

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 35  
3105212

BETWEEN

YI ZHOU  
Applicant

AND

BEST HEALTH FOODS LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Brown, counsel for the Applicant  
Yuan Gu, advocate for the Respondent

Investigation Meeting: 19 November 2020 at Christchurch

Submissions Received: 13 January 2021 from the Applicant  
11 January 2021 from the Respondent

Date of Determination: 1 February 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Best Health Foods Limited is to pay Yi Zhou \$4,230.77, pursuant to s 123(1)(b) of the Employment Relations Act 2000.**
- B. Best Health Foods Limited is to pay Yi Zhou \$10,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Best Health Foods Limited is to pay Yi Zhou costs of \$2,321.56.**

**Employment relationship problem**

[1] James Gu is a director of Best Health Foods Limited. Yi Zhou started work fulltime as an accountant for Best Health Foods on 20 January 2020 but was dismissed by Mr Gu by

letter dated 22 January 2020, sent to him by email early on 23 January. The letter advises of the company's decision to terminate the employment under the 90 day trial period clause in the employment agreement, confirming that Mr Zhou is not required to work and would be paid a 3 day notice period.

[2] Mr Zhou raised his claim of unjustified dismissal by letter to the company on 11 February 2020. He says that the employment agreement did not include a 90 day trial period clause. He now applies to the Authority seeking compensation, reimbursement of lost wages and costs.

[3] Best Health Foods says that the 90 day trial period clause was omitted by clerical error, that Mr Zhou breached terms of the agreement so that his employment was terminated under clause 21 for serious and persistent breach of the agreement.

[4] Despite mediation, the problem remains unresolved. This determination resolves Mr Zhou's personal grievance claim.

[5] The Authority organised the independent translation of a letter Mr Zhou sent to Yali Li, which had been produced as evidence. Ms Li is a principal of Best Health Foods. The translation was then sent to both parties for their comments. Responses were received from Mr Gu on 11 January 2021 and Mr Zhou on 13 January 2021.

## **Issues**

[6] It is convenient first to set out a little more about the context in which the problem arose. The following issues then need to be determined:

- (a) Were the company's actions those of a fair and reasonable employer?
- (b) If not, what losses have been established?
- (c) To what extent did Mr Zhou's actions contribute to the situation?
- (d) Do those actions require a reduction in remedies?

## **Context**

[7] The company says it is one of the largest OEM milk powder blending and packaging companies in New Zealand. It advertised for an experienced accountant. Mr Zhou responded and was interviewed. There are several emails between Mr Zhou and Mr Gu in early January 2020. It is not necessary to set out the details except to say that Mr Gu offered and Mr Zhou accepted employment, with an agreed starting date of 20 January 2020. Mr Zhou gave notice to his existing employer and Mr Gu said that he would prepare and send a draft employment agreement for review.

[8] A draft was not sent until just before Mr Zhou started work on 20 January. The draft was signed by both parties around 10.00am that morning, so more than an hour after Mr Zhou had started work. Nothing turns on the timing. The signed agreement is in standard form. Several provisions refer to “your trial and/or probationary period”. However, the signed agreement does not include either a trial period or a probationary period clause.

[9] I accept Mr Gu’s evidence that a trial period clause was omitted from the draft by clerical error. However, there is no basis on which the company can now rely on the limited statutory protection against personal grievance claims that might have applied but for the error. There had been no reference to an intended 90 day trial provision in any of the written exchanges prior to work starting. The company makes no application for relief under the Contract and Commercial Law Act 2017 provisions relating to a contractual mistake. The company’s mistake did not result in an unequal exchange of value or the conferment of a disproportionate benefit or obligation. The omission was entirely the company’s error and Mr Zhou was unaware of the omission.

[10] Mr Zhou is entitled to have his personal grievance claim assessed on its merits.

### **Were the company’s actions those of a fair and reasonable employer?**

[11] Mr Zhou worked ordinary business hours on 20, 21 and 22 January.

[12] There is no reason to doubt Mr Gu’s evidence that he developed some concerns about Mr Zhou’s work at some point prior to the email mentioned below. Mr Gu says that his dismissal letter did not refer to these issues because highlighting them would have caused more offence. That is why he just referred to termination of employment in reliance on a trial

period. I say more about the concerns later. Mr Gu did not speak to Yali Li about the concerns. Ms Yi is a director and had been involved in Mr Zhou's employment initially. Ms Yi controls or has an interest in a substantial portion of the company's shareholding.

[13] Mr Gu sent Mr Zhou an email at 12.25am on Thursday 23 January. The email just asks Mr Zhou to read the attached letter. The letter is headed "Re: Ending of Trial Period". Mr Zhou is thanked for his efforts. It says that after three days observation and discussion it appeared that Mr Zhou was not suitable for the manufacturing operation. Reference was made to the difference between Mr Zhou's previous industry and a large scale food factory. It goes on to say "After careful consideration, we decided reluctantly to terminate the employment... under the 90-day trial period clause". Mr Zhou was not required to work out but would be paid notice of 3 days in addition to the 3 days worked. He was asked to ensure all company information received on his personal devices was deleted.

[14] Whether the dismissal was justifiable must be determined objectively by considering whether Best Health Foods' actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[15] I find that Best Health Foods did not raise any concerns with Mr Zhou before it dismissed him. Best Health Foods gave Mr Zhou no opportunity to respond to any concerns before the dismissal. Best Health Foods did not consider any explanation by Mr Zhou before the dismissal.

[16] Best Health Foods had sufficient resources available to it to properly investigate Mr Gu's concerns. The situation at the time meant Best Health Foods could have investigated, raised concerns and considered Mr Zhou's response. The absence of investigation and opportunity for Mr Zhou to respond to the concerns are not minor defects. They are fundamental to fairness. Unfairness to Mr Zhou resulted from Best Health Foods' decision not to take those steps.

[17] I find that Best Health Foods' actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time.

[18] Mr Zhou has a personal grievance, having been unjustifiably dismissed by Best Health Foods.

### **What losses have been established?**

[19] Mr Zhou was paid up to Monday 27 January. I accept his evidence that he sought replacement employment but lost income for 4 weeks before starting new employment.

[20] Subject to a point dealt with later, I must order Best Health Foods to pay the sum equal to the lost remuneration. I fix that amount by reference to the annual salary of \$55,000.00 at \$4,230.77 (gross).

[21] Mr Zhou seeks compensation of \$15,000.00 under s 123(1)(c)(i) of the Act. He was dismissed just before Chinese New Year. He says that this is similar to a western person being dismissed at Christmas. I accept that the emotional effect on Mr Zhou was exacerbated given the timing of the dismissal.

[22] Mr Zhou says that he was woken by the email and read it. He was shocked, his stomach was full of knots, was cold, shaky and sweaty and felt sick. He was unable to sleep and his sleep was affected until he found another job. Before then, Mr Zhou experienced these effects, he having left long standing employment and facing financial obligations. This was the first time Mr Zhou had been without employment since graduating 12 years earlier. He describes it as the biggest humiliation in his career, causing him to avoid friends and others.

[23] Mr Zhou messaged Ms Li shortly after reading the email. That resulted in an arrangement for them to meet around midday on 23 January 2020. Their exchange was cordial and supportive. Ms Li apologised for Mr Gu's action. She invited Mr Zhou to consider being re-employed by the company. It was agreed that Mr Zhou would discuss the possibility with his wife and contact Ms Li shortly.

[24] Mr Zhou sent Ms Li a letter declining that offer on 24 January. Mr Zhou and Ms Li met again on 26 January. Ms Li's evidence is that the meeting was "quite friendly" with no sign of distress shown by Mr Zhou. They exchanged gifts as is customary.

[25] Two points emerge. First, I find that the offer of re-employment did not extinguish or answer Mr Zhou's personal grievance of unjustified dismissal. Mr Zhou declined<sup>1</sup> the offer principally because he did not wish to put himself in a position of being a point of tension between Ms Li and Mr Gu, the two directors of the company. Mr Zhou reasonably declined to consider reappointment so is entitled to an assessment of remedies for his grievance.

[26] The second point is that Ms Li's evidence, which I accept, must be taken into account as part of assessing the level of humiliation, loss of dignity and injured feelings experienced by Mr Zhou. Mr Zhou's willingness to engage with Ms Li, his demeanour and the relatively short time lead me to conclude that the non-pecuniary loss suffered by Mr Zhou, while not insignificant, is towards the lower end of the range of such effects. I fix \$10,000.00 compensation as the amount required to remedy the proven loss suffered by Mr Zhou.

[27] To summarise, Mr Zhou has established lost remuneration of \$4,230.77 (gross) and non-pecuniary loss of \$10,000.00.

**To what extent did Mr Zhou's actions contribute to the situation?**

[28] Best Health Foods produced documentation of transactions which it says show errors amounting to serious breaches by Mr Zhou. I accept that the documents show that Mr Zhou did not correctly allow for the proper treatment of the transactions for GST purposes. Mr Zhou entered the data into the company's accounting software system from Excel spreadsheet information. Mr Zhou also treated an item as an expense rather than capital spending.

[29] Mr Gu says that the incorrect accounting records which resulted created a serious risk for the company and its relationship with its lenders. Mr Zhan who is employed by Best Health Foods says IRD would impose a "huge penalty" if it found an item should have been depreciated rather than treated as an expense. However, there is no other evidence to support these assertions. I do not accept that these errors created the risk now claimed by Mr Gu and Mr Zhan. The printed sheets show that Mr Gu corrected some entries in early March, more than a month after the transactions by Mr Zhou. If there was a serious risk the company would have needed to correct transactions much sooner. I accept Mr Zhou's evidence that the

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<sup>1</sup> Mr Gu raises a point about the accuracy of the translation. The independent translation already captures the meaning argued for by Mr Gu. In any event, Mr Zhou reasonably declined the offer. The precise words with which he declined are immaterial.

incorrect treatment would have been identified as a matter of routine during company meetings and that corrections could have been completed quickly. I note that the time stamp on printed sheets show that it took Mr Gu very little time on 3 March to edit the transactions.

[30] Mr Gu is critical of Mr Zhou because a supplier sent Mr Gu an email at 11.14am on 22 January warning that an overdue account would be referred to a collection agency if Mr Gu did not contact the supplier by the end of business on 23 January. Mr Zhou had sent an email to the supplier on 21 January asking for a statement and introducing himself as the new accounts manager. Mr Gu says that poor communication and people skills are likely the source of the warning.

[31] I accept Mr Gu's evidence that the company had not previously received such a warning on an account. However, I do not accept that there was any blameworthy conduct by Mr Zhou. Mr Zhou sent his introductory email to a general sales email address for the supplier. The email to Mr Gu was sent from the credit controller's individual email address. Mr Zhou was not responsible for the overdue account which the supplier must have already referred to its credit controller. It is likely that the credit controller was unaware of Mr Zhou's very recent appointment or his request for a statement. If he had been aware, the credit controller would have copied Mr Zhou into the message sent to Mr Gu because that would have been an additional way to achieve prompt payment of the overdue account.

[32] Mr Gu says that Mr Zhou refused to set up a computer which was supplied to him, despite claiming IT experience with IT responsibility part of the agreed job description. The first computer had another employee's profile, but I accept that there was a second computer which could have been set up. However, Mr Zhou used his personal laptop to do some work. This does not show that Mr Zhou "refused" to do what had been agreed as part of his job description. The issue was no more than a set-up matter which Best Health Foods had not dealt with before Mr Zhou commenced work. Any reasonable employer would have arranged set-up and induction to cover the issue. I reach the same conclusion concerning the computer issue covered by Mr Zhan's evidence. I do not accept that there was a refusal by Mr Zhou to set up a computer.

[33] On review of the issues now raised by Best Health Foods, I find that none of Mr Zhou's actions require a reduction in remedies. Mr Gu formed the view as he expressed in the letter that Mr Zhou's experience in a different industry meant that he could not

immediately undertake the accountancy work required in a large scale food factory enterprise. Mr Zhou's actions attributable to a lack of familiarity with the accountancy work in the latter environment are not blameworthy. No reduction in the assessed remedies is required.

### **Summary**

[34] Mr Zhou was unjustifiably dismissed and has a personal grievance.

[35] To remedy the grievance there will be orders that Best Health Foods pay him \$4,230.77 (gross) as reimbursement and \$10,000.00 for compensation.

[36] As the successful party, Mr Zhou is entitled to a contribution towards his representation costs. The investigation meeting took almost half a day. I adopt a daily tariff approach and fix the contribution at \$2,250.00. Mr Zhou is also entitled to claim the application fee, a further \$71.56. There will be an order for costs totalling \$2,321.56.

Philip Cheyne  
Member of the Employment Relations Authority