

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 130/10  
5138295

BETWEEN	YING YUAN Applicant
A N D	NEW ZEALAND ZHENGDA TRADING COMPANY LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: Ian Thompson, Advocate for Applicant  
Feng Chiao Lee, Advocate for Respondent

Investigation Meeting: 25 and 26 March 2010

Submissions Received: On the day from Applicant  
12 April 2010 from Respondent

Determination: 14 June 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ying Yuan says that she was unjustifiably disadvantaged and dismissed, actually or constructively, from her employment with New Zealand Zhengda Trading Company Limited (Zhengda Trading) between 26 November 2007 and 26 February 2008 as a Chef.

[2] Ms Yuan says that during the period of her employment with Zhengda Trading she was required to work approximately 16 hours a day seven days a week. Further that she had limited freedom of movement and that although most of her wages were deposited into her account they were then withdrawn from her account by her employer without authorisation and she did not have the use of them. Ms Yuan also says that she was required to work on a farm, the Guang Ming Farm, at a location other than that set out in her employment agreement as well as undertake her duties as a chef. She says that as a result of the breaches of her employment agreement she

went twice to the Community Law Centre on 25 and 26 February 2008. The police were called and obtained her bank card from her employer. When the account was accessed there was only \$6.00 in it. The police found Ms Yuan other accommodation and she did not return to work after 26 February 2008.

[3] I clarified with Mr Thompson whether or not there was any claim for wages on behalf of Ms Yuan. He advised that there was not as wages and holiday pay had been dealt with by the Labour Inspector.

[4] Mr Thompson advised the Authority that there was a claim that an unlawful premium had been charged for employment under s.12A of the Wages Protection Act. Ms Yuan also claimed compensation in the sum of \$25,000, damages for breaches of her employment agreement in the sum of \$10,000 and costs.

[5] Feng Chiao Lee is the director of Zhengda Trading that trades as the Luck Restaurant in Christchurch. Zhengda Trading does not accept that it undertook any action or conduct that would establish Ms Yuan's claims of personal grievance. It denies that she was dismissed constructively or actually Ms Lee says that it was Ms Yuan who breached her employment agreement because she misrepresented her skills at the time the employment was offered.

[6] Progress in terms of investigating this employment relationship problem was delayed. Ms Lee faced a charge of theft of wages in the sum of \$3,500 from Ms Yuan. This charge was the subject of a jury trial in or about June 2009 and the investigation meeting set down for that same month was adjourned because of the risk of prejudice to a fair trial. Ms Lee's then counsel, Lee Lee Heah, advised the Authority that the jury at the end of the trial was unable to reach a verdict.

[7] The parties agreed to attend further mediation at that point. The matter remained unresolved.

[8] There was then a further trial in September/October 2009 at which Ms Lee was found guilty of theft of Ms Yuan's wages and was required to repay them.

[9] A Mandarin-speaking interpreter was required by both Ms Yuan and Ms Lee and was available for the duration of the investigation meeting.

**Payments made by Ms Yuan to Ms Lee before employment started**

[10] There is no dispute that Ms Yuan paid Ms Lee money before her employment commenced and that such money was transferred from China to New Zealand. The amount of Chinese money transferred to New Zealand is not in dispute although the exchange rate at the applicable time appears to be. On or about 25 June 2007, Ms Yuan remitted about CNY45,000 from China to, or for the use of, Ms Lee in New Zealand and then later a further CNY2,450 was transferred. Ms Lee says that the amounts were about New Zealand \$7,750 and \$435 respectively. Ms Yuan puts the New Zealand value of the money in excess of \$10,000.

[11] Although there is reference to a premium in some of the earlier correspondence between Mr Thompson and Ms Lee's then representative, it was not a claim in the statement of problem. This was probably because it was, for a period of time, before the Labour Inspector. Ms Yuan said that she agreed to pay Ms Lee legal and immigration expenses but she did not agree to pay for Ms Lee's return airfares because Ms Lee, on her trip to China to interview her went to Taiwan first for a conference and family reasons. Ms Lee on the other hand said that there was agreement reached that Ms Yuan pay legal and immigration expenses and for Ms Lee's airfares to China.

[12] There had been no proper accounting provided to Ms Yuan in terms of how the money that she had sent to Ms Lee had been used. Ms Lee told me during my investigation that such accounting was forwarded to the Labour Inspector who had been involved in and did resolve issues of unpaid wages and holiday pay aside from the money that was the subject of the jury trial.

[13] I asked for a copy of the Labour Inspector's file so I could ascertain the situation in terms of how this money had been spent. Some information was provided to the Labour Inspector under cover of letter dated 9 June 2008 from Ms Lee's then representative Julie McAndrew. Some of the documents that appear to be relied on and are attached to the letter of 9 June 2008 to support the way the money paid had been applied concerned me. There was an invoice for legal fees dated 18 December 2006 which is well before Ms Yuan was interviewed for \$2,250. It is not clear why Ms Yuan would have been required to pay for that invoice. There is another account dated February 2007 for disbursements including advertising in the Press and Otago Daily Times.

[14] Under s.12A of the Wages Protection Act 1983, if money is received by an employer in contravention of the provision that no premiums be charged for employment, the person who pays the money may recover that as a debt. Given the amounts paid by Ms Yuan this is a significant matter.

[15] There is a difficulty given that this claim was not in the statement of problem. Ms Lee was not in any position to properly address any claim of this nature or in my view appreciate the seriousness of one. I am strengthened in this view because her statement of evidence prepared by Ms Heah make only limited reference in a brief paragraph to the money paid by Ms Yuan and her agreement to that.

[16] The sensible course of action is for me now to send this matter back to the Labour Inspector for further consideration in light of my comments above.

### **The issues**

[17] The issues before the Authority are as follows:

- What were the terms and conditions of Ms Yuan's employment;
- Was there a breach of those terms and conditions on the part of either party and did those breaches unjustifiably disadvantage Ms Yuan;
- How did the employment relationship end; and
- Was Ms Yuan dismissed constructively or actually;
- If Ms Yuan was dismissed, then was that dismissal justified;
- If Ms Yuan was unjustifiably dismissed, then what remedies is she entitled and are there issues of mitigation or contribution;
- Is this an appropriate case for an award of damages for alleged breaches of the employment agreement if they are established.

## **What were the terms and conditions of Ms Yuan's employment**

### **Hours of work**

[18] Ms Yuan signed a written employment agreement. There was some dispute as to whether this agreement was translated to enable her to understand its contents. Ms Lee says that it was translated and she provided a checklist of documents prepared by her immigration consultant that she says was given to Ms Yuan in China. Ms Yuan says that the document was not translated and she could not understand it being unable to speak or read English but signed it anyway. She says that she was not given a copy although Ms Lee is adamant that she was.

[19] I find that if Ms Lee's evidence is to be preferred, the information Ms Yuan would have about her new job in Christchurch New Zealand was limited to hours of work, payment and her day off. Ms Yuan was to receive in terms of her employment agreement \$550 a week for 40 hours of work. Her days of work would be Tuesday to Sunday. The hours of work were between 11am and 7pm.

[20] In terms of the hours she worked Ms Yuan provided the Authority with advertisements in a newspaper for the Luck restaurant. From those advertisements, it was likely, in my view, that the restaurant was open until 10.30 or 11pm rather than 7pm as set out in the employment agreement. Ms Yuan I find was more likely required to be on duty until that later time.

[21] Ms Lee said in her evidence that on Saturdays and Sundays the restaurant only opened at 5pm. That, however, is inconsistent with the hours set out in the employment agreement and in the advertisements and I find less probable.

[22] For the first week in New Zealand, Ms Yuan lived with Ms Lee on her farm. It is common ground that during that first week Ms Lee took Ms Yuan out for some sightseeing and photos were provided at the investigation meeting of that sightseeing. Ms Yuan said that during that first week in New Zealand, from between 19 November and when she commenced work at the Luck Restaurant on 26 November, she was required to undertake hard labour on the farm from 6.30am to 8pm.

[23] Ms Yuan did accept that she considered Ms Lee's actions during this time were kind and in turn she worked on the farm because of that. I do not find, given

that there is no claim for wages for this period, that it is necessary for me to resolve the dispute about this week.

[24] On 26 November 2007, Ms Yuan commenced work at the restaurant and lived in a room above the restaurant on the first floor rent-free. Ms Yuan says that she worked for almost all of her employment for seven days a week starting between 6.30am and 7am and working through until 11.30pm. Ms Yuan says that she used to start between 6.30 to 7am working on the farm owned by Ms Lee until about 11.30am when she would return to the restaurant and work until 11pm as a chef. Ms Lee says that that claim is totally untrue and that Ms Yuan was never required or expected to work at her farm.

[25] Ms Yuan says that the only time she had days off was toward the end of her employment.

[26] Ms Lee agreed that there were some departures from the written terms of the employment agreement. Ms Lee said that Ms Yuan had Saturday and Sunday off from work rather than the Monday. She said that this was because originally it was contemplated that three chefs would be recruited but as it transpired only two were. If there were only two chefs rather than three then in my view it is less likely that Ms Yuan would have two days off rather than the one contemplated in the employment agreement. There was no other satisfactory evidence about Ms Yuan's days off and on balance I prefer Ms Yuan's evidence that there were no days off until just before the relationship ended.

### **Payment**

[27] The written agreement provided that Ms Yuan's salary would be \$28,600 per annum which was to be paid monthly on the penultimate working day into a bank account nominated by the employee.

[28] There is a significant dispute about the payments made to Ms Yuan. Both parties agree that on 27 December 2007 a bank account was opened for Ms Yuan's salary to be paid into. Ms Lee's son took both Ms Yuan and the other chef to the bank to help them open their bank accounts.

[29] Ms Yuan's evidence is that about a week after the bank account was opened, she was asked by Ms Lee for her PIN number and bank card because Ms Lee needed

access to her salary to pay her tax. Ms Yuan said that she gave permission to Ms Lee to pay tax from that account and that she did not see her bankcard again until it was returned to her by the Police on 28 February 2008. Ms Yuan said that she had accommodation and was provided with food and she thought that she could save the money in her account. She said that she trusted Ms Lee and did not understand the New Zealand tax system.

[30] Ms Lee, on the other hand, said that she did not ask Ms Yuan for her bankcard and PIN number but that Ms Yuan gave them to her so that Ms Lee could withdraw money from her bank account for her. Ms Lee said that except for the occasions she was given the bankcard in order that she could draw money out of the bank account for Ms Yuan, Ms Yuan had the bankcard with her. Ms Lee denies that she ever told Ms Yuan that she had to withdraw money from her account to pay tax.

[31] Both Ms Lee and Ms Yuan agree that there were two cash payments made to Ms Yuan on 1 January 2008 and 5 February 2008. In total the cash payments were \$560 and Ms Yuan said that she remitted most of that money back to China.

[32] Other than that sum, Ms Yuan said that she had no need for any other money and was not given any because she was provided with rent-free accommodation by way of the room above the restaurant and food. She said that she thought that money would be accumulating in her bank account.

### **Freedom of movement and association**

[33] Ms Yuan accepted that she was not as set out in the letter from a solicitor from the Community Law Centre confined to her room above the restaurant without freedom of movement or association. I am satisfied that she was able to come and go as she wished from her room and associate with whom she wished. In saying that, the fact she could not speak English was a difficulty for her as no doubt were the long hours she worked. Those issues and the living arrangement above the restaurant made her more reliant on her employer than another employee may be.

### **Food**

[34] Leading up to the relationship ending Ms Yuan said she only had limited access to food and did not have the money to buy food. If there was such an issue about food and this was fiercely disputed then I find it was in all probability limited to

the inability to access the restaurant on the weekend before the employment relationship ended.

**Was there a breach of the terms and conditions on the part of either party and did those breaches disadvantage Ms Yuan**

[35] There are serious allegations made by Ms Yuan about her employment. As to the credibility of Ms Lee and Ms Yuan I found they both agreed to matters such as receiving money and cash from each other which, in my view, would be unlikely to have been established because of the absence of receipts. There was, however, in terms of the hours of work, payment, whether or not Ms Yuan worked on the farm and her performance, significant dispute.

[36] Having heard the evidence and carefully weighed and considered it, I conclude it is more likely than not that Ms Yuan often, but not always, went to Ms Lee's farm in the morning with the other chef. I find it unlikely that once at the farm she did not then undertake work. I have considered Ms Lee's evidence that Ms Yuan went to the farm to socialise and have company. In part I accept that this may have been a motivation in her going to the farm but also I find it likely that Ms Yuan felt it was expected of her. I also find it likely, having seen advertisements for the restaurant, that the restaurant operated for longer hours than those contained in the employment agreement which, in my view, bore little resemblance in reality to the hours of work required to be undertaken.

[37] In conclusion I find that Ms Yuan worked longer hours than set out in her employment agreement and not always at the Luck Restaurant as set out in her employment agreement. She did not have Mondays off as set out in her employment agreement notwithstanding any variation to the employment agreement was required to be in writing. Indeed I am not satisfied that Ms Yuan had any days off at all until just before the relationship ended except to the extent that in the early part of the employment of about three months Ms Lee did take Ms Yuan out for some sightseeing of a limited nature.

[38] I accept that in this case there was probably some difficulty in separating the living and working arrangements and that there may well have been time during the day when Ms Yuan could relax from the preparation of food.

[39] Amounts were deposited into Ms Yuan's bank account which could be said to be in accordance with the annual salary as set out in her employment agreement. Ms Lee is at somewhat of a disadvantage, given the jury verdict, in maintaining her firm view before the Authority that she withdrew the money and gave it to Ms Yuan. That is because the standard of proof in a criminal trial is beyond reasonable doubt that Ms Lee withdrew the wages for her own use from Ms Yuan's account whilst before the Authority on the balance of probabilities. For present purposes therefore I accept that this matter has already been the subject of a criminal court process and the outcome of that was that such money be refunded to Ms Yuan. There are good faith issues about that.

[40] I find that a requirement for Ms Yuan to work the extended hours resulted in her feeling tired and exhausted and Ms Yuan describes this as a feeling that she had not previously experienced to that degree. I find that this was a breach of the health and safety obligations which were set out in the employment agreement to take reasonable steps to provide Ms Yuan with a healthy and safe working environment.

[41] Ms Lee said that Ms Yuan misrepresented her ability as a pastry cook. Ms Lee said that her restaurant is famous for its pancakes and dumplings and it was clear from her evidence that she felt very strongly that Ms Yuan had misrepresented her experience and qualifications from the start of the process leading to submissions. Ms Lee provided final written submissions following the investigation meeting and asked for an investigation to be undertaken into Ms Yuan's qualifications, culinary skill and knowledge.

[42] It is not the role of the Authority to carry such investigations. An employer is entitled to address performance concerns with an employee. After a fair process, this can result in a termination of the employment relationship and I will need to determine whether there was such a fair process as part of my investigation.

[43] It seemed to me that an additional difficulty in this case was that Ms Lee had been given money by Ms Yuan prior to travelling to China for an interview. This, in my view, would have made it more difficult if Ms Yuan had not then been offered a position than it would have been if no such transaction had taken place.

[44] In conclusion therefore I find that there were breaches of the employment agreement by Zhengda Trading in terms of the hours Ms Yuan worked and where she

worked and the obligation to provide a healthy and safe workplace. There was also I find misleading conduct in terms of the wages and the lack of good faith about that. The employment relationship, in reality, bore little resemblance to the individual employment agreement and, as it transpired, given the shortage of chefs, I do not find that there was, in all likelihood, any days that Ms Yuan was able to take in full as days off until just before the relationship ended. These matters were unjustified and disadvantaged Ms Yuan as they were not the actions of a fair and reasonable employer

### **How did the employment relationship end?**

[45] The evidence as to what occurred the week the employment relationship ended is disputed. Ms Yuan said that on Sunday 17 February 2008 she asked Ms Lee if she could have a day off and that Ms Lee advised her that there were only two chefs and if Ms Yuan had a day off then she would not be able to run the restaurant. Ms Yuan also said that she asked for money but was told that she had not been paid because turnover of the business had been so bad. Ms Yuan said that then on the weekend of 23/24 February 2008, the other chef went to the farm without her. Ms Yuan explained that she had fallen out with the other chef some time prior and on this weekend she did not go with him out to the farm. Ms Yuan says that on the Saturday and Sunday the restaurant was locked and whilst she was able to go to and from her room, she was not able to access the restaurant to make food.

[46] Ms Lee does not accept she refused Ms Yuan a day off or refused to pay her and says that on Friday 22 February 2008 Ms Yuan was at work at the restaurant and customers complained about tasteless dumplings and the poor quality of the seaweed/egg soup that she had prepared. Then Ms Lee says that the restaurant was open on Saturday and Sunday but Ms Yuan was not around the restaurant during the day because those were her days off but that she came home in the evening and cooked for herself.

[47] Both parties agree that on Monday, 25 February 2008, Ms Yuan asked for time off and it was on this day that she went for the first time to the Community Law Centre to ask for assistance with respect to her employment situation.

[48] I find it likely that Ms Yuan then returned to the restaurant on the evening of 25 February and I think it likely that she did cook something on that day.

[49] On 26 February 2008, both parties accept that there was a discussion about the quality of the food that Ms Yuan had prepared on 22 February 2008. Ms Lee asked Ms Yuan to go upstairs to her room as the discussion between them had become heated. I accept that there was probably raised voices. I find Ms Yuan then went to the Community Law Centre for a second time and the Community Law Centre, as a result of that visit, called the Police.

[50] A letter written to the Labour Inspector by a solicitor at the Community Law Centre, Blake Dawson, set out that Ms Yuan presented at the Community Law Centre on 26 February 2008 with the assistance of a Chinese interpreter and had no money and had not eaten in 48 hours. Having heard the evidence I am not satisfied that Ms Yuan went without food for that entire period. A complaint was made to the Police. I think it likely that the Police, after assisting Ms Yuan to pick up some personal effects from her room above the restaurant, advised that she would not return to work. The Police later retrieved Ms Yuan's bankcard from Ms Lee and when Ms Yuan was taken to the bank to see the balance in her account, it was \$6.

[51] On 27 February 2008, Ms Lee wrote to the Immigration Department advising that she had terminated Ms Yuan's employment in accordance with her individual employment agreement dated 5 August 2007. The reasons Ms Lee said she had dismissed Ms Yuan was that she had breached her employment agreement and committed serious misconduct. The breaches were in relation to her skills and performance and the serious misconduct appeared to relate to harassment of a work colleague, serious and repeated failure to follow reasonable instructions, actions which were alleged to damage the employer's reputation and breach of the confidentiality provisions of her employment agreement. Ms Lee's letter concluded by her advising that Ms Yuan could not be contacted as she had left on 26 February without notification.

**Was Ms Yuan dismissed from her employment actually or constructively?**

[52] Ms Lee is adamant that Ms Yuan simply left her employment on 26 February and resigned or abandoned her employment. She is however faced with the obvious difficulty of the letter to the Immigration Department dated 27 February 2008 advising that Ms Yuan's contract was terminated effectively from 26 February 2008 for the reasons set out in that letter. I find that it is likely Ms Yuan was actually dismissed. She would not have known about that however until after she got advice

to leave her employment. There were serious breaches of Ms Yuan's employment agreement. I have set those out above and do not intend to set them out again here but they are such that the Authority has no difficulty concluding that there was either an actual or constructive dismissal.

[53] Ms Yuan was dismissed from her employment.

### **If there was a dismissal, then was it justified?**

[54] I do not find that the matters put forward in Ms Lee's letter to the Immigration Department were matters that had been discussed with Ms Yuan prior to Ms Lee advising the relationship was over and/or were at a point that they were such to justify a dismissal. I accept that Ms Lee feels strongly that Ms Yuan made false representations to her about her skills. In those circumstances, Ms Lee was able to move to performance manage Ms Yuan and if there was no improvement end the relationship. I accept that Ms Lee did take some positive steps because she did offer some training. My own observations of the exchanges between Ms Yuan and Ms Lee supported that Ms Yuan did not agree with Ms Lee's concerns and that would have made it all the more important for Ms Lee to move to a formal process.

[55] Nevertheless, without a process such as a formal warning, these matters would not justify a dismissal. I find that Ms Yuan was unjustifiably dismissed either actually or constructively.

### **Remedies**

#### **Contribution**

[56] I am not satisfied that Ms Yuan contributed to her personal grievance that she was unjustifiably dismissed but I do take into account that the relationship may not have been a long one given Ms Lee's view of her cooking skills.

#### **Lost wages**

[57] Mr Thompson confirmed no further wages are due.

#### **Compensation**

[58] There is a significant amount of compensation sought, being \$25,000. I asked Ms Yuan what she wanted in terms of remedies. Ms Yuan responded that *she would*

*go with Ms Lee's decision.* When the matter progresses to the Authority though it is the Authority which is required to make a decision as to remedies based on the evidence.

[59] Although I have concluded that this could be on its facts either a constructive or actual dismissal, compensation falls to be determined on the basis of serious breaches of her employment agreement that led Ms Yuan not to return to work because the letter of dismissal would not as at 26 February 2008 have been seen by Ms Yuan.

[60] Ms Yuan said that at the time of her dismissal she was exhausted and said she had lost weight from working very hard on the farm and in the restaurant. She said that she was tired in a way that she had not been before and felt that this was because the working time was too long.

[61] Then there is the reality that given Ms Lee's strong views on Ms Yuan's performance, this employment relationship may not have lasted for a long time. The other issue for Ms Yuan that I think was significant was that she felt lonely and I think it likely she started to become concerned and anxious about Ms Lee's views in terms of her performance. Ms Yuan was in a very vulnerable position if she lost her job.

[62] When I asked Ms Yuan why she went to the Community Law Centre, she said as well that, *she wanted to go home* and that, *she missed home*.

[63] It is necessary for me to stand back and consider all of those matters in terms of resolving the employment relationship problem. I cannot compensate Ms Yuan for her loneliness and her understandable desire to return home. I think it is unlikely that this relationship would have continued for much longer and Ms Yuan I find feared that as well. I also cannot ignore that the District Court ordered repayment of wages by instalment in all probability after financial details were provided by Ms Lee. On the other hand the breaches were serious.

[64] Taking all matters into account in all the circumstances, I am of the view that a suitable award for compensation is the sum of \$7,000. For completeness I find that the unjustified actions were inextricably linked to the dismissal and I make no separate award.

[65] I order New Zealand Zhengda Trading Company Limited to pay to Ying Yuan the sum of \$7,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

**Damages**

[66] I am not minded to make an award on top of the award above for damages in terms of breaches of the employment agreement because I have taken the breaches into account in arriving at the award set out above.

**Costs**

[67] Mr Thompson advised that Ms Yuan is legally aided and that his costs in terms of this matter are \$2,600 together with a lodgment fee of \$70 and a hearing fee because this matter went into the second day of \$150.

[68] I am of the view that that is a very reasonable claim for costs given that this matter proceeded into a second day.

[69] I award costs to Ms Yuan in the sum of \$2,600 together with disbursements in the sum of \$220 being filing fee and hearing fee.

Helen Doyle  
Member of the Employment Relations Authority