

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Joseph Pritchard (applicant)
AND	Yan Zeng (respondent)
REPRESENTATIVES	Johanne Greally for the applicant Mark Chiu for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	6 July 2006
DATE OF DETERMINATION	29 August 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Pritchard says he was unjustifiably dismissed by the respondent. He also says Ms Zeng unlawfully deducted money from his wages and that he is owed holiday pay and wages for extra time worked by him – statement of problem received on 14 February 2006.
2. Ms Zeng says Mr Pritchard was not employed by her but by Sun Shine Fortune Trading Group Limited, of which she is the manager and majority shareholder. Both

Ms Zeng and the Company deny Mr Pritchard's allegations and say he was justifiably dismissed for taking home movies and/or games without paying and without advising his employer, even though he knew he was not to; for repeatedly refusing to follow instructions despite being warned his failure could lead to the termination of his employment; for closing the shop when going to the toilet and for bullying and threatening Ms Zeng – statements in reply received on 1 March & 28 April.

3. Mediation did not settle this employment relationship problem.
4. During a telephone conference on 13 April the parties' representatives agreed to a one-day investigation on Tuesday 27 June. Because the Authority was committed to another investigation on that date, and because the parties were unable to agree on another date, and by way of a notice dated 19 May, the parties were advised that the Authority would instead investigate this problem on 6 July: s. 173 of the Act applied.
5. By email dated 20 May, and because of study and graduation commitments, Ms Zeng requested the Authority to postpone its investigation until after 30 November: because of the inadequacy of the reasons given for the request, and because her representative had already agreed to an investigation date close to that set by the Authority, and because the application did not agree, Ms Zeng's request was declined: s. 173 of the Act applied.
6. By telephone on 5 July, Mr Mark Chiu advised that he had recently agreed to represent Ms Zeng. Mr Chiu sought an adjournment of the investigation scheduled for the following day on the ground he had insufficient information with which to represent his client. An email from Ms Zeng on the same day set out in some detail why she would not be present at the investigation set down for the following day.
7. Mr Chiu's request was declined by the Authority as it was opposed by the applicant and Ms Zeng had had reasonable opportunity to arrange for legal representation in advance of the advised investigation date.
8. The investigation proceeded on 6 July: Ms Zeng was not present, however she was represented by Mr Chiu: ss. 160 (1) & 173 (2A) of the Act applied.

Background

- 9 The parties agree that Mr Pritchard was employed as a shop assistant at United Video Trentham, for just under 3-months between 7 November 2005 and 16 January 2006 and that he was advised of the United Video position through Work and Income New Zealand; his appointment attracted a WINZ subsidy. He was subsequently interviewed for the position by Ms Zeng. His role included serving customers, opening or closing the store, tagging absent movies and keeping the shop clean and tidy. No written employment agreement was provided before the commencement of Mr Pritchard's employment.

Applicants' Position

10. Mr Pritchard had not been employed for about two years prior to starting at United Video Trentham as he had been on a sickness benefit. The applicant says that, following medical treatment, he was well and fit enough to undertake work and, as he also intended to undertake tertiary study, he was seeking an evening or weekend job. He says he asked the respondent, during the job interview, if he could study at work and that Ms Zeng confirmed he could if he was not busy and other tasks had been attended to.
11. Mr Pritchard says he operated the shop with no supervision during his shift. He describes himself as a good employee who did nothing to break the trust of his employer. He also believes he had no problems with customers and was able to build a reasonable rapport with them. He says he had no written employment agreement although one was offered to him some weeks after he commenced his employment.
12. Mr Pritchard says he undertook 10-12 hour's unpaid training from 31 October 2005.
13. At the end of his first week's work, Mr Pritchard says Ms Zeng approached him and advised he owed her \$7.50 because he had undercharged customers. He also says that she warned him if it happened again, he would be fired. He says his pay for that week was \$205.45, and that it was short \$5.45. Mr Pritchard states that he was worried about the way he had been approached in respect of a small error and the

threat to dismiss him. He says that, at that point he started to keep a record of relevant events: a copy of the applicant's diary was provided to the Authority (document C in the applicant's witness statement).

14. Mr Pritchard says he believed at all times that his employer was Ms Zeng. He says that at no time did she inform him that he and she were working through a limited liability company. He also formed this view because his wages were paid into his account from another described as "*Yan Zeng t/a United Video Trentham*" (par 17 of the applicant's statement and as recorded in copies of bank statements supplied by the applicant to the Authority on the day of the investigation). The applicant says that he only heard of the Sun Shine Fortune Trading Group Limited when he received it and Ms Zeng's statements in reply. Mr Pritchard relies on the doctrine of undisclosed principal to pursue his claim against Ms Zeng personally.
15. Mr Pritchard says he was given no break at all during his shift. He says Ms Zeng told him on one occasion not to close the shop so that he could take a toilet break. He says his requests for additional pay for working over his shift were dismissed by the respondent.
16. Mr Pritchard says that he started taking movies home without renting them out after another staff member drew his attention to a set of staff rules allowing for that practice (document E in the Company's statement in reply received on 1 March); he says he ensured a record was kept by ringing up a full discount so that he or other staff could not be accused of doing anything wrong. He denies taking out some of the videos listed in the statement of reply received on 1 March. Mr Pritchard says the rule he relied on was changed by Ms Zeng, without consultation, on 8 January. The changed rules, which Ms Zeng required employees including the applicant to sign, also required staff to pay for any till shortages by deduction from their wages, to pay for all movies and games taken from the shop and to not close the shop at any time (document E in the applicant's witness statement).
17. The applicant says that he took issue with Ms Zeng about the changed rules, in particular challenging her intention to require staff to make good any shortages resulting from customers not being charged the right price. He says he asked what

would happen if he did not sign the changed rules and was told, *“Then you will have to look for a new job”* (par 40 of Mr Pritchard’s witness statement).

18. Mr Pritchard says he signed the changed rules but later sought advice from the Department of Labour. Acting on that advice, the applicant advised Ms Zeng in writing that he was withdrawing his consent (document F). Mr Pritchard says that Ms Zeng subsequently denied saying he would lose his job but said, instead, that he *“might”* lose his job (par 43, above); she also declined the applicant’s request to rip up the signed document.
19. Around that time Mr Pritchard says that, sensing hostility and being fearful for his job, he again approached the Mediation Service of the Department of Labour, to seek their assistance. He says Ms Zeng declined to involve herself with any mediation involvement. Document I in Mr Pritchard’s witness statement is from the Mediation Service and confirms the applicant sought their assistance and that *“Ms Zheng”* (sic) advised she would not be attending mediation.
20. Mr Pritchard says he met with Ms Zeng on Monday 16 January. He says she described his note (document F) as a threat, that it gave her the right to dismiss him immediately and that his taking of DVDS and videos was *“stealing”* ([par 52 of the applicant’s witness statement). Mr Pritchard says Ms Zeng said, *“... I am deducting the costs from your final pay”* (above).
21. In response Mr Pritchard says he asked the respondent several times, was he fired? The applicant says Ms Zeng confirmed he was and that she tried, unsuccessfully, to get him to sign for the deductions. Mr Pritchard says that he left the workplace in a state of shock.
22. An hour later Ms Zeng visited the applicant at his house so as to retrieve a work key.
23. Mr Pritchard produced sworn witness statements in support of his claim that Ms Zeng was the employer, that unilateral deductions were effected from wages for alleged till discrepancies and that staff originally were permitted to take tapes, etc overnight without payment.

Respondent's Position

24. The evidence before the Authority as to Ms Zeng's position is set out in the two statements in reply and in correspondence from the respondent. It is this:

- Ms Zeng says she was not the employer but that Mr Pritchard was an employee of the Sun Shine Fortune Trading Group Limited.
- On behalf of the Company Ms Zeng confirms that the applicant was dismissed on 16 January, as well as the other statements made in the former's statement in reply received on 1 March.
- The dismissal resulted from the applicant taking home movies and/or games without paying and without advising the employer even though Mr Pritchard knew this was something he should not do, for repeatedly refusing to follow instructions despite being warned his failure could result in the termination of his employment, closing the shop when going to the toilet and bullying and threatening the manager.

25. Ms Zeng and the Company say that, "*very early on*", there were issues with continued till shortages (par. 3.2 of the Company's statement in reply). Those issues caused the Company to seek Mr Pritchard's written consent to it deducting shortfalls from his pay. They deny threatening the applicant with dismissal. Amongst other detail, Ms Zeng and the Company confirm that Mr Pritchard advised that any deductions would be illegal, and say he "*raised the issue in a hostile and belligerent fashion*" (par 3.3, above). They claim his behaviour toward Ms Zeng was so bad that she placed the business on the market and moved to Dunedin in order to put the experience behind her.

Discussion

26. I am satisfied, for the following reasons, that Mr Pritchard's employer was Ms Zeng and not the Company, and that the applicant was unjustifiably dismissed.

27. The parties do not agree in respect of who was the employer or about the circumstances leading up to the applicant's dismissal. Mr Pritchard gave direct evidence under oath/affirmation and provided sworn statements in support of his claims. No evidence was called on behalf of the Company and Ms Zeng: they instead relied on their statements in reply and the unsworn and untested statements communicated by the respondent. By email Ms Zeng confirmed to the Authority, the day before the investigation, that she would not be attending.

28. There is no independent written record identifying the Company as Mr Pritchard's employer, or of Ms Zeng explaining to the applicant, at any time before and during his employment, that she was not his employer but instead that she was acting on the Company's behalf. In marked contrast, Mr Pritchard's bank statements consistently record wages being paid to him under the name of "*Yan Zeng t/a United Video Trentham*". The same description occurred in at least one other staff member's bank record. The unsigned individual employment agreement records the applicant's name and the employer as "*United Video*" (see attachment A to that statement): it does not record the Company's name. The Job Plus Subsidy Scheme prepared by Work & Income in respect of Mr Pritchard is signed off by "*United Video Trentham*" (attachment B of the applicant's witness statement), and not by the Company. I am satisfied from Mr Pritchard's credible evidence and that provided by relevant documents that the Company never identified itself as the employer, and that Mr Pritchard properly and lawfully regarded Ms Zeng as the face of United Video Trentham and therefore his employer.

29. There is no record of Ms Zeng ever recording in writing her concerns about Mr Pritchard's performance, notwithstanding the claim set out in the statement in reply that he was warned his repeated failures to follow instructions could result in the termination of his employment. These are serious matters that can fairly and reasonably be expected to be recorded in a written form.

30. The credibility of Ms Zeng's claims about Mr Pritchard's performance shortcomings and related warnings is weakened by the effect of the draft individual employment agreement advanced by the Company to the applicant some weeks after the commencement of his employment. It provides for, amongst other things, the following:

We are committed to dealing with any problems, which may arise for you in your employment with us. If you think you have a problem in your employment, please let your supervisor know immediately so we can try and resolve it with you.

...

If you do try to bring your problem to our attention but we don't address the issue or if you don't feel happy with our response, then you can contact Mediation Services of the Department of Labour for free assistance.

(Schedule B, document A in the Company's statement in reply

31. Despite these commitments, the evidence is of Ms Zeng and the Company refusing to respond to Mr Pritchard's concerns, including declining to undertake mediation initiated by him (attachment I in the applicant's witness statement). This failure to respond to Mr Pritchard's reasonable request is further evidence, I conclude, in support of his version of events and, in particular, in determining the competing claims as to who bullied who.
32. Further support for Mr Pritchard's version of events, and the unreasonable stance adopted by the respondent, is reflected in the unreasonable nature of Ms Zeng's revised Staff Rules (document D in the applicant's witness statement): amongst other things the revised rules require staff to keep the shop open at all times. This requirement is simply impracticable, as it has no regard to the legitimate requirement of staff to be able to take reasonable comfort stops.
33. I am also satisfied from Mr Pritchard's uncontested diary entries that shortly into his employment he encountered various difficulties with his employer, which worsened when he fairly and reasonably, but unsuccessfully, attempted to exercise his employment rights by, in particular requiring holiday pay. Adding credibility to Mr Pritchard's account is that fact that the issues recorded by him in his diary are the same concerns as those set out in the statements of reply, albeit from an entirely competing perspective. I prefer Mr Pritchard's version of events, and it follows that I am satisfied Ms Zeng acted unjustifiably in proceeding to dismiss Mr Pritchard when he attempted to rely on his lawful position and entitlements.

34. My conclusion is reinforced by the following: the Staff Rules attached to the company's statement in reply (attachment E) support Mr Pritchard's claim, that staff were initially able to take home tapes, etc without payment. The original Staff Rules only require staff to return tapes or DVDs or games the next morning, by midday: they do not expressly require staff to pay for the hire of its property. I am satisfied from that evidence that Mr Pritchard believed he was entitled to take tapes, etc without paying for their rental. There is therefore no support for Ms Zeng's claim that Mr Pritchard was justifiably dismissed for knowingly taking home tapes, etc without payment.
35. I am satisfied that Mr Pritchard's refusal to continue to authorise deductions from his wages in instances of till discrepancies (refer to attachment F in the applicant's witness statement) resulted in his dismissal. This was because the applicant was faced with an ultimatum of either accepting alleged till discrepancy deductions from his wages or being dismissed: his dismissal was occasioned by his refusal. I am satisfied that Mr Pritchard's initial agreement to wage deductions was not freely given and that he could therefore lawfully resile from his original, forced consent. Other options were reasonably open to Ms Zeng to address any concerns she had about till discrepancies. But, in the absence of a proper process of putting actual instances to the applicant, it was unjustified for the respondent to proceed to dismiss Mr Pritchard over his refusal to agree to what was a unilateral variation to his employment agreement.

Remedies

36. Mr Pritchard seeks reimbursement of his final week's pay, which he says he did not receive, 3 additional weeks' pay following his unjustified dismissal and before subsequent re-employment, compensation for financial loss arising out of his inability to complete a course of tertiary study, he says because of the unjustified dismissal, compensation of \$8,000 for humiliation, interest on the claimed monies, general compensation of \$5,000 for unfair dismissal and set back of career plans and costs.
37. I am satisfied from the evidence before the Authority that Mr Pritchard is entitled to his final week's pay, and for another 3-weeks' pay following his unjustified dismissal and before finding fresh employment. As claimed, I am satisfied, from Mr Pritchard's

evidence that he was paid at the rate of \$300 gross per week. He is therefore entitled to compensation of \$1,200 gross: s. 123(1) (b) of the Act applied.

38. I accept Mr Pritchard's claim that he is entitled to unpaid holiday pay: he calculates the amount as 6% of \$4,295, or \$257.70: I see no reason to decline that claim.
39. I do not accept Mr Pritchard's claim that he should be paid for his trial week or for any overtime: I reach this conclusion on the absence of any evidence of agreement between the parties that the applicant, via the terms of his employment agreement, was entitled to those monies.
40. I decline Mr Pritchard's claim for interest on monies awarded to him: that claim is too broad and I am satisfied that the applicant's remedies are best addressed by way of particularised awards.
41. I also decline Mr Pritchard's claim for compensation for losses arising out of his withdrawing from his tertiary study: this is because I do not accept that the applicant can fairly impose on Ms Zeng an express or implied agreement that his employment would result in him successfully completing the study course: s. 123(1)(c) of the Act applied.
42. I also decline the double-counting contained in Mr Pritchard's claims of \$5,000 for unfair dismissal and set back of career plan and \$8,000 compensation for humiliation, etc. As already addressed, Mr Pritchard cannot reasonably hold Ms Zeng to account for his failure to complete his study course. Mr Pritchard's expectations, as set out in par. 93 of his witness statements, in respect of marriage, starting a family life, etc cannot realistically be built on the prospects he faced going into his employment as a shop assistant in Ms Zeng's rental business.
42. However, the applicant could expect his employment rights to be recognised and, in the event of any performance concerns, for those matters to be properly managed by the respondent: I am satisfied that compensation for the distress occasioned by Ms Zeng's failures is properly set at \$6,000: s. 123(1) (c) of the Act applied.

43. Mr Pritchard is entitled to a contribution to his fair and reasonable legal costs. Because of the greater costs resulting from the applicant having to prove that Ms Zeng was his employer and the need for the applicant to address the respondent's efforts to postpone the Authority's investigation, to cover summonsed witness costs and consistent with well-established costs principles, I am satisfied Mr Pritchard is entitled to recover a contribution to his costs of \$2,500: clause 15 of Schedule 2 of the Act applied.

Contributory Fault

44. I am satisfied from the evidence before the Authority that Mr Pritchard properly attempted to address his, and his employer's, concerns, but without success: he cannot be said to have contributed in any way toward the situation that gave rise to his personal grievance.

Determination

45. For the reasons set out above, I find for the applicant's claims as to the identity of his employer, unjustified dismissal and lost wages against the respondent, Ms Yan Zeng, and direct the respondent to pay the following sums to the applicant:

Wages lost: \$1,200 (one thousand, two hundred dollars) gross;

Holiday pay of \$257.70 (two hundred and fifty-seven dollars and seventy cents);

Compensation for humiliation, etc of \$6,000 (six thousand dollars); and

A contribution to Mr Pritchard's legal costs of \$2,500 (two thousand and five hundred dollars)

Denis Asher

Member of Employment Relations Authority