

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 343/09
5146572

BETWEEN YONG BO LIU
Applicant

AND AUCKLAND FRUIT
MARKET LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: Yong Bo Liu in person
J Balia, advocate for respondent

Investigation Meeting: 14 September 2009

Determination: 24 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Yong Bo Liu seeks from his former employer Auckland Fruit Market Limited (trading as Fruit World New Lynn) (“AFML”) a payment of one week’s pay plus holiday pay which he says he was owed on the termination of his employment.

[2] AFML says the payments were not made because Mr Liu terminated his employment before the end of the required notice period, and it was entitled to make the associated deduction under the parties’ written employment agreement.

[3] The relevant clause read:

“11. Termination

11.1 ... the employer may terminate [this agreement] on giving one week’s notice in writing to you or you may terminate it on giving four weeks’ notice in writing to the employer. ...

11.2 If you do not give the required notice, the Employer reserves the right to deduct a day's wages for each day not worked during the notice period. This may include deduction of any monies that have accrued due for any period of leave.

11.3 If you give a notice which is longer than one week the employer shall not be obliged to accept such longer notice period; neither shall the employer be liable to pay more than one week's wages if the employer does not require you to work out the notice period.

11.4 If the parties agree to a variation of the one week's notice period this shall not be effective unless confirmed in writing and signed by both parties."

Background

[4] Mr Liu's employment at the Fruit World New Lynn shop began on 12 August 2008.

[5] On 30 September 2008 Mr Liu informed Mr Balia that he wished to resign in order to travel to China to visit his mother, who was sick. No specific departure date was identified although Mr Liu indicated in a general way that he sought to leave as soon as possible. For his part Mr Balia expected to receive the four weeks' notice of termination apparently required by clause 11.1 of the employment agreement. It was important to him to receive the full amount of notice because he would need time to find a suitable replacement for Mr Liu, and he indicated to Mr Liu that an early departure would cause difficulties. Mr Liu has not disputed that four weeks' notice was required, rather he says he was permitted to leave when he did.

[6] Mr Balia said that a few days after the 30 September conversation Mr Liu advised he had booked a ticket to China, and was leaving on 13 October. Mr Balia told Mr Liu that was 'no good' and said Mr Liu 'must stay', but Mr Liu was adamant that he had booked his ticket and had to leave. In those circumstances Mr Balia felt he had no alternative but to acquiesce in what he viewed as the early termination of Mr Liu's employment.

[7] Mr Liu denied informing Mr Balia that he had bought an air ticket, that he gave a date of departure, and that the parties had the conversation just set out. However it was at least apparent that somehow the parties had identified Saturday 11 October 2008 as Mr Liu's last day of work. Mr Balia even informed other members of the staff of Mr Liu's departure date.

[8] This mutual expectation was such that, on 11 October, Mr Balia asked if Mr Liu could work one more day. Mr Liu sought confirmation that 11 October was his last day of work, which was given, and declined to work the extra day.

[9] Since there was no other explanation of how the final date of 11 October had been arrived at, I accept that Mr Liu told Mr Balia he had booked an air ticket and was departing for China on 13 October. Mr Balia acquiesced in Mr Liu's departure accordingly. I am reinforced in this conclusion by the evidence of a (now) former employee to the effect that he heard Mr Liu say he needed to go back to China and had already purchased his ticket.

[10] Later that week, on or about 15 or 16 October, Mr Liu reported to the workplace to collect his final pay. By then Mr Balia had received reports that Mr Liu had not left for China, but rather had obtained another job. He withheld the final payments now sought, believing clause 11.2 of the employment agreement permitted this.

[11] Indeed Mr Liu had obtained another position at a Fruit World store near his home, and he started work there a week or so later. Bearing in mind the proximity of that workplace to Mr Liu's home, his various statements that he was unhappy at the New Lynn store, and his evidence that his mother's illness concerned a problem with her back which would flare up and down, I consider it likely that Mr Liu sought to leave his employment at New Lynn simply because he no longer wished to work there. The possibility of travel to China was no more than that, but suggested a convenient reason to seek to leave as soon as possible.

[12] In fact Mr Liu did not purchase an air ticket, did not travel to China at the time and has not done so since. He did not tell the truth about his plans when he sought to resign. He did not act in good faith.

Determination

[13] Mr Liu was entitled to seek to leave his employment if he was as unhappy as apparently he was, but was not entitled to misrepresent his intentions to his employer in an effort to obtain permission for an early departure. Further, if I am wrong in

believing the possibility of a trip to China was a convenient excuse and that the trip was intended, then obviously Mr Liu's plans changed. He should have advised his employer of the change and been prepared to work the full notice period as the parties understood it to be. For these reasons I would not accept his argument that he left early with permission.

[14] On the other hand the Wages Protection Act 1983 provides that wages must be paid in full and without deduction when they become payable¹ although deductions may be made with the written consent of the worker.² The deduction from Mr Liu's final pay relied on a view that written consent was provided through the inclusion of clause 11.2 in the employment agreement, which was signed.

[15] The difficulty for AFML is that clause 11 is internally inconsistent. While clause 11.1 requires four weeks' notice of termination from an employee, clause 11.3 assumes an obligation to provide only one week's notice while clause 11.4 confuses matters further. Although the approach of both parties assumed the requirement was for four weeks' notice, the relevant provisions in the Wages Protection Act are usually given a strict interpretation. In particular, as well as being in writing consent must be clear. I find the inconsistency in clause 11 means the consent to the deduction was not clear.

[16] Mr Liu did at least work for two weeks after he had give notice. Accordingly I find that the deduction of one weeks' pay in respect of the second week – being the week of 6 – 11 October 2008 – as well as the deduction in respect of holiday pay, were in breach of the Wages Protection Act. Mr Liu was entitled to those payments, and AFML is obliged to make them. Mr Liu's failure to act in good faith in the matter does not affect this.

[17] AFML is therefore ordered to pay to Mr Liu:

- a. the payment owed for hours actually worked in the week of 6 - 11 October 2008; and
- b. holiday pay owed as at 11 October 2008.

¹ S 4.

² S 5.

Costs

[18] Costs are reserved.

[19] If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and copy to each other a written statement of what is sought and why. The other party shall have a further 14 days to file and copy a response.

[20] Mr Liu is warned that his failure to act in good faith in respect of the termination of his employment means I consider him to be the author of his own misfortune in this matter to a substantial degree. In the absence of further relevant information I am unlikely to make an order for costs in his favour.

R A Monaghan

Member of the Employment Relations Authority