

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 82
5636146

BETWEEN LEA ZHAO
 Applicant

A N D MULTIMARKETING LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Andrea Kelleher, Advocate for Applicant
 Edwin Morrison and Joy Yan, Counsel for Respondent

Investigation Meeting: 28 February 2017 and 1 March 2017 at Auckland

Submissions Received: 3 March 2017 from Applicant
 3 March 2017 from Respondent

Date of Determination: 23 March 2017

**DETERMINATION
OF THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Lea Zhao was unjustifiably dismissed by Multimarketing Limited.**
- B. In order to settle Ms Zhao's personal grievance claim, Multimarketing is to make payment of the following sums to her within 21 days of the date of this determination:**
- (a) \$17,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), for humiliation, loss of dignity and injury to feelings in respect of her unjustifiable dismissal;**

- (b) Pursuant to s.128(2) of the Act, reimbursement of lost salary in the sum of \$10,147.41 gross for the 3 month period from the date of dismissal on 17 June 2016.

C. Costs are reserved.

Employment relationship problem

[1] Ms Zhao was contracted by Multimarketing Limited (Multimarketing) from 22 June 2015 until 3 September 2015 to provide marketing and events services.

[2] From 28 September 2015 until her dismissal on 17 June 2016, Ms Zhao was employed by Multimarketing in the full time role of Events and PR Manager pursuant to an individual employment agreement dated 2 September 2015.

[3] Ms Zhao says her dismissal was substantively and procedurally unjustified. Ms Zhao claims reimbursement of lost remuneration together with compensation for hurt and humiliation that she says she suffered as a result of the dismissal.

[4] Multimarketing says it justifiably dismissed Ms Zhao for serious misconduct following a full investigation. In its letter of dismissal dated 17 June 2016, Multimarketing sets out the following grounds for dismissal:

- (a) Ms Zhao had a second job while employed by it which was in conflict with her role at Multimarketing;
- (b) Ms Zhao repeatedly refused to complete tasks assigned to her; and
- (c) Ms Zhao made disparaging comments about Multimarketing.

[5] Multimarketing says each of these actions by Ms Zhao constituted serious misconduct and accordingly it was justified in dismissing her without notice, following a disciplinary investigation.

The investigation meeting

[6] Ms Zhao, her partner Mr Craig Wilderspin and a former colleague at Multimarketing, Ms Cindy Zhang each filed a witness statement prior to the investigation meeting. Ms Baomin (Pauline) Gao, Multimarketing's director also filed

a witness statement prior to the investigation meeting. Each witness affirmed that their evidence was true and correct.

[7] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

The issues

[8] The issues for the Authority to determine are as follows:

- (a) Was Ms Zhao's dismissal justified?
- (b) If the dismissal was not justified, what remedies should be payable to Ms Zhao?
- (c) If remedies are payable to Ms Zhao, did she contribute to the dismissal, and if so, should the remedies be reduced by the Authority pursuant to s.124 of the Act.

First Issue

Was Ms Zhao's dismissal justified?

Multimarketing

[9] Multimarketing is a marketing company based in Auckland, New Zealand with strong connections to Chinese business networks. Ms Gao is the sole director and majority shareholder of Multimarketing.

[10] Multimarketing provides information to Chinese immigrants to New Zealand and also to New Zealanders planning on doing business in China.

[11] Multimarketing provides marketing strategies, branding and a number of other services which are aimed at targeting the Asian market within New Zealand and introducing New Zealand brands into the Chinese market.

[12] Multimarketing provides services to both Asian and New Zealand companies requiring branding, design, copyright and media strategy. Its website states:

Multimarketing specialises in campaigns that reach across different cultures. We have helped New Zealand companies boost their sales

by targeting the cash-rich Chinese-speaking audience in Auckland. We have also come up with strategies in creative work to help Kiwi exporters enter China.¹

Interview with Multimarketing

[13] Ms Zhao became aware of the position of Marketing Coordinator and PR at Multimarketing when its Marketing Manager at the time, Mr James Sun, posted the position on Wechat, an instant messaging application. Ms Zhao applied for the role and emailed her CV to Mr Sun. Ms Zhao's work experience included public relations, media relations, journalism and marketing.

[14] Ms Zhao was interviewed by Mr Sun and Ms Gao at Multimarketing's offices in Ponsonby, Auckland. Ms Gao's business partner, Ms Pat Mo also met Ms Zhao. Mr Sun and Ms Gao were happy with Ms Zhao's qualifications and experience. Ms Zhao's qualifications, experience and the fact that she knew Mr Sun were all important considerations for Ms Gao. Also, Ms Gao intended Ms Zhao to undertake a trial period so she could assess her ability to perform the role. Accordingly, Ms Gao did not think it necessary to undertake any background or reference checking in respect of Ms Zhao.

[15] Ms Gao offered and Ms Zhao accepted a consultancy position providing marketing and events services to Multimarketing. Ms Zhao's consultancy contract was for approximately 2 months.

Permanent employment – 28 September 2015

[16] Ms Gao was very satisfied with Ms Zhao's performance during the consultancy. On 2 September 2015, Ms Gao offered Ms Zhao a permanent full-time position as Events and PR Manager with Multimarketing. The position was to commence on 28 September 2015, after Ms Zhao returned from holiday.

Employment Agreement

[17] Ms Zhao was provided with and signed an employment agreement on 3 September 2015.

¹ www.multimarketing.co.nz

[18] Schedule 1 of the employment agreement stated that Ms Zhao would report to the Managing Director, Ms Gao, hours of work were 40 per week from 9.30am-6.00pm with a salary of \$45,000 gross per annum. Holidays of 4 weeks per year and 5 days sick leave were also set out in the Schedule.

Requirements of the role

[19] The job overview in Schedule 2 stated:

The Events and PR manager is responsible for the management and coordination of all events ... by Multimarketing. Additionally, this position is responsible for the development and implementation of the marketing and public relations plans and the maintenance of multiple social media (such as website, wechat etc) for Multimarketing and its clients. This position develops sponsorship/trade/business arrangements and relationships with businesses, individuals and organizations interest in supporting Multimarket/Yiju's events and activities. This position will work in coordination on other projects as assigned with the marketing manager or other staff as well.

[20] Performance indicators required the role to work with and support the marketing manager in respect of Marketing including for the "Wechat platform", "marketing and promotional initiatives for Multimarketing & Yiju"; to "plan and coordinate Yiju marketing communications initiatives"; and to "... identify opportunities for continuous improvement to the Yiju & Multimarketing's administrative systems...". Weekly updates to the manager and weekly team meetings regarding the performance indicators were also a requirement of the role.

[21] The position description stated that the position reported to and would be supported by the managing director and general manager who will:

Ensure that you receive:

- regular appraisals;
- regular feedback on your performance highlighting areas of strength and opportunities to grow and develop;
- support in exploiting commercial opportunities, presentations and events where you feel your chances of success are enhanced by delivering a team sell or presentation;
- reasonable resources include business expense and in-house staff.

[22] Clause 9 of the employment agreement provided for performance reviews as follows:

9.1 To maintain its standards, Multimarketing will set and record performance measures each year in consultation with you. Multimarketing will monitor your performance against such measures in an on-going basis and will undertake a performance and planning review at least annually.

9.2 Where performance standards are not being met, remedial/disciplinary procedures will be followed stop.

[23] Clause 15 provided in respect of other work/other business as follows:

15.1 Should you wish to take up or continue in secondary employment, engage in or be otherwise interested in other business activities, you must first seek the written permission of Multimarketing.

15.2 You undertake during your employment with Multimarketing not to establish yourself or engage in private business or undertake other employment in competition to Multimarketing or which in any way conflicts with Multimarketing's business without the express written consent of Multimarketing.

15.3 Multimarketing shall not unreasonably withhold its approval; however approval may be withheld if the secondary employment or business activity is a conflict of interest or could create a business risk. (e.g health and safety risk/fatigue).

[24] The work at Multimarketing was high pressure. Ms Gao was extremely busy running all aspects of what she described as a "start-up" business. Ms Gao required all employees to pitch-in to ensure that publication deadlines were met and events were organised in a timely fashion.

[25] During the course of Ms Zhao's employment, a number of employees left and she found herself being asked to perform more and more tasks, some of which she was uncomfortable with as she felt she did not have the necessary skill or technical knowledge. In particular, Ms Zhao suggested to Ms Gao that she employ an editor of YIJU magazine, which was owned by an associated company of Multimarketing, when the former editors left. This did not occur.

[26] Despite not having what she considered to be the necessary skills, Ms Zhao continued to perform duties which she did not consider were part of her job description in order to ensure that the work was done.

[27] This became an issue for her and for Ms Gao in approximately April 2016. The other matter which became an issue related to the payment of Ms Zhao's salary. Ms Zhao's salary was delayed on a number of occasions during the course of her

employment and she also discovered that PAYE had not been deducted by Multimarketing.

Meeting on 18 April 2016

[28] At about 5.30pm on 18 April 2016, Ms Gao asked to speak with Ms Zhao. They discussed the YIJU magazine, the fact that it had been delayed on a number of occasions and had missed the latest deadline of 15 April 2016. Ms Zhao felt that she was being blamed by Ms Gao for the delays. Ms Zhao felt that the areas of the YIJU magazine that she was being required to work on were not part of her job description, particularly its distribution. Ms Zhao felt that the departure of the latest editor, in February/March 2016, meant her workload had become unmanageable.

[29] At the meeting, Ms Gao raised with Ms Zhao the need for her to have a new Key Performance Indicator (KPI) which was that she sell \$3,000 of media and events per week. Ms Zhao was concerned by the KPI as she was not employed as a sales person and was not experienced in sales. When Ms Zhao asked Ms Gao what would happen if she was unable to meet that KPI, Ms Zhao says the response was that if it was not met within three months she would be replaced. At the Authority's investigation meeting, Ms Gao denied saying this but agreed there was a discussion about a company wide sales KPI.

[30] When Ms Zhao got home, she discussed the meeting with her partner, Mr Wilderspin, who suggested she make a note of what had happened at the meeting. Ms Zhao emailed herself notes entitled "Gmail- Meeting Minutes 2016-4-18". Ms Zhao also recorded in her email her concerns that her PAYE did not appear to have been deducted from her salary in the months June 2015 until December 2015, also her concerns that on a number of occasions her salary had been paid late.

[31] Ms Zhao kept notes of subsequent meetings and emailed them to herself, following this meeting.

Ms Zhao's performance

[32] Ms Zhao says that despite what was stipulated in her employment agreement, she did not receive any appraisals, nor did she receive a performance review. Ms Zhao says she did not receive regular feedback or reasonable resources from Ms Gao.

[33] When asked about steps taken before the meeting to discuss any issues with Ms Zhao about her work, Ms Gao said that after each event held by Multimarketing, the team met to discuss the event and what went well and what could be improved upon. Ms Gao said that these discussions were in the form of an “appraisal” of Ms Zhao’s performance. Ms Zhao agreed that team meetings were held about events but these were not about individual performances.

[34] I do not accept that the discussions held after events were appraisals as contemplated by the employment agreement. These discussions did not, for example, explore areas of strength and opportunities to grow and develop in relation to Ms Zhao’s performance. Ms Gao took no notes of any “appraisals” held by her. In my view, the discussions were team sessions to discuss the success or otherwise of events organised by Multimarketing and how they could be improved, they were not appraisals.

[35] Ms Zhao began to take notes after the meeting on 18 April 2016. Ms Zhao’s evidence to the Authority about what occurred at that meeting was consistent with the content of her contemporaneous notes. This was also the case with her evidence in respect of the next meeting on 9 May 2016, following which she received a written warning.

[36] I found Ms Gao’s evidence to the Authority not credible and unreliable. On more than one occasion during the investigation meeting, when asked questions about the disciplinary process, Ms Gao would not reply to the question. Rather, she focussed her answers on how challenging the business was and how many opportunities she had given to Ms Zhao. On other occasions Ms Gao was inconsistent. At the Authority’s investigation meeting, Ms Gao’s descriptions of the meetings with Ms Zhao on 18 April and 9 May 2016, which were important meetings, were that they were casual or very casual. Following questioning by the Authority about the nature of the meetings they were described by Ms Gao as being formal.

[37] Overall, I preferred Ms Zhao’s evidence.

Meeting – 9 May 2016

[38] Ms Gao was due to travel to China on the evening of 9 May 2016. At about 5pm, Ms Gao called a meeting with all staff at Multimarketing to discuss projects

while she was away. After the meeting, Ms Gao asked for a meeting with Ms Zhao and the new office manager, Ms Joanne Chen. This meeting was at 5.32pm.

[39] Ms Gao raised a number of issues with Ms Zhao. One issue concerned Ms Zhao's answer to a Wechat group about electricity supply. Ms Gao and her business partner, Ms Mo, were in the same Wechat group and considered that Ms Zhao's answer to the question indicated that she had a secondary job and was spending time on her own business during work hours.

[40] Ms Zhao had just set up a company and had purchased her house in its name. Ms Zhao's partner, who works in the electricity industry, thought at some stage he may provide electricity brokerage services with Ms Zhao's assistance. However, the business was not set up in competition to Multimarketing and there were no customers. Ms Zhao said she answered the question on Wechat, but did not spend work time on the business.

[41] Ms Gao also spoke to Ms Zhao about the YIJU magazine and the delays in publishing. Ms Zhao was informed at the end of the meeting by Ms Gao that she was receiving a verbal warning in respect of these matters and that Ms Chen would send a letter of warning to her.

[42] Ms Zhao was not told that she was to attend a meeting to discuss her performance, nor was she told the outcome may be a warning. Ms Zhao recorded the meeting details in an email to herself on 9 May 2016 at 7.13pm.

[43] Ms Zhao felt Ms Gao was attempting to remove her from Multimarketing and she was concerned about the repeated late payment of her salary and the failure of Multimarketing to deduct PAYE from her salary.

[44] Following this meeting at which Ms Zhao received a warning, she kept a detailed recording of the work that she performed in the office each day.

17 May 2016 – written warning

[45] On 17 May 2016, Ms Zhao received a written warning. The warning was in the Mandarin language and set out five issues. The warning was subsequently translated into English following a request by Ms Zhao's representative.

[46] The first issue related to Ms Zhao's "work attitude" and alleged that Ms Zhao "always refused to do assigned simple tasks using the reason that you, 'do not know how' because you have not completed such tasks before". No examples of the occasions when this had occurred were provided.

[47] The second issue related to the YIJU magazine. The issues included Ms Zhao's inability to "communicate effectively, inability to efficiently organise tasks and staff and the delay in publishing the magazine". No examples of such conduct were provided.

[48] In relation to the organisation of the Manhua Feng Shui seminar which had taken place in February 2016, the allegation was that Ms Zhao's event summary report was "not submitted on time and the contents were of poor quality". No details of "poor quality" and what was expected were provided.

[49] The third issue set out in the letter was a failure by Ms Zhao to provide clients with a professional media planning proposal. No details were provided.

[50] The fourth issue was that Ms Zhao had engaged in "private works that were in conflict with the company's interests during normal working hours ...". A screenshot of a Wechat conversation was provided in support of this allegation.

[51] With the fifth issue, it was alleged Ms Zhao had made "disparaging comments in front of our clients which seriously damaged the company's interest and reputation". No details were provided.

[52] The letter concluded with the statement that the company was "issuing a warning letter and with the hope that Ms Zhao could improve in the next four weeks of observation period".

[53] On 18 May 2016, Ms Zhao was sick and emailed Ms Gao informing her of this.

Ms Zhao's response

[54] Ms Zhao was upset when she received the letter and sought representation. On 19 May 2016, Ms Zhao's representative sent a letter by email to Ms Gao raising a personal grievance in relation to the warning letter, recording that as the letter was in

Mandarin no further details could be provided at that stage but confirming that Ms Zhao viewed the issues raised as unreasonable.

[55] Ms Zhao's representative also raised the failures of Multimarketing in relation to Ms Zhao's holiday and salary entitlements. A request was made on behalf of Ms Zhao to explore whether the parties could mutually resolve the matters between the parties.

[56] This letter was not responded to and Ms Zhao's representative sent a further email on 31 May 2016 asking for an urgent response from Multimarketing as Ms Zhao was finding the employment situation very difficult while matters remained unresolved.

Letter from Multimarketing - 31 May 2016

[57] At the Authority's investigation meeting, Ms Gao said that when she received the letter of 19 May 2016 from Ms Zhao's representative she took the matter extremely seriously and obtained legal representation to assist with a letter in reply.

[58] In the letter to Ms Zhao of 31 May 2016, Ms Gao raised four matters which she wished to investigate further.

[59] The matters raised in the letter of 31 May were that:

- Ms Zhao had other full-time employment in addition to her role at Multimarketing and was making phone calls during office hours which were unrelated to her work at Multimarketing. These allegations were said by Ms Gao to have seriously undermined her trust and confidence in Ms Zhao;
- certain customers claimed Ms Zhao had made disparaging comments about Multimarketing and that she had made disparaging comments in front of two Multimarketing employees. This conduct was alleged to have seriously damaged Multimarketing's reputation;
- Ms Zhao had repeatedly failed to follow reasonable instructions; and
- Ms Zhao had failed to provide a medical certificate for sick leave taken on 18 May 2016.

[60] No details of the allegations were provided in the letter. Ms Zhao was asked to attend a meeting on 2 or 3 June 2016 to respond to the allegations.

[61] The letter concluded:

Each of the above issues and allegations, if proved, could amount to serious misconduct and accordingly if such conduct is determined following an investigation could result in your dismissal.

Letter from Ms Zhao's representative – 1 June 2016

[62] Ms Zhao was sick on 1 and 2 June 2016 and provided medical certificates to Ms Gao. On 1 June 2016, Ms Zhao's representative replied to the letter of 31 May 2016. In it, she requested that Ms Gao provide information to support the allegations being made against Ms Zhao. A request was also made for the warning letter of 17 May 2016 in Mandarin, to be provided to her in English. Ms Zhao's representative concluded: "... I am unable to represent Lea at a meeting when I am unaware of all relevant matters ...When I have the necessary information I will be able to advise her further".

Letter from Multimarketing's lawyers – 3 June 2016

[63] The details and information requested were not provided. Rather, the lawyers for Multimarketing sent a letter to Ms Zhao's representative incorrectly stating that Ms Zhao's representative had failed to reply to the letter of 31 May 2016 and requiring Ms Zhao to attend a meeting on 7 or 8 June 2016.

Letter from Multimarketing's lawyers – 9 June 2016

[64] On Wednesday, 9 June 2016, Multimarketing's lawyers sent a letter to Ms Zhao's representative enclosing a translation by the lawyer of the warning letter of 17 May 2016 into English. The letter states:

Notwithstanding that your client is a native Mandarin speaker I have translated the initial letter for you and attach a copy. I am not Court certified translator so if you have any specific language requirements you should engage properly qualified independent translators.

[65] The letter requests a meeting on Monday, 13 June 2016 at 10am or 3pm with Ms Zhao.

Letter from Ms Zhao's representative - 10 June 2016

[66] Ms Zhao's representative replied to the letter from Multimarketing's lawyers recording that she had only just received the English translation of the 17 May 2016 warning letter and that, "To date I haven't received the information requested in order to adequately represent Lea fully". The request was again made for information and complaints which led to the warning letter to be provided.

Letter from Multimarketing's lawyer to Ms Zhao's representative - 13 June 2016

[67] The letter stated:

... it is our client's intention to meet with your client to progress its investigation relating to the potentially serious matters particularised in the employer's letter of 31 May 2016. Our client intends to continue with the investigation and does not wish to undertake this process together with your client's alleged grievance at the same time as this will only complicate matters unnecessarily. We can deal with your client's alleged grievance separately.

To date the employer has proposed the following dates to meet:

- (a) Thursday 2 June 2016 at 11am.
- (b) Thursday 2 June 2016 at 2pm.
- (c) Friday 3 June 2016 at 10am.
- (d) Tuesday 7 June 2016 at 10am.
- (e) Tuesday 7 June 2016 at 3pm.
- (f) Wednesday 8 June 2016 at 10am.
- (g) Monday 13 June 2016 at 10am.
- (h) Monday 13 June 2016 at 3pm.

Your client has not responded to any of these dates and has refused to meet. We will attend the 3pm meeting this afternoon and invite you to attend with your client.

[68] In support of Multimarketing's claim that it had undertaken a full and fair investigation, counsel for Multimarketing in its closing submissions states:

Multimarketing suggested 8 meeting times at the respondent's offices, during the applicant's normal business hours.

The applicant did not meet at each of the proposed times. ... the applicant met with the respondent on 14 June 2016 for the investigation meeting.

[69] At the Authority's investigation meeting, Ms Gao accepted that the first three dates and times offered to Ms Zhao were at times when she was away on sick leave.

Ms Zhao provided Ms Gao with a medical certificate that she was not fit to return to work until Tuesday 7 June 2016.

[70] Therefore, the first time that Ms Zhao was able to meet was on the fourth date offered, being 7 June 2016 at 10am. However, Ms Zhao's representative did not receive an English translation of the 17 May warning letter until 9 June 2016 and made it clear to Multimarketing's lawyers that she was not able to adequately represent Ms Zhao without the information sought.

[71] Therefore, out of the eight dates and times offered by the lawyers acting for Multimarketing, there were only two dates on which Ms Zhao could meet, namely on 13 June 2016 at 10am or 3pm.

Letter from Ms Zhao's representative to Multimarketing's lawyers – 13 June 2016

[72] Ms Zhao's representative was unable to meet at the time specified and wrote to Multimarketing's lawyers informing them of this and repeating her request for relevant information. The meeting was adjourned until 14 June 2016.

Investigation Meeting - 14 June 2016

[73] Ms Zhao attended the meeting alone because her representative was unable to attend. Multimarketing was represented by two experienced lawyers. Ms Zhao was asked to respond to allegations by Multimarketing made in its letter dated 31 May 2016.

Allegations of conduct which seriously undermines our trust and confidence

- **Whether you have other full time employment in addition to this role**

[74] This allegation was made on the basis of one response by Ms Zhao to an inquiry by a member of a public group on Wechat concerning electricity suppliers. Ms Zhao explained herself to Ms Gao and that it was simply not possible for her to have another fulltime job in addition to her position at Multimarketing.

[75] It is my view from the evidence, that Ms Zhao was not performing other work while employed by Multimarketing and she was not carrying on business in competition with Multimarketing.

- **Personal phone calls during working hours**

[76] Ms Zhao disputed this claim and offered to make her phone records available to Multimarketing. This offer was not taken up.

[77] At the Authority's investigation meeting when questioned about this matter Ms Gao said she had heard from other staff in the office that Ms Zhao had been making personal calls.

[78] Ms Gao did not take any steps to obtain details from the staff as to what, when or how often these phone calls were supposedly being made. At no stage of Multimarketing's disciplinary investigation did Ms Gao obtain such information or provide it to Ms Zhao as had been repeatedly requested by her representative. No such information was provided to Ms Zhao at the meeting on 14 June 2016 because it had not been obtained by Multimarketing.

[79] Even so, at the Authority's investigation meeting Ms Gao accepted that she had never informed Ms Zhao that she was not to make personal phone calls at work and that if she did she may be disciplined.

Allegations of actions seriously damaging our reputation

Disparaging comments

[80] Ms Gao was asked about this allegation at the Authority's investigation meeting. Ms Gao had heard rumours that Ms Zhao had been disparaging of Multimarketing to the Marketing Manager of HRV. Ms Zhao's written statement set out her response to the allegation.

[81] In fact, Ms Zhao had been attempting to secure business for Multimarketing from HRV. Not only did Ms Zhao explain the circumstances in which she had met the Marketing Manager, she provided Multimarketing with a letter from the Marketing Manager explaining that Multimarketing did not match HRV's requirements and so it would not become a client.

Repeated failure to follow reasonable instructions

[82] With regard to the alleged failure to follow directions, it is my finding from the evidence that Ms Zhao did not refuse to follow reasonable instructions. Rather, Ms

Zhao pointed out to Ms Gao that she felt ill equipped to do some of the tasks required of her, but continued any way to do the work as instructed as best she could. At no stage did Ms Gao inform Ms Zhao that she was issuing her with an instruction and that if she did not comply, she would face disciplinary action.

Correspondence of 16 and 17 June 2016

[83] On 16 June 2016, the lawyers for Multimarketing wrote to Ms Zhao's representative and enclosed a record of the meeting held on 14 June 2016. In the letter, it was claimed that Ms Zhao had refused to respond to the allegation that she had made disparaging comments about Multimarketing. This was not the case. Ms Zhao had provided a written response regarding the allegation she had been disparaging of Multimarketing to the HRV Marketing Manager. In the letter of 16 June 2016, it was stated that the allegation was not limited to the HRV Manager but to "Multimarketing Limited's business. This was referring to customers in a broad perspective and was not intended of limiting to HRV only."

[84] Ms Zhao was asked to reply to the allegation by the close of business on 16 June 2016. Ms Zhao provided a full response on 17 June 2016 and also asked for feedback in relation to her own claims regarding her personal grievance, wages and holiday pay.

[85] On 17 June 2016, Multimarketing responded through its lawyers that a tentative decision had been made that "the issues both collectively and individually amount to serious misconduct" and Multimarketing intended dismissing Ms Zhao that day.

[86] Ms Zhao was given 30 minutes from receiving the letter, to reply. At 4.10pm Ms Zhao's representative sent an email to Multimarketing's lawyers repeating her request for information. Multimarketing confirmed its decision to dismiss Ms Zhao requiring her to leave the premises within 30 minutes of receiving the dismissal letter.

Onus

[87] Multimarketing bears the onus of establishing on the balance of probabilities that its dismissal of Ms Zhao was justified.

Justification

[88] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Multimarketing's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Zhao was dismissed.²

[89] A fair and reasonable employer is expected to comply with its statutory obligations which include each of the four procedural fairness tests set out in s.103A(3) of the Act together with the good faith requirements set out in s.4(1A) of the Act.

Good faith

[90] Section 4(1A) of the Act requires an employer who is proposing to make a decision that may adversely impact on an employee's ongoing employment to give the employee access to relevant information and an opportunity to comment on it before a final decision is made.

[91] That did not occur in this case. Ms Gao accepted at the Authority's investigation meeting that despite repeated requests from Ms Zhao's representative she did not provide the information being relied upon by her to undertake a disciplinary investigation.

[92] Ms Gao relied on rumours she had heard to conclude that Ms Zhao had been making personal phone calls and had been making disparaging comments about Multimarketing. This was a breach by Multimarketing of its obligation to Ms Zhao to act in good faith. This seriously undermines its ability to justify Ms Zhao's dismissal.

Procedural Fairness

[93] For the reasons set out in this determination, the process undertaken by Multimarketing in investigating Ms Zhao's conduct and dismissing her was seriously flawed.

[94] I find that Multimarketing failed to comply with the procedural fairness tests in s103A(3) of the Act. It failed to provide information requested by Ms Zhao, it

² Section 103A(2) of the Act

failed to give her a reasonable opportunity to respond to its concerns and it failed to genuinely consider her responses before summarily dismissing her.

Substantive justification

[95] In assessing whether a finding of serious misconduct and a consequent outcome of dismissal is fair and reasonable, consideration must be given to whether Ms Zhao's conduct was such that it "deeply impairs or is destructive of that basic confidence or trust". This will be a matter of degree in the circumstances³.

[96] I find that the procedural fairness defects and breaches of good faith by Multimarketing were so significant that a fair and reasonable employer could not have concluded that Ms Zhao's actions constituted serious misconduct.

[97] Dismissal for serious misconduct was not the action of a fair and reasonable employer in the circumstances.

[98] The answer to the first issue is "No".

Second Issue

What remedies should be payable?

Compensation under s.123 of the Act

[99] Ms Zhao was distressed by her dismissal and worried about her future. Ms Zhao's partner told the Authority about the impact of the dismissal on Ms Zhao. He said it was the first time Ms Zhao had been dismissed and she was humiliated, shocked and stressed by it. Ms Zhao had just bought a house and was very worried about how she would afford the mortgage payments.

[100] I consider an award of \$17,500 compensation for hurt and humiliation under s.123(1)(c) (i) of the Act appropriate in the circumstances. I order Multimarketing to pay Ms Zhao compensation of \$17,500 within 21 days of the date of this determination.

³ *BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA)

Reimbursement of lost remuneration under s.128 of the Act

[101] Ms Zhao seeks reimbursement of lost remuneration being the difference of income she would have earned at Multimarketing and income actually earned for the period from 17 June 2016 until the date of the investigation meeting. This claim is made under s.128(3) of the Act. The amount sought is \$25,242.40 gross. No evidence or reasons were provided to the Authority in respect of the exercise of its discretion to order reimbursement of lost remuneration for this period of time. I am not convinced I should exercise my discretion to award the sum sought.

[102] Ms Zhao immediately tried to find another job and I am satisfied took appropriate steps to mitigate her loss. Ms Zhao did some work as a legal assistant before obtaining a part-time job on 25 October 2016. Ms Zhao earned a total of \$1352.59 gross in the 3 month period from the date of her dismissal. If Ms Zhao had not been dismissed by Multimarketing, based on her annual salary of \$45,000 gross, she would have earned \$11,500 gross during that period.

[103] I consider an award of lost remuneration for the 3 month period from the date of dismissal to be appropriate. Multimarketing is ordered to pay Ms Zhao the sum of \$10,147.41 gross under s.128(2) of the Act within 21 days of the date of this determination.

Third Issue**Did Ms Zhao contribute to the dismissal?**

[104] The Authority is bound under s124 of the Act to consider whether Ms Zhao contributed to her dismissal and if so to reduce remedies awarded. I do not accept Ms Zhao contributed to her dismissal. Accordingly, remedies awarded will not be reduced.

Costs

[105] Costs are reserved. Ms Zhao has 14 days from the date of this determination to file a memorandum as to costs. Multimarkeing has 14 days from receipt to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority