Determination Number: AA 426/05
File Number: AEA 829/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Janice Park (Applicant)
AND	Brand Works Limited (First Respondent)
	Kenneth Wang (Second Respondent)
REPRESENTATIVES	Glenn Finnigan, Counsel for Applicant Paul Wallace, Advocate for First and Second Respondents
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	22 March, 6 May and 27 June 2005
FURTHER SUBMISSIONS RECEIVED	4, 11 and 18 July 2005
DATE OF DETERMINATION	26 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mrs Janice Park complains that she was constructively dismissed by the first respondent Brand Works Limited from the employment relationship they had entered into three months earlier. She also complains that by the time she accepted the offer of employment, BWL had not given her a copy of the employment agreement intended to apply, as every prospective employer is required to provide under the Employment Relations Act 2000. Mrs Park further complains that she was underpaid by Brand Works Ltd (referred to as "BWL") for the duration of her employment.

[2] Mrs Park still further complains that during the employment she was sexually harassed by the second respondent Mr Kenneth Wang, who is the managing director of BWL.

[3] To resolve these employment relationship problems Mrs Park asks the Authority to make orders requiring BWL to;

> reimburse her for remuneration lost as a result of her contended unjustified constructive dismissal;
>
> compensate her for injury to feelings, distress and anxiety she suffered as a result of her dismissal and sexual harassment by Mr Wang;

pay her the shortfall in remuneration she received during employment;
pay her a penalty for breach of the statutory requirement to provide a copy of the intended employment agreement;

pay her a penalty for breaching her employment agreement through the sexual harassment she was subjected to by Mr Wang.

[4] Against Mr Wang, Mrs Park seeks an order requiring him to pay her a penalty for inciting, instigating, aiding or abetting BWL's breach of the employment agreement occurring through sexual harassment.

Response to the complaints

[5] In their statement in reply BWL and Mr Wang deny any wrongdoing in connection with the employment of Mrs Park, and BWL raises a problem of its own with regard to her.

[6] BWL complains that Mrs Park caused the company financial loss of $1,945 by misrepresenting her skills and qualifications for the employment, and also by leaving her job without giving notice. BWL asks the Authority for orders requiring her to compensate the company for its loss and to pay it a penalty for breaching the employment agreement through her failure to give notice.

Mediation

[7] As required in an employment dispute of this kind, mediation has been undertaken by the parties. They resorted to an Authority investigation only when the dispute remained unresolved.

The employment

[8] Mrs Park is a Chinese immigrant who arrived in New Zealand in 2002. BWL is a design, advertising and trade promotion company which has been operating for more than 10 years. Mr Wang is its managing director and Mr Bo Li is the executive director of the company.

[9] In March 2004, Mr Wang and Mr Li interviewed Mrs Park for an advertised position of Personal Assistant. At interview Mrs Park provided a written CV in which she represented that she had been working as "Personal Assistant to Managing Director" for an employer in New Zealand since June 2002. She provided considerable detail of the nature of that employer's business, her job responsibilities and her achievements, but she withheld the employer's name by stating in the CV, "Current Employer kept anonymous."

[10] With regard to referees, the comprehensive CV stated "Shall be provided as and when required."

[11] Mr Wang and Mr Li were undeterred by the secrecy in respect of her "current employer" and, without immediately requiring her to provide the names of referees, offered Mrs Park a position with BWL. It was not the advertised position but a different one they had discussed with her, requiring accounting and receptionist duties to be carried out. The position was part time, for 30 hours a week.

[12] Mrs Park e-mailed to Mr Wang her acceptance of the position on 25 March 2004, at the same time providing the names of some referees. Her e-mail began, "Thank you so much for the job offer, what a long-awaited first job and boss in NZ!" Mr Wang and Mr Li told the Authority they

had been concerned to read this advice which contradicted the representation in the CV that she had been working for two years in New Zealand. However they did not pursue this with Mrs Park and despite their misgivings allowed her to start work four days later on 29 March 2004.

[13] Checks with referees were carried out, but only after she had started. These yielded responses that were not entirely satisfactory to Mr Wang but did not cause him to question Mrs Park further about her previous work history.

Intended employment agreement – underpayment of remuneration

[14] It is not in dispute that before entering into the employment agreement BWL did not provide Mrs Park with "a copy of the intended agreement," as required by ss.64(2) and 65(1) of the Employment Relations Act 2000. As she was given no written agreement, it follows that she was not, as also required by s.64, advised by BWL of her right to seek advice about the intended written agreement. Neither was she given time to seek such advice. This failure by BWL was a breach of the Act and one for which a penalty may be imposed by the Authority.

[15] It was not until about one or two weeks after commencing work that Mrs Park was given a written agreement to inspect. A copy of that document has not been produced by either Mrs Park or BWL, however I accept that she did not sign it but instead marked several of its provisions for reconsideration by her employer. Some time later, it is not clear whether in April or May, she received a second version in writing of the agreement, and this one she did not sign either.

[16] Part of the problem Mrs Park has raised about her employment is that the job she performed and the pay she received for it once she had started work, were not what BWL had offered orally and what she had accepted. She complains that the second written agreement provided for lower remuneration than had been agreed orally, and that she was paid this lower amount contrary to the oral agreement.

[17] Mrs Park claims that she was offered remuneration equivalent to $30,000 per annum for her 30 hour a week part time job. Mr Wang and Mr Li both deny this and say that $30,000 was referred to by them only as the remuneration for a standard 40 hours work a week, or full time performance of the job. Mrs Park discovered she was to be paid only $22,500 per annum when she received her first pay a fortnight after starting the job. Obviously, compliance by BWL with ss.64 and 65 of the Act before the employment had been accepted and performance of it had commenced, would have removed any confusion and misunderstanding that had crept in during the job interviews.

[18] I find that Mr Wang and Mr Li did not at any time offer Mrs Park, or intend to offer her, remuneration of $30,000 per annum. I consider it unlikely that they promised a particular level of remuneration with the intention of later on simply and blatantly dishonouring that promise. It is more likely that Mrs Park's eagerness to obtain a job and a well paying one, may have contributed to her misapprehension about how much she was to be paid. I note her evidence that before she came to New Zealand she had been working in Hong Kong for about NZ$70,000. She said she had been disappointed to learn she would be getting only $30,000 from BWL, as she at least thought.

[19] This was also her first paid job in two years since coming to NZ, as she said in her e-mail to Mr Wang when accepting the position with BWL. The job of "Personal Assistant to Managing Director" with the secret employer was in fact unpaid assistance she was giving to her husband who was starting up a business from their home.

[20] I also accept that there was some discussion at the job interview about the BWL position

becoming a full time one and having the pay for it reviewed. This I find was not a promise but a mere possibility, no doubt dangled to give encouragement to Mrs Park. While she wanted to think that she would be paid $30,000, that sum I find is not what she was promised and there was no contractual agreement reached to pay it. No estoppel was created by the employer's omission to provide the written terms of employment prior to entry into the employment, as s.64(2) provides that such a failure does not affect the validity of the employment agreement.

[21] The amount Mrs Park was to be paid was confirmed by BWL with the written pay advice she was given on 12 or 13 April, after her first fortnight in the job. Knowing that that was her level of pay Mrs Park sent an email to Mr Li on 21 April, saying;

> *The individual employment contract overall is acceptable, everything remains unchanged except above mentioned.*

The "above mentioned" was a reference to duties she listed in the e-mail, not to the level of remuneration. This statement to Mr Li was, I find, a plain expression by Mrs Park of her satisfaction with, or affirmation of, her terms of employment which included the pay she knew by then she would be receiving.

[22] It seems more likely that Mrs Park's e-mail of 21 April was referring to the contents of the first written agreement presented to her, a document the Authority has not been able to see and verify the remuneration level specified in it. Mrs Park said the second agreement was not given to her until May, and Mr Li said that happened about a month after the employment had commenced, making it the end of April or early May.

[23] In any event I find it unlikely that the first agreement provided a salary of $30,000 for the 30 hours of work to be performed by Mrs Park, whereas the second specified that amount to be the pay for 40 hours. Given that the second agreement was the product of dissatisfaction expressed by Mrs Park about the contents of the first, the first agreement is likely to have been less, not more, favourable to Mrs Park than the second. So, if she approved the salary specified in the first agreement in her e-mail of 21 April, she was approving $30,000 for a 40 hour week. It is the same if it was the salary specified in the second agreement that she said was acceptable.

[24] I find it was a term of the employment agreement that the pay would be proportionate for 30 hours a week based on $30,000 for 40 hours a week. I therefore reject Mrs Park's claim for any shortfall in her pay.

Failure to provide copy of intended terms of employment

[25] Mr Wang told the Authority that he had understood the general requirements made of employers by the Employment Relations Act, but had not known there was a need to provide a copy of the intended terms of agreement before entry into the employment agreement. This failure by BWL is one of some significance in this case, as I am satisfied that BWL caused Mrs Park to start work with misconceptions about her pay, her duties and other terms upon which she had been employed. I am satisfied that she is unlikely to have continued to hold those misconceptions if she had seen the intended agreement before she accepted the job.

[26] The second written agreement given belatedly to Mrs Park even then did not comply with s.65(2)(a)(vi) of the Act. The agreement failed to include a plain language explanation of the services available for the resolution of employment relationship problems and it made no reference to the 90 day period for raising a grievance. Compliance with this requirement becomes even more important when the person becoming employed does not have English as a first language or

has had no experience of employment in New Zealand before.

[27] The claim for penalty for breach of s.64 of the Act was commenced by amendment to the statement of problem which was made on 15 March 2005. As the cause of action arose immediately before entry into the employment on 25 March 2004, the claim has been commenced inside of one year, as required under s.135 of the Act. A penalty is appropriate in the circumstances which caused harm to Mrs Park and her employment relationship. That harm was however limited, because the terms of employment were recorded in writing within about four weeks after commencement of employment and Mrs Park had expressed the terms of employment (probably as outlined in the first written agreement) to be "acceptable" within three weeks of commencement.

[28] Being an incorporated company BWL is liable to a penalty up to $10,000, some or all of which may be paid to Mrs Park. Mr Wang and Mr Li were not small, novice or unsophisticated businessmen in respect of BWL and the employment of staff in their business.

[29] BWL is ordered to pay a penalty of $2,500, the entire amount of which Mrs Park is to receive, as allowed for by s.136 of the Act.

Conflicts of evidence

[30] These were extensive, particularly as between the evidence of Mrs Park and Mr Wang in relation to the claims about sexual harassment, additional hours of work and additional duties. I conclude that overall Mrs Park's evidence cannot be relied upon. She included false statements in her CV and her evidence I find suffered from exaggeration, inflation and a reworking of the facts to fit her claims against BWL. An example of aggrandizement was her request to have her job title renamed "Management Accountant," when the title BWL had given it of "Accountant/Receptionist" accurately described her position.

[31] I find that Mr Wang had no sinister or improper motive for taking photographs of her hands, as she allowed him to do. That was done in the studio in the course of BWL's business in producing advertisements for clients. Mrs Park said she had earlier become concerned that Mr Wang had been looking for excuses to touch her hands, yet she did not decline to take part in the photo shoot. Neither was this matter mentioned in the letter written on Mrs Park's instructions by Mr Finnigan to BWL raising the grievance. That is a surprising omission considering the close focus put on this particular event during the investigation meeting. This was a construction Mrs Park decided to place on the event to bolster other claims.

[32] Similarly the claim that Mr Wang forced Mrs Park to drink too much alcohol and tried to get her to go for a ride with him in his car, is an artificial recreation of what happened. The facts I accept are that at his birthday dinner in a restaurant there was one bottle of wine available among the eight people attending. The wine was not the idea of Mr Wang but of the restaurateur. If Mr Wang did offer to drive Mrs Park home and she had accepted, she would not have been alone with him, because he drove two others home in his car that night.

Variation of duties and hours of work by BWL

[33] I find that there was no significant variation of Mrs Park's duties. I accept that she was not able to perform work she had represented she was skilled and experienced at, or that at least she was slow in performing it. I find that she was not ordered or instructed to work longer than six hours a day but that she needed to work the extra time to try and keep up with the requirements of the job. By contrast her predecessor had found time on her hands because the job was relatively

undemanding.

[34] Mrs Park's complaints about her involvement with cleaning up in the kitchen and about having to make tea and coffee for Mr Wang and Mr Li and their visitors, are trivial. BWL was a relatively small office with only a few staff and Mrs Park was employed partly as a receptionist, a position that often requires some versatility. It was I find one of her duties as Accountant/Receptionist to keep the kitchen clean and tidy.

Sexual harassment by Mr Wang

[35] I prefer the evidence of Mr Wang and find that he did not unnecessarily touch Mrs Park's hands when taking from her cups of tea or coffee she had made for him. I find he had no improper objective in posing and photographing her hands for the advertisement that was subsequently produced by using a different model. I find that whatever contact his leg or hand may have made with her body while he was training her on the computer was inadvertent rather than by deliberate groping of her. As mentioned above, I find he did not harass Mrs Park by trying to get her drunk so that he could be alone with her in his car. I also find that whatever contact Mr Wang may have had with her arm outside the door of his office, was unintentional and not a deliberate assault as she describes it. This "chopping" of her left arm in a karate like fashion was also not referred to in the grievance letter written by Mr Finnigan.

Constructive dismissal

[36] I find that there was no breach of duty, and certainly no serious breach of duty, by BWL capable of founding a claim of constructive dismissal as put forward by Mrs Park. I have rejected the claim of breach through sexual harassment of Mrs Park by Mr Wang. Such dissatisfaction that she undoubtedly had with her employment, even if justified by any actions of the employer, did not render it foreseeable to BWL that she would leave her job in response to it. I conclude that it was BWL which had reasonable cause to be dissatisfied with her performance and that Mrs Park had become aware of that. About a week before she left, on 14 June Mr Li had drafted a letter criticising aspects of her performance, although he did not give the letter to her. I conclude it is more likely she left because she had seen the writing, if not on the page, on the wall.

[37] I therefore reject the claim of constructive dismissal. I find that Mrs Park was not dismissed at all but chose, freely although unhappily, to resign.

BWL's claim against Mrs Park

[38] BWL complains that Mrs Park falsified her CV and misrepresented her employment experience in New Zealand, particularly her experience of handling accounts, financial reporting and statutory compliance requirements. BWL claims $240 from Mrs Park as the cost of retaining a departing employee to help train Mrs Park when she started the job. Also claimed is $1,134 as fees charged to BWL by its accountants, who spent time training Mrs Park to use the MYOB computer programme. A further $331.73 is claimed for the cost of calling in an accountant to take over work that needed doing immediately, as a consequence of Mrs Park leaving her job without notice.

[39] I find it was misleading or deceptive conduct by Mrs Park to refer to "office management and staff supervision" as a responsibility she had when employed as "Personal Assistant to Managing Director." In fact there was no office and no staff in respect of the unwaged spousal assistance she gave her husband in setting up a business from their home. Read as a whole this part of her CV was deliberately intended to imply that Mrs Park held an established position of employment within

the organisation of an established corporation for which she worked at a senior administrative level. Her statement went well beyond exaggeration or the use of inflated language and I find it was written with intent to mislead or deceive readers of the CV.

[40] However although I consider that what Mrs Park wrote in her CV about her "current" employment was misleading or deceptive and was intended to have that effect, I am not satisfied that BWL relied on the misrepresentation when it employed her. At the interviews BWL chose not to explore what Mrs Park was really referring to in this part of her CV, and when she did expressly and openly contradict her CV statement BWL did not terminate the employment contract either by cancellation or dismissal, as it could readily have done as soon as it received her e-mail of 25 March and was alerted to the inconsistency of advice.

[41] Before offering Mrs Park employment BWL did not check her CV by insisting to know who the secret employer was and it did not make referee checks at that time. Mr Wang readily acknowledged to the Authority that BWL should have made these checks and that the employer could not be heard to complain when it later on discovered the truth about Mrs Park's employment history.

[42] Neither did BWL require Mrs Park to demonstrate her proficiency with MYOB, by way of a short practical test on the computer. Mrs Park says she did not say at interview that she had used MYOB, whereas Mr Wang and Mr Li say the contrary. In not providing in writing the intended agreement BWL missed an opportunity to specify, before entry into the agreement, the requirement for her to be proficient with MYOB. It lay in BWL's hands to avoid this sort of confusion, by complying with the requirement to provide a copy of the intended agreement.

[43] In these circumstances BWL can be expected to bear the cost of obtaining professional training assistance when it discovered Mrs Park did not have the skill level the employer thought she had. As an alternative, BWL arguably could with justification have dismissed Mrs Park, but chose not to.

[44] The claim for $331.17 is a stronger one. I have found that Mrs Park was not dismissed and neither did BWL agree to her leaving without giving notice, as I find she in fact did. I consider that a claim requiring her to forfeit to BWL pay in lieu of notice would have succeeded if brought. As to the notice period, a reasonable period may be implied and notice of four weeks is expressed under the second employment agreement that was proffered to Mrs Park but left unsigned by her. Four weeks pay was $1,730.36. Fortunately for Mrs Park the claim with regard to the actual harm or loss caused to BWL by her leaving without notice has been confined to $331.17. She is ordered to pay that sum to BWL.

[45] Leaving without notice was an act by Mrs Park in breach of an implied or express term of her employment agreement. A penalty of up to $5,000 may be claimed for such breach from an individual employee or employer. I consider a penalty should be imposed in the circumstances to enforce the employment agreement. Mrs Park is ordered to pay $1,500. That sum is to be paid to the Crown, as BWL has been compensated for actual loss suffered as consequence of the breach.

Determination

[46] The findings of the Authority are that Mrs Park was not sexually harassed by Mr Wang and she was not dismissed by BWL, whether constructively or in any other way. She was not underpaid, and neither BWL nor Mr Wang acted in breach of any term of her employment agreement. BWL however did breach the Employment Relations Act through its failure to provide a copy of the intended employment agreement before the employment was entered into.

[47] The Authority finds that Mrs Park breached an express or implied term of her employment agreement requiring her to give notice of termination of her employment. This breach caused financial loss to BWL.

Summary of orders

(i) The only order made against BWL is under s.135 of the Act, requiring the company to pay Mrs Park a penalty of $2,500.

(ii) No orders are made against Mr Wang.

(iii) Mrs Park is required to pay BWL the sum of $331.73 as damages for breach of the employment agreement.

(iv) Mrs Park is to pay the Crown a penalty of $1,500 for breach of the employment agreement.

Costs

[48] Costs are reserved to allow the parties, through Mr Finnigan and Mr Wallace, an opportunity to resolve the question themselves. If there is no agreement an application may be made in writing to the Authority for it to fix costs. If that becomes necessary it will be relevant to the exercise that Mrs Park has succeeded in respect of one of her penalty claims and also in having the bulk of BWL's claim for damages against her rejected by the Authority. Overall BWL has been more successful that Mrs Park, and Mr Wang has been completely successful.

A Dumbleton
Member of Employment Relations Authority