



# New Zealand Employment Relations Authority Decisions

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## Ng v Discover Oasis Limited (Auckland) [2018] NZERA 149; [2018] NZERA Auckland 149 (8 May 2018)

Last Updated: 18 May 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 149  
3023076

BETWEEN KAI KONG NG Applicant

A N D DISCOVER OASIS LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person

Jenni Qin, Director of Respondent

Investigation Meeting: 4 May 2018 at Auckland

Date of Determination: 8 May 2018

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

**A. The applicant, Mr Kai Kong Ng was unjustifiably dismissed by the respondent, Discover Oasis Limited (“Discover Oasis”).**

**B. In order to settle Mr Ng’s personal grievance claim, Discover Oasis is to make payment of the following sums to him within 21 days of the date of this determination:**

**a) \$12,000 compensation under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (“the Act”) for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal.**

**b) \$6,480 gross in lost remuneration under [s128](#) of the Act.**

[1] The applicant, Mr Kai Kong Ng and his wife Ms Wai Jing Lai, are shareholders of Fountain of Plenty Care Service Limited (“Fountain of Plenty”). Ms Lai is the sole director of Fountain of Plenty.

[2] Fountain of Plenty owned a rest home called Concord House Rest Home (“the rest home”) which was sold in January 2018 to Discover Oasis.

[3] Ms Jenni Qin is a director and shareholder of Discover Oasis. Discover Oasis owns and operates the rest home. Ms Qin is also the Managing Director of the rest home.

[4] Mr Ng and Ms Lai assisted with the handover of the rest home business to Ms Qin. Ms Qin says that she was very inexperienced as a business owner, this being her first business. Ms Qin expected Mr Ng and Ms Lai to mentor her in business matters. Ms Qin says she was also very inexperienced with New Zealand employment relations and laws.

### Mr Ng employment

[5] Mr Ng was employed part time by Discover Oasis as the rest home cook. An employment agreement was entered into and signed on 24 March 2016 by Ms Qin on behalf of the rest home and by Mr Ng.

## Dismissal

[6] Ms Ng was dismissed, this is not disputed by Discover Oasis. Mr Ng says that on 1 December 2016, he received a letter from Ms Qin informing him that he was dismissed. Mr Ng said he was shocked. Mr Ng says Ms Qin did not give him an explanation for his dismissal and left the dismissal letter for him on the computer table in the rest home lounge. Mr Ng says the letter informed him that his employment was being terminated with one month's notice and that his final day was at the end of December 2016. Mr Ng says he had worked in the rest home as a cook for four years and eight months and was shocked at his treatment following his loyalty and commitment.

[7] Ms Qin says that after taking on the business, she soon realised it was not sufficiently profitable, but retained Mr Ng as the main cook. They were not in a position financially to employ Ms Lai.

[8] Ms Qin says that she and Mr Ng had a number of run-ins which affected her ability to manage the business. Ms Qin says she would give Mr Ng instructions, he would not follow them and would often become angry with her. Mr Ng says he did follow instructions but often had to raise his voice because Ms Qin would be issuing instructions when he was under pressure preparing meals. Mr Ng says he was never spoken to by Ms Qin about her issues with him and did not receive any verbal or written warnings.

[9] Ms Qin accepts that her inexperience with New Zealand employment relations meant that she understood from the terms of the employment agreement with Mr Ng that she could terminate his employment by giving him one month's notice of termination, without reasons. Ms Qin accepted at the Authority's investigation meeting that she could not dismiss Mr Ng in the manner she did. Ms Qin says this was due to her inexperience and lack of knowledge of New Zealand employment law. Ms Qin says that the business is not performing and she does not have the ability to pay Mr Ng if it is found he was unjustifiably dismissed.

## Investigation meeting

[10] Mr Ng and Ms Lai did not file witness statements. They relied on the statement of problem filed by Mr Ng. Ms Qin relied on two statements that she filed in the Authority. In addition, Ms Qin's mother, Ms Wu, Ms Anna Toyota, the agent involved with the sale of the rest home business and Mr Nicolas Lake who was not a resident of the rest home but rented a room in the facility, gave evidence.

[11] Each of the witnesses either swore on oath or affirmed that their evidence was true and correct. As allowed under [s.174](#) of the [Employment Relations Act 2000](#) ("the Act"), this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

[12] An interpreter of Cantonese attended the Authority's investigation meeting to assist.

## First issue

### Was Mr Ng unjustifiably dismissed? Employment Agreement

[13] Discover Oasis trades as Concord House Rest Home and owns and operates the rest home. Mr Ng (whose company sold the rest home to Discover Oasis) was employed as the rest home cook.

[14] Clause 3 of the employment agreement states:

#### TERM

(a) The agreement shall come into effect on the day assigned by the parties. Employment shall commence on 24/03/16 (the **commencement date**) and continue indefinitely subject only to the termination [and trial period – **remove if trial period not included**] provisions in this agreement.

[15] The alternative provision was a fixed term agreement/optional which was not completed by the parties.

[16] The termination clause in paragraph 17 states:

either party may terminate the employment agreement by giving not less than one month's notice of termination in writing.

This is followed by the usual provisions relating to immediate termination in the event of serious misconduct.

[17] Mr Ng and Ms Qin did not communicate well. Ms Qin was frustrated with Mr Ng who she felt was not respecting her as his manager. Mr Ng was frustrated and at times angry with Ms Qin when she issued instructions to him at inappropriate times.

### Dismissal letter - 1 December 2016

[18] On 1 December 2016 Ms Qin, wrote to Mr Ng as follows:

Thank you for your continued service at our rest home since its settlement under new ownership in March of this year. We have determined that your services will no longer be required and we are giving you one month's for termination of your employment contract with us.

We are grateful for the help and support you and your wife Isabella [Ms Lai] have given to us after selling us the business, but we've decided that we would like to become independent of that support and would now like to go our separate ways.

There are several reasons we wish to end our employment relationship with you and if you require you may request a letter with a list of those reasons within the next 60 days.

I would like to express my intention to part amicably and hope that you too would accept this letter with that understanding.

Your employment therefore terminates at the end of this calendar month and we expect that you will be working until that day unless you wish to cease working at an earlier date. Please let us know at the earliest possible time if you have any problems with this arrangement.

Thank you for your attention and the best of luck with your future endeavours.

Kindest regards

Chuyan (Jenni) Quin

Concord House Rest Home Managing Director.

[19] Mr Ng says the letter was left on his computer by Ms Qin, she did not hand it to him. Mr Ng says he tried reading the letter but as it was in English and his English was not good he asked a colleague to read it for him. The colleague informed him that he had been "fired". Ms Qin, who was present at the time, did not say anything to Mr Ng or respond.

[20] When Mr Ng got home, he gave the letter to his wife who read the letter and also told him that he had been "fired with one month's notice". Mr Ng says he was shocked and upset as he felt he had worked hard and had trained the new part-time cooks. Mr Ng says all the residents, families and staff loved his food. He said he had never received any complaints about his work as the rest home cook and had not received any warnings from Ms Qin.

[21] Mr Ng says the day after receiving the letter of termination he asked Ms Qin why he had been terminated his employment so suddenly. Ms Qin simply told him that she wanted to terminate the employment relationship. Mr Ng informed her that he was going to seek advice from Employment NZ, to which he did not receive a response from Ms Qin.

[22] Mr Ng's wife says she and Mr Ng agreed that they would wait for a few days to see if Ms Qin changed her mind and if she did not, they would seek help from the Department of Labour. Ms Qin did not approach them or change her mind so Ms Ng contacted the Department of Labour. Following her conversation with the Department of Labour, Ms Lai told Ms Qin that she was not acting properly or according to New Zealand employment law and should contact the Department of Labour herself.

#### **Further letters from Ms Qin – 19 December 2016**

[23] On 19 December 2016, Mr Ng received a further "Letter from Management". It was once again signed by Ms Qin in her capacity as the Rest Home Managing Director.

[24] The letter states:

Dear Kai Kong Ng,

Attached is a Letter of Warning to indicate changes we wish to see. This letter follows my previous letter to request an end to our employment contract.

We have mentioned before that we would like to maintain an amicable relationship, and that letter was my attempt to leave each other without more conflict. However you have indicated you will be refusing to terminate your contract and would like to initiate mediation. I have agreed to this and would like us to complete this process as soon as possible.

I feel there are irreconcilable differences in our relationship, being that you are the previous business owner and we are the new owners, thus I urge that you begin to look for alternative employment as there is and will continue to be friction and problems between us and I believe this relationship will only get worse and affect both of us negatively in the future.

Changes that I propose are responded to with difficulty, negativity and a disrespectful attitude. Even if you as my senior and with greater experience; promise to change your behaviour, I believe it is not in a happy or willing way. This will in turn affect our communication, team work and the morale of myself and other staff. In my view, our separation was not a matter of why but a matter of when.

I want also to indicate that as we have not made profit from this business since its purchase from your family in March, I am

requesting now, for a renegotiation of your hourly wages. I have not brought this issue up out of respect for you, however from the next pay period forward I am requesting that your contract of employment be reduced to the minimum wage, if you cannot agree to these terms then I will unfortunately have to dismiss you for redundancy.

Kindest regards.

[25] Attached was a letter of the same date headed up “Letter of Warning and Request to Amend”. The letter starts by stating:

This letter is a request to amend your behaviour in your future days of work. This in no way implies any change in the management’s prior letter for request for dismissal.

[26] The letter sets out a number of matters which Ms Qin says needed to be addressed by Mr Ng. There is a list of tasks which Ms Qin requires Mr Ng to perform in a particular manner. In the event that he fails to do so, Ms Qin says his actions will be considered misconduct.

[27] At the Authority’s investigation meeting, Ms Qin said her letter of 19 December 2016, was written following contact by her with the Department of Labour.

[28] Mr Ng worked until Christmas Day, 25 December 2016. That was his last day of work.

### **Mediation**

[29] The parties attended mediation on three separate occasions in an attempt to resolve the issues between them. A memorandum of understanding was reached in which the issues concerning wages and time, holiday and leave records were dealt with between Mr Ng and Discover Oasis.

[30] The issue of Mr Ng’s claim of unjustified dismissal and remedies were not the subject of the memorandum of understanding. This was the only matter for the Authority to investigate.

### **Purchase of rest home business**

[31] In her statements filed on behalf of Discover Oasis, Ms Qin sets out a background in relation to the purchase of the business and the issues which she says arose following the purchase of the business. I consider those matters to be commercial matters between Fountain of Plenty and Discover Oasis. The employment relationship between Discover Oasis and Mr Ng is a separate issue and is the subject of my investigation.

### **Employment arrangements**

[32] In Ms Qin’s statement on behalf of Discover Oasis, she referred on numerous occasions to her inexperience in business and employment relationships. When it came to Mr Ng’s employment, she stated:

“During this time neither of us made it clear of our intention to carry this contract with Kai in the long term. It was my understanding that after selling the business and helping us for some time, the family would leave and I would have to find a new cook”.

[33] Ms Qin accepted at the investigation meeting that she should have had a fixed term employment agreement in place but did not do so. Mr Ng says that it was not his intention to be employed for a short period of time. His wife assisted Ms Qin with transitioning the business and he was employed as the cook.

[34] The employment agreement signed by Ms Quin on behalf of Discover Oasis is expressly stated to be for an indefinite period, subject to the usual clauses concerning termination.

[35] Ms Qin says that she had a number of issues with Mr Ng’s performance, including that he had poor English skills, was being paid more than the other cooks, but did not have more responsibilities than them. Ms Qin refers to a number of what appear to be business issues between the companies and says:

From these above facts and incidents I could only conclude that KK and Isabella took advantage of my lack of experience in business, knowing that I did not understand the processes I was supposed to follow, they not only did not give explanations but would try to benefit from my ignorance while I was in a position to trust them and was vulnerable to them.

### **Fair and reasonable employer**

[36] It is my view that Mr Ng’s dismissal was not the action of a fair and reasonable employer, as required by s.103A of the Act. It is for Discover Oasis to establish that its dismissal of Mr Ng was justified.

[37] Section 103A of the Act sets out the test of justification. Under the test, the question of whether the dismissal of Mr Ng was justifiable must be determined on an objective basis, by considering whether Discover Oasis's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[38] In applying s.103A of the Act, the Authority must also consider four particular factors, relating to the procedure and manner of dismissal as set out in s.103A(3) of the Act, as well as any others it thinks appropriate.

[39] The test in s103A of the Act is to be applied with a proviso that a dismissal must not be determined to be unjustifiable solely because of the process defects if they were minor and did not result in the employee being treated unfairly.

[40] In my view dismissing Mr Ng by leaving a letter on his computer, in English, which Ms Qin must have known he would find difficult to read, was not the action of a fair and reasonable employer.

[41] If Ms Qin had concerns about Mr Ng's performance as a cook, or his attitude towards her, these should have been raised with him and discussed, before his dismissal. They were not. After leaving the initial letter of dismissal on Mr Ng's computer, Ms Qin then sent a letter to Mr Ng on 19 December 2016. The letter left a confusing picture. In the letter Ms Qin attempted to justify her dismissal of Mr Ng on

1 December 2016, by attaching a letter to him purporting to be a warning, despite already dismissing him.

[42] The letter of 19 December 2016 also referred to "irreconcilable differences" in their relationship and urged Mr Ng to look for alternative employment. Finally, the letter stated that due to a lack of profits that if he did not renegotiate his wage rate to the minimum wage, he would be dismissed for redundancy.

[43] The warning letter attached to the letter of 19 December 2016, set out a list of matters, never formally raised with Mr Ng, which Ms Qin required of him in order to "amend" his behaviour but also reiterated that there was no change in the decision to dismiss him.

[44] It is my finding that Mr Ng was unjustifiably dismissed by Discover Oasis. Ms Qin relies on her inexperience in business and employment relations in New Zealand to justify her behaviour. This is not an acceptable reason for her actions on behalf of Discover Oasis. As the purchaser of the business, the onus is on her to seek the appropriate advice. If she was unhappy with the state of the business, she did not have to proceed with the purchase of it.

[45] Similarly, with employment relations, as an employer of staff, the onus is on Ms Qin to ensure that she was familiar with the relevant employment law. Clearly she was not. Her actions in dismissing Mr Ng in the manner that she did were unfair and caused him stress and monetary loss.

## **Remedies**

[46] Mr Ng says he was shocked and upset by the dismissal. Mr Ng's wife said Mr Ng was a good cook and was upset by the dismissal. She says he was not able to sleep and it has taken him along time to find work.

[47] I consider an award of \$12,000 compensation under s123(1)(c)(i) of the Act appropriate in the circumstances.

[48] Mr Ng is also entitled to an award of lost remuneration under s128 of the Act. Mr Ng worked an average of 30 hours a week at the rate of \$18 gross an hour. Under s128(2) of the Act Mr Ng is entitled to the lesser of actual lost remuneration or to 3 months' ordinary time remuneration.

[49] Mr Ng says he looked for other work but was not able to secure employment. Mr Ng's loss of remuneration for the 3 month period since his dismissal at the end of December 2016 amounted to \$6480 gross.

## **Contribution**

[50] I am required under s124 of the Act, to consider whether Mr Ng contributed to his dismissal and if he did, to reduce remedies accordingly. I do not consider Mr Ng contributed to his dismissal and therefore I am not prepared to reduce his remedies.

## **Costs**

[51] Neither party was represented and so there will be no order as to costs.

## **Anna Fitzgibbon**

### **Member of the Employment Relations Authority**

