

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 138
5398638

BETWEEN

BILL (SEE) TOH
Applicant

A N D

LINCOLN PARK MARKETS
LIMITED t/a THE MIGHTY
DOLLAR SHOP
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Garry Pollak, Counsel for Respondent

Investigation Meeting: 10 April 2013 Auckland

Date of Determination: 19 April 2013

DETERMINATION OF THE AUTHORITY

A. Mr Toh resigned and was not unjustifiably dismissed.

B. Costs are reserved.

Employment relationship problem

[1] The respondent, Lincoln Park Markets Limited (Lincoln Park) imports a wide range of wholesale products which are stocked at its warehouse in Pakuranga. Lincoln Park also operates two retail stores, named The Mighty Dollar Shop, located in Henderson, Auckland and in Porirua, Wellington¹. Mr Jason Koid and Mr Peter Collins are co-owners of Lincoln Park and have owned and operated it for approximately 10 years.

¹ The retail stores are similar to Two Dollar Shops and retail a wide variety of inexpensive products.

[2] The applicant, Mr Bill Toh, was employed by Lincoln Park to work at its warehouse. Mr Toh began work at the warehouse on Monday, 23 July 2012 and his job was to pack and deliver products to Lincoln Park's customers throughout Auckland.

[3] On 6 and 27 August 2012, Mr Toh was spoken to by Mr Collins about complaints received by another staff member about Mr Toh's work. The meetings were informal to discuss Lincoln Park's expectations. No warnings were issued.

[4] On 11 September 2012, Mr Toh's car had a flat tyre and he left the warehouse in order to fix it. This was not the first time Mr Toh had experienced difficulties with his car. Mr Toh was contacted by Mr Koid about where he was and what was happening. During the course of this conversation, Mr Koid suggested to Mr Toh he should get help with his flat tyre from a passer-by. Mr Koid and Mr Toh also discussed Mr Toh being away from work. Mr Koid says the outcome of the discussion was Mr Toh's resignation. Mr Toh says he did not resign, he was dismissed by Mr Koid.

Issues

[5] The issues for the Authority to determine are:

- (a) Did Mr Toh resign or was he dismissed on 11 September 2012;
- (b) If he was dismissed, was the dismissal unjustified?

First Issue

Did Mr Toh resign or was he dismissed on 11 September 2012?

[6] Mr Toh claims he was "*fired*" by Mr Koid during a telephone conversation on 11 September 2012. The telephone conversation related to Mr Toh being away from work to fix a flat tyre on his car. Mr Toh says he was dismissed and his dismissal was unjustified. Mr Koid disputes this, saying Mr Toh resigned.

[7] Mr Toh and Mr Koid disagreed on almost every issue regarding Mr Toh's employment and personal grievance claim. Mr Toh and Mr Koid disagreed on facts such as the role Mr Toh was employed to perform, Mr Toh's pay rate, where he worked and most importantly whether Mr Toh resigned or was dismissed.

[8] As a result, credibility of the witnesses is very important. I found Mr Toh not a credible witness. During the investigation meeting Mr Toh mocked Lincoln Park's witnesses and alleged they were all "*liars*". Mr Toh claimed that Mr Koid threatened to "*fire*" him on at least two occasions during the course of his short period of employment over minor matters. Further, Mr Toh claimed that when he went to the warehouse to pick up his final pay cheque from Mr Koid, Mr Koid threw the cheque at him, swore using the "*f word*" and told him if he took the matter "*to the authorities*", he would "*kill him and his house members*". Mr Toh claimed he took this threat very seriously and feared for his wife and children's safety. Because of this threat Mr Toh did not want to provide Mr Koid with his bank account details or an address to send a cheque to pay holiday pay.

[9] This was a very serious allegation and one that upset both Mr Koid and Mr Collins. Mr Koid presented as a quiet and conscientious man who had successfully operated his business in New Zealand for more than 10 years. Given such a serious allegation, it was very surprising and unbelievable in my view, that Mr Toh sought to be reinstated to his position at Lincoln Park. As a result of these matters, I did not believe Mr Toh to be a credible witness.

[10] In mid-July 2012, Lincoln Park advertised for a number of positions at its warehouse and retail stores in Auckland and Wellington. The advertisement was contained in a Chinese newspaper and Mr Toh applied for the warehouse and delivery position.

[11] On 19 July, Mr Toh telephoned Mr Koid about the position. Mr Toh says he was told by Mr Koid that the pay rate for the job was \$15.30 per hour. Mr Koid says he told Mr Toh the rate was \$13.50 per hour.

[12] Mr Koid asked Mr Toh to come to Lincoln Park's warehouse the next day, Friday 20 July to look around the premises and to discuss the position further. Mr Toh says he was asked to go to the warehouse on Saturday 21 July. As mentioned earlier, I do not believe Mr Toh to be a credible witness. I prefer the evidence of Mr Koid that during the telephone conversation on 19 July a pay rate was discussed with Mr Toh who was told the pay rate was \$13.50 per hour for the position. Mr Toh was asked to meet with Mr Koid the next day on Friday, 20 July, at Lincoln Park's warehouse in Pakuranga.

[13] At the investigation meeting, Mr Prasan Chandrananda, who is employed by Lincoln Park to perform IT, Logistics and administrative functions including preparing employment agreements recalled the meeting with Mr Toh was on a Friday as the warehouse was not open in the weekend. This confirms Mr Koid's evidence about where and when the meeting occurred.

[14] It is my finding that the meeting with Mr Toh was held on Friday 20 July at Lincoln Park's warehouse in Pakuranga.

[15] Mr Koid and Mr Toh discussed the role and Mr Koid took notes of the meeting as follows:

- *From Malaysia Penang*
- *Four years in New Zealand*
- *Study in Australia since young age!*
- *Graduated from Australia*
- *Experience doing student day work clothing factory*
- *More than 10 years working experience in Malaysia*
- *In warehouse, logistic inventory*
- *Able to travel, have driving licence. Can start work any time.
(= any NZ working experience?)*
- *Three years in retailing at PC store at \$15/hour rate.*
- *Company closing down, get two months redundant pay.*
- *Willing to start with any job,*
- *Pay = what expectation – willing to accept min rate at \$13.50*
- *Start at warehouse first at \$13.50 40/ week*
- *Married with two kids age 8 and 10 school at Henderson*
- *Wife not working only tutoring Sat and Sun only can work Mon to Fri*
- *Will provide full detail in c.v. Passport bring next time.*
- *Wanted to start next Monday.*

[16] I hold this to be an accurate record of Mr Koid's interview with Mr Toh. At the investigation meeting Mr Toh confirmed the information recorded in the note about him for the most part to be correct.

[17] Mr Toh commenced work with Lincoln Park on Monday, 23 July, not Sunday, 22 July as Mr Toh claimed. The warehouse is not open on the weekend and the starting date on Monday, 23 July accords with Mr Koid's notes of the interview with Mr Toh on Friday, 20 July. Mr Toh was shown around the warehouse following his interview and met with and spoke with Mr Koid's co-director, Mr Collins. Mr Collins talked to Mr Toh about his immigration status and Mr Toh confirmed that he was a permanent resident of New Zealand.

[18] Mr Toh was offered the warehouse delivery position. Mr Koid wrote an instruction to Mr Chandrananda about Mr Toh's employment which is recorded at the foot of Mr Koid's interview notes. The instruction is as follows:

*Prassan temp file 1st. File it together when the document complete.
Follow up tax declaration form, photocopy passport, Dr L cv. Start
23/07/12 40 hours/week at \$13.50/hour min rate*

After Provision Period to 14.50/hour.

[19] Mr Chandrananda prepared a template individual employment agreement (the agreement) which was the template used by Lincoln Park for all its employees. The agreement stated in clause 2.1 that the position was that of warehouse/delivery assistant, wages in clause 7.1 were specified as "\$13.50 per hour for the probation period."

[20] Mr Chandrananda left a blank in the agreement where Mr Toh's name was to be inserted pending receipt of Mr Toh's passport and confirmation of immigration status. Mr Chandrananda asked Mr Toh to provide him with these documents as had been requested by Mr Koid. Mr Toh never provided these documents and Mr Chandrananda failed to follow up.

[21] Mr Toh said he never received a copy of the agreement. Mr Toh said he wanted to confirm the details of his employment and so on 8 August 2012 sent a letter to Mr Koid as follows:

8 August 2012

*Mr. Jason Koid, the Mighty Dollar Shop, cc Lincoln Park Markets
Limited, 25, Ben Lomond Crescent, Pakuranga, New Zealand. tel: 09
576 6089 ...*

Dear Jason,

Employment contract

*This letter is sent as a reminder to you that if no employment contract
received by me before 15 August 2012, then this letter will serve as
our agreed employment contract.*

Job title: Retail Shop Assistant

*Work location: The Mighty Dollar Shop, Westfield, Henderson Mall,
Henderson*

Job status: Permanent/ongoing

Work hours: 9am-5.30pm, Monday-Friday

Normal hourly rate: NZ\$15.30

Payment frequency: weekly

Yours sincerely,

[22] I do not accept that this document is authentic. Mr Koid never received it and it does not accord with the agreement reached between Mr Toh and Mr Koid that Mr Toh would be employed in the warehouse as a delivery assistant at the rate of \$13.50 for the probation period. It does not accord with the agreement drafted by Mr Chandrananda at the time Mr Toh was offered employment. I find that the employment agreement reached between Mr Koid and Mr Toh was as set out by Mr Koid in his notes following the meeting with Mr Toh on 20 July 2012.

[23] On 6 and 27 August, Mr Toh was spoken to by Mr Collins following two complaints from a staff member. The first discussion on 6 August related to Mr Toh's frequent disappearance from the workplace without informing any of his colleagues. Mr Collins spoke with Mr Toh about the need to keep his colleagues informed and to be punctual. The other matter concerned Mr Toh being consistently late back from lunch and tea breaks. Mr Collins reminded Mr Toh that he was to take 30 minutes for lunch and 15 minutes each for morning and afternoon tea breaks.

[24] The next occasion on which Mr Collins had to speak to Mr Toh was on 27 August. Mr Collins had been told by a member of staff that Mr Toh was not using the punch cards to clock into and out of work each day. Mr Toh was informed by Mr Collins that the punch card was to be used by him. These meetings were informal meetings so that Mr Collins could make it clear to Mr Toh what Lincoln Park's expectations were of him. The meetings were not hostile meetings and no warnings were issued.

[25] At the meeting on 27 August, Mr Toh raised an issue about the travel to the warehouse in Pakuranga and asked Mr Collins if he could work more often in the retail store in Henderson as it was closer to his home. Mr Collins agreed to look into it and after talking with other staff managed to rearrange Mr Toh's work schedule to accommodate Mr Toh's request.

[26] On Friday, 7 September 2012, Mr Toh went to the retail store in Henderson and handed his key to one of the shop assistants, Ms Lad Mitali Manharail. Mr Toh says this was because he was not working on that day and did not need the key. Ms Manharail says she told Mr Toh that she did not need his key. Mr Toh responded saying "*he didn't want to open the shop any more*". Ms Manharail repeated to

Mr Toh that she did not need his key. Mr Toh then told Ms Manharail “*he did not want the key*” and “*did not want to work there any longer*”.

[27] Mr Toh was due to work next on Tuesday, 11 September. Mr Toh came to work that day and left shortly afterwards saying he needed to move his car to avoid a fine. Mr Koid rang Mr Toh to find out what was happening.

[28] Following a discussion about the length of time Mr Toh was out of the office and whether or not the time was going to be recorded as leave, Mr Toh resigned. Mr Toh asked to be paid his final pay that day.

[29] Mr Koid said he questioned Mr Toh about resigning and told him he had to give notice. Both Mr Collins and Mr Koid say Mr Toh’s resignation was inconvenient because they had to replace him. Mr Toh says he was dismissed by Mr Koid.

[30] On 12 September, Mr Toh attended the warehouse to pick up a cheque for his final pay. Mr Collins was there because he had to countersign the cheque. Mr Chandrananda was also there.

[31] Mr Toh and Mr Koid met in Mr Koid’s office. Mr Toh says Mr Koid threw the cheque for his final pay at him and swore using “*the f word*”. Mr Toh says Mr Koid threatened if he reported him to the authorities he would “*kill him and his house members*”. Even though the offices at the warehouse are small and close together no one else heard these alleged threats. For these and the reasons previously given about Mr Toh’s credibility, I do not accept Mr Toh’s evidence.

[32] It is my finding that on the balance of probabilities Mr Toh resigned. Mr Toh claimed he was underpaid. I do not accept this. Mr Toh and Mr Koid agreed on a rate of pay of \$13.50 per hour which would be reviewed following a probation period. Mr Toh was mistakenly paid \$15.30 per hour. This was an initial typing error and was discovered when Mr Toh’s final pay was being prepared.

Costs

[33] Costs are reserved. The respondent has 14 days within which to file and serve a memorandum as to costs and the applicant has 14 days from receipt to file and serve his reply.

Anna Fitzgibbon
Member of the Employment Relations Authority