

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 373
5326073

BETWEEN

HULIN CHEN
Applicant

AND

AARON & COMA LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Richard Zhao for Applicant
No appearance for Respondent

Investigation Meeting: 23 August 2011

Determination: 24 August 2011

DETERMINATION OF THE AUTHORITY

- A. Hulin Chen was unjustifiably dismissed by Aaron & Coma Limited. He has a personal grievance.**
- B. Aaron & Coma Limited must settle the grievance by paying to Mr Chen:**
- (i) \$9375 as lost wages under s123(1)(b) and s128 of the Employment Relations Act 2000 (the Act); and**
 - (ii) \$8000 as compensation under s123(1)(c)(i) of the Act; and**
 - (iii) \$2500 as a contribution to his costs.**

The investigation

[1] The Authority has investigated the personal grievance application of Hulin Chen, a noodle shop chef. Mr Chen's former employer, Aaron & Coma Limited (ACL) did not respond to the application or attend the investigation meeting.

[2] I am satisfied the statement of problem and notice of investigation meeting were served at ACL's registered office address. Directions were made to Mr Chen's representative to arrange service. Affidavits of service confirm the statement of problem was left at ACL's registered office on 2 March 2011 (affidavit of Dharmen Prasad, law clerk) and the notice of investigation meeting was handed to a woman who identified herself as Stella Wang at the office address on 22 June 2011 (affidavit of Alden Ho, law clerk). Mr Chen's representatives had also made inquiries of a law firm that had represented ACL but were advised that firm no longer acted for the company and would no longer accept service of documents in this matter.

[3] A support officer of the Authority made separate efforts to contact ACL director Shui Bo. These included telephone calls to a mobile telephone number known to have been used by Mr Shui, a landline telephone number identified for the company, and a landline number for the noodle shop at which Mr Chen previously worked. No-one answered those calls. The officer also contacted the present lessee of the noodle shop who was unable to assist with contact details for Mr Shui.

[4] On the notified day of the investigation meeting no-one attended on behalf of ACL. No good cause was shown for ACL failing to attend or be represented at the investigation meeting and, after waiting 20 minutes after the notified starting time, I proceeded to hear Mr Chen's evidence, his representative's submissions and to determine the application.¹

Employment relationship problem

[5] On the basis of Mr Chen's affirmed evidence, I find Mr Chen was employed under the terms of a written employment agreement dated 30 October 2009. The agreement was said to be for an initial term of three years, renewable subject to Mr Chen having the necessary immigration permit.

[6] ACL assisted Mr Chen in gaining the necessary work visa to enter New Zealand from China. He began work at ACL's noodle shop in Balmoral Road on 20

¹ See clause 12 of Schedule 2 of the Employment Relations Act 2000.

December 2009.

[7] From discussion with other employees in January 2010 Mr Chen found out he was being paid less than the minimum wage for the hours he worked and was not getting days off that other staff got. He was working 10 or 11 hours a day, seven days a week. He talked about his hours and wages with Mr Shui but no change was agreed. Mr Chen also asked about tax arrangements but was told by Mr Shui that ACL had already made the necessary arrangements.

[8] On 7 March 2010 Mr Chen and Mr Shui had an argument. Mr Chen was angry when Mr Shui asked for his passport in order to get an IRD number for him. Mr Chen complained about his hours, working conditions and being misled about tax arrangements. Mr Shui told Mr Chen he could leave but then stopped him leaving the shop. During the argument Mr Shui called the Police. Officers attended the restaurant. One of the officers was Chinese and spoke with both men in Mandarin. Mr Chen said that at the end of the conversation the police officer told him he was free to leave the shop so he went home.

[9] The following day Mr Shui rang Mr Chen. Mr Chen asked for a few days to calm down and decide whether to continue working for ACL. Mr Shui refused this request and told Mr Chen: "Don't let me find you, if I find you I will cancel your visa and send you back to China".

[10] On 9 March Mr Shui's lawyer sent Mr Chen a text message saying he was dismissed. Mr Chen then sent Mr Shui a text saying that as he had been dismissed he would seek help from the Department of Labour and the Immigration Service. Mr Shui did not reply.

[11] In May Mr Chen contacted Mr Shui by telephone to see whether they could resolve the matter. He said Mr Shui refused to discuss his concerns or attend mediation.

[12] Some months later Mr Chen lodged his application in the Authority. In the meantime a Labour Inspector had investigated a complaint by Mr Chen and the

Inspector had identified the sum of \$2352 as due in unpaid holiday pay. ACL paid that amount to the Department of Labour which was then transferred to Mr Chen.

The employer's position

[13] Although ACL did not respond to this matter in the Authority, its position on Mr Chen's claim could be discerned from two sources – firstly, notes sent by ACL's accountant in June 2010 in response to the Labour Inspector's inquiries and, secondly, an email on 8 November 2010 from ACL former solicitor. The email is marked without prejudice but, I find, no actual privilege attached to its contents because it contained nothing to facilitate negotiation or settlement of the dispute.

[14] Those notes and that email disclose that ACL refused to attend mediation or otherwise seek to resolve Mr Chen's claim because it said:

- (i) he quit his job of his own volition and without notice to ACL on 7 March 2010; and
- (ii) he left the job as part of a plan to work for the owner of another restaurant; and
- (iii) he had not raised a personal grievance within 90 days; and
- (iv) payment of outstanding wages to the Labour Inspector had settled the matter.

[15] I find none of those contentions proven. I prefer Mr Chen's evidence on how his job came to an end, as explained further below. He did seek work at another restaurant but this followed ACL ending his employment. He did raise a grievance in time by notifying his employer that he would pursue his rights in a text on 9 March and through a telephone conversation with Mr Shui in May. The payment of overdue holiday pay to the Labour Inspector was in fulfilment of statutory rights, not a full and final settlement of all employment related matters between the parties.

The dismissal

[16] I find ACL dismissed Mr Chen, at the latest, by 9 March 2010 through a text message sent to him by its lawyer. The text confirmed Mr Chen was "officially

dismissed”. That action was not what a fair and reasonable employer would do. Mr Chen had reasonably asked for some time to cool off before a decision was made on his employment future with ACL. ACL denied that request rather than arranging a meeting to discuss and resolve the issue.

[17] However if that conclusion were wrong and Mr Chen did leave the job on 7 March, and arguably demonstrated an intention to abandon it because he did not attend work on 8 and 9 March, I find his actions followed and were caused by ACL’s breach of his terms of employment.

[18] Mr Chen’s employment agreement said the hours of work would be 40 hours a week but he might have to “work extra hours as required to meet the reasonable requirements of the position or the employer”. In fact he was required to work 70 hours a week over seven days each week. When he sought, on at least three occasions, to talk about the long working hours and why he was not paid at least the minimum wage for all of them, his employer refused to discuss the matter. On 7 March his concerns were met with a direction to leave if he did not like the job and a threat to his immigration status. It was clear ACL did not intend honouring the terms of his agreement and in those circumstances, Mr Chen’s departure was not a freely given resignation but, rather, should be construed as resulting from the actions of his employer, that is as a constructive dismissal.

[19] On either analysis – a direct dismissal or a constructive dismissal, the actions of ACL were unjustified. I find Mr Chen has a personal grievance which requires remedies.

Remedies

Lost wages

[20] Mr Chen had a work permit permitting him to work only for ACL as a noodle chef. After his dismissal he twice applied for his work visa to be altered to allow him to work for a different employer who was prepared to offer him work. His applications were denied. As he could not otherwise legally work without an

amended visa, I accept he made reasonable endeavours to mitigate his loss.

[21] He has not had employment since March 2010 and has survived by borrowing money and 'house sitting' for a friend so he had minimal accommodation costs.

[22] However I consider lost wages should not be awarded for the full period as, in assessing loss, I must consider the contingencies of life. While Mr Chen may have otherwise continued through at least a three year stint with ACL, he may also have sought work elsewhere or found New Zealand life unsatisfactory and returned to China. While his loss may have been more than three months, I must in these circumstances award the lesser amount of three months' ordinary time remuneration.² I calculate that amount on the basis of one quarter of the annual salary set in his employment agreement – that is \$9375. That is the amount ACL must pay Mr Chen under s123(1)(b) and s128 of the Act.

Compensation for distress and injury to feelings

[23] Mr Chen's job in New Zealand was the first time he travelled outside China. He expected to have at least three years work. He was entitled to be treated fairly in accordance with New Zealand's laws. He was not. He was short paid, worked longer hours than agreed, not given breaks, misled about tax arrangements, and, when he challenged these shortcomings, his employment was arbitrarily terminated. He was threatened with removal of his visa. His employer called the Police, who on inquiry found there was nothing to which they need attend. Mr Chen was left without money and without a job. He was forced to rely on the kindness of friends and borrow more money to survive. He had, by the time of the Authority's investigation meeting, bought a plane ticket for return to China where he hoped to find work as a chef.

[24] Mr Chen felt crushed by how he was treated by ACL. He spoke of the worry and emotional distress of what happened to him.

² Section 128(2) of the Act.

[25] I accept he suffered humiliation, loss of dignity and injury to feelings for which ACL must compensate him under s123(1)(c)(i) of the Act. Having regard to the range of awards in cases of this type and the particular circumstances of this case, the award under this heading is set at \$8000.

Contribution

[26] No reduction of these remedies is required under s124 of the Act as the evidence disclosed no culpable or blameworthy conduct by Mr Chen contributing towards the situation giving rise to his grievance.

Costs

[27] Mr Chen sought, through his representative, an award of costs on an indemnity basis. I do not consider the circumstances support such an award but do accept that there should be an upward adjustment of the amount that would otherwise be awarded on a tariff basis.

[28] The email of 8 November 2010 from ACL's lawyers at that time indicated the company would not participate in mediation. This, and ACL's non-participation in the Authority investigation, was inconsistent with the tenor of the dispute resolution process set out in its employment agreement with Mr Chen.

[29] The matter took less than half a day to hear which, taking a notional daily rate of \$3000, makes the starting point for costs \$1500. That amount is adjusted upward by \$1000 to offset increased costs resulting from ACL's failure to participate in the agreed resolution processes and the need to lodge affidavits of service for the statement of problem and notice of investigation meeting.

Robin Arthur
Member of the Employment Relations Authority