

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Gilbert & Company Limited (First Applicant)
AND Peter Chiu (Second Applicant)

AND Peter Chiu (First Respondent)
AND John Gilbert & Company Limited (Second Respondent)

REPRESENTATIVES Clive Bennett, for Applicant
John Coyle, for Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 1 November 2005

SUBMISSIONS RECEIVED 3 February 2006 from first Applicant
15 February 2006 from first Respondent

DATE OF DETERMINATION 6 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship Problem – AEA 1134/04

[1] John Gilbert & Company Limited (“John Gilbert”) employed Mr Peter Chiu as an engineer from 1 April 1996 until April 2000 when he left to work for a family business. Mr Chiu is a Taiwanese immigrant and this was his first position in New Zealand.

[2] In August 2000, Mr Chiu left the family business and returned to John Gilbert and worked until August 2004. Mr John Gilbert, managing director, says Mr Chiu left suddenly without providing the notice required in his written employment contract after he retracted an earlier resignation. John Gilbert is seeking damages and a penalty for the alleged breach of the employment agreement.

[3] John Gilbert also claims Mr Chiu was overpaid for his last week of employment and seeks recovery of the overpayment.

[4] Mr Chiu denies he left without notice. He says he provided a months notice on 16 July 2004 and left on 20 August 2004 and denies retracting the notice.

[5] Issues for determination:

- Did Mr Chiu provide a months notice; if yes – was that notice ever retracted by agreement?
- Did Mr Chiu breach his employment agreement?

Did Mr Chiu provide a months notice; if yes – was that notice ever retracted by agreement?

Terms and conditions of employment

[6] The parties were subject to a written employment agreement dated 1 April 2001. the agreement provided for the payment of a salary of \$80,000 per annum; medical and life insurance benefits to be available after six months and provision of either a meal or payment of a meal allowance after working nine hours in one day, provided the work continued for a further four hours. The agreement required the parties to provide one month's notice of termination.

[7] Mr Chiu was also provided with a company Visa credit card to which he was authorised to charge expenses such as petrol. The wage and time records show that Mr Chiu was reimbursed for non-taxable expenses which were confirmed at the investigation meeting as being reimbursement for petrol expenses. At the investigation meeting the company clarified for me that once Mr Chiu had reached the limit of credit available on his company credit card, he would pay cash for purchases which were then reimbursed.

The resignation

[8] Mr Chiu says he approached Mr Gilbert several times and told him he needed a change of job due to the long hours and stress that was having on his family. Mr Gilbert acknowledged that Mr Chiu approached him 2-3 times during the 3-4 months before he left and that he discussed the need for him to get an alternative job. Mr Gilbert says he was not sure how genuine Mr Chiu was about leaving. He wanted to understand his motives for wanting to go because he seemed happy with his work.

[9] On 16 July 2004 Mr Chiu provided three weeks written notice of his resignation and intention to leave. Mr Chiu says after he emailed his resignation Mr Gilbert advised him that it was normal in New Zealand for managers to provide 3-6 months notice. He says Mr Gilbert also told him it was important in New Zealand to have a good reference letter to secure a good job, and he then promised Mr Chiu a holiday on the Gold Coast or Fiji rather than leave his job. At the

investigation meeting Mr Gilbert agreed that he told Mr Chiu about the reference letter and the holiday but denies telling Mr Chiu it was normal to give 3-6 months notice.

[10] On 23 July 2004 at an informal meeting of managers including Mr Chiu, Mr Chiu's intention to leave was discussed. Concerns were expressed by the team members about Mr Chiu leaving. Mr Gilbert says that it was at this point that Mr Chiu advised the management team that he would not be leaving. This evidence was supported by two others present at the meeting and who answered questions at the investigation meeting.

[11] At the investigation meeting Mr Chiu accepted that he told all those present at the meeting that he would be staying. He says that after the meeting he then approached Mr Gilbert and told him he would still be leaving. Mr Gilbert agrees that Mr Chiu approached him after the meeting but didn't believe Mr Chiu was serious about leaving. Mr Chiu says he told the managers he would stay because he felt pressured by Mr Gilbert to do so.

[12] Mr Gilbert says it was a great shock to everyone when the company received a message from Mr Chiu on Wednesday 25 August 2004 where he advised Mr Gilbert through a junior employee that he had another job but would come in that afternoon to train the new assistant. The information was shocking because in fact Mr Chiu had advised his employer he was not well on Monday 23 August and he worked as usual on Tuesday 24 August 2004. Mr Gilbert says he expected Mr Chiu to turn up for work as usual and was completely unaware Mr Chiu intended to leave.

[13] Mr Gilbert points to the following factors which support his contention that he had every reason to expect Mr Chiu was expected to be at work on 23 August 2004:

- A new employee who was to provide assistance to Mr Chiu commenced employment that day;
- New computer packages were arriving which Mr Chiu had specifically arranged;
- Mr Brian Armstrong from Pilkington's attended the office on Wednesday 25 August 2004 expecting to have a meeting with Mr Chiu.

[14] Mr Gilbert says it was a difficult time for Mr Chiu to leave, he was a senior manager who had specific expertise which was critical in completing a very important project for the company.

[15] I am satisfied that Mr Chiu provided written notice on 16 July 2004 to the company of his intention to leave. I am also satisfied that Mr Chiu withdrew that notice during the meeting on 23

July 2004 when he agreed in the meeting to stay. However, immediately following the meeting Mr Chiu made it very clear to Mr Gilbert that he still intended leaving. Mr Chiu's last day of employment was 24 August 2004 which was one month after 23 July. Mr Chiu has therefore provided one months notice of his intention to leave the company, as required by his employment agreement.

[16] Mr Chiu has admitted he was not honest with his employer during his final days of employment. It seems to me Mr Chiu was trying to hide from his employer, the fact that he had secured alternative employment. Mr Chiu gave compelling evidence that Mr Gilbert harassed him about his resignation and coerced him into telling staff he would stay. I consider it is more likely than not that Mr Gilbert did put undue pressure on Mr Chiu not to leave. I am supported in that conclusion through the evidence provided at the investigation meeting of the actions of Mr Gilbert post termination. Once Mr Gilbert found out about the new employment situation Mr Gilbert contacted Mr Chiu's new employer and attempted to negotiate an arrangement whereby both companies could share Mr Chiu's services. The offer was rejected. Mr Gilbert then made some very disparaging remarks about Mr Chiu to his new supervisor in an effort to discredit him.

[17] I have no doubt that Mr Chiu was an extremely valuable employee of John Gilbert. However, Mr Chiu was free to leave his employment after providing the requisite notice. Mr Gilbert did not then have the right to interfere in the new employment relationship and his contacting the new employer was extremely ill advised.

[18] Mr Gilbert knew Mr Chiu was unhappy with his role and in particular the hours he was working. Mr Gilbert accepted that Mr Chiu had told him 2-3 times that he would be looking for alternative employment. Mr Gilbert had agreed to supply an assistant for Mr Chiu in an effort to reduce his workload. On 23 July 2004 when Mr Chiu advised him that irrespective of what he had said in the meeting he would be leaving, Mr Gilbert would have been wise to have taken him seriously. Instead, Mr Gilbert simply rejected what Mr Chiu told him. Given the warnings Mr Chiu had given Mr Gilbert about his intention to leave I find Mr Gilbert's reaction surprising, particularly in light of the very important project Mr Chiu was working on.

I find Mr Chiu provided the required one month's notice of his intention to leave his employment and in doing so, he did not breach his employment agreement.

[19] Section 4 of the Employment Relations Act requires parties to an employment relationship to deal with each other in good faith and this includes a duty not to do any misleading or deceitful.

Mr Chiu did deceive his employer. It was incumbent on Mr Chiu to advise his employer that he was employed by a new company instead of trying to hide the information by pretending to be ill. I consider that behaviour by Mr Chiu to be a breach of the good faith provisions of the Act. In normal circumstances a penalty would be considered for such behaviour. However, no penalty for such a breach has been sought by John Gilbert.

Overpayment of salary

[20] Mr Gilbert claims Mr Chiu was overpaid as a result of an accounting error. The documents presented to the Authority show Mr Chiu received his last salary payment on 27 August 2004. By this stage Mr Chiu was already employed by the new company and was no longer an employee of John Gilbert. I have concluded that Mr Chiu has been overpaid by \$1,087.91.

Mr Chiu is ordered to pay to John Gilbert & Company Limited the sum of \$1,087.91 being overpaid wages for the week ending 27 August 2004 within 28 days of the date of this determination.

COUNTER-CLAIM

Employment Relationship Problem – AEA 106/05

[21] Mr Chiu counter-claims against the company for disadvantage in his employment as a result of the long hours he was required to work; the failure to take out medical insurance pursuant to the employment agreement; the duress to which Mr Chiu was subjected at the meeting on 23 July 2004 regarding his resignation; and hurtful and unnecessary comments made by Mr Gilbert to Mr Chiu's new employer. Mr Chiu has asked the Authority to determine the following matters:

- Entitlements to various payments arising under his employment agreement including outstanding holiday pay;
- Whether he was disadvantaged in his employment as a result of the actions of his employer; and
- Whether penalties should be awarded against John Gilbert for breaches of his employment agreement and the Employment Relations Act.

[22] In response John Gilbert denies Mr Chiu was disadvantaged in his employment and that the personal grievance for disadvantage was not raised within the statutory 90 day period. John Gilbert also denies entitlements have not been paid to their full extent and denies, any breaches of the employment agreement or the Act.

[23] The issues for determination of this claim are:

- Was Mr Chiu's disadvantage grievance raised within the statutory 90 days?

- Was Mr Chiu subject to disadvantage in his employment?
- Has the company breached the employment agreement?
- If so, what entitlements remain outstanding under the employment agreement?
- What penalty, if any, should be awarded against John Gilbert for any breaches?

Was Mr Chiu's disadvantage grievance raised within the statutory 90 days?

[24] As already held earlier in this determination, Mr Chiu left his employment on 24 August 2004. The actions giving rise to the personal grievance is the requirement to work long hours. The long hours continued throughout Mr Chiu's employment up to and including August 2004. On 15 October 2004 Mr Coyle wrote to Mr Gilbert raising a personal grievance on behalf of Mr Chiu. At the investigation meeting Mr Gilbert admitted receiving this letter. The letter was clearly written within the 90 day period and I am satisfied that it is more likely than not that Mr Gilbert received the letter soon after it was written.

I find the grievance was raised by Mr Chiu within 90 days of the actions giving rise to the grievance occurred.

Was Mr Chiu subject to disadvantage in his employment?

[25] Mr Chiu is required to show on the balance of probabilities that one or more of his conditions of employment were affected to his disadvantage by an unjustifiable action by John Gilbert (s.103(1)(b) Employment Relations Act 2000).

[26] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words "are affected" are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[27] Mr Chiu says the requirement that he work long hours and on weekends disadvantaged him as he suffered stress, there was serious disruption to his family life and little opportunity for recreation.

[28] In answer to questions at the investigation meeting Mr Gilbert told me he became aware of Mr Chiu working late hours and told him it was not desirable. Mr Gilbert says he spoke to Mr Chiu a couple of times and ultimately asked him to surrender his keys to the office to stop him coming in early and finishing late. Mr Gilbert says he later found out that Mr Chiu had obtained

another key from one of the foremen. Mr Gilbert says the agreement does not require any payment for overtime but he did offer to pay Mr Chiu time off in lieu as recompense for his working such long hours.

[29] Mr Chiu says Mr Gilbert would call him during the weekends and request him to complete tasks. Mr Gilbert was evasive when answering questions relating to this issue but conceded that he had asked him to complete tasks when he was already working during a weekend – probably.

[30] It was common ground at the investigation meeting that Mr Gilbert had spoken to Mr Chiu about working such long hours and had gone to the extent of withdrawing Mr Chiu's key so that he could not access the premises outside of normal working hours. Mr Chiu got around that by getting a key from another employee.

[31] Mr Gilbert's view was that Mr Chiu was a "*workaholic*" that he worked tirelessly and enthusiastically, but that he would often stay at work late at night to avoid going home. Mr Chiu says he approached Mr Gilbert and told him he needed a change of job due to the long hours and stress that was having on his family. Mr Gilbert acknowledged that Mr Chiu approached him 2-3 times during the 3-4 months before he left.

[32] Having heard the evidence from both parties I am satisfied on the balance of probabilities that Mr Gilbert applied pressure on Mr Chiu to meet deadlines and that this necessitated Mr Chiu being at work for long hours and to work a number of weekends. This conclusion is supported by the evidence of Mr Gilbert when he told me at the investigation meeting that Mr Chiu approached him several times in the last 3-4 months of his employment and told him he [Mr Chiu] was not happy with the hours he was working and was going to get another job. In response to Mr Chiu's complaints Mr Gilbert agreed to the employment of an assistant to reduce the pressure on Mr Chiu. Also, in Mr Chiu's written resignation on 16 July 2004 Mr Chiu tells Mr Gilbert that he has chosen his family over his job.

[33] Mr Chiu also claims he was disadvantaged by not having medical insurance and as a result he had to go to Taiwan for an operation. I accept the evidence of John Gilbert that the lack of medical and life insurance was an oversight which was rectified when it was brought to the company's attention. Mr Chiu says that as a result of the failure by the company a pre-existing condition was not covered by the medical insurance and this necessitated the trip to Taiwan. In answering questions at the investigation meeting Mr Chiu accepted that the condition was not, in

fact, pre-existing. I find there was no disadvantage to Mr Chiu arising from the oversight to provide medical insurance cover.

I find Mr Chiu was disadvantaged in his employment as a result of the long working hours but not in relation to the medical insurance cover.

Has the company breached the employment agreement?

[34] Mr Chiu says he is entitled to payments for overtime hours worked. He says he worked very long hours – up to midnight almost every day and then almost every Saturday and Sunday. In response Mr Gilbert says Mr Chiu decided what hours he would work and was never required to work beyond the 45 hours maximum agreed in his employment agreement.

[35] Mr Chiu must satisfy me that there is a factual basis for his claim. The starting point therefore must be the agreed terms and conditions of employment between the parties.

[36] As already set out in this determination Mr Chiu had previously worked for John Gilbert before returning in August 2000. On his return Mr Chiu was subject to a written employment agreement which provided for payment of wages at an hourly rate of \$28.00 per hour to be paid for each hour worked. It is common ground that up until the beginning of 2001 Mr Chiu received payment for all hours worked including overtime hours on a regular basis.

[37] On 1 April 2001 Mr Chiu signed a new employment agreement. This agreement provided for the payment of an all inclusive salary. From that point on Mr Chiu did not receive any payment for overtime hours worked. From 1 April 2000 until he left Mr Chiu received a pay increase each year of between 5-10,000 per annum.

[38] Mr Chiu has not provided any proof of extra hours worked during the period August 2000 to 1 April 2001 for which he did not receive payment. After 2001 Mr Chiu's employment agreement is clear that the arrangement regarding payment is a flat rate for all hours worked and was specified as being a salary. I am satisfied that the salary was an all inclusive payment to cover all hours worked by Mr Chiu.

I am satisfied that Mr Chiu has received full compensation for all hours worked during his employment and his claim therefore fails.

Meal Allowance

[39] The employment agreement between the parties requires the provision of a meal or payment of a meal allowance of \$7.81 where an employee works more than nine hours and after each subsequent four hours, provided work continues. The meal allowance is also payable after four and a half hours worked on a public holiday.

[40] It was common ground that meals would be arranged for staff when they were working late. Mr Chiu was often working at the same time as other staff who received a meal in accordance with the clause. Some times Mr Chiu would make the arrangements for the meal.

[41] It was also common ground that Mr Chiu received a meal sometimes but not every time he worked late nor did he receive payment of the meal allowance. Ms Debbie Granados, payroll officer, explained that while the clause was written into Mr Chiu's employment agreement it only applied to factory staff and not to salaried staff. Ms Granados told the authority that Mr Chiu would have to sign an overtime authority before she would order the meals and at other times he would order the food and pay for it on the company Visa card.

[42] Ms Granados interpretation of the employment agreement is not correct. While the salary is stated to be all inclusive, the agreement specifically requires provision of a meal or payment of a meal allowance if certain conditions are met. If it was intended that this clause not apply to salaried employees, then the provision should not have been included in the agreement.

[43] The obligation is on Mr Chiu to satisfy me that there is a factual basis for his claim. At the investigation meeting Mr Chiu admitted that he had no proof of the hours he worked. Mr Coyle has provided me with an estimate based on average hours worked during the first two months of Mr Chiu's employment. That is most unsatisfactory. As I have no reliable records from which to calculate the outstanding meal allowance I leave it to the parties to resolve the issue and if need be, to return to mediation before investigating it more if requested.

Statutory Holidays and Annual Leave

[44] Prior to the investigation meeting I requested the Labour Inspector from the Department of Labour to try and assist the parties to resolve the matter of outstanding payments for statutory and annual holidays. The Labour Inspector provided a copy of a report on the outstanding payments due. Mr Gilbert has accepted the Labour Inspector's view of what is owed, but has not paid any amounts to date.

[45] The Labour Inspector reported that no payments were due for statutory holidays but that \$4,914.24 was due for outstanding holiday pay.

I order John Gilbert & Company Limited to pay to Mr Chiu the amount of \$4,914.24 gross being payment for outstanding holiday pay within 28 days of the date of this determination.

What penalty, if any, should be awarded against John Gilbert for any breaches?

[46] Mr Chiu claims John Gilbert breached the employment agreement when it failed to pay the meal allowance and in relation to the failure to provide the medical insurance cover. Mr Chiu also claims that John Gilbert has breached the Employment Relations Act 2000 in that the company failed to provide Mr Chiu with a description of the work he carried out and did not supply wage and time records as required. Further, Chiu submits in final submissions that John Gilbert had breached the Holidays Act 2003.

[47] The traditional standard of proof required to establish liability to penalties was that of beyond reasonable doubt. If that standard is to be departed from, then the evidence must nevertheless be convincing. Ms Granados evidence regarding the non payment of the meal allowance was compelling. As the payroll officer she was under the misapprehension that the meal allowance was only payable to factory staff. She also gave unequivocal evidence that Mr Chiu arranged some of the meals and therefore believed he arranged them for himself and therefore no meal allowance would be payable. I am satisfied that the breach of the employment agreement was an unintentional breach and no penalty will be imposed.

[48] The claimed breaches of the Employment Relations Act relates to the non-provision of wage and time records and the failure of John Gilbert to include a duties clause in the employment agreement. I am satisfied John Gilbert has breached the act in that it failed to provide the wage and time records as requested by Mr Coyle, on behalf of his client, and that a penalty is available (section 130(4)). With regard to the failure to provide a list of duties, the Act does not provide for a penalty to be attached to this failure.

John Gilbert & Company Limited is ordered to pay a penalty of \$500 for breaching the Employment Relations Act in respect of its failure to provide wage and time records. The penalty is to be paid to the Crown within 28 days of the date of this determination.

[49] Mr Coyle, on behalf of Mr Chiu, has sought penalties for breaches of the Holidays Act in relation to public holidays and provisions required to be inserted into employment agreements. This claim for penalties was never before the Authority and appeared only in final submissions. I decline to consider this claim for penalty.

Remedies for disadvantage

Compensation

[50] Mr Chiu seeks compensation pursuant to section 123(c)(i) for his disadvantage grievance. The evidence provided to the authority regarding the hurt and humiliation suffered by Mr Chiu as a result of his disadvantage claim was sparse. I accept the working of the long hours had an impact on his health, however, Mr Mr Chiu must take some responsibility for working the hours he worked. The evidence was clear that Mr Gilbert went to the extent of removing his work keys to prevent Mr Chiu from working such long hours. Mr Gilbert also agreed that an assistant would be employed to help him. Mr Chiu says it took too long to find that assistant. Mr Chiu himself was charged with the responsibility to find the assistant but he rejected many of the applicants put forward for the job. I am satisfied that the delay in finding the assistant resulted from the lack of adequate applicants and was not occasioned by any delay by John Gilbert.

[51] Taking all the factors into account I consider that any award should be at the lower end of the scale.

John Gilbert & Company Limited is ordered to pay to Mr Chiu the sum of \$3,000 pursuant to section 123(c)(i) of the Employment Relations Act with 28 days of the date of this determination.

SUMMARY OF REMEDIES

AEA 1134/04

Mr Chiu is ordered to pay to John Gilbert & Company Limited the sum of \$1,087.91 being overpaid wages for the week ending 27 August 2004 within 28 days of the date of this determination.

AEA 106/05

John Gilbert & Company Limited is ordered to pay a penalty of \$500 for breaching the Employment Relations Act in respect of its failure to provide wage and time records. The penalty is to be paid to the Crown within 28 days of the date of this determination.

John Gilbert & Company Limited is ordered to pay to Mr Chiu the sum of \$3,000 pursuant to section 123(c)(i) of the Employment Relations Act with 28 days of the date of this determination.

John Gilbert & Company Limited is ordered to pay to Mr Chiu the amount of \$4,914.24 gross being payment for outstanding holiday pay within 28 days of the date of this determination.

Costs

[52] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority