

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 151
5514796

BETWEEN KUN ZHANG
 Applicant

AND GL FUTURES
 DEVELOPMENT LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Zhenzhen Chen for the Applicant
 David Liu for the Respondent

Investigation Meeting: 21 and 22 May 2015

Oral Determination: 22 May 2015

Written record issued: 26 May 2015

ORAL DETERMINATION OF THE AUTHORITY

[1] Kun Zhang was employed as a customer centre operator by GL Futures Development Limited (the company) from 16 June 2011 until her dismissal on 27 June 2014.

[2] The company operates an online gaming business in Asian markets and has a customer call centre in Auckland employing around 25 staff. Its director and his assistant are based in Hong Kong.

[3] The letter of dismissal given to Ms Zhang, signed by the company's executive manager Yuhua Du (who is based in Auckland), gave the following reasons for ending Ms Zhang's employment:

Taking break over 30 minutes related to the employment contract without consent, which was in breach of the staff code of practice. During the first meeting, you did not admit your breach of duty. This is leading our further concern (sic), and according to the employment contract (10.5) serious misconduct – dishonest, your behaviour leads to lost trust between you and the employer.

[4] Ms Zhang was called to that ‘first meeting’ with Ms Du and the company’s assistant executive director Haiyan Shangguan on 16 May 2014. She was told a fellow worker had complained that Ms Zhang and two other workers had taken too long on their dinner break the previous day. Ms Du’s evidence was that she also asked Ms Zhang about another allegation made in the complaint – that she had hung up on customer calls. Ms Zhang confirmed in her oral evidence that she was asked that and had replied that it was something that she and other customer service officers had sometimes done.

[5] The other two workers accused of taking an over-long break on 15 May were called to meetings in subsequent days. One of those workers was a shift supervisor. Both admitted they were late back from their break and apologised. One was issued a verbal warning and disqualified from the company’s bonus scheme for three months. The other, the shift supervisor, received a written warning and a six month bonus disqualification.

[6] What happened with Ms Zhang became more complicated for two reasons. Firstly, the company conducted further inquiries about her conduct as a result of questions she asked in the 16 May meeting. Secondly, Ms Zhang was pregnant at the time and, in the weeks following that meeting, experienced stomach pains and bleeding that eventually resulted in a miscarriage being diagnosed on or around 10 June.

[7] After the 16 May meeting Ms Du had the company’s customer support manager Yuan Gao make further inquiries about what had happened on 15 May and into other aspects of Ms Zhang’s work. Ms Gao’s investigation resulted in further accusations of unsatisfactory work being put to Ms Zhang. Those allegations concerned how she had dealt with customer calls and customer queries.

[8] The allegations were set out in a letter given to Ms Zhang on 27 May and she attended a disciplinary meeting with Ms Du and Ms Gao on 29 May. The meeting lasted less than five minutes. Notes said to have been taken by Ms Gao at the meeting recorded Ms Zhang had said she did not intentionally exceed her break and would be more careful in future. She also said she would pay more attention to how she handled calls in future.

[9] After that meeting Ms Zhang exchanged messages with Ms Du on the WeChat mobile messaging service.¹ Ms Zhang wrote that she was reluctant to explain herself in front of Ms Gao because she thought Ms Gao would feel Ms Zhang was just making excuses. Ms Du encouraged Ms Zhang to write a full explanation – telling her to “*write down everything you feel in your heart*” and to “*sincerely apologise*”. Ms Du said she would “*help you plead your case with 003*”.

[10] The term 003 used an internal company numbering system for employees and referred to the director’s assistant who was based in Hong Kong. Ms Du and Ms Gao reported to 003. Ms Zhang asked if she should send her explanation directly to 003 but Ms Du said to send it to her first as if Ms Gao knew about it, she would complain about Ms Zhang again. During these WeChat exchanges Ms Du also said Ms Gao was “*being too subjective*”.

[11] Ms Zhang then sent Ms Du an email responding to each of the concerns set out in the 27 May letter. She apologised for taking too long on her break on 15 May and for any trouble caused for other customer service representatives as a result. She also admitted she had made mistakes in dealing with some customer calls but said she had woken up from that misunderstanding and would not, in future, treat her work “*with this mistakenly negative attitude*”.

[12] During 29 May Ms Zhang had experienced stomach pains and later in the day consulted her midwife by telephone. The midwife advised Ms Zhang to take one week’s bed rest and gave her a medical certificate. She sent the certificate to Ms Gao and sought sick leave. The leave was granted.

[13] On returning to work on 10 June Ms Zhang attended a further meeting with Ms Du and Ms Gao. Ms Shangguan had advised her of the meeting by telephone the previous night. Ms Du gave Ms Zhang a letter that said the company doubted her credibility because Ms Zhang had not admitted in the first meeting held on 16 May that she had exceeded the time allowed for her break and that in the second meeting on 29 May her “*conduct and conversation did not demonstrate to the company that you are apologetic and sorry for what you did*”. Notes said to have been taken by Ms Gao in that meeting recorded that Ms Zhang accepted she had made mistakes,

¹ The WeChat text and voice messaging communication service operated by internet company Tencent in China reportedly has more than 500 million users, including 70 million outside China.

apologised and said it would not happen again. The meeting ended with Ms Du advising that Ms Zhang might be suspended on pay while the company decided what to do but Ms Du would let her know “*before close of business*”.

[14] Ms Du’s written witness statement for the Authority investigation said that she and Ms Gao:

duly reported back to our superiors and after detailed discussion with them, we formed the view that, given [Ms Zhang’s] ill treatment of the company’s customers and the way that she conducted herself during the disciplinary meeting, we could no longer have trust and confidence in her as an employee.

[15] Ms Du did not communicate that view to Ms Zhang on 10 June because Ms Zhang left work around mid-afternoon as she was experiencing bleeding. Her husband collected her and took her to hospital. An ultrasound examination conducted the following day confirmed that her pregnancy had miscarried. Her medical records suggested an incomplete miscarriage may have occurred some weeks earlier.

[16] On 11 June Ms Du had prepared a dismissal letter for Ms Zhang but was not able to give it to her as Ms Zhang was away from work due to the miscarriage diagnosis.

[17] Ms Zhang advised Ms Gao of her miscarriage on 14 June. She requested two weeks’ leave which was granted. On 26 June Ms Shangguan contacted Ms Zhang by telephone and asked her to attend a meeting at the company’s offices the next day so the company could inform her of the outcome from the 10 June disciplinary meeting. On 27 June Ms Zhang met Ms Du and was given a letter of dismissal giving the reason cited earlier in this determination.

[18] Ms Zhang’s application to the Authority said her dismissal was unjustified because of how the company had carried out its investigation and accused her of being dishonest. She sought remedies of lost wages, distress compensation and a penalty for “*numerous breaches of duties of good faith*”.

[19] The company replied that its investigation was thorough, with allegations ‘squarely put’ to Ms Zhang, that she had a reasonable opportunity to respond and her explanations were carefully considered before the dismissal decision was made. It said the decision was substantively fair because Ms Zhang had admitted exceeding her meal break, had jeopardised the company’s reputation by rudeness and ill-

treatment of customers, and had “*made no admissions until she was presented with overwhelming evidence and even then was unapologetic for her actions*”.

Investigation and issues

[20] In investigating Ms Zhang’s claim I have considered the following evidence:

- (i) Written witness statements from Ms Zhang; Yi Lu, one of the other workers disciplined for taking too long a break; Victoria Lin, Ms Zhang’s midwife; Wenjing Peng, the worker who complained about Ms Zhang and others; Ms Du; Ms Gao; Ms Shangguan; and Neil Pattison, an obstetrician who reviewed Ms Zhang’s hospital records and provided a statement at the company’s request; and
- (ii) Answers to questions asked of those witnesses (except Dr Pattison) by me and the parties’ representatives at the investigation meeting; and
- (iii) Relevant documents lodged by the parties including Ms Zhang’s employment agreement, correspondence with her about the disciplinary issues, and notes of meetings.

[21] Most witnesses answered questions with the assistance of an interpreter of the Mandarin language. Examination of Dr Pattison’s evidence proved unnecessary as the circumstances of Ms Zhang’s miscarriage were not in dispute.

[22] I also considered closing submissions on the facts and the law made by the parties’ representatives.

[23] As permitted by s174A(1) and 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[24] The primary issue for resolution concerned whether the company’s decision to dismiss Ms Zhang was what a fair and reasonable employer could have done in all the circumstances at the time of investigating its concerns and making that decision.² This statutory test of justification considers both what was done and how it was done.

² Section 103A of the Employment Relations Act 2000 (the Act).

Also relevant to this test was whether the company's actions met its good faith obligations to provide information to an employee where the employer was proposing to make a decision likely to have an adverse effect on the continuation of the employment and an opportunity to comment on that information before the decision was made.³

[25] In light of the evidence received and tested in the Authority's investigation, the specific questions for answer in determining Ms Zhang's claim were these:

- (i) Was there a disparity of treatment between her and other employees?
- (ii) Was she fairly treated in how the disciplinary procedure was carried out – including adequate notice of the meetings, advice of the opportunity for representation and support, and proper provision of the relevant information?
- (iii) Was she heard by the actual decision-maker or decision-makers before the decision to dismiss her was made?
- (iv) Was she dismissed solely for the reason given in the letter of dismissal or also for other performance concerns, and if so, was the sanction of dismissal properly available on those grounds?
- (v) Was serious misconduct established?
- (vi) If the company's actions were found to be unjustified, had Ms Zhang established reasonable endeavours were made by her to mitigate resulting loss of wages and, if so, what amount of lost wages should be awarded?
- (vii) If the company's actions were found to be unjustified, should an award of compensation for humiliation, injury to her feelings and loss of dignity be made to Ms Zhang, including the question of how to properly account for associated or concurrent distress suffered by her as a result of the miscarriage of her pregnancy?
- (viii) Was any reduction of remedies required under s124 of the Act due to actions by Ms Zhang that contributed towards the situation that gave rise to her personal grievance?
- (ix) Had the company breached its statutory good faith obligations warranting a penalty and, if so, of what amount?
- (x) Should either party contribute to the reasonably incurred costs of the other party?

³ Section 4(1A)(c) of the Act.

Disparity?

[26] Two aspects of disparate treatment of Ms Zhang emerged in the evidence. One concerned how the other worker and the shift supervisor who took an overly long break with her on 15 May were treated. The other concerned how other workers identified as having ‘hung up’ on customers were dealt with by the company.

[27] A three stage test applied to considering that issue:⁴ whether there was a disparity; if so, was the disparity adequately explained; and, if not, was the dismissal nevertheless justified despite an inadequately explained disparity?

[28] Ms Zhang suffered a significantly harsher sanction for the breach of the break rules on 15 May than her co-worker and the supervisor. This was said to be because she did not express immediate contrition but had asked the company for its evidence about the issue. I have not accepted Ms Du’s evidence that Ms Zhang denied having exceeded the break time at all. Instead Ms Zhang was effectively punished for asking to be given information she was entitled to have. Her questioning of the initial allegation that she and the others were absent for almost an hour (that is almost twice the permitted break period) was vindicated by subsequent information that Ms Du and Ms Shangguan gathered from two other workers, questioned after 16 May, who reported that the absence was “*over 40 minutes*”. Ms Li was then told in her disciplinary meeting that her absence was for “*45 minutes*” while Ms Zhang was only asked about being away “*nearly an hour*”. While Ms Du’s evidence was that one minute or ten minutes over the allotted time was still a breach of the employment agreement, I consider a fair and reasonable employer could not have failed to consider the difference as a matter of degree in considering the seriousness of the offence, along with factors such as whether it was a ‘one off’ or was a repeated breach. Both other workers kept their jobs, including the shift supervisor who could have been held to a higher standard of accountability for keeping the rules than the two junior employees who had accompanied her on the overly long break.

[29] Accordingly I have found Ms Zhang was subject to an inadequately explained disparity of treatment over that issue and, for other reasons given in this determination, her dismissal was not justified.

⁴ *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 at [45] (CA).

[30] Similarly Ms Gao's oral evidence revealed that her investigation of company telephone records, initiated after the 16 May meeting with Ms Zhang, identified other workers who had 'hung up' on customer calls. Ms Gao said this resulted in three operators being called to meetings with her and Ms Du. She said each had then acknowledged their fault and promised it would not happen again. None of those three were dismissed.

[31] In her 29 May letter of explanation Ms Zhang had accepted the seriousness of the issue of ending customer calls and described it as "bad behaviour" and "misguided". It included this statement:

After this event, I woke up from this misunderstanding, for my future work, I will try my best to ensure I perform well in my role, I will never treat my work with this mistakenly negative attitude.

[32] However, again, her apparent contrition was treated differently from that of other workers in a manner that was effectively punishing her for having asked in the 16 May meeting for information about the allegations. The evidence from Ms Gao and Ms Du did not establish an adequate explanation for the difference and, for other reasons given in this determination, Ms Zhang's dismissal was not justified.

Process

[33] In support of its submission that it had fairly carried out its disciplinary process, including by finding Ms Zhang was dishonest in her initial reply about the 15 May break, the company relied on a principle stated by the Employment Court in *George v Auckland Council*. The following passage from that judgement aptly sets the procedural context:⁵

In order to undertake a fair and proper disciplinary process an employer is obliged to meet certain minimum standards, including adequately particularising the concerns that he/she has; identifying the potential consequences of a finding against the employee; providing sufficient information and a reasonable time to respond; and giving adequate consideration to any explanation given. I do not accept, however, that an employer who becomes concerned that an employee is not being truthful in his/her responses is obliged to conclude a disciplinary process that is already in train and then embark on a new process, or initiate parallel processes. That would lead to unnecessary complexity, delay, and inefficiency. Provided that the requirements of fair process are met, an employer may identify a concern about truthfulness and deal with that concern in the

⁵ [2013] NZEmpC 179 at [101].

course of a pre-existing process. Whether the process that was adopted in this case met the minimum standards is answered by a consideration of what in fact occurred, rather than an application of blanket rules.

[34] What ‘in fact occurred’ in the company’s disciplinary investigation of Ms Zhang were multiple failures in meeting minimum standards of fairness.

[35] She was called to the 16 May meeting without notice after being told by Ms Shangguan that it was a “*formality*” with an implication that it would result only in a warning letter. For the meetings on 10 June and 27 June Ms Zhang was called at home during a period when she was known by Ms Shangguan, Ms Gao and Ms Du to be in poor health, even if Ms Zhang (when asked) agreed to attend the meetings. Ms Shangguan’s evidence was that she had on two occasions of telephoning Ms Zhang to attend those meetings – on 9 June and 26 June – mentioned, at Ms Du’s instruction, that Ms Zhang could bring a support person. Ms Zhang accepted she was told that. However neither Ms Du’s letter outlining concerns given to Ms Zhang on 27 May nor a further letter given to her on 10 June referred to the disciplinary nature of the meetings, the prospect of a disciplinary sanction (including the prospect of dismissal) or Ms Zhang’s right to get advice on the issue and have a representative accompany her. In her WeChat exchange with Ms Du on 29 May Ms Zhang had asked “*is the company going to fire me*” but it was a prospect or possibility that she was guessing at rather than having been properly advised of potential outcomes by her employer.

[36] It was not a minor defect and resulted in her being treated unfairly because, properly notified, she could have sought advice and support that may have discouraged the company from imposing the ultimate sanction of dismissal.

[37] The company also failed to give Ms Zhang the information that it gathered and relied on in its disciplinary investigation so she could properly consider and comment on it. This included Ms Gao’s research on telephone calls, copies of recordings of telephone calls with customers, and varying information from different workers about the time taken on the 15 May break. Ms Du also received information from the company’s Quality Control Department that she summarised in the 29 May letter but Ms Zhang should, fairly, have been given the actual reports and the opportunity to listen to phone recordings in which she was said to have inadequately dealt with customer inquiries.

Heard by the decision-makers?

[38] The evidence of Ms Du and Ms Gao established decisively that the decision to dismiss Ms Zhang was not made by them. Instead it was made, in Hong Kong, by the the company's director – Mui Man Bok – and his assistant, 003.

[39] The Hong Kong executives were given a copy of Ms Zhang's explanation letter, Ms Gao's meeting notes for 10 June (and possibly 29 May), and some customer call information. It was unclear from the evidence of Ms Du and Ms Gao, even after questioning in the Authority investigation, exactly what other oral or written reports they had provided about their investigation of Ms Zhang's conduct.

[40] Ms Du's evidence was that she was given instructions to dismiss Ms Zhang on the grounds of "*ill treatment of the company's customers and the way that she conducted herself during the disciplinary meeting*".

[41] Facing the prospect of dismissal Ms Zhang had the right to be heard in person by those who were making the decision. In *Irvine Freightlines Limited v Cross* Judge Palmer stated:⁶

It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.

[42] In *Quinn v BNZ* the Court emphasised that written reports of the employee's position or explanation are not sufficient:⁷

The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision-maker."

[43] Ms Zhang did not get 'a real and purposeful hearing' by all the people who made the decision. The director and his assistant (003) could have only relied on Ms Du and Ms Gao's account of Ms Zhang's explanation and that account was marred by the inadequacies of the disciplinary process, the unfair criticism of Ms Zhang asking for information she was entitled to have, and an assessment of inadequacies in her

⁶ [1993] 1 ERNZ 424 at 442.

⁷ [1991] 1 ERNZ 1060 at 1070.

performance in dealing with customer inquiries that had not been properly subject to the opportunity for improvement.

[44] However, if I were wrong about the justifiability of the Hong Kong executives coming to the decision they did about Ms Zhang's conduct and performance (and the way they had done so), there was a second decision they made that Ms Zhang was entitled to be heard on by them — that was the decision to dismiss her at that time.

[45] It was not an academic or abstract point. Ms Zhang had not been subject to any prior disciplinary or performance inquiries. Given the opportunity to make a 'plea in mitigation' directly to the director or his assistant Ms Zhang may have persuaded them to impose a less severe sanction than dismissal. This is particularly plausible because the two other workers involved in the break issue had received warnings and bonus disqualifications and the three other workers who were identified as having 'hung up' on customers calls were not dismissed.

[46] The disciplinary options were never put to Ms Zhang and she was not given any opportunity to make any submissions on them. Ms Gao's notes for the 10 June meeting record that Ms Du, near the end of the meeting, said the company "*may consider suspension with pay as penalty*" and when Ms Zhang asked "*how long*", Ms Du replied that the company had not decided on a penalty.

[47] A fair and reasonable employer could not have failed to advise Ms Zhang of the prospect of dismissal and to have heard from her on that and other disciplinary options. That defect in the company's process was more than minor and resulted in Ms Zhang being treated unfairly because there was some reasonable prospect that its decision may have been different if it had taken that step (given the different treatment of the other workers over the long break).

Performance concerns

[48] There were a number of performance issues outlined in Ms Du's 27 May letter – not providing one customer with accurate information that a particular game was available on a website, not having checked on a recent update to the customer service manual, not recording a customer complaint on the proper form, and 'hang ups' on customer calls in five days during May.

[49] In *Trotter v Telecom New Zealand Limited* the Employment Court set out this non-exhaustive list of questions as a useful guide in assessing the fairness of how an employer has dealt with concerns about a worker's performance of his or her duties:⁸

- (1) *Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) *If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
- (3) *Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*
- (4) *Was a reasonable time allowed for the attainment of those standards?*
- (5) *Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
 - (a) *Using an objective assessment of measurable targets;*
 - (b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
 - (c) *Listening to the employee's explanation with an open mind;*
 - (d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
 - (e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment.*

[50] In respect of identified issues in Ms Zhang's performance the company did not give her an adequate opportunity to improve against measurable standards over a reasonable period of time. It was remedial action that it was prepared to take with other operators who had 'hung up' on customer calls. The company neither attempted nor exhausted possible remedial steps for Ms Zhang's performance before deciding to dismiss her. Significantly the dismissal letter did not refer to those concerns. Ms Du's evidence was that the customer service issue was a decisive reason in Mr Mui's decision to dismiss Ms Zhang (as passed on to Ms Du by 003) but Ms Du said she forgot to refer to it in the dismissal letter.

⁸ [1993] 2 ERNZ 659, 681.

Was serious misconduct established?

[51] In all the circumstances a fair and reasonable employer could not have concluded Ms Zhang's conduct in asking for information from her employer about the basis of allegations made about her was dishonesty amounting to serious misconduct. While a single incidence of a late return from a break could, in other circumstances, constitute conduct deeply impairing of trust and confidence, it was not a conclusion that a fair employer could have reasonably reached about Ms Zhang but not the other two workers involved. The difference of degree – between being around 10 minutes late back from a break on a single occasion, as opposed to around 30 minutes or on repeated occasions – was also a factor that could reasonably have been weighed in considering whether serious misconduct had occurred.

[52] The other concerns about her performance – already noted – could not have justified a conclusion of serious misconduct at the time Ms Zhang was dismissed because fair remedial steps had not yet been attempted.

[53] Consequently I have concluded the company failed to establish its disciplinary investigation and dismissal of Ms Zhang was carried out and decided for procedurally and substantively justified reasons. She was unjustifiably dismissed and was entitled to an assessment of remedies.

Remedies: lost wages

[54] During the Authority's case management conference with the parties' representatives on 2 February 2015, the sought remedy of lost wages was identified as being subject to Ms Zhang providing evidence of reasonable endeavours by her to mitigate her loss. The issue was listed in a Minute sent to the parties soon after that conference call. Neither her written witness statement, dated 20 March 2015, nor her reply witness statement dated 11 May 2015, provided any substantive evidence about any job search or employment subsequent to her dismissal in June 2014 or any health information that explained whether she was well enough to seek work in some or all of the period from the date of her dismissal to the date (at the latest) of her 11 May statement. A Common Bundle of Documents lodged by the representatives, at the

Authority's direction, included no evidence of job search or earnings. It had her medical records up to 22 July 2014 but nothing later.

[55] In her 20 March 2015 witness statement Ms Zhang said she was “*not fully recovered to date*” but said she had endured a painful recovery from her miscarriage while looking for employment as she and her husband still had a mortgage to service and a life to put back together.

[56] In seeking the remedy of lost wages, Ms Zhang was obliged to show what she had done to seek other work and income from the date of her dismissal on 27 June 2014 because:⁹

... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[57] At the Authority investigation meeting Ms Zhang's oral evidence on what she had done to mitigate her loss of wages was that it was not until the end of August 2014 that she really began to search for work in earnest and that she was successful in gaining new employment from 12 December 2014. She had not felt well enough before August to look for another job.

[58] Under s123(1)(b) and s128 of the Act, where the Authority has established that an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must award the employee the lower amount of the following – either the lost remuneration or three months ordinary time remuneration.

[59] The assessment of the appropriate period of loss has been described this way by the Court of Appeal in *Telecom New Zealand Limited v Nutter*:¹⁰

... [F]ull compensation must be assessed in light of all contingencies and in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the

⁹ *Allen v Transpacific Industries Group Ltd (t/a Medismart Ltd)* AC20/09, 4 May 2009 at [78].

¹⁰ [2004] 1 ERNZ 315 at [81].

likelihood that had a proper procedure been followed the employee would have been dismissed.

[60] Although Ms Zhang's period of lost wages was from two weeks after her dismissal (because she was paid two weeks' notice) until 12 December 2014 – that is about 21 weeks – her properly mitigated loss cannot be assessed at being that long. Her account of her job search from the end of August until the start of her new job gave a period of 14 weeks but given the absence of supporting information about job applications I have concluded the period of loss should be assessed as at no more than the three month lesser period referred to in s128(2) of the Act. Taking that period to amount to 12 weeks for the purpose of calculation and using the hourly pay rate of \$19.20 ordinary time remuneration stated in Ms Zhang's employment agreement with the company and a 40 hour week, the resulting award for lost wages totalled \$9,216.

[61] I have considered whether any reduction should have applied to that amount to account for contingencies, as contemplated in the *Nutter* case, but concluded none properly applied. Ms Zhang's ill-health as a result of her miscarriage was no longer a relevant factor after August (when she began her job search) and I have not accepted she could otherwise have been dismissed but for procedural defects in the company's investigation and decision. As a matter of probability, with properly conducted performance management, she was just as likely to have continued to be employed by the company.

Remedies: distress compensation

[62] Ms Zhang gave evidence of having felt shocked and humiliated by the circumstances of her dismissal. Her sense of distress was compounded by the disciplinary meetings having occurred around the time she experienced the symptoms of what was later confirmed to be the miscarriage. Hospital records established the miscarriage had probably occurred earlier in her pregnancy, around April, but it was not until May and early June that the symptoms of it became more apparent through pain and bleeding she experienced (including at work on 29 May and 10 June). Those sad health circumstances were relevant not because there was any suggestion that the workplace issues contributed to her miscarriage – with Ms Zhang accepting in her evidence that they did not – but because it meant she was in a particularly vulnerable physical and emotional state at the time, particularly of the 10 June and 27 June

meetings, and the New Zealand managers were aware (because of her requests for sick leave) of her state of health. As a result Ms Zhang's sense of distress about her dismissal was heightened or magnified. An award of compensation under s123(1)(c)(i) of the Act addresses that injury to her feelings but not the other natural emotional distress she felt about the miscarriage of her pregnancy. In setting the appropriate level of distress compensation I have been mindful of that distinction and concluded the appropriate figure was \$9000 as an appropriately modest amount and within the normal range of awards in similar cases.

Remedies: any reduction for contributory behaviour?

[63] As required by s124 of the Act I considered whether the award of lost wages and distress compensation should be reduced due to any blameworthy actions by Ms Zhang that contributed to the situation giving rise to her grievance.

[64] She did not contribute to the procedural failings in how the company carried out its investigation and decided to dismiss her so no reduction was required on that account.

[65] However she had accepted during the course of that investigation that she took an overly-long break on 15 May and had not applied the right attitude in terminating customer calls. It was blameworthy conduct but I was not persuaded by the company's submissions that a substantial reduction of remedies – of at least 50 per cent – was consequently warranted. Two other workers who took long breaks that day kept their jobs and had reduced bonuses for a set period. Other workers were identified in Ms Gao's investigation as having hung up on customer calls but remained employed with no other identified sanction. A reduction of ten per cent of the remedy of lost wages awarded to Ms Zhang was sufficient to mark admitted failings by her in her conduct. The reduction does not apply to the distress compensation.

Breach of good faith - penalty

[66] Ms Zhang sought the imposition of a penalty on the company for failing to observe good faith duties – particularly around the provision of information relevant to the continuation of her employment. There was a clear failure in that respect by the company that appeared to be based on its attitude that the company should not be 'put

to proof⁷ in having to give her information about the basis of the allegations made. It was a view at odds with the good faith emphasis in New Zealand employment law and the entitlement of workers to have relevant information in responding to an employer's concerns.

[67] However I have accepted the company's submission that the failing was one, at worst, of competence or understanding of the managers involved rather than meeting the necessary standard of deliberate or reckless behaviour that would warrant a penalty. The wrong done to Ms Zhang in that respect was also remedied sufficiently, I concluded, without the need for a further penalty to be imposed.¹¹

Summary of outcome

[68] For the reasons given I have found that:

- (i) Ms Zhang was unjustifiably dismissed.
- (ii) Ms Zhang is entitled to awards of lost wages of \$9216 and of compensation under s123(1)(c)(i) of the Act of \$9000.
- (iii) A reduction of ten per cent of the lost wages remedy, to mark contributing behaviour by Ms Zhang, should be applied under s124 of the Act so that the following amounts are now due to her from the company: \$8294.40 as lost wages and \$9000 as distress compensation.

Costs

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[70] If they are not able to do so and an Authority determination on costs is needed Ms Zhang may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the company would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

¹¹ See *Xu v McIntosh* [2004] 2 ERNZ 448 at [45] and *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [103].

[71] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors required an adjustment upwards or downwards.¹²

Robin Arthur
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.