

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 295
5414513

BETWEEN HAI YING (CHERRY) ZHOU
Applicant

A N D ST GEORGE
INTERNATIONAL GROUP
LIMITED T/A ST GEORGE
INSTITUTE OF LEARNING
Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur, Advocate for Applicant
Carolyn Shi, Director of Respondent

Investigation Meeting: 02 July 2013 at Auckland

Additional Information: 08 July 2013 from Applicant
08 July 2013 from Respondent

Submissions Received: 04 July 2013 from Applicant
08 July 2013 from Respondent
08 July 2013 from Applicant

Date of Determination: 10 July 2013

DETERMINATION OF THE AUTHORITY

- A. St George International Group Limited t/a St George Institute of Learning (“St George”) unjustifiably dismissed Hai Ying (Cherry) Zhou.**
- B. St George is ordered to pay Ms Zhou:**
- (a) \$4,050 lost remuneration;**
 - (b) \$4,250 distress compensation;**

- (c) **\$547.26 for hours worked but not paid;**
- (d) **\$523.68 annual holiday pay;**
- (e) **\$2,442 unpaid commission;**
- (f) **\$3,500 towards her legal costs;**
- (g) **\$71.56 to reimburse her filing fee.**

Employment relationship problem

[1] Ms Zhou began working for St George as a marketer and student counsellor in February 2010. Over the course of her employment her total weekly hours varied from 35 - 40 hours per week. When Ms Zhou's employment ended she was employed for 37.5 hours per week.

[2] Ms Zhou claims she was summarily dismissed from her employment on 15 January 2013. She says that on 15 January St George's director, Ms Carolyn Shi, met with her unexpectedly and raised a number of concerns then asked her to resign.

[3] Ms Zhou claims Ms Shi told her to finish a student application she was in the middle of processing then "*leave work immediately*". Ms Zhou says she left so hurriedly she did not collect all of her personal belongings from her desk and did not say farewell to her colleagues before leaving at 12pm that same day.

[4] Ms Zhou claims wage arrears. She says she did not receive holiday pay upon termination and that on two occasions she did not receive the full remuneration recorded in her payslips. Ms Zhou claims \$1,098 for unpaid commission for the period August-October 2011 and \$2,442 for unpaid commission for the period 2012-2013. She also claims she should be paid for 134.25 additional hours she worked outside of her contracted hours of work while observing Prometric Exams.

[5] Ms Shi admits meeting with Ms Zhou on 15 January and raising concerns about Ms Zhou's conduct but denies asking her to resign or leave work immediately. Ms Shi claims that when Ms Zhou was confronted with the concerns about her behaviour she immediately resigned in order to avoid a disciplinary process. She says Ms Zhou's resignation was genuine and voluntary.

[6] Ms Shi says St George's policy is not to pay overtime so it can keep its wages outgoings in check. She says Ms Zhou was not entitled to be paid for the additional hours she worked while observing Prometric Exams. Ms Shi says she made it clear to Ms Zhou on a number of occasions that she should take time off in lieu during her normal contracted work hours to compensate her for any additional hours she was required to work.

[7] St George agrees Ms Zhou is owed \$284.54 holiday pay which was due upon termination but which has not been paid. St George admits it deducted a total of \$520 from her wages on 08 November and \$27.26 from her wages on 02 December 2011 to recover overpaid commission without informing her it had done so.

[8] St George denies Ms Zhou is owed any commission from August to October 2011 because it says it paid her a total of \$1,108 commission with her wages on 07 and 21 October 2011. St George accepts Ms Zhou is owed commission for 2012-2013 which it says it has been paying her by instalments. St George agrees \$2,442 commission remains outstanding.

Issues

[9] The following issues are to be determined:

- (a) Was Ms Zhou dismissed;
- (b) If so, was dismissal justified;
- (c) If not, what if any remedies should be awarded;
- (d) What holiday pay is Ms Zhou owed;
- (e) What commission is Ms Zhou owed;
- (f) Is Ms Zhou owed wage arrears;
- (g) What if any costs should be awarded?

Was Ms Zhou dismissed?

[10] Ms Zhou bears the onus of establishing on the balance of probabilities that she was dismissed. Ms Zhou claims she was asked to resign on 15 January and told to

leave immediately. Ms Shi claims Ms Zhou resigned voluntarily to avoid a disciplinary process when presented with concerns about her wrongdoing. This conflict in the evidence is to be resolved on the balance of probabilities.

[11] I prefer Ms Zhou's evidence because her version of events seems to make more sense than Ms Shi's. Ms Zhou had a work permit which restricted her to working in the position she held with St George. Losing her employment with St George put her immigration status in jeopardy so I consider that makes it unlikely she would have immediately resign as Ms Shi claims.

[12] Ms Shi did not provide Ms Zhou with any documentation relevant to her concerns. Although there was a conflict in the evidence about how much information Ms Zhou was given about each of the concerns I consider it likely minimal details were provided. The absence of information makes it unlikely Ms Zhou would have immediately resigned.

[13] Another factor which weighs in favour of Ms Zhou's evidence is that she strongly disputes any wrongdoing. In respect of each of the three concerns raised with her Ms Zhou believes her actions were explainable. I therefore consider it unlikely she would immediately resign when she believes she has not acted appropriately.

[14] I am also mindful Ms Shi appears to have formed the view that Ms Zhou had engaged in inappropriate conduct from the outset. Ms Shi describes her three concerns as "*serious issues.*" I consider it likely Ms Shi asked Ms Zhou to resign in response to the concerns raised. I am influenced to reach this conclusion by the first point of the Statement in Reply which was prepared by Ms Shi. It says:

"The Applicant was found guilty of serious misconduct which could lead to dismissal effective immediately but was given a chance to resign to save her future career."

[15] I consider the acknowledgment in the Statement in Reply that Ms Zhou was "*found guilty of serious misconduct*" is consistent with Ms Zhou's evidence she was asked to resign. I also consider it undermines Ms Shi's evidence that Ms Zhou resigned freely and voluntarily.

[16] The manner in which Ms Zhou departed St George tends to suggest she felt compelled to leave abruptly, which in my view is inconsistent with a voluntarily

resignation. Ms Zhou did not finish her normal work day but left at 12pm. Her evidence she did not farewell her colleagues or collect all of her personal belongings suggests she was under pressure to leave immediately. I doubt a voluntarily resignation would have resulted in Ms Zhou departing in this manner

[17] Ms Zhou was also evidently extremely distressed when she left. She sat in the carpark crying for a time and she called her sister, crying and saying she had been dismissed. There was also no reason for Ms Zhou not to have collected her personal effects from her desk and to have omitted to farewell colleagues if she was not under pressure from Ms Shi to leave.

[18] Ms Zhou was happy in her job. Ms Zhou's future prospects at St George were positive and she was a valued member of staff. Ms Zhou was gaining varied experience and enjoyed good relationships with management, her colleagues and students. She saw herself as having a long term future at the school. It does not make sense for Ms Zhou to have immediately resigned in the circumstances that existed at the time her employment ended.

[19] No disciplinary process had been initiated, no formal concerns had been put to her, no supporting documents or evidence had been provided and only minimal information had been given about her alleged wrongdoing. I consider Ms Zhou had insufficient details of the three concerns to be able to properly respond to them. However, from what Ms Zhou had been told she was clear about denying any wrongdoing.

[20] The fact Ms Zhou resigned in such circumstances fits more logically with the scenario she described in which Ms Shi pressured her to resign. I therefore consider it more likely than not that Ms Zhou's employment ended as a result of Ms Shi's request she resign. That amounts to a dismissal because it was a sending away at the employer's initiative. I therefore conclude Ms Zhou has discharged the onus of establishing she was dismissed.

Was dismissal justified?

[21] Because Ms Zhou has established she was dismissed the onus now passes to St George to establish on the balance of probabilities that dismissal was justified. Justification is to be assessed under s.103A of the Employment Relations Act 2000 (the Act). Section 103A requires the Authority to objectively determine whether St

George's *"actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred."*

[22] During the Authority's investigation St George did not attempt to justify Ms Zhou's dismissal because it maintains she was not dismissed. However in its closing submissions St George says it was justified in dismissing Ms Zhou for serious misconduct.

[23] I find St George is unable to discharge the onus of justifying that its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances. A fair and reasonable employer is expected to comply with its statutory obligations. I find St George did not do so because there was no process implemented before Ms Zhou was dismissed much less a fair or proper process. The lack of process means St George is unable to substantively justify Ms Zhou's dismissal.

[24] St George breached its statutory good faith obligations by failing to provide Ms Zhou with access to information relevant to her ongoing employment and an opportunity to comment on that information before her dismissal contrary to the requirements of s.4(1A) of the Act. St George also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act.

[25] The lack of process means St George was not in a position to fairly or properly assess whether it had a good reason(s) for dismissing her. This is not a case where a fair and proper process which complied with statutory obligations of good faith and procedural fairness would necessarily have resulted in dismissal. There is a question about whether the conduct complained of is capable of amounting to serious misconduct and even if it did dismissal would not necessarily have been a justified response in all the circumstances.

[26] I find Ms Zhou's dismissal was substantively and procedurally unjustified.

What remedies should be awarded?

Mitigation

[27] I am satisfied Ms Zhou appropriately mitigated her loss because she actively sought new employment and managed to obtain a new job eight weeks after her dismissal.

Lost remuneration

[28] Ms Zhou claims \$4,050 lost remuneration (37.5 hours per week x \$13.50 per hour x 8 weeks). I am satisfied Ms Zhou lost \$4,050 as a result of her unjustified dismissal so St George is ordered to pay her that amount under s.128(2) of the Act.

Distress compensation

[29] It is clear Ms Zhou suffered a high degree of humiliation, distress and anxiety. She has been deeply affected by her unjustified dismissal and has required medical attention. Ms Zhou has suffered anxiety about her immigration status and has experienced financial stress. She has been embarrassed to have to rely on financial support from her parents to support herself. Ms Zhou was tearful during the Authority's investigation and it is evident these matters still weigh heavily on her.

[30] St George is ordered to pay Ms Zhou \$5,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, injury to feelings and distress she suffered as a result of her unjustified dismissal. However, amount is reduced to \$4,250 on the grounds of contribution.

Contribution

[31] Having determined that Ms Zhou has a dismissal grievance, s.124 of the Act requires me to assess the extent to which she contributed to the situation which gave rise to her grievance and if so required to reduce remedies accordingly. Contribution denotes blameworthy conduct by the employee which must be proven on the balance of probabilities.

[32] The three concerns involved claims Ms Zhou:

- a. Had disclosed a student's personal information to her sister who went on to date the student;

- b. Concealed an email from St George's former principal which records he had retained copies of St George's employment agreements;
- c. Sent a copy of information Ms Shi asked Ms Zhou to scan to her (Ms Shi) to her own (Ms Zhou's) email address which St George says contains confidential information.

[33] The evidence relating to the first concern was lacking and non-specific so I do not find Ms Zhou was at fault in this regard.

[34] The email from the former principal was sent to Ms Zhou from his personal email address the day his employment ended, although he did not attend work that day. It says:

"I deleted the employment agreements and you need to put them back in my folder on the shared drive before questions are asked. I don't want it known that I have a backup copy. Please save the attached files in the kfm folder as soon as you can."

[35] St George say Ms Zhou helped cover up the former principal's *"theft of key company legal documents."* I find Ms Zhou did engage in blameworthy conduct by failing to advise St George the former principal had taken copies of its employment agreements when he left.

[36] This was one of the reasons I consider Ms Shi asked Ms Zhou to resign so her actions contributed to the situation that gave rise to her dismissal grievance. Ms Zhou's award of distress compensation should be reduced by 15% (\$750) to reflect this contribution.

[37] Although I find that Ms Zhou did email herself a copy of the St George information (which included confidential information) she scanned to Ms Shi I do not consider her actions in the particular circumstances were blameworthy, so remedies are not to be reduced on this basis.

[38] It was Ms Zhou's usual practice to use her gmail and hotmail email accounts for work purposes because the St George's email system was notoriously unreliable. The former principal, the former CEO and Ms Shi all emailed work information (including confidential information) to Ms Zhou at her personal email addresses.

[39] I accept Ms Zhou's evidence she copied the scanned information to herself so it was easier to resend it in case the St George email system did not deliver the scanned information to Ms Shi (which was something that often occurred). I am influenced in reaching this view because Ms Zhou did not conceal she had copied the information to herself as her personal email address appears in the header so could be easily seen by the recipient Ms Shi. Ms Zhou had no reason to want to use or retain the information she copied to her non work email.

[40] I therefore consider Ms Zhou genuinely believed her actions were in St George's best interests because they would allow the scanned information to be more easily resent if it was not received by Ms Shi. Whilst Ms Zhou's actions may be viewed as unwise in light of what subsequently occurred St George had known of, encouraged and condoned Ms Zhou's use of non-work email addresses for work purposes so I am not satisfied her actions in this instance were blameworthy.

What holiday pay is Ms Zhou owed?

[41] The parties agree Ms Zhou is owed \$284.54 holiday pay which was due upon termination. She is also entitled to \$239.14 holiday pay being 8% of her total gross earnings of \$2,989.26 as awarded to her in this determination (\$547.26 wage arrears and \$2,442 commission payments).

[42] St George is ordered to pay Ms Zhou annual holiday pay of \$523.68.

What commissions is Ms Zhou owed?

[43] The parties agree Ms Zhou is owed unpaid commission of \$2,442 for the 2012-2013 period. St George is ordered to pay her that amount.

Is Ms Zhou owed wage arrears?

[44] Ms Zhou pursued the following wage arrear claims:

- a. \$547.26 being \$520 short pay in her 18 November 2011 pay and \$20.26 short pay in her 02 December 2011 pay;
- b. 134.25 over time hours she claims she worked whilst observing Prometric Exams which she says she should be paid for.

[45] St George deducted a total of \$547.26 from Ms Zhou's wages on 18 November and 02 December 2011 without first obtaining her permission to do so and without advising her these deductions had been made or the reasons for them.

[46] St George says these deductions were made to recover overpaid commission. St George had no contractual right to deduct this amount from Ms Zhou's wages and she had not given permission for it to do so. These deductions were therefore unlawful so must be repaid.

[47] St George as the employer must keep accurate wage and commission records. It is unable to satisfy me on the balance of probabilities Ms Zhou was overpaid the \$547.26 commission it says it deducted in 2011. St George is therefore ordered to pay Ms Zhou wages arrears of \$547.26.

Prometric Exams

[48] Ms Zhou was a waged employee. Her total weekly hours changed from 40 to 35 to 37.5 hours per week over the course of her employment which suggests St George monitored and where appropriate adjusted her total hours of work. St George does not pay staff overtime or for additional hours worked but gives them time off in lieu during their normal contract hours. It does this to manage its wages bill in a challenging and competitive environment.

[49] St George says whilst Ms Zhou was required to observe Prometric Exams outside of her contracted hours of work the dates she claims she did so are inaccurate. I prefer St George's evidence about the dates on which Prometric Exams were held over Ms Zhou's. St George compiled its information from the actual Prometric Exam records while Ms Zhou relies on her informal staff check out/check in forms which are not timesheets.

[50] St George also disputes the number of hours Ms Zhou claims she worked when observing Prometric Exams. It says she was only required to be present half an hour before the exam started and fifteen minutes after it ended rather than the extended additional hours Ms Zhou claims. I have preferred St George's evidence about this because Ms Zhou was unable to satisfy me she was required to work the additional hours outside of the times St George says she need to be present.

[51] Ms Zhou bears the onus of establishing on the balance of probabilities she was entitled to be paid for the additional hours she claims. I find she is unable to do so.

[52] I consider it significant that the timesheets Ms Zhou submitted in order to obtain her fortnightly wages do not show her claiming any additional hours of work. This is a claim that arose for the first time after she was dismissed. It is odd that Ms Zhou failed to claim pay for additional hours that date back to 11 February 2012 if she genuinely believed she was entitled to be paid for these hours.

[53] I prefer Ms Shi's evidence that she told Ms Zhou she had to take time off in lieu during her normal hours of work to compensate her for being required to work outside her contracted hours.

[54] I am not satisfied the parties ever agreed Ms Zhou was entitled to be paid extra wages for observing the Prometric Exams. Ms Shi produced the minutes of an administrative and marketing meeting on 9 June 2011 which say "[...] *if you did over work [stet] previous day then you can leave early next day*".

[55] I find on the balance of probabilities there was no agreement for Ms Zhou to be paid extra for observing the Prometric Exams. It was up to Ms Zhou to take the additional hours she worked off as time off in lieu during her normal contract hours. If she was unable to do so then she should have re-negotiated a different arrangement with St George. It was inappropriate of her to save up a substantial overtime claim in circumstances where she had already been told overtime would not be paid.

[56] Ms Zhou is unable to prove to the required standard that she is due any wage arrears for the additional hours worked observing the Prometric Exams.

What costs should be awarded

[57] Ms Zhou as the successful party is entitled to costs. I am satisfied Ms Zhou has incurred actual costs in excess of the Authority's notional daily tariff, which is currently \$3,500. Neither party identified factors that warrant adjusting the notional daily tariff and I am not aware of any.

[58] This matter involved a one day investigation meeting so an award of one day of the notional tariff is appropriate. St George is ordered to pay Ms Zhou \$3,500 towards her actual costs together with \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority