

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Heng Li (Applicant)

**AND** Astral Management Limited t/a Marina Chinese Restaurant  
(Respondent)

**REPRESENTATIVES** Bernie Chow, Advocate for Applicant  
Brian Nathan, Counsel for Respondent

**MEMBER OF AUTHORITY** Philip Cheyne

**INVESTIGATION MEETING** 30 August 2005  
18 May 2006

**DATE OF DETERMINATION** 24 August 2006

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] Heng Li worked for Astral Management Limited in its business called the Marina Chinese Restaurant as a Chef from January 2004 until January 2005.

[2] There are several different parts to Mr Li's employment relationship problem. He says he has a personal grievance because he was constructively dismissed from his employment. Mr Li had a work permit for one year, issued on 14 January 2004. Mr Li says that he asked his employer to renew his work permit, but nothing happened and it expired on 14 January 2005. On 17 January 2005, Mr Li instructed solicitors who wrote to Astral Management's solicitors alleging constructive dismissal because of the lack of a valid work permit. The letter also raised the other employment issues. It was claimed that a bond of \$10,000 had been illegally deducted from Mr Li's wages, that he had not been paid wages for overtime hours worked and that there were also other unpaid wages and holiday pay.

[3] In its statement in reply, Astral Management says it did not constructively dismiss Mr Li, that it was not obliged to pay him any overtime, that there is no bonus payment due to Mr Li and that it made no unlawful deduction from, nor has it withheld any pay due to, Mr Li. Astral Management does concede that holiday pay, including payment for days in lieu of statutory holidays, is due to Mr Li.

[4] To resolve the problems it is necessary to set out the genesis of the employment and relevant terms, make findings on disputed evidence about Mr Li's days and hours of work and what he has been paid, and to set out the circumstances under which his employment ended.

### ***Terms of employment***

[5] There is a written employment agreement in Mandarin. It was signed on 12 May 2003 on behalf of Astral Management and on 20 May 2003 by Mr Li. Mr Li made an application for a New Zealand work visa in September 2003. Around the same time, Astral Management applied for approval in principle to recruit a Chinese chef for one year, which was granted in November 2003. Mr Li was granted a one year work visa dated 14 January 2004 and he arrived in New Zealand on 23 January 2004.

[6] There is an English language employment agreement dated 12 May 2003 when signed on behalf of Astral Management and 22 December 2003 when signed by Mr Li. There are some significant differences between the Mandarin language and English language agreements.

[7] The Mandarin agreement provides for three years employment. It states that the employer must pay NZ\$10,000 to the Immigration Service as part of applying for a work visa for the employee. It records an agreement that the NZ\$10,000 shall be deducted from the employee's monthly salary, retained by the employer but remitted to the employee when the employment agreement ends. If the employee voluntarily resigns or is dismissed for misconduct, the employer is entitled to retain the NZ\$10,000. There is no mention of these arrangements in the English language agreement, nor is it for a fixed term. The salary is set at \$1,700 per month in the Mandarin agreement, but \$30,000 per annum in the English language agreement. Both versions specify the minimum ordinary hours of work as 40 per week but require the employee to work such extra hours as may be required to ensure that the work is completed.

[8] The English language agreement is the one signed later in time by Mr Li shortly before he commenced the employment. It follows that the English language agreement applied during his employment in New Zealand.

### ***Hours of work***

[9] Mr Li says he kept a notebook in which he recorded his hours of work each day. He produced the notebook as evidence. Astral Management did not keep any record of Mr Li's days or hours of work, but does not accept the entries in the notebook are an accurate record of when Mr Li worked.

[10] As a means of testing the accuracy of the notebook record, Astral Management was asked by the Authority to review its printed invoices and EftPos transaction records for a period of time. The EftPos record shows the date and time that customers paid their bill, while the invoice shows the date and time of its preparation. Typically, an invoice would be prepared when customers at a table indicated that they have finished ordering meals or drinks, while payment would be made just before the customers left the restaurant. I compared the transaction records for November 2004 with the times recorded in Mr Li's notebook. The gap between the last EftPos transaction and Mr Li's recorded finishing time varied between  $\frac{3}{4}$  an hour and 3 hours. On eight days the gap was 2 hours or longer. On another six days the gap is between  $1\frac{1}{2}$  and 2 hours.

[11] Mr Li's duties were limited to work in the kitchen. By the time of the last invoice, Mr Li would have completed his cooking duties and commenced cleaning up. By the time of the last EftPos transaction as the restaurant closed, Mr Li would possibly have had some cleaning up to finish. After the EftPos records were compiled, I asked Mr Li what work he performed after the premises closed. He spoke of cleaning up and preparation. However, I do not accept his evidence to the effect that he routinely spend  $1\frac{1}{2}$  hours or more doing this clean up and preparation work for the next day. Mr Li's evidence given before the EftPos and invoice printouts were viewed, is that he spent time each morning before the restaurant opened doing preparation work for the day's

service. That evidence was given to explain the gap between his recorded starting time and the evidence about the restaurant's opening time. I do not accept that there was so much preparation that it would explain both an early start and a late finish. Mr Li was clear that he recorded his start and finish times each day so the unexplained gaps between the last EftPos payment and the recorded finish time cast doubt on the veracity of the record. Either Mr Li systematically recorded longer hours than he worked or the record was created at a later date. Either way, I accept that the electronic transactions establish that Mr Li's claim as to his hours of work is incorrect. It follows that Mr Li's claim for overtime payments is rejected.

[12] That does not entirely resolve the arrears claim. The evidence on behalf of Astral Management is that Mr Li commenced work on 6 February 2004, the day that the restaurant opened for business. Mr Li's claim to have started work a few days earlier is based on his notebook, but I have found that to be an unreliable record. There is a statement of wages accrued and deductions made that was given to Mr Li in about June 2004 before any dispute. It records his starting date as 6 February 2004 and there is no evidence of any protest by Mr Li at the time about that information. Given this and the unreliability of Mr Li's notebook, I accept that Mr Li started work on 6 February 2004.

[13] From 6 February 2004 to 16 January 2005 is 11 months 11 days. Mr Li should have been paid \$28,387.00 (gross) over that time (excluding holiday pay). To the extent that there is any doubt in the evidence about wages paid the benefit of that doubt must be given to Mr Li because Astral Management has failed to keep a proper record of wages actually paid to Mr Li. There is good evidence from the IRD that it received \$13,139.33 from Astral Management on behalf of Mr Li. That leaves \$15,247.67 to be accounted for. Mr Li accepted that Astral Management sent \$4,300.00 on his behalf to China. That leaves \$10,785.67. There are receipts or acknowledgements for payments in cash totalling \$6,000.00. However, Astral Management cannot establish that the remaining \$4,947.67 was ever paid to Mr Li. That sum may represent deductions made from Mr Li's wages as shown on the statement mentioned above. If so, those are illegal deductions because Astral Management never had written authority for them so they were made in breach of the Wages Protection Act 1983. In any event, I find that Mr Li is entitled to a payment for arrears of wages payable totalling \$4,947.67. That is a net sum since Astral Management has paid tax on the salary earned by Mr Li.

[14] I also accept Astral Managements concession that a further \$2,272.60 is payable in respect of annual and statutory holidays. That is a gross amount.

[15] The English language version of the employment agreement states at clause 4.1 that the employer will pay the remuneration set out in schedule 2. Schedule 2 says: *Bonus: \$100 ~ \$300 per month*. No bonus was actually paid to Mr Li. I do not accept that the bonus was a discretionary payment because that is not what is said in the agreement. There is evidence from Ms Wang that gifts and cash were given to Mr Li periodically. A fair approach is to treat those gifts and cash advances as discharging the employer's obligation to pay a bonus.

### ***How the employment ended***

[16] Mr Li's work permit expired on 14 January 2005. He nonetheless worked on 15 and 16 January 2005. On 17 January 2005, Jenny Wang saw her solicitor (Jeanette Ching) about renewing the work permit. Ms Ching had just returned from leave over the Christmas period on that day. Ms Wang obtained some forms for Mr Li to sign for the renewal application and went to the restaurant. However, Mr Li did not arrive at work. In the meantime, he had gone to the Police station and Ms Wang received a call from the Police about Mr Li's allegation that she would not

return his passport. Ms Wang went to the Police station, showed them the forms and explained that the passport was with the solicitor to process the renewal application.

[17] Next day, there was a meeting involving Mr Li, Ms Wang, Mike Yang (Ms Wang's partner) and the solicitors. Ms Wang's solicitor confirmed that she had instructions to renew the work permit and it was explained that they wanted Mr Li to continue working for them. Mr Li, however, insisted on the return of his passport.

[18] On 18 January 2005, Mr Li's lawyer wrote to Ms Wang's solicitor. The letter asserts constructive dismissal because Astral Management allowed the work permit to expire despite Mr Li's reminders that it needed to be renewed. There was then a further meeting on or about 20 January 2005 during which Mr Li made it clear that he did not want Astral Management or Ms Ching to take any steps to renew his work permit.

[19] On 20 January 2005, Mr Li's solicitor wrote again to Ms Wang's solicitor. The letter listed four issues that needed to be resolved before *healthy employment relationship can continue between your client and our client*. Mr Li claimed a bond of \$10,000 which had been deducted from his wages should be returned; he claimed overtime of \$17,829.30; he claimed unpaid wages of January 2004 and January 2005; and he claimed reimbursement for legal costs incurred.

[20] Subsequent attempts at resolving the problems, including mediation, were not successful.

### ***Constructive dismissal***

[21] The Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136 identified categories of constructive dismissal, holding that the concept includes but is not limited to those cases where:

The employer gives the employee a choice between resigning and being dismissed;

The employer embarks on a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; or

A breach of duty by the employer leads an employee to resign.

[22] The evidence establishes clearly that Astral Management wanted Mr Li to continue his employment and had just started a process for the renewal of the work permit when Mr Li stopped working. That evidence rules out the first and second categories of constructive dismissal leaving the third category.

[23] The breach of duty principally relied on by Mr Li is the alleged failure to take steps to renew the work permit. That is made clear by the 18 January 2005 letter from Mr Li's solicitor. In his evidence, Mr Li says he was extremely concerned about his immigration status. However, Astral Management was prepared to arrange the renewal of the work permit which Mr Li was told about on 17 January 2005. The failure was to initiate that renewal earlier in time so that a new permit would be issued before the expiry of the existing permit. I accept the point for the respondent that this was not solely (or perhaps at all) Astral Management's responsibility. I find that there was no breach of any express or implied employment obligation and it follows that there can be no constructive dismissal.

[24] Mr Li does not have a personal grievance against Astral Management Limited.

*Summary*

[25] Mi Li's personal grievance, overtime and bonus claims are rejected.

[26] Astral Management Limited is to pay Mi Li \$4,947.67 (net) for arrears of salary and/or for illegal deductions.

[27] Astral Management Limited is to pay Mi Li \$2,272.60 (gross) respect of annual and statutory holidays.

[28] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority