

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 50  
5305498

BETWEEN                      FEIFEI WANG  
AND                                SUN CRYSTAL LIMITED

Member of Authority:        Yvonne Oldfield  
Representatives:              May Moncur for applicant  
   Yongxing Sun, Director, for respondent  
Investigation Meeting:        14 January 2010  
Determination:                 10 February 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Wang worked for the Respondent (Sun Crystal) as a retail assistant from the end of January 2010 until mid April 2010 when she says she was unjustifiably dismissed. Sun Crystal denies dismissing Ms Wang. It says that she was rostered off duty for a two week period in mid April but there was no intention to bring her employment to an end.

[2] In January 2010 Ms Wang responded to an advertisement for a full time position with Sun Crystal. She was interviewed by Mr Wang Peng (then manager of Sun Crystal's St Lukes store) on 26 January 2010. Mr Peng told Ms Wang she would work "rostered hours" but did not tell her how many hours per week she could expect. He also told her that a written employment agreement would be provided to her at a later (unspecified) date. Meanwhile she would receive the minimum wage.<sup>1</sup> At the Authority investigation meeting director Mr Yongxing Sun explained that Sun Crystal's usual practice (at the time Ms Wang was employed) was to wait two to three

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<sup>1</sup> The minimum wage was \$12.50 at the time of Ms Wang's employment, increasing to \$12.75 on 1 April 2010.

months before preparing a written agreement so that both parties had time to consider the terms of employment. As things turned out, Ms Wang was never presented with a written employment agreement.

[3] Ms Wang was also told that before formally starting work she would be required to complete two days unpaid instruction in order to develop her understanding of the respondent's specialised products (crystals which are believed to impart therapeutic benefits to the wearer.) She accepted the job on that basis and reported to the St Lukes store for a total of nine hours on 27 and 28 January for training. Normal duties were to begin on 29 January but Ms Wang claims to have begun serving customers from 27 January and says what training she received was in relation to store procedures such as opening and cashing up.

[4] For the next couple of months Ms Wang reported directly to Mr Peng. This time passed without incident although Ms Wang found she was rostered on for only 22 hours per week on average and would have liked more work.

[5] On or about 22 March a new store manager, Like Wang (Karen)<sup>2</sup> started at St Lukes in Mr Peng's place. The two women did not previously know each other but clashed immediately. Karen informed Ms Wang that she proposed to test her product knowledge but her manner made Ms Wang feel very uncomfortable. Karen telephoned Mr Sun (director of the respondent) for support. Mr Sun told me that he was aware that Karen's management style could be an issue for some staff. He explained this by saying that she had previously been in the Chinese army. He told me he counselled her to show patience towards Ms Wang. He then had Karen pass the phone to Ms Wang to whom he spoke about the need to co-operate with her new manager.

[6] Ms Wang told me that by the end of the phone call she felt satisfied that things were going to be all right. Mr Sun's evidence was that he was not so sure. He remained concerned because he had not found the conversation with Ms Wang entirely positive, and because he anticipated having Karen continue as St Lukes' store manager even after Mr Peng (who was on holiday) returned. Mr Sun said he told

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<sup>2</sup> Because Ms Like Wang has the same family name as the applicant, and with her permission, she is identified here by her adopted name.

Karen that if she continued to have problems she had his permission to reduce Ms Wang's hours of work or even to remove her from the roster for a period.

[7] Karen rostered Ms Wang to work for only nine hours in each of the weeks beginning 28 March and 5 April. She told the Authority that she did this in order to get Ms Wang "*to think about things*" but could not recall giving Ms Wang any explanation at the time. For her part Ms Wang told the Authority that she believed she was being punished because Karen did not like her, but made an effort to co-operate, as she had promised Mr Sun she would. She thought that things went reasonably well at work during these two weeks apart from the fact that she needed more hours.

[8] Karen did not feel the same way. On April 11 she telephoned Ms Wang and (she says) told her that she had two weeks off to think about her attitude to work, after which she could expect a further call from Karen.

[9] According to Ms Wang, Karen told her that she was finished. Ms Wang said she asked for clarification and Karen confirmed that she was fired. Either way, Karen never rang Ms Wang back. She told the Authority that she was very busy and it slipped her mind to do so. On 17 April Ms Wang texted Karen to say that she had checked her bank account and she had not been paid for 7 April. Ms Wang's text queried whether this money would be paid "together" but does not make it clear with what. Ms Wang now says she meant "together with her holiday pay." I accept that this was what she meant. On 23 April Ms Wang received one day's pay. On 26 April she went to see an employment consultant who immediately raised a personal grievance on her behalf.

[10] After the grievance was raised Mr Sun telephoned Ms Wang and asked her to meet with him to discuss a return to work. Then, as now, he maintained that Ms Wang had not been dismissed. He said that Karen did not have authority to dismiss staff and had not discussed the situation with him since the first call on 22 March.

[11] Ms Wang agreed to a meeting. She said that she was very hopeful, at that point, that she might be able to return to her job. After the call, she rang her representative, Ms Moncur who agreed to accompany Ms Wang to the meeting with Mr Sun. Ms Wang texted him again, advising that she wanted her "lawyer" to

accompany her. She asked him to contact Ms Moncur to confirm a suitable time for the meeting (which had originally been planned for that afternoon.)

[12] Mr Sun was not happy with the proposed change to the plan and (as he told the Authority) declined to meet with Ms Moncur present. His reason was that he did not think it would be constructive to have her there. He continued to maintain this position subsequently after Ms Moncur made formal requests for a meeting with him.

[13] Ms Moncur also requested that he provide wage and time records, partly with the intention of checking what holiday pay Ms Wang might be owed. Wage and time records were not provided until they were given to the Authority in the course of this investigation. Mr Sun has confirmed his awareness of the obligation to provide wage and time records upon request<sup>3</sup>. Mr Sun told the Authority that he did not provide the records to Ms Moncur because he was not provided with formal confirmation of her authority to act for Ms Wang.

[14] After her dismissal Ms Wang found part time work at another shop at the Mall. Over the first three months after her dismissal she earned a total of \$720.00 net (or approximately \$900.00 gross.) Had she remained with Sun Crystal, she would have earned \$3,646.50 (\$12.75 x 22) over 13 weeks.

[15] At the time of the Authority investigation meeting Ms Wang still had not received her holiday pay. Mr Wang said he accepted the obligation to pay holiday pay but did not intend to do so until it fell due (as he understood it) upon the anniversary of her employment, at the end of January 2011. Ms Wang has advised the Authority that she is satisfied that the wage and time records are accurate and that holiday pay should be calculated on the basis of those records, which show her total gross earnings to have been \$3,107.99.

## **Issues**

[16] The employment relationship problem remains unresolved. Ms Wang says that she should have been paid for 27 and 28 January because she was given little or

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<sup>3</sup> The obligations to keep and produce wage and time records are contained in section 130 of the Employment Relations Act (in subsections (1) and (2) respectively) while section 130 (4) provides for liability for penalties in the event of breach.

no training and her employment effectively started then. She says her employer should have given her a written employment agreement, provided wage and time records when asked, and paid holiday pay along with her final pay.

[17] Finally she is certain she did not misconstrue anything Karen said to her on 11 April because both she and Karen spoke in their first language. She says she was dismissed and that this dismissal was procedurally and substantively unjustified. Ms Wang claims the following remedies:

Arrears of wages for two day training period (\$12.50 per hour for 9 hours)	\$112.50
Holiday pay at 8% of gross earnings of \$3,107.99	\$248.63
Penalty for failure to provide a written employment agreement	\$10,000.00
Penalty for failure to produce wage and time records	\$10,000.00
Penalty for breach of good faith	\$10,000.00
Three months lost income (at \$12.75 per hour for 22 hours per week.)	\$3,646.50
Compensation for hurt and humiliation pursuant to s.123 (c) (i)	\$10,000.00

[18] All of Ms Wang's assertions are denied by the respondent.

**(i) Employment agreement**

[19] Section 63 (2) of the Employment Relations Act provides that an employer must :

*(a) provide to the employee a copy of the intended agreement...*

[20] Section 63 (3) meanwhile provides that:

*“Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.*

[21] The obligation to provide a written employment agreement exists to ensure that the parties are clear and certain about their mutual obligations. It is critical to the management of employment relationships. The respondent in this case was not a small or a new employer, operating as it did more than one shop with a number of employees, and neither Mr Peng nor Mr Sun provided a satisfactory explanation as to why there was no written employment agreement. In these circumstances, a penalty is appropriate. I fix this at \$500.00.

**(ii) Training period**

[22] Ms Wang's agreement to forego payment for 27 and 28 January was based on being told at her interview that these days would be devoted to training in the respondent's products.

[23] I accept that only a small part of those first two days was spent in developing product knowledge and that meanwhile, Ms Wang served customers and familiarised herself with store routines. I am satisfied therefore that Ms Wang should receive wages as claimed for 27 and 28 January respectively.

**(iii) The dismissal**

[24] Karen's failure to contact Ms Wang in the fortnight after 11 April is consistent with the assertion that Ms Wang's employment had been ended. I am satisfied that there was a dismissal. Given the absence of any warning, or indeed of any reasons being provided for dismissal, it follows that it was unjustified, and that there can be no question of Ms Wang having contributed to the situation that gave rise to the grievance.

[25] Ms Wang is entitled to lost earnings in relation to her personal grievance. After allowance for the \$900.00 she earned in the period after her dismissal her losses amount to \$2,746.50.

[26] As for compensation for hurt and humiliation, Ms Wang told the Authority that she found the experience of being dismissed very humiliating when she had been

working hard to establish herself as a recent arrival from overseas. She said she still did not feel able to tell her family in China what had happened.

[27] This evidence is accepted however this was a part-time employment of only a few months duration. I am not satisfied that this personal grievance warrants more than a modest level of compensation. In all the circumstances I consider the sum of \$3,000.00 to be appropriate.

**(iv) Wage and time records, holiday pay and associated penalties**

[28] It is not credible for Mr Sun to assert that he did not know that Ms Moncur was Ms Wang's authorised representative when Ms Wang herself had told him so and provided him with Ms Moncur's contact number. If he was genuinely unsure about this he had only to say so and ask for formal written authority to be provided. His conduct amounts to a blatant refusal to ensure that his company has met its statutory obligations. Once again a penalty is warranted in respect of the respondent's failures to keep and produce wage and time records. I fix this at \$500.00.

[29] It has subsequently been possible to examine the wage and time records and identify the amount of holiday pay outstanding. It has been confirmed that Ms Wang did not take any leave during the brief period of her employment and is entitled to 8% of her gross earnings of \$3,107.99.

**(v) Breach of good faith**

[30] The applicant's claim of breach of good faith does not relate to any separate matter not covered by the claims addressed above. No further award is required to address the issues and no additional penalty is ordered in respect of this general head of claim.

**Summary of Orders**

[31] The respondent, Sun Crystal Limited, is ordered to pay to the applicant the following sums:

Arrears of wages	\$112.50 gross
Holiday pay	\$248.63 gross
Loss associated with personal grievance	\$2,746.50 gross
Compensation for personal grievance	\$3,000.00

[32] The respondent is also ordered to pay into the Authority, for payment to the Crown Bank Account, a \$500.00 penalty in respect of its failure to supply a copy of the proposed employment agreement and a further \$500.00 penalty in respect of its failure to supply wage and time records.

### **Costs**

[33] The issue of costs is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority