IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 176/08
511 1669

	BETWEEN	YI (TONY) YANG Applicant
	AND	XIAOBIN (BEN) LIU Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Nicholas Carter for Applicant Mr Liu for Respondent
Investigation Meeting:	2 April 2008
Further Information received	7 April from Applicant
Submissions received:	15 April, 24 April, 29 April, 30 April from Applicant 14 April, 18 April, 23 April, 24 April, 28 April, 30 April from Respondent
Determination:	13 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This problem concerns a very brief employment relationship. Mr Liu (a solicitor) employed Mr Yang as a legal assistant between 12 October 2007 and 19 November 2007 when he summarily dismissed him.

[2] It is not in dispute that Mr Yang was initially engaged full time on a salary of $550.00 per week which was later reduced to $480.00 per week. Neither the original terms nor the variation to them were ever reduced to writing. Mr Liu's explanation for this is that he was too busy to prepare a written agreement, either before the employment commenced or during the weeks which followed.

[3] Mr Liu maintains that prior to his employment Mr Yang misrepresented his abilities and afterwards, he proved himself totally incapable of performing his duties. Mr Liu says that he issued two employment warnings to Mr Yang but saw no improvement in his performance. He says therefore that the termination of the employment was justified.

[4] Mr Liu also says that Mr Yang was employed on a three month probationary period. Mr Yang disputes this, saying that he gave up another position for this one and (as a family man with small children) would not have done so if it had not been secure. Mr Yang maintains that his dismissal was unjustified. He disputes any misrepresentation and says that despite the junior nature of his position he received little or no supervision. He denies any poor performance and says he did not receive warnings.

Issues

[5] Section 67 of the Employment Relations Act provides:

"Probationary arrangements

(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment-

a. The fact of the probation or trial period must be specified in writing in the employment agreement…

(2) …

(3) …if the employer does not comply with subsection (1) (a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation or trial if the employee elects, at any time, to treat that term as ineffective."

[6] It is not in dispute that there was no written employment agreement. Mr Liu did not specify in writing the fact of a probationary period or any other term of employment. He failed to comply with subsection (1) (a). Since Mr Yang disputes that

he agreed to a probationary period at all he cannot be said to have elected to treat the alleged term as effective. Therefore, pursuant to subsection (3) Mr Liu may not rely on any alleged agreement that Mr Yang serve a period of probation. The period during which Mr Yang was employed cannot be treated as probationary in nature. The effect of section 67 is to dispose of any issues relating to the existence and effect of the alleged probationary period.

[7] The remaining issues for determination are therefore:

i. Whether Mr Yang misrepresented himself prior to employment and whether the supervision he received was adequate for a position at this level;
ii. Whether he was warned that, having been assessed as failing to meet the requirements of the position, he was at risk of losing his employment;
iii. Whether the dismissal was justified, and if it was not,
iv. What remedies should be awarded.

(i) Alleged misrepresentation and adequacy of supervision.

[8] When he took on Mr Yang Mr Liu had been looking for someone who could (without further training) step in and take over the work of a qualified solicitor who was leaving the firm.

[9] Mr Yang is not a qualified solicitor. He arrived in New Zealand in 2004 with undergraduate and masters level degrees in "Economic Law" from Chinese universities and went on to obtain an LLM with an overall result of B- from the Law School at the University of Auckland. However he does not hold a New Zealand LLB or equivalent and has not been able to enter a training programme for admission to the bar here. Prior to his employment by Mr Liu, the extent of Mr Yang's relevant New Zealand work experience had been about a year part time with another Auckland law firm, where he assisted with conveyancing work (in the main for Chinese clients.) Mr Yang had no experience in any kind of administrative work.

[10] Mr Liu knew all this before he hired Mr Yang. Nonetheless, from the outset of the employment, he expected him to prepare documents and complete conveyancing work with little or no supervision. Mr Liu's evidence was that before he was

employed Mr Yang told him that he was a very careful person who was able to work and write letters independently, was competent in the use of a computer and could deal with residential and business conveyancing. Mr Liu maintains that this was all untrue as he found that Mr Yang made mistakes in conveyancing work, required templates when drafting documents, could not type at speed, could not use simple *Xcel* and *Word* applications, and was not fluent in written or spoken English. He said Mr Yang was slow, made too many errors, lacked common sense, failed to follow instructions, did not cooperate with other staff and was unprofessional.

[11] Mr Yang does not deny saying that he could work independently but says that he did not mean by this that he required no supervision at all. He considered himself a careful person and competent to hold a junior level position, as this one was. He told me he believed his computer skills were good, although his typing speed was not that of a professional typist. As for his English, I record my assessment that the two men have similar levels of written and spoken English.

[12] I accept Mr Yang's assertions and conclude that Mr Liu had an extreme and, in the circumstances, unreasonable view of what it means to work independently. Given Mr Yang's background and level of experience, Mr Liu's expectations of him were unrealistic. I find that his level of performance in the role was consistent with his qualifications and experience, and that Mr Liu did not provide the level of supervision that would normally be expected in relation to a junior position. I do not accept that Mr Yang misrepresented himself.

(ii) Warnings

[13] Mr Liu told me he reminded Mr Yang on an almost daily basis of the need to work more carefully and eliminate mistakes. He maintains that he also had two formal discussions with Mr Yang, the first about two weeks after he started, when he told him he did not find his work satisfactory and the second on 29 October, when he told Mr Yang he was reducing his salary to $480.00 per week.

[14] Mr Yang does not dispute that Mr Liu often picked up errors in his work. He also agrees that his salary was reduced on 29 October. However he says he was not

told specifically what Mr Liu wanted him to improve, received no training, and was not told his job was in jeopardy.

[15] I am satisfied that Mr Liu conveyed to Mr Yang that he was not happy with his work. However he did not set out specifically what his requirements were nor set a clear timeframe for improvement. It cannot be said that Mr Yang was properly warned. The requirements of procedural fairness were not met. On this basis alone Mr Yang has established a personal grievance.

(iii) Dismissal

[16] On the evening of 19 November Mr Liu called Mr Yang to his office and told him that over the previous weekend he had made a decision to dismiss him. Mr Yang was told to leave immediately. Mr Liu gave Mr Yang no reason except to say that he was not satisfied with Mr Yang's performance, and did not invite any comment from Mr Yang. No payment was made in lieu of notice.

[17] Procedural fairness requires not only that an employee be properly warned prior to any dismissal but also that the employer put its specific concerns to the employee and give a real opportunity for response. Mr Liu did not do this. He also failed to give Mr Yang notice of the termination.

[18] For all these reasons, the termination of Mr Yang's employment is unjustified.

(iv) Remedies

[19] Mr Yang has claimed the following remedies:

i. A penalty for failure to supply a written employment agreement;

ii. $210.00 reimbursement of the unilateral reduction in his salary from the agreed $550.00 to $480.00 for the final three weeks of the employment;

iii. One months wages in lieu of notice;

iv. $10.000.00 compensation for hurt and humiliation pursuant to s. 123 (c) (i), and

v. A minimum of three months lost earnings pursuant to s. 128 of the Employment Relations Act 2000.

[20] Section 65 of the Act provides:

"The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-

a. Must be in writing…"

[21] Although the Act does not make specific provision for a penalty for breach of this section, it does permit the imposition of a penalty for breach of an employment agreement, and hence for breaches of statutory provisions which can be said to be terms or conditions of employment. The entitlement to a written employment agreement is one such provision. It is therefore within my discretion to impose a penalty on Mr Liu for his failure to provide a written employment agreement. However I decline to exercise this discretion in Mr Yang's favour. As will become apparent from the succeeding paragraphs, this determination contains a number of orders against Mr Liu and I consider that an additional order of a punitive nature is not warranted in all the circumstances.

[22] Mr Yang's second claim is effectively one for arrears of wages. He says he did not consent to a reduction in his salary. I accept that his original agreed terms of employment were unilaterally varied by Mr Liu. The claim for arrears has been made out. **Mr Liu is ordered to pay to Mr Yang the sum of $210.00 gross arrears of wages.**

[23] Mr Liu neither gave notice to Mr Yang nor provided pay in lieu of notice. The only issue in relation to this claim is what period of notice can be inferred (in the absence of a written agreement) from the circumstances. Since the agreed salary was expressed in weekly terms it is reasonable to infer a notice period of one week. **Mr Liu is ordered to pay a further one weeks pay, $550.00, in lieu of notice.**

[24] In relation to his claim of hurt and humiliation, Mr Yang told me he felt disgraced and embarrassed within the small Mt Albert Chinese community of which he and his wife are part. His wife also told me that after the dismissal she observed him to suffer from headaches, insomnia and a lack of patience. The stress of this time was compounded by the fact that the couple were expecting their second child at the time of the dismissal.

[25] I am satisfied that the termination of his employment caused Mr Yang a great deal of stress. However he was employed for only a very brief period. Taking both these factors into consideration **I order the respondent, Mr Liu to pay the sum of $4,000.00 to Mr Yang by way of compensation pursuant to s. 123 (c).**

[26] The final remedy claimed is for earnings lost as a result of the dismissal. This was the most contentious claim, and generated a number of responses from Mr Liu after the investigation meeting.

[27] At my investigation meeting Mr Yang provided very little evidence about his post dismissal job search. He told me that he had applied for jobs as legal secretary or legal executive but had not been called to any interviews. A couple of emails sent to prospective employers were provided to me. This year, after the birth of her baby, his wife has returned to full time study and the whole family are living on her student allowance which is being paid at a rate intended to cover dependent family members. I told Mr Yang that on the evidence I had I could not be satisfied that he had made every effort to mitigate his loss. I told him that I would allow an opportunity for him to submit further evidence on this issue.

[28] Mr Carter accordingly supplied copies of further emails to prospective employers. After seeing these Mr Liu has responded by saying that from the way they are formatted, he doubts their authenticity. I therefore considered whether I should convene a further investigation meeting to establish whether these emails are reliable evidence and whether Mr Yang's credibility as a witness has been undermined.

[29] I have concluded that this will put the parties to unnecessary additional expense and have proceeded to determine the matter on the information I have. My

first reason for doing so is that (contrary to Mr Liu's submission) credibility has not been a major issue in this case. My conclusion that the dismissal was unjustified was supported by Mr Liu's own evidence.

[30] The second reason is that notwithstanding the additional information which has been provided, I remain of the view that proper steps were not taken to mitigate loss of remuneration. Mr Yang claims to have sent standard form emails (15 over a period of one week in January, 4 over a similar period in February and one in March) to employers seeking legal secretaries or legal executives. Many immigrants have an uphill battle to find work that is appropriate to their skills and experience. In Mr Yang's case this was compounded by the fact that he was applying for roles for which he did clearly did not have the necessary skills or experience. He was unlikely to succeed in winning an interview for a position as legal secretary or legal executive since these roles require a particular skill set distinct from that associated with Mr Yang's academic qualifications.

[31] I consider that Mr Yang's pursuit of employment for which he is not equipped (rather than his personal grievance) is the primary cause of his ongoing lack of remuneration. I urge him to seek career planning assistance so that he can look at moving into work more suited to his considerable talent and qualifications.

[32] However I accept that in all the circumstances (including the fact that he was dismissed shortly before the summer break) it would have taken Mr Yang some time to get work. I am satisfied that he would have been unlikely to find employment until after the Christmas period and on that basis set the remuneration lost as a result of the personal grievance at eight weeks wages.

[33] **Mr Liu is therefore ordered to pay to Mr Yang the sum of $4,400.00 gross pursuant to s. 124 of the Employment Relations Act 2000.**

[34] Pursuant to section 124 of the Act there is one final issue to be considered under the heading of remedies and that is whether Mr Yang contributed to the situation that gave rise to the personal grievance. I am satisfied that he did not. Remedies are not reduced for contributory conduct.

Costs

[35] This issue is reserved. If the parties cannot resolve it between themselves they have a period of 28 days from the date of this submission in which to lodge submissions on costs.

Yvonne Oldfield
Member of the Employment Relations Authority