

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 9
5643774

BETWEEN JIAYI LI
 Applicant

A N D ASOPALAV NEW ZEALAND
 LIMITED t/a HAIR CO AND
 BEAUTY CO LYNN MALL
 SHOPPING CENTRE
 Respondent

Member of Authority: Rachel Larmer

Representatives: May Moncur, Advocate for Applicant
 Deepak Kapadia, Advocate for Respondent

Investigation Meeting: 12 January 2017 at Auckland

Written Record of Oral 12 January 2017
Determination:

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Li worked as a hairdresser for Asopalav New Zealand Limited t/a Hair Co and Beauty Co Lynn Mall Shopping Centre (Asopalav) from on or about 02 November 2015 until she was dismissed by text message on 06 September 2016.

[2] Ms Li claims she was unjustifiably dismissed and that she is owed holiday pay arrears.

[3] Asopalav says it dismissed Ms Li because its director Mr Deepak Kapadia saw her working for a competitor across the road from its premises while she was on annual leave. Ms Li's employment ended when she received the text on 06 September

2016 because Asopalav paid her two weeks' pay in lieu of notice instead of requiring her to work out her notice period.

[4] Ms Li strongly denies working for a competitor while employed by Asopalav. Ms Li says she started work with the competitor in issue only after she was dismissed by text.

[5] Asopalav admits it still owes Ms Li holiday pay arrears but says her dismissal was justified.

Consent orders

[6] Asopalav admitted during the investigation meeting that it owes Ms Li holiday pay arrears and notice pay arrears.

[7] By consent, within 7 days of the date of this determination, Asopalav will pay directly into Ms Li's bank account;

- a. \$470.78 holiday pay arrears;
- b. \$136.44 notice pay arrears.

Material background

[8] At the end of her normal shift at work on 08 August 2016 Mr Deepak Kapadia (who is the director of Asopalav) approached Ms Li and told her to take her belongings and leave immediately.

[9] Ms Li was confused and distressed about the rude manner in which Mr Kapadia spoke to her. She asked him what was going on and why she had been told to take her things and leave.

[10] Mr Kapadia responded by telling Ms Li that she had to take four weeks' annual holiday immediately. Ms Li told him that she didn't want to take annual leave at that time because she wanted to use it for a trip to China later at the end of the year.

[11] Ms Li also told Mr Kapadia that she should have been given advance notice of a request to take annual leave so she wanted to know why he was insisting she take annual holiday so suddenly. Ms Li says Mr Kapadia did not answer her questions but just kept repeating "go, go, go".

[12] Ms Li says she felt she had no option but to leave so did. She still wanted to know why she had been told to leave. Ms Li tried to contact Mr Kapadia by telephone later that evening and subsequently. All of her attempts were unsuccessful.

[13] Ms Li asked a mutual friend to call Mr Kapadia and when he answered the friend passed the phone to Ms Li so she could also speak to Mr Kapadia. As soon as that occurred Mr Kapadia said "*I can't hear you*" then hung up.

[14] Ms Li also tried to communicate with Mr Kapadia by text message but these texts from her also failed to get any response from him, until she received the dismissal text on 06 September which said "*we do not need you to work for us anymore*".

[15] Mr Kapadia did not dispute that:

- a. He told Ms Li she had to take four weeks' annual holiday starting the next day but he did not tell her why she had to do so;
- b. Ms Li didn't want to take her annual leave then but he insisted she did;
- c. Ms Li asked why she had to leave work immediately but he didn't respond to her questions;
- d. He deliberately decided not to respond to Ms Li's numerous attempts to contact him.

[16] Mr Kapadia told the Authority that he was dissatisfied with Ms Li as an employee which is why he insisted she take four weeks' holiday to give him time to figure out what to do.

The issues

[17] The following issues are to be determined:

- (a) Was Ms Li's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

Was dismissal justified?*Onus*

[18] Asopalav bears the onus of establishing on the balance of probabilities that its dismissal of Ms Li was justified.

Justification test

[19] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Asopalav's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Li was dismissed¹.

[20] A fair and reasonable employer is expected to comply with its statutory obligations which include each of the four procedural fairness tests set out in s.103A(3) of the Act together with the good faith requirements set out in s.4(1A) of the Act.

Good faith

[21] Section 4(1A) of the Act requires an employer who is proposing to make a decision that may adversely impact on an employee's ongoing employment to give the employee access to relevant information and an opportunity to comment on it before a final decision is made.

[22] That did not occur here. Mr Kapadia says he saw Ms Li working for a competitor when he was walking past (she strongly denies that) then sent her the text dismissing her.

[23] Ms Li did not know anything about Mr Kapadia's concerns or that her employment was potentially at risk. She had no opportunity to respond to his view that he had seen her working for a competitor.

[24] These breaches of good faith by Asopalav seriously and fundamentally undermine its ability to justify Ms Li's dismissal.

¹ Section 103A(2) of the Act

Procedural fairness

[25] Asopalav raised various concerns about Ms Li for the first time in its Statement in Reply. It did not commence a disciplinary investigation or process prior to dismissing her. The allegation that resulted in her dismissal was never even put to her.

[26] I find that Asopalav failed to comply with any of the four procedural fairness tests ins.103A(3) of the Act. These failures were serious and resulted in significant unfairness to Ms Li. Her dismissal is therefore procedurally unjustified.

Substantive justification

[27] Mr Kapadia claims to have seen Ms Li working for a competitor on a date he can't recall at a time he can't recall. I found Mr Kapadia not very forthcoming with his evidence about this.

[28] When pressed very hard for some specific details about this alleged sighting of Ms Li, he said she was cutting the hair of a white man but he didn't know any more than that.

[29] Mr Kapadia suggested that customers had told him Ms Li was working for a competitor but he didn't identify what customers, when he was given that information, what had been said and what exactly each customer says they had seen.

[30] Mr Kapadia told the Authority that he did not do anything when he allegedly saw Ms Li cutting hair on a competitor's premises. He did not approach her to ask what she was doing, he did not start an investigation or disciplinary process. He did not discuss the matter with her or with the competitor.

[31] Ms Li provided a text from her new employment which confirmed that she was offered employment on 12 September. Ms Li's evidence was that she had not been on the competitor's premise while employed by Asopalav.

[32] Ms Li produced her bank statement which shows she was first paid by her new employer on 26 September 2016. She says she is paid fortnightly in arrears which accords with her start date of 14 September.

[33] I have resolved this conflict in favour of Ms Li on the basis I consider her evidence is more likely to be correct than Mr Kapadia's.

[34] I find that the procedural fairness defects and breaches of good faith were so significant that a fair and reasonable employer could not have concluded that Ms Li had worked for a competitor while still employed by Asopalav. I therefore find that Ms Li's dismissal was substantively unjustified.

Outcome

[35] I find that Asopalav's dismissal of Ms Li was procedurally and substantively unjustified.

What if any remedies should be awarded?

Mitigation of loss

[36] I am satisfied that Ms Li took appropriate steps to mitigate her loss. She was dismissed on 06 September and by 12 September 2016 had received an offer of new employment. Ms Li accepted this offer and started work in her new job on 14 September 2016.

Lost remuneration

[37] During the investigation meeting Ms Moncur withdrew Ms Li's lost remuneration claim on the basis that because she had been paid two weeks' pay in lieu of notice in pay and had got new work so quickly she had not actually incurred any lost wages.

Distress compensation

[38] Ms Li gave compelling evidence of the shock, humiliation and distress she says that she was caused by her unjustified dismissal. She was clearly visibly upset at the investigation meeting today.

[39] Ms Li talks about trembling and crying and about how she arrived home devastated. She says these events were devastating to her because she had a 30 year unblemished track record in the industry and she didn't know why she had been treated so rudely.

[40] Ms Li described how she experienced problems eating and sleeping. She had recurring embarrassment when she saw Asopalav clients or others in community would ask her why she was not working there any more.

[41] Ms Li says she was very distressed because she did not know why this had happened to her. She says that Mr Kapadia's refusals to answer her questions or phone call or texts about her employment had increased her distress.

[42] Ms Li says she felt like a begger because she had begged Mr Kapadia to tell her what she had done to make him insist she take her things and leave work immediately and she had begged him to take her leave later in the year. Her requests had fallen on deaf ears which made her feel diminished.

[43] Ms Li expressed great concern about the damage she feels has been done to her reputation by these events. She described how her acute embarrassment made her reluctant to go out in public.

[44] Bearing in mind the evidence that I have heard, I consider it appropriate for Asopalav to pay Ms Li \$8,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she sustained as a result of her unjustified dismissal.

Contribution

[45] Having established that Ms Li has a valid grievance, s124 of the Act requires me to assess the extent to which Ms Li contributed to the situation that gave rise to her grievance.

[46] Contribution involves blameworthy conduct which must be established on the balance of probabilities. I find that Asopalav's evidence about Ms Li fell far short of the required standard.

[47] Accordingly remedies are not to be reduced on the grounds of contribution.

Costs

[48] Ms Li as the successful party is entitled to a contribution towards her actual legal costs.

[49] I adopt the Authority's usual notional daily tariff based approach to costs in respect of this matter. The tariff is currently \$4,500 per day. This is to be pro-rated to reflect the actual number of hours required for the investigation meeting. Accordingly, the notional starting point for assessing costs in this matter is \$1,286.

[50] Neither party identified any factors which should result in the tariff being adjusted and I am not aware of any myself.

[51] Within 28 days of the date of this determination Asopalav is ordered to pay Ms Li:

- a. \$1,286 towards her actual legal costs;
- b. \$71.56 to reimburse her filing fee.

[52] Asopalav is also ordered to pay the amounts in paragraph [7] within 7 days of this determination.

Rachel Larmer
Member of the Employment Relations Authority