

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 247
5559889

BETWEEN

ANDREW YAO
Applicant

A N D

TE WHANAU O
WAIPAREIRA TRUST
Respondent

Member of Authority: T G Tetitaha

Representatives: S Greening, Counsel for Applicant
M Ryan, Counsel for Respondent

Investigation Meeting: 19 and 20 July 2016 at Auckland

Submissions Received: 20 July 2016 from both parties

Date of Determination: 22 July 2016

DETERMINATION OF THE AUTHORITY

- A. Andrew Yao was unjustifiably dismissed by Te Whanau o Waipareira Trust.**
- B. Te Whanau o Waipareira Trust is ordered to pay compensation of \$2,500 to Andrew Yao pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.**
- C. Te Whanau o Waipareira Trust is ordered to pay \$7,071.56 to Andrew Yao as a contribution towards his costs.**

Employment relationship problem

[1] Andrew Yao was employed as a Senior Software Developer until dismissed for making allegations of immigration fraud against a co-worker.

Relevant facts

[2] Mr Yao was introduced to Te Whanau o Waipareira Trust (the Trust) through a Chinese relative, Ms Ma. Ms Ma was friendly with the wife of a manager working at the Trust. She gave Mr Yao her friend's husband's contact details.

[3] Through this contact, Mr Yao met Michael Zheng. Mr Zheng interviewed him for a position as a software developer on his team. Mr Zheng subsequently offered Mr Yao a job at the Trust as the Senior Software Developer.

[4] Unfortunately due to personal issues Mr Yao was unable to take up the position until July 2014. He started to work at the Trust on 28 July 2014.

[5] In August 2014, Ms Ma contacted Mr Yao by way of the Chinese equivalent of Facebook, "WeChat". Ms Ma suggested he "*pay tribute to them for their help*" meaning her friend and his boss. Her "third oldest aunty" suggested payment of \$40,000 but she suggested payment of "*10 to 20 thousand to extend your gratitude properly.*" She later suggested purchasing gifts such as a high-end digital single lens reflex camera and taking them to dinner.

[6] Mr Yao subsequently purchased a camera and watches for NZ\$50-60 in Japan. They were seized by customs because their estimated value was NZ\$7,286 and Mr Yao was required to pay tax. He returned the goods to Japan.

[7] On 11 February 2015, Mr Yao emailed Mr Zheng. He referred to his gratitude for Mr Zheng's help with immigration and his work. Although he had asked Ms Ma how he could extend his gratitude for his help and was told she had no idea. He then referred to anonymous phone calls to his house stating he should "*pay dozens of thousands of dollars to extend my gratitude.*" He then referred to his thwarted attempts to give "*some koha*" buying online two men's watches and a high end digital single lens reflex camera. He had also asked Mr Zheng to dinner which he'd refused. He sought suggestions about how to extend his gratitude.

[8] Mr Zheng asked to meet him to discuss this the following day at a local café.

[9] On 18 February 2015, Mr Yao was issued with a verbal warning about his performance and was required to attend a disciplinary meeting regarding those concerns. On 23 February 2015, a performance improvement plan was imposed.

[10] Between 10 to 20 April 2015 performance issues regarding Mr Yao's lateness to work and inability to log onto the work server were noted.

[11] On 29 April 2015, Mr Yao was advised to attend a disciplinary meeting.

[12] After that meeting, Mr Yao sent a text message written in Chinese to Mr Zheng.

[13] Mr Zheng alleged this text message was threatening and complained to Paula Parkin, HR manager about it. That same evening at 9.23pm Mr Zheng emailed Mr Yao advising he was not required to attend work the next day.

[14] On 3 May 2015, Ms Parkin, sent an email advising his employment advocate, Nathan Santesso sought to reschedule a disciplinary meeting that had been scheduled to occur the next day. She also advised that he was to be placed on garden leave until the date of the rescheduled meeting.

[15] On 8 May 2015 Mr Santesso and Mr Yao met with John Tamihere, Chief Executive of the Trust. The meeting did not end well. Mr Santesso was subsequently banned from the Trust's premises.

[16] On 9 May 2015 Mr Santesso wrote to Mr Tamihere alleging amongst other things:

Micheal Zheng requested that Mr Yao pay \$40,000 to keep his position. Mr Yao was unable to pay. Mr Zheng subsequently suspended Mr Yao and has threatened to terminate his job.

[17] Mr Santesso had also reported this information to the Labour Inspectorate including his belief Mr Zheng was acting independently of the Trust.

[18] On 13 May 2015, Mr Tamihere wrote to Mr Yao stating the text message sent on 29 April 2015 was a "*direct threat from you to the personal safety of Michael Zheng*", was serious misconduct and a breach of the code of conduct. He was asked to give his responses within seven days of receipt of the message. The English translation of the 29 April 2015 text message was set out in the letter and is replicated below:

If everything is too late to get back, I expect you can give me 3 months' notice for finding another job. If you can do it, I will not go through the legal or government process.

We all knew the situation, also I've taken the note as well as Voice recorded every dialogue during the meeting today. I hope we can settle the thing in an easy way. You don't need to waste anything for small people like me. However, if I'm pushed to the end, I will fight against you with my life to the death.

[19] That same day, Mr Yao raised a personal grievance through Mr Santesso. Later that day Mr Yao sent a text to Mr Zheng stating "I have not and never will physically threaten any one" and that "I hope you will not misunderstand."

[20] On 29 May 2015, Mr Yao filed a statement of problem in the Employment Relations Authority. He sought interim reinstatement. The statement of problem alleged, amongst other things he received an electronic message via WeChat where "Ms Ma told Mr Yao that he was required to pay a 'premium' of \$40,000 to Mr Zheng for his immigration support."¹ It further alleged Mr Zheng had met with Mr Yao at a coffee shop and raised concerns about quantum and timing of the premium.²

[21] A Minute was issued on the same day querying the basis for reinstatement given Mr Yao's evidence stated he was on garden leave until 29 May 2015. The parties were directed to attend mediation. Urgency was declined³ and the interim reinstatement application was eventually withdrawn.⁴

[22] The Trust's then legal counsel, Clint Rickards, wrote to Mr Santesso advising that his garden leave ended on 17 July 2015 and he was expected to return to work.

[23] When Mr Yao returned to work on 20 July he was given two letters from Mr Tamihere. The first advised the Trust intended to commence an employment investigation into two allegations of serious misconduct. The first was the threatening text message dated 29 April 2015 and a "false" allegation Mr Zheng, through an intermediary and personally, tried to elicit a premium payment of \$40,000 and an assortment of gifts from Mr Yao for assisting him with immigration support to come into New Zealand.

[24] The second letter confirmed he was subject to a performance management plan and his access to the server, email and payroll systems was restricted until the Trust believed his work performance was at the required level and the investigation into the allegations had been completed.

¹ Statement of Problem dated 29 May 2015 para. 2.6.

² See above para. 2.13.

³ Minute dated 3 July 2015.

⁴ Minute dated 11 December 2015.

[25] On 4 August 2015, Ms Parkin requested Mr Yao attend a meeting to discuss his performance, ongoing support, work attendance and the “*allegation of immigration fraud against Michael Zheng (Chief Information Technology Officer)*” and “*text threats against a fellow worker and your understanding of Te Kauhau Ora, the preface to your employment contract*”.

[26] On 14 August 2015, Mr Yao and his advocate, Mr Santesso, met with Mr Tamihere, Mr Rickards, Ms Parkin and various Board members. The allegation of fraud and the threatening text message were discussed amongst other things. Mr Santesso advised the allegations were based on the evidence of a third party which he would not provide and declined to discuss the allegations. Mr Tamihere advised the Trust had exhausted its own investigation and requested the evidence of the allegations made.

[27] On 21 September 2015, Mr Tamihere advised that the allegations by Mr Yao against Mr Zheng could not be substantiated and:

As indicated to you by way of our meeting on Friday 14 August 2015 we consider this to be a most serious allegation against:

1. A fellow work[sic] and
2. Against Te Whanau o Waipareira as an employer.

[28] The Trust advised Mr Yao that his employment was terminated. The notice took effect as of 22 September 2015 at 4pm.

[29] On 22 September 2015, Mr Yao raised a personal grievance of unjustified dismissal through Mr Santesso.

Issues

[30] Despite the lengthy factual scenario leading to hearing, there are only two issues for determination. These are:

- (a) Was there misconduct for which Mr Yao could have been dismissed?
and
- (b) Were the Trust’s actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

Was there misconduct for which Mr Yao could have been dismissed?

[31] Serious misconduct “... will generally involve deliberate action inimicable to the employer’s interests”⁵ and is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”⁶

[32] The respondent’s code of conduct, Te Kauhau Ora O Waipareira set out a misconduct and disciplinary action policy. There were bulleted examples of serious misconduct with the phrase “but not limited to”.

[33] Unsubstantiated serious allegations of misconduct against fellow employees have resulted in refusal of reinstatement on the basis that any relationship of trust and confidence that previously existed had been irrevocably destroyed.⁷ The parties accepted the allegations were serious.⁸ If unsubstantiated, these allegations would constitute serious misconduct.

Were Mr Yao’s allegations false?

[34] Mr Yao accepted in evidence Mr Zheng had never directly asked him for money or gifts. His own evidence showed Mr Zheng had refused ‘gifts’ such as requests to take him out to dinner. Mr Yao was of the view Mr Zheng was indirectly involved because of his WeChat exchange with Ms Ma. She had queried if he had showed “gratitude towards your boss”.

[35] In July 2015 Ms Ma and Mr Zheng confirmed in sworn affidavits they did not know each other and denied asking Mr Yao to pay \$40,000 to Mr Zheng.⁹ Ms Ma’s evidence was confirmed by the WeChat exchange where she said “I don’t know Mike” meaning Michael Zheng.¹⁰ Mr Yao’s own email confirmed Ms Ma “had no idea” in what way Mr Yao could extend his gratitude.¹¹

⁵ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

⁶ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

⁷ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [43].

⁸ ABD Tab 42 Email exchange between N Santesso and J Tamihere.

⁹ Affidavit Shaobin (Michael Zheng) sworn 3 July 2015; Affidavit Shuyin (Ariel) Ma sworn 21 July 2015.

¹⁰ Applicants Bundle of Documents (ABD) Tab 3, page 2 WeChat English translation.

¹¹ ABD Tab 8 Email A Yao to M Zheng dated 11 February 2015.

[36] Despite opportunity being given, Mr Yao did not provide any further evidence to the Trust. In the circumstances it is more probable than not the allegations were false.

[37] Mr Tamihere gave specific evidence about the impact of the allegations for the Trust. His evidence referred to the potential damage to the Trust's reputation where allegations of immigration fraud against one of his senior staff members was made. He firmly believed the allegation was false and Mr Yao's advocate, Mr Santesso had publicised it, causing damage to the Trust's reputation. He was conscious at the time of allegations of immigration fraud being made against other organisations. The Trust primarily relied upon government funding to provide services to the west Auckland community. 40% of the clientele accessing their services were migrant communities from the Pacific Islands and Asia. The Trust's mana with its migrant community and funder would have been seriously affected by alleged fraudulent activity involving immigration.

[38] In my view there was conduct for which Mr Yao could have been dismissed.

Were the Trust's actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

[39] The fact Mr Yao's employment was terminated is accepted. The onus falls upon the Trust to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred (s103A(2)). In applying this test, I must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[40] The Trust accepts that its process was flawed. The concerns raised with Mr Yao were not necessarily replicated in the termination email he received on 21 September. His employment appeared to have been terminated for an additional reason of a serious allegation against the Trust which Mr Tamihere explained referred to the reputational damage caused by the false allegation. The serious allegation against the worker did not specify which allegation had been proven. At hearing Mr Tamihere advised he had discounted the text messaging allegation because of the

competing interpretations of the Chinese text. This part of the process does not appear to have been relayed to Mr Yao.

[41] The investigation was carried out by an employee, Ms Wu and the Trust's barrister, Mr Rickard. From the evidence of Mr Tamihere it did not appear that the information from Ms Wu and Mr Rickards was provided to Mr Yao. It was submitted he received this information by way of the affidavits that were filed in the Authority in respect of the application for interim reinstatement. That was not made clear to Mr Yao at the time. The information submitted did not include any reference to Ms Wu's investigations of Mr Zheng's correspondence.

[42] The final meeting on 14 August 2015 was allegedly recorded. A signed receipt from Mr Yao for a USB stick with the recording of the meeting was produced. However there was no proof he received the minutes Mr Tamihere considered when he made his decision. Those minutes were not a transcript of the recording but a summary of the points made. Mr Yao could not confirm their accuracy because he did not understand the English and Maori being spoken and relied upon Mr Santesso.

[43] The above flaws were not minor and did cause unfairness to Mr Yao. Mr Yao's dismissal was substantively justified but procedurally flawed.

[44] Mr Yao was unjustifiably dismissed by Te Whanau o Waipareira Trust.

Remedies

[45] Because Mr Yao's dismissal was substantively justified he is not entitled to any lost remuneration. This is because even if the procedural requirements had been followed correctly, the result would have been exactly the same.

[46] I am satisfied from his evidence at hearing he would have suffered some humiliation, loss of dignity and injury to his feelings as a result of the procedurally flawed dismissal. In these circumstances, he would be entitled to compensation of \$5,000 subject to contribution.

[47] An employee's conduct may be relevant to remedies. I am required to consider the extent to which the actions of the employee contributed towards the personal grievance and if required reduce any remedies.¹²

Contributory conduct

[48] In order for contributing behaviour to be taken into account in the reduction of remedies the actions of the employee must be both causative of the outcome and blameworthy¹³.

[49] The serious misconduct leading to dismissal was caused by his advocate's email to the Trust on 9 May 2015. Given the lack of evidential foundation linking Mr Zheng with the allegation of payment, it was blameworthy behaviour. In the circumstances a 50% reduction in remedies is justified.

[50] Te Whanau o Waipareira Trust is ordered to pay compensation of \$2,500 to Andrew Yao pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

Costs

[51] After hearing from both parties regarding costs, I order that Te Whanau o Waipareira Trust pay Mr Yao the sum of \$7,071.56. This is two hearing days at the Authority's daily notional tariff of \$3,500 per day and recover of the Authority's filing fee.

T G Tetitaha
Member of the Employment Relations Authority

¹² Section 124 of the Act.

¹³ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49]