

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROA ROHE**

[2021] NZERA 454
3119396

BETWEEN MING HU
 Applicant

AND NEW ZEALAND NEWCAN
 INTERNATIONAL LIMITED
 First Respondent

AND YUSHENG LIN
 Second Respondent

Member of Authority: David G Beck

Representatives: Shih Chieh “Mins” Chang, advocate for the Applicant
 Yusheng Kevin Lin for the Respondent

Investigation Meeting: 20 July 2021 in Auckland

Submissions Received: 20 July and 30 July 2021 from the Applicant
 5 October 2021 from the Respondent

Date of Determination: 15 October 2021

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ming Hu (aka Joanna) was employed by Newcan International Ltd (Newcan) in a part-time marketing role from 16 March 2020 until she says her position was disestablished in a text from her employer of 26 July 2020. The employment ended on 31 July 2020.

[2] Ms Hu claims that she was unjustifiably dismissed or disadvantaged, has had her employment agreement breached, is owed holiday pay and that her termination was not

effected in a good faith manner. Further, Ms Hu seeks to pursue an action against Yusheng Kevin Lin, the sole director of Newcan, for aiding and abetting identified breaches and not providing “a fair and reasonable restructure process”.

[3] As remedies, Ms Hu claims compensation for distress, lost wages, penalties against Newcan and Mr Lin for them breaching the employment agreement, good faith obligations and the Holidays Act.

[4] By contrast, Newcan contend that a restructuring process was initiated for genuine reasons absent of any ulterior motive and that it was based upon Ms Hu’s position being temporarily superfluous due to a significant drop off in business as a result of the Covid-19 lockdown in March 2020. Newcan say that Ms Hu’s employment was ‘frozen’ rather than terminated on 26 July 2020 and thereafter, despite being placed on unpaid leave with a right to return to work when the business activity improved, Ms Hu signalled she was seeking alternative employment.

The Authority’s Investigation

[5] The investigation took half a day and I heard evidence from Ming Hu, her friend Ruidi Tian and Yusheng Kevin Lin. I was ably assisted by Teng Ooi, an interpreter with proficiency in Mandarin, as English was not the first language of all parties.

[6] I received submissions from both parties’ representatives following the investigation meeting. I have carefully considered the information provided and submissions. As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the applicant’s claims.

Issues

[7] The issues I have to resolve are:

- i. Should Mr Lin be held personally responsible for any of his actions or omissions?

- ii. Was Ms Hu unjustifiably dismissed and/or disadvantaged or was the employment relationship ongoing?
- iii. Did Newcan comply with the relevant provisions of Ms Hu's employment agreement?
- iv. Did Newcan breach any good faith obligations owed to Ms Hu?
- v. If an unjustified dismissal claim is established, what remedies should be awarded?
- vi. If any breach of good faith or breach of Ms Hu's employment agreement is established - is it appropriate to award penalties against Newcan for such?
- vii. An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[8] At the time of Ms Hu's employment, Newcan operated three Auckland retail stores with 18 staff. Newcan's business centred on the sale of health supplements, milk powder, honey and skin care products with a large percentage of trade being with China. The trade engaged in was online and direct with overseas visitors being a key target group.

[9] I received evidence that the emergence of Covid-19 caused ongoing disruption and loss of trade to the business that has currently reduced its capacity to one store and eight employees. Mr Lin indicated he has also been compelled to explore setting himself up as a real estate agent to keep Newcan afloat.

[10] Newcan initially engaged Ms Hu in February 2020 as an unpaid intern which led to an offer of a permanent, part-time marketing role that Ms Hu accepted and was recorded pursuant to an individual employment agreement signed by Ms Hu and dated 23 March 2020.

[11] The employment agreement referred to a job description and an appendix setting out sales targets but neither was provided. The agreement's hours of work clause stated:

The Employee's normal hours of work shall be 20 hours per week, between the hours of Monday to Friday on 9am to 1pm. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties.

[12] An hourly rate of \$18.90 was specified in the agreement and the agreement has a definition of redundancy as "a situation where the position of employment of an employee" may be surplus to the employers business requirements and detailed process and notice requirements.

[13] The timing of Ms Hu's paid employment commencing coincided with the period of the first level 4 Covid-19 lockdown in New Zealand and Mr Lin says he used the opportunity of applying for and being granted a government wage subsidy in order to fund Ms Hu's employment and two other unpaid interns, so they could be paid and work from home and gain valuable experience.

[14] Ms Hu's advocate provided a letter from the Ministry of Social Development in response to an Official Information Act request she had made - it indicated Newcan had applied for, using Ms Hu's IRD details, and been granted the initial wage subsidy on 31 March 2020 (covering the period 27 March – 9 June) and then a wage subsidy extension payment was granted on 16 June 2020 (covering the period 10 June – 1 September). Work and Income's "COVID-19 wage subsidies-Employer search" revealed Newcan obtained both wage subsidies, the first for 15 employees and the second for 11 employees. ¹

[15] Ms Hu says that during the lockdown she was mainly deployed to manage Newcan's TradeMe account, initially from home and then under level 3 from the office and that sales of health related products and hand sanitiser appeared to be strong but hampered at times, by supply problems.

¹ <https://services.workandincome.govt.nz/eps/search>.

Ending of employment relationship

[16] Despite feeling all was going well, Ms Hu described shock at getting a Wechat message from Mr Lin at 8:22 pm on 26 July 2020 that indicated (in an uncontested translation from Mandarin):

Joanna, due to the lack of Chinese tourists and returning clients, three stores have experienced a decline in sales. At this rate, the company won't be able to cover the expenses after the Government Wage Subsidy runs out! Unfortunately. I must inform you that after next Friday, your position will be frozen. If by chance the sales get back on track, we will prioritise arranging work for you. Thank you for your effort, if you need a reference letter, please let me know. Kindly handover all work which you are currently responsible for to Sandy. Appreciate your time.

[17] Ms Hu promptly responded around 9 pm expressing shock at the sudden decision, but then essentially accepted such in her email correspondence, she thanked Mr Lin for the experience of working for him, confirmed she wanted a reference and the only concern raised was how long she would continue to be paid the wage subsidy that she thought ran to 9 August 2020. In seeking confirmation Ms Hu indicated: "It won't be a problem if it's 9 August as I would like to give myself some time to look for another job".

[18] Mr Lin replied immediately in somewhat opaque terms: "Because of the holiday pay your employment will end prior to that, the government wage subsidy will be fully paid to you". There was no further communication disclosed and Ms Hu's employment ended on 31 July 2020.

[19] Mr Lin then provided Ms Hu with a glowing written reference dated 6 August 2020.

Personal grievance

[20] Ms Hu then sought advice and by way of a letter from her advocate of 20 August 2020, raised a personal grievance claiming an unjustified dismissal that cited a perception that Ms Hu had been made redundant "in circumstances that were neither fair nor reasonable".

The letter also requested wage, time and holiday and leave records and concluded with a request to attend mediation.

[21] Mr Lin who conceded in evidence that he at no point sought legal advice, responded with an email of 28 August that had Ms Wu's employment agreement attached and the reference letter (but no wage, time, holiday and leave records). Pertinently to Mr Lin later claiming during the investigation meeting and written submissions, that he did not end the employment relationship due to a redundancy (he said he 'froze' the position after noting a newspaper article indicating Air NZ has taken this approach), his 28 August email (written in English) in part stated:

According to the employment agreement we need to inform her the redundancy 7 days in advance. That is why I write to her via Wechat 7 days in advance to the redundancy.

[22] Subsequent attempts to resolve matters including mediation were unsuccessful. Newcan resisted the request to disclose wage and holiday information until Mr Lin filed a statement in reply with the Authority on 22 December 2020 that portrayed the employment ending as: "It is not a notice of redundancy but a temporary unpaid leave".

[23] Mr Lin also sought to suggest by production of an unattributed MSD 'no reply' email that the wage subsidy extension paid to Ms Hu, was to end "8 weeks from 16/06/2020" being 7 August (although Mr Lin suggested it ended on 2 August). I observe this email contradicted the correspondence produced by Ms Hu's advocate that indicated Newcan was paid the second extension wage subsidy from 10 June 2020 up until 1 September 2020. In assessing the authenticity of both I prefer Ms Hu's documentation as it is on MSD letterhead and is consistent with the MSD search I conducted.²

Issue 1: joining Mr Lin to the proceedings?

[24] I dispose of this issue by a finding that Mr Lin should not be held personally liable for any claimed breaches as Ms Hu engaged in an employment relationship and was paid by a limited liability company (Newcan).

² Op cit.

[25] Ms Hu's advocate, Ms Chang, was asked to provide an additional submission to support this aspect of her client's claim after failing to do so during the investigation meeting. The claim was that Mr Lin had aided and abetted the claimed breaches.

[26] Ms Chang in a subsequent submission, cited Mr Lin's sole control of the company claiming his actions in dismissing brought him within the scope of s 134(2) of the Act and suggested I order penalties against Mr Lin for the alleged breaches. I however, do not consider that the cases Ms Chang cited in support of this proposition were distinctly analogous and I prefer the more pragmatic approach adopted by the court in *Strachan v Moodie* that the breaches if established, fall to the liability of the company despite Mr Lin's identification with such. To depart from this approach would require more than ordinary circumstances to be present and here I find they were not.³

[27] I was also invited by Ms Chang to consider whether Mr Lin fell within s 142 W of the Act as a person involved in a breach of minimum standards. I was not persuaded of this being the case either, as the two breaches cited (a failure to pay the minimum wage and "unilaterally deducting the Applicant's hours") were neither made out. Newcan paid Ms Hu \$18.90 per hour as evidenced by payroll records belatedly provided (the minimum wage in force from 1 April 2020) and the latter claim related to the actual dismissal and can be adequately dealt with by considering other conventional remedies should I find Ms Hu was unjustifiably dismissed. The payroll records provided, sufficiently record Ms Hu's holiday pay including in her final pay.

Issue 2: was Ms Hu unjustifiably dismissed?

[28] Section 103A of the Act (the justification test) requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This test is applied regardless of whether I consider Ms Hu to have been made redundant or dismissed for other reasons.

³ *Strachan v Moodie (also known as "Miss Alice") (t/as Moodie & Co, a law firm)* [2012] NZEMPC 95; BC201232366.

[29] A dismissal must also be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[30] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

[31] I easily find on assessing the facts, that Newcan gave scant attention to all of the above factors. Mr Lin in "a nutshell": did not initially identify specific concerns or put them to Ms Hu for comment, he held no meeting, carried out no investigation, did not allow Ms Hu any opportunity to get advice and he did not genuinely consider Ms Hu's explanations as he did not seek any.

The employment agreement

[32] If I was to view this as a redundancy situation it is clear Newcan failed to apply any procedural fairness steps identified in s 103A of the Act that were concisely set out in clause 12.5 of Ms Hu's employment agreement under the heading "Redundancy Process". That is:

In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making any decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.

Finding

[33] My finding in relation to issue 3 and 4 is that Newcan breached the above clause of Mr Hu's employment agreement in that they simply disregarded it and also breached concurrent good faith obligations owed to Ms Hu. Mr Lin came across as a naïve employer with insufficient knowledge of employment law concepts, but given the size of his organisation and number of employees, this is no excuse for not seeking legal advice.

[34] I appreciate that Mr Lin was under stress at the time due to the impact of Covid-19 on his business, but I could not discern why there was any urgency to end Ms Hu's employment given the wage subsidy he had secured ran until 1 September 2020. During the investigation meeting however, Mr Lin did not assist Newcan's situation by attempting to lead evidence from co-employees that brought Ms Hu's performance and general character into disrepute. This in particular struck me as at odds with Newcan's claim that they merely suspended the employment or 'froze' it rather than terminated it. I record that had I found any credibility in this freeze notion, it would legally fail, as any suggestion of Ms Hu being asked to or agreeing to be placed on unpaid leave was absent. Evidently what occurred was a unilateral breach of Ms Hu's employment agreement contrary to s 62 of the Act.

[35] The defects in procedure were not minor – the dismissal was so deficient in procedural fairness that it rendered the actual decision to dismiss to be unjustified. I will though consider the substantive fairness of the decision, as that may bear upon remedies and any contribution issues.

Substantive reason for the dismissal

[36] This is an inquiry into whether the grounds advanced for the dismissal were such that a fair and reasonable employer could conclude dismissal was warranted. To approach this in a balanced fashion I have to consider whether Newcan have made out grounds for establishing that Ms Hu's position was surplus to their requirements. In assessing the evidence it is not difficult to conclude that Newcan's business was struggling as a result of the Covid-19 lockdown and the closure of the New Zealand border to international tourists.

[37] Mr Lin led evidence after the investigation meeting to show the impact of the aforementioned factors on his business and its reduction in size and scope, but manifestly failed to put any of those factors to Ms Hu at the time of her dismissal and it is not at all clear why Ms Hu was selected for termination. As a result, I cannot safely conclude Newcan had genuine substantive reasons to end Ms Hu's employment.

[38] Mr Lin also tried to convince me during the investigation meeting that at the time Newcan engaged Ms Hu and two others, Newcan was nobly utilising the government subsidy to keep them employed. I could equally conclude however, that Newcan saw the opportunity of using the subsidy to engage additional workers at no cost to assist the business in pivoting to online sales.

Penalties

[39] I am not however in all of the circumstances, persuaded that penalties for the various breaches identified are warranted. In my view the transgressions Ms Hu's advocate has identified, though not minor or condoned, can be adequately remedied by my finding that Ms Hu has successfully established a personal grievance that she was unjustifiably dismissed and the remedies that flow from that. In making this assessment I rely generally upon s 160 (3) of the Act.

Overall Findings

[40] In all of the circumstances, I found that Ms Hu has been unjustifiably dismissed and is entitled to remedies discussed below. In making this finding I do not need to explore the alternative disadvantage claim Ms Hu advanced.

Remedies

Lost wages

[41] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Hu should I find that she has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration. Here I find Ms Hu's lost remuneration was attributed to the personal grievance.

[42] Ms Hu provided evidence that she mitigated her loss to a degree by continuing to work in another part-time position at a pet-shop (work she had been undertaking whilst at Newcan and with their consent) but was unable to make ends meet until she found another part-time job at the end of October 2020. Newcan pay records show that Ms Hu was paid up until 4 August 2020. Ms Hu claimed ten weeks lost wages and provided an IRD statement to evidence her lost earnings.

[43] The respondent is ordered to pay Ms Hu ten weeks' lost wages in the sum of \$3,780 gross. The sum, as claimed, was calculated by the applicant at 20 weekly hours over the entire 10 weeks of her employment at \$18.90 per hour.

Compensation for hurt and humiliation

[44] Ms Hu gave compelling evidence of the dismissal and the confusion, distress, worry and uncertainty it created at a difficult time to find immediate alternative employment. This was heightened by Ms Hu, a Chinese national, having to explain her situation to her family at home and the worry that caused.

[45] With some justification, Ms Hu felt Mr Lin has misled her about the reasons for ending her employment and belated attempts during the investigation process to attack her credibility and work performance did not assist. Ms Hu was afforded no dignity and she thus suffered humiliation as a direct result of how she was dismissed.

[46] The timing of the dismissal led to uncertainty and Ms Hu indicated worry about meeting financial commitments and having to rely upon friends to lend money to support her. Ms Hu also described symptoms of anxiety, loss of self esteem at not being able to quickly secure alternative ongoing employment.

[47] I am convinced that at the time, Ms Hu suffered humiliation, loss of dignity and injury to feelings but has now moved on. Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which Newcan effected this dismissal, I consider Ms Hu's evidence warrants compensation of \$18,000 under s 123(1)(c)(i) of the Act and Newcan is ordered to pay this sum.

Contribution

[48] Section 124 of the Act states that I must consider the extent to which, if at all, Ms Hu's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*.⁴

[49] I do not find that Ms Hu contributed to the circumstances that led to her dismissal and she did not engage in any blameworthy conduct that would lead to any reduction in the remedies I have awarded.

⁴ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary

[50] I have found that:

- a. Ming Hu was unjustifiably dismissed from her employment with New Zealand Newcan International Limited.
- b. New Zealand Newcan International Limited must pay Ming Hu the sums below:
 - i. \$3,780.00 gross lost wages;
 - ii. \$18,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act;

Costs

[51] Costs are at the discretion of the Authority and here Ming Hu has obtained compensatory remedies by establishing that she was unjustifiably dismissed following a half day long investigation meeting and timetabled legal submissions.

[52] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[53] If no agreement is achieved, Ming Hu has fourteen days following the date of this determination, to make a written submission on costs and New Zealand Newcan International Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority