach by a company. This penalty does not form part of the compensation payable to Mr Liu and is to be paid by the respondent to the Authority for payment into the Crown bank account.

Dismissal for redundancy

[23] On 2 July 2007 Ms Chen invited Mr Liu to a meeting. In her oral evidence to the Authority she said she told Mr Liu she knew he was not happy working with her team and that he was unhappy about the bonus issue, the financial circumstances of the business could no longer support his employment and it would be better if his employment ended. She said in evidence that she tried to couch his dismissal in terms of both their points of view.

[24] Ms Chen said she then presented Mr Liu with the following letter dated 29 June 2007 advising of his dismissal for redundancy on two weeks notice:

Dear Mr Liu

RE: Redundancy

Having considered your work during the trial period, I am impressed with your work and performance. I realise that you have been enthusiastic and capable in performing your duties efficiently.

It is therefore with regret that I have to inform you that after communicating with my accountant, I have been advised by them to make your position redundant because of the financial situation of my company.

I understand that you rely on this job for your future career and it will mean that my company will not be able to sponsor you as a viable employer in light of my company's financial position.

You now have two weeks to finalise the responsibilities with us and I wish you all the best for your future career.

Yours faithfully

Maggie Chen

[25] Mr Liu said he received a telephone call from Ms Chen on Wednesday, 27 June 2007 asking him to attend a meeting the following week. He went into the office on the afternoon of Monday, 2 July 2007 and Ms Chen asked him into a meeting. In the meeting she put the dismissal letter in front of him and said “*I know you are not happy*”. He said he did not challenge her and worked out his notice period.

[26] The statement in reply and Ms Chen’s written evidence claim Mr Liu did not work out his notice period. It became apparent during the investigation meeting that this assertion had no basis in fact; Ms Chen had no direct knowledge of whether or not he worked out his notice. I accept Mr Liu’s evidence that he worked his notice period.

[27] Ms Chen said she negotiated an indefinite notice period with Mr Liu until he secured another position. Mr Liu denies an indefinite notice period was discussed and agreed during the 2 July 2007 meeting and relies on the dismissal letter which gives two weeks notice.

[28] I find that Mr Liu was advised of his dismissal and the notice period as set out in the letter. The letter was not amended. Ms Chen did not know Mr Liu had worked out his notice period.

[29] A dismissal is justified if it can be shown the employer’s actions were fair and reasonable in all the circumstances². A dismissal for redundancy requires the Authority to inquire into two issues; the genuineness of the redundancy and the process undertaken to carry out the redundancy.

[30] This dismissal falls short on both counts. Ms Chen was unable to provide a satisfactory explanation as to why Mr Liu’s redundancy was necessary. Bare notice of redundancy does not meet the required procedural standards.

[31] Ms Chen’s oral evidence to the Authority indicates a mixed motive for Mr Liu’s dismissal; she said Mr Liu was dismissed because of his apparent dissatisfaction with his terms of employment and the difficulties her business was facing at that time. In addition, the redundancy notice refers to Mr Liu’s employment being subject to a

² Section 103A Employment Relations Act 2000

trial period. There is no evidence the parties agreed to a trial period in the terms prescribed by law³. However, as this was the respondent's view of the employment, it is likely that the conclusion of the asserted trial period was also a motivator for Mr Liu's redundancy.

[32] Ms Chen says she dismissed Mr Liu because her accountant advised her business could no longer afford to employ him. In support Ms Chen has provided the Authority with a spread sheet of income and expenditure for the three months preceding and the month following Mr Liu's dismissal. Ms Chen prepared this spread sheet. The figures show a significant increase after Mr Liu's dismissal. Ms Chen accepted this increase was not wholly attributable to Mr Liu's redundancy.

[33] It is not clear how these figures relate to the advice Ms Chen received from her accountant (that advice was relayed in very general terms to the Authority) and does not answer the question why Mr Liu's position was selected for redundancy (Mr Liu was one of a number of staff employed by the business). There is no evidence of a selection process, let alone notice to staff of a restructuring, consultation as to a restructuring proposal or selection criteria, or exploration of redeployment options. These are necessary elements in a fair redundancy process and their absence leaves the respondent vulnerable to allegations that the redundancy was not motivated for genuine business needs.

Remedies

[34] Mr Liu has a personal grievance. He is entitled to a consideration of the remedies he seeks.

[35] I have found his redundancy was not genuine. This opens the claim for lost wages. Mr Liu claims 17 weeks lost wages. His evidence as to mitigation of loss was not strong. **I set the award of lost wages at six weeks to be calculated at the rate of \$576.92(gross) per week, total award of \$3461.52(gross).**

³ Section 67 Employment Relations Act 2000

[36] Mr Liu seeks an award to compensate him for the hurt and humiliation he has experienced as a consequence of his redundancy. I accept he was dismayed and shocked by his dismissal. **I set the award at \$6000.**

[37] There is not issue as to contribution.

Costs

[38] Costs are reserved. The parties are invited to try to resolve this issue themselves. If they are unable to then Mr Molloy should file a costs memorandum within 14 days of the date of the determination and Mr Tomaszuk should file memorandum in reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority