

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 329
3110432

BETWEEN	MICHAEL XU Applicant
AND	MATERIALS AND TESTING LABORATORIES LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Gelb, advocate for the Applicant
Bruce Murray, counsel for the Respondent

Investigation Meeting: 13 July 2021 at Auckland

Determination: 28 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Michael Xu, claims that he was unjustifiably dismissed by the Respondent, Materials and Testing Laboratories Limited (MTL).

[2] Specifically Mr Xu claims that he had completed more than 90 days of employment when MTL dismissed him in reliance on a trial period provision in an employment agreement.

[3] MTL denies that Mr Xu was unjustifiably dismissed and claims that he was justifiably dismissed in compliance with a valid trial period provision in the employment agreement.

[4] MTL claim that events during March and April 2019 prior to his commencement date with MTL did not amount to Mr Xu commencing employment with MTL.

The Authority's investigation

[5] 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.

Issues

- [6] This preliminary determination addresses the issue of whether or not the events prior to 1 April 2019 were a commencement of work by Mr Xu for MTL and therefore whether or not the termination of Mr Xu by MTL was outside the 90 day trial period such that he can proceed with a personal grievance for unjustifiable dismissal.

Background

- [7] MTL operates a full mechanical testing, non-destructive testing, welding inspection and certification, and metallurgical investigation service. In late 2018 it advertised for a senior technician in its Mechanical Laboratory because its senior testing technician had health issues and it wanted a back-up technician to assist in that area.
- [8] Mr Xu applied for the position and was interviewed by M Thibaud Lastennet, General Manager. M Lastennet said that Mr Xu told him his employer at that time, Pacific Steel Limited, had put together a redundancy package for him.
- [9] Following a second interview on 25 February 2019, MTL offered Mr Xu the mechanical laboratory manager position. MTL sent Mr Xu a job offer dated 27 February 2019 attaching an employment agreement which it requested him to sign, date and email back to it.
- [10] The attached individual employment agreement (the Employment Agreement) stated the starting date of employment as: "1 April 2019 or as soon as mutually agreed". Mr Xu said he had discussed his intention to take some time off between jobs with M Lastennet on 5 March 2019, and during the discussion it was agreed that his start date would in fact be 29 April 2019. He had altered the start date to 29 April 2019 on Schedule 1 of the Employment Agreement, and both he and M Lastennet had initialled the change in date.
- [11] The Employment Agreement contained a trial period provision as clause 2 entitled **Trial Period**, and stated at clause 2.1:

2.1 You agree that your employment is subject to a trial period of 90 days from the commencement date as provided in Schedule 1, to assess and confirm your suitability for the position.

- [12] In clause 4 the Employment Agreement stated:

4 Hours of Work and Location

4.1 Your normal hours of work are set out in **Schedule 1**. However, you agree to work such hours that are reasonably necessary to fulfil the duties required of your position. The company will require a reasonable amount of overtime to be worked and will endeavour to give reasonable notice before it is required.

[13] M Lastennet had signed and dated the Employment Agreement on 27 February 2019, Mr Xu had signed and dated it on 5 March 2019.

[14] M Lastennet said that later in mid-March 2019, and after Mr Xu had signed the Employment Agreement, Steel and Tube Holdings Limited (Steel and Tube) made contact with MTL regarding potential rebar testing. In an email to MTL, Steel and Tube asked for :”pricing per test”. M Lastennet said this was not an actual engagement or a project, simply a price enquiry.

[15] He, together with two mechanical testers, continued research in preparing a set-up for testing and identified equipment and methods.

[16] M Lastennet said that Mr Xu had mentioned during the interview process that he had experience in rebar testing, and he thought he could: “bounce MTL’s ideas off him”, compare against Mr Xu’s experience in Pacific Steel and achieve a better understanding of what the Steel and Tube work might involve.

Events prior to 29 April 2019

[17] Mr Xu said that subsequent to his signing of the Employment Agreement he was asked to do work for MTL in the period between 16 March 2019 and 10 April 2019, specifically:

- a) On 16 March 2019 he received a text message from M Lastennet asking him to assist him to seal a testing deal with Steel and Tube;
- b) On 18 March 2019 he attended MTL’s office at approximately 3.30 p.m. and worked with M Lastennet for an hour;
- c) On 3 April 2019 M Lastennet sent him another email enquiring about a certain aspect of testing for Steel and Tube. This involved him spending approximately 30 minutes on the telephone talking to Mr Lastennet; and
-) On 10 April 2019 M Lastennet sent him an email requesting his assistance for Steel and Tube’s testing business and followed this up with a text message which resulted in him attending the MTL office for approximately an hour on 11 April 2019 demonstrating to M Lastennet how to measure a reinforcing bar’s rib heights and other geometric parameters as per AS/NZS 4671 required.

16 March 2019

[18] On 16 March 2016 there was an exchange of emails between the parties:

TB 3.20 pm:

Hi Michael, hope you are having a good weekend. Is it possible to meet as early as possible (Monday?). It is regarding Steel&Tube that have been contacting us about their work. It is the occasion to seal the deal. Just what you were talking about. There is some tech details where your input would be invaluable. Let me know when. Cheers.
Thibaud

MX:

Hi Thibaud, yes I am enjoying my weekend, thanks for asking. Can you talk now?
Michael.

MX 5.38 pm:

Hi Thibaud I should be able to meet you at 3.00 – 3.30 pm on Monday if it is not too late for you. However we have to postpone meeting to 1st April the earliest if S&T personnel will attend. 29th March is my official finish date with Pac Steel. Cheers
Michael.

TB 8.26 pm:

Ok for Monday. S&T is not present. No intention for meeting yet.

[19] Mr Xu did not attend the MTL offices, and there was no other contact between the parties on that date.

18 March 2019

[20] Mr Xu said that on 18 March 2019 he had spent time at the MTL offices with M Lastennet explaining to him the technical details of Steel and Tube's testing, relevant regulatory requirements, and the type of equipment needed. In the meeting M Lastennet had also asked him the approximate price MTL should charge Steel and Tube per test.

[21] M Lastennet said that Mr Xu did not advise on, or show, MTL how to do such testing because it had the experience and was already testing to the industry as well as having accreditation for other relevant industry standards. He described the interaction on 18 March 2019 when Mr Xu discussed the set up and procedure he used at Pacific Steel as being in the nature of a discussion between colleagues discussing best practice and experience.

[22] The timing of the meeting was considered by both Mr Xu and M Lastennet to be approximately one hour or less.

3 April 2019

[23] On 3 April 2019 there was a further exchange of emails between Mr Xu and M Lastennet:

TL 10.01 am:

Hi Michael, Steel& Tube just indicates that they want to start trial testing with us. Just need to talk to you regarding the tests (rib height) and tool that we would need. Also if any special thing for the bend/revend. We will start with contact extensometer until we get video. Let's talk later. When are you available to talk?.

MX 11.09 am:

Hi Thibaud, sorry to miss your message, I'm doing outdoor painting for my house, don't have phone with me. It is great we will have S&T business, I can talk now, Michael.

[24] Mr Xu said he spent approximately 30 minutes on the telephone talking to M Lastennet.

[25] M Lastennet said he believed the call had taken less than 30 minutes. He had found talking to Mr Xu helpful, but said MTL did not need Mr Xu's input in order to be able to perform the tests.

10 April 2019

[26] On 10 April 2019 M Lastennet emailed Mr Xu stating:

Hi Michael,

We have received some samples from Steel & Tube (not a job, just to practice). So we are continuing preparation.

We will show you the jig we have to bend and rebend. I think it works well.

We are upgrading it and getting mandrels as well (buying the metal)

Also I have a quote for a water bath (>7,000NZ\$) from Labec so I am looking at alternatives from China. Any idea of manufacturer?

More importantly

Would you be able to come to the office today for a short while only to show us how we should do the measurement for rib height etc? ...

[27] In response Mr Xu sent M Lastennet a text message at 2.06 pm the following day, 11 April 2019, confirming that he was on the way and would be at MTL in 30 minutes.

[28] Mr Xu said that when he arrived he spent approximately an hour at the MTL office demonstrating to M Lastennet how to measure a reinforcing bar's rib heights and other geometric parameters as per AS/NZS 4671 required.

[29] M Lastennet said that Mr Xu did not conduct any actual test rather he looked around the laboratory and showed the MTL team a measurement technique with the micrometre. There was no task in relation to an ongoing job, and he did not take a formal measurement.

[30] On or about 11 April 2019 Mr Xu completed an Employee Information Form which he returned to MTL as requested. On the form he had entered the Start Date as '29/04/19'.

[31] As part of its induction processes MTL required Mr Xu to provide a medical certificate. The medical certificate was dated 24 April 2019, confirmed that the doctor had seen Mr Xu that day, that he was fit to take up employment with MTL and stated: I understand he (Mr Xu) will start his new job as a manger of a mechanical laboratory soon.”

[32] Mr Xu said that on 12 July 2019 Mr Lastennet called him into his office and presented him with a letter which stated that he (Mr Xu) agreed with the termination of his employment.

[33] After he had refused to sign the letter Mr Xu said Mr Lastennet provided a letter dated 19 July 2019 and asked him to sign to indicate that he had received it, which he did. The letter stated:

Dear Michael,
This letter is established in reference to your individual Employment Agreement dated 29 April 2019 which sets your conditions of employment as mechanical laboratory manager with Materials & Testing Laboratories Ltd (the company).

This letter serves as 1 week notice period under trail period as provided in clause 2.2.

We inform you that the notice period will be taken as garden leave. Last day of employment is July 19th.

[34] Mr Xu said that following the termination of his employment he sought advice from Mr Gelb and filed a personal grievance with the Authority on 29 June 2020 on the basis that his employment with MTL commenced prior to 29 April 2019 and therefore the termination of his employment with MTL occurred after the expiry of the 90 day trial period. On that basis he had been unjustifiably dismissed by MTL.

Did the events in March and April 2019 constitute ‘work’ by Mr Xu for MTL?

[35] Mr Xu’s date of commencement with MTL was 29 April 2019. This was an amendment by Mr Xu from of 1 April 2019, the date originally entered in the Employment Agreement by MTL. The reason for the date being altered by Mr Xu was for his personal wish to take some personal time between leaving his job with Pacific Steel Limited and starting employment with MTL.

[36] Mr Xu’s evidence is that despite stating his commencement date as 29 April 2019, in fact he performed ‘work’ for MTL prior to that date.

[37] In *Idea Services Limited v Dickson* the Court of Appeal noted that the Employment Court had identified three factors as helpful in considering whether or not a sleepover constituted ‘work’:¹

¹ *Idea Services Limited v Dickson* [2011] NZCA 14 at [7]

- (a) The constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
- (b) The nature and extent of responsibilities placed on the employee; and
- (c) The benefit to the employer of having the employee perform the role.

[38] The Employment Court had observed that the greater the degree or extent to which each factor applied, the more likely it was that the activity in question would be considered as ‘work’.²

16 March 2019

[39] On 16 March 2019 the event consisted of an exchange of emails only. In the exchange M Lastennet stated that Steel and Tube had made contact regarding their work and the potential for MTL undertaking it and Mr Xu could provide some technical input in that context.

[40] By response Mr Xu stated a time when he would be able to meet which would be no sooner than 1 April 2019 since he was still employed by Pacific Steel, and M Lastennet confirmed the suggested date was acceptable and that Steel and Tube would not be present.

[41] I find no constraint on Mr Xu in this text message exchange. There was no responsibility placed on Mr Xu, and no benefit conferred on MTL.

[42] I find that this did not constitute work by Mr Xu for MTL.

18 March 2019

[43] When Mr Xu and M Lastennet met on 18 March 2019 it was at a time and date set by Mr Xu in the text message he sent on 16 March 2019. Steel and Tube personnel were not at present at the meeting. There was a verbal discussion only, there were no tests carried out either by Mr Xu or under his supervision.

[44] I find no constraint placed on Mr Xu by MTL in regard to his attendance at the meeting, and no responsibility was laid upon him either in relation to work carried out by MTL or by MTL on behalf of Steel and Tube since no work had eventuated from Steel and Tube at that point. In fact no contract was subsequently placed with MTL by Steel and Tube.

² *Idea Services Ltd v Dickson* (2009) 6 NZELR 666 at [64] and [65]

[45] I agree with M Lastennet's comment that any information has a value, but I find no tangible benefit accruing to MTL from the event on 18 March 2019. As such there was a low degree of benefit to MTL.

[46] I find that this did not constitute work by Mr Xu for MTL.

3 April 2019

[47] On 3 April 2019, similarly to the event on 16 March 2019, there was an exchange of emails only.

[48] I find no constraint on Mr Xu in this text message exchange. There was no responsibility placed on Mr Xu, and no benefit conferred on MTL.

[49] I find that this did not constitute work by Mr Xu for MTL.

11 April 2019

[50] When Mr Xu attended the MTL offices on 11 April 2019 I find it was at his timing rather than that of MTL. In the email dated 10 April 2019 M Lastennet had asked Mr Xu if he was able to go into the MTL offices that day, there is no response to that text message provided to the Authority however it is the following day, 11 April 2019, that Mr Xu went to the MTL office.

[51] Whilst at the MTL office Mr Xu had carried out a demonstration on how to conduct rib height measurements and other geometric parameters. There was no work carried out by Mr Xu for a client of MTL.

[52] I find that there was some benefit to MTL in that it added to its knowledge about techniques but there is no evidence that MTL benefitted financially from the demonstration.

[53] Viewed as a whole I find there was no constraint placed on Mr Xu to attend MTL on 10 or 11 April 2019, no responsibility in that no work was carried out for a client of MTL, and there was no tangible benefit to MTL thus that the benefit level was of a low degree only.

[54] I find that this did not constitute work by Mr Xu for MTL.

Suitability Assessment

[55] It is submitted for Mr Xu that MTL benefitted from the events prior to 29 April 2019 because it gave it the opportunity to assess Mr Xu and his ability to be suitable for its business prior to 29 April 2019.

[56] There is no evidence of any testing of Mr Xu on the 18 March or 11 April 2019 when he attended the MTL office. Since Mr Xu performed no work for MTL on those occasions, there was no client present and no task carried out for a client on MTL's behalf, I do not find that his skills were being put to the test by MTL.

Lack of payment

[57] Mr Xu did not seek payment for the period prior to 29 April 2019.

[58] It was submitted that there were a number of reasons for this. Firstly that his Employment Agreement provided that his salary encompassed all such hours as were reasonably required to fulfil the role.

[59] Mr Xu's employment commenced on 29 April 2019 as stated in the Employment Agreement that was the date when he commenced full-time in the role of Manager-Mechanical Laboratory and the date when his salary commenced accruing.

[60] Clause 4.1 of the Employment Agreement refers to working the hours reasonably necessary: "to fulfil the duties required of your position." Prior to 29 April 2019 Mr Xu did not occupy the position of Manager – Mechanical Laboratory and therefore I find there were no duties he was required to fulfil prior to that date.

[61] Secondly it is submitted that Mr Xu received a deposit in his goodwill account with MTL which would assist in his successful completion of the trial period.

[62] Whilst I accept that all potential employees are keen to garner good will by responding to approaches prior to the employment commencement date by the new employer there was no compulsion on Mr Xu to attend the meetings at MTL's offices, inference that his failure to do so would adversely affect the good will of MTL towards him, or conversely any indication on the part of MTL that attending the meetings would enhance any good will which would attach to the employment following the commencement of the Employment Agreement and thus trigger the start of the trial period.

[63] Thirdly that Mr Xu received a performance bonus based on achievement of KPIs which was enhanced by his performance prior to 29 April 2019.

[64] I find there to be no evidence that the payment of the bonus was based upon events prior to the commencement of his employment and Mr Xu's working in the role of Manager – Mechanical Laboratory.

[65] Finally I observe that Mr Xu's actions prior to 29 April 2019 were consistent with his understanding that his employment with MTL was to commence on that date:

- (a) Altering the date in the employment Agreement from 1 April to 29 April 2019 explaining to M Lastennet that he wanted to take time off between jobs;
- (b) Completing the Employee Information Sheet on or about 11 April 2019 and entering a start date of 29 April 2019;
- (c) Visiting his GP on 24 April 2019 who completed the medical certificate stating his understanding as being that Mr Xu would be: “soon starting his new job”.

Conclusion

[66] I do not find that the events prior to 29 April 2019 constituted work by Mr Xu for MTL. On that basis I determine that the trial period provision in the Employment Agreement was valid and Mr Xu was not unjustifiably dismissed by MTL.

Costs

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

[68] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 Applicant 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.

[69] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[70] 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.³

Eleanor Robinson
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].
