

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 215
3019033

BETWEEN DAN LAN LAN KE
 Applicant
 &
 BOB WU
 Applicant

AND B & Z TRADES COMPANY
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Deanne Burt, Counsel for the Applicant
 May Moncur, Advocate for the Respondent

Investigation Meeting: 8 June 2018

Additional documents
received: 12 June 2018 from the Applicant
 15 June 2018 from the Respondent

Determination: 12 July 2018

DETERMINATION OF THE AUTHORITY

- A. The Respondent unjustifiably dismissed the Applicants.**
- B. The Respondent is ordered to pay to the First Applicant the following amounts within 14 days of the date of this determination:**
- a. The sum of \$1,804 gross for monies lost as a result of his personal grievance;**
 - b. The sum of \$5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - c. The sum of \$2,362.50 under s 131 of the Employment Relations Act 2000;**

d. The sum of \$71.56 for costs.

C. The Respondent is ordered to pay to the Second Applicant the following amounts within 14 days of the date of this determination:

a. The sum of \$9,020 gross for monies lost as a result of her personal grievance;

b. The sum of \$5,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

D. Costs are reserved.

Employment Relationship Problem

[1] Bob Wu and Da Lan Lan Ke (the Applicants) were employed by B & Z Trades Company Limited (the Company) in February 2017. On 26 June 2017, they were notified in writing that their positions would be made redundant as of 24 July 2017.

[2] The Applicants allege they were summarily dismissed on 16 July 2017. They claim their dismissal, whether this occurred by way of summary dismissal or redundancy, was unjustified. They further claim they suffered a disadvantage to their employment as a result of the Company's failure to provide them with individual employment agreements. In addition, they claim they are owed wage arrears.

[3] The Company denies unjustifiably dismissing the Applicants. It also denies that it acted in an unjustifiable manner giving rise to an unjustified disadvantage or that wage arrears are owed to the Applicants.

[4] As permitted by s 174E of the Act, this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues:

[5] The issues to be determined are:

(a) Were the Applicants unjustifiably dismissed from their employment with the Company?

- (b) Did the Applicants suffer an unjustified disadvantage to one or more of their conditions of employment?
- (c) If the Applicants were unjustifiably dismissed, or suffered an unjustified disadvantage, what remedies should be awarded?
- (d) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by the Applicants that contributed to the situation giving rise to their grievance?
- (e) Are any wage arrears owing to the Applicants?
- (f) Should either party contribute to the costs of representation of the other party?

Relevant Background facts

[6] The Applicants are husband and wife. They were employed by the Company on 20 February 2017 to manage the Company's Hamilton car yard.

[7] The Applicants' did not sign Individual Employment Agreements (IEA). However having heard from the parties, viewed the wage records, and viewed "We chat" messages exchanged between the parties at material times, I find on balance that the following terms were agreed:

- a) The Applicants were employed for an indefinite period and not for a fixed term of three months as claimed by the Company. The requirements of s 66 of the Act were not met.
- b) The Applicants would each be paid a sum of \$902 gross each per week.
- c) The Applicants were to work 40 hours per week. The Hamilton yard was to be open from Monday to Friday from 9 am to 5 pm and on a Saturday and Sunday from 10 am to 3 pm. During this period the Applicants were permitted to take one day off in turn between Monday and Thursday. In addition, they could each take 2 hours off work between Friday and Sunday.
- d) The Applicants were permitted to live in the office premises at no cost.

[8] Following a short period of training, the Applicants relocated to Hamilton. This coincided with the opening of the Company's Hamilton car yard in March 2017.

[9] Shortly thereafter Mr Bei started to receive family pressure to terminate the Applicants' employment. He said he also started to have concerns with Mr Wu's performance and the Company began experiencing financial difficulty.

25. After my father learnt about the accommodation arrangements and the extra costs incurred he was not happy with me. My father was also not very happy about seeing Bob playing computer games and watching TV online during business hours on several occasions.
26. I told my Dad that I was helping out friends for a couple of months and pleaded for his support and understanding. As the Hamilton yard did not make any profit the tension between me and my Dad got worse.
28. I was under constant pressure to end the Hamilton arrangement as soon as the three-month period was finished. To make matters worse, Bob's poor performance escalated the tension between me and my father and added more pressure on me to exit from the arrangements with Bob.
32. It was very much a feeling of being trapped in the arrangement with Bob and his wife and seeing no easy way to exit from it. I was feeling isolated in the family and did not know what to do. The business was not making money, Bob and his wife did not want to move out of the commercially zoned site, my dad and partner were not happy with me and the bills were piling up.
33. I decided I had to make Bob and his wife redundant and run the store with my partner ourselves. I also thought that Bob and his wife would understand the situation as it would cause least embarrassment to all involved. I had mentioned to them on a couple of occasions previously that the business was losing money.

[10] In or about the middle of June 2017 Mr Bei and his wife invited the Applicants to dinner. During the dinner they say Mr Bei told the Applicants that the Company "was not profitable and had many problems". They told them they were therefore going to have to shut the Hamilton car yard and would need to make the Applicants redundant. The Applicants deny this conversation took place.

[11] On 26 June 2017 the Applicants received an email from the Company's General Manager. This email attached a letter of the same date that stated:

I am writing this letter to inform you that B&Z Trades Company Limited (the Company) is conducting a restructure of B&Z Car Hamilton Branch.

Due to our overall performance review, we are deeply concerning about the current operational and financial status of B&Z Car Hamilton branch.

A formal business strategic decision has been made and we are writing this letter to let you know that the Company will end the current employment relationship with both of you.

Based on the current employment contract you have signed with the Company your last day of employment will be Monday, 24 July 2017.

We have been fortunate to work with both of you over the last few months. We appreciate your understanding, and we wish you all the best.

[12] On Sunday 16 July 2017 the Applicants' employment came to an end. The events of the day, and the reason for their employment ending, are in dispute. I am satisfied, on balance, the following took place:

- a) The car yard was closed early to enable the Applicants to relocate to new accommodation.
- b) Mr Bei arrived at the car yard while the Applicants were away. He was upset to find it closed. Upon checking the Company computer he viewed personal emails exchanged between the Applicants and their lawyer regarding the raising of a personal grievance. He said:

I was sitting there feeling numb and empty then I became overwhelmed by sadness, hurt and feelings of betrayal. After I pulled myself together I checked the work computer and found that Bob had been spending hours and hours watching TV programmes and playing online games during trading hours. I did not want to mention to my father what I had just found as he had complained about it before and I had taken no action on the information, thinking what he saw was not the normal situation.

- c) Ms Ke then returned to the car yard. Mr Bei asked Ms Ke why they had closed the car yard early. He told her he had read through the emails that were on the company computer and asked her to give him the keys to the car yard. Mr Bei told Ms Kei that she was being fired and she responded that she would "see you in court".
- d) Ms Ke then returned to the office and text Mr Wu to return. Mr Wu returned and phoned the police. In turn the police called Mr Bei and asked him why "I was evicting a pregnant woman from her house". Mr Bei responded "I explained to the police that I was merely discussing job handover with her and did not ask her to move out immediately."

[13] On 17 July 2017 Mr Wu text Mr Bei seeking confirmation that, by returning the car yard keys to the Company, the Applicants' employment was at an end. Mr Bei confirmed this was the case.

[14] On 21 July 2017 the Applicants were paid their final pay. This was for the period ending 16 July 2017. They did not work after this date.

Issue One: Unjustified dismissal?

Were the Applicants dismissed on 16 July 2017?

[15] I am satisfied the Applicants were dismissed from their employment on 16 July 2017. This finding accords with the events that I have found took place on that day, the text message exchange between the parties on 17 July 2017, and the final pay paid to the Applicants which was for the period ending 16 July 2017.

Was the dismissal justified?

[16] In order for the Applicants' dismissal to be justified, the Company must satisfy the requirements set out in s 103A of the Act. This requires an objective assessment of whether the Company's actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[17] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[18] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.¹

[19] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of

¹ Section 103A(5), Employment Relations Act 2000.

employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[20] I am satisfied the test of justification was not met by the Company. The process leading to the Applicants' dismissal on 16 July 2017 was defective. The Company did not meet any of the mandatory considerations set out in s 103A (3) when it dismissed the Applicants. There was no investigation before dismissal. There was no rising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in the Applicants being treated unfairly.

The Redundancy

[21] I note, for completeness, that even if I am wrong about this point, I am satisfied that the Company's decision to terminate the Applicants on the grounds of redundancy was also unjustified. For the reasons that shall follow I find the Company did not meet the minimum standards of procedural fairness outlined in s 103A of the Act and its decision to terminate the employment relationship was not genuine.

No fair process followed

[22] The procedure that was followed by the Company was flawed, even having regard to the small size of the company and the alleged friendship between the parties. The Company failed to follow the requirements prescribed by the Act.

[23] There was no consultation with the Applicants prior to the decision being made to terminate their employment. The key requirements of consultation were recently summarised by Judge Inglis (as she then was) in *Stormont v Peddle Thorp Aitken Limited*².

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

² [2017] NZEmpC 71 at [54].

[24] These requirements were not met by the Company. The decision was presented as a fait accompli. There was no opportunity for the Applicants to provide any input into the decision made by the Company. They were not provided with any information relied upon by the Company in reaching the decision to make their positions redundant. The Company's failure to comply with the statutory requirements was not minor and did result in the Applicants being treated unfairly.³

Termination on the grounds of redundancy was not genuine

[25] The reason stated by the Company in its letter of termination for making the Applicants' positions redundant was due to the "current operational and financial status of B&Z Car Hamilton branch". Mr Bei explained that the outgoings on the Hamilton branch exceeded its income. In support of this position he produced a one page document that showed vehicle sales between March and July 2017 and monthly expenses (the Spreadsheet).

[26] Mr Bei also referred to a significant downturn in the used-car market. He said this had resulted in the Company suffering significant losses and having to take out loans to support its expenses. He said he made the decision to close all of its yards, except its Auckland branch, as soon as the Company's existing stock was sold. For this reason he retained the staff in the Christchurch and Napier yards but he decided to run the Hamilton branch himself and make the Applicants' positions redundant.

[27] Mr Bei's explanation for making the Applicants' redundant did not accord with the evidence that I viewed and heard.

[28] Firstly, Mr Bei's evidence that the Company was in financial difficulty was inconsistent with the Statements of Financial Performance provided by the Company and other information I heard.

[29] While the Statement of Financial Performance for the year ended 31/03/18 shows the Company suffered a loss of \$16,999 that loss was attributable to an increase in expenditure of \$500,351 over that spent by the Company in the previous financial year. This was more likely than not due to the Company expanding, not curbing its operations as Mr Bei said. I am fortified in my view by the Statements of Financial

³ Section 103A(5) of the Employment Relations Act 2000.

Performance for the periods ended 31/03/15, 31/03/16, 31/03/17 and 31/03/18 and an advertisement placed by the Company.

[30] The Statement of Financial Performance for the year ended 31/03/18 shows:

- a) The amount of wages paid to staff increased by 20% from the year ended 31/03/17. It was more than double that for the year ended 31/03/16 and more than triple that for the year ended 31/03/15.
- b) The amount paid by the Company for advertising increased by 30% from the year ended 31/03/17. This was nearly double that for the year ended 31/03/16 and four times that for the year ended 31/03/15.
- c) The rental expenses paid by the Company increased by nearly 200% on the year ended 31/03/17. Mr Bei said the Company owned the properties on which its car yards were located, except its Auckland car yard and Christchurch car yard that were leased.
- d) Vehicle testing costs increased by approximately 55% on the year ended 31/03/17. During this period the Company made vehicle purchases totalling \$2,575,862.50. Freight charges totalled \$1,059,680.70. This is inconsistent with Mr Bei's evidence that the Company was using existing stock, other than for its Auckland car yard.
- e) In the year ended 31/03/18 the total monies owed by the Company to the bank decreased by \$167,932.90 from that owed for the year ended 31/03/17. This meant that the total loans of the Company were reduced to \$991,644.16. Of the monies owed a sum of \$900,000 related to the purchase of the Hamilton car yard site.
- f) In the year ended 31/03/18 monies owed to creditors dropped by 60% from that owed in the year ended 31/03/17. While GST liability increased, this was offset by the Company going from owing tax in the year ended 31/03/17 to having a credit for tax.

[31] The advertisement placed by the Company in the month prior to making the Applicants' positions redundant showed the Company was advertising for a full-time sales person due to "business development". The advertisement stated:

Due to business development, the company is now recruiting one full-time sales person, working location Auckland Western suburb, central, Hamilton. Fluent English, good communication skills, excellent pay and condition.

[32] Secondly, Mr Bei's evidence that the Hamilton branch was suffering loss was inconsistent with the Spreadsheet, the Statements of Financial Performance and other documents produced by the Company. These included several power accounts, a mortgage repayment schedule and Trade Me advertisement costs that were said to relate to advertising of vehicles on the Hamilton yard.

- a) *Gross Profit* - Between March and June 2017 the Spreadsheet shows that the Hamilton branch sold 40 vehicles. The total value of these vehicles was \$365,815. The Statements of Financial Performance show a gross profit on vehicle sales in the region of 25-30%. Based on these percentages the gross profit for Hamilton was in the region of \$91,453 to \$109,744.
- b) *Expenses* - The Spreadsheet shows expenses of \$20,731. However, the expenses listed do not all accord with the documentation provided. For example, the advertising expenses are recorded on the Spreadsheet as \$3,000 per month but the receipts provided by the Company show that, in the period March 2017 to June 2017, the Company only spent \$6,374.14 (exclusive of GST). This equals \$1,593 per month.
- c) *Operating profit/loss* - Even if the figures stated on the Spreadsheet for expenses were correct, the total expenses for the Hamilton yard, for the period March and June 2017, were less than the gross profit. This means the Hamilton branch had an operating profit.

Finding on Issue Two

[33] The Company's decision to terminate the Applicants' on 16 July 2017, and its earlier decision to make their positions redundant, was not one that a fair and reasonable employer could have made. I therefore confirm the preliminary findings that I provided to the parties on the day of the investigation. Namely, that the Company unjustifiably dismissed the Applicants.

Issue 3: Unjustified Disadvantage

[34] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[35] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[36] The Statement of Problem pleads the Applicants suffered an unjustified disadvantage to their employment by the Company's failure to provide the Applicants with an individual employment agreement. Mr Wu said this disadvantaged them because there was no certainty around the hours that they were to work.

[37] Mr Wu's evidence was inconsistent with other evidence that he and Ms Ke gave during the investigation meeting. I am satisfied that at material times all parties knew what hours the Applicants were required to work.

[38] I confirm the preliminary findings that I provided to the parties on the day of the investigation meeting, namely that the Applicants did not suffer an unjustified disadvantage.

[39] For completeness I record that had a claim for a penalty been made for failure to provide an individual employment agreement then it is likely that I would have ordered the Company to pay a penalty. The requirement to provide an employment agreement has been in place for more than a decade. Ample assistance is available to help employers, small and large, to ensure they comply. However, as a claim was not made for a penalty, I cannot investigate this issue.

Issue 4: Remedies for unjustified dismissal grievance

Lost remuneration

[40] The Applicants each claim 3 months' lost wages.

[41] Section 123(1)(b) of the Act provides for the reimbursement by the Company of the whole or any part of wages lost by the Applicants as a result of their grievance. Section 128(2) of the Act provides that I must order the Company to pay the Applicants the lesser of a sum equal to their lost remuneration or to three months' ordinary time remuneration.

[42] In *Xtreme Dining v Dewar* the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.⁴

[43] The Company did not put mitigation at issue. However, in the circumstances presented to me, a claim by each Applicant for a sum of 12 weeks' lost wages is not reasonable.

Mr Wu

[44] The Applicants were paid up to and including 16 July 2017. Mr Wu said he obtained employment on 31 July 2017. I am satisfied in these circumstances that two weeks' lost wages are attributable to his unjustified dismissal.

[45] The Company is ordered to pay to Mr Wu the sum of \$1,804 gross. Payment of this sum must be made within 14 days of the date of this determination.

Ms Ke

[46] Ms Ke was pregnant at the time she was dismissed. Due to the stress of her dismissal she said she was too unwell to find work. Ms Ke delivered her baby on 27 September 2017. She received paid parental leave from that time. I am satisfied Ms Ke lost 10 weeks' and two days remuneration as a result of her unjustified dismissal. 10 weeks' lost wages (\$9,020) plus two days' lost wages (\$360) equals \$9,380.

⁴ [2016]NZEmpC 136

[47] The Company is ordered to pay to Ms Ke the sum of \$9,380 gross. Payment of this sum must be made within 14 days of the date of this determination.

Compensation s123(1)(c)(i)

[48] The Applicants claim a sum of \$12,000.00 each under s 123(1)(c)(i) of the Act. In their Counsel's submissions the sum claimed is \$10,000 each.

[49] The Applicants said they felt distressed and ashamed about being terminated. They struggled telling their families of their terminations. Mr Wu said he lost confidence in himself and felt humiliated that as a husband and father he could not provide support to his family.

[50] Ms Ke was pregnant at the time of her termination. Ms Ke said she cried a lot after finding out they were terminated and became stressed. She suffered at that time from headaches, dizziness and was unable to eat.

[51] Taking into account the foregoing factors, together with the short duration of the Applicants' employment, Mr Wu finding employment within two weeks, and there being no evidence of any longstanding impact on either Applicant, I award each of the Applicants the sum of \$5,000.00 as compensation for hurt and humiliation.

[52] I order the Company to pay to the Applicants the sum of \$5,000.00 each as compensation for hurt and humiliation. These sums must be paid within 14 days of the date of this determination.

Issue 4: Contribution

[53] I am satisfied that the Applicants did not act in a way that was causative of, or contributed to, their grievance. Their actions were in no way culpable or blameworthy. I therefore do not find that there is any contribution.

Issue 1: Are any wage arrears owing to the Applicants?

[54] The Statement of Problem pleads that the Applicants each worked 65 hours per week. They claim payment of an additional 25 hours per week.

[55] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.⁵

Mr Wu

[56] During the investigation meeting Mr Wu conceded that, at most, he worked an additional 7 hours per week and not 25 hours as claimed. He said this was based on him travelling to and from Auckland, on average, 2 times per week delivering vehicles. His evidence is supported by petrol receipts.

[57] I am satisfied the hours Mr Wu worked were outside of his ordinary hours of work. The Company would have been aware of the additional hours he was working as he was collecting and delivering vehicles from and to its car yard in Auckland.

[58] 7 hours per week at Mr Wu's hourly rate of \$22.50 equals \$157.50 per week. Mr Wu started working in Hamilton in March 2017. Between then and his termination (excluding his final week of work when he did not travel) was 15 weeks. 15 weeks multiplied by \$157.50 is \$2,362.50.

[59] The Company is ordered to pay to Mr Wu the sum of \$2,362.50 for wage arrears. This sum is to be paid to Mr Wu within 14 days of the date of this determination.

Ms Ke

[60] During the investigation meeting Mr Wu said that Ms Ke worked an additional 6 hours per week as opposed to the 25 hours claimed. Ms Ke did not agree with her husband.

[61] Ms Ke maintained that she worked an additional 25 hours per week. In support she pointed to the need for her to clean 60-70 vehicles that came from Auckland following flooding in March/April 2017. She said she had to clean 3-4 of these cars each day for about a month, some of which were cleaned outside of ordinary work hours. She said she also had to attend to cleaning and maintenance of the yard outside normal working hours.

[62] Mr Bei challenged Ms Wu's evidence. He said the Company only sent 8 vehicles to the Hamilton yard for cleaning during this period. He said it would not

⁵ Section 131 Employment Relations Act 2000

have been economic to send 60-70 vehicles to Hamilton. In addition, he said, the yard did not have sufficient room to store an additional 60-70 vehicles.

[63] I find that it is more likely than not that any vehicles that Ms Ke cleaned, or maintenance that she undertook, was done during her ordinary working hours. Even if she did have to clean 60-70 additional vehicles, this would have only been for 2-3 weeks based on her estimate of 3-4 vehicles per day. She could not say how many vehicles were cleaned outside ordinary working hours or how much time she spent doing this.

[64] In the circumstances, I confirm my preliminary indication provided to the parties during the investigation meeting. I make no award of wage arrears to Ms Ke.

Issue 5: Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and an Authority determination on costs is needed the Applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Company will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].