

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Chao Feng
AND Chinese Times Group Limited
REPRESENTATIVES Applicant Chao Feng in Person
Respondent non appearance
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING Friday 16 June 2006
DATE OF DETERMINATION Thursday 22 June 006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Chinese Times Group Limited ("CTG") publishes a weekly magazine, telephone directory and web site for the New Zealand Chinese community. Chao Feng was employed by CTG in August 2005 as a chief editor. In December 2005, at the initiation of the employer, Mr Feng moved into a sales position, from which he was dismissed on 12 January 2006. Mr Feng says his dismissal was unjustified. He seeks to recover arrears of wages, reimbursement of wages lost as a consequence of his dismissal, holiday pay and commission payment he says are due and owing.

[2] CTG did not file a statement in reply or attend the investigation meeting. I am satisfied that CTG has been served with the statement of problem and notice of investigation meeting. No application for adjournment was received from CTG and the investigation meeting commenced 15 minutes after the scheduled time to accommodate the possibility of lateness on the part of the respondent.

[3] I record the parties have attended mediation.

[4] I record also that I was assisted in the investigation of this employment relationship problem by a translator of the mandarin language.

Wage arrears

[5] Mr Feng did not have a written employment agreement. He told me he had repeatedly asked CTG's general manager, Fred Shu, for a written employment agreement, without success.

[6] Mr Shu wrote a letter dated 10 October 2005 setting out Mr Feng's terms of employment:

TO WHOM IT MAY CONCERN

This is to confirm that Mr Chao Feng (IRD *****) works for Chinese Times Group Ltd on a full time basis (40 hours/week) from 22 August, 2005. The monthly wage is \$1800 before tax. If you have any enquiry, please feel no hesitation to contact me.

Best regards

Fred Shu
General Manager
Chinese Times Group Ltd

[7] Mr Feng said he did not agree to his salary being reduced, that he continued to work on a full time basis and he understood he was entitled to 30% commission on all advertising sales he made. CTG's non-attendance at the investigation meeting meant that the Authority was unable to put Mr Feng's evidence to CTG's witnesses to clarify its understanding of what Mr Feng's terms of employment were.

[8] There is no evidence that it was made clear to Mr Feng that the sales position was part-time or that his salary would be reduced as a consequence of accepting the new position. A written employment agreement provided at the outset would have clarified Mr Feng's terms of employment in the sales position. CTG failed to provide Mr Feng with a written employment agreement as required by section 65 of the Employment Relations Act 2000. In such circumstances Mr Feng should not have to bear the consequences of the uncertainty about his terms of employment.

[9] Chinese Times Group Limited is ordered to Mr Feng wage arrears of \$1800 gross pursuant to section 131 of the Employment relations Act 2000.

Commission

[10] Mr Feng seeks payment of 30% commission on 24 weekly advertisements he sold in December. The advertisements cost \$180 each and were to commence from 6 December 2005. Mr Feng calculates the total commission owing to him on the total advertisements is \$1296. Mr Feng told me the commissions were paid on a monthly basis when payment for the advertisements was received.

[11] Mr Feng's evidence was that it was a term of his employment, in the sales position, that he would receive 30% commission on all advertisements sold in addition to his monthly salary of \$1800. I find it difficult to accept that Mr Feng would be moved to a sales position, in the circumstances he described, and receive an increase in terms and conditions. However, his evidence was not challenged and in such circumstances I accept that these were his terms of employment. Based on Mr Feng's evidence he could not expect to receive commission payments until CTG had received payment for advertisements. There was no evidence that the payments for which Mr Feng claims commission had been received CTG. There is insufficient evidence upon which to make an award.

Dismissal

[12] Mr Feng said he was telephoned by Mr Shu on 12 January who dismissed him with immediate effect. He said Mr Shu did not give him any reasons for his dismissal. Mr Feng wrote to Mr Shu and Jiang Zhou, a director of CTGL on 8 February asking for the reasons for his dismissal, setting out why he believed his dismissal was unfair, seeking payment of wage arrears, lost wages, commission and holiday pay and advising he would refer the matter to mediation services if it was not resolved by 26 February.

[13] Mr Shu replied to Mr Feng's letter by email dated 24 February which included that he decided to dismiss Mr Feng following his (Mr Shu's) return from holiday in early January when he reviewed Mr Feng's performance and found it lacking. There was no evidence that that review was conducted with Mr Feng's knowledge or input.

[14] This dismissal does not meet the minimum requirements of a fair process; there was no evidence Mr Feng was on notice that his performance was poor or given an opportunity to improve or to comment on the employer's concerns. Mr Feng's dismissal was unjustified.

[15] Mr Feng said that his dismissal just before Chinese New Year caused a great deal of upheaval in his life. Given that his employment was of short duration and he was able to secure alternative employment relatively quickly Mr Feng is entitled to be reimbursed for two weeks wages lost as a consequence of his dismissal.

[16] Chinese Times Group Limited is ordered to reimburse Mr Feng two weeks lost wages, \$900 gross, pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Holiday pay

[17] I am satisfied that Mr Feng has not received holiday pay to which he is entitled. Mr Feng said he was paid monthly by cheque and that he received no pay slips. Mr Feng's final pay cheque appears to represent a net figure equivalent to six weeks pay at the rate of \$900 per month. CTG did not attend the investigation meeting and so Mr Feng's evidence as to non-payment of holiday pay has not been challenged.

[18] Mr Feng was employed by CTG from 22 August 2005 until 12 January 2006 at the rate of \$1800 per month. He is entitled to holiday pay calculated at 6% of his gross earnings.

[19] Chinese Times Group Limited is ordered to Mr Feng holiday pay of \$540 gross.

Costs

[20] Mr Feng is the successful party and is entitled to be reimbursed for the fee incurred in lodging this application with the Authority.

[21] Chinese Times Group Limited is ordered to pay Mr Feng \$70 to reimburse the Authority filing fee.

Marija Urlich
Member, Employment Relations Authority