

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 396/07
5098407

BETWEEN CHEN (CHERRY) WANG
 Applicant

AND BADE DRAPER SOLUTIONS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: John Hancock, for Applicant
 Shahin Kermani, for Respondent

Investigation Meeting: 11 December 2007

Submissions received: 13 December 2007

Determination: 17 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wang says she was employed by Bade Draper for five weeks from 21 May 2007 until 25 June 2007. She seeks payment of wages and holiday pay for that period, a finding that she was unjustifiably dismissed, reimbursement of 12 weeks lost wages and compensation for hurt and humiliation consequent to her alleged dismissal.

[2] Bade Draper says Ms Wang agreed to work unpaid for a trial period during which her suitability for the position would be assessed, that the trial was extended from two to five weeks, that Ms Wang's trial did not work out and she was told she would have to leave.

[3] The parties have been to mediation.

Unpaid trial

[4] Ms Wang denies that she agreed to work unpaid for a trial period to ascertain her suitability for the position. She says she agreed an hourly rate and hours of work with Mrs Kermani, the respondent's owner, provided her bank account details at Mrs Kermani's request and pursued her unpaid wages having received assurances from Mrs Kermani that they would be paid. The terms agreed were 3 hours per day, five days per week at \$11 per hour. The hourly rate is less than the 2007 Minimum Wage Order of \$11.25 per hour.

[5] Mrs Kermani accepts that she discussed wage rates with Ms Wang and received her bank account details but says this information was received conditional on the trial working out.

[6] An arrangement may be entered by parties for voluntary work which is not undertaken for reward¹. Mrs Kermani's claim that the respondent entered a voluntary arrangement with Ms Wang is inconsistent with the purported purpose of that voluntary arrangement – to assess Ms Wang's suitability to work for the respondent for reward. Further, the statutory scheme requires that employees who undertake a trial period for the purposes of assessing their suitability for a position must have a written employment agreement specifying the fact of the trial². The mandatory requirements of this section preclude a voluntary probationary period.

[7] The respondent says it offered Ms Wang employment conditional on the successful completion of the trial period. I accept Mr Hancock's submission that if it is accepted by the Authority that this was the agreement between the parties then Ms Wang must be a person intending to work³ and as such she must be paid for the work she has performed.

[8] The respondent's defence to Ms Wang's claim as to employment status fails. Ms Wang was an employee. She is entitled to the unpaid wages and concomitant holiday pay as claimed.

¹ Section 6(1)(c) Employment Relations Act 2000

² Section 67 Employment Relations Act 2000

³ Section 5 Employment Relations Act 2000

[9] **Bade Draper Solutions Limited is ordered to pay Chen (Cheery) Wang \$894.50(gross) in unpaid wages and \$71.55(gross) in unpaid holiday pay being 8% of gross earnings.**

Unjustified dismissal

[10] Mrs Kermani said that on 25 June 2007, at the end of Ms Wang's three hour shift, she called her into her office and advised her things were not working out because her performance was not acceptable and she would have to leave. She said Ms Wang was very upset and she agreed to provide a written reference. The reference was provided the following day and praises Ms Wang's performance, professionalism and attitude and invites the reader to contact Mrs Kermani to discuss any queries about the reference. The reference is signed by Mrs Kermani.

[11] Ms Wang says she was called into Mrs Kermani's office and told she could no longer employ her because her son needed to work Ms Wang's hours. This reason for Ms Wang's employment ending is consistent with the reference provided by Mrs Kermani. A reasonable employer who was dissatisfied with an employee's performance would not write a glowing reference for that employee and invite a prospective employer to discuss such with her.

[12] I accept Ms Wang's version as to how her employment ended. I also accept Ms Wang's claim that her dismissal was unjustified; to end a worker's employment in order to give that employment to someone else is not reasonable grounds for a justified dismissal. Also relevant to justification are the circumstances in which the dismissal was advised and there is no evidence that the dismissal was conducted fairly.

Remedies

[13] Ms Wang seeks an award of \$5000 for hurt and humiliation consequent to her dismissal. She and Mrs Kermani spoke of her upset at the dismissal meeting. Ms Wang described her persistent attempts to secure payment of her wages after her employment ended which must have added to her upset.

[14] Bade Draper Solutions Limited is ordered to pay Ms Wang \$1500 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

[15] Ms Wang seeks reimbursement of three months lost wages. Ms Wang's evidence of her attempts to find alternative employment was not strong. I set the award of lost wages at two weeks wages, totalling \$337.50.

[16] Bade Draper Solutions Limited is ordered to pay Ms Wang \$337.50(gross) pursuant to section 123(b) of the Employment Relations Act 2000.

Costs

[17] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority