

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 58
5390799

BETWEEN RICHARD HAO ZHU
 Applicant

A N D RENAISSANCE
 INVESTMENTS AND
 FINANCE GROUP LTD
 Respondent

Member of Authority: T G Tetitaha

Representatives: D Vinnicombe, Advocate for Applicant
 R Parmenter, Counsel for Respondent

Investigation Meeting: 30 November 2012 at Auckland

Submissions Received: 30 November 2012 from Applicant
 30 November 2012 from Respondent

Date of Determination: 19 February 2012

DETERMINATION OF THE AUTHORITY

Determination/Orders

- A. A determination Mr Zhu was unjustifiably dismissed by Renaissance**
- B. Renaissance's counterclaim is dismissed**
- C. An order pursuant to s.131 of the Act that Renaissance pay Mr Zhu wage arrears being commission of \$3,676.35**
- D. An order pursuant to s.128 of the Act for payment of lost remuneration of two months (1 July to 31 August 2012) totalling \$7,870.20**
- E. An order pursuant to s.123(1)(c)(i) of the Act for payment of compensation for hurt and humiliation of \$3,000.00**
- F. Interest is to accrue on the above orders C to E at the rate of 5% calculated from 31 August 2012 until payment**

G. An order pursuant to clause 15 Schedule 2 of the Act for Renaissance to pay to Mr Zhu \$1,750.00

Employment relationship problem

[1] Richard Hao Zhu was employed by Renaissance Investments and Finance Group Ltd (Renaissance) on 3 March 2011 as a financial analyst. His salary was \$36,000 gross, excluding commissions and bonuses.

[2] Mr Zhu was seconded to China to start a new branch of the company. Following the opening of the new branch he was instructed to undertake a form of foreign exchange trading which he believed contravened Chinese laws and would have been a criminal offence. As a result Mr Zhu did not follow this instruction.

[3] When Mr Zhu returned to New Zealand he was given a leave application by Renaissance. The leave application was for six months unpaid leave from 1 July to 31 December 2012. He was told unless he signed the leave application he would not be paid outstanding commissions of between \$3,000 - \$4,000 USD.

[4] Mr Zhu refused to sign the application. Renaissance instructed Mr Zhu not to come into work from 1 July 2012 onwards.

[5] Mr Zhu alleges he was unjustifiably dismissed. Renaissance does not dispute the dismissal. It raises a counterclaim against Mr Zhu for \$9,000 overpaid salary alleging:

- He did not have a valid working VISA during May to June 2012 and did not work during those months
- He took unauthorised paid leave in China for 1 month

[6] Mr Zhu disputes the counterclaim. He states he has a valid VISA (producing a copy of this at hearing) and was authorised to take leave during the Chinese New Year while in China.

Issues

[7] Renaissance took no issue with Mr Zhu's evidence or the fact of the dismissal. It only seeks to advance its counterclaim.

[8] The following issues arise:

- (a) Whether Mr Zhu was unjustifiably dismissed?
- (b) If yes, what remedies are owed to Mr Zhu?
- (c) Did Mr Zhu have a valid working VISA for May/June 2012 and if so did he take unauthorised leave?

Was Mr Zhu unjustifiably dismissed?

[9] Mr Zhu asserts he was constructively dismissed by Renaissance with their instruction for him not to report to work after 1 July 2012 following his refusal to sign the six month unpaid leave application. His evidence is not contested by Renaissance.

[10] The Authority determines that Mr Zhu was constructively dismissed.

[11] The respondent has given no evidence regarding justification of the dismissal.

[12] The Authority determines that Mr Zhu's dismissal was unjustified.

What remedies are owed to Mr Zhu?

Wage arrears claim

[13] Mr Zhu's gave evidence of the commissions owed totalling \$3,188.50 USD (NZ\$3,676.35).¹ Renaissance accepted Mr Zhu's wage arrears claim.

[14] Accordingly the Authority determines Mr Zhu is owed wage arrears in the form of commission totalling NZ\$3,676.35.

[15] This money was due and owing upon the termination date of 1 July 2012.

[16] The Authority determines Mr Zhu ought to receive interest upon the wage arrears from the date of termination being 1 July 2012 until date of payment at the rate of 5% per annum.

Lost wages claim

[17] The primary issue regarding payment of lost wages is quantum.

¹ Kiwibank foreign exchange calculator rate of 1 to 0.8673.

[18] A schedule of salary and commission was put to Mr Zhu by Renaissance. Mr Zhu accepted this accurately reflected the amounts of salary and commission he had earned in New Zealand up and until he was allegedly dismissed. The schedule showed commission earned of \$24,225.69 and gross earnings of \$43,544.85. This figure does not include the \$3,676.35 unpaid commission sought in the above wage arrears claim.

[19] Accordingly the total amount of income wages, including commission earned by Mr Zhu for the 12 months prior to his dismissal was \$47,221.20.

[20] Mr Zhu seeks an award in excess of three months lost wages under s.128(1) of the Act.

[21] Mr Zhu submitted his personal grievance had been made out and the Authority ought to accept his entitlement to greater than three months' ordinary time remuneration without further evidence of lost remuneration. He also referred to the "*contentious attitude of Renaissance*" in its handling of the litigation. For example ignoring a request for mediation, turning up at mediation then not staying, filing a reply without briefs of evidence, requesting an adjournment but not complying with the timetabling orders and running defences it did not pursue.

[22] The basis for payment in excess of three months ordinary time remuneration is discretionary. The Authority may order an employer to pay a greater sum to an employee "*by way of compensation for remuneration lost by that employee as a result of the personal grievance.*"

[23] There is no evidence before the Authority Mr Zhu has lost remuneration greater than the amounts that could ordinarily be ordered under s.128(2). In the circumstances an order for payment of three months ordinary time remuneration is appropriate.

[24] Renaissance took issue with the full three months remuneration being ordered on the basis he took few steps to obtain work due to being out of the country. It was accepted Mr Zhu was out of the country between 31 August and 24 November 2012. Mr Zhu's affidavit at para.33 alleges he continued to seek work during the three months after his dismissal on 1 July 2012. Renaissance says that cannot happen if he was not in the country at the time.

[25] Mr Zhu submits the Authority ought to accept his evidence as he was looking for work in New Zealand irrespective of his location. This evidence was not vigorously contested by Renaissance.

[26] There is very little evidence of what efforts Mr Zhu undertook in finding work during the three month period following his dismissal. Although he need not be physically present within New Zealand to apply for jobs, I do not have any evidence of applications for jobs before me. It is conceded he was out of the country from 31 August 2012. In the circumstances and considering all of the evidence, it is likely he was not applying for jobs in New Zealand but working on personal interests and/or taking leave. It is a reasonable inference he did not lose remuneration during this period given the lack of evidence that he was looking for jobs or what he was doing in China during the period 31 August 2012 to 24 November 2012.

[27] In the circumstances the Authority determines lost remuneration shall be payable only for a period of two months (1 July to 31 August 2012) totalling \$7,870.20.²

Compensation for hurt and humiliation

[28] Mr Zhu submits he ought to be paid the sum of \$10,000 for hurt and humiliation because:

- The manner in which he was dismissed was extremely hurtful and humiliating;
- The post dismissal conduct by Renaissance (detailed above) indicated a contentious attitude;
- The withholding of commissions owed of \$3,188.50 USD.

[29] There is little or no evidence of the injury to Mr Zhu as a result of the employer's actions. The case law provided by Mr Zhu involved injury such as depression³ headaches, difficulty sleeping and symptoms of stress⁴ or anxiety⁵ following ongoing dysfunctional conduct by the employer.

² The remuneration owed is calculated at the rate of \$3,935.10 per month based upon the last 12 months annual salary of \$47,221.20.

³ *Smaill v. Sims Brothers (1992) Ltd* [2011] NZERA Christchurch 126

[30] Mr Zhu was abruptly dismissed following his refusal to take unpaid leave for six months. There was no evidence of depression, stress or anxiety evidenced by Mr Zhu.

[31] An award of \$3,000 compensation is appropriate.

Counterclaim

[32] The counterclaim relied upon Mr Zhu having an expired or invalid work VISA for the months of May/June 2012. A work VISA was produced with Mr Zhu's witness statement covering the May/June 2012 period.

[33] Mr Zhu gave evidence he had authorisation from Mr Ziming Li to take one months holiday for Chinese New Year while in China. This was not contested in cross examination by Renaissance.

[34] The counterclaim therefore fails.

Costs

[35] Mr Zhu seeks costs in excess of the notional daily tariff of \$3,500. He submits in support of his costs application:

- There has been subsequent misconduct by the employer in refusing to attend mediation and/or stopping mediation;
- non compliance with timetabling orders;
- filing a reply but no briefs of evidence;
- nominating defences to hearing which were not pursued;
- seeking an adjournment then withdrawing it.

[36] There is no evidence of Mr Zhu's actual costs and no evidence costs were increased as a result of any of the factors identified above.

[37] Costs are discretionary and generally follow the event. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's

⁴ *Andrew Yong T/A Yong & Chartered Accountants v. Chin* [2007] ERNZ 322

⁵ *Kevey v Inspire Enterprises Ltd* unreported AA 412/09 18 November 2009

conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing the award. The awards will be modest and frequently costs are judged against a notional daily rate.⁶

[38] Mr Zhu was successful and the nature of the case warrants an award of costs. The hearing time equated to half a day. There is no evidence that an award should be in excess of half of the notional daily tariff applied by the Authority of \$3,500.

[39] A costs award of \$1,750.00 is made in favour of Mr Zhu.

T G Tetitaha
Member of the Employment Relations Authority

⁶ *PBO Ltd (formerly Rush Security) v Da Cruz* [2005] ERNZ 808, 819 at [44]