

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 495/10
5286771

BETWEEN WEI CHENG (JAMES) YU
Applicant

AND GOLDEN WORLD (NZ)
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Mark Nutsford, advocate for Applicant
Lisa Yu, advocate for Respondent

Investigation Meeting: 22 July and 15 October 2010

Submissions Received 26 and 29 July, 1 and 8 November 2010

Determination: 29 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated problems that arose from an employment relationship between the applicant Mr Wei Cheng (James) Yu and the respondent company Golden World (NZ) Limited.

[2] The problems were at the beginning and end of the short relationship. At the start Golden World did not provide James Yu with a copy of the employment agreement. At the finish Golden World dismissed James Yu, leading him to raise a personal grievance claim of unjustifiable dismissal. He has also claimed that he was not paid holiday pay for the period of his employment.

[3] Mediation was undertaken by the parties but they remained unable to resolve the employment relationship problem on their own terms.

[4] To remedy his claims James Yu seeks orders under the Employment Relations Act 2000 requiring Golden World to reimburse him lost wages of \$6,375.20 and holiday pay of \$604.35. He also seeks compensation of \$10,000, for humiliation and distress, and a penalty under s 63A of the Act for Golden World's failure to provide him with a copy of the employment agreement.

[5] The facts are to be established from the evidence, much of it sharply conflicting, given by James Yu and Ms Lihua (Lisa) Yu who is the sole director of Golden World (NZ) Ltd. Written and oral evidence taken from them included a number of documents and papers signed by one or both. To help resolve the conflict of evidence the Authority summonsed and examined Mr Michael Huang. He was the General Manager of Golden World during most of Mr Yu's employment and gave key evidence.

[6] The employment relationship lasted only about seven weeks, or little more than half of the three month trial period Lisa Yu claims was a term of the employment. It is significant that she was only present in the workplace for about one quarter of the short employment period. In her evidence Ms Yu confirmed that she had travelled overseas on 18 September 2009 and not returned to Auckland until 27 October. By her own account she could only have been physically present at Golden World for a total of six or seven working days during the period James Yu was employed there.

[7] There is no dispute that James Yu was dismissed by Golden World. Lisa Yu said in evidence she had given him one weeks notice on 30 October. There is also a letter dated 5 November written by Lisa Yu confirming dismissal from that day. She said she gave the letter to James Yu on 6 November. The only reason for dismissal expressed in the letter is that James Yu was not "a right fit" for Golden World and was not "suitable" for the position.

Mr Huang

[8] During her absence from 18 September to late October, Lisa Yu was not in a position to directly supervise the workplace but she left Mr Huang the general manager in charge. Lisa Yu said that while she was away she had kept in frequent contact with him, by email and fax. On her return she found the business had not been

run properly to her requirements. She regarded Mr Huang as having had the responsibility for doing that while she was away, and for supervising James Yu.

[9] Mr Huang's employment terminated soon after Lisa Yu's return. Although there is some dispute between Lisa Yu and Mr Huang as to whether he resigned or was dismissed by her, it is clear she regarded him as having failed to perform satisfactorily as Golden World's general manager. She said that when she returned from her overseas trip she found his management was "such a mess" that she had not wanted to continue employing him. Her evidence was that Mr Huang's employment had reached the end of a trial period of five months, during which he had shown himself to be unsuited for the position.

[10] Mr Huang was in a position to directly observe the conduct and performance of James Yu, and he was also in charge of the workplace and of James himself while Lisa Yu was away. Because Mr Huang had direct knowledge of what happened during that time, and because neither party had presented Mr Huang as a witness, faced with deep and extensive conflict between the evidence of James Yu and Lisa Yu the Authority made contact with Mr Huang and issued a summons requiring him to give evidence.

[11] The Authority had some doubts about Lisa Yu's evidence as to what she had been told about James Yu by Mr Huang while she was overseas, before Mr Huang's evidence was obtained. That evidence supported much of James Yu's and contradicted much of Lisa Yu's. Her response to Mr Huang's evidence has been that he and James Yu have conspired to give false evidence so they can exact revenge against Golden World for ending their employment. I reject this, as Mr Huang had not wanted to be involved in any way in the case at all. He was contacted by the Authority and had to be compelled to give evidence, which he accepted as his duty. James Yu did not present Mr Huang as a witness, and in the way the investigation progressed it seems quite unlikely that he was gambling on the Authority itself eventually calling Mr Huang.

[12] Overall Mr Huang, who has degrees in engineering and commerce, presented as a reluctant witness whose only interest was to give evidence of material facts and not opinions. He had not wished to be drawn into the circumstances in which his own employment with Golden World had terminated and he had to be pressed by the Authority to answer some questions about this. I assessed Mr Huang to be honest and

credible. I have preferred his evidence to that of Lisa Yu where there has been any conflict in material respects.

Date employment commenced

[13] There was a conflict in the evidence as to whether 14 or 21 September was the date on which James Yu commenced employment. I find that he first came into contact with Golden World after seeing a job vacancy advertised in a Chinese language newspaper on Saturday 12 September 2009. He was interviewed by Lisa Yu for the position the same day. There is no dispute that Mr Huang was present during the interview. I find that James Yu commenced employment with Golden World on Monday 14 September. This was James Yu's evidence and Mr Huang confirmed it with his, which I accept on this point. The evidence of another Golden World employee, Ms Elaine Teh, was consistent with 14 September being the start date. In the presence of a witness she also signed a statement saying she had commenced work with James Yu on that date. A copy of that statement was produced to the Authority.

[14] Pay records for James Yu show that his first pay of \$440 net was direct credited to his ASB account on 25 September 2009. If he had started on the Monday of 21 September he would not have worked a full week before receiving his first pay. There is also another document signed by Ms Teh and James Yu, as well as by Lisa Yu, in which the start date is given as Monday 14 September 2009.

Copy of written employment agreement – s 63A of the Act

[15] I find that Golden World did not give James Yu a copy of the proposed employment agreement, as employers are required to give their intended employees by s 63A(2)(a) of the Employment Relations Act. Compliance with this provision gives valuable protection to employers as well as employees. Golden World may have avoided the need for this investigation by the Authority if it had recorded the employment agreement in writing and given James Yu a copy before the employment relationship had commenced. Doing so would have provided greater certainty as to whether there was any trial period and, if so, the duration of it. The gross rate of pay would have been clear from the outset, and also whether a 90 day trial period under the Act applied, as Lisa Yu has suggested was the case in her submissions.

[16] Lisa Yu's evidence was that she had told James Yu she would prepare a formal employment agreement after she returned to New Zealand from her overseas

trip. The only document shown to the Authority even remotely like an employment agreement is a handwritten letter confirming entry into an employment relationship, and the gross rate of pay and duties. James Yu initiated the writing of this. He presented it to Lisa Yu and her husband, Mr Stephen Qiu, both of whom signed it. The letter reads:

Dear Wi Cheng (James) Yu:

This is a confirmation letter of employment in Golden World NZ. You started working as a Warehouse Managing and Sales Executive from Monday 21st of September, 2009 officially employed.

Lisa Yu and I, Stephen Qiu, as company director of Golden World NZ Limited confirm your salary per hour is \$11/hour after tax, every week you get paid \$440 NZ net (after tax) on hand.

Your duty mainly looking after warehouse, use forklift shifting products customer service and sales oriented.

Regards

[17] As the document shows, and as they confirmed in their evidence, Mr Stephen Qiu signed it on 15 October 2009 and Lisa Yu on 28 October 2009, the day after returning from her overseas trip and more than a month after the employment had commenced.

[18] In the original version of his letter presented to the Authority by James Yu, the date of 21st of September 2009 has been crossed out and 14th September written underneath. James Yu said he had made this alteration to reflect the correct start date. A copy of the document retained by Lisa Yu shows that the date was originally written as 21st September. I have accepted the evidence of James Yu, Mr Huang and Ms Teh that the 14th was the date work started, not the 21st of September. The correction was properly made by James Yu to reflect this fact.

[19] There was conflict between the evidence of James Yu and Lisa Yu as to whether the employment was subject to a trial period. James Yu said that it was not and there had never been a discussion about that, whereas Lisa Yu says that at the initial job interview she told James Yu his employment would be subject to a work trial for three months. Mr Huang said he had heard no mention of any trial period made during the job interview on 12 September. I find there was no oral or written agreement as to a trial period being a term or condition of the employment.

[20] In submissions Lisa Yu fell back to contending that the statutory 90 day trial period had applied. If a trial period under s 67A and s 67B of the Act had been intended, Golden World did not comply with the requirements for creating it. A fundamental requirement is to have any provision for a trial period under the Act in writing contained in the employment agreement at the commencement of the employment. There was no written employment agreement at all at the start of the employment and the handwritten letter signed during the employment says nothing about a trial period of any kind.

[21] I find there was a clear breach of s 63A. The imposition of a penalty against Golden World is appropriate.

Whether any warning given to James Yu

[22] In her written evidence Lisa Yu said that she left New Zealand on 18 September. This would have been before Mr Yu had started, according to her evidence of his start date. In October 2009 while she was still away Lisa Yu said Mr Huang had given her reports of poor performance by James Yu. She told the Authority she had asked Mr Huang to hold a meeting with James to advise him that if he did not improve dismissal would be considered.

[23] In Golden World's statement in reply there is a copy of a warning letter dated 21 October 2009 addressed to James Yu. Lisa Yu said in evidence she sent it to Mr Huang to give to James Yu. It reads:

James,

Having regard to your performance during the trial period, our company does not think you are suitable for the position. You have been slacking at work and idling away the working hours. You do not have a forklift licence. Notice is hereby given that you are given two weeks to make improvement and your performance will be scrutinised.

Lisa

[24] In his evidence James Yu denied receiving that letter. He denied being told at any time by Mr Huang that he was required to improve his performance or else face the possibility of dismissal. Mr Huang's evidence strongly supported James Yu's claims in this regard.

Mr Huang's employment with Golden World ended on about 30 October. After he had gone Lisa Yu had a meeting with James Yu at which she said he was told that

Golden World was completely dissatisfied with his job performance. The meeting occurred after only six days of the 10 working day period referred to in the above warning letter of 21 October 2009 which expresses a requirement for James Yu to improve his performance.

Mr Huang's evidence about complaints reported to Lisa Yu and warnings given

[25] Mr Huang said he had once asked James Yu to speed up the loading of stock onto shelves but had given him no warnings at any time, whether orally or in writing. He denied that he had told Lisa Yu while she was away that James' conduct or performance had been unsatisfactory in any way. Every item of alleged misconduct or performance as set out in Lisa Yu's written evidence was put to Mr Huang. In each case he refuted the claim that he had passed on a complaint or report to Lisa Yu about it.

[26] Mr Huang denied that Lisa Yu had asked him to issue a warning to James Yu. He denied that he had been sent a copy of the warning letter dated 21 October 2009, or that he had been instructed to give it to James Yu. Mr Huang's evidence was that he had never seen the warning letter produced by Golden World until he was summonsed to give evidence by the Authority and shown a copy of it on 15 October 2010.

[27] I accept the evidence of James Yu, which has been corroborated by that of Mr Huang. I find that James Yu received no disciplinary warning of any kind at any time from his employer. The evidence of Lisa Yu to the contrary, I reject.

The dismissal

[28] Lisa Yu said that she gave a formal dismissal letter to James Yu on 6 November and told him that was his last day in the job. The letter is dated 5 November and reads:

Letter Terminating Employment

To: James

From: Golden World

James,

Golden World formally notifies you that your performance during the Trial Period has been assessed we do not think you are a right fit for the company; nor do we consider you are suitable for the position. We decide to terminate your employment, effective from 6.30pm 5 November 2009. Our company will transfer your holiday pay to your bank account on 12 November 2009.

Lihua Yu

[29] Lisa Yu said in evidence that after his dismissal James Yu returned to Golden World's premises on 9 November and asked to keep his job. Lisa Yu said that she told him the reasons why he was not suitable and asked him to leave the building. James Yu then rang the Police. They attended and interviewed those present before issuing James Yu with a trespass notice. James Yu explained in evidence that he rang 111 after becoming upset about having his employment terminated in front of other staff and being asked to take off company clothing in the presence of some female employees.

Driving forklift and other alleged misconduct

[30] The confirmation of employment letter written by James Yu and signed by Lisa Yu on 28 October confirms that using the forklift was one of James' duties in his employment.

[31] Lisa Yu said that James Yu had been asked at the employment interview to present a forklift licence when he began work, and also an ID such as a passport, and two references from previous employers. James Yu said he had shown his passport and references at the interview. He did not hold a forklift licence but had an ordinary car licence. He said he drove the forklift around in Golden World's premises while employed there, with the knowledge of Mr Huang. Mr Huang said he had made no issue about James Yu's production of appropriate documents requested. Mr Huang seems to have permitted the employment to commence without requiring production of a forklift licence by James.

[32] Mr Huang said he had been concerned about compliance with the regulations and had undertaken training to get the appropriate endorsement on his own driver's licence, permitting him to use the forklift. He said he had intended later to send James Yu on the same course. I find that Golden World through its general manager Mr Huang was fully aware that James Yu did not have a forklift licence when he commenced but, without making a disciplinary issue of it, had intended to see that James did become properly licensed. Mr Huang knew that James Yu was driving the forklift and took no steps to warn or discipline James. Lisa Yu said she had given James Yu two weeks to rectify his lack of the licence, yet he was dismissed before that period had expired.

[33] Lisa Yu said in her written evidence that this and other serious misconduct of James Yu was disclosed to her while she was away overseas, during regular email and telephone communication she had had with Mr Huang. In one telephone discussion she said he had made the following complaints about James Yu:

- Taking one hour for lunch instead of half an hour;
- Taking a week to put stock – plastic flowers – on a 6.0 x 0.4 metre shelf;
- Taking too long to deliver goods – resting outside client’s premises for 3 to 4 hours;
- Taking food belonging to other staff – apples, eggs;
- Not finishing jobs;
- Not having a forklift licence;
- Using the company phone for chatting to his friends;
- Spending 20/30 minutes in the toilet.

[34] Mr Huang denied making any of these complaints to Lisa Yu. I accept his evidence and reject hers. In the context of misconduct Lisa Yu also referred to serious damage caused to the engine of Golden World’s van used for deliveries. She maintained that the engine failure had been James Yu’s fault, as he had not put water in the radiator before using the vehicle. It seems that overheating caused the damage to the vehicle which apparently was old and had done a high mileage. Mr Huang said he had had concerns about its safety on the road. Mr Huang did not consider that the breakdown was the fault of James Yu.

[35] Lisa Yu said she had also been “suspicious” that James Yu had stolen property belonging to her which she had left stored on the premises of Golden World. This property was a lawn mower and a hedge trimmer. James Yu confirmed in evidence that had taken the lawn mower to use but said he had been given permission to borrow it by Mr Huang. James Yu returned the lawn mower on 10 November, after he had been dismissed. He denied taking or even seeing on the premises any other equipment such as a chainsaw or hedge trimmer. It is clear that James Yu was never

confronted by Lisa Yu with her suspicions that he had stolen her property. The dismissal letter makes no mention of any lawn mower or its removal by James Yu. Mr Huang confirmed that he had allowed James Yu to borrow the mower for his personal use at home.

[36] Lisa Yu said she had considered giving James Yu more time to improve his performance before dismissing him but had found out he had told others that a man who had given her a ride in his car was her boyfriend. Lisa Yu said that when she had confronted James Yu with this he said he had been just kidding.

[37] Lisa Yu said these were just some of the matters for which she decided to dismiss James Yu. She claims that he was given one week's notice by her. If a trial of three months had been agreed, the dismissal occurred well inside that period which would not have expired until about 14 December. If three months was a probation period, James Yu was not permitted to complete it.

Whether dismissal justified

[38] The test of justification at s 103A of the Act cannot be met in this case. This is because most of the conduct put forward to the Authority by Golden World as amounting to grounds for dismissal did not occur, I find. I am satisfied that Golden World did not have any reasonable basis for believing James actions amounted to serious misconduct or poor performance and did not rely on such a belief to justify his dismissal.

[39] Lisa Yu had no basis for believing that James Yu was to blame for the work van breaking down while he was driving it. Although he did drive the forklift without a licence this was known by the general manager of Golden World, Mr Huang, who did not stop him but planned to have James become licensed. Lisa Yu claims that she gave James Yu two weeks to "make improvement." If so he was dismissed without being given the opportunity to improve in this regard.

[40] Golden World has not shown that it had reasons to justify dismissal. While it is likely Lisa Yu did have some reason for dismissing James Yu, she has not explained to the Authority what that reason truly was. It might have been that her dissatisfaction with Mr Huang, causing the termination of his employment, left her thinking the worst of James Yu. If so dismissal was unjustified, as it was her decision to employ Mr Huang in the position of general manager and to leave him in

charge of the company and of James Yu while she was away. Any failure in performance by his supervisor cannot be visited upon James. There is no suggestion that Mr Huang and James Yu had connived to allow James to commit misconduct while Mr Huang encouraged James or looked the other way. The Authority is not required to guess the reasons for dismissal when they have not been disclosed by the employer.

[41] No sufficiently clear reasons for considering any disciplinary action were put to James Yu for him to respond to with any explanation he might have. If there had been a probation period in the employment, which I have found there was not, there was no fair assessment of James Yu's performance during that period. There were no proper warnings about his performance or conduct so that he knew what standards were expected and how long he had to make improvements.

[42] Applying the test of s 103A of the Act, I find that the actions of Golden World and how Golden World acted in relation to the dismissal of James Yu were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. James Yu has a personal grievance.

Failure to pay holiday pay

[43] James Yu's evidence was that Lisa Yu had acknowledged that he was owed holiday pay. He pointed to a statement written in Chinese by Lisa Yu, part of which referred to a promise by her to pay 8% as holiday pay.

[44] James Yu was employed for less than 12 months and so was entitled to proportionate annual holiday pay, less the value of any leave taken in anticipation of becoming entitled to paid leave after 12 months. His evidence was that he was not paid 8% of his total gross pay earned during the employment from 14 September until dismissal. I find he is owed that money.

Remedies

[45] I am satisfied from the evidence of James Yu and of Mr Huang, who personally observed and supervised him during most of the employment, that there was no contributory fault on the part of James Yu that requires the remedies of lost wages or compensation to be reduced.

[46] As he was dismissed on 6 November, his actions on 9 November that led to him being 'trespassed' from the employer's premises are not relevant in this regard. His alleged behaviour when returning the borrowed lawnmower also occurred after the dismissal, on 10 November.

[47] I am satisfied that James Yu lost wages as claimed and also that he made reasonable efforts to find other employment and mitigate his loss in this regard. He has given satisfactory evidence of that. His claim is for loss over slightly less than 13 weeks, or three months.

[48] I am also satisfied that James Yu suffered considerable humiliation and hurt feelings as a result of the dismissal, particularly when he had given no grounds for that action to be taken against him. He is a young business graduate who had hopes of acquiring management experience from the employment, as well as earning a living. Lisa Yu observed him to be a sensitive person. I consider \$4,500 is appropriate compensation.

Orders

[49] **To remedy the personal grievance and the claims for holiday pay and penalty, Golden World (NZ) Ltd is to pay to James Yu;**

- (1) \$6,375.20 in reimbursement of gross lost wages under s 123(b) of the Act,**
- (2) \$4,500 as compensation under s 123(1)(c)(i),**
- (3) \$604.35 as gross annual holiday pay, plus interest at 5% per annum from 6 November 2009 until paid,**
- (4) \$2,000 as a penalty for breach of s 63A of the Act. Pursuant to s 136(2) half of that amount is to be paid to James Yu and the other half to the Crown.**

Costs

[50] Costs are reserved. An application on behalf of James Yu may be made in writing no later than 20 December 2010. Golden World (NZ) Ltd may reply in writing no later than 14 January 2011.

A Dumbleton
Member of the Employment Relations Authority