

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2012] NZEmpC 135
WRC 30/11**

IN THE MATTER OF of a challenge to a determination of the
Employment Relations Authority

BETWEEN FUQIANG (JAMES) YU
Plaintiff

AND SYMBOL SPREADING LTD
Defendant

Hearing: 1 August 2012
(Heard at Wellington)

Appearances: Plaintiff in person
No appearance for the defendant

Judgment: 7 August 2012

JUDGMENT OF JUDGE A D FORD

[1] The plaintiff has challenged part of a determination¹ of the Employment Relations Authority (the Authority) dated 23 September 2011. That determination followed on from an earlier determination² of the Authority dated 26 April 2011. In its earlier determination, the Authority had concluded that Mr Yu was an employee of the defendant company and that he had been unjustifiably disadvantaged because of the failure of the defendant to pay him for the two-month period during which he was working out his notice of resignation. Mr Yu was awarded compensation for hurt and humiliation in the sum of \$2,000 and the Authority set out a formula to enable the parties to calculate Mr Yu's entitlement to unpaid wages and holiday pay.

¹ [2011] NZERA Wellington 150.

² [2011] NZERA Wellington 61.

[2] In its subsequent determination, the Authority recorded that the parties had been unable to reach agreement on what wages were owing to Mr Yu and the parties had been unable to resolve the matter through mediation. The Authority then went on to apply the formula it had suggested in its earlier determination and concluded that Mr Yu was not owed any outstanding wages.

[3] Mr Yu has challenged the particular paragraph in the determination that concluded that he was not owed any outstanding wages.

[4] By way of background, the Court was told that the defendant published a Chinese newspaper in the Wellington district known as the “NZ Chinese Times”. It covered world events and local items of news. The company was run by its director, Mr Li. Mr Yu worked for the company between April 2009 and 20 July 2010 as a “marketing consultant” selling advertising space to local businesses. He was employed on a commission basis under which he was paid monthly receiving \$250 per week plus 20 per cent of the total advertising volume he had sold during the previous month. Mr Yu handed in his resignation at the beginning of June 2010 to take effect from 20 July 2010 but he did not receive any payments in respect of his final two months with the company.

[5] Mr Yu’s challenge was based on his claim that the formula adopted by the Authority was incorrect. He agreed with the Authority’s findings that he was entitled to receive the sum of \$36,892.80 for his total period of employment with the company, made up of minimum pay of \$34,160 plus holiday pay of \$2,732.80. However, he disputed the Authority’s calculation of the amount he had actually received. The Authority concluded that he had received a total of \$44,955 made up of 61 weekly payments of \$250 i.e. \$15,250, plus commissions totalling \$29,705. In other words, the Authority found that he had been overpaid in the sum of \$8,062.20. Mr Yu claimed that the Authority had duplicated his weekly payments because the sum of \$15,250 was actually included in the \$29,705 figure which the Authority had labelled “commissions”.

[6] In its statement of defence the company, through its representative, Mr Li, pleaded that the Authority had not made a mistake. Relevantly it stated:

2b) Mr. Yu's monthly income consists of two parts. The first part is the commission which varies from month to month, and the second part is the base payment which is fixed every week. Before the company made the commission payment to Mr. Yu, the company needed Mr. Yu to check the amount of commission calculated and needed his signature to confirm that he accepted the company's calculation. However, the company never needed his confirmation of the base payment as it was the same all the time and there were no likely disputes.

[7] Prior to setting the matter down for hearing, the Acting Registrar attempted to arrange a telephone conference call between the parties. A date was fixed for a conference call on 8 May 2012 but on 2 May 2012 the Court received a letter from Mr Li's accountant stating that Mr Li was out of the country until the end of May and a new date was requested for sometime after his return. On 8 June 2012, the Court received an email from Mr Li's accountant which stated:

I have received the attached letter from Mr Li via email which he has asked me to forward to you. I am beginning to wonder whether Mr Li has any intention of returning to NZ. It is becoming clear that he has left debts in NZ which I believe are unlikely to be paid.

[8] The accompanying letter from Mr Li, which did not contain any address or contact details, stated in part:

I am currently in China and originally planned to return at the end of May. However, the business opportunities in China are more valuable than I expected. Hence, I now intend to stay in China for the near future.

[9] Mr Li confirmed in his letter that the defendant company had "stopped its business trading 1 year ago". He denied that the company owed Mr Yu any money and he described the \$2,000 award for hurt and humiliation as "totally unreasonable". In the final paragraph of his letter, Mr Li stated:

I do have limited time and energy and I would like to use it productively. I do not want to waste more time on crazy employees such as Mr. Yu at the cost of my future. I have faith in the New Zealand justice system and I trust you will make the right decisions on this case.

[10] The Acting Registrar gave notice to Mr Li's accountant of the intended fixture date for the hearing but there was no appearance on behalf of the defendant company.

[11] In one of his written submissions in support of his challenge, Mr Yu stated:

The reason I still insist to continue this case is that I believe New Zealand is impartial country and employee rights can be protected from those unethical employer.

Bill Li is clearly realised his liabilities in this case, therefore, he deliberate (sic) ceased the running of “symbol spreading ltd” and shifted the entire company asset to the “NEW ZEALAND CHINESE TIMES LIMITED (3376931)” while the case was running with ERA. (new company info is attached) His intension (sic) was very clear, even I won the case and I will not get a cent. He mentioned that a Chinese employer has done these previously in Wellington while I was employee of the company, which is why I have been keeping an eye on the Company Register website.

During the case, Bill Li has shown all his tricks to the Judge including lie to the Judge by stated (sic) that he paid my basic salary in full separately which he did not. He also asked his accountant to lie with him by given a time to come back in the end of May, but now he is not coming back.

My evidence of total payment which I received during the employment is very solid which he cannot argue. It is difficult to enforce him to pay what he owns (sic) since he intended to escape all his liability.

I am rely (sic) on your honourable judgment to help get through this case.

[12] At the hearing before me, Mr Yu produced various documentation including a two-page earnings information schedule from the Inland Revenue Department (the IRD) confirming full details of his income during the entire period he worked for Symbol Spreading Ltd. The records show that for the month ended May 2009, Mr Yu’s income was \$1,198. He explained that \$1,000 of that figure represented his weekly wage of \$250 and the balance of \$198 represented the commission he earned during that month. The monthly commissions then gradually increased over time and Mr Yu drew attention to his income figure for March 2010 which was \$3,198. He said that \$1,000 of that figure still represented his weekly wage of \$250 but his commission payment had increased to \$2,198.

[13] I have considered all of the material placed before the Court and I am left in no doubt that what Mr Yu said in his sworn evidence is correct. The IRD schedule of payments which shows his total income during the period he worked for Symbol Spreading Ltd as \$29,708 was made up of both his weekly wage and his monthly commissions. In other words, contrary to the findings of the Authority, he was not overpaid by the defendant but he has unpaid wages owing to him in the amount of \$7,184.80. That figure is made up of the total amount he should have received, namely, \$36,892.80 less the \$29,708 he in fact received.

[14] Mr Yu has sought interest on his unpaid wages, pursuant to cl 14 of sch 3 of the Employment Relations Act 2000, which he appears to have calculated correctly in the amount of \$755. The Court has a discretion in relation to interest and I am satisfied that this is an appropriate case for such an award because Mr Yu has quite unjustly been deprived of the use of money he was otherwise entitled to.

[15] The defendant is, therefore, ordered to pay Mr Yu unpaid wages in the sum of \$7,184.80 together with interest at \$755 along with the \$2,000 compensation awarded by the Authority and the Authority filing fee of \$70, making a total sum of \$10,009.80.

A D Ford
Judge

Judgment signed at 11.15 am on 7 August 2012