

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 23/08
5092595

BETWEEN HUANYU CHEN
 Applicant

AND ZLC LIMITED t/a EULUX
 FLOORING
 Respondent

Member of Authority: James Crichton

Representatives: Stephen Kannangara, Counsel for Applicant
 James Gu, for Respondent

Investigation Meeting: 13 November 2007 at Christchurch

Determination: 11 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Chen) alleges that he was unjustifiably dismissed on 25 May 2007, a claim resisted by the respondent (Eulux) which says that Mr Chen on that date reached the end of an agreed probationary period of employment and his employment was not renewed in accordance with the agreement between the parties.

[2] There is also dispute between Mr Chen and Eulux as to the wages paid by Eulux to Mr Chen; Mr Chen claims that he is owed wages because he was paid less than the minimum wage and that he is owed holiday pay as well. Eulux denies the alleged short payment.

[3] Mr Chen says that he was employed by Eulux as a full time employee to work as a sales assistant in a flooring showroom belonging to Eulux, that he was to be paid \$15 per hour and that he started his employment on 24 March 2007.

[4] Eulux says that Mr Chen was only paid \$15 an hour for the first week of his employment and thereafter was paid a fixed weekly rate of \$562.50 regardless of how many hours were worked in the week and critically, that Mr Chen was subject to a probationary period of employment of two months duration.

[5] Further, Eulux says that Mr Chen was never just a sales assistant and that it would be more accurate to describe the role as a sales representative *who can perform multi tasks* including visiting architects and builders to get new business, measuring and quotations at customers' homes, onsite customer services and the like.

[6] It is common ground that there was no employment agreement between the parties, although Mr Chen says that he asked for one regularly. Mr Gu, for Eulux, said that Mr Chen was *clearly told we are using standard employment contract which is easily accessible from many websites and any specific clauses such as working hours pay rate and nature of the work*. Mr Gu also said that he was *really not able to spare some hours to prepare a full contract and job descriptions*.

[7] Mr Chen says that he was employed effectively as a labourer *so that he would be able to familiarise himself with flooring matters*.

[8] Mr Chen says that he was not given proper training and was asked to do dangerous work. Mr Gu, for Eulux, said that Mr Chen was lazy, unwilling to learn and that he caused loss to Eulux through his poor work attitude.

[9] On 11 May 2007, there was a meeting between Mr Chen and Mr Gu at which Mr Gu told Mr Chen that the latter was not suitable for the position and on 14 May 2007, Mr Gu sent Mr Chen an email terminating the employment from 25 May 2007.

The employment agreement

[10] There was no written employment agreement between the parties. That is a breach of the Employment Relations Act 2000 and Mr Gu's explanations are unsatisfying. The short point is that had the parties had a written employment agreement, the dispute would in all probability never have arisen.

[11] The absence of an employment agreement means that I must make judgments about the factual position where there are conflicts in the evidence between the parties. By way of a general observation, I found the evidence of Mr Chen credible

and trustworthy while I was less inclined to be drawn to Mr Gu's recollection of events.

[12] I think the evidence supports the conclusion that Mr Chen was offered employment in a sales role but with some manual component at an hourly rate of \$15 per hour.

[13] I am not attracted by the Eulux witnesses' contention that, despite Mr Chen's evidence that he was offered and accepted \$15 an hour as an hourly rate and its own evidence that Mr Chen told it that he needed \$15 per hour in order to meet his financial commitments, that there was then a subsequent agreement that Mr Chen be paid a weekly rate of \$562.50 without limitation on the number of hours required to be worked. Mr Chen struck me as an intelligent young man and given that assessment, it seems to me inconceivable that he would have agreed to what amounted to a weekly salary tied to unlimited hours instead of insisting on the rate that he himself stipulated he needed in order to meet his financial commitments and which Eulux's witnesses themselves acknowledged that Mr Chen maintained that he needed.

[14] On the question of the nature of the work required of Mr Chen, I prefer the evidence of Eulux witnesses. I do not think Mr Chen was employed just to act as a sales assistant, given the nature of the business as described by Mr Gu. Mr Gu's evidence was that the business was very small and that the firm simply could not justify a second person (given Mr Gu was himself in the sales area) whose only job it was to sell the product.

[15] I prefer Eulux's evidence that Mr Chen was to be more like a sales representative who would not be salesroom bound but would be able to do quotations in customers' premises and measuring of customers' needs, make cold calls on potential customers and so on.

[16] However I do not think the evidence supports the conclusion that what I find the parties agreed to was indeed what happened in Mr Chen's day-to-day work with Eulux.

[17] Indeed, the evidence discloses that Mr Chen spent virtually no time at all during his short employment working in selling or marketing in any of its myriad

manifestations and indeed spent the vast bulk of his time as a flooring installation labourer.

[18] I accept Mr Chen's evidence that, having commenced employment on 24 March 2007, he worked briefly in the salesroom. Effectively on and from 1 April 2007, Mr Chen was required to work at a building site with which Eulux was involved. On 1 April 2007, I accept that Mr Chen met Mr Richard Banks who gave evidence at my investigation meeting. Mr Banks was a professional floor installer and he was told by Mr Gu to have Mr Chen work with him and to, in effect, *show Mr Chen the ropes*.

[19] Mr Banks then supervised Mr Chen's work, effectively for the balance of Mr Chen's employment. When Mr Banks gave his evidence before the Authority, I formed the view that he was a reliable and credible witness and where there are differences in the recollection between Mr Banks and Mr Gu, generally I have preferred the evidence of Mr Banks.

[20] Mr Gu claimed that the reason Mr Chen did not have his employment continued after the end of his probationary period of employment was that Mr Chen was either lazy or incompetent or both. I do not think the evidence supports those contentions. I rely particularly on the evidence of Mr Banks who said that Mr Banks was a good, willing worker who was happy to learn skills but that *you wouldn't employ Leo [Mr Chen] to do the job he was actually doing*. What Mr Banks meant by this observation was that Mr Chen would not have been employable as a flooring installation labourer because he did not have the skill set, but Mr Banks was happy with Mr Chen's attitude and clearly got on well with him.

Wages

[21] Mr Chen claims unpaid wages and unpaid holiday pay. He relies on Mr Banks who certified the times as correct. I accept Mr Banks' evidence in this regard.

[22] Mr Gu's contention that Mr Chen agreed to work an unlimited span of hours for a flat weekly wage is inconsistent with Mr Chen's evidence, with Mr Banks' evidence and with Eulux's own evidence to the effect that Mr Chen sought \$15 per hour for an ordinary working week in order to meet his financial obligations.

Mr Gu's allegations

[23] Mr Gu contends that Mr Chen was lazy and incompetent and I reject those allegations absolutely on the basis that there is no evidence to support those views, save for Mr Gu's bald assertions to that effect. None of the other Eulux witnesses support that contention, Mr Chen naturally denies it and Mr Banks, who actually worked with Mr Chen, specifically and unequivocally rejects it.

[24] However, Mr Gu goes further and alleges that Mr Chen deliberately sabotaged work that Eulux was involved with. This is a very serious allegation and one that should not be lightly made by an employer of an employee.

[25] Mr Gu makes it in the context of alleging that if any damages were to be awarded, the damages ought to be awarded to Eulux and not to Mr Chen because it was Mr Chen who was the more culpable in the employment relationship.

[26] The nature of the allegations made by Mr Gu were in effect allegations about sabotage by a tradesperson such that the standard of workmanship was simply unacceptable and the costs of putting the matter right then rested with Eulux. Mr Gu brought evidence before the Authority which showed the nature of the alleged sabotage and there is no doubt that there were difficulties with the quality of the work as disclosed by the evidence before the Authority.

[27] The problem with the allegation made by Mr Gu is that there is simply no nexus with Mr Chen. There is just no evidence at all to suggest that Mr Chen had anything to do with the deficits in workmanship identified by Mr Gu. By this I mean that there is no evidence that Mr Chen was either involved in sabotage or that through incompetence or want of skill he caused the difficulty. Mr Gu simply makes the bald allegation, identifies the problem and tries to sheet it home to Mr Chen.

[28] That approach is not good enough and does Mr Gu no credit. Mr Banks gave clear and unequivocal evidence that Mr Gu was, in his opinion, not responsible by reason of incompetence and that he was not **capable** of deliberately sabotaging the work as Mr Gu alleged. Mr Banks formed the view, on the basis of having worked with Mr Chen, that Mr Chen simply could not have done what he was alleged to have done, if the workmanship was sabotaged. The principal reason for Mr Banks reaching this conclusion was that power tools would have been required and Mr Chen did not know how to use them.

Determination

[29] I am satisfied on the balance of probabilities that Mr Chen has made out his claim that he has been unjustifiably dismissed. There was no process whatever in the effecting of the dismissal. On 16 April 2007, Mr Gu told Mr Chen that Eulux was not satisfied with Mr Chen's performance. On 15 May 2007, Mr Gu sent Mr Chen an email terminating his employment and after an email protest from Mr Chen, Mr Gu sent a second email confirming the termination. That process fails to give Mr Chen the minimum requirements that New Zealand law allows. In particular, Mr Chen had no opportunity to have his views considered and no opportunity to have a support person to assist him in dealing with this very important matter. Fundamentally, there was no evidence before the Authority that the parties had even agreed that a two month trial was in prospect and that it was available to Eulux to terminate the employment if it was dissatisfied.

[30] There was no employment agreement so there was no ability for the parties to refer back to what they had agreed at the commencement of the relationship and plainly there was a huge gulf between the parties as to what was agreed. Mr Chen thought that he was employed in a permanent full time position; Mr Gu claimed that Mr Chen had agreed to a probationary period of employment with an ability to terminate if work was unsatisfactory.

[31] I am also satisfied that Mr Chen has made out his claim for unpaid wages and unpaid holiday pay. For reasons which I have enunciated in the body of this determination, I find Mr Chen's wages claim proved.

[32] Mr Chen has suffered a personal grievance by reason of an unjustified dismissal and he is entitled to remedies. I award Mr Chen the sum of \$5,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[33] I also think it appropriate in the particular circumstances of this case to direct that a penalty apply against Eulux in respect of its failure to provide Mr Chen with a written employment agreement. I am satisfied on the evidence that Mr Chen asked for such an agreement on a number of occasions and I absolutely reject Mr Gu's explanation as to why one was not provided.

[34] I direct that Eulux is to pay a penalty of \$1,000 to Mr Chen in relation to the failure to provide Mr Chen with a written employment agreement.

[35] Having found on the facts that Mr Chen was employed at \$15 per hour for each hour worked and having accepted the veracity of the evidence of Mr Banks as to the times actually worked, I accept the calculation of moneys due to Mr Chen in respect of unpaid wages and unpaid holiday pay.

[36] I have accepted Mr Chen's claim for lost remuneration occasioned by the dismissal by Eulux and included that in the total amount owing by Eulux to Mr Chen: Section 128 Employment Relations Act 2000 applied.

[37] I am required by law to consider whether the successful applicant has contributed in any way to the circumstances leading to his grievance. I have reflected on that issue and reached the conclusion that there is no contributory fault that can be attributed to Mr Chen: Section 124 Employment Relations Act applied.

[38] The orders that I have made follow. Eulux is to pay to Mr Chen the following sums:

- (a) Compensation of \$5,000;
- (b) A penalty of \$1,000;
- (c) Unpaid wages of \$1,279;
- (d) Unpaid holiday pay of \$92.10;
- (e) Lost remuneration of \$8,970.

Costs

[39] Costs are reserved.

James Crichton
Member of the Employment Relations Authority