

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 540
3162681
3166704

BETWEEN	XINGHUA (AMY) LI Applicant in 3162681
AND	ZHUOFENG WEI Applicant in 3166704
AND	PEARL GARDEN LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	David Kim, advocate for the applicants May Moncur, advocate for the respondent
Investigation Meeting:	27 September 2022 by audio-visual link
Submissions (and further information) received:	4 August 2022 and at the investigation meeting 9 August 2022 and at the investigation meeting
Date of determination:	21 October 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The Authority declines to grant leave to Xinghua (Amy) Li and Zhoufeng Wei to raise their dismissal personal grievances with Pearl Garden Limited out of time.**
- B. Costs are reserved.**

What are the employment relationship problems?

[1] Pearl Garden Restaurant is a long established, family owned Auckland establishment, operated by Pearl Garden Limited (Pearl Garden or the company). Some

years ago Xinghua (Amy) Li and Zhoufeng Wei (the employees) worked at the restaurant.

[2] Ms Li claims she was constructively dismissed in mid-2020. Mr Wei brings a dismissal claim, saying he finished employment in February 2018. Both employees also seek arrears they claim Pearl Garden owes them. Pearl Garden denies Ms Li was dismissed, saying she left voluntarily on good terms. It denies that Mr Wei was unjustifiably dismissed.

[3] The company has paid some arrears since the claims were lodged, said to be calculated on the information provided on behalf of the former employees.

How has the Authority investigated?

[4] Pearl Garden argued that neither employee raised their dismissal personal grievance claim in time. Ms Li's application for leave to raise her grievance out of time was made in July 2022. Mr Wei's March 2022 statement of problem included a request for leave to raise his grievance.

[5] I initially decided to determine on a preliminary basis the questions regarding raising of grievances and leave. A timetable was set for the filing of affidavits and submissions. The subsequent response from the employees' representative did not include affidavits.

[6] I again sought affidavit evidence from the employees on the raising of the grievances and leave issues. Affidavits were filed although only a paragraph of each referred to the leave issue. An affidavit was received from one of Pearl Garden's operators, Mabel Kan. Written submissions were also received.

[7] The parties were informed that there was insufficient evidence from the employees to properly decide the leave applications. The parties were given the chance to comment on how the leave applications should proceed. I decided to arrange a short investigation meeting by audio-visual link (AVL) to hear evidence from the employees, any resulting evidence for Pearl Garden and any final submissions.

[8] The investigation meeting was held by AVL on 27 September 2022, with an interpreter in attendance to assist the Authority. Unexpectedly not in attendance were the employees.

[9] Their representative David Kim indicated that Ms Li was overseas on a family matter and was unable to ensure sufficient broadband access to attend. Mr Kim told the Authority that Mr Wei had been informed of the meeting but had not indicated that he would attend. No application to adjourn the meeting was made. Rather Mr Kim stated that the Authority should decide the leave applications on the basis of the evidence it had.

[10] I indicated to Mr Kim repeatedly that there was inadequate evidence regarding the leave applications and checked that the employees still wished for me to go ahead and determine those applications on the basis of what had been provided. Mr Kim stated three times that that was what the employees were seeking. Pearl Garden's representative indicated that the company was willing for the Authority to proceed on that basis, confirming its previous written submissions that the applicants had failed to provide evidence in support of their applications.

[11] The parties were also given a final opportunity to make additional submissions.

[12] The matter is set down in November 2022 for a substantive investigation meeting into the other claims and any grievance which is able to be pursued.

[13] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

What are the issues?

[14] Neither Ms Li nor Mr Wei argue that they raised their grievances within 90 days of when they were dismissed or became aware of their dismissals, as required by s 114 of the Act.

[15] The issues are then whether the requirements under s 114(4) are met, so:

(a) Was the delay in raising the grievances occasioned by exceptional circumstances?

(b) If so, is it just to grant leave to raise the grievances?

[16] In other circumstances more individual focus would be needed on each employee's application. However, here there is little evidence regarding those

identified issues from Ms Li or Mr Wei, so their situations will largely be considered together.

What happened with Ms Li's employment?

[17] Ms Li's statement of problem from February 2022 outlines a constructive dismissal based on poor treatment with Ms Li said to have finished work on 19 June 2020. It appears a letter outlining her concerns were sent by her representative to her employer in November 2021. No application for leave was filed with the statement of problem. A request for leave was contained in a memorandum received on 17 July 2022.

[18] The only evidence in Ms Li's affidavit specifically about her dismissal is that she had no employment agreement and seeks leave to raise a grievance out of time and compensation for humiliation, loss of dignity and injury to feelings.

[19] Pearl Garden accepts that Ms Li had no written employment agreement but asserts she left the job for personal and family reasons. Ms Kan recalls a good relationship with Ms Li during her employment and Ms Li coming in to dine at the restaurant after she stopped working there. Ms Li is said during that visit to have expressed sorrow for Ms Kan about the effect of Covid-19 on the business.

What happened with Mr Wei's employment?

[20] Mr Wei's statement of problem and affidavit simply referring to his dismissal being unjustified with compensation sought and his job ending in February 2018 after some months at the restaurant. The application for leave is included in the statement of problem.

[21] Initially Pearl Garden had difficulty identifying Mr Wei as one of its former employees and was unable to specifically respond to his application. It says passage of time and lack of records did not assist. After further investigation, the company was able to identify Mr Wei as a former employee and acknowledged that it did not provide him with an employment agreement. Ms Kan's evidence is that Mr Wei only worked for a weekend trial period as a casual employee and she and her husband have no memory of dismissing Mr Wei.

Are there exceptional circumstances?

[22] Both former employees had no written employment agreement. The absence of an explanation of the resolution of employment relationship problems in an employee's employment agreement, as required by s 65 of the Act, is identified as an example of an exceptional circumstance in s 115(c).

[23] Section 65 requires individual employment agreements to be in writing and contain that explanation, including a reference to the 90-day period in s 114 within which a personal grievance must be raised.

[24] Here there are no written employment agreements and thus no explanation of the 90-day grievance raising requirement. This gives a basis for exceptional circumstances.

Is that enough?

[25] The short answer is no. The difficulty for Ms Li and Mr Wei is that s 114(4)(a) of the Act requires more than that.

[26] The Authority must be satisfied that "*the delay in raising the personal grievance was occasioned by exceptional circumstances*".¹ This requires a connection between the circumstances and the delay.

[27] Here there is no evidence at all of what caused or contributed to the delay, not even the employees saying the lack of the agreement was a factor. It could have been the absence of knowledge due to a lack of a written explanation about the 90-day requirement. Or it might have been something else.

[28] The delay could have been caused by an entirely different factors such as, for example, them not believing at that time that there was anything wrong with how Pearl Gardens had acted. I simply do not know.

[29] An additional consideration is Pearl Garden's suggestion that Ms Li had ready access to legal advice in the relevant period. Ms Kan's evidence is that in 2019 she assisted Ms Li with an introduction to a lawyer on a property matter which Ms Kan understands is still on-going.

¹ The Act, s 114(4)(a).

[30] I can only conclude that there is insufficient evidence to establish that the delay in Ms Li and Mr Wei raising their dismissal grievances was linked to the absence of an explanation regarding of the 90 day requirement as they had no written employment agreements.

[31] There is no evidence of any other basis on which to establish exceptional circumstances.

[32] The requirement under s 114(4)(a) is not established.

Is it just for leave to be granted?

[33] In the event that I am wrong in that assessment, I go on to note that the employees would still face the question of whether it just to grant leave.² They face difficulties here too.

Delay

[34] There was a lengthy period between when the 90 days expired when the applications for leave were filed. Ms Li's application for leave was made what appears to be about two years after she finished her Pearl Garden work and over six months after she was being represented on employment issues.

[35] Mr Wei's application was included in his statement of problem lodged in March 2022. That was the first time when there was mention to the employer of a dismissal concern. There appears to be substantial dispute about whether Mr Wei's employment finished in mid-2017 or February 2018. On either version there was at least four years between any dismissal and when the leave application was made.

[36] In neither case is the delay explained in their evidence.

Prejudice

[37] Pearl Garden submits that it would be significantly prejudiced if leave was granted for the grievance to be raised out of time. Ms Kan speaks of her and her husband having no memory of dismissing Mr Wei, either at the end of the weekend they think he worked in mid 2017 or in February 2018 when he says he finished work. Other than identifying an unjustifiable dismissal claim there is nothing to aid provision

² The Act, s 114(4)(b).

of a response. Pearl Garden's ability to respond to the claim would be prejudiced by passage of up to five years since the relevant events may have occurred.

[38] Pearl Garden's prejudice argument is stronger in Mr Wei's case. Ms Li's termination of employment was more recent and she was a longer serving employee.

Costs

[39] Costs are reserved and will be dealt with, if necessary, along with the costs regarding the substantive investigation.

Nicola Craig

Member of the Employment Relations Authority