

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 405  
3081455

BETWEEN                      MEIYING FAN  
Applicant

AND                              VICTORXIE NZ TRADING  
LIMITED  
Respondent

Member of Authority:      Robin Arthur

Representatives:            Maria Green, counsel for the Advocate  
Garry Pollak, counsel for the Respondent

Investigation Meeting:      3 July 2020

Determination:              7 October 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Meiyong Fan was unjustifiably dismissed by Victorxie NZ Trading Limited (VTL).**
- B. In settlement of her personal grievance for unjustified dismissal VTL must pay Ms Fan the following amounts within 28 days of the date of this determination:**
- (i) \$7,257 in reimbursement of lost wages; and**
  - (ii) \$11,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved with a timetable set for memoranda if not resolved by the parties.**

**Employment Relationship Problem**

[1] Victorxie Trading NZ Limited (VTL) operates two Asian grocery stores in Auckland, one on the North Shore and one in Newmarket. Meiyong Fan began work as

customer service person in VTL's Newmarket store in July 2019. On 21 September 2019 Ms Fan took leave, for urgent family reasons, to travel to China. On Ms Fan's return to New Zealand VTL's director and sole shareholder Ling Xie told Ms Fan further work at the store would be part-time, not full-time. After several days passed without Ms Xie advising her of her new hours of work Ms Fan sent Ms Xie a message saying she wanted to go back to working full-time as she had done previously.

[2] On Saturday 12 October 2019 Ms Fan went to the workplace around the time of what, previously, would have been her usual starting time for the day's work. Soon after her arrival a senior staff member, after talking with Ms Xie by telephone, told Ms Fan that Ms Xie said she should leave the premises. Over the following ten days Ms Xie made no contact with Ms Fan about her expected working hours. In Ms Fan's view being sent away on 12 October, and the subsequent silence about her hours, amounted to an unjustified dismissal. She sought remedies of lost wages and distress compensation.

[3] VTL's statement in reply agreed Ms Fan was asked to return to work on a part-time basis after taking leave but said this was due to concerns about her well-being. It said an "apology message" was sent to Ms Fan on 23 October, after Ms Xie got a letter from Ms Fan's lawyer on 22 October, but disagreed other remedies Ms Fan sought for the situation should be provided.

### **The Authority's investigation**

[4] Ms Fan, Ms Xie, Ms Fan's daughter-in-law Abbey Chen and Ms Fan's son Frank Chen each gave oral evidence at the Authority's investigation meeting. They did so by answering questions from me and the parties' representatives. An interpreter of Mandarin was available to assist the four witnesses, where needed, with translation of questions asked and answers given. The representatives also gave closing submissions on the issues for determination.

[5] This matter has been determined on the basis of the oral evidence given, copies of messages exchanged between Ms Fan and Ms Xie using the WeChat application and the representatives' submissions. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. It has been provided outside

the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.<sup>1</sup>

### **The issues**

- [6] The issues requiring investigation and determination were:
- (i) Did the way in which Ms Fan's employment with VTL ended amount to a dismissal and, if so, was that the result of unjustified actions by VTL, through the actions of its director Ms Xie?
  - (ii) If VTL's actions were not justified, what remedies should be awarded to Ms Fan, considering:
    - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
    - (b) Compensation under s123(1)(c)(i) of the Act?
  - (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Fan that contributed to the situation giving rise to her grievance?
  - (iv) Should either party contribute to the costs of representation of the other party?

[7] Ms Fan's statement of problem had referred to some issues about providing her with a written employment agreement and her wage and time records. Although touched on in questioning in the investigation meeting, those aspects were not pursued in closing submissions. Ms Fan's employment relationship problem has been resolved in this determination without making any findings or orders on those issues.

### **How Ms Fan came to see her employment as ended by dismissal**

[8] By 12 October something of a 'stand-off' had developed between Ms Fan and Ms Xie over the status and future of Ms Fan's employment with VTL. Understanding how this situation arose required further attention to the communication, and perhaps miscommunication, that had occurred up to 12 October and through the following days until Ms Fan's lawyer raised a personal grievance on her behalf on 22 October.

[9] While Ms Fan was in China in late September she and Ms Xie exchanged some messages which gave no indication there was any intended change to her working

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<sup>1</sup> Employment Relations Act 2000, s 174C(4).

arrangements once she was able to come back to New Zealand. Ms Xie asked on 27 September when Ms Fan might return. Ms Xie explained in the Authority meeting that she asked because she wanted to know how long she might need to continue a short term arrangement she had made for an employee from VTL's North Shore store to cover Ms Fan's position in the Newmarket store. On hearing from Ms Fan that her mother had died on 26 September, Ms Xie with a responded message of sympathy and asked Ms Fan not to come back until she had done everything she needed to do in China.

[10] Ms Fan remained in China until after her mother's funeral. She returned to New Zealand on Saturday, 5 October. On her return Ms Fan sent Ms Xie a message saying she was back in Auckland and asking when she could return to work. Ms Xie replied with a message saying there was no hurry and Ms Fan should "have a rest" because of the time zone differences between New Zealand and China. Ms Fan replied saying 'ok' and that she was waiting to hear from Ms Xie.

[11] Two days later, on Monday, Ms Fan went to the Newmarket store. While at the store she encountered Ms Xie. During their conversation Ms Xie said ongoing work would be on a part-time basis only, not the full-time hours Ms Fan had worked prior to taking leave. One reason Ms Xie gave for the change was that Ms Fan's daughter-in-law was pregnant, with the baby due in December. Ms Xie anticipated Ms Fan would want to reduce her working hours in order to spend time with her new grandchild. In subsequent evidence Ms Fan accepted she had, albeit reluctantly, agreed to the proposal. She said she felt she had no choice but said she had agreed on the proviso that she was quickly rostered back to work. She understood Ms Xie had also agreed that would be done and Ms Fan was waiting for news of her revised hours of work.

[12] Later the same day Ms Xie met with Ms Fan's daughter-in-law Abbey Chen for coffee. Ms Chen had become friends with Ms Xie when they had worked together in a previous job. It was through that connection Ms Fan had first got work in VTL's Newmarket store. During their coffee meeting Ms Chen and Ms Xie talked about Ms Xie's arrangement for Ms Fan to continue to work in the store on a part-time basis only. Ms Chen said Ms Xie questioned the suitability of the job for someone of Ms Fan's age. Ms Fan was 65 years old at that time. Ms Chen said Ms Xie also referred to Ms Chen needing Ms Fan's help once Ms Chen's baby was born. Ms Chen said she told Ms Xie that she did not agree with those reasons for reducing her mother-in-law's hours

of work. She also told Ms Xie that changing Ms Fan's hours in that way was not lawful in New Zealand.

[13] By the end of the conversation Ms Chen understood Ms Xie would shortly contact Ms Fan about working hours for a maximum of four days a week for the remainder of the year and that after Christmas Ms Fan could return to working full time. Ms Xie, in her evidence, agreed those were the arrangements discussed with Ms Chen about Ms Fan's ongoing employment.

[14] Over the following two days Ms Fan received no information about a work roster. On Wednesday 9 October she sent Ms Xie a further WeChat message saying she was prepared to go back to work full-time from that weekend. She got no reply to the message. Ms Fan then decided she would go to work on the morning of Saturday, 12 October in what appeared to be a move to force the issue of getting information about her hours of work. When the senior staff member, after speaking to Ms Xie by telephone, told Ms Fan to leave the store he also said that Ms Xie would be in touch with her about her expected hours of work.

[15] Later that morning Ms Xie sent Ms Fan a message saying she had heard Ms Fan had come to work that day. She said someone had told her "that you are going to take me to the court, because of your working hours reduced". She referred to having talked to Ms Chen about the situation and said her decision about the part time hours was "based on the best intention and trying to be responsible for both of us". Her message said Ms Xie would ask the company's accountant to pay Ms Fan for coming into work that day and said she hoped Ms Fan understood her difficulties. It said nothing about what hours or days Ms Fan would or could expect to work.

[16] Ms Fan did not reply to that message and heard nothing further from Ms Xie through the following ten days.

[17] On 20 October Ms Xie removed Ms Fan from a WeChat message group she had set up for VTL staff set up in July.

[18] On 22 October Ms Fan's lawyer wrote to VTL raising a personal grievance for unjustified dismissal. The letter said Ms Fan considered her employment had been terminated because she had received no pay since 30 September, was asked to leave the premises on 12 October and had heard nothing further since then from Ms Xie about

any ongoing hours of work. It said Ms Fan felt she was “cast aside so suddenly and rudely” and “got rid of” because of her age. The letter sought an apology, three months’ lost wages and distress compensation of \$25,000.

[19] Ms Xie did not respond to Ms Fan’s lawyer but sent a lengthy WeChat message directly to Ms Fan. This determination has used Ms Xie’s own translation of that message. It referred to the requested apology and said she “can do it now”. Ms Xie’s message apologised for anything that had upset Ms Fan, asked Ms Fan to understand Ms Xie’s situation and said she would “like to negotiate with you”. The message then set out three reasons Ms Xie gave for reducing Ms Fan’s “working time”. Firstly, she said Ms Fan “may need two or three days” to visit her daughter-in-law and, when born, the new baby. Secondly, Ms Xie said Christmas was a busy time and she was worried Ms Fan could not “physically handle the heavy workload”. She referred to telling Ms Chen that Ms Fan could “come back to work as many days as you want after Christmas”. Thirdly, Ms Xie referred to financial difficulties for the store and wanting to give equal working time to Ms Fan and a new employee in the store. She said Ms Fan had turned up at the store on 12 October when Ms Xie was still trying to organise Ms Fan’s working hours.

[20] Ms Xie wrote that if Ms Fan believed her concerns were not being dealt with properly to “please report to the Employment Relations Authority and I am fully accept the legal punishment”. However Ms Xie also wrote that she did not agree to Ms Fan’s request for compensation of three months’ wages and, if that was the outcome from any Authority proceedings, “I will go through the process of applying for bankrupt”.

[21] There was no subsequent negotiation with Ms Fan, either directly or through her lawyer or family members, about setting working hours or otherwise resolving the situation. Rather, as became apparent from her evidence at the investigation meeting, Ms Xie felt Ms Fan had not respected her role as the employer. Ms Xie felt she “would be regarded as a puppet simply manipulated by other people” if she engaged in further communication with someone who wanted to “sue” her.

### **Were VTL’s actions unjustified and amount to a dismissal?**

[22] The statutory test requires the Authority to consider whether the actions of VTL that led to Ms Fan raising her personal grievance for unjustified dismissal were “what a fair and reasonable employer could have done in all the circumstances at the time of

those actions”.<sup>2</sup> This test includes the requirement for such a fair and reasonable employer to consult a worker about a proposed change that might impact on the worker’s employment and to be “active and communicative” in talking about and carrying out such changes.<sup>3</sup>

[23] Ms Xie’s decision to reduce Ms Fan’s hours from a full-time to a part-time basis was clearly not reached after following at least a minimum level of consultation with her about the reason for that change. Rather, it was delivered as an outcome with which Ms Fan had to agree. Even if Ms Fan had freely agreed to reducing her working hours from mid-October through to some time after Christmas 2019, Ms Xie then failed to act reasonably and fairly in informing Ms Fan of those new hours of work and to have her start working them.

[24] From Ms Xie’s evidence it appeared she usually drew up the next week’s roster each Sunday. After Ms Fan’s unwelcome visit to the store on Saturday 12 October, Ms Xie could have worked out on the following day what hours were required for the coming week and let Ms Fan know. Even if she had not done that on Sunday, 13 October, she could have done so on the following Sunday, 20 October. Assessed on the balance of probabilities it appears Ms Xie did not take any steps to advise Ms Fan of new hours of work because Ms Xie had decided she was subject to an unreasonable attempt to “sue” her business. Her silence over that extended period was not what a fair and reasonable employer could have done in all the circumstances at the time. In light of that failure, Ms Fan then reasonably reach her own view that this non-communication about any future hours of work was itself a message that her employment was at an end.

[25] As well as those clearly unjustified procedural failures in how VTL did what it did, there were also shortcomings in the substantive reasons Ms Xie gave for her actions in seeking to change Ms Fan’s hours of work and then not telling Ms Fan what her hours would be in the following weeks.

[26] Firstly, there was no lawful basis for assuming Ms Fan would or should reduce her hours of work because of the impending birth of a grandchild. Ms Fan’s closing submissions described that as Ms Xie “imposing her own cultural practices” on Ms Fan.

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<sup>2</sup> Employment Relations Act 2000 s 103A(2).

<sup>3</sup> Employment Relations Act 2000 s 4.

Neither Ms Fan, nor Ms Chen, felt a need for Ms Fan's work hours to be reduced for that reason and they had each told Ms Xie so.

[27] Secondly, there was no evidence Ms Fan had any real physical difficulty with lifting or carrying required as part of her work or, that if she did, any such difficulty could not easily be accommodated in the division of labour with other workers in the store. There was also an unexplained inconsistency in VTL's suggestion Ms Fan might not be able to cope with the workload up to the busy Christmas season but would be able to do so if she returned to full-time work after then, during the similarly busy period in late January associated with Chinese New Year.

[28] Thirdly, Ms Xie's oral evidence at the investigation meeting confirmed there was no operational need to split Ms Fan's working hours with another new employee. Rather, the new employee was recruited to work in the North Shore store and had only been deployed to the Newmarket store to cover Ms Fan's unexpected absence on urgent leave. There was ample other work and hours for that employee to return to at the North Shore store.

[29] Fourthly, VTL provided no compelling financial evidence justifying the change in Ms Fan's hours or, even on Ms Xie's own view of the supposed agreement to change working hours, for not advising Ms Fan of her expected part-time hours in the October-December months. Ms Xie was involved in a legal dispute with a previous owner of the business over payment of a debt but, on her own evidence, VTL did not miss payment of a single day of staff salaries during this period. Whatever the financial challenges were in meeting commitments for payments to suppliers and staff, VTL had not established this justified how Ms Xie made the decision about Ms Fan's hours of work or subsequently treated her.

[30] The decision, communicated on 7 October, and the silence about her expected hours after Ms Fan was told to leave the store on 12 October, were an effective severing of the work and wage bargain. What was done, and how it was done, was unjustified. Ms Fan's employment by VTL, therefore, ended by unjustified dismissal. An assessment of remedies was required.

## **Remedies**

### *Lost wages*

[31] Because there was no properly-established agreement for Ms Fan to reduce to part time hours, the assessment of the wages she lost as a result of her grievance is made on the basis of her previously-worked full-time hours. Ms Fan's gross weekly wage in the full-time role was \$1062 for 60 hours a week, worked over six days, at the rate of \$17.70 an hour. She got a new job, working 37 hours a week, from 28 October 2019 and earning \$654.90 a week.

[32] She sought an award of three week's lost wages, amounting to \$3,186, and then for a further ten weeks for the difference between what she was paid in her new job and what she was paid at VTL. The difference amounted to a further \$4,071. The combined total of \$7,257 was the appropriate measure of her loss which Ms Fan had mitigated by finding new work. This is the amount VTL must pay Ms Fan as a remedy under s 123(1)(b) and s 128(2) of the Act within 28 days of the date of this determination.

### *Compensation for humiliation, loss of dignity and injury to feelings*

[33] Ms Fan's evidence established that she took considerable pride in being able to maintain her financial independence through her work. She felt keenly the loss of a job for reasons which related to mistaken perceptions about her family responsibilities and the effect of age on her capability as a worker.

[34] Her evidence also suggested Ms Fan was a resilient person who, although upset by how she was treated on her return from China, was able to recover from those problems and move on with her life.

[35] In the particular circumstances of her case and considering the general range of awards in similar cases, \$11,000 was an appropriate level of compensation to award Ms Fan for the humiliation, loss of dignity and injury to feeling she experienced as a result of her grievance. This is the amount VTL must pay Ms Fan under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

## **Costs**

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

[37] If they are not able to do so and an Authority determination on costs is needed Ms Fan 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 VTL would 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.

[38] 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.<sup>4</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].