

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 91
5470787 and 5470783

BETWEEN DONG ZHANG and PING LI
Applicants

A N D GOLDEN MOMENTS
RESTAURANT LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ming Shue Pang, Counsel for the Applicants
Sacha Beacham, Counsel for the Respondent on
8 December 2014
Yong Gao Xiao, Director for the Respondent on
11 March 2015

Investigation Meeting: 8 December 2014 and 11 March 2015 at Auckland

Submissions Received: 11 March 2015 from the Applicants
11 March 2015 from the Respondent

Date of Determination: 25 March 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

- A. The unjustified dismissal claims were not raised within the statutory 90 day time period;**
- B. Mr Dong Zhang and Ms Ping Li failed to establish the existence of “*exceptional circumstances*” under s.115(a) of the Employment Relations Act 2000;**
- C. Costs are reserved.**

Employment relationship problem

[1] This determination addresses the preliminary issue of whether the applicants, Mr Dong Zhang (Mr Zhang) and Ms Ping Li (Ms Li) raised personal grievances of

alleged unjustified dismissal with their employer, Golden Moments Restaurant Limited (Golden Moments), within 90 days of the grievances occurring in accordance with the requirements of s.114(1) of the Employment Relations Act 2000 (the Act), so that they are able to pursue their grievances before the Authority.

[2] In the event that it is determined that Mr Zhang and Ms Li failed to raise their personal grievances within the statutory 90 day period, Mr Zhang and Ms Li seek leave to raise their grievances outside the 90 day time period pursuant to s.114(3) of the Act.

[3] In seeking leave under s.114(3) of the Act, Mr Zhang and Ms Li seek the Authority's leave to raise their grievances outside the 90 day period, citing "*exceptional circumstances*", namely that they "*made reasonable arrangements to have the grievance raised on [their] behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time*".

[4] Mr Zhang and Ms Li did not seek to rely on exceptional circumstances in the Statement of Problem filed by each of them respectively on 21 July 2014. Reliance on exceptional circumstances as specified in s.115(b) of the Act was raised in the final written submissions made by Counsel for Mr Zhang and Ms Li at the conclusion of the investigation meeting on 11 March 2015.

[5] Counsel for Mr Zhang and Ms Li submitted that Mr Zhang and Ms Li relied on incompetent legal advice which lead to their failure to file their grievances within the statutory 90 day time frame.

The legislation

[6] Section 114 of the Act states:

...(3) *Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

(4) *On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority:*

- (a) *is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*
- (b) *considers it just to do so.*

[7] As stated above, Mr Zhang and Ms Li now claim “exceptional circumstances” under s.115(b) of the Act which states:

where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time ...

Issues

[8] The issues for determination by the Authority are:

- (a) Did Mr Zhang and Ms Li each raise a personal grievance with Golden Moments within the statutory 90 day time period;
- (b) If the answer to (a) is no, should leave be granted pursuant to s.114(4) of the Act for Mr Zhang and Ms Li to raise personal grievances outside the statutory 90 day time period on the basis that they made reasonable arrangements to have their grievances raised on their behalf by their agent, and the agent unreasonably failed to ensure that the grievances were raised within the required time;
- (c) In the event that the answer to question (b) is yes, is it just to grant leave pursuant to s.114(4) of the Act?

Investigation meeting

[9] As permitted under s.174 of the Act, this determination has not set out all the evidence received. The determination states findings and relevant facts and legal issues and makes conclusions in order to efficiently dispose of the matter.

[10] The investigation of this preliminary matter took 1½ days in the Authority. Submissions were filed on behalf of both parties at the conclusion of the investigation meeting on 11 March 2015 with a further opportunity to comment by 18 March 2015.

[11] For the Authority's investigation, the applicants, Mr Zhang and Ms Li provided written statements. Mr Yong Gao Xiao, the sole director and shareholder of Golden Moments, provided a written statement on its behalf. Each confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so. Each witness had the benefit of an interpreter present throughout.

First issue: Did Mr Zhang and Ms Li raise personal grievances with Golden Moments within 90 days as required by s.114(1) of the Act?

[12] Mr Xiao was a citizen of China until 2011 when he came to New Zealand as a business migrant. Mr Xiao's company, Golden Moments operates a Chinese-style buffet restaurant (the restaurant) in Panmure, Auckland.

[13] Mr Zhang was employed by Golden Moments as a chef in the restaurant from 14 December 2013 until his dismissal on 14 January 2014. Ms Li was employed by Golden Moments as a kitchen hand and waiter from 16 December 2013 until her dismissal on 14 January 2014.

[14] Mr Zhang and Ms Li both say they were unjustifiably dismissed by Golden Moments for alleged poor performance without proper notice and in breach of their employment agreements. Mr Zhang was particularly aggrieved by comments made by Mr Xiao on a Chinese website about his performance as a chef immediately following his dismissal. Mr Zhang and Ms Li say they each raised a personal grievance of unjustified dismissal with Golden Moments at a meeting with Mr Xiao on 21 January 2014.

[15] Mr Xiao says Mr Zhang and Ms Li did not perform their duties satisfactorily. However, Mr Xiao accepts the manner in which he terminated Mr Zhang and Ms Li's employment did not comply with the requirements of New Zealand employment law.

[16] Mr Xiao says Mr Zhang and Ms Li did not raise personal grievances with him at the meeting on 21 January 2014. Rather, Mr Xiao says Mr Zhang and Ms Li threatened to sue him over the termination of their employment if he did not sponsor the visa applications of Mr Zhang's friend and Ms Li's son both of whom were residing in China and wished to work and reside in New Zealand.

[17] Mr Xiao says the first time an employment relationship problem was raised was when the Statements of Problem dated 21 July 2014 were served on him some six months after Mr Zhang and Ms Li's employment was terminated.

[18] Mr Xiao denies the employment relationship problems were raised within the statutory timeframe contained in the Act and does not consent to the grievances being raised outside the required timeframe.

[19] Mr Zhang and Ms Li say even if Mr Xiao is correct and they did not raise their grievances in time, they have exceptional circumstances which would justify the Employment Relations Authority giving leave for them to raise their grievances outside the timeframe specified in the Act. The exceptional circumstances are that they received incompetent legal advice and so did not raise their grievances in time.

Mr Zhang and Ms Li's employment by Golden Moments.

[20] Mr Zhang was introduced to Mr Xiao by his former chef, Ms Lou. Ms Lou was an extremely capable chef and was highly regarded by Mr Xiao. In December 2013, Ms Lou's husband was involved in a serious car accident. As a result of her husband's accident, Ms Lou had to resign as chef at Golden Moments. This left Mr Xiao without a chef. Before leaving her employment, Ms Lou suggested to Mr Xiao that Mr Zhang, whom she knew, may be suitable for the position.

[21] Mr Xiao said Ms Lou knew Mr Zhang and he valued her opinion so decided to interview him for the chef's position at Golden Moments.

[22] On 9 December 2013, Mr Xiao interviewed Mr Zhang. Mr Zhang and Mr Xiao discussed hours and duties for the chef's position. Mr Xiao said he verbally indicated to Mr Zhang that his employment would be subject to a two months' trial period so that he could assess his suitability. Mr Xiao and Mr Zhang also discussed matters concerning immigration. Mr Xiao told Mr Zhang that he had two visa quotas available to recruit overseas chefs for his restaurant.

[23] Mr Zhang asked Mr Xiao whether he would support a friend from China with his visa application to immigrate and work in New Zealand as a condition of Mr Zhang accepting employment as a chef at Golden Moments.

[24] Mr Xiao said that he was in desperate need of a chef and agreed to Mr Zhang's request. Mr Zhang also told Mr Xiao at the interview on 9 December 2013 that he had a friend/colleague in New Zealand, Ms Ping Li, who could work at the restaurant as a kitchen hand and waiter.

[25] On 11 December 2013, Mr Zhang contacted Mr Xiao and asked him to immediately provide him with a letter of approval from the Department of Immigration regarding the visa quota for his restaurant. This was to enable Mr Zhang's friend from China to obtain a quota to work and reside in New Zealand.

[26] On 12 December 2013, Mr Zhang followed the visa matter up with Mr Xiao. A transcript of the text message from Mr Zhang to Mr Xiao on 12 December 2013 was provided to the Authority. The text message stated:

Zhang: Have you sent me the immigration letter, Teacher Xiao?

Xiao: I'll send it when I'm back. I'm now in the auction yard.

Zhang: Okay.

[27] This text was sent at 9.30am. Mr Zhang sent another text message to Mr Xiao at 20:52 on the same day as follows:

Zhang: Do remember to send it, Teacher Xiao, I'm waiting for this.

[28] Mr Zhang started as a chef at Golden Moments on 14 December 2013. On Mr Zhang's first day of employment, he provided Mr Xiao with an employment agreement which he had prepared already. Mr Zhang intended this agreement to apply to both his employment and that of Ms Li in the event she was employed by Golden Moments. The employment agreement was one which Mr Zhang had used in previous employment.

[29] Mr Xiao wished to take advice before signing the employment agreement. However, Mr Zhang was anxious to have the document signed immediately and as Mr Xiao was desperately in need of a chef for the restaurant, he signed the document. Mr Xiao admits that his action was very unwise.

[30] Mr Xiao interviewed Ms Li for the position of kitchen hand on 15 December 2013 and she began work on 16 December 2013.

The employment agreement.

[31] The employment agreements were signed respectively by both Ms Li and Mr Zhang and by Mr Xiao. Mr Zhang's employment agreement was backdated to 9 December 2013 and Ms Li's employment agreement was backdated to 12 December 2013.

[32] Apart from position, duties and salary, the terms and conditions of employment contained in Ms Li's employment agreement were identical to those in Mr Zhang's employment agreement. There was no trial period stipulated in the employment agreements.

[33] Clause 3.1 of the employment agreements stipulate the date of commencement and that the employment "... shall last 12 months at least". Clause 13.1 specifies that:

... the Employer may terminate this agreement for cause after 12 months, by providing four weeks' notice in writing to the Employee. The Employer may, at its discretion, pay remuneration in lieu of all of this notice period.

[34] Clause 13.2 made provision for termination by Golden Moments without notice in the event of serious misconduct.

[35] Clause 14 stipulates:

Resolving employment relationship problems

14.1 Short form If an employment issues arise, those should be raised with the Employer as soon as possible so that they can be resolved. If the matter is not resolved either party can seek assistance from the Department of Labour's mediation service. If the issues are not resolved at mediation, they may be referred to the Employment Relations Authority. If the issue is a personal grievance, the employee must present that grievance within 90 days of the event giving rise to the grievance, or after further time if allowed by the employer or where the Employment Relations Authority grants an extension of time.

Termination of employment.

[36] During the course of Mr Zhang's short period of employment, Mr Xiao became unhappy with his performance as a chef and with complaints received about him from customers. Mr Xiao was also unhappy with the level of Ms Li's skills.

[37] Mr Xiao mistakenly understood the employment agreement contained a two month trial period and decided to rely on it to dismiss Mr Zhang and Ms Li. On 14 January 2014, Mr Xiao discussed his performance concerns with Mr Zhang and told him not to come back in. Mr Xiao asked Mr Zhang for Ms Li's phone number. Ms Li was also contacted by Mr Xiao and told not to return to work.

[38] This was an unacceptable way in which to deal with Mr Zhang and Ms Li. They were each entitled to know if Mr Xiao had concerns about their performance and given an opportunity to address such concerns. Mr Xiao accepts there was no trial period in either employment agreement and that his dismissal of Mr Zhang and Ms Li in such circumstances was not justified.

[39] On 20 January 2014, Mr Xiao received a phone call from Ms Li which he took as a threat. Mr Xiao said Ms Li threatened to take action against him which would jeopardise his business immigration status in New Zealand. Mr Xiao said he became scared by the threats and agreed to meet with Mr Zhang and Ms Li on 21 January 2014.

Meeting of 21 January 2014

[40] Mr Zhang and Mr Xiao each digitally recorded the meeting of 21 January. Both parties have provided the Authority with written transcripts of the meeting. The entire transcripts were not provided and neither transcriber gave evidence. At the meeting, a conversation ensued primarily between Mr Zhang and Mr Xiao. Ms Li also participated from time to time. Mr Zhang's wife was in attendance but did not participate.

[41] Mr Zhang and Ms Li utilised the services of ANZTS (Aria NZ Translation Services) to translate and transcribe the digital recording of the meeting on 21 January 2014. The transcript begins as follows:

Man 1: Mr Zhang

Man 2: Mr Xiao

Man 1: You are an employer in New Zealand, you are looking for a Chinese chef, as you can't find one in NZ, therefore you have this quota, right?

Man 2: Right.

Man 1: Now, you now(sic) me. I will introduce one chef from China to you. We can use one agent to go to find a right person, now this person has been found, whether he meets the requirement of NZ Immigration or not is his own problem, not yours. As long as you agree to sponsor him, that is okay.

Man 2: but is it possible that you will come to bother me if his application is unsuccessful?...

[42] The first page of the transcript deals entirely with the issue of immigration and sponsorship. Other passages which are relevant in this matter include a passage on p.3 of the transcript:

Man 2: ... the problem we have here is that, to get the visa quota my friend deserves, and Old sister[Ms Li] needs one to plan for sponsoring family unification in the future, then everything will be okay. There are no other issues, are we clear? No other problems.

[43] There was some discussion about the deboning of salmon by Mr Zhang when he was chef at Golden Moments and complaints received about this by Mr Xiao. However, in my view, the meeting was held primarily for the purpose of discussing visa quotas and immigration matters, not personal grievance claims.

[44] At the investigation meeting, Counsel for Mr Zhang and Ms Li relied heavily on the excerpt of the transcript of the meeting recorded between 10:52 and 12:57.

Mr Xiao: What my lawyer tells me, is what he is trying to say, for example, about employee dismissal, you should give them one month three months prior notice ...

Mr Zhang: What he said is right, but what is the standard procedure for doing that in a normal condition. If I have had serious fault at work, you should send me three letters. The first letter is a warning, the second letter is blah blah, you can't say to dismiss me unless I have a major fault. Then "I give you two weeks several weeks to dismiss you". You write nothing to us and you haven't done anything concerning how to fire us. I told you one best example happened in Fonterra, one person was fired by Fonterra, for what reason? For (they) dance in the factory. The person was fired. Well, the person lodged a complaint, then the Court issued judgment in favour of the employee, the employer lost the case, the employee went back and continued to work, isn't it a big mistake? It is not easy to fire an employee. In addition, it is written clearly in our contract, why? It is written the employment terms one year. ...

Mr Xiao: Should be fine to dismiss Ms Li one year, right!

Mr Zhang: Every lawyer has his expertise. I don't know you're lawyer's expertise, but I told you that the lawyer we had seen would work on our case free of charge, what fee will he charge us? If we won, my lawyer says that we would get 30%, what do you think he will win the case or not? The lawyer has agreed to take our case after the meeting with us, at least can win back one year's salary, plus 30%, what it is called ...

[45] The discussion was, in my view, a communication by Mr Zhang and Ms Li about the process for correctly terminating an employee's employment as described to them by their lawyer.

[46] The transcript of the meeting on 21 January 2014 provided on behalf of Mr Xiao does not differ in any major respect, in my view, from the transcript provided by Mr Xiao. A relevant excerpt from the transcript prepared on Mr Xiao's behalf is:

Mr Zhang: That thing can be solved, the quota is sold to us, there is no problem anything is fine. Okay? ... We've already promised our friend in China, and I've also prepared everything and contacted with Immigration office. The son has prepared the visa and planned to come here before Chinese New Year, prepared to flight to her, it's been here, you don't want to do it anymore. Actually, to be honest, this job, have or not have, for me or Ping, it's not a big thing. I can find another one by myself or I have another job in morning. This is why I always do two jobs at the same time. Do you understand?

[47] Having read the transcripts provided, it is clear to me that the primary purpose of the meeting on 21 January 2014 was to discuss immigration matters and not for the purpose of raising a personal grievance. Mr Zhang was concerned that his friend from China would be supported by Mr Xiao in his application to work and live in New Zealand. Ms Li was concerned her son in China also be supported by Mr Xiao in his application to work and live in New Zealand.

[48] Ms Li and Mr Zhang issued Mr Xiao with an ultimatum. The ultimatum was that in the event Mr Xiao did not sponsor the visa applications of Mr Zhang's friend or Ms Li's son they would sue him over the way in which they were dismissed.

[49] The way in which the employment matters were raised at the meeting was not in the context of raising personal grievances of unjustified dismissal which Mr Xiao could address and perhaps resolve.

The Law.

[50] The law is settled in relation to what constitutes the raising of a personal grievance under s.114 of the Act. The leading case is *Creedy v. Commissioner of Police*¹ in which the Court stated at para[36]:

It is the notion of the employer wanting the employer to address the grievance. That means that it should be specified sufficiently to enable the employer to address it. It is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employer simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage ... As the Court determined in cases under previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[51] This statement of law was recently cited with approval by Judge Ford in *Snowden v. Radio New Zealand Ltd*².

[52] There was insufficient evidence provided by Mr Zhang and Ms Li as to their personal grievances. Mr Zhang and Ms Li informed Mr Xiao that they had taken legal advice. They then communicated to Mr Xiao the advice received which was the standard procedure to be followed by an employer when dismissing an employee. Reference was also made by them to the types of monetary awards made in successful claims by employees against employers.

[53] I do not accept such communication by Mr Zhang and Ms Li constituted the “*raising of a grievance*” as contemplated by the Act. The purpose of the meeting on 21 January 2014 was, in my view to threaten Mr Xiao with regard to immigration matters. Mr Zhang made it clear that the job was not important to him, rather the visa and immigration issues were what was important.

[54] I do not accept that the ultimatum issued to Mr Xiao to sponsor Mr Zhang’s friend and Ms Li’s son amounted to a discussion of suitable remedies to resolve

¹ [2006] ERNZ 517

² [2014] NZEmpC 45 at para.[54]

personal grievances of unjustified dismissal. The issuing of such an ultimatum would not, in my view, address the grievances “*as the legislation contemplates*”.³

Meeting on 17 March 2014

[55] At the resumption of the investigation meeting on 11 March 2015, Mr Zhang gave evidence about a meeting held with Mr Xiao on 17 March 2014 at which time he says he also raised a personal grievance of unjustified dismissal.

[56] Mr Zhang says on this occasion, he and his wife visited Mr Xiao at his restaurant. Mr Zhang presented Mr Xiao with an employment agreement for the friend he wished to have sponsored to New Zealand and requested that Mr Xiao sign the agreement. Mr Zhang says at that meeting he again raised his personal grievance of unjustified dismissal and asked that Mr Xiao pay salary owing to him.

[57] When questioned by the Authority as to why this meeting on 17 March 2014 had never been raised before, in his Statement of Problem, in his witness statement or at the investigation meeting on 8 December 2014, Mr Zhang said this was because he had not recorded the conversation.

[58] Mr Xiao denied that Mr Zhang raised a personal grievance at the meeting on 17 March 2014. Mr Xiao says Mr Zhang presented him with an employment agreement for his friend from China and demanded he sign it. Mr Xiao was afraid not to do so and signed the employment agreement.

[59] I prefer Mr Xiao’s evidence. It is my conclusion that Mr Zhang went to see Mr Xiao on 17 March 2014 with an employment agreement for him to sign to enable his friend from China to obtain a work visa. The purpose of the meeting was not for Mr Zhang to raise a personal grievance of unjustified dismissal and no such grievance was raised at the meeting.

[60] It is my finding that Mr Zhang and Ms Li did not raise personal grievance claims with Golden Moments until the filing of their statements of problem on 21 July 2014, well outside the 90 day period. The answer to the first issue is “No.”

³ *Creedy supra para.[36]*

Second Issue

If the answer to the first issue is “no”, should leave be granted by the Authority, pursuant to s.114(4) of the Act for Mr Zhang and Ms Li to raise personal grievances outside the statutory 90 day time period on the basis that they made reasonable arrangements to have their grievances raised on their behalf by their agent, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[61] Mr Zhang and Ms Li did not raise “*exceptional circumstances*” in their Statements of Problem or in their witness statements. It was raised for the first time as a ground relied on by Mr Zhang and Ms Li in closing submissions at the conclusion of the investigation meeting.

[62] During the investigation meeting on 8 December 2014 , Mr Zhang in response to questions from then Counsel for Golden Moments, said the information from his “*prior lawyer*” was that he had to raise any grievance within “*94 days*”. There was no evidence that Mr Zhang and Ms Li made arrangements for their “*prior lawyer*” to have grievances raised on their behalf and that their “*prior lawyer*” unreasonably failed to do so. There was not sufficient evidence to establish an exceptional circumstance under s.115(b) of the Act.

[63] In Mr Zhang’s and Ms Li’s witness statements they each say that on 16 June 2014 they obtained legal advice from Hong Hu lawyers and that on 21 July they instructed Hong Hu lawyers to file an application for each of them for an employment relationship problem. This is what occurred.

[64] There was no mention in the witness statements of grievances being raised with a previous lawyer.

[65] I am not satisfied that the delay by Mr Zhang and Ms Li in raising their personal grievances was occasioned by exceptional circumstances. The answer to the second issue is “No”.

[66] Because the answer to the first two issues is “No”, there is no requirement for the Authority to consider the third issue.

Costs

[67] Costs are reserved. Golden Moments has 14 days within which to file a memorandum as to costs. Mr Zhang and Ms Li have 14 days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority