

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 98
5304145

BETWEEN

FOOK KUEN LEUNG
Applicant

AND

ASIAN BUSINESS YEAR
BOOK LIMITED
First Respondent

PRESTIGE PROPERTY
PUBLICATION LIMITED
Second Respondent

Member of Authority: R A Monaghan

Representatives: L Darroch, counsel for applicant
R Wyatt, advocate for respondents

Investigation Meeting: 10 February 2011

Determination: 14 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Fook Keun (Frank) Leung says Asian Business Yearbook Limited (ABYL) and Prestige Property Publication Limited (PPPL) dismissed him unjustifiably and owe him money in respect of a shortfall in his final pay.

Background

[2] Catherine Kwok was the director and, through her company Wing Gold Marketing Limited (WGML), the shareholder in PPPL. PPPL published a weekly newspaper containing information about real estate and related businesses. Ms Kwok was also the director, and through WGML the shareholder in ABYL. ABYL

published the Asian Business Yearbook, an annual publication which the parties described as the 'Chinese Yellow Pages'.

[3] In or about January 2010 Ms Kwok sought sales and marketing staff for PPPL, and a person to manage both PPPL and ABYL. To that end she obtained assistance from Vincent Hii, whose primary business is not recruiting but who nevertheless acts as an unpaid job broker for referrals from WINZ. On or about 3 March 2010 WINZ referred Mr Leung to Mr Hii as a candidate for a management position with ABYL. A series of interviews followed.

[4] By emailed message dated 11 March 2010 Mr Hii informed Mr Leung:

This email serves as a preliminary offer of employment to you. On behalf of the director of 'Chinese Year Book' we would like to offer you a full time position as managing director. Your initial 3 months annual salary will be based on NZD\$30,000 (prorate basis) plus company mobile and bonuses. There will be increments of NZD\$5k per quarter, to both parties' satisfaction on your performance.

..

Please email me back if you accept the offer so I can prepare your employment contract

[5] The offer was not intended to suggest Mr Leung become an office holder in either of the companies, rather that he would be the general manager.

[6] None of the contemporaneous written material referred to the weekly newspaper or PPPL. Although both the yearbook and the newspaper were discussed during the interview process, it was not clear that they were published by separate companies and PPPL was not mentioned. However Mr Leung accepted the offer of employment and began work on Monday 15 March. He became aware the same day that the publications were owned by separate companies and as a result has cited both companies as his employer in this employment relationship problem. No issue has been taken with that matter.

[7] In an emailed message to Mr Hii dated Thursday 18 March Mr Leung enquired about his written employment agreement. In a reply of the same date – with 'termination of employment due to sale in business' as the subject line - Mr Hii advised he had been preparing the agreement but Ms Kwok had just advised him that

she had been approached by a competitor to purchase her business. She intended to sign a sales agreement the next day. Mr Hii said in the message that Mr Leung should discuss with Ms Kwok whether the new owner would employ him. No-one initiated any further discussion of this matter.

[8] Mr Hii said in evidence that, in discussion with Ms Kwok, the intention was to proceed to identify ABYL as Mr Leung's sole employer in the event PPPL was sold. That was the reason for the delay in the preparation of a written employment agreement. Unfortunately none of this was raised properly with Mr Leung.

[9] At the investigation meeting Ms Kwok said an approach had been made at the end of the previous year regarding the purchase of PPPL, but she was reluctant to sell at the time. Despite a direction from the Authority issued in November 2010, it was not until after the investigation meeting and at my further direction that she produced what proved to be an agreement for sale and purchase of WGML's shares in PPPL. The date of execution was not recorded on the agreement, but on Ms Kwok's evidence the date was probably on or about 27 March 2010. The settlement date was 1 April 2010. The agreement included a provision that WGML would assist the purchaser to carry on the business for one year from the date of settlement. Ms Kwok referred to this as an arrangement under which the business would be carried on in her name.

[10] According to Mr Leung, on Friday 19 March PPPL's IT manager Peter Yuan advised that as his employment was terminated that day a cheque for payment was available for him to collect. Mr Leung did not return to work after that date.

The personal grievance

1. Whether Mr Leung was dismissed unjustifiably

[11] The statement in reply was unfortunate. It did not address the sale of the 'business'. It purported to rely on the trial period provisions in s 67A of the Employment Relations Act 2000. However that avenue is not open to ABYL and PPPL because there was no written employment agreement at all, let alone one containing the required provisions.

[12] The statement in reply also listed Ms Kwok's concerns about aspects of Mr Leung's conduct. Even if the concerns were supported by the evidence and were justified they were not so serious as to warrant the termination of employment, and in any event they were not raised with Mr Leung as they should have been.

[13] I comment on only one of them. It arose out of a document dated 18 March 2010 and headed 'power of attorney,' which Mr Leung prepared and presented for Ms Kwok's signature. It read:

I, Catherine Kwok for and on behalf of Asian Business Yearbook and Prestige Property Publication Board of Director to appoint of Mr Frank Leung as manager where in charge of the aforesaid companies. This power of attorney is effective from 15 March 2010.

[14] Ms Kwok was worried the document meant Mr Leung sought full access to her bank accounts, and as a result she distrusted Mr Leung. This concern was a reason why, in the face of the matters I discuss below, no action was taken to continue Mr Leung's employment with ABYL at least.

[15] For my part I find that Mr Leung was simply seeking to establish the parameters of his authority as manager, which could reasonably have included his authority in financial matters. This was important since Ms Kwok was said to have been out of the country at or about the time - and indeed this problem overall has suffered because of what appear to be her frequent absences overseas - and there was no written employment agreement. The approach Mr Leung took to resolving the matter was misconceived, but it was a result of poor communication on the employers' part and the general lack of information available to him.

[16] Accordingly to the extent that Ms Kwok's concerns were intended to justify the termination of Mr Leung's employment, I do not accept there was such justification.

[17] In the light of the indication from Mr Hii that Mr Leung's employment was to end as a result of the sale of a business and the indication from Mr Yuan that a cheque for his pay was to be collected - Mr Leung believed his employment was ended on 19 March. He had reason to form that view.

[18] In those circumstances I am satisfied there was a dismissal.

[19] I have already commented on the attempt to justify the dismissal with reference to the concerns Ms Kwok expressed.

[20] To the extent that the termination of employment relied on the sale of a business, the sale of the shares was merely that and should not have affected the continuation of Mr Leung's employment. Any attempt to rely on the bare fact of the sale as a justification for the termination of employment cannot succeed. ABYL was in any event unaffected and Mr Leung's employment on that publication should also have continued.

[21] Despite the attempts to provide a reason for the termination of Mr Leung's employment, some of Ms Kwok's evidence suggested a view that there was no intention to terminate Mr Leung's employment at all. The termination has been the result of a misunderstanding. That may be true, although the attempts to criticise Mr Leung's conduct tended to undermine such a position. Even so, overall I find the employers were guilty of serious failures to communicate with Mr Leung adequately about the circumstances of his employment, the sale of the shares, and the implications if any for his continued employment. The employment relationship need not have ended but employers' failures were the cause.

[22] For these reasons I find Mr Leung was unjustifiably dismissed and has a personal grievance on that ground.

2. Remedies

[23] Mr Leung seeks the reimbursement of remuneration lost as a result of his dismissal, and compensation for injury to his feelings.

[24] Mr Leung obtained alternative employment on 14 June 2010. In the meantime he made adequate efforts to mitigate his loss. He was not guilty of contributory fault and is entitled to the reimbursement of 3 months' remuneration lost as a result of his personal grievance, calculated as $\$30,000/4 = \$7,500$. Both ABYL and PPPL were

his employers, and are liable jointly and severally for this amount. I order accordingly.

[25] I also accept Mr Leung suffered injury to his feelings as a result of his personal grievance, although I take into account that his employment was of very short duration. ABYL and PPPL are ordered jointly and severally to compensate him in the sum of \$6,000.

Claim for payment of monies owing

[26] On 7 April 2010 Mr Leung received his final payment of \$427.28 nett. He says he is owed:

- . \$57.69 for a half day spent on 12 March 2010 interviewing staff for Ms Kwok;
- . \$57.69 for a half day spent on 14 March 2010 meeting with Ms Kwok;
- . \$576.92 for the week 15 – 19 March 2010;
- . \$57.69 for a half day's overtime worked on 16 March 2010;
- . \$13.80 as payment for the use of his own car calculated at 60c/km.

[27] The total gross salary payments owed was \$749.99. Mr Leung calculated the nett amount as \$622.27. Since he was paid \$427.28 he says he is owed \$194.99 nett plus \$13.80 for the use of his car.

[28] Ms Kwok denied conducting interviews together with Mr Leung on 12 March, saying he visited the offices that day simply to have a look at them and the interviews to which he referred occurred on 15 March. She denied any meeting at all on 14 March. She did not ask that overtime be worked on 16 March, and said that a company car was available for Mr Leung's use if he wished. On that matter, Mr Leung said the accountant told him if he used his own car he could claim an allowance.

[29] Mr Leung was employed on a salary and I am not satisfied there was any entitlement to payment for the work said to have been done on 12, 14 and 16 March. Work done in the week of 15 – 19 March was paid for. Finally, the matter of the use

of a vehicle could have been clarified if a written employment agreement was available. In the absence of such an agreement, I accept that Mr Leung used his own car on work business and is entitled to an allowance of \$13.80. I order accordingly.

Summary of orders

[30] ABYL and PPPL are ordered jointly and severally to pay to Mr Leung:

- i. \$7,500 as reimbursement of remuneration lost as a result of his personal grievance;
- ii. \$6,000 as compensation for injury to feelings caused by the personal grievance; and
- iii. \$13.80 for the use of his own car on work business.

Costs

[31] Costs are reserved.

[32] The parties are invited to reach agreement on the matter. If a party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file and copy to the other parties a written account of what is sought and why. The other parties shall have 14 days from the date of receipt of that information in which to file and copy the remaining parties a written reply.

R A Monaghan

Member of the Employment Relations Authority