

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 60  
3084472 & 3085154

BETWEEN	MINGXIA YU Applicant in 3084472
AND	YAN JIN Applicant in 3085154
AND	URBAN DÉCOR LIMITED Respondent

Member of Authority: Nicola Craig

Representatives: Paul Young, advocate for the applicants  
Daniel Zhang, counsel for the respondent

Investigation Meeting: 15 and 16 October and 19 November 2020

Submissions received: At the investigation meeting

Date of Determination: 19 February 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Mingxia Yu and Yan Jin were unjustifiably dismissed by Urban Décor Limited.**
- B. Urban Décor Limited is to pay the following sums within 28 days of the date of this determination:**
- (i) to Ms Yu \$2,675.20 gross as lost wages and \$4,000 as compensation; and**
  - (ii) to Ms Jin \$2,451.20 gross as lost wages and \$4,000 as compensation.**
- C. Costs are reserved and a timetable set if the parties are not able to resolve costs by agreement.**

## **Employment relationship problem**

[1] Mingxia Yu and Yan Jin (the employees) had jobs as curtain makers for Urban Décor Limited trading as Promax Colours (Urban Décor or the company). Lei Han is the company's sole director and shareholder. Urban Decor operates a curtain factory in Auckland. Ms Yu and Ms Jin usually worked together as a pair.

[2] Mr Han, Ms Yu, Ms Jin were involved in a heated argument in the factory on 10 December 2019 after Ms Jin used her phone. The employees claim they were unjustifiably dismissed by Urban Décor on 11 December. The company's position is that the employees resigned or abandoned their employment.

[3] The Authority decided to hear Ms Yu and Ms Jin's claims together. On 15 and 16 October and 19 November 2020 an investigation meeting was held. Written witness statements were received and oral evidence heard from Ms Yu, Ms Jin, Mr Han, Zhengxia Ren, Xuanjie Gu, Ying'an Wang, Yanling Cao, Xiaohong Wan, Liping Zhong, and Jingying Zhu. A statement was received from another former Urban Décor worker but withdrawn by the employees as that worker was not available to be questioned.

[4] The Authority was assisted by an interpreter of the Mandarin language.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

## **Issues**

[6] The issues for investigation and determination are:

- (i) Did Ms Yu raise her personal grievance within 90 days as required by s 114 of the Act?
- (ii) Were Ms Yu and/or Ms Jin dismissed by Urban Décor?
- (iii) If so, were the dismissal/s unjustified?
- (iv) If so, what remedies, if any, should Ms Yu and/or Ms Jin receive?

[7] Mr Young on behalf of the employees informed the Authority at the start of the investigation meeting that a harassment claim was withdrawn.

**Is there any relevant history?**

[8] The statements of problem included copious information related to events from times prior to December 2019. Also, during their evidence at the investigation meeting the employees tended to move towards earlier issues. However, those matters are not the subject of this investigation.

[9] In addition Mr Young lodged witness statements from former staff focused on their objections to Urban Décor's treatment of themselves, rather than the employees involved in this case. These were not helpful.

[10] Ms Jin says she had not received any warnings from Urban Décor. Ms Yu acknowledges that she received a verbal warning in July 2019 for spilling water which was described as a health and safety matter. This appears to have led to the implementation by the company of a written policies document.

[11] Mr Han's witness statement refers to previous "disciplinary issues". However, it is not evident that warnings were given at most of those times. They are occasions when Mr Han was dissatisfied with the performance or conduct of one or both of the employees. He tended to focus on the employees as a work team and so regard both as responsible for anything which went wrong. He acknowledges that he took those disciplinary issues into account when making the decision to give notices of dismissal.

[12] I conclude that Ms Yu was given one verbal warning and Ms Jin did not receive any warnings.

**What was the policy on phone use?**

[13] Urban Décor asserts that it had a phone use policy. This is in the form of a document entitled "Promax Colours staff meeting minutes" from a 2 July 2019 staff meeting. Mr Han accepts that these were not minutes in the usual sense of a record made at or shortly after a meeting. He wrote them before the meeting, setting out what he wanted to talk about. He then handed them out to staff.

[14] The minutes document includes a description of the employment relationship being based on co-operation and good faith. Various areas of employment law and the employment agreement are outlined. Misconduct is described as including:

Acts or behaviour which cause damage or cost to the company or adversely affect quality or productivity. This includes dealing with personal affairs while at work, chitchat, playing cell phone app or answering personal phone call (company allows personal call within 1 min).

[15] During their evidence I found both Ms Yu and Ms Jin reluctant to accept that there was a policy limiting phone use during work time. Ms Jin acknowledges that phone use was mentioned at the 2 July 2019 meeting but her attitude is that as she had seen other people using their phones there cannot be a policy. Ms Jin suggests that Mr Han broke the policy himself and allowed one staff member to do other things that some staff were not allowed to do. She therefore thought she did not have to follow the policies.

[16] Ms Yu was reluctant to accept that the minutes document was what was given to her at the 2 July 2019 meeting. She denied being able to remember the contents.

[17] I find it more likely than not that Ms Jin and Ms Yu, who were both at the 2 July 2019 meeting, were given the minutes document. That document includes company policies.

### **What happened on 10 December 2019?**

[18] The morning tea break was often taken at 10am. At around 10am Mr Han saw Ms Jin pick up her phone when standing at her work station. There is a disagreement about when that occurred and what she was doing on her phone.

[19] Ms Jin says she was checking the time to see if it was time for the tea break and the phone accidentally went into WeChat.<sup>1</sup> Mr Han says he saw her playing on her phone, meaning using social media.

[20] Ultimately I conclude that when and for what purpose Ms Jin picked up her phone are not significant to the outcome of this case. Events unfolded dramatically and overtook the matter of Ms Jin's original phone use.

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<sup>1</sup> WeChat is a Chinese social media and messaging site.

[21] Mr Han objected to the phone use. He and Ms Jin began arguing. Initially Ms Yu was not directly involved. However, after a little while she involved herself to defend her workmate.

[22] Observing picture-only CCTV footage, it is evident that a fairly extended argument occurred between Mr Han and Ms Jin and later Ms Yu. Other staff are nearby, within earshot of the argument. The first phase of the argument goes on for almost ten minutes. The employees then go for their morning tea break. On their return the argument between Ms Jin and Mr Han continues, with Ms Yu mostly observing.

[23] After around five minutes Ms Jin picks up her bag and leaves the factory. She comes back in. She leaves and Ms Yu leaves as well, around 25 minutes after the argument started (including the tea break time). Ms Yu and Ms Jin do not punch their time cards on departure.

[24] Ms Yu, Ms Jin and Mr Han all accept that the argument became heated. The employees report their emotions being out of control.

### **What was said during the argument?**

[25] There are some differences in the evidence regarding what was said, including whether Ms Jin and Ms Yu mentioned resigning.

#### *Ms Jin*

[26] Ms Jin accepts that she said to Mr Han the phone policy did not exist. She based this on seeing people using their phones. Ms Jin also said to him that if the others do not remember about the policy, she did not remember either. She called the policies unfair. Ms Jin acknowledges saying to Mr Han that she could play on her phone.

[27] Ms Jin was reluctant to answer my questions about whether she may have said that she would not follow the policies. She emphasised that she would not have gone against the policies. I consider that she avoided answering my questions and that she did tell Mr Han that she would not follow the policies.

[28] Ms Jin says that Mr Han told her and Ms Yu that if they did not want to work they could leave of their own accord but they would have to give him a resignation letter and four weeks' notice. Ms Jin refused saying she would not leave unless Mr Han gave her a letter saying that he wanted her to leave. He refused.

[29] Ms Jin says due to the argument she and Ms Yu could not carry on their work as normal and had to leave the factory. She did not think she said she quit her job. She cannot remember whether she said she was going to sue Mr Han as she left. I conclude that she did say she was going to sue Mr Han.

*Ms Yu*

[30] Ms Yu says she told Mr Han that Urban Décor's policies are not fair and are not clear. She questioned whether Mr Han had considered the company's policies when he undertook a certain action.

[31] She told the Authority that staff had never been officially informed about the policies, downplaying the July 2019 meeting as not even lasting half an hour. She suggested that no policies were put up there. She recognises that she said something like "the company does not have policies", during the 10 December argument.

[32] Ms Yu expressed some reluctance in the investigation meeting to go into detail about what was said on 10 December. She persistently refused to answer some questions under cross-examination.

[33] Mr Han is reported by Ms Yu to have tried to upset the employees by saying "you have feet and legs and can leave of your own accord".

[34] Ms Yu accepted that she may have said she quit her job but could not remember for sure.

*Other witnesses*

[35] Mr Han and most of the remaining workers from the Urban Décor factory all included material in their witness statements about 10 February in script dialogue format. This specified what each of Ms Jin, Mr Yu and Mr Han said. The dialogue is identically quoted by witnesses over many lines although some witnesses finish sooner than others or have "xxxxx" to indicate a line of dialogue which they cannot remember. An identical error in the reference to the date of the argument also revealed the duplication.

[36] Mr Young raised an issue about this duplication and challenged the involvement of Urban Décor's representative in the Authority meeting. Having heard Mr Zhang's explanation I was satisfied that he could continue with representation.

[37] When questioned a couple of these witnesses insisted that they had written the wording themselves but I discount that possibility. All largely stuck to their statements as being a true account of what they had heard. However, I find the prospect that several people could recall exactly the same words from a 15 minute argument highly improbable.

[38] It was difficult to get a precise picture of what happened with the creation of this evidence and when it occurred. Ultimately it was clear that the witnesses had all discussed what they remembered being said during the argument. There may have been some group discussion shortly after Ms Jin and Ms Yu finished work but the main discussion was six months after the dismissal when Mr Han got everyone together as witness statements were needed. The group discussed what they remembered and a joint position was developed. Mr Han typed up witness statements in Mandarin and translated them into English. He checked with each witness whether they would accept each lines of the jointly developed dialogue with what they did not accept being removed. This process was not described in the witness statements. Needless to say this scenario did little for the witnesses' credibility.

[39] Mr Han accepted that although he may have had some notes he could not remember 100% what was said but the dialogue script was the "meaning" of what happened.

### *Conclusion*

[40] I may well have been inclined to completely disregard the statements of these other witnesses. However, Ms Yin and Ms Yu accepted a number of parts of the dialogue as reflecting what was said. For example, similar to Ms Jin's recall, the script includes Mr Han asking if they wanted to resign and saying they could if they wanted to.

[41] The script refers to the employees both saying they quit before leaving, although one of the group did not recall hearing the reference to "quit" so removed it from her statement. I take into account Ms Jin and Ms Yu's reluctance to answer some questions about what they said on 10 December 2019. Ms Jin said she could not remember saying she quit and Ms Yu said it was possible that she did but could not remember. I found this lack of memory of an important aspect of the event surprising. I conclude that both said they quit.

### **What happened after the employees left?**

[42] Late that afternoon Ms Jin sent Mr Han a WeChat message asking him to keep the CCTV footage. She messaged that his actions had forced her to leave or left her no choice. She goes on to say (in translation from Mandarin):

Don't think that because you say the factory is yours that you can do whatever you like or you can get away with the basic [or the most basic] respect a boss must give to his employees according to New Zealand law.<sup>2</sup>

Because of your unreasonable action again and again you shouted and scolded, I couldn't carry on working as per usual.

[43] Ms Yu messaged Mr Han saying that she was hurt by his harsh words and still cannot calm down.

### **How did Mr Han respond?**

[44] There was no immediate response to the employees' WeChat messages. Then at 4.34am the next morning Mr Han sent Ms Yu and Ms Jin a letter attached to a message. The messages describes the letter as a "resignation letter". He continues that if the employee has any queries that should go to their lawyer as he did not need to explain or translate it for her.

[45] When asked about sending the letters at 4 in the morning, Mr Han said he worked at night several days a week.

[46] The letters are similar but not identical. Ms Jin's letter refers her objecting to the company phone policy, becoming aggressive and verbally abusive, then walking off site. Ms Yu's letter refers to her previous warning.

[47] Both letter conclude that the employee shows a negative attitude to work, not being willing to comply with the company's policies and not being willing to accept the employee's error or make correction (of behaviour).

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<sup>2</sup> Alternative interpretation offered by the interpreter, in square brackets.

[48] Ms Yu and Ms Jin's "employment is terminated immediately" with final pay to be paid out the following week.

[49] Mr Han accepts that the letters look like he is dismissing the employees with him deciding that they would not come back to work.

### **Was Ms Yu's grievance raised in time?**

[50] In the lead up to the investigation meeting Urban Décor claimed that Ms Yu had not raised a dismissal personal grievance within the 90 days required by s 114 of the Act. This was based on there being no indication of correspondence between the employees or their representative prior to the claims being lodged in the Authority and Ms Yu's statement of problem focusing on earlier dissatisfactions and saying little about the termination of employment.

[51] The 90 day issue was less problematic for Ms Jin as her statement of problem, which was served within 90 days of the alleged dismissal, referred to her termination.

[52] Submissions for Urban Décor suggested that detail may have been deliberately withheld in order to wait and see what the company's position was about the resignation/dismissal and what the CCTV footage revealed. There appears to be an element of truth in that. Deliberate withholding can be a dangerous game. I must look at what was communicated to the company.

[53] On the third day of the investigation meeting Mr Young provided for the first time an email from himself to Mr Han of 12 December 2019. Mr Han accepts that he may well have received it. The email refers to Ms Jin and Ms Yu being dismissed and explicitly raises their personal grievances. Information is sought including an explanation of the law and company "regulations" Ms Yu did not follow and what error she made.

[54] The email was sent within days of the dismissal and satisfactorily raises an unjustified dismissal grievance within the time required. Ms Yu is able to pursue her grievance.

[55] Even if I am wrong about the email, Ms Yu's statement of problem, although lacking in detail regarding the termination of her employment, does identify the problem as "I was unjustifiably dismissed with substance and procedural flaws". This

was served within the 90 days period. In addition Mr Han was representing Urban Décor at that point and lodged a comprehensive response of 12 tightly written pages to Ms Yu's claim. This provides much detail regarding 10 December 2019 and Mr Han's response. He then went to mediation voluntarily regarding Ms Yu and Ms Jin. In these circumstances, Mr Han consented to any late raising of Ms Yu's grievance.

### **Were Ms Yu and Ms Jin dismissed?**

[56] Urban Décor's position in its statement of reply was that the employees had been summarily dismissed due to serious misconduct. By the time of the investigation meeting its position had changed to saying that the employees had resigned and were therefore not dismissed.

[57] I have concluded that Ms Jin and Ms Yu did say they quit when leaving the factory. However, these were clearly heat of the moment statements after the lengthy and intense workplace argument with Mr Han. At such times it is incumbent on the employer to allow some time for a cooling off period to ensure that a resignation is genuine.<sup>3</sup>

[58] It was suggested that the employees may have abandoned their employment. However, the employment agreements required absence for a continuous period of three days without notification for absence to be deemed to be abandonment.<sup>4</sup>

[59] Mr Han did not wait long to see if the employees retracted a resignation or if they remained absent from the workplace for three days. Instead he let his annoyance at Ms Jin and Ms Yu's argumentativeness and insubordination take over. He decided to dismiss Ms Yu and Ms Jin, messaging them in the early hours of the morning.

[60] He sent them letters which clearly state that the employees are being dismissed, effective immediately.

[61] Ms Yu and Ms Jin were dismissed by Urban Décor.

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<sup>3</sup> *Boobyer v Good Health Wanganui Limited* WEC 3/94, 24 February 1994 (Employment Court).

<sup>4</sup> Employment agreements, clause 11.

### **Were the dismissals unjustified?**

[62] The question is whether dismissing the employees was something which a fair and reasonable employer could have done at that point.

[63] As noted above, when deciding to dismiss, Mr Han took into account what he describes as earlier disciplinary issues. Other than in one instance, these were not the subject of warnings. My impression was that Mr Han was strongly influenced by previous conduct or disagreements which had not resulted in warnings. He may have felt at the time that he was lenient regarding those matters but to then use them as a basis for a dismissal is not fair.

[64] I now consider the elements in s 103A(2) of the Act. The 10 December argument could be seen as Mr Han raising concerns and getting responses but this was too heated a situation for that process to be undertaken in a fair and considered way.

[65] The phone use was not really the issue. Only Ms Jin had been involved in phone use and in any event the phone use of itself should only at most have led to a warning rather than dismissal.

[66] The dismissal was really based on the heated argument in the workplace with Ms Jin and Ms Yu challenging Mr Han and the company's policies. The employees were dismissed because they were not willing to recognise and comply with Urban Décor's policies.

[67] Ms Yu and Ms Jin had not been warned that dismissal was on the cards. In fact Mr Han told them during the argument that he did not want to dismiss them. There was no discussion with them after they left the factory before the letters were sent. Mr Han believed that there had been too many discussions about company policy with the same thing being talked about every time. Understandably he was finding this challenging but the employees did not know their jobs were on the line unless they stopped arguing about, and recognised the need to comply with, the policies. I do not accept that this had yet become a situation where there had been sufficient action to destroy trust in the employment relationship.

[68] Fair and reasonable employer would not have gone from one or no verbal warnings regarding policy to dismissing for serious misconduct.

[69] I cannot say that these are minor matters and did not create unfairness for Ms Yu and Ms Jin.

[70] I conclude that Urban Décor's actions in dismissing Ms Yu and Ms Jin in the way that it did were unjustified.

### **Remedies**

[71] I go on to consider remedies. Both Ms Yu and Ms Jin claim lengthy periods of lost wages as well as compensation for humiliation, loss of dignity and injury to feelings. Urban Décor emphasised the employees' role in their terminations.

#### *Lost wages*

[72] Ms Jin seeks 40 hours' lost wages a week from 18 December 2019 until the final investigation meeting date of 19 November 2020.

[73] Urban Décor challenges the employees' attempts at mitigation of their loss, emphasising Ms Yu's comment on 10 December that there were many curtain making businesses and she would not starve.

[74] The evidence of both employees around mitigation was relatively minimal. Neither applied for any curtain making jobs without adequate explanation. However, there was no evidence that any such jobs became available in the relevant period.

[75] Ms Jin provided information about four jobs she says she applied for although there was no written evidence of actual applications. Ms Jin started studying in February 2020 and did not apply for more jobs. I do not accept that she had got to the point where that was a reasonable option whilst still claiming lost wages. Her wages claim can only run to the end of January 2020.

[76] At Ms Jin's rate of \$19.15 per hour, her weekly wage was \$766. Six weeks and two days totals \$4,902.40 gross before consideration of contribution.

[77] Ms Yu phoned around some Chinese companies about jobs but has no record of applying for any particular jobs. She got a council business licence and started her own food business. Her wages claim runs to 30 April 2020. However, during the investigation meeting she admitted having prepared for the new business from some point in January 2020. I am not convinced that she made any effort to find work from

that time on. I therefore only consider her lost wages claim until the end of January 2020.

[78] Ms Yu's hourly rate was \$20.90, making her weekly wage \$836. Six weeks and two days totals \$5350.40 gross before contribution is considered.

*Compensation under s 123(1)(c)(i) of the Act*

[79] Compensation of \$14,000 each is sought.

[80] Ms Jin describes feeling threatened by the dismissal letter, especially receiving it in the early hours of the morning. She still finds thinking about the events at Urban Décor very intense and has to work hard to calm down. She sought medical help.

[81] Ms Yu's evidence was that she faced financial pressures due to her children having a lot of tuition fees. She felt unable to express her unhappiness in front of her children.

[82] Both Ms Jin and Ms Yu provided some medical information however I did not find it to offer a lot of assistance. Ms Yu's medical certificate describes her reporting "mental health symptoms and insomnia". However, it is from the day after the dismissal and so insomnia, if linked to the dismissal, can at most indicate a night or two of difficulty sleeping. The nature of the mental health symptoms are not spelt out. There is no indication of the cause of these symptoms nor the insomnia.

[83] Ms Jin went to the doctor two days after her dismissal. She is described as being feeling low in mood but also as very angry. Poor sleep and low appetite are noted.

[84] I accept the submission for Urban Décor that, at least after a couple of months, both employees seem to have happily started on other paths of interest.

[85] I cannot conclude that either employee suffered more than the other and so consider the same compensation for both of \$8,000 would be suitable before assessing contribution.

*Contribution and conclusion*

[86] I have carefully considered the possibility that the employees should not be awarded any remedies at all. In *Xtreme Dining Ltd (trading as Think Steel) v Dewar a*

full bench of the Employment Court concluded that no remedies would be awarded when there is disgraceful, outrageous or particularly egregious misconduct.<sup>5</sup>

[87] There is a serious element of contributory conduct here. Both Ms Yu and Ms Jin made it clear to Mr Han that they were refusing to follow company policies. There was also a strong sense in their evidence to me of defiance towards Mr Han. They did not consider they should have to follow company policies or Mr Han's (lawful) instructions. This is potentially risky from a safety perspective in a curtain making factory. Mr Han decided he had had enough.

[88] I conclude Ms Yu and Ms Jin's behaviour does not quite hit the disgraceful or outrageous level but it is blameworthy and contributed to the situation giving rise to their dismissals.<sup>6</sup> As such a substantial contribution should be deducted from what would otherwise be their remedies.

[89] I have considered whether Ms Jin and Ms Yu should have different percentage amounts deducted for contribution. Although Ms Jin clearly lead the charge on 10 December 2019, Ms Yu decided to involve herself and made similar comments to Mr Han. I consider that their contribution should be assessed as the same and the appropriate rate is 50%.

[90] I order Urban Décor to pay the following sums within 28 days of the date of this determination:

- (i) to Ms Yu \$2,675.20 gross as lost wages and \$4,000 as compensation; and
- (ii) to Ms Jin \$2,451.20 gross as lost wages and \$4,000 as compensation.

### **Costs**

[91] Costs are reserved. The parties are invited to resolve the matter.

[92] If no resolution is possible, Ms Yu and Ms Jin shall have 21 days from the date of this determination in which to file and serve a memorandum seeking costs. This is to include a breakdown of how and when the costs were incurred and be accompanied

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<sup>5</sup> *Xtreme Dining Ltd (trading as Think Steel) v Dewar* [2016] NZEmpC 136 at [216].

<sup>6</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178] and *Xtreme Dining Ltd (t/a Think Steel) v Dewar* (above) at [175].

by supporting evidence. Urban Décor shall have a further 14 days in which to file and serve a memorandum in reply.

Nicola Craig  
Member of the Employment Relations Authority