

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TAMAKI MAKAUROHE**

[2024] NZERA 102  
3117312

BETWEEN RUIDONG XU  
Applicant

AND PIONEER EDUCATION AND  
IMMIGRATION SERVICES  
GROUP LIMITED  
Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person  
Joseph Harrop and Abby Shieh, counsel for the  
Respondent

Investigation Meeting: 12 August 2021 in Auckland

Submissions Received: 20 August 2021 from the Respondent  
30 August 2021 from the Applicant

Determination: 23 February 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ruidong Xu, claims to have been both unjustifiably dismissed and unjustifiably disadvantaged by reason of various actions of the employer, Pioneer Education and Immigration Services Group Limited (Pioneer).

[2] The allegations of unjustified disadvantage relate to claims Pioneer:

- (a) Failed to advise the true reasons for Mr Xu's dismissal, though this claim was withdrawn during the investigation meeting;
- (b) Unilaterally changed Mr Xu's role from Student Counsellor to Licensed Immigration Adviser (LIA);
- (c) Asked Mr Xu to follow non-compliant LIA procedures; and

(d) Subjected Mr Xu to his employer's religious practices in the workplace absent consultation.

[3] Pioneer accepts Mr Xu was unjustifiably dismissed but denies his other claims.

### **Background**

[4] Before proceeding, it should be noted there was a dispute about the identity of the respondent and while Pioneer is cited, there was some confusion in that regard. The individual employment agreement governing the terms of Mr Xu's employment cites Pioneer Ever-worship Education Services Group Limited as the employer but as far as the Companies Register is concerned no such entity exists.

[5] As a result Mr Xu suggested at one point that the true employer was Mr Zhu as he supervised Mr Xu. That said Mr Xu appears to have been clearly aware of the identity of the employer given he correctly cited it when lodging his claim. When I add comments and concessions he made I conclude any claim Mr Zhu might have personally employed Mr Xu has no basis. Finally, and given the parties agreement, the matter proceeded with Pioneer recognised as the correct respondent.

[6] Pioneer primarily provides education consultancy services to international students who predominately come from China. It also provides immigration consultancy services primarily aimed at those same students. The latter services are provided by employees licensed with the Immigration Advisers Authority though they are assisted by various support staff.

[7] Mr Xu says he was initially engaged as a student counsellor and was issued an essential skills work visa accordingly. He says he was subsequently compelled to engage in LIA work and this forms the basis of one of his grievances. That said he accepts that having had his role amended and LIA duties added, he did so as a provisionally registered LIA and was supervised in that role by Mr Zhu.

[8] By way of further background, Mr Xu adds Mr Zhu was found to have used non-compliant practices by the Immigration Advisers Complaints and Disciplinary Tribunal.

[9] Mr Xu also adds that three colleagues left between mid-July and mid-November 2019, meaning that he got a lot of extra work. This was largely LIA work and goes to the claim he was disadvantaged by having to perform that work.

[10] Mr Xu says that on 7 January 2020, and totally unheralded, he was simply told he was going to be dismissed. That was followed by an email headed “Personal issue about supervising capability and time engagement”.

[11] Included is the following:

This is to confirm the following notices are listed for your reference:

This is the official notice according to employment agreement clause 12, a three week notice to be given. The ending date is 28<sup>th</sup> of January 2020.

The reason for termination of employment was explained today, majorly due to my limited time strength and capability, which cannot cater your needs of long-term career development.

[12] On 9 January, Mr Xu responded with an email questioning the decision. It closed by stating Mr Xu wished to remain at Pioneer and asking that Mr Zhu reconsider.

[13] That did not occur and while the parties met on 10 January the decision to dismiss was confirmed and there was a further email which reiterated Mr Zhu’s view he had the right to choose not to supervise Mr Xu any longer and give consideration to changing his life/work balance. The email goes on to suggest another LIA who had been mentioned in Mr Xu’s letter was in a better position as she could obtain a full, as opposed to provisional, licence before going on to say:

I consider this as an opportunity for me to take a break, to simply well look after my engaged clients, rather than giving training and full monitoring provisional advisers daily practice for the last 8 years. I think I have the minimum right to make such a decision at this point.

[14] The email then discusses a further point before saying: “By considering your strong willingness to keep working at Pioneer, we can schedule a meeting to discuss variation of working scopes” and the possibility of finding a new LIA supervisor though the evidence confirms that if this occurred it would have been with an employer other than Pioneer.

[15] Suffice to say, nothing changed and Mr Xu’s last day of employment was 28 January 2020.

[16] Thereafter, he attempted to return to China in order to find work but his travel plans were stymied by the Covid pandemic.

[17] On 2 April, he raised a personal grievance challenging his dismissal and the change to his original role. The following day a further personal grievance was raised regarding the non-licensed immigration advisor practices. A third personal grievance followed concerning the bringing of religious practices into the workplace.

[18] A final and fourth personal grievance regarding the allegation Pioneer had not disclosed the true reasons for the dismissal was raised in July.

### **Analysis**

[19] Mr Xu's first and prime claim is that he was unjustifiably dismissed. That it dismissed Mr Xu is conceded by Pioneer which means it is required to justify its decision.

[20] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

*... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[21] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of s 103A of the Employment Relations Act (the Act) are enshrined in statute and a number have a procedural focus.<sup>1</sup>

[22] As a bare minimum and having regard to its resources, an employer contemplating dismissal is required to conduct a sufficient enquiry prior to dismissing. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[23] Mr Xu says none of that happened with his first knowledge of the dismissal being advice it was to occur. Mr Zhu essentially concedes that was correct and expresses the view he thought he had the right to bow to personal pressures and cease supervising Mr Xu which effectively meant he was no longer employable. The concession does however mean Pioneer had no chance of complying with the

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<sup>1</sup> Sections 103A(3)(b) to (d) of the Employment Relations Act 2000

requirements of s103A of the Act and that was recognised by its lawyers when they later wrote:

While Mr Zhu was of the understanding that termination of your employment was justified at the time (namely, he did not have the capacity to supervise you any longer), he is realistic in his approach and understands it is futile to argue termination of your employment was justified in accordance with the test of justification in the Act. While termination of your employment was not intended to be malicious, Mr Zhu accepts that it was misguided.<sup>2</sup>

[24] The simple fact is, as conceded, the dismissal was absent any process or consideration of Mr Xu's situation and a lack of resource cannot excuse such all-encompassing deficiency.<sup>3</sup> The dismissal is unjustified.

[25] Turning to the disadvantage claims which I shall consider in the order each was listed in the Statement of Problem.

[26] For a claim of unjustified disadvantage to succeed there must be an action of the employer which operated to the employee's disadvantage in the workplace.

[27] As already said the first claim raised in the statement or problem, namely that Pioneer failed to advise the true reasons for Mr Xu's dismissal, was withdrawn.

[28] The second claim was that Pioneer unilaterally altered Mr Xu's role from Student Counsellor to Licensed Immigration Adviser (LIA). The claim is that Mr Xu was disadvantaged by virtue of having his immigration status put at risk by reason of a unilateral change in duties contrary to his visa which described him as a Student Counsellor. He also claims to have been overworked by reason of the departure of his colleagues with a resulting need to then concentrate on LIA duties and that he was "deskilled" by reason of doing less student advisory work.

[29] The evidence is clear – the LIA duties were not imposed. Mr Xu agreed, and this is reflected in his closing submission, that he enjoyed the "hybrid" nature of the role as it offered experience in both education and immigration consultancy.<sup>4</sup>

[30] To that I add the fact I largely accept the evidence Mr Xu in fact preferred that work and here I note the Pioneer's submission where it was said:

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<sup>2</sup> Letter to Mr Xu dated 13 October 2020

<sup>3</sup> *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 at [94] and [95]

<sup>4</sup> Closing submission at [13]

It is notable that he is also seeking compensation for a change in his duties to immigration advisory work and at the same time seeking compensation for a dismissal that could have been avoided had he accepted the offer in January 2020 to relinquish immigration advisory work and revert to education consultancy work.<sup>5</sup>

[31] The evidence supports that submission. It also supports the submission Mr Xu's job description, which Immigration New Zealand had when it approved Mr Xu's visa, was sufficiently wide as it includes immigration work.

[32] Finally it has to be noted Mr Xu's visa was not affected and the main disadvantage claimed never occurred.

[33] Similarly, and while he did raise issues about workload, the evidence is that Pioneer responded by both giving additional pay and three staff to assist. There is no evidence that other than constant grumbling to colleagues about workload, he found Pioneer's response inadequate or that if he did he raised it with the company. For this type of disadvantage to succeed there must also be evidence the employer rejected an opportunity to address it and here the evidence is the opposite – it did address the issue when raised and were not told its response was inadequate.

[34] The third claim was that Mr Xu was required to follow non-compliant LIA procedures. Other than the reference to issues with the licensing Authority there is little evidence. Such breaches, if they occurred, are in the domain of another jurisdiction and while he complains he was at risk of proceedings in the relevant Authority no such event occurred and no such disadvantage materialised. In any event as a supervised LIA the bulk of any risk would fall upon the supervisor.

[35] Aside from the fact supporting evidence is sparse, I conclude the claim appears to have been brought to support the overwork claim. On that I have already commented. Given the points above this claim also fails.

[36] The final claim is that Mr Xu was disadvantaged by having his employer's religion practiced in the workplace absent consultation. Mr Xu says as he did not participate he was disadvantaged as he felt excluded from his colleagues who did attend.<sup>6</sup>

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<sup>5</sup> Closing submission at [37](b)(i)

<sup>6</sup> Closing submission at [50]

[37] This claim must also fail as aside from the fact there is no evidence of exclusion, I note. Mr Zhu's religious views and practices were well promulgated and Mr Xu knew of them, or should have, when he was employed. To that I add his evidence that while he did not attend there was no compulsion he do so and no penalty for not. While he says this did not alleviate feeling of peer pressure and a feeling of exclusion there is again no evidence he raised the issue. Indeed he accepts he didn't as by the time he considered this an issue he was already leaving. The implication of that evidence is until the dismissal there was no disadvantage which severely undermines the claim. It too shall fail.

[38] For the reasons above I conclude Mr Xu was unjustifiably dismissed but that his disadvantage claims fail.

[39] That conclusion means the question of remedies must be considered. For the dismissal Mr Xu seeks lost wages and compensation pursuant to s123(1)(c)(i) of the Act.

[40] Section 128(2) of the Act requires the payment of three months wages or the actual loss if less though I this instance Mr Xu asks I exercise my discretion and increase that amount without saying to what.

[41] That is not a discretion I intend exercising as the evidence is Mr Xu made no attempt to mitigate his loss in New Zealand, instead choosing to return to China. That he was then stymied in his attempt to do so by reason of the covid pandemic was not the fault of Pioneer and should not be visited upon them. Indeed the evidence would suggest the reason for the return to China was most likely the ending of a long standing personal relationship and while Mr Xu now blames that on his dismissal there is no evidence to support that proposition.

[42] The award shall be the three months payable under that Act.

[43] There are also a range of claims for the reimbursement of monies lost as a result of the dismissal but the bulk of these appear related to Mr Xu's decision to return to China. As already said, that was his choice with the evidence suggesting other issues influencing his decision. Others relate to medical costs and psychiatrists fees but the relevant dates correspond with the relationship breakup and not the dismissal. To that I add Mr Xu's evidence he was also stressed as a result of covid and once again I

reiterate Pioneer cannot be held responsible for that and its effects. No award shall therefore be made.

[44] With respect to compensation, and while specific amounts were claimed for the alleged disadvantages, Mr Xu does not specify an amount for the dismissal though he does refer to a generous offer of settlement Mr Zu made in an open letter.

[45] While I accept hurt must emanate from the dismissal there was little direct evidence of the effect it had on him with the evidence offered being a diverse mix of alleged effects from that, the disadvantages, the loss of Mr Xu's personal relationship and the effect of covid.

[46] Given my conclusion there is only one of those I can compensate and again I reiterate there was little direct evidence and definitely none that would come close to warranting an award of the magnitude of the offer Mr Xu rejected.

[47] Having considered the evidence and current levels of compensation I consider \$15,000 appropriate.

[48] Finally the conclusion Mr Xu has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.<sup>7</sup> The short answer is no as there is no evidence he contributed to the failures which ensured he succeeded with his dismissal grievance.

### **Conclusion and Orders**

[49] For the above reasons I conclude Mr Xu has a personal grievance in that he was unjustifiably dismissed. As a result I order Pioneer Education and Immigration Services Group Limited pay Ruidong Xu:

- (a) Three months wages being those lost as a result of the dismissal; and
- (b) A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;

[50] While Mr Xu has been successful he was self-represented which means recoverable cost are limited to the Authority's filing fee. Having said that I note the

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<sup>7</sup> Section 124 of the Employment Relations Act 2000

magnitude of the open offer means it is quite possible there is a Calderbank in existence, though the Courts conclusions in *Fifita v Dunedin Casinos*<sup>8</sup> would suggest its benefit might well be limited to ensuring costs lie where they fall. It is my preliminary view that is what should occur here.

[51] If either party disagrees they should serve a memorandum on costs within 14 days of this determination. From the date of service of that memorandum the other party will have 14 days to lodge any reply.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>8</sup> *Fifita v Dunedin Casinos Ltd* [2013] NZEpmC 171