

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 367  
5350263

BETWEEN                      JINGXIN TIAN  
   Applicant

A N D                              SOUTH PACIFIC LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:              May Moncur, Advocate for Applicant  
   No appearance for Respondent

Investigation Meeting:      26 September 2012 at Auckland

Date of Determination:      15 October 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.    The respondent, South Pacific Limited (South Pacific) received a premium of \$33,510 from the applicant, Ms Tian in respect of her employment and in doing so breached s.12A(1) of the Wages Protection Act.**
- B.    South Pacific is ordered to repay the sum of \$33,510 to Ms Tian, pursuant to s.12A(2) of the Wages Protection Act.**
- C.    South Pacific is ordered to a pay penalty of \$10,000 in respect of its breach of s.12A(2) of the Wages Protection Act. South Pacific shall pay \$5,000 of the total amount of the penalty (\$10,000) into the Authority for subsequent payment to the Crown Bank Account. The remaining \$5,000 is to be paid by South Pacific to Ms Tian.**
- D.    South Pacific is ordered to pay Ms Tian wages due to her totalling \$12,400.**

- E. South Pacific is ordered to pay Ms Tian holiday pay owing to her totalling \$1,455.20.**
- F. Ms Tian was unjustifiably dismissed by South Pacific. South Pacific is ordered to pay Ms Tian distress compensation in the sum of \$10,000**
- G. South Pacific breached its statutory obligations of good faith to Ms Tian and is ordered to pay a penalty in the sum of \$5000 pursuant to section 4A of the Act. \$2000 of the total amount of the penalty (\$5000) shall be paid in to the Authority for subsequent payment to the Crown Bank Account. The remaining \$3000 shall be paid by South Pacific to Ms Tian.**
- H. South Pacific is ordered to pay Ms Tian the sum of \$1750 in costs being the notional tariff for a half day investigation meeting in the Authority together with the sum of \$71.56 being the filing fee.**

#### **Non-appearance of respondent**

[1] South Pacific failed to comply with timetabling orders agreed during the course of a telephone conference on 12 July 2012, failed to file witness statements and failed to attend the investigation meeting. I am satisfied that South Pacific was properly served with the statement of problem and subsequent correspondence from the Authority together with a notice of investigation meeting. In those circumstances, I proceeded to investigate the matter in the absence of South Pacific.

#### **Employment relationship problem**

[2] The applicant, Ms Jingxin Tian claims she paid South Pacific a premium of \$27,000 to secure employment with it and further payments of \$6,510 to retain her employment. The total premium paid to South Pacific amounted to \$33,510.

[3] Ms Tian further alleges that she did not receive a written employment agreement and is still owed outstanding wages and holiday pay in respect of her employment by South Pacific.

[4] Ms Tian claims that she was unjustifiably dismissed by South Pacific on 13 June 2011.

[5] Ms Tian alleges her treatment by South Pacific was in breach of its statutory obligations of good faith under the Employment Relations Act (the Act).

### **Issues to be determined**

[6] The issues to be determined include:

- (a) Did South Pacific seek or receive a premium in respect of the employment of Ms Tian? If the answer is yes, is South Pacific liable to pay a penalty?
- (b) Did Ms Tian receive a written employment agreement by South Pacific? If not, is South Pacific in breach of the Act and should a penalty be imposed?
- (c) Is Ms Tian owed outstanding wages and holiday pay? If so, is there a breach of the Act for which a penalty should be imposed?
- (d) Was Ms Tian unjustifiably dismissed by South Pacific?
- (e) Was South Pacific in breach of its statutory obligations of good faith in respect of its employment of Ms Tian? If so, should a penalty be imposed?

### **Issue One**

***Did South Pacific seek or receive a premium in respect of the employment of Ms Tian? If the answer is yes, is South Pacific liable to pay a penalty?***

[7] Ms Tian is a Chinese citizen. She came to New Zealand in February 2008 to study. Ms Tian was assisted to settle in New Zealand by the son of a good friend of her mother's, Yanglu. Yanglu picked Ms Tian up from the airport when she arrived in New Zealand from China and assisted her to set up her homestay and accommodation.

[8] In August 2010, at the age of 20 years, Ms Tian graduated from the UUNZ Institute of Business with a New Zealand Diploma in Business. After completing her diploma, Ms Tian and Yanglu went out for lunch and discussed what she would be doing now that she had completed her studies. Yanglu told Ms Tian that he knew of a company that could possibly provide her with a good employment opportunity in New Zealand. A couple of weeks after the lunch, Yanglu telephoned Ms Tian to see whether she was interested in taking the job opportunity they had discussed at lunch

further. Yanglu told Ms Tian that if she paid \$27,000 she may be able to secure employment with the company he had talked to her about. The company was South Pacific.

[9] Ms Tian decided to speak to her mother about the opportunity. Ms Tian had a number of conversations with her mother about the role. Ms Tian's mother trusted Yanglu because of her friendship with his mother. Ms Tian's mother finally agreed to pay the money so that Ms Tian could secure the job opportunity with South Pacific. Accordingly, on August 2010, Ms Tian's mother transferred the amount of \$27,000 into Ms Tian's bank account.

[10] After obtaining her mother's agreement, Ms Tian rang Yanglu and a meeting was arranged on 27 August 2010 so that Ms Tian could withdraw the funds needed. Yanglu picked Ms Tian up from her home and drove her to the ASB Bank at 300 Queen Street, Auckland where his girlfriend Ouyang was waiting. Ms Tian did not have her passport as it had been submitted to Immigration New Zealand in respect of her open work visa and so was unable to withdraw the \$27,000 in cash over the counter. Therefore, Ms Tian transferred the \$27,000 into Ouyang's bank account and Ouyang withdrew the \$27,000 in cash and gave it to Ms Tian.

[11] The following day, Yanglu picked Ms Tian up at her house and they went to the home of another contact of Yanglu's, Sunwen, an immigration agent. Yanglu, Sunwen and Ms Tian then went to MacDonald's in Grey Lynn where they met the director and owner of South Pacific, Catherine Guo and her business partner, Colin. Ms Guo talked to Ms Tian about the position that was available at South Pacific. Essentially, Ms Tian would be working for the Asian Business Year Book part of South Pacific contacting customers and trying to sell them advertising space. Ms Guo informed Ms Tian that she would be employed on a trial basis for three months and she would be paid \$200 per week during that time. After the trial period, Ms Guo told Ms Tian if things worked out she would receive a wage increase.

[12] In the presence of Yanglu, Sunwen and Colin, Ms Tian gave Ms Guo \$27,000 in cash to secure the position with South Pacific. On Monday 30 August 2010, Ms Tian began employment with South Pacific at its offices in St George Road, Avondale. Ms Tian worked 9.30am – 6.30pm from Monday to Friday. Ms Tian was not provided with an employment agreement and despite asking Ms Guo for one on a number of occasions, never received one.

[13] From the outset, Ms Tian did not receive the amount of \$200 in wages per week as promised. Her first fortnightly wage payment was given to her in cash and was for \$300, rather than \$400 as promised. Ms Tian raised the matter with the company's accountant, Amy and was told that she had been paid in accordance with Ms Guo's instructions. Ms Tian did not wish to jeopardise her employment as she was still on a trial period and so did not raise the matter with Ms Guo at that time.

[14] Following completion of her trial period, Ms Tian approached Ms Guo with concerns about being underpaid but Ms Guo refused to increase her wages. Ms Tian did not want to lose her job so did not take the matter further.

[15] In February 2011, Ms Tian raised with Ms Guo the fact that PAYE was not being deducted from her wages and paid to the IRD. Ms Guo agreed to pay the PAYE to IRD but on the condition Ms Tian reimburse South Pacific for the amount of the PAYE. Ms Tian was not agreeable to this but did not want to lose her job because she was fearful of the implications in terms of her immigration status.

[16] From February 2011 until May 2011, a pattern developed whereby Ms Tian was given a cheque for her wages which she was required to bank and then immediately withdraw cash for the same amount and repay South Pacific. Ms Tian's bank statements show the deposits and withdrawals which occurred over that period of time. Effectively, Ms Tian was paying South Pacific to keep employing her.

[17] Ms Tian presented as a credible witness who believed Yanglu when he said that there was a good employment opportunity for her with South Pacific. Ms Tian met with Ms Guo, heard more about the role and agreed to pay \$27,000 to secure the role. Ms Tian worked hard at South Pacific and wished to retain the role.

[18] It is my finding that Ms Tian paid South Pacific the sum of \$27,000 in order to secure the position with it. Ms Tian subsequently paid South Pacific in order to keep her position. These subsequent payments were indirect. They were wages owed to Ms Tian but not paid by South Pacific and reimbursement by Ms Tian of wages and PAYE payments made by South Pacific. These payments totalled \$6510. Ms Tian made payments to South Pacific totalling \$33,510 to secure and retain employment with it.

[19] The question then is whether these transactions constitute a premium in terms of s.12A of the Wages Protection Act 1983 (the Wages Protection Act). It provides as follows:

***No premium to be charged for employment***

- (1) *No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.*
- (2) *Where an employer receives any amount of money in contravention of sub-section (1), whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the Employment Relations Authority by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under s.223 of the Employment Relations Act 2000 on behalf of the person.*
- (3) *Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.*

[20] I have already found that Ms Tian made payments to South Pacific in order to secure and retain employment with it. It is my finding that Ms Guo as Director and owner of South Pacific did receive a premium of \$33,510 in total in respect of providing employment to Ms Tian and in doing so breached s.12A(1) of the Wages Protection Act. Therefore pursuant to s.12A(2) of the Wages Protection Act, South Pacific is ordered to repay the sum of \$33,510 to Ms Tian.

[21] Under s.13 of the Wages Protection Act, there is provision for penalties as follows:

***13. Penalties***

*Where-*

- (a) *any payment is made by or on behalf of any employer in contravention of this Act; or*
- (b) *any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act,-*

*that employer is liable, at the suit of the worker or of a Labour Inspector designated under s.223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority.*

[22] It is also appropriate that a penalty should be awarded pursuant to s.13(b) of the Wages Protection Act due to the contravention of s.12A(1) of that Act.

[23] Pursuant to s.161(1)(m)(v) of the Employment Relations Act 2000, the Authority has jurisdiction to make determinations about actions for the recovery of penalties under s.13 of the Wages Protection Act.

[24] Further under s.135(2) of the Employment Relations Act 2000:

*Every person who is liable to a penalty under this Act is liable –*

- (a) in the case of an individual, to a penalty not exceeding [\$10,000];*
- (b) in the case of a company or other corporation, to a penalty not exceeding [\$20,000].*

[25] It seems to me it is a particularly egregious action on the part of South Pacific (via Ms Guo as the Director and owner) to exploit the vulnerability of Ms Tian given her age, inexperience in the workplace and immigration status. Ms Tian was dependant on her employment in seeking an open work permit in order to remain in New Zealand. Ms Tian was hoping to become a permanent resident. She was very anxious therefore to have employment in New Zealand.

[26] It is appropriate that any penalty ordered should reflect the seriousness of the unlawful action of South Pacific. I believe a penalty of \$10,000 is appropriate.

[27] Therefore, pursuant to s.135(1)(b) of the Employment Relations Act 2000 and s.13(b) of the Wages Protection Act, South Pacific is ordered to pay a penalty in the sum of \$10,000. Pursuant to s.136 of the Employment Relations Act 2000, \$5,000 of the total amount (\$10,000) shall be paid by South Pacific into the Authority for subsequent payment to the Crown Bank Account. The remaining \$5,000 should be paid by South Pacific to Ms Tian.

## **Issue Two**

***Did Ms Tian receive a written employment agreement by South Pacific? If so, is South Pacific liable to pay a penalty?***

[28] Towards the end of May 2011, Ms Tian became more insistent about obtaining her employment agreement in writing as she needed it for her open work visa application. Despite her requests and despite promises by Ms Guo that it was going to be provided to her, Ms Tian never received an employment agreement.

[29] I find that Ms Tian was not provided with a written employment agreement by South Pacific as required by s65 of the Act. Ms Tian seeks a penalty to be imposed by the Authority in respect of South Pacific's failure to provide her with a written employment agreement. The Authority has jurisdiction to impose a penalty pursuant to s65(4) of the Act but only in an action brought by a Labour Inspector. Ms Tian brought the action, not the Labour Inspector. Therefore, no penalty will be imposed.

### **Issue Three**

***Is Ms Tian owed outstanding wages and holiday pay by South Pacific. If so, is there a breach of the Act for which a penalty should be imposed?***

[30] From the commencement of her employment by South Pacific on 30 August 2010, Ms Tian was underpaid. Ms Tian raised the issue with the accountant, Amy and with Ms Guo but South Pacific never paid her the wages agreed to. For the period from 30 August 2010 until 24 December 2010 the underpayment totalled \$5950. From 03 January 2011 until 10 June 2011 Ms Tian the underpayment totalled \$6450.00. Ms Tian did not agree to the underpayment and is owed a total of \$12,400 in wages.

[31] I order South Pacific to pay Ms Tian wages due totalling \$12,400.

[32] Ms Tian was entitled to holiday pay on the wages paid to her and due owing to her, such wages amounted to \$18,190. Holiday pay calculated at the rate of 8% totals \$1,455.20.

[33] I order South Pacific to pay Ms Tian holiday pay totalling \$1,455.20.

[34] South Pacific's failure to pay Ms Tian's wages as agreed and its failure to pay holiday pay is a breach of Ms Tian's employment agreement. Ms Tian seeks a penalty. No claim for a penalty was raised in the Applicant's statement of problem. Section 135(5) of the Act provides that an action for the recovery of a penalty must be commenced within 12 months after the date when the cause of action became known or should reasonably have become known to the person bringing the action. This was not done. Ms Tian is out of time to recover a penalty.

## **Issue Four**

### ***Was Ms Tian unjustifiably dismissed by South Pacific?***

[35] On 8 June 2011 whilst working at South Pacific, Ms Tian suffered a fall and had to take the next two days off. On Sunday 12 June 2011, Ms Tian telephoned Ms Guo and told her that she would need to go to the doctor on the Monday and was informed by Ms Guo that Peter, her PA, would take her to the doctor. Peter did not come as arranged and after a number of telephone calls Ms Tian finally managed to speak to him in the afternoon. Peter told Ms Tian that at a staff meeting that morning, Ms Guo had announced that Ms Tian's employment had been terminated. Ms Tian was shocked and immediately sent a text message to Ms Guo expressing her shock and disappointment. She also asked for reimbursement within 3 days, of the \$27,000 she had paid to her to secure the position with South Pacific or she would take the matter further. Ms Guo replied by text shortly after to say the matter was with her lawyers and that Ms Tian did not need to wait 3 days and could take what ever action she wanted to take. Ms Tian never heard from Ms Guo again. Ms Tian was deeply shocked by her treatment and had to rely on her family to assist her financially until such time as she obtained a part time job.

[36] It is my finding that on Monday 13 June 2011 Ms Tian's employment was summarily terminated by Ms Guo. Ms Guo did not inform Ms Tian directly that she had been dismissed, rather she informed staff at a staff meeting and this message was relayed to Ms Tian by a telephone call by Ms Guo's PA, Peter. No reasons for dismissal were given to Ms Tian by Ms Guo.

[37] It is for South Pacific to establish that the dismissal was justified pursuant to s.103A of the Act. Section 103A(2) provides:

#### ***103A Test of Justification***

- (1) *For the purposes of s.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 sub-section (2).*
- (2) *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.*

[38] Ms Guo's actions were not those of a fair and reasonable employer. Ms Guo gave no reasons for dismissing Ms Tian nor did she inform Ms Tian that her

employment had been terminated. In the absence of any evidence from the employer, it is my finding that Ms Tian's dismissal was unjustifiable.

[39] The process undertaken by South Pacific in dismissing Ms Tian was disgraceful and was not carried out in a procedural fair manner. Ms Tian suffered humiliation, loss of dignity and injury to feelings as a result of her unjustifiable dismissal.

[40] I order South Pacific to pay Ms Tian compensation in the sum of \$10,000 pursuant to s.123(1)(c) of the Act for the hurt and humiliation she suffered as a result of her dismissal.

[41] In May 2010, Ms Tian obtained a parttime position working evenings and weekends to supplement her income. Following her dismissal, Ms Tian was able to increase her hours of work. Ms Tian's wages exceeded the wages she was paid and the wages she should have been paid by South Pacific. At the investigation meeting, Ms Moncur withdrew Ms Tian's claim for lost wages as there was no loss.

#### **Issue Five**

***Was South Pacific in breach of its statutory obligations of good faith in respect of its employment of Ms Tian? If so, should a penalty be imposed?***

[42] Section 4 of the Act provides as follows:

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

*(1) The parties to an employment relationship specified in sub-section (2) –*

*(a) must deal with each other in good faith; and*

*(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –*

*(i) to mislead or deceive each other; or*

*(ii) that is likely to mislead or deceive each other.*

*(1A) The duty of good faith in sub-section (1) –*

*(a) is wider in scope than the implied mutual obligations of trust and confidence; and*

*(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 ...*

- (4) *The duty of good faith in sub-section (1) applies to the following matters;*
- (ba) *bargaining for an individual employment agreement or for a variation of an individual employment agreement;*
  - (bb) *any matter arising under or in relation to an individual employment agreement while the agreement is in force ...*
- (5) *The matters specified in sub-section (4) are examples and do not limit sub-section (1).*

[43] South Pacific did not comply with this section of the Act. Ms Tian paid South Pacific a significant amount of money to secure employment with it and during her employment was effectively paying to be employed by South Pacific. Ms Tian did not receive the wages agreed to by South Pacific and did not receive a written employment agreement. Ms Tian wished to ensure her employment record was clean as she did not wish to jeopardise her goal in the future of applying for permanent residence in New Zealand. Ms Tian told Ms Guo about her concerns and was told by Ms Guo to wait and speak with Vincent, the immigration advisor used by South Pacific to assist its employees with immigration matters. Ms Tian's concerns were never addressed by Ms Guo.

[44] Finally, following an accident at work, Ms Tian was summarily and harshly dismissed without her knowledge, the message being relayed to her by a colleague.

[45] Section 4A of the Act provides:

*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; ...*

[46] It is my finding that the way in which South Pacific conducted itself was in breach of its statutory obligations to act in good faith under the Act. Ms Guo was aware of Ms Tian's desire to obtain an open work visa and eventually permanent residence. Ms Guo knew Ms Tian needed the job at South Pacific for those purposes. Ms Guo took advantage of Ms Tian's youth and inexperience, immigration status and vulnerability.

[47] In decision of *Waikato District Health Board v The New Zealand Public Service Association Inc* [2008] ERNZ 80, Judge Colgan for the full employment court observed that “*egregious bad faith*” was required for a penalty to be awarded under section 4A of the Act. It is acknowledged that this is high threshold. However, I am satisfied in this case, it has been met. The breach of good faith by South Pacific was deliberate, serious and sustained and therefore South Pacific is liable to pay a penalty.

[48] Section 135(2) of the Act provides:

*Every person who is liable to a penalty under this Act is liable –*

- (a) in the case of an individual, to a penalty not exceeding \$10,000;*
- (b) in the case of a company or of a corporation, to a penalty not exceeding \$20,000.*

[49] I consider a penalty close to the maximum amount appropriate in this case. However, I take in to account that penalties have already been imposed in respect of other aspects of South Pacific’s conduct and have reduced the award to reflect this. I order that South Pacific pay a penalty in the sum of \$5,000 in respect of it’s breach of good faith. Pursuant to s.136 of the Act, \$2000 of the total amount (\$5000) shall be paid in to the Authority for subsequent payment to the Crown Bank Account. The remaining \$3000 shall be paid by South Pacific to Ms Tian.

### **Costs**

[50] South Pacific is ordered to pay Ms Tian the sum of \$1,750 being the notional tariff for a half day investigation meeting in the Authority.

[51] South Pacific is ordered to reimburse Ms Tian the sum of \$71.56 being the filing fee.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**