

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 199/10
5308490

BETWEEN ZHAOQIN FAIR
 Applicant

AND YING WANG AND QUAN
 ENTERPRISES LIMITED
 Respondents

Member of Authority: P R Stapp

Representatives: Steven Fair for Applicant
 No appearance for Ying Wang
 Mr Quan Chun Wang for Quan Enterprises Limited

Investigation Meeting: 9 November 2010 at Masterton

Interpreter: Sanying Huang

Determination: 15 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Zhaoqin Fair's employment relationship problem with the Masterton Noodle Canteen came to an end on 22 April 2010. The identity of Ms Fair's employer as opposed to the trading name will need to be established. The circumstances in regard to the end of the employment are in dispute. Ms Fair claimed that she has not been properly paid her wages and holiday pay. The Masterton Noodle Canteen's owner, through Mr Quan Chun Wang, a director of Quan Enterprises Limited, says that there is a big difference in her hours worked and her claim. Mr Quan Chun Wang says Ms Fair left her employment voluntarily, which she denied.

[2] Ms Fair has claimed wages, holiday pay and remedies for a personal grievance.

Issues

- [3] Who was the employer?
- [4] What was the reason for the employment ending?
- [5] Is there a personal grievance, and if so, what remedies apply?
- [6] Is the applicant owed any unpaid wages and holiday pay?

Non appearance of the respondent

[7] Yin Wang (the cited respondent) did not appear at the Authority's investigation meeting and was not represented. Mr Steven Fair, the applicant's partner, informed me that he cited Yin Wang in the employment relationship problem filed in the Authority because that person's name was written on the building, and he thought that Yin Wang was the employer. He can be excused for that because there was no proper employment agreement and no assistance was provided by Mr Quan Chun Wang (a director of a company called Quan Enterprises Limited trading as the Masterton Noodle Canteen, to which I will refer to shortly) to identify the correct employer prior to the Authority's investigation meeting.

[8] Mr Quan Chun Wang was present and attended the Authority's investigation meeting. He signed off the statement in reply filed in the Authority. He relied on the proceedings only involving Yin Wang as the respondent. No one could tell me who Yin Wang is, and if Mr Quan Chun Wang did know who Yin Wang is, he did not tell me. It does not appear that Ying Wang has anything to do with this claim. I am satisfied that Mr Quan Chun Wang is the director of Quan Enterprises Limited trading as the Masterton Noodle Canteen. He accepted that the company was Ms Fair's employer. Ms Fair accepted that the company was her employer too. As Mr Quan Chun Wang is the sole director of the company and given that he signed off the statement in reply and attended the Authority's investigation meeting to defend the employment relationship problem on behalf of his company, I decided that Quan Enterprises Limited should be cited as the respondent (applying s 221 of the Act).

This is because Quan Enterprises Limited is the employer. Mr Quan Chun Wang could have done more to disclose the true identity of the employer earlier, for instance in the statement in reply, he filed.

[9] Normally the joining of a party would be done by notice, but no good reasons were advanced for me to delay the hearing any further. There has been no prejudice to Quan Enterprises Limited, I hold. Given that Mr Quan Chun Wang is raising what amounts to a technicality and has fully defended this claim when he had full knowledge of the matter, is the sole director of the company, he filed the statement in reply, attended the Authority's investigation meeting and produced a document outlining the business's hours and employee meal breaks, I confirm my decision to join Quan Enterprises Limited under section 221 (a) of the Employment Relations Act 2000 (the Act).

The facts

[10] Ms Fair commenced her employment on 26 September 2009 at the Masterton Noodle Canteen. This is a business owned by Quan Enterprises Limited. Mr Quan Chun Wang acknowledged that Ms Fair was employed by Quan Enterprises Limited, and this was accepted by Ms Fair and her partner. The details from IRD support this too.

[11] Ms Fair claimed that she was told:

- (a) She would be paid weekly in cash;
- (b) "The company" would pay her tax;
- (c) She was asked to provide her IRD number and sign a weekly wages book;
- (d) She started on a "low rate" until she knew her job, when when she would be paid more and employed on a full-time basis.

[12] The applicant says that her pay initially was \$500 per week. She has claimed that she should have been paid for 64 hours per week, 6 days a week. This is denied by the Noodle Canteen who claimed that her hours should have totalled 46 hours per

week, taking into account meal times and the regular hours of work for the business. It was estimated that her meal times amounted to approximately one hour.

[13] Ms Fair had been paid some wages during this time but her calculation has been based on the hours of work that she recorded in her note book based on the minimum wage, and having regard to the account information from the Inland Revenue Department of her earnings and income details. The latter recorded that her total gross income in the period 1 April 2009 to 31 March 2010 was \$11,410.00 (from Quan Enterprises Limited).

[14] The record also indicates that for the period 1 April 2010 for the year to date Quan Enterprises Limited paid her gross income in the sum of \$2,820.00.

[15] The applicant kept diary notes of her hours of work and amounts she was paid. Despite Ms Fair confirming there was a notebook kept by the employer at the work place of the hours of work that employees were meant to sign, and Mr Quan Chun Wang confirmed that there was some type of record, such a record had not been produced for the Authority's investigation meeting. I would reasonably have expected such a record to be produced because Ms Fair asked for wage and time records twice in letters and the Authority made a direction for any such records to be produced, albeit to be produced by Yin Wang. Mr Quan Chun Wang had a reasonable opportunity to produce any relevant records given he was in receipt of the correspondence, has a role in this matter and he could have assisted more given his relationship in the matter with the applicant. He said that there was no employment agreement, no records of interview notes, no job description and the pay was \$500 per week after tax. It was common ground that the pay was a low rate at first until Ms Fair obtained experience. I hold that there was no proof of any agreement to use meals to "cover" holiday pay, and although there is the claim from Mr Quan Chun Wang that the applicant's hours are inflated (including her not taking into account the meal times), I have found no evidence that the actual claim for the hours from Ms Fair is substantially incorrect. However, I do accept that at least an hour per day for unpaid meal breaks was probably provided by the employer, and Ms Fair has not properly accounted for these in her claim. She accepted taking time to eat and drink while she was at work. An adjustment will need to be made.

[16] I accept that there were probably unpaid meal breaks because:

- a. In all probability Ms Fair did have meal breaks while she was at work, because she accepted that she had time to eat and drink soft drinks
- b. Ms Fair's evidence on the actual notice she was given has been inconsistent in the manner in which she has referred to the actual days.
- c. Mr Fair has relied upon Ms Fair's details to calculate the hours claimed and there has been no allowance explained for unpaid meals and time for eating at work.
- d. There is a dispute and conflict over the hours and business's hours and employee breaks.
- e. There is apparently another notebook record of hours and this is accepted by the applicant who acknowledged it existed.

[17] Ms and Mr Fair have done their best to recreate her wages from her diary (for the hours worked) and IRD Records (for gross pay details) on the basis of 6 days work per week. I accept their calculation, except for the unpaid meal breaks. I accept the substantiality of their claim because Quan Enterprises Limited trading as the Masterton Noodle Canteen did not produce proper wage and time records and there is no evidence that such a record has been properly kept as required under s 130 of the Act. Where such wage and time records are not supplied I am able under s 132 to accept the applicant's claim proved in respect of the wages actually paid and the hours, days and time worked (s 132 of the Act).

[18] Ms Fair's record is that she worked Boxing Day 2009, Waitangi Day 6 February 2010, Good Friday 2 April 2010 and Easter Monday 5 April 2010 without receiving a day in lieu. She claims she has not been paid any annual holiday pay.

[19] I accept that Ms Fair was dismissed when Kwan Yin Lam, the cook, gave her 14 days notice to leave. There are mixed reasons given for the decision to dismiss her that appear to relate to (1) Ms Fair's English not being good enough (Mr Quan Chun

Wang's evidence before me and the SOP and SIR), and (2) work was not busy and was not very good (according to Mr Kwan Yin Lam).

Determination

[20] The calculation of wages owing is \$6,415.75. I accept the hours Ms Fair says she worked based on her diary and the IRD records of gross pay and based on the entitlement of the Minimum Wage Act and Regulations. I have included an adjustment for 174 hours to account for unpaid meal breaks of at least an hour per day when Ms Fair worked at the Masterton Noodle Canteen.

[21] Next there is absolutely no record of any holiday pay being paid. Mr Quan Chun Wang tried to suggest that holiday pay be off set from Ms Fair's down time at work and the employer providing free meals that included Ms Fair drinking soft drinks. Parties can not contract out of the Holidays Act 2003. There is no written employment agreement. There are no records. The applicant and her husband had no idea about calculating holiday pay, suffice to say, that I accept the applicant's evidence that she received no annual holiday pay. Therefore, I calculate annual holiday pay under the Holidays Act at 8% of her total gross earnings from the IRD records as there was not a complete year of service in employment. The sum owed is \$1,138.40 holiday pay. Also she is entitled to 4 days in lieu for working on 4 statutory holidays calculated at the rate of \$12.75 per day (8 hours per day: \$102).

[22] I hold Ms Fair's dismissal was not justified. A fair and reasonable employer would have consulted Ms Fair properly. First I am satisfied that there was no consultation with Ms Fair on the reasons for her dismissal before she left. I am also satisfied that she was not offered part time work and or full time work as alternatives at the time, although she was made an offer for alternate arrangements much later after she had left.

[23] Second I am not satisfied that Kwan Yin Lam's evidence is reliable because at the Authority's investigation meeting he said that he only spoke Cantonese and then it was discovered he could understand some Mandarin. Therefore I am not prepared to give his evidence greater weight than Ms Fair's evidence, when she denied Kwan Yin Lam's claim that he offered her part time work at the time. This suggestion

contradicted his evidence that one of the reasons for dismissing Ms Fair was that the work was not busy and was not very good at the time. I have doubt about the reasons provided for Ms Fair's dismissal and the employer has not supported that there were any difficulties in justifying the dismissal because of Ms Fair's English.

[24] I now turn to remedies for the personal grievance. Ms Fair is entitled to lost wages. I have calculated the amount at the rate of \$12.75 for an average of 53 hours per week for 4 weeks in the sum of \$2,703. Her loss takes into account the period until 20 May when she turned down an offer of part time work. Thereafter I have calculated her wages loss at 40 hours per week until 4 August, which involves a further 10 weeks. Therefore I have limited her award to 14 weeks lost wages. Ms Fair did provide examples of her attempts to get alternative work and finally being successful in August 2010. Her ten weeks loss of wages is \$5,100 for the second period. The total amount of the loss due to her dismissal is therefore \$7,803. There was no contribution on her part to the situation giving rise to the personal grievance, I hold.

[25] Ms Fair gave little evidence to establish a claim for hurt and humiliation. I assess her claim for compensation at \$1,000 for hurt and humiliation having regard to how it was carried out and that Ms Fair involved her partner and that she was embarrassed telling him what had happened.

[26] Ms Fair is entitled to the \$70 filing fee, because she needed to bring the proceedings to get her money owing and was successful in her personal grievance claim.

Orders of the Authority

[27] Quan Enterprises Limited is to pay Zhaoqin Fair:

- a. \$6,415.75 wage arrears;
- b. \$1,138.40 holiday pay;
- c. \$102 days in lieu;

- d. \$7,803 lost wages due to her dismissal;
- e. \$1,000 compensation for hurt and humiliation;
- f. \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority