

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 144
3022571

BETWEEN	LARISA TAOUKTSI Applicant
A N D	Z & L GROUP LIMITED First Respondent
AND	TONG ZHANG Second Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Mark Saunders, Counsel for the applicant No appearance for the respondents
Investigation Meeting:	4 and 30 April 2018 in Auckland
Date of Determination:	4 May 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Statement of problem

[1] The applicant, Ms Larisa Taouktsi filed a statement of problem in the Authority on 10 November 2017, claiming that she had been unjustifiably constructively dismissed by the respondent, Z & L Group Limited (the company) and that she was owed unpaid wages, holiday pay and associated employment benefits. Ms Taouktsi is seeking remedies for what she says was an unjustifiable dismissal under the Employment Relations Act 2000 (the Act).

Statement in reply

[2] A very brief statement in reply was filed in the Authority on behalf of the company on 28 November 2017.

Telephone conference

[3] Following receipt of the statement in reply, Mr Tong Zhang, the sole director and shareholder of the company, was contacted by the Authority to participate in a case management conference. An email was sent on 22 January 2018 to the parties which set out the issues that would be discussed at the conference. Issues included clarifying the issues for investigation, checking remedies sought, relevant witnesses, the dates for the filing of evidence, the date for the investigation meeting and the Authority's procedure.

[4] Mr Zhang was in China. At Mr Zhang's request, Mr Stephen Berry, an Authority officer, contacted Mr Zhang by telephone at the agreed time of 4pm (NZ time) on 20 February 2018. An interpreter of Mandarin was available to assist with the call. There was no reply by Mr Zhang to the Authority's telephone call. The conference call continued in Mr Zhang's absence.

Timetabling directions

[5] On 20 February 2018, following the case management conference, Mr Berry sent an email to the parties informing them that an Investigation Meeting would take place in Auckland on Wednesday, 4 April 2018. A notice of investigation meeting was attached to the email.

[6] Ms Taouktsi and her husband, Mr Gary Smith, both filed witness statements as agreed, together with relevant documents. All documents were sent to Mr Zhang. A witness summons was served on another witness, Mr Anthony Hart, to attend the investigation meeting to give evidence. An interpreter of the Mandarin language was organised for the investigation meeting. All correspondence was copied to Mr Zhang. There was no response by Mr Zhang to any of the communications.

Applications filed by Ms Taouktsi

[7] On 29 March 2018, Counsel for Ms Taouktsi filed a synopsis of submissions together with two applications. The first application was to join Mr Zhang as a second respondent, the second application to include penalties against the company and Mr Zhang personally. These documents were served by email on the company. At the investigation meeting on 4 April 2018, Counsel for Ms Taouktsi explained that the

applications had been filed after information had been received that the company appeared to have ceased trading.

Mr Zhang's medical condition

[8] Upon receipt of Ms Taouktsi's applications, Mr Zhang emailed the Authority on 29 March 2018 stating that he had a serious illness and would not be able to attend the Authority's investigation meeting. A photo of a medical certificate was attached.

[9] At the investigation meeting on 4 April 2018, the medical certificate was translated by an interpreter of Mandarin. The medical certificate stated that Mr Zhang had been diagnosed with "acute myocarditis" and should avoid intense exercise and be off work for 6 months.

[10] It is noted that the medical certificate was dated 20 January 2018, which was before the telephone conference on 20 February 2018. The Authority was not made aware of the certificate until late on 29 March 2018, immediately before the Easter break and immediately after Mr Zhang was served with applications by Ms Taouktsi that he be joined as a second respondent and for penalties.

[11] Mr Zhang did not make the Authority aware of his medical condition between 20 January 2018 and 29 March 2018, despite receiving communications regularly.

Adjournment of investigation meeting and directions by Authority

[12] As a result of the late notification of Mr Zhang's medical condition, the Authority was unable to conduct the investigation meeting on 4 April 2018. The investigation meeting was adjourned until 10 am on 30 April 2018 to enable Mr Zhang to respond to Ms Taouktsi's applications and to provide more detailed medical information as to his state of health.

Directions

[13] Directions were issued by the Authority as follows:

- Mr Zhang was directed to file a response on his own and the company's behalf to Ms Taouktsi's applications that Mr Zhang be joined as a second respondent and that penalties be imposed on both

the company and Mr Zhang. The response was directed to be filed by the company and Mr Zhang by 4:00pm on 18 April 2018;

- Mr Zhang was directed to file any evidence on behalf of himself and the company in respect of Ms Taouktsi's claims by 4:00pm on 18 April 2018.
- Mr Zhang was directed to provide a full medical report by a medical doctor as to his medical condition. The report was to be provided to the Authority by 4:00pm on 26 April 2018.

No provision of medical information as directed by the Authority

[14] Upon receipt of the Authority's direction, Mr Zhang sent an email to the Authority on 10 April 2018, that he could not "go back to Auckland on 30/04/2018, because I need be hospitalized until 20/07/2018. Please look at my medical report."

[15] The Authority issued a further direction to Mr Zhang on 10 April 2018 as follows:

"The Authority requires a medical report filed by your medical specialist, signed, and affirmed in front of an attorney who is legally able to take such an affirmation. The medical report is to detail your medical diagnosis - what the diagnosis is, what the prognosis is, what the symptoms of the medical condition are and how they manifest themselves. The report is to detail and give a recommendation as to when you will be able to travel to New Zealand. Also, the report is to detail whether you can give evidence to the Authority via audio link or skype.

[16] The direction was urgent and required a response by Mr Zhang by 4pm on Tuesday, 24 April 2018.

[17] Mr Zhang's response received by the Authority on 24 April 2018, was that he needed more time because of his health problems and that he could not leave his house to see his lawyer.

[18] The Authority provided Mr Zhang with a further opportunity to provide it with the medical information sought by it. Mr Zhang failed to do so.

[19] The Authority was not satisfied with Mr Zhang's response. The response contradicted Mr Zhang's earlier advice that he was hospitalised until 20 July 2018. From Mr Zhang's email apparently, he was at home. Presumably, given his health

issues, Mr Zhang was in contact with his medical specialist. Mr Zhang should therefore have been able to provide the medical information required by the Authority to support his claim he was unable to participate in the Authority's investigation of Ms Taoutski's claims against him and the company.

[20] The Authority informed Mr Zhang by email on 26 April 2018 that the investigation meeting set down for 30 April 2018 would proceed on that date.

Non-appearance of respondent

[21] The Authority is satisfied that Mr Zhang has been properly served with the proceedings, the Notices of Investigation Meeting, and that he has regularly communicated with the Authority. Mr Zhang has failed to comply with the Authority's directions to provide it with information to support his claim that, because of health issues he is not able to participate in the investigation meeting either in person, by Skype or video link.

[22] Mr Zhang has been given ample opportunity to provide the required information.

[23] In the circumstances and weighing up issues of fairness between the parties, the decision was made by the Authority to proceed with its investigation in the absence of Mr Zhang or any other representative of the company as they failed to appear or to agree to appear via Skype or video link.

Investigation Meeting

[24] Ms Taouktsi swore on oath and Mr Smith affirmed at the investigation meeting on 30 April 2018 that their evidence was true and correct. Mr Anthony Hart attended the investigation meeting pursuant to a summons and affirmed his evidence was true and correct.

[25] As allowed under s 174 of the Act, this determination does not set out all of the evidence. Relevant facts and legal issues are set out along with the Authority's conclusions.

Employment Relationship Problem

Lorenz & Z Furniture

[26] The company operated a retail business under the name “Lorenz & Z Furniture”, selling furniture and rugs from premises in Newmarket. The business has apparently recently closed.

[27] Mr Zhang is the sole director and shareholder of the company.

Ms Taouktsi’s employment

[28] Following an interview with Mr Zhang, Ms Taouktsi was employed by the company on 11 February 2015, as a furniture and home staging designer. Ms Taouktsi was initially employed part time working 4 days a week. Ms Taouktsi reported to Mr Zhang, he gave her instructions and was responsible for her employment and for the payment of her wages. No written employment agreement was provided to her.

[29] After approximately 1 year Ms Taouktsi was employed fulltime, working 5 days a week. Ms Taouktsi was still not provided with an employment agreement. After numerous requests by Ms Taouktsi, she was provided with an individual employment agreement which she and Mr Zhang signed on 22 December 2016.

[30] During the course of her employment, Ms Taouktsi says she was not paid wages in a timely manner, was not paid wages due to her, was not paid holiday pay, was not told about or enrolled in the KiwiSaver scheme and was not reimbursed for work related travel expenses. Ms Taouktsi says she raised these issues regularly with Mr Zhang during her employment. However, Mr Zhang ignored her requests.

[31] Ms Taouktsi says on 2 November 2017, after she had written to Mr Zhang requesting that he pay her what she was due, Mr Zhang abused and threatened her. Ms Taouktsi says she was shocked by his treatment, very upset and felt unsafe. Ms Taouktsi reported the matter to the Police.

[32] Ms Taouktsi says the incident left her feeling that she had no alternative but to resign which she did. Ms Taouktsi says that her resignation amounted to an unjustified constructive dismissal as a result of the ongoing failures by the company to

comply with its legal obligations to her and as a result of Mr Zhang's threatening and abusive behaviour towards her on 2 November 2017.

[33] Ms Taouktsi seeks reimbursement of wages owing to her, unpaid holiday pay, contributions which should have been paid into the KiwiSaver scheme on her behalf, reimbursement of work related expenses, compensation as a result of the unjustified actions of the company in failing to enrol her in KiwiSaver and compensation for the hurt and humiliations she says she suffered as a result of her unjustified constructive dismissal.

The respondent's response

[34] The statement in reply filed by Mr Zhang is that he had informed Ms Taouktsi that business was very bad and that he would pay her as soon as possible. There is an acknowledgement by Mr Zhang that the discussion around wages owing to Ms Taouktsi became heated.

Applications filed by Ms Taouktsi in the Authority

[35] Ms Taouktsi's applications to join Mr Zhang as a second respondent and for penalties were both filed in the Authority and served on the company and Mr Zhang by email correspondence on 28 March 2018. Mr Zhang failed to respond to the applications.

[36] I accept the submissions made by Counsel for Ms Taouktsi that it is appropriate for Mr Zhang to be joined as a second respondent to the matter under s 142X of the Act. It is alleged that the company breached its employment obligations to Ms Taouktsi. Under s142W of the Act, if there is a breach by a company, "a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity".

[37] Mr Zhang is the sole director and shareholder of the company and was solely responsible for the employment of Ms Taouktsi. Mr Zhang has been aware of the applications and has been given an opportunity to respond to them but he has failed to do so.

[38] I am satisfied that Mr Zhang should be joined as a second respondent to these proceedings and accordingly he is joined.

The issues

[39]

- (a) Was Ms Taouktsi's resignation of 2 November 2017 a constructive dismissal?
- (b) If Ms Taouktsi's resignation did amount to a constructive dismissal was the constructive dismissal unjustified? If so, what remedies are available to her?
- (c) If the dismissal was unjustified did Ms Taouktsi contribute to the dismissal and, if so, should remedies be reduced accordingly?
- (d) Was Ms Taouktsi unjustifiably disadvantaged by not being informed about and enrolled in the KiwiSaver scheme? If so, is she entitled to compensation?
- (e) Is Ms Taouktsi owed unpaid wages and holiday pay and, if so, what amounts is she owed?
- (f) Was there a failure by the company and Mr Zhang to provide Ms Taouktsi with a written employment agreement?
- (g) Did the company fail to maintain wages and time records, holiday and leave records?
- (h) If the company failed to provide Ms Taouktsi with an employment agreement and if it failed to keep or produce wages and time records, holiday and leave records, are penalties payable?

Unpaid wages

[40] Ms Taouktsi says throughout her employment, she was not paid wages on time, was not given payslips and was often paid incorrectly. Ms Taouktsi raised these issues on a regular basis with Mr Zhang.

[41] Ms Taouktsi has provided the Authority with her bank records and IRD records. Ms Taouktsi says that the income declared to the Inland Revenue Department

(IRD) by Mr Zhang as her income was incorrect and does not match income paid to her. This was another issue raised by her with Mr Zhang.

11 February 2015 – 02 November 2017

[42] Ms Taouktsi worked part-time, 4 days a week, earning an hourly rate of \$15 until 15 September 2015. From 16 September 2015, Ms Taouktsi went to a five-day week and her income increased. As Ms Taouktsi never received any payslips, she reconciled wage payments made into her bank account with hours worked by her. Ms Taouktsi says that for the entire period of her employment, she should have earned \$99,048.78 net but was actually paid \$91,405.14 net. The total owing to Ms Taouktsi in unpaid wages is \$7,643.64 net.

Unpaid holiday pay

[43] Ms Taouktsi never took annual leave, only public holidays during her employment. Ms Taouktsi's gross income for her period of employment amounted to \$118,460 gross. Ms Taouktsi was not paid holiday pay when her employment was terminated and is owed the sum of \$9,476 gross in holiday pay.

[44] During the course of her employment, Ms Taouktsi says that she requested on numerous occasions that her wages be paid regularly.

[45] Ms Taouktsi says that she regularly texted Mr Zhang about her financial difficulties as a result of not being paid on time. She says she also emailed Mr Zhang regularly about not being provided with payslips, not being provided with an employment agreement and issues with the fact that her wages were not matching what was being declared by the company to the IRD.

Events leading to resignation

[46] Ms Taouktsi provided the Authority with correspondence sent to Mr Zhang during the course of her employment which shows she was regularly raising the late payment and the underpayment of wages with Mr Zhang. Ms Taouktsi clearly set out in her emails the issues that she was having and requesting that they be rectified. They were not rectified.

[47] On 1 November 2017, Ms Taouktsi sent an email to Mr Zhang informing him that if she was not paid what she was owed she would be seeking the services of a lawyer, the Citizens Advice Bureau or the Department of Labour.

[48] On 2 November 2017, Ms Taouktsi says that while working at the company's shop in Newmarket, Mr Zhang came into the shop and began shouting at her about the wages and about "the grief she was giving him about payment of her wages". Ms Taouktsi says Mr Zhang stood over her and threatened her, swore at and abused her. She felt unsafe.

[49] Ms Taouktsi says Mr Zhang shouted: "how fucking dare you ask me for money! You threaten me with a fucking lawyer! - just you go to a fucking lawyer and see what I fucking do to you. You have no idea what I am fucking capable of doing to you".

[50] At this point, Ms Taouski says Mr Zhang was extremely threatening and aggressive. Ms Taouktsi left the shop in a stressed and upset state. The altercation was observed by the manager, Mr Anthony Hart, who told the Authority, while there had been heated arguments before he had never heard Mr Zhang abuse Ms Taouktsi in that manner before. Mr Hart says he immediately went to Ms Taouktsi whose chest and face had erupted in a red rash, to see how she was. Ms Taouktsi was not in a good state. Ms Taouktsi went to the Henderson Police Station for help. While there her husband Mr Smith arrived. Mr Smith says Ms Taouktsi was very upset and crying.

[51] The Authority was shown the report lodged by Ms Taouktsi at the Henderson Police Station. Ms Taouktsi did not return to work and says she was forced to resign by Mr Zhang.

Did Ms Taouktsi's resignation amount to a constructive dismissal?

[52] It is my view that Mr Zhang's actions on 2 November 2017 amounted to a serious breach of his duty to Ms Taouktsi, which resulted in her resignation¹.

[53] In the Court of Appeal decision *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers RUOW Inc*², the Court held that for a

¹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* 1985 [2 NZLR 372]
² [1994] 1 ERNZ 168

resignation to be a constructive dismissal it requires not only a breach of duty justifying resignation, it also requires that the breach be of:

sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[54] It is my view that it was reasonably foreseeable that Ms Taouktsi would resign in the circumstances. I find that Ms Taouktsi's resignation amounted to a constructive dismissal.

Was the constructive dismissal unjustified?

[55] Mr Zhang swore at and was abusive of Ms Taouktsi, such that she felt unsafe and had to go to the Henderson Police Station for her own protection and to lodge a complaint. Mr Hart heard the shouting and swearing and saw Ms Taouktsi's state after she had been abused. Ms Taouktsi's husband also saw how upset Ms Taouktsi was after the abuse.

[56] In the circumstances, the dismissal was unjustified. Mr Zhang had repeatedly failed to address Ms Taouktsi's concerns about her wages being paid and her wages being paid on time. When she put her request in writing that the issues be resolved, Mr Zhang became extremely angry and abused her. As an employee, Ms Taouktsi was entitled to have her wages paid on time and to be paid the correct amount. It was unjustifiable and unfair for Mr Zhang to become angry when Ms Taouktsi was simply seeking to be paid and to be paid on time.

[57] Mr Zhang's actions were not those of a fair and reasonable employer. I find the constructive dismissal to be unjustified.

Remedies

[58] Ms Taouktsi described how shocked and upset she was at the manner in which she was treated by Mr Zhang. Ms Taouktsi says she was very scared and thought Mr Zhang was going to "come after her" as threatened. She was upset and very nervous. The manner of dismissal has impacted on Ms Taouktsi and continues to impact on her.

[59] I consider an appropriate amount of compensation under s123 of the Act to be \$20,000 to be paid within 28 days of the date of this determination.

[60] Ms Taouksti did obtain another job shortly after her dismissal. However, this new job is not paying the same remuneration as Ms Taouksti was being paid by the company. Ms Taouksti was out of work for 11 days until she began work for Hunter Furniture on 20 November 2017. Ms Taouksti had been earning \$175 net per day at the time of her dismissal. For the 11 days in which she was out of work, Ms Taouksti lost a total of \$1,925 net in income.

[61] Ms Taouksti earns \$8.40 net less an hour than she was receiving when employed by the company. Ms Taouksti is seeking reimbursement of lost remuneration under s128 of the Act. Under s128(2) of the Act and subject to any contribution under s124 of the Act, the Authority must order “the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration. The Authority has a discretion under s128(3) to order an employer to pay a greater sum.

[62] Three months lost remuneration includes the 11 days in which Ms Taouksti received no income. The loss totals \$1,925 net. For the balance of the 3 month period, totalling 11 weeks Ms Taouksti lost \$294 net a week, being the difference in what she had been earning at the company and the amount she actually earned at Hunter Furniture. This amounts to \$3,234.

[63] Ms Taouksti is owed lost remuneration totalling \$5,159 net for the 3 month period.

Did Ms Taouksti contribute to the dismissal, and if so, should the remedies be reduced by the Authority pursuant to s.124 of the Act?

[64] I do not consider there was any contribution by Ms Taouksti to her dismissal and therefore the remedies awarded will not be reduced.

KiwiSaver

[65] Ms Taouktsi says that when she began work, she was not aware of the existence of the KiwiSaver scheme and that at no stage did Mr Zhang mention it to her. She subsequently found out about the KiwiSaver scheme and that Mr Zhang was required to offer it to her when she began working for the company. Ms Taouktsi says she did not “opt out” of the scheme because it was never offered to her. Ms Taouktsi says she never received a KiwiSaver pack. Ms Taouktsi says that she has been significantly disadvantaged by the company’s failure to enrol her in KiwiSaver. Specifically, she has not received any of the following entitlements totalling \$5,717.86 calculated as follows:

- (i) The company’s contribution of 3% of her gross earnings for each financial year she worked for it, these sums are \$468.72 for 2015, \$434.70 for 2016 and \$2,772 for the year 2017 (totalling \$3,675 gross); and
- (ii) The Government’s “kick start” annual contribution to the KiwiSaver scheme which operated until 21 May 2015 amounting to \$1,000;
- (iii) The Government’s annual contribution to the scheme amounting to \$521.43 per annum for 2016 and 2017 amounting to \$1042.86;

[66] Ms Taouktsi claims \$5,717.86 gross in respect of the losses she says have arisen as a result of not being enrolled in the KiwiSaver scheme together with interest.

Reimbursement of work related expenses

[67] Ms Taouktsi seeks payment of mileage costs incurred by her when using her own car. There was no provision in the employment agreement for Ms Taouktsi to claim such expenses. There was no evidence of agreement to pay such expenses. In such circumstances I do not consider it appropriate to make any order for payment.

Penalties

[68] Ms Taouktsi seeks penalties against the company and Mr Zhang in respect of his failures to comply with employment legislation and in respect of breaches of her

employment agreement. Penalties were not sought in the Statement of Problem and it was only in a subsequent application by Ms Taouktsi that penalties were sought.

[69] From the evidence, it is clear that the company and Mr Zhang failed to comply with its basic obligations as an employer. Ms Taouktsi was not provided with an employment agreement, her wages were not paid on time, time and wages records were not kept. These failures ultimately led to Ms Taouktsi's dismissal.

[70] The leading case on penalties in the employment jurisdiction, is *Borsboom (Labour Inspector) v Preet PVT Limited & Anor*³.

[71] In that case, a full bench of the Employment Court considered the approach which is to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements.

[72] The Court in *Borsboom* set out the objectives of penalties and employment law generally at paras [61-63] of its decision. To summarise, they are to:

- (a) Punish those who breach statutory obligations;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition in business.

[73] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide "*a uniform, reasonably predictable result*". The four step process is to ensure that "*fixing the amount of a penalty, or penalties, is consistent and transparent*".

[74] Taking in to account the considerations contained in *Borsboom*, I consider penalties of \$1000 each against the company and Mr Zhang to be appropriate to be paid within 28 days of the date of this determination.

³ [2016] NZEmpC 143

Orders

[75] Within 28 days of the date of this determination, the company is to make the following payments to Ms Taouktsi:

- (i) Compensation in the sum of \$20,000 in respect of her unjustified constructive dismissal,
- (ii) Lost remuneration totalling \$5,159 net,
- (iii) Unpaid wages of \$7,643.64 net,
- (iv) Unpaid holiday pay of \$9,476 gross,
- (v) KiwiSaver entitlements of \$5,717.86 gross.

[76] Interest on the outstanding amounts of wages, holiday pay and KiwiSaver entitlements owing at the rate of 5% per annum from 2 November 2017 until the date of payment.

[77] The company must pay to the Authority, for transfer to the Crown account, a penalty of \$1,000 within 28 days of the date of this determination.

[78] Mr Zhang must pay to the Authority, for transfer to the Crown account, a penalty of \$1,000 within 28 days of the date of this determination.

Costs

[79] Costs are reserved. Ms Taouktsi has 14 days from the date of this determination in which to file a memorandum as to costs. The company and Mr Zhang have 14 days from receiving the memorandum, in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority