

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 470
3085275

BETWEEN SHUYUE LUAN
Applicant

AND BEST HEALTH FOODS LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Amy Keir, counsel for the Applicant
James (Yuan) Gu, for the Respondent

Investigation Meeting: 3 & 4 June 2021 at Christchurch

Submissions Received: 11 June, 12 July & 18 October 2021 from the Applicant
2 July & 18 October 2021 from the Respondent

Date of Determination: 22 October 2021

DETERMINATION OF THE AUTHORITY

- A. Best Health Foods Limited is to pay Shuyue Luan \$15,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- B. Best Health Foods Limited is to pay Shuyue Luan is to pay \$10,725.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.**
- C. Best Health Foods Limited is to pay Shuyue Luan \$162.00, pursuant to s 131 of the Employment Relations Act 2000.**
- D. I reserve costs, subject to the set timetable for submissions if required.**

Employment relationship problem

[1] Shuyue Luan was employed as a Graphic Designer and Content Writer from 6 March 2019 until she was given notice of dismissal on 3 July 2019, effective on 5 July 2019. Ms Luan says that she was unjustifiably dismissed. Her personal grievance was raised by her lawyer's letter dated 9 August 2019. Time and wage records were sought. The statement of problem covers the personal grievance, a penalty claim and arrears.

[2] Best Health Foods Limited (BHF) says that it justifiably dismissed Ms Luan for poor work performance.

[3] Matters were not resolved by mediation.

[4] Details of the arrears claim were provided prior to the investigation meeting. The penalty claim was withdrawn. The arrears claim and the personal grievance claim remain for investigation. This determination resolves this employment relationship problem. It is helpful to set about more about the context, before identifying and considering the issues that need to be determined.

Context in which the problem arose

[5] BHF operates a milk powder factory based in Christchurch. The company advertised for a Graphic Designer and Content Writer. Ms Luan was working in Auckland, saw the advertisement and sent her CV and other information to BHF, as an expression of her interest in the position. Yang Li is a director of BHF. There was some communication between Ms Luan and Ms Li in late 2018. Later, Ms Luan was offered employment and a written employment agreement was signed.

[6] There is a disagreement in the evidence about whether BHF initially refused to include the pay rate in the written employment agreement. The signed agreement included pay rates, so it is not necessary to resolve that dispute.

[7] There is a disagreement about whether a job description was included with the employment agreement. Clause 6 of the signed agreement stated that an outline of duties would be provided prior to commencement. Ms Luan says it was not, while BHF says that page 12

headed “Job Description” was included with the written offer but that Ms Luan did not initial and return page 12 when she signed and returned the rest of the agreement. It is not necessary to resolve the disagreement. The duties in the Job Description cover the sort of work a person employed as a “Graphic Designer and Content Writer” might reasonably expect to perform, as follows:

- ...General duties of a graphic designer
- Work with NZ and overseas based teams on ...packaging, websites, social media, promotional materials design and maintenance
- Produce other promotional materials ...
- Content writing ...
- Gather and source images and videos ...
- Manage and archive all artwork ...
- General office duties
- Perform any other reasonable work assigned ...

[8] The agreement included at clause 4 a trial period provision, in reliance on s 67A and s 67B of the Employment Relations Act 2000. Clause 5 of the agreement provided for a three month probationary period, following the completion of the trial period. During the probationary period, employment could be terminated on three days’ notice. Clause 5.3 permitted the employer, at its discretion, to extend the probationary period. Ms Luan was dismissed after the trial period, but during the probationary period.

[9] The rate of pay was set at \$20.00 per hour during the trial period and \$22.00 per hour following the trial period. Hours of work were set at 30 hours per week during the trial period and 37.5 hours per week after the trial period. Pay records show that BHF started to pay Ms Luan for 37.5 hours per week from the fortnight starting 15 April 2019 and at the rate of \$22.00 per hour from the fortnight starting 27 May 2019.

[10] On 13 June 2019, Ms Luan received an “Employee Performance Review Form”. Ms Luan completed the form. There was a meeting later that day. Another meeting occurred on 18 June. Mr Gu gave Ms Luan a letter dated 23 June, to meet on 25 June regarding “performance concerns”. The letter ended with the caution that the outcome of the meeting may be the implementation of a formal performance improvement plan or a formal written warning. There was a meeting on 25 June. Mr Gu gave Ms Luan a letter on Thursday 27 June with an instruction to complete a design by “next Monday”. The letter ended with a caution that “the outcome of this further improvement plan may trigger a termination under the

probation clause in the employment agreement”. Ms Luan sent her work to Mr Gu on Monday 1 July.

[11] On Wednesday 3 July, Mr Gu gave Ms Luan three days’ notice of the termination of her employment under the probationary clause in the agreement. Ms Luan worked on Thursday and Friday before finishing up.

[12] Ms Luan’s personal grievance claim was raised with BHF on 9 August 2019.

[13] The agreement between Ms Luan and BHF expressly included a three month probationary period, following the end of the trial period. The probationary period therefore started on 4 June 2019. In *Nelson Air Ltd v NZ Airline Pilots Association*¹ the Court of Appeal confirmed that a probationary period is to enable the employer to assess the employee’s suitability. Employees may be taken to realise they will be subject to close and critical assessment and that permanent employment would follow if they meet the employer’s standards. The employer was required to point out shortcomings, to advise about necessary improvements and to warn of likely consequences if expectations were not met. Both parties must contribute to achieving the success of a probationary period.

[14] The expectations are now underpinned by the statutory good faith obligations. An employer must be active and constructive in establishing and maintaining a productive employment relationship.² In addition, the statutory test for justification must be applied to a dismissal during a probationary period.³ Under section 67 of the Employment Relations Act 2000, a probationary period does not affect the application of the law relating to unjustifiable dismissal. BHF must show its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. An employer proposing to make a decision that is likely to adversely affect the continuation of an employee’s employment must provide the employee with access to and an opportunity to comment on relevant information before the decision is made. In assessing justification, I must consider:⁴

¹ *Nelson Air Ltd v NZ Airline Pilots Association* [1994] 2 ERNZ 665 (CA).

² Employment Relations Act 2000, s 4(1A).

³ Employment Relations Act 2000, s 67(1)(b).

⁴ Employment Relations Act 2000, s 103A.

- (a) Did BHF sufficiently investigate the allegations, before the dismissal?
- (b) Did BHF raise its concerns with Ms Luan, before the dismissal?
- (c) Did BHF give Ms Luan a reasonable opportunity to respond, before the dismissal?
- (d) Did BHF genuinely consider Ms Luan's explanations, before the dismissal?
- (e) What other factors should be considered?
- (f) If Ms Luan was unjustifiably dismissed, what remedies should be awarded?

[15] There is a claim for arrears, so I also must assess whether Ms Luan has shown that BHF paid her less than should have been paid to her under the employment agreement.

[16] It is convenient to consider the personal grievance claim first.

Did BHF sufficiently investigate the allegations, before the dismissal?

[17] BHF makes milk powder and nutritional products at its Christchurch production plant for domestic and international sale. Its directors, Yali Li and James Gu, are both experienced in New Zealand business operations. The company promotes itself as a major dairy product exporter. Mr Gu says it has access to employment law advice through Canterbury Chamber of Commerce and The Retailers' Association and has hired consultants to assist with documents and manuals. BHF had resources available to support it to instigate its concerns fully.

[18] I describe more fully the steps taken by BHF in what follows. However, whether BHF's actions were consistent with those of a fair and reasonable employer does not turn on whether BHF sufficiently investigated its concerns.

Did BHF raise its concerns with Ms Luan, before the dismissal?

[19] BHF terminated Ms Luan's employment, in reliance on the probationary clause in the employment agreement. On 3 July 2019, Mr Gu handed Ms Luan a letter. It reads:

Dear Sara,
Further Performance Assessment

Thanks for attending several meetings lately to discuss your performance. For general composition and editing and use of software, you appears fine. However, the mascot work and re-design of infant formula are not up to commercial level. I understand it may take years of training and work to achieve acceptable proficiency.

As we really need someone who can create attractive packaging for the consumer market, I am thinking the skill and experience needed for this role is beyond what you can do at the moment.

Therefore we have to terminate the employment agreement between you and the company under the probation clause in the agreement. The notice period is 3 days, effective from today. So, the last day you will be working with us is this Friday.

We wish you to find another suitable job soon. A firm with senior graphic designers will be a better option for your career development.

...

[20] To paraphrase, BHF dismissed Ms Luan because of its concerns that her work was not up to a commercial level, that she was not able to create attractive packaging for the consumer market and that it would take years of training and work for Ms Luan to achieve acceptable proficiency. BHF must show it had raised these issues with Ms Luan.

[21] Ms Luan was given a template performance review form on 13 June. The evidence for BHF is to the effect that this was a routine process every three months or so for employees. Ms Li and Mr Gu expressly denied that they initiated the review process because of any specific concern with Ms Luan's performance. Jinguan Huang was BHF's administrative assistant at the time and assisted with human resource management tasks. Her evidence is that she gave the blank form to Ms Luan in accordance with BHF's routine process, rather than in response to a specific directive. I accept this evidence.

[22] Ms Luan completed the form on 13 June 2019. The form asks the employee to rate their performance on a scale 5 (Exceptional) to 1 (Unsatisfactory), under 15 "Topic" headings, such as "Job Knowledge, Productivity, Work Quality, Technical Skills" and "Attitude, Initiative, Work Relations, Punctuality". Ms Luan scored herself as "3-Average" or "4-Above Average", except for "Punctuality" where she marked herself "2-Satisfactory". Ms Luan also made comments in the "Comments or examples" column, such as "Lack of experience, a lot to learn". The completed form was returned to Mr Gu.

[23] In its statement of reply, BHF said that documented meetings started from 13 June 2019, following employment advice, to improve Ms Luan's "creativity and efficiency". There was a meeting between Mr Gu, Ms Li and Ms Luan in the afternoon on 13 June. The discussion was not documented. Ms Luan's evidence is that Ms Li accused her of plagiarism, which Ms Luan denied. Ms Luan says that Ms Li was personally critical of her, and suggested she look for another job. Ms Luan said she would work harder. Her evidence is that Mr Gu told her she should find another job with a senior designer who could teach her.

[24] Mr Gu and Ms Li did not respond to Ms Luan's evidence about the 13 June meeting in their statements of evidence. When questioned, Ms Li spoke about a meeting between her and Ms Luan, during the earlier trial period. Mr Gu told me that he could not remember what they had talked about on 13 June.

[25] After the meeting, Ms Luan received an email from Mr Gu (copied to Ms Li) timed at 9.31am on Friday 14 June 2019. It reads:

Hi Sara,
Thanks for participating in the performance review.
Your effort to the work and your honesty to your strength and weakness are really appreciated.
As discussed, graphic design is a bottle-neck for our entire operation.
Your thoughts and feedback about this is appreciated.
May be we can schedule another meeting late today.
Kind Regards,
James

[26] I find that there was very little discussion on 13 June about Ms Luan's ratings or her comments set out in the form. If there had been a discussion focussed on Ms Luan's performance review, Mr Gu as her manager would have recorded his own "Rating" figures and his "Comments or feed back" on the form. Mr Gu's reference to a "bottle-neck", his request that Ms Luan think about what had been discussed "seriously" and the events that followed soon after, lend some support to Ms Luan's evidence that the directors suggested that she find another job. I find that Ms Li and Mr Gu said that to Ms Luan on 13 June. However, there is not sufficient evidence to establish that Ms Li and Mr Gu were personally critical of her or accused her of plagiarism, as claimed by Mr Luan.

[27] There was no meeting on 14 June. On Tuesday 18 June at 10.13am, Mr Gu sent Ms Luan a further email. It reads:

Hi Sara,
Haven't received any feedback from you so far.
Please think about what we discussed seriously and provide feedback.
We'd like to discuss this further 4.30pm today.
Kind Regards,
James

[28] Ms Luan's evidence is that Mr Gu came to her on 18 June and asked what she thought about the previous discussion. Ms Luan also says that she asked if he wanted her to resign but Mr Gu told her to think about that by herself. Mr Gu did not dispute any of this evidence, so I accept it.

[29] The foregoing interactions do not demonstrate that BHP raised concerns about the level and standard of Ms Luan's work or the prospects of her achieving acceptable proficiency.

[30] On Monday 24 June, Mr Gu gave Ms Luan a letter dated 23 June. It reads:

Dear Sara,

Meeting to discuss performance concerns

Best Health Foods Limited has been reviewing your performance in your role as a Graphic Designer and in light of these reviews, we would like to invite you to a formal meeting to discuss the following areas of concern in relation to your performance:

- Creativity to Commercial Production Level;
- Efficiency of Work to Commercial Production Level;
- Caring for Details;
- Desire to Learn More through More Work;
- Understanding on Copyright Issues.

We would like to meet with you at our downstairs meeting room on Tuesday, the 25 June 2019 at 4pm to hold this meeting.

You are welcome to bring a support person or representative to this meeting.

Please advise me ... at the earliest opportunity if you cannot attend this meeting for any reason, or if you have any queries in relation to this.

Please be aware that the outcome of this meeting may be the implementation of a formal performance improvement plan, or a formal written warning.

...

[31] There was a meeting between Ms Luan, Mr Gu and Ms Li on Tuesday 25 June. It was also attended by Ms Huang, who took notes during the meeting. The notes do not record the attendance of Ms Li. However, there is some overlap between the noted topics and Ms Luan's evidence about the meeting. There was mention of a brand design called "Goatsmile", provided by Ms Luan before her employment. Ms Luan said that it was to demonstrate her work and could not be used for commercial purposes, unless significantly changed or on purchase of the copyright. There was mentioned about the time taken to do work. Ms Luan said that Mr Gu had taken the USB drive. There was mention of the border design for a business card.

[32] Ms Luan's evidence is that Ms Li was "blaming and cursing", making her afraid. She claims Ms Li and Mr Gu said things to her, which can be described as demeaning. Giving evidence, Ms Huang had little recollection about what happened during the meeting. Nothing in the notes supports Ms Luan's claims.

[33] BHF provided a translation of the notes. I obtained an independent translation. It was circulated to the parties for comment and Mr Gu took issue with a few points. It is not necessary to take those points any further. I accept there was mention during the 25 June meeting of the points foreshadowed in the letter.

[34] On Thursday 27 June, Mr Gu gave Ms Luan the following letter:

Dear Sara,

Follow Up to the Meeting to discuss performance concerns

Thanks for attending the meeting this Tuesday to discuss the following areas of concern in relation to your performance:

- Creativity to Commercial Production Level;
- Efficiency of Work to Commercial Production Level;
- Caring for Details;
- Desire to Learn More through More Work;
- Understanding on Copyright Issues.

We don't think we've received satisfactory answers to these concerns. In contrast, you are over confident to what you are able to do and deliver.

I am going to give you more time to show your capability on producing commercial grade artwork and how can improve from the level you have now.

The mascots for infant formula required need a lot of more work for us to make selections despite the work has given to you last week.

Please complete the design of 3 sets of mascots (each contain stage 1, 2 and 3 mascots) by next Monday. They need to be done in Adobe Illustrations even if they are draft versions.

Please be aware that the outcome of this further improvement plan may trigger a termination under the probation clause in the employment agreement.

[signed]

[35] Ms Luan's evidence is that she had been asked on or about 25 June to design "three mascots sketch", but had not been told that it was for the purpose described in the 27 June letter. Mr Gu told me that it was at the "very first performance" on 25 June, or "maybe" on 18 June that he first asked for the design. He did not dispute Ms Luan's evidence that she had not been told of its purpose at the time. I find that the "three mascots sketch" instruction was not part of the 25 June meeting. When he gave the instruction, Mr Gu did not explain its purpose. It is common ground that Mr Gu later clarified that he required nine mascots in total. Ms Luan sent her work to Mr Gu on Monday 1 July. No concerns about it were raised with Ms Luan.

[36] Ms Luan's evidence is that she and a colleague were assigned another design task on 1 July by Ms Li, to be completed within 2 days. Ms Li did not dispute this evidence. I accept Ms Luan's evidence. No concerns about this work were raised with Ms Luan.

[37] I will summarise what BHF did and did not do to raise its concerns with Ms Luan, prior to giving her notice of dismissal. BHF did not engage with Ms Luan over the performance review form in any substantive way. Mr Gu gave evidence that Ms Luan overstated her scores on the form. However, BHF did not raise with her its view that she had overstated these scores, even after 21 June, the date Ms Luan was requested to sign her form. BHF's concerns were first expressed in the 23 June letter. They were mentioned during the 25 June meeting. The 23 June list of concerns was repeated in the 27 June letter. BHF's view that the mascot work did not meet a "commercial level" was not raised with Ms Luan.

[38] There is evidence from Nathan Scott, BHF's quality manager. Mr Scott told me that he saw Ms Luan a number of times doing design work at BHF, other than for BHF's benefit. His evidence is that he told Mr Gu about this. Mr Scott gave evidence that Ms Luan's delay on a specific design held up production. His evidence is that he spoke to Mr Gu about this. He was concerned that Ms Luan spent time on social media but it did not benefit BHF. Mr Scott did not claim to have reported this to Mr Gu. Mr Nathan's concerns, to the extent they were relayed to Mr Gu, were not specifically raised with Ms Luan before her dismissal. These concerns do not assist BHF to establish justification for the dismissal.

Did BHF give Ms Luan a reasonable opportunity to respond, before the dismissal?

[39] Ms Li's evidence included that Ms Luan "cheated" BHF, and "finally admitted" that her only acceptable work (Goatsmile) was largely copied from others. Wechat messages show that Ms Li was aware on 3 April 2019 that Ms Luan had copied some elements of the Goatsmile design, but Ms Li gave instructions to make some changes so "we can avoid copyright infringement". While in her evidence to the Authority, Ms Li claimed that Ms Luan "cheated" but "finally admitted" use of copyright elements, that is not how the concerns was raised in June 2019. If those were concerns that caused Ms Li (jointly with Mr Gu) to dismiss Ms Luan, Ms Luan had no reasonable opportunity to respond.

[40] The 23 June letter cautioned Ms Luan that the outcome of the requested meeting to discuss concerns might be a formal performance improvement plan or a formal warning. Mr Gu acknowledged in evidence that Ms Luan was not given any warnings. When asked why there had been no performance improvement plan, Mr Gu first said that Ms Luan could have provided a plan. He then said that the instruction set out in the 27 June letter to design three sets of mascots was the performance improvement plan. I do not accept that the mascot instruction was a performance improvement plan. BHF took no steps to help Ms Luan to understand and meet its expectations related to the bullet point list of concerns, first noted in the 23 June letter.

[41] By dismissing Ms Luan, before having taken any steps to advise about and support necessary improvements and allow a period of time for Ms Luan to achieve its expectations, BHF failed to give Ms Luan a reasonable opportunity to respond to its concerns.

[42] On Wednesday 3 July, Mr Gu gave Ms Luan the letter terminating her employment. Ms Huang was present, but Ms Li was not. There is a note that reads "James explained details and the problems to her", but Ms Huang's evidence is that she did not remember how she learnt that Ms Luan had been fired, that she could not remember what Mr Gu explained, and that she had not read the letter but thought it was "something in regard to a warning". Ms Luan's evidence is that Mr Gu did not comment about her work. Mr Gu did not dispute that evidence. I find that if anything was said by Mr Gu, it did not extend beyond the description set out in the 3 July

letter. Ms Luan had no opportunity to respond on 3 July before being told that her employment had been terminated.

[43] I find that BHF did not give Ms Luan a reasonable opportunity to respond to its concerns before dismissing her.

Did BHF genuinely consider Ms Luan's explanations, before the dismissal?

[44] While BHF outlined its concerns on 25 June, there is no evidence to show that during the meeting or afterwards, the company genuinely considered Ms Luan's responses.

[45] Ms Li removed Ms Luan from a BHF group chat group on 25 June at 5.42pm, after the meeting. That action had not been foreshadowed during the meeting. When questioned in evidence about that, Ms Li said that the chat group was "just taking her (Ms Luan's) time" and "she doesn't need to be there". Ms Li also told me that it was no longer needed. If the action had been intended to allow Ms Luan to focus on improving her performance in the areas of concern, one might have expected some discussion on the point. If it was no longer needed, it would not have taken up any of Ms Luan's time.

[46] I have referred to it as the "27 June" letter. The printed date was "26 June", but it was changed by hand. The date was changed to reflect when the letter was given to Ms Luan. It was written and printed earlier. Ms Li's evidence was that she was aware of the "27 June" letter before it was given to Ms Luan. Ms Li told me "Whenever a dismissal is going to take place James tells me". That evidence indicates that the dismissal was predetermined.

[47] BHF changed its position from considering a warning or a performance improvement plan to considering dismissal, based on the same concerns. Ms Luan's work performance had not deteriorated between 23 June and 27 June. These circumstances indicate that the dismissal was pre-determined.

[48] Nothing was said to Ms Luan about the quality of her mascot designs between 1 July and when she was given the dismissal letter on 3 July. This indicates that the dismissal was pre-determined.

[49] I find that BHF did not genuinely consider Ms Luan's explanation, to the extent she was given an opportunity to respond to its concerns, as BHF had pre-determined its decision to dismiss her.

What other factors should be considered?

[50] Mr Gu submitted that the majority of Ms Luan's evidence in her statement was untrue. He says that Ms Luan had not done design work, as claimed by her. Mr Gu says that Ms Luan did not work hard, despite her claim. He says that Ms Luan was paid overtime as requested and for a public holiday, contrary to her claim. Mr Gu says that Ms Luan's evidence was fabricated to defame BHF's directors. Mention is made of the USB drive. He submits that Ms Luan did freelance work. Mr Gu disputes claims about breaks and working hours. I deal with working times as part of determining the claim for arrears. Mr Gu submits that BHF is a reputable company and its directors are honest and reliable.

[51] For the most part, these submissions do not address the issues for determination. There is no reason to doubt that BHF is a "legitimate company and reputable exporter who contributes significantly to the community". The case does not turn on credibility. It is not necessary to determine whether Ms Luan worked on the designs she claims.

[52] Ms Luan started working for BHF from early March 2019, after exchanges between her and Ms Li from late October 2018. BHF knew from these exchanges that Ms Luan was inexperienced. It was a factor in negotiating the wage rate. The employment agreement included a trial period. By April 2019, BHF knew that the design provided by Ms Luan before the employment included elements that had not been created by her, but continued the trial period. Ms Luan's probationary period then started in early June. BHF did not engage with her over the performance review process. There is no evidence that BHF pointed out shortcomings, advised of necessary improvements and warned of likely consequences for not meeting them, ahead of the 23 June letter. BHF raised performance concerns in its 23 June letter, then repeated them in the 27 June letter. BHF was entitled to its view that Ms Luan's work was not up to a commercial level, that she was not able to create attractive packaging for the consumer market and that it would take years of training and work for Ms Luan to achieve acceptable proficiency. What BHF did not do, during the short time it continued her

probationary period, was take any steps to assist Ms Luan to meet its expectations. BHF's actions and how it acted over its concerns were not what a fair and reasonable employer could have done at the time.

[53] Mr Gu submits that BHF should not be "penalised", even if there were minor procedural faults. I must not determine a dismissal to be unjustifiable because of defects in the process followed by the employer, if the defects were minor and did not result in the employee being treated unfairly. Not providing Ms Luan an opportunity to meet BHF's performance concerns after they were brought to her attention in the 23 June letter is a matter of substance, not procedure.

[54] If there had only been minor defects in BHF's process, I would have needed to consider whether defects had resulted in Ms Luan being treated unfairly. Ms Luan has been treated unfairly. BHF should have clearly communicated its expectations, identified in what ways Ms Luan's work fell short and supported her to achieve those expectations, throughout her trial period and her probationary period. It fell well short of doing this.

What remedies should be awarded?

[55] There is a claim for compensation under s 123 of the Employment Relations Act 2000. Ms Luan's evidence is that her experience working for BHF has become a "forever dark shadow in my mind". Her evidence is that she was really upset to lose her job and to be "damaged in communication with people". Ms Luan says it was very hard for her to rebuild confidence and optimism in her life. Ms Luan had no money and was very upset, ashamed and embarrassed. Ms Luan had relocated from Auckland to Christchurch to take up the position, so had no friends or family in Christchurch for support. While there is no reason to doubt this evidence, it does not establish serious or long lasting harm. I assess \$15,000.00 as the amount of compensation required to remedy the proven effects of the unjustified dismissal.

[56] Ms Luan was without income after her employment ended, until she left New Zealand to return to China in December 2019, apart from some freelance work. I accept that Ms Luan lost remuneration as a result of the unjustified dismissal. Section 128(2) of the Employment Relations Act 2000 entitles Ms Luan to an order that Best Health Foods Limited pay her the lesser of the lost remuneration or 3 months' ordinary time remuneration. Under the

employment agreement, BHF could offer additional hours from time to time. BHF had several times approved extra hours before the dismissal. However, there is no evidence to show that Ms Luan was likely to have worked extra hours in the period following the dismissal.

[57] Ms Luan's ordinary time remuneration at the date of her dismissal was 37.5 hours per week at \$22.00 per hour, a total of \$825.00 gross per week. Ms Luan lost remuneration of \$10,725.00 during the initial three months following the dismissal.

[58] The Authority has a discretion to order an employer to pay compensation of a greater amount, to cover loss beyond the initial three months. However, there was little evidence to establish that Ms Luan continued with efforts to mitigate her loss. In the absence of such evidence, there is not a proper basis to exercise the discretion under s 128(3) of the Employment Relations Act 2000. That leaves the compensable loss at \$10,725.00.

[59] In deciding the nature and the extent of remedies, I am required to consider the extent to which Ms Luan's actions contributed in a blameworthy way to the situation giving rise to the grievance and, if those actions so require, reduce the remedies. For Ms Luan, it is submitted that the copyright issue regarding the Goatsmile design is not relevant. The issue was known to BHF in early April, but it did not deal with it as a disciplinary matter then, later allowing the trial period to end and the probationary period to commence. "Understanding on Copyright Issues" was included in the list of concerns in the June letters but was not mentioned in the letter of dismissal. Despite Ms Li's evidence, I do not accept that Ms Luan's action prior to her employment, known to Ms Li in April, contributed to the situation giving rise to the personal grievance.

[60] Ms Luan's level of skill and experience was known to BHF before it employed her. BHF came to the view that it was insufficient for its commercial needs. Ms Luan's actions did not contribute to BHF's misjudgement as to its requirements.

[61] There is conflicting evidence about a USB drive. Ms Luan's evidence is that her ability to perform her work was affected by the USB not being available to her. Mr Gu disputes that. It is not necessary to resolve the dispute. While Mr Gu and Ms Li are now critical about whether Ms Luan was diligent in attending to tasks she was assigned by BHF, that was not identified as a basis for the dismissal.

[62] There are no grounds to reduce the nature and extent of remedies due to Ms Luan.

[63] In summary, Ms Luan was unjustifiably dismissed and there will be orders for compensation of \$15,000.00 and reimbursement of \$10,725.00.

Arrears Claim

[64] There is a claim for arrears for Queens Birthday public holiday. The holiday fell on Monday 3 June 2019. Timesheets completed by Ms Luan record hours of work on 4 – 7 June. Wage records for the period 27/5/19 – 9/6/19 show a fortnightly payment of 75 hours. The employment agreement provided for wages to be paid fortnightly. I find that Ms Luan did not work on Monday 3 June, it would otherwise have been a working day for her and BHF paid her for the day at relevant daily pay. This part of the arrears claim fails.

[65] There is a claim in respect of work in the period of Monday 1 April to – Monday 8 April. Ms Luan's ordinary hours were initially 30 hours per week. However, Ms Luan sent an email to Mr Gu on 8 April to say that she was working 37.5 hours per week as her normal hours, as instructed by Ms Li. Ms Luan's evidence is that she sent this email when told by Ms Li to do so. BHF says that Ms Li did not authorise increased hours and that Ms Li only learnt of it near the end of the trial period. It is unlikely that a person in Ms Luan's position would send an email to Mr Gu stating that the other director had authorised an increase in normal hours, if that was not true. One would also expect Ms Li to take up the point with Ms Luan during (or after) her trial period, if Ms Li had not authorised the increase. I accept Ms Luan's evidence about the increase in her normal weekly hours to 37.5 hours, starting 1 April.

[66] The pay records show Ms Luan was paid on 18 April for 67.5 hours for the fortnight ending 14 April. That included 7.5 hours for work on Saturday 6 and Sunday 7 April, so Ms Luan was only paid for 60 hours normal time for the fortnight. A second payment was made on 18 April, for 7.5 hours, so Ms Luan was paid for 67.5 hours, but should have been paid for 75 normal hours. Ms Luan has proven arrears of wages of 7.5 hours at \$20.00 per hour with respect to normal pay in the fortnight ending 14 April. Arrears will include an order for \$150.00, plus holiday pay.

[67] There are timesheets for 25 March – 5 April and 13 May – 5 July 2019. Timesheets before 25 March and for 6 April - 12 May were not adduced in evidence, but I accept Ms Luan had completed the missing timesheets.

[68] Ms Luan's first day of work was Wednesday 6 March. The normal hours were set at 30 per week, equating to 6 hours per day Monday to Friday. Ms Luan was paid for 50 hours on 25 March for the period ending Sunday 17 March. There is a claim of \$200.00 in arrears for the fortnight. However, Ms Luan worked 8 days in the fortnight, so 48 normal hours. The only evidence that Ms Luan worked more than 6 hours on any day is the note "2 hrs overtime" in the pay records. Ms Luan worked 50 hours and was paid for 50 hours. I conclude that Ms Luan was correctly paid in this period.

[69] In the fortnight ending 31 March, Ms Luan was paid for 65.5 hours. Pay records include a note "5.5 hrs overtime". There are time sheets only for the second week of the pay period. Ms Luan did not record the start/finish time of any unpaid meal breaks, but I accept it is likely that Ms Luan took meal breaks each day. There is no specific detail for arrears claimed.

[70] The next claim for arrears is for the pay fortnight ended 26 May 2019. The pay record shows 75 hours were paid. There is a claim for 6.97 additional hours, based on the start, break and finish times recorded in the time sheets. Similarly, there are the following claims: .41 hours in the fortnight to 7 June; 9.2 hours in the fortnight to 21 June; and 8.65 hours in the fortnight to 5 July. Under the employment agreement, Ms Luan's hours were to be set by BHF in accordance with a roster. Ms Luan was "required" to work 37.5 hours per week. BHF was entitled to "offer" Ms Luan extra hours from time to time. I note that Ms Luan had sent Mr Gu emails several times previously recording requests or instructions to work additional hours. No emails are produced to support the present claims. The evidence does not establish that Ms Luan was offered or required to work the extra hours for which Ms Luan now seeks payment.

[71] Ms Luan is entitled to recover arrears of \$150.00, plus holiday pay of 8%, a total of \$164.00.

Summary

[72] Ms Luan was unjustifiably dismissed. There will be orders for compensation of \$15,000.00 and reimbursement of \$10,725.00.

[73] Ms Luan has established arrears of \$164.00.

[74] In its reply and submissions, BHF says it has been “out [of] pocket[s]’ on wages and the directors’ valuable time. BHF asks the Authority to determine “remedies” or “compensation” payable to it. BHF did not commence its own claim. In any event, no proper basis has been shown for any award against Ms Luan.

[75] Costs are reserved. A claim for costs may be made by lodging and serving submissions in support within 28 days. The other party may then lodge and serve submissions in reply. Costs will be determined, based on these submissions.

Philip Cheyne
Member of the Employment Relations Authority