

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 57  
5359587

BETWEEN	MARTIN (DING) MA Applicant
AND	DOLCE DESIGN LIMITED First Respondent
AND	CLOUD TWELVE LIMITED (formerly 4U WEB DESIGN LIMITED) Second Respondent

Member of Authority: R A Monaghan

Representatives: M Moncur, advocate for applicant  
B Suess, advocate for respondents

Investigation meeting: 21 December 2011

Determination: 17 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Martin (Ding) Ma says his former employers were either or both of Dolce Design Limited (DDL), and 4U Web Design Limited (4U Web Design) which is now named Cloud Twelve Limited. Mr Ma says his employers dismissed him constructively and unjustifiably. He also says they owe him the unpaid wages and holiday pay which led to his constructive dismissal, and seeks payment accordingly.

[2] Finally Mr Ma seeks the payment of penalties for breach of the duty of good faith and for failure to provide a written employment agreement.

[3] DDL says it was not Mr Ma's employer, rather the employer was 4U Web Design. 4U Web Design says it was the employer.

[4] The investigation in the Authority encompassed the identity of the employer, as well as Mr Ma's personal grievance, the claim for unpaid wages and holiday pay, and the claims for a penalty.

[5] A purported counterclaim was not ready to be heard and was adjourned.

### **Identity of the employer**

#### 1. Background

[6] It was common ground that Mr Ma commenced his employment with DDL in October 2006. The parties completed a written employment agreement in February 2008, which among other things described Mr Ma's position as web development designer.

[7] DDL's managing director, Beat Suess, said that during 2010 it became difficult to identify which of DDL's business activities were making a profit and which were losing money. He said he decided to address this by splitting the company into four new entities, one of which was to take over the web design business and was to be named 4U Web Design Limited. A second was to be named 4U Shops Limited, a third was to be named 4U IT Computer Solutions Limited and the last was to be named iPoll 4U Limited. DDL would cease trading.

[8] 4U Web Design Limited was registered on 5 January 2011. Mr Suess was the director and Taca Holdings Limited (THL), which had been registered in December 2010, was the shareholder. Mr Suess is registered as the director and shareholder of THL. The three other companies Mr Suess named were also registered in January 2011. The companies were to, and in the case of 4U Web Design in particular did, commence trading on 1 April 2011.

[9] Since 4U Web Design was to deliver the service in which Mr Ma was engaged, Mr Suess discussed his proposal with Mr Ma at first informally in December 2010. It was common ground that Mr Suess explained he intended to split up DDL's activities, and how he intended to do so. As Mr Ma put it he was told he would be 'given a company to run'. It was common ground that Mr Ma was told shares would

be offered to him, and said he responded by saying something like 'good idea' to Mr Suess.

[10] Mr Suess said there were several subsequent discussions about: establishing 4U Web Design; the need to make it profitable; the way it would charge for work done; and Mr Ma's role in it. He said that without Mr Ma's involvement he would not have developed the idea of 4U Web Design further, and told Mr Ma several times that the new company would be 'his baby'. He understood that Mr Ma was an enthusiastic supporter.

[11] Much of Mr Suess' account was not disputed. Instead Mr Ma said he did not want to run the new company, but simply smiled when Mr Suess explained his plans. He intended to provide a response when he was given a document to address.

[12] In April 2011 a business consultant engaged by Mr Suess, Paul Alexander, sought to discuss a new written employment agreement with Mr Ma. The document was based on the existing agreement, with amendments including the name of the employer party. The document was a photocopy of the executed agreement of February 2008 between Mr Ma and DDL, with the amendments in respect of 4U Web Design made by Mr Alexander and initialled by him. There was no additional annotation by Mr Ma.

[13] Mr Alexander said he met with Mr Ma and gave the document to Mr Ma to take away and consider. Mr Ma denied seeing the document until it was produced for the Authority's investigation. He did not, however, deny having a discussion with Mr Alexander. Instead he gave his view of Mr Alexander.

[14] On or about 18 April 2011 Mr Ma left New Zealand for China and did not return until early June 2011.

[15] During that time he arranged for his parents to emigrate to New Zealand as residents in the family category. To that end he was asked to provide Immigration New Zealand with information about his employment. He provided a copy of the February 2008 employment agreement with DDL, and evidence of earnings including a series of bank statements which identified wage payments first from DDL, then 4U

Web Design from April 2011. After the absence of an employment agreement with 4U Web Design was queried by an immigration officer Mr Suess provided a letter dated 6 May 2011 confirming that Mr Ma's employment had been with DDL until 1 April 2011 when employment by '4U Web' Limited commenced.

[16] Otherwise Mr Ma said that his work continued just as it had when he was employed by DDL. Mr Suess said that the work Mr Ma carried out after 4U Web Design began trading was carried out for and invoiced by that company. Some incidental work which Mr Ma carried out for the benefit of the other 4U companies was charged to those companies. Invoices were produced in support so I accept that was the case.

## 2. Who was the employer?

[17] The issue arising out of the above is whether the employment relationship with DDL terminated and a new relationship with 4U Web Design was entered into.

[18] Whether or not Mr Ma was given an amended written employment agreement in April 2011, naming 4U Web Design as the employer, I accept that he did not sign it and because of the facts to be discussed below I do not rely on it in determining the issue. It remains open to me to consider all of the evidence with a view to determining whether there was an oral agreement to the above effect, or whether the parties by their conduct affirmed the existence of such an agreement.

[19] Part of Mr Ma's response in questioning on the evidence concerning the extent to which Mr Suess discussed his plans for the restructuring of DDL in general, and the creation of 4U Web Design as a vehicle for Mr Ma's activities in particular, was to say that he did not worry about what was being said because it did not concern him. Indeed when he was asked in evidence whether critical pieces of information were mentioned, there was no denial and that was the essence of his response. His attitude appears to have been influenced by his view that the discussions concerned a possible shareholding only, and since he was not interested in a shareholding there was no need to take any further notice of what was being said. However the scope of the discussions was not limited to the possibility of a shareholding.

[20] Whether or not my view of Mr Ma's attitude is correct, he had clearly disregarded a number of significant pieces of important information. This has implications for the claim he is now making. He cannot, for example, say he was not advised of the proposals, or that he was unaware of Mr Seuss's intentions. The information was available to him but he chose not to take proper account of it. In the circumstances he cannot rely on his inaction to say that no change was agreed.

[21] Similarly, in the knowledge of the nature of the restructuring, from April 2011 Mr Ma continued to work without ever indicating any disagreement with or refusal to accept the change he knew had been proposed and was being implemented. He knew, in addition, that 4U Web Design had begun paying his wages. He knew he was being required to complete timesheets for 4U Web Design. Against the background of the information provided to him there were no grounds for any conclusion that 4U Web Design made the wage payments as agent for DDL, and I do not accept the submission on behalf of Mr Ma that such was the case. Finally, Mr Ma did not express any disagreement with the letter Mr Seuss provided for immigration purposes, and in which 4U Web Design was identified as the employer from April 2011.

[22] Accordingly while I accept there was no express written or oral agreement that 4U Web Design effectively replace DDL as the employer, the intention that it do so was or should have been clear to Mr Ma, he did not voice any objection, and he continued to work under the new arrangement again without voicing any objection. From those actions Mr Ma's consent can be implied.

[23] For these reasons I conclude that on 1 April 2011 DDL ceased to be the employer, and an employment relationship with 4U Web Design was entered into.

### **The personal grievance**

#### **1. Background**

[24] Mr Ma resigned by letter dated 31 August 2011. No reason was specified in the letter, but Mr Ma said the reason was the employer's continuing failures to pay wages on time or in full.

[25] Mr Sues accepted that payment fell behind, particularly during Mr Ma's absence in China. Inevitably, since Mr Ma was the income-generator for 4U Web Design but was absent, the new company had no income from which to pay him. Even so payslips generated during Mr Ma's absence show payments were made during that period, but that some were made in respect of obligations which had accrued during his employment with DDL. They were 'catch up' payments.

[26] When Mr Ma returned in June 2011 the parties discussed how the wage payments could be brought up to date. They agreed that arrears would be brought up to date by 7 August 2011, although Mr Sues noted that no orders were coming in and said in evidence that he agreed to the date because Mr Ma pressed for it.

[27] The payslips show no payment was made in July, while a payslip for 3 August shows payment was made up to 17 June. Thus overall payment remained in arrears by 7 August. Mr Sues said there was still no money to pay.

[28] The next payment to Mr Ma was made on 17 August, and was made up to 8 July. That was the last payment Mr Ma received. He said he kept hoping to be paid, but by 31 August he could not continue without payment and submitted his resignation. He asked for payment the next day, 1 September, but when he was again informed that there was no money to pay he left immediately.

## 2. Was there an unjustified dismissal?

[29] Although Mr Ma resigned, the termination of his employment amounts to a constructive dismissal if it meets tests as set out in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW*:

*... we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer ... If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.<sup>1</sup>*

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<sup>1</sup> [1994] 2 NZLR 415, 419

[30] I find the continuing failures to pay Mr Ma amounted to a breach of duty by the employer of sufficient seriousness to make it reasonably foreseeable Mr Ma would not be prepared to continue to work under those circumstances. I also accept that his resignation was caused by that breach of duty.

[31] Accordingly Mr Ma was constructively dismissed.

[32] Even if the employer was unable to pay, in these circumstances that is not a justification for a dismissal and I find the dismissal unjustified.

### 3. Remedies

[33] Mr Ma obtained alternative employment commencing on 18 September 2011. Although he was arguably in breach of his obligations in respect of notice, his action was the response to advice that he would not be paid. He was entitled to terminate the relationship immediately, and in turn is entitled to the reimbursement of two weeks pay lost as a result of the termination.

[34] Cloud Twelve Limited is therefore ordered to reimburse Mr Ma for two weeks' wages calculated as

$$2 \times \$24/\text{hour} \times 40 \text{ hours} = \$1,920.$$

[35] As there was no evidence of injury to Mr Ma's feelings I make no further order.

### **The claim for wages and holiday pay**

[36] In the course of discussion during the investigation meeting the parties agreed that the gross sum of \$5,981.04 (inclusive of holiday pay) is owed.

[37] Cloud Twelve Limited (formerly 4U Web Design) is therefore ordered to pay to Mr Ma the sum of \$5,981.04.

## The claims for penalties

[38] The applicable statutory provisions were not properly cited and the grounds on which penalties were sought as a result were not properly identified. In the interests of avoiding claims for penalties the grounds for which are unclear, or which cannot succeed, this is a practice which should not continue.

### 1. Breach of good faith

[39] The obligation of good faith is detailed in s 4 of the Employment Relations Act 2000, but penalties are available only in respect of breaches of s 4A. That section reads:

*4A. A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if –*  
*(a) the failure was deliberate, serious and sustained; or*  
*(b) the failure was intended to undermine –*  
     *(i) bargaining...; or*  
     *(ii) an individual employment agreement ...; or*  
     *(iii) an employment relationship; or*  
*(c) ...*

[40] The actions of the employer said to have breached s 4(1) were not identified, nor in turn was the question of whether those actions met the threshold for payment of a penalty under s 4A addressed. If the failures to pay are being relied on, then while they amount to breaches of the employment agreement they do not necessarily amount to breaches of good faith if, for example, there is genuinely no money with which to pay. Even if they are breaches of good faith, they do not necessarily amount to breaches of the kind set out in s 4A.

[41] For these reasons there will be no order for a penalty.

### 2. Failure to provide written employment agreement

[42] The claim for a penalty for failure to provide a written employment agreement was made in the event I found 4U Web Design was the employer. I have so found.

[43] Section 63A of the Employment Relations Act applies to the present circumstances. It requires employers, when negotiating the terms of an individual employment agreement, to provide an employee with a copy of the intended agreement as well as an opportunity to obtain advice on the agreement. Section 63A(3) provides that an employer is liable to a penalty for the failure to comply with these provisions.

[44] If s 63A is being relied on, then any claim for a penalty under the section is inside the time limit in s 135(5). However the conflict in the evidence concerning whether Mr Alexander gave Mr Ma an amended written agreement to consider amounts to Mr Ma's word against Mr Alexander's. In the absence of any other basis on which I can resolve the conflict I am not persuaded to the necessary standard that there was a breach of s 63A which should be reflected in an order for a penalty.

[45] Section 65 of the Act requires individual employment agreements to be in writing when the work in question is not covered by a collective agreement binding on the employer. Section 65(4) provides that an employer who fails to comply with the section is liable to a penalty in an action brought by a Labour Inspector. No such action was brought here.

[46] For these reasons there will be no order for a penalty.

### **Procedure for addressing counterclaim**

[47] As the counterclaim appeared to concern the period from 1 April 2011, when Cloud Twelve Limited (formerly 4U Web Design Limited) was the employer, the company is directed to advise the Authority within 28 days of the date of this determination of whether it wishes to proceed with the counterclaim.

[48] If the counterclaim concerns an earlier period, DDL is directed to advise the Authority of that, and to confirm whether it wishes to proceed with its counterclaim, within 28 days of the date of this determination.

**Summary of orders**

[49] Cloud Twelve Limited (formerly 4U Web Design Limited) is ordered to pay to Mr Ma:

- (a) \$5,981.04 as unpaid wages; and
- (b) \$1,920 as reimbursement of remuneration lost as a result of the personal grievance.

[50] Interest is to be paid on both of these amounts, calculated as 5% from 1 September 2011 to the date of payment.

**Costs**

[51] Costs are reserved.

[52] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority