

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 527/10
5303311**

BETWEEN WEI LUN WU
 Applicant

AND JDC NEW ZEALAND CO
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Mr Jin, Director of JDC

Investigation Meeting: 15 November 2010 at Auckland

Determination: 23 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Wei Lun Wu, claims he was employed by the Respondent, JDC New Zealand Co. Ltd (“JDC”), at the Enjoy Inn Restaurant (“the Restaurant”), from 2003 until 14 February 2010, when he was unjustifiably dismissed by the Respondent.

[2] JDC denies the claim that it unjustifiably dismissed Mr Wu on the basis that Mr Wu was not an employee but an independent contractor.

[3] If it is determined that Mr Wu was an employee, JDC denies the claim that it unjustifiably dismissed Mr Wu, on the basis that all employees were employed subject to completing a 6 month trial period, and Mr Wu’s employment terminated prior to the six month trial period not being completed. Consequently Mr Wu’s employment justifiably came to an end as a result of this condition not being fulfilled.

[4] Alternatively, if Mr Wu was an employee JDC denies the claim that it unjustifiably dismissed Mr Wu on the basis that Mr Wu voluntarily terminated his employment through resignation.

Issues

[5] The issues for determination are:

- a. Whether Mr Wu was an employee or an independent contractor during the period of his employment with JDC.
- b. If Mr Wu is deemed to be an employee, whether Mr Wu was employed subject to a trial period, such that as a result of Mr Wu not completing the trial period, his employment justifiably terminated on this basis.
- c. If Mr Wu is deemed to be an employee, whether Mr Wu was unjustifiably dismissed by JDC or whether he resigned.

Background Facts

[6] Mr Wu said he was employed as a chef at the Restaurant in 2003, prior to JDC acquiring the Restaurant in February 2009. During February 2010 Mr Wu was the main chef at the Restaurant.

[7] The Restaurant had a succession of owners during the period Mr Wu was employed at the Restaurant. On 16 February 2009 JDC purchased the Restaurant, and Mr Jin, the Director of JDC, took over management of the Restaurant and the staff.

[8] Mr Wu said that he was not provided with a written employment agreement by JDC. Mr Jin explained that he had given every staff member an application form and an IRD form. Mr Jin said that the reason he had done so was in order to establish information about the staff members who worked at the Restaurant which was not otherwise available to him. This information included employee addresses, telephone numbers and IRD numbers.

[9] Mr Wu stated that the terms of the oral agreement under which he worked were:

- a. A 6 day working week, with hours of work from 11 a.m. to 3 p.m. and 5 p.m. to 10.30 p.m.
- b. A weekly wage of \$1,200.00 net, paid in cash
- c. Duties which included cooking, ordering stock, preparing a special menu for special bookings, and management of the kitchen and kitchen staff members.

[10] Mr Wu also said that if the Restaurant was busy, he would work from 11 a.m. to 10.30 p.m. without breaks. There was no additional payment made to him on these occasions.

[11] Mr Jin stated that Mr Wu was paid a net weekly payment in two parts, \$500.00 and \$700.00, and that the payment of \$700.00 included payment of \$150.00 in respect of annual leave entitlement and statutory holiday payment. Mr Jin said that Mr Wu signed each week an acknowledgement of receipt of the weekly payments.

[12] In the period mid-June to mid-September 2009, Mr Wu obtained approval from Mr Jin for a 3 month period of absence, during which time he returned to China for personal reasons. Mr Wu was not paid by JDC during this period.

[13] Prior to obtaining this approval, Mr Wu said that he had to find another chef to replace him during this period of absence. Mr Wu said he found Mr Li to replace him and that JDC paid Mr Li during this 3 month period. However upon Mr Wu's return in mid-September, he was asked by Mr Jin to pay Mr Li \$1,200.00 in respect of annual leave entitlement earned, but not taken, by Mr Li during his employment at the Restaurant. Mr Wu stated that Mr Jin said he would reimburse Mr Wu for this payment by making Mr Wu a 4 week holiday entitlement payment at the end of the year, 1 week of which would be the reimbursement of the monies paid by Mr Wu to Mr Li.

[14] Mr Wu stated that he was asked by Mr Jin to purchase dried seafood for JDC whilst in China. Mr Wu purchased the seafood and was reimbursed by Mr Jin upon his return to the Restaurant.

[15] Mr Wu said that when he was in China, there was some disturbance among the staff in the Restaurant following the resignation of a sous-chef. Mr Jin had contacted Mr Wu and requested him to speak to some of the Restaurant staff members, which Mr Wu duly did, and the problem was resolved.

[16] Mr Wu and Mr Jin enjoyed a good working relationship until December 2009, when Mr Wu began applying for his wife to join him in New Zealand. JDC provided proof of Mr Wu's earnings to New Zealand Immigration, at which point Mr Wu said he became aware that JDC had not been paying the correct amount of PAYE to the IRD. Mr Wu raised this issue immediately with Mr Jin but failed to get a satisfactory response or resolution, and that from this point on there were arguments between the parties.

[17] Monday 13 February 2010 was the day before Chinese New Year and Mr Jin said he had, as was customary, presented all staff members, including Mr Wu, with a red envelope gilded with a golden "Luck" word on it and containing a monetary gift.

[18] Mr Wu stated that some of the staff, himself included, had worked until late that evening on preparation work because the next day was expected to be the busiest day of the year.

[19] Sunday 14 February 2010 was the first day of the Chinese New Year and the Restaurant had been extremely busy with little time for breaks. Mr Jin said that at approximately 8.30 p.m. when the Restaurant was still very busy, he became aware of a loud disturbance in the kitchen. On entering he found a disturbance between the kitchen staff, and Mr Wu was shouting and banging a metal spatula. Mr Jin said that he had spoken to the staff and they became calmer.

[20] Mr Wu denied that there had been any incident in the kitchen that evening, explaining that noise in the kitchen was a normal occurrence as the staff needed to talk very loudly due to the background noise made by the ventilation fan.

[21] At approximately 9.45 p.m. the Restaurant had emptied, and the staff began to have their dinner. Mr Wu said he had just got his bowl of rice and was about to sit down when Mr Jin asked to have a talk with him. Mr Jin stated that he had wanted to discuss what had happened earlier in the kitchen and that during their discussion Mr Wu had asked if he could take some holiday. Mr Jin said he had told Mr Wu this was not possible.

[22] Mr Wu stated that Mr Jin had suddenly informed him he was dismissed and that he did not need to come to work the following day. Mr Wu said Mr Jin had not given him a reason for his dismissal. Mr Wu stated he had requested that his final payment include his holiday pay, and that Mr Jin had told him to return the next week to collect the final payment.

[23] Mr Jin said that he had told Mr Wu he could not take annual leave, whereupon Mr Wu had become upset. There ensued heated words between himself and Mr Wu who had asserted that he (Mr Wu) was an essential member of the Restaurant, without whom it would close. As a result of this statement Mr Jin had said he would give Mr Wu 3 weeks to find another position. Mr Jin denied that he had dismissed Mr Wu and that he had expected Mr Wu to return to work at some stage during the 3 week period.

[24] Ms Gu, the receptionist at the Restaurant, said that she had overheard part of the conversation between Mr Wu and Mr Jin, specifically she had heard Mr Wu's request for holiday and she had heard Mr Wu stating that Mr Jin was firing him. Ms Gu said that after this remark, Mr Wu walked away from Mr Jin and joined the other staff members at the dinner table.

[25] Mr Wu disputed that Ms Gu could have overheard any part of the conversation between himself and Mr Jin, given that the reception desk was some distance away from the table where he was sitting with Mr Jin.

[26] Mr Yan and Mr Jun, who were employed at the Restaurant on 14 February 2010, gave evidence that they saw Mr Wu and Mr Jin having a conversation, although they could not hear what was being discussed. They both confirmed that when Mr Wu returned to join them at the table where they were eating, Mr Wu had told them

he had been fired. Mr Jun said he was very surprised by this news as it was Chinese New Year.

[27] Mr Wu said that the following day he, accompanied by Mr Yan and Mr Jun, had attended the Citizens Advice Bureau.

[28] Mr Jun said that Mr Jin had told him on 15 February 2010 that Mr Wu was to be replaced by another chef working in the Restaurant, and that Mr Jin had confirmed when asked by Mr Jun, that Mr Wu had been dismissed.

[29] Mr Jin said he had found a temporary replacement for Mr Wu and had confirmed when asked if Mr Wu had been dismissed, that he had said: “*yes, Mr Wu had departed ways with the Restaurant*”.

[30] Mr Wu stated that as agreed with Mr Jin on 14 February 2010, he returned to the Restaurant 5 days later on 19 February 2010, to receive his final payment. Mr Wu said Mr Jin refused to pay him his annual and statutory holiday leave entitlements and then wrote up a “*Certificate for leaving JDC New Zealand Co Ltd*”. This document identified the parties to it as Employer (A), being JDC New Zealand Co Ltd, and Employee (B), being Wei Lun Wu; made provision for the signatures of the parties to be entered; and stated:

- a. A&B agree that B to be put on two trial periods (3 months and 6 months)*
- b. A&B agree that B is to provide 3 weeks notice and leave A*
- c. A paid B \$4,200 and allow B to look for jobs*
- d. A&B have no financial disputes*

[31] Mr Wu said that this was the first time he was made aware that his employment had been subject to a trial period. Mr Wu disputed that there had been a notice period as Mr Jin had told him to leave immediately.

[32] Mr Wu said Mr Jin had asked him to sign this document immediately but he (Mr Wu) had refused to do so and had left the Restaurant with the unsigned

document. Mr Jin stated that he had drafted the document at Mr Wu's request and according to Mr Wu's demands.

Determination

Was Mr Wu was an employee or an independent contractor while working at the Restaurant for JDC?

[33] Mr Wu did not have a written employment agreement with JDC but Mr Wu said that there was an oral agreement. Mr Jin agreed that there had been a conversation during which the terms of employment as stated by Mr Wu were agreed.

[34] Mr Jin explained his belief that as Mr Wu had not completed and returned the application form which had been provided to him, consequently his employment was subject to a "*weekly contract basis*".

[35] In deciding whether Mr Wu was employed by JDC as an employee, I apply s.6 of the Employment Relations Act 2000 ("the Act") which provides:

"s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the ... Authority... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider all relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[36] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[37] Mr Wu stated there was an oral contract of employment between the parties, Mr Jin agreed the terms applicable to Mr Wu’s position were as Mr Wu represented, but stated that these terms were agreed on the basis that the services were provided by Mr Wu as an independent contractor.

[38] Inland Revenue documentation submitted by Mr Wu to the Authority showed that Mr Wu had had various employers from 2003, culminating with JDC, all of whom had paid PAYE on his behalf to the Inland Revenue.

[39] I find these facts provide strong, if not conclusive, evidence of an employer-employee relationship.

¹ [2005] 1 ERNZ 372

Control and Integration test

[40] Turning to the manner in which the relationship operated in practice I note that Mr Jin expected by Mr Wu to: attend work on 6 days each week; manage the kitchen employees; create special recipes and other dishes; order food; and ensure that the quality of the dinner service was satisfactory each day. Mr Wu was not allowed by Mr Jin to take any annual or statutory leave entitlement.

[41] I find that Mr Wu was subject to the control of Mr Jin in his daily work. I further find that the nature of the duties Mr Wu was expected to perform as the head chef of the Restaurant meant that he was integral to that business.

[42] This view is supported by the evidence that when Mr Wu was on extended leave in China, he was telephoned by Mr Jin and requested by him to assist in resolving a problem which had arisen with the Restaurant staff.

Fundamental Test

[43] In considering the fundamental question of whether Mr Wu was in business on his own account I find the following facts significant:

- a. The fact that Mr Wu was responsible for providing the services of Mr Li during his absence when he took extended unpaid leave to go to China, could have been an action undertaken by someone on a contract to provide services. However I note Mr Wu's evidence, which was not challenged by Mr Jin, that although Mr Wu was expected to reimburse Mr Li for holiday pay earned but not taken during the 3 month period, this was on the basis that the amount paid was to be reimbursed to Mr Wu in the form of an additional week of annual leave entitlement at the year end.
- b. While in China, Mr Wu was requested by Mr Jin to purchase dried seafood. When Mr Wu returned to New Zealand and recommenced work in the Restaurant, he gave the seafood to Mr Jin, and there is no evidence that Mr Wu purchased and sold any dried seafood on his own behalf.

- c. Mr Wu worked 6 days a week at the Restaurant, using the facilities and staff provided by JDC. In performing his duties as a chef, Mr Wu ordered and used stock which was paid for by JDC.

[44] I find that Mr Wu was not in business on his own account.

[45] I determine that Mr Wu was an employee in the employment of JDC rather than an independent contractor.

Was Mr Wu was employed subject to a trial period?

[46] The Employment Relations Act 2000 (“the Act”) makes provision for trial periods at ss 67A and 67B. The Act states:

*S 67A(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –*
(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee’s employment, the employee is to serve a trial period

[47] Mr Wu’s employment was not subject to a trial period pursuant to s 67A (2) of the Act since the provision was not in writing and Mr Jin refers to trial periods in excess of 90 days.

[48] The Act makes provision for periods of probation at s 67:

S 67 Probationary arrangements
(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of employment –
i. The fact of the probation period must be specified in writing in the employment agreement;

[49] Mr Wu was not provided with a written employment agreement, and Mr Wu clearly stated that he did not agree to a trial or probationary period. Mr Wu’s employment was consequently not subject to a probationary period pursuant to s67.

[50] As Mr Wu was not employed subject to a trial period in accordance with the provisions of the Act, I determine that his employment was not justifiably terminated on the basis of a trial period which was not completed.

[51] It is not necessary, given that I have found there was no applicable trial period, to determine whether Mr Wu had completed 6 month's service with JDC, but for the sake of completeness I note that during the period when Mr Wu was on extended unpaid leave in China, he was still employed by JDC and would have been deemed to have the requisite 6 month trial period service with JDC.

Was Mr Wu was unjustifiably dismissed by JDC or did he resign?

[52] On 14 February 2010 Mr Wu gave evidence that after what had been a long and very busy period of work, he had served himself with a bowl of rice in preparation for joining the other employees in their evening meal. There was no indication at this point that Mr Wu was contemplating resignation.

[53] It was Mr Jin who initiated the conversation with Mr Wu, during which Mr Wu requested permission to take annual leave. This request was refused by Mr Jin. I consider that there followed a heated conversation between the parties.

[54] I consider that Mr Jin had possibly not intended there to have been an irrevocable parting of the ways. However whatever his intention may have been in relation to the 3 week period, Mr Wu had come away from the conversation with a clear impression that he had been dismissed by Mr Jin, as supported by the evidence of Mr Yan and Mr Jun.

[55] When Mr Wu had requested his final payment at the conclusion of this conversation on 14 February 2010, Mr Jin had not clarified that there was no final payment as Mr Wu was not dismissed, but had told Mr Wu to come back the following week to collect it.

[56] Additionally, when questioned by some of the employees at the Restaurant if Mr Wu had been dismissed, Mr Jin confirmed that Mr Wu had been dismissed.

[57] I find that Mr Wu did not resign, but that he was dismissed by JDC.

[58] There was no substantive justification for the dismissal, nor was a fair process followed. I determine that Mr Wu was unjustifiably dismissed by JDC.

Remedies

Lost wages

[59] I have found Mr Wu's employment to have been unjustifiably terminated by JDC with effect from 14 February 2010. Mr Wu says that he tried to mitigate the effects of the loss of his employment by looking for alternative employment but was unable to supply evidence of this. In *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*² Chief Judge Colgan commented that the obligations of a dismissed employee making a loss of earnings claim are as follows:

...dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[60] In *Radius Residential Care Limited v McLeay*³ the Employment Court observed in relation to the employee's obligation to mitigate loss that: "*The Court should not be left to speculate or guess.*"

[61] Mr Wu produced no tangible evidence of his attempts to find alternative employment but stated that there would not be vacancies available in the period following Chinese New Year, and that he had applied for a job at the Casino through the introduction of a friend, but was unsuccessful in that application as the vacancy had been filled.

[62] Mr Jin made representation to the Authority that Mr Wu, being an experienced chef, should have been able to find alternative employment in a relatively short period of time, and in support of such a claim produced evidence of vacancies for chefs advertised in Chinese newspapers during February and March 2010.

² (2009) 6 NZELR 530

³ Unreported [2010] NZEMPC 149

[63] I am not convinced that Mr Wu made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment.

[64] I note that Mr Jin paid Mr Wu the sum of \$4,200 upon the termination of his employment. This sum included payment for the days worked by Mr Wu during the week of 14 February 2010 and 3 weeks payment in lieu of notice. Taking into consideration a nominal notice period, which in the absence of an employment agreement, but taking into consideration the weekly remuneration period, I set at 2 weeks notice, I determine that Mr Wu has received the appropriate payment in respect of notice from JDC, and I award no further sum in respect of lost wages.

[65] Mr Wu claimed that he had received no annual or statutory holiday entitlement throughout his period of employment with JDC. I determine that, as an employee, Mr Wu should have received the annual and statutory holiday payment entitlements.

[66] Under the Holidays Act 2003 annual leave must be paid to the employee in one of two situations:

s 27 When payment for annual holidays must be made

(1) An employer must pay an employee for an annual holiday before the holiday is taken unless –

- (a) the employer and employee agree that the employee is to be paid in the pay that relates to the period during which the holiday is taken; or*
- (b) the employee's employment has come to an end*

[67] Mr Wu said that it had been agreed by Mr Jin that he would be paid annual leave entitlement before he went on extended leave to China for 3 months in 2010. However Mr Wu stated that he had received no annual leave payment. Mr Wu also stated that he had received no payment in respect of annual holiday entitlement following the termination of his employment. I find that there have been no annual holiday leave entitlement payments made pursuant to s 27 of the Holidays Act 2003.

[68] Mr Jin has claimed that the weekly payments made to Mr Wu included a payment in respect of annual and statutory leave entitlements.

[69] Holiday pay may only be incorporated into an employee's regular pay in respect of two categories of employee pursuant to s 28 Holidays Act 2003:

s 28 When annual holiday pay may be paid with employee's pay

(1) Despite section 27, and employer may regularly pay annual holiday pay with the employee's pay if –

(a) The employee –

(i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or

(ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16, and

(b) the employee agrees in his or her employment agreement; and

(c) the annual holiday pay is paid as an identifiable component of the employee's pay

[70] Mr Wu's employment was not a fixed term agreement to work for less than 12 months, nor was the nature of the work intermittent or irregular. Mr Wu was a permanent employee with a regular pattern of working. I find that no annual holiday leave entitlement payments could have been made pursuant to s 27 of the Holidays Act 2003.

[71] I determine that Mr Wu is entitled to payment in respect of annual leave entitlement.

[72] Mr Wu stated that he worked all the statutory holidays that fell between the period 16 February 2009 and 14 February 2010 but that he received only his relevant daily pay in respect of those days. Mr Wu is therefore entitled to an additional payment of half his relevant daily pay in respect of 10 statutory holidays worked during the period pursuant to s.50(1)(a) of the Holidays Act 2003. As 7 of the statutory holidays fell on days which would otherwise have been working days for Mr Wu, Mr Wu is additionally entitled to payment in respect of 7 alternative holiday days pursuant to s.56(1) of the Holidays Act 2003.

[73] I make the following award:

- a. A payment of \$3,000.00 net in respect of annual leave entitlement for the period 16 February 2009 to 14 February 2010, excluding the 12 week period between mid-June 2010 to mid-September 2010.
- b. A payment of \$2,400.00 net in respect of statutory leave entitlement for the period 16 February 2009 to 14 February 2010.

Compensation

[74] I am satisfied from the evidence given by Mr Wu that he suffered humiliation and injury to feelings as a result of the dismissal. I also accept that the fact of his dismissal with the resulting lack of an income and Mr Jin's failure to complete the forms sent to JDC by Work and Income New Zealand in respect of Mr Wu, compounded these feelings.

[75] I make the following award: a payment under s. 123(1)(c)(i) of the Act for hurt, humiliation and injury to feelings in the sum of \$3,000.00.

Contribution

[76] I have considered the matter of contribution as I am required to do under s124 of the Act. Mr Wu did not contribute to the situation which gave rise to the grievance. There is to be no reduction in remedies.

Costs

[77] While costs are reserved, I note here that, subject to his submissions, Mr Wu represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority