

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 64/10
5280678

BETWEEN	YIXIN WANG Applicant	
AND	AMICI'S LIMITED Respondent	RICCARTON

Member of Authority: Philip Cheyne

Representatives: Yixin Wang, the Applicant in person
Jeff Goldstein, Counsel for Respondent

Investigation Meeting: 11 March 2010 at Christchurch

Determination: 12 March 2010

DETERMINATION OF THE AUTHORITY

[1] Yixin Wang worked for Amici's Riccarton Limited from December 2008 until her employment terminated when she resigned in August 2009. Mrs Wang says that she was constructively dismissed and that she has a personal grievance as a result. In her statement of problem Mrs Wang says that during a discussion with Mr Williams on Monday 10 August he told her that she was not working hard enough, that he was not able to give her a full-time job because of her family commitments and that he could make her redundant because of the economic downturn. She then resigned.

[2] Amici's says that Mrs Wang simply resigned and that she did not raise any grievance within 90 days so as to permit her to pursue this application in any event.

[3] There is no merit in the point about 90 days. There was mediation well within 90 days which could only have been about the personal grievance so it must have been raised with the employer on the date of the mediation at the latest.

[4] The Authority had some difficulty contacting Mrs Wang so a phone conference was scheduled and a letter was sent to Mrs Wang's address for service advising her of the conference and asking her to contact the Authority so she could take part. There was no response and Mrs Wang could not be contacted on the day of the conference. Counsel applied for the investigation to be ended without more but I decided to schedule an investigation meeting as the final opportunity for Mrs Wang to attend and give evidence supporting her claims. Meantime nothing further was required of Amici's.

[5] Mrs Wang attended the meeting with her husband. She gave evidence by responding to my questions and enlarging on the sequence of events leading up to her resignation and she was also questioned by counsel. Alistair Williams, the company's director, provided some information as well. Counsel then submitted that Mrs Wang had not established that her resignation met any of the circumstances giving rise to a constructive dismissal. I explained to Mrs Wang that it was for her to establish grounds for a constructive dismissal before there was any onus on Amici's to prove justification for a dismissal. She and her husband conferred following which Mrs Wang outlined her case. I then adjourned the investigation meeting on the basis that I would reflect on the evidence and either issue a determination or make arrangements for further investigation. I have decided that Mrs Wang's employment relationship problem can be resolved on the basis of the evidence and information available as explained below.

Terms of employment

[6] There was no written employment agreement apparently because of an oversight on Amici's part since it does have agreements with other staff. Mrs Wang's evidence is that she was interviewed by Mrs Williams, completed a brief trial and then offered the job. Mrs Wang said that Mrs Williams told her nothing about what her days or hours of work would be. In practice, Mr Williams posted a roster usually on a Sunday for the coming week and Mrs Wang worked in accordance with the roster. Sometimes there were changes to the roster because of illness or unavailability or for some other reason and Mrs Wang complied with whatever changes were made to the roster. I find that it was a term of the employment that Mrs Wang would work in accordance with the roster as determined by Amici's. In practice her weekly hours varied from about three to nearly fifty but she generally worked between thirty and

forty hours and five days per week to suit the needs of the business. This was permanent employment but it was never agreed to be for any minimum number of hours or days per week. It is common ground that Mrs Wang was highly regarded for her work and Mr Williams was accommodating of her family commitments.

The resignation

[7] Mrs Wang worked on Sunday 2 August but she was not well so she finished early. Before finishing Mrs Wang saw the roster for the following week. Mrs Wang is adamant that she was rostered only for four days and about twenty-six hours. There is some twink on a fifth day (Sunday) on the original roster and Mr Williams is now unsure if Mrs Wang was originally rostered for the Sunday with that being twinked out later on. I accept Mrs Wang's evidence about what she saw. As it transpired, Mrs Wang was sick for the whole week. She arranged for her husband to drop off a letter at Amici's to that effect. A payslip for the period ending 9 August indicates that Mrs Wang was paid sick pay for four days and about twenty-six hours.

[8] Mrs Wang returned to work on Monday 10 August. She saw the week's roster for her to work four days and similar hours to the previous week. During the afternoon there was a discussion between her and Mr Williams. Mrs Wang expressed her dissatisfaction about the reduced hours of work. In particular there was discussion about what comprised full-time work, Mrs Wang asserting that hers was a full-time position so she should be rostered for forty hours per week. Mr Williams said that there was no guarantee of forty hours per week but there would be between thirty and forty hours work each week as previously. There was mention of Mr & Mrs Williams' forthcoming holiday and the opportunity for extra hours as a result. There was also mention of Mrs Wang's state of health and its effect on her work, her family commitments and the business downturn. These were peripheral issues and I do not accept that these matters were discussed in the pejorative terms alleged by Mrs Wang in her statement of problem. If they had been they would have featured in the resignation letter. Accordingly I do not accept that Mr Williams breached any obligation owed to Mrs Wang in what he said to her about these peripheral matters. Mrs Wang was told to finish early because it was quiet and she seemed still to be unwell.

[9] Mrs Wang next worked on Wednesday 12 August. Mrs Wang says that she gave Mr Williams her resignation letter in a sealed envelope that day but the company

says that it was the next day that she asked to finish up and the following day that she gave Mr Williams the letter after he requested something in writing. Either way, it is common ground that Mrs Wang said nothing about the reason for her resignation. Mrs Wang's evidence is that Mr Williams did not open the envelope in her presence. It appears that the letter was not opened until Mr Williams returned from holiday two weeks later. Mrs Wang worked as per the roster on 12, 13 & 14 August and then finished up.

Constructive dismissal

[10] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[11] I turn first to what caused the resignation.

[12] Mrs Wang's letter of resignation says:

Recently, my working hours are cut from full time to part time without any sound reasons and any warning in advance. After discussing with Al (the boss), it looks like there are no other options for me. To support my family and myself, I do need find a full-time job somewhere else as quickly as possible. Therefore, I give you this formal notification of resignation which starting from August 17.

[13] When first asked, Mrs Wang said in evidence that when she told Mr Williams that she was resigning she also said that she had another job to go to. In fact she had the prospect of another job but it did not work out. Later in evidence, Mrs Wang said

that she told Mr Williams that she had the possibility of another job. Aside from that, Mrs Wang said nothing to Mr & Mrs Williams about the reasons for her resignation. Mrs Wang's evidence today as to the reason for her resignation reflects the reason mentioned in the letter. I find that the letter conveys the true reason for Mrs Wang's resignation.

[14] I do not accept that there was any breach of duty owed to Mrs Wang arising from the decision to roster her for less than 30 hours in the week ending 9 August or in the week ending 16 August. I find that Mrs Wang resigned because she needed some certainty about her weekly income. Such a guarantee was never a term of her employment with Amici's. It follows that Mrs Wang has not established that her resignation should be treated as a dismissal.

Summary

[15] Mrs Wang resigned and was not constructively dismissed.

[16] Counsel sought \$500.00 as a nominal contribution to Amici's costs. The evidence is that Mrs Wang has not found other employment since her resignation so counsel accepted that her financial position would be difficult. That is a reason to reduce any award of costs otherwise appropriate. The investigation has also been managed so as to minimise Amici's legal costs. More fundamentally, a significant contributor to this problem was Amici's failure to ensure that Mrs Wang was proffered a written employment agreement and given the opportunity to seek advice before she started work. If Amici's had complied with the law there would have been no room for the different views about whether the employment was full-time and every chance this grievance claim would not have arisen. The proper course is to make no order for costs.

Philip Cheyne
Member of the Employment Relations Authority