

**N THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

3029352
[2019] NZERA 108

BETWEEN HUIFANG QIN
 Applicant

A N D NEW ERA TILING NZ LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: B. Hinchcliff, Counsel for the Applicant
 A. Swan, Counsel for the Respondent

Investigation Meeting: 11 October 2018 and 22 February 2019 at Auckland

Submissions Received: 22 February 2019

Costs Submissions
Received: From Applicant on 27 February 2019
 No Submissions from Respondent

Date of Determination: 27 February 2019

DETERMINATION OF THE AUTHORITY

A. The application for personal grievance is dismissed.

**B. I order Huifang Qin pay New Era Tiling Limited the sum of \$4,970
towards costs.**

Non-publication order

[1] There is a non-publication order pertaining to the applicant's previous employer Tiling Projects Limited (TPL) regarding their client information contained on the Authority's files or in the parties or applicant's possession including any of

their agents. None of this information is to be published without order of the Authority or Court or the express agreement of TPL.

[2] There is a further non-publication order pertaining to the respondents client information contained on the Authority's files or in the applicant's possession including any of her agents. None of this information is to be published without order of the Authority or Court or the express agreement of New Era Tiling Limited.

Employment Relationship Problem

[3] Huifang Qin (HQ) alleges she was unjustifiably dismissed by New Era Tiling Limited (NETL) on 13 November 2017 following allegations of dishonesty and misconduct. NETL denies she was unjustifiably dismissed. Even it is held there is a personal grievance, it submits her misconduct requires remedies to be substantially reduced.

Relevant Facts

[4] Ms Qin was employed by NETL on 31 July 2017 as a part time Office/Marketing Manager. She worked three days per week around her tertiary studies. Horst Schosser was her manager and the owner of NETL. NETL is a tiling company that subcontracts tiling services to building companies. This is usually by way of tender.

[5] Ms Qin had previously worked for a competing tiling business, TPL. It is accepted when she left TPL Ms Qin retained client information. This information was saved to her personal hard drive. Ms Qin believed this was her information because she was authorised to work from home and this information had been saved to her personal hard drive. The information included, amongst other things three tenders Ms Qin had worked upon for TPL.

[6] NETL leased offices in close proximity to several other businesses. It shared the kitchen and bathroom with these other tenants.

[7] Ms Qin received training on Xero an online accounting system. She had restricted access to Xero, only being able to produce draft quotes and invoices. She

was also trained to use BCI an online search engine for tiling contract tenders. She was instructed to undertake the office administration. This included compiling draft tenders and quotes.

[8] On 21 August 2017 Mr Schosser left New Zealand to travel to Germany. He communicated by phone and email with Ms Qin. During this period he raised concerns about her work on the company brochure and her quoting through Xero, the company's online accounting system. Ms Qin had by-passed her restrictions by using another employee's password resulting in an incorrect quote going to a client. At this stage Mr Schosser was becoming concerned about Ms Qin's abilities to do her work.

[9] On or about 12 September 2017 the contents of Ms Qin's hard drive were downloaded to NETL's computer through her logon and computer. Ms Qin denied she downloaded this material. The hard drive included significant parts of TPL's client database and tenders and some of Ms Qin's personal information.

[10] Mr Schosser returned to New Zealand on 13 Sept 2017. He went into the office on 18 September and was met with complaints from other tenants of the neighbouring offices about Ms Qin. These included that she:

- Had private items delivered to the office;
- Kept irregular hours at the office;
- Left the shared kitchen and bathroom in a mess;
- Had friends coming into work.

[11] When he confronted Ms Qin about these matters she agreed to stop the delivery of personal items. She denied she had irregular hours or that it impacted upon her work. She showed him how she had doubled the numbers of tenders. She blamed poor eyesight for any other issues. She agreed not to allow her friends to attend the offices.

[12] Mr Schosser then obtained two 32 inch monitors to assist with her poor eyesight.

[13] However further concerns about Ms Qin's ability and business practices surfaced in October 2018.

[14] Mr Schosser had directed Ms Qin utilise Hart Design to update their brochure. When Mr Schosser made enquiries with Hart Design in late October 2018 he was told Ms Qin's instructions were confusing and no further progress had been made on the brochure. Mr Schosser then discovered Ms Qin had engaged a friend of hers to do the design instead, citing problems with Hart Designs. Her friend - then charged NETL for her work. Mr Schosser was dissatisfied with the design work but could not afford to pay twice. He finished updating the brochure himself.

[15] From mid to late October 2018 issues arose about Ms Qin's tenders. Although initially she had doubled the numbers of NETL tenders, no new tenders were being generated. Ms Qin showed Mr Schosser information from her ex-employer. This included details of three TPL's tenders. Mr Schosser saw she had copied the same tenders and presented these as her own work. Ms Qin stated in her evidence at hearing that she had done this to show loyalty. Further she stated she had given the same information to TPL but because they did not treat her right she had paid them back and "gave benefit to her new boss."

[16] Mr Schosser alleges he then ordered her to get rid of the hard drive and cancel all jobs she had obtained using TPL's information. Ms Qin denies this occurred.

[17] Mr Schosser had instructed Ms Qin to arrange interviews to find tiling labourers for existing tenders. On 1 November Mr Schosser interviewed friends of Ms Qin. He asked them to leave when it was revealed they were not entitled to work in New Zealand. Ms Qin confirmed at hearing that she had told Mr Schosser the tilers had "a low education" so "they needed to be paid in cash so that you could just get rid of them if it did not work out." She believed he would be better not to seek work visas for these tilers because they were time consuming. She advised that a friendly immigration consultant had told her taking the tilers through the work visa process "then finding they were no good was pointless." Mr Schosser declined to take her advice and told her he did not want to hear this again.

[18] On 2 November during a meeting with a labour hire company providing overseas based tilers Ms Qin accepted at hearing she told Mr Schosser amongst other things:

“You are wrong because the immigration process was too long”

“We need to get tilers on holiday VISAs and pay them cash only”

“If they were good we could get them VISA’s”

Dismissal

[19] Mr Schosser alleges he told Ms Qin her business practices were illegal and they would be discussing these at a later meeting. On 6 November 2017 Mr Schosser met with Ms Qin at work and told her of his concerns about her honesty and misrepresentation of her skills. He alleges he told her to go home while he investigated these concerns. She denied this was the case. Further she presented for work as usual one or two days later.

[20] When Ms Qin returned to work, Mr Schosser alleges he asked her to identify the information she had taken from TPL on their system then told her they would meet again at a later date following further investigation into the concerns. Ms Qin denies this occurred.

[21] On 13 November 2017 Mr Schosser approached Ms Qin again at work. He informed her of his findings from his investigations. He believed the information she had taken from TPL had been stolen and used to draft tenders for NETL. Further she had been arranging interviews for her friends who were not legally entitled to work in New Zealand and may have been offering them opportunities to work for cash at NETL.

[22] It is accepted Ms Qin did not (and still does not) deny the allegations. Mr Schosser told her she was dismissed immediately. She left the office and did not return to work.

[23] She raised a personal grievance of unjustified dismissal on 20 December 2017.

Issues

[24] There is a single issue for determination namely whether Ms Quin was unjustifiably dismissed from her employment?

Law

[25] It is accepted Ms Qin's employment was terminated. The onus falls upon NETL to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)).

[26] In applying this test, the Authority must consider the matters set out in s.103A(3). 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 employees explanation prior to dismissal.

[27] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)).

[28] Serious misconduct "... will generally involve deliberate action inimicable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty."¹ It is conduct which "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."²

Was there serious misconduct?

[29] Ms Qin's employment agreement included clause 30 Termination for serious misconduct. This clause defined serious misconduct as, amongst other things "unauthorised possession of property, dishonesty" and "actions which seriously damage the Employer's reputation, breaches of trust and confidence".

¹ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319.

² *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483.

[30] Ms Qin's evidence at the initial hearing in October 2018 confirmed:

- She had retained information from TPL. These included information about three tenders. One TPL had secured, another TPL had been completing work for and a third it had lost.
- TPL did not give her authorisation to retain or use this information for NETL.
- She used TPL's information to draft tenders for NETL.
- She solicited TPL's clients, several of whom were her friends, to come to NETL.
- She believed TPL's information was hers "because I had collected it while working for [TPL]".

[31] When asked what she had done with TPL's information she confirmed she had used it "to create a database of 350 business partners/suppliers/builders for [NETL]". When asked where this was stored she confirmed she had placed it on the NETL computer.

[32] Following her above evidence, the hearing was briefly adjourned to allow NETL to search its computer system to locate the database. Over 100 pages of information identified as belonging to TPL were located on NETL's computer hard drive. This was filed in the Authority. Ms Qin sought an opportunity to view the information and respond. The matter was then adjourned.

[33] In January 2019 Ms Qin filed an expert report that confirmed the information on Ms Qin's hard drive was the same information on NETL's computer system. The report also confirmed the times and dates the information was downloaded to NETL's computer hard drive.

[34] At the subsequent February 2019 hearing Ms Qin denied she had downloaded any information. Further she now stated she had only shown Mr Schosser three TPL payment claims by plugging her hard drive into the system at the start of her employment. She denied that she had downloaded anything.

[35] Ms Qin's expert confirmed all of the documents upon her personal hard drive had been downloaded to NETL's computer system on 2 August 2017 then deleted. The same documents were downloaded again on 12 September 2017 at 12.12 pm. These documents were located upon Ms Qin's computer and under her logon within NETL's computer system. Ms Qin had her own computer at NETL that no one else used until she had left.

[36] Further the dates the documents were downloaded (2 August and 12 September 2017) were both dates Ms Qin was present at the office. Ms Qin appeared to accept she may have mistakenly downloaded documents on 2 August to show Mr Schosser but not 12 September. Mr Schosser states he saw TPL's information in October not August and told her to remove it immediately. Emails Ms Qin sent from her NETL computer on 12 September at 11.48 am and 12.46 pm were produced at hearing. These suggest only she was in the office and using her computer at that time.

[37] Ms Qin attempted to suggest that another employee may have taken her hard drive, had access to her computer and downloaded the documents on 12 September. Mr Schosser produced his passport showing he was not in the office on 12 September because he was in Germany. No other NETL employees were shown to be present at the office on 12 September.

[38] I accept Mr Schosser's evidence that neither he nor anyone else he may employ would be motivated to do so. This is because TPL and NETL offer different tiling services. TPL priced for bulk housing developments and were consequentially lower. NETL's services were aimed at a premium residential and commercial construction and therefore his pricing was significantly higher than TPL's. There was no benefit in having any of TPL's pricing information.

[39] I do not accept Ms Qin's allegation Mr Schosser asked her for TPL's information and therefore NETL should be held accountable for her disclosures. This does not make sense if it held little or no value for NETL given the different tiling services they offered. I accept Mr Schosser's evidence he would not have been motivated to ask for TPL's information as a consequence. Further Mr Schosser told TPL about Ms Qin having removed their information. TPL have instructed solicitors and Ms Qin has received correspondence regarding her alleged breaches.

[40] Ms Qin suggested Mr Schosser had inadequate information upon which to form any view about her honesty. The three TPL payment claims Ms Qin accepts she showed NETL during her employment contain confidential pricing information that Ms Qin was aware she had no authority to disclose to NETL. Further Ms Qin did not deny at the time of dismissal and at hearing that she took information from her previous employer. This information alone would be sufficient for an employer to have reasonable concerns about her honesty.

[41] While Ms Qin may be at a loss to explain how the TPL documents were discovered on her computer at NETL, the evidence strongly infers she is most likely to have downloaded these documents. Even if this information was discovered after her dismissal, it merely strengthens the employer's case that there was serious misconduct.

[42] Further Ms Qin held the firm belief even at hearing that cash payments to migrant tilers, some of whom were not allowed to work in New Zealand or were here on a holiday visa was an honest practice. I respectfully disagree.

[43] Having regard to the evidence, there is little doubt a fair and reasonable employer could have concluded there was serious misconduct.

Was the process leading to dismissal fair and reasonable?

[44] Before she was dismissed, Ms Qin was well aware of NETL's concerns about her behaviour. At the next meeting on 13 November 2018 as well as at hearing, Ms Qin did not deny any of NETL's findings.

[45] However employers are required not only to raise their concerns but must also give employees an opportunity to be heard. Ms Qin was not fully informed her actions may lead to dismissal or that she had the right to bring a support person. She may not have appreciated the seriousness of the meetings on 6 and 13 November 2017 as a consequence. This was a defect in the employer's process because it did not give her a reasonable opportunity to be heard.

[46] Section 103A(5) requires that I consider whether this defect was minor and created unfairness for Ms Qin. Given the finding of serious misconduct and Ms Qin's

frank admissions prior to dismissal and at hearing, there seems little to be gained by further time to seek advice and support. Her representative submitted that she should have been given an opportunity to remove the information from NETL's system and this may have impacted upon the decision to dismiss. I have doubt this would have made any difference. Her actions placed her employer's reputation for honesty at risk, created a potential liability and lost income. An employer would also hesitate to give Ms Qin any access to its information given her previous actions. In these circumstances the defects were minor and did not create unfairness.

[47] The application for personal grievance is dismissed.

Costs

[48] I had intended dealing with costs within this determination on the basis of the daily notional tariff and sought the parties' views on this by 12 pm today. The respondent was content to deal with this matter based upon the daily notional tariff. The applicant filed submissions seeking reduction of costs and referring to Calderbank offers being exchanged. Copies of those offers have not been provided to the Authority. Therefore they shall not be taken into account.

[49] Given the respondent was successful, it is entitled to costs. The starting point for costs is the Authority's daily notional tariff of \$4,500 for the first day and \$3,500 for each successive hearing day. The first days hearing started at 9.30 am and adjourned at 3 pm to allow Ms Qin an opportunity to view the documentation recovered from NETL's computer. This comprised 2/3 of a hearing day or \$2,970 of the first hearing day tariff. The entirety of the second hearing day was required or \$3,500 for the second hearing day. Therefore the starting point for assessing costs is \$6,470.

[50] I accept the respondent ought to contribute towards the computer forensic experts report because it was substantially helpful in resolving this matter in its favour. This shall be met by reducing the costs payable by the applicant to the respondent by \$1,000.

[51] Ms Qin filed a statement in reply to the counterclaim prior to it being withdrawn on 10 October 2018. I accept this did require her to incur cost. This shall be met by reducing the costs payable by the applicant to the respondent by \$500.

[52] I order Huifang Qin pay New Era Tiling Limited the sum of \$4,970 towards costs.

T G Tetitaha
Member of the Employment Relations Authority