

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 119
3071253

BETWEEN YONGGANG YAN
 Applicant

AND NZJX LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Jiaju Sun, advocate for the Applicant
 Jing Xiao for the Respondent

Investigation Meeting: 13 March 2020

Determination: 13 March 2020

DETERMINATION OF THE AUTHORITY

- A. Yongyang Yan was not unjustifiably dismissed by NZJX Limited. He was unjustifiably disadvantaged at the end of his employment.**
- B. In settlement of his personal grievance NZJX Limited must pay Mr Yan the following amounts within 28 days of the date of this determination:**
- (i) \$1,385.45 (without deduction) as compensation for loss of a benefit, being money due to him as notice; and**
 - (ii) \$500.00 (without deduction) as compensation for injury to his feelings caused by this grievance; and**
 - (iii) \$71.56 as reimbursement of the Authority filing fee.**

Employment Relationship Problem

[1] Yonggan Yan sought an order that he was unjustifiably dismissed by NZJX Limited (NZJXL) on the grounds of redundancy.

[2] Jing Xiao is the sole shareholder and director of NZJXL. Ms Xiao dismissed Mr Yan on 13 December 2018 after she sold a business she had operated through NZJXL. Ms Xiao told Mr Yan that the new owner of the business did not have a job for him. NZJXL's final pay to Mr Yan comprised two weeks labelled as "extra salary", his holiday pay and one weeks' salary.

Issues

[3] The issues for determination were:

- (i) Was the dismissal of Mr Yan by NZJXL, for redundancy on sale of the business, and how that was done, what a fair and reasonable employer could have done in all the circumstances at the time; and
- (ii) If NZJXL were found to have acted unjustifiably (in dismissing Mr Yan or disadvantaging him in how it decided to do so), what remedies should be awarded to him, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Yan that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[4] Mr Yan, his wife Jiaju Sun and Ms Xiao each lodged a written witness statement and attended the investigation meeting. Under affirmation Mr Yan and Ms Xiao answered questions about their evidence and various background documents each party had provided. An interpreter of Mandarin was available to translate, as needed, the questions asked and the answers given. Each party also had the opportunity to ask additional questions and sum up regarding their views on the issues for determination.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Mr Yan's employment and dismissal

[6] In June 2016 Ms Xiao borrowed \$30,000 from Yuanhang Qu to open the business she operated through NZJXL. Mr Qu is a director of ALC Trade Limited (ALCTL). The business of NZJXL and a business operated by ALCT traded from the same premises.

[7] NZJXL's business was selling healthcare and other products ordered online, mostly to customers in China. Mr Yan was employed on 12 March 2018 in a position described in his written employment agreement as "sales". His duties comprised, mostly, packing goods into small boxes for pick up by a courier and keeping his work area tidy and clean. On some occasions he also picked up goods from suppliers.

[8] Although Mr Yan's application to the Authority and his witness statement complained about various events during the course of his employment, the only personal grievance he raised within the required 90 day period was about his dismissal. This determination concerns only the personal grievance for unjustified dismissal raised by letter on 16 January 2019.

[9] On 20 November 2018 Ms Xiao told Mr Yan the business was slowing down and she might have to sell it and end his employment. She had already talked with Mr Qu about selling her business to him in return for Mr Qu forgoing repayment of the loan he had made to her earlier.

[10] On 6 December Ms Jiao sent Mr Yan this email:

Just let you know I have a meeting with the owner of ALC trade limited tomorrow afternoon 4pm. We will discuss the detail of business including the impact on all employees. I will try to negotiate with him to keep your job, and preferably on the same terms if possible. Any result will update asap.

[11] On 7 December Ms Xiao and Mr Qu met and confirmed an agreement to transfer the business operated by NZJXL to ALCTL. Mr Qu declined to offer Mr Yan a job. A document Ms Xiao provided showed the business transfer, from NZJXL to ALCTL, was formally agreed on 7 December and was to be effective from 10 December 2018. It recorded that ALCTL would "not take packing position staff" as it

was combining purchasing and packing into one position and already had one of its own existing employees working in that sort of that role. Mr Yan was the person referred to as “packing position staff”.

[12] On 10 December Mr Yan got a phone call while at work to say that his wife’s grandfather had died in China. He immediately purchased flight tickets and he and his wife left New Zealand that day to attend to family matters in China. He did not tell Ms Xiao he was leaving but sent her an email at 1.19pm on 13 December containing this message:

Hi Ms Xiao,
I’m writing this letter to notify you that I’m in China at the moment and I need a leave due to my grandfather’s sudden death. Sorry for the late notice.

[13] Earlier than day, at 10.42 am, Ms Xiao had sent Mr Yan this email message:

Dear Mr Yan
I am sorry to tell you the new company can’t offer a job to you. We have already tried all possible redeployment options for you. So your contract will finish at 22th Dec. NZJX Limited will pay you two weeks extra salary as ..., also holiday pay as 9 months work. I can also provide you with a reference letter and/or any other support programmes if you want. Thanks for work for us.

[14] The three dots following the phrase “two weeks extra salary as” is as written in the email Ms Xiao sent. It did not explain was the “extra salary” was for.

[15] NZJXL paid three net sums into Mr Yan’s bank account on 21 December 2018: \$1,108.36 labelled as “two weeks pay”; \$1,662.54 labelled as “holiday pay and \$554.18 labelled as “salary”.

The law on dismissal for redundancy

[16] Redundancy is a situation where the reason for an employer terminating a worker’s employment is attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer. The Authority may not substitute its business judgement for the assessment made by the employer about whether a position was surplus to its needs.

[17] However, when called on to consider if a dismissal for redundancy was justified, the Authority must determine, on an objective basis, 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.¹ As part of this assessment the Authority may consider whether the employer has shown its decision to disestablish a position was made for genuine business reasons and not as a pretext for dismissing a disliked employee.²

[18] The Authority must also consider whether a fair process was followed in making and carrying out that decision. This includes meeting the good faith obligations in the Act on an employer proposing to make a decision likely to have an adverse effect on the continuation of a worker's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the employer.³

[19] Those statutory obligations are also considered in light of the terms of the worker's employment agreement. In Mr Yan's case his agreement included the following term about redundancy:

Redundancy is when an employee's role is no longer required. If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in **Ending employment**. They will also get redundancy compensation based on this formula: two weeks pay for each full year worked for the employer, up to a maximum of 12 weeks pay. Partial years will be paid pro rata.

However, if the employer or the new employer ... offers another suitable role on generally the same or better terms and conditions – or any role with terms and conditions the employee accepts – then the employee will not get redundancy compensation or other redundancy entitlements, whether they accept the role or not.

[20] The "Ending employment" clause referred to in the redundancy clause included the following provisions:

... either the employer or the employee can end employment by giving four weeks notice in writing.

The employer may decide to pay the employee instead of them working out their notice period. ...

¹ Employment Relations Act 2000, s 103A.

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

³ Employment Relations Act 2000 s 4(1A) and s 103A(3)-(5).

Assessment of the employer's reasons and actions

[21] NZJXL, through the evidence of Ms Xiao, established the sale of the business to ACLT and the subsequent redundancy of Mr Yan's position was made for genuine business reasons. Ms Xiao attempted to secure ongoing employment for Mr Yan with ACLT but it had no need for his services as it already had sufficient staff to meet its operational needs, including by doing whatever work Mr Yan had previously done. The sale was a transfer of a business, not a sale of shares in NZJXL. ACLT had no obligation to employ Mr Yan and NZJXL had made reasonable efforts to explore the prospect of future work for him with that other company.

[22] What was done to consult Mr Yan, as the affected worker, about what was happening was within the range of what a fair and reasonable employer could have done for a business of its size and resources. Mr Yan was told of the prospect of the sale, told he would be kept up to date and Ms Xiao did tell him, both in person on 20 November and in her email of 6 December, that she was exploring the prospect that ACLT might take him on as its employee.

[23] There was some delay in advising him of the decision regarding the prospects of ongoing employment and therefore in confirming his employment was to be terminated. Ms Xiao knew by 7 December that ALCTL would not offer Mr Yan a job and that, as a consequence, NZJXL would have to dismiss him for redundancy. This occurred on a Friday and Ms Xiao decided to wait till the following Monday, 10 December to tell him.

[24] Ms Xiao said she understood she needed to meet with Mr Yan in person, so wanted to do that in the week beginning 10 December. However, on that Monday, Mr Yan left for China and, for reasons not known to Ms Xiao until she got his 13 December email, did not attend work on the Monday, Tuesday or Wednesday of that week. She decided to tell him through the email she sent on 13 December. While that delay and way of breaking the news to him was not ideal, it was in some part attributable to the family circumstances in which he had left work and suddenly on 10 December. Even if Ms Xiao had called him to a meeting that day, Mr Yan would not have been able to come because he had left to travel to China.

[25] Assessed objectively, NZJXL had acted fairly and reasonably in the circumstances at the time. Accordingly Mr Yan did not establish a personal grievance

for unjustified dismissal. However the last action of NZJXL as his employer, regarding his final pay, was to his disadvantage. It breached the term of his employment regarding notice. NZJXL opted to pay him in lieu of him working out the notice period. It was entitled to do so but did not pay him for the full notice period, thereby depriving him of the opportunity to work for the remaining period or be paid for it.

[26] Ms Xiao's 13 December email advised Mr Yan the termination of his employment was to be effective from 22 December. His final pay was transferred to his bank account on 21 December.

[27] In Ms Xiao's oral evidence she confirmed that the payment labelled "extra salary" was intended to be for the redundancy compensation. The holiday pay amount was calculated as eight per cent of Mr Yan's gross earnings for the nine months of his employment. The "salary" figure was for his last week's wages up to 21 December.

[28] The difficulty for NZJXL was that the payments made did not cover all of the four weeks' notice period Mr Yan was contractually entitled to receive. Taking 13 December as the day of notice, the payment of salary for the week ending 21 December covered one of those four weeks. He was still entitled to three weeks of either paid work or paid notice.

[29] However NZJXL had paid Mr Yan two weeks redundancy compensation when, under the pro rata provision in the redundancy clause, he was entitled to compensation equivalent to only one-and-a-half weeks' pay. Offsetting that overpayment against the underpaid notice, the shortfall in his final pay was two-and-a-half weeks' pay.

[30] The Authority may find a grievance is of a type other than alleged.⁴ Failure to pay amounts due under the terms of his employment agreement was an unjustified action so Mr Yan had a personal grievance of unjustified disadvantage that arose just before the end of his employment on 22 December 2018.

⁴ Employment Relations Act 2000, s 122.

Remedies

[31] Because he had not established a grievance for unjustified dismissal, Mr Yan could not be granted a remedy for wages he lost during his subsequent search for new employment. For his grievance of unjustified disadvantage two remedies could be considered – firstly, an order compensating him for the money lost from failure to pay his full notice period and, secondly, compensation for humiliation, loss of dignity and injury to his feelings.

[32] Mr Yan's net weekly wage was \$554.18. He was entitled to be paid a further two-and-a-half week's pay as notice at that rate. Under s 123(1)(c)(ii) NZJXL must pay Mr Yan \$1,385.45 as compensation for the benefit of payment of notice he was due but not paid in his final pay on the termination of his employment. This amount is the net amount due for those wages. Whatever PAYE tax is due on the gross amount must be calculated by NZJXL and paid to IRD.

[33] Mr Yan is not entitled to compensation for the distress and upset he reported feeling about the termination of his employment because he has not established a personal grievance for unjustified dismissal.

[34] In the particular circumstances of his case however, Mr Yan may be compensated for the distress caused to him by not receiving all the money he was entitled to at the close of his employment.

[35] It is difficult to separate from the overall injury to his feelings at the time but the modest amount of \$500 should be paid to him by NZJXL to compensate him for the upset caused by the particular and confined unjustified disadvantage grievance caused by the breach of a term of his employment. The order for payment of that amount is made under s 123(1)(c)(i) of the Act.

[36] Both amounts of compensation ordered must be paid within 28 days of the date of this determination.

[37] Where remedies are awarded the Authority must consider whether there was any blameworthy conduct by the worker that contributed to the situation that gave rise to the grievance.⁵ No such reduction is required in this case.

⁵ Employment Relations Act 2000, s 124.

Expenses

[38] Mr Yan and his wife Ms Sun prepared and presented his case together so incurred no legal costs. In light of the outcome NZJXL must reimburse him the sum of \$71.56 for the fee paid to lodge his application. This amount must also be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority