

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Yunpei (Sophia) Chin
AND Andrew Yong trading as Yong & Co Chartered Accountants
REPRESENTATIVES Mark Nutsford, Advocate for the Applicant
Rohineet Sharma, Counsel for the Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 3 October 2006
DATE OF DETERMINATION 4 October 2006

DETERMINATION OF THE AUTHORITY

- A. Andrew Yong trading as Yong & Co Chartered Accountants is ordered to pay to Yunpei (Sophia) Chin the gross sum of \$3,653.85 (5 weeks @ \$730.77 gross per week) as reimbursement.
 - B. Andrew Yong trading as Yong & Co Chartered Accountants is ordered to pay to Yunpei (Sophia) Chin the sum of \$5,000.00 as compensation.
 - C. Andrew Yong trading as Yong & Co Chartered Accountants is ordered to pay to Yunpei (Sophia) Chin holiday pay of \$2,192.31 gross as arrears of wages.
 - D. Andrew Yong trading as Yong & Co Chartered Accountants is ordered to pay to Yunpei (Sophia) Chin interest on the judgment sum of \$2,192.31 at the rate of 9% per annum from 25 November 2005 until the date of payment.
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The problem

[1] The applicant Ms Yunpei (Sophia) Chin ("Ms Chin") applies to the Authority for an investigation into the termination of her employment as accounts clerk with Mr Andrew Yong ("Mr Yong") trading as Yong & Co Chartered Accountants ("Yong & Co"). She says she was unjustifiably constructively dismissed and asks that the problem be resolved in her favour by orders for reimbursement and compensation. She also seeks to recover holiday pay owing to her at termination.

[2] Yong & Co say that Ms Chin left the employment of her own volition and in the alternative, that any constructive dismissal was justifiable and that Ms Chin's own conduct contributed to the situation to such an extent that no damages would flow.

[3] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[4] Ms Chin commenced employment with Yong & Co on 3 May 2004 having previously been employed there. She was employed to work on client accounts.

[5] Ms Chin wrote to Mr Yong by letter dated 25 November 2005 as follows: -

Dear Mr Yong

I am writing to tender my resignation as the situation at your office is untenable for me to continue working there any longer. And I am giving you one week notice in this regard.

The reasons for my resignation are as follows:

1. I was badly treated by Mr Andrew Wenborn at the interview held on September 29, 2005, and both of you and he have also written me letters making unreasonable demands.

2. You have made so many disparaging comments about me to some of my colleagues behind my back, specifically on the financial deal between you and my husband.

The above has caused stress on me and I am suffering a health problem because of those unpleasant events.

You must be aware that I am entitled to my sick leave till Tuesday next week, and it is hoped that I shall be able to come back to work that day.

The opportunity is also taken to tell you that I am going to take a personal grievance against you.

*Yours sincerely
Sophia Chin*

[6] Sometime in May/June 2005, Mr Yong's wife informed Ms Chin that Mr & Mrs Yong had loaned Ms Chin's husband Mr Julian Chan ("Mr Chan") \$50,000.00. Mrs Yong asked Ms Chin

not to tell Mr Yong that she (Mrs Yong) had told her (Ms Chin). Mrs Yong declined to divulge further details. Later that evening, Ms Chin confronted her husband. Mr Chan told her Mr Yong had invested \$50,000.00 into his (Mr Chan's) cattle deal in February 2003 for a return of \$75,000.00 three months later. There was however no return to Mr Yong.

[7] I find that Ms Chin had no knowledge of this transaction prior to being informed of it by Mrs Yong in May/June 2005. I further find that Mr Yong had agreed to Mr Chan's wish that Ms Chin not be advised of the transaction.

[8] In August 2005 Mr Chan was adjudicated bankrupt. Mr and Mrs Yong sought to influence Ms Chin to exert some pressure on her husband to repay the \$50,000.00 they had loaned to him. Ms Chin made clear that as she was never consulted about the matter she bore no responsibility for repayment.

[9] Mr Yong met one Mr Andrew Wenborn ("Mr Wenborn") near his office in September 2005. Mr Wenborn was a Scientologist and Mr Yong joined the organisation. Mr Wenborn stress tested Mr Yong.

[10] Mr Wenborn found that Mr Yong was very stressed and his health was not good. Mr Yong accepted Mr Wenborn's offer to re-organise his business so as to make it function more efficiently. Mr Wenborn advised Mr Yong he considered Ms Chin was the cause of Mr Yong's stress and although she was highly regarded by Mr Yong, Mr Wenborn considered she was not assisting in the general running of the business.

[11] Mr Wenborn then convened a meeting with Ms Chin and Mr Yong. While Messers Wenborn and Mr Yong tell the Authority the meeting was to discuss restructure of the business I find that is not what was actually discussed. I accept Ms Chin's evidence that she was summoned to this meeting without any prior notice.

[12] Ms Chin was told Mr Wenborn was Mr Yong's consultant. While there was some initial mention of restructuring, Mr Wenborn proceeded to interrogate Ms Chin about Mr Chan. He asked about Mr Chan's business activities, his limited liability company and the loan from Mr & Mrs Yong. Ms Chin kept repeating that her husband's business activities were not her concern and enquiries were properly directed to him. She continued to protest. Eventually she asked if she was being threatened and informed Mr Yong she felt uncomfortable. Mr Yong did not assist her and simply smiled back at her. Ms Chin tells the Authority she felt obliged to remain because she was an employee.

[13] Ms Chin was asked to provide a solution to her husband's indebtedness to Mr and Mrs Yong. Mr Wenborn declared that the issue had to be sorted out as a matter of priority before any other measures could be implemented to make Yong & Co functional and efficient.

[14] Mr Wenborn subsequently sent Ms Chin his notes of the discussion at the 29 September 2005 meeting.

[15] Ms Chin wrote by letter dated 14 October 2005 recording her discomfort with the discussion at the 29 September 2005 meeting and the manner in which she was treated. She further denied that there was any upset between her and Mr Yong. She concluded: -

It would be much appreciated if you could just plainly tell me the role you think I could play in assisting Mr Yong to accomplish his honourable goal, and this is the only matter I am interested. Being a loyal and the longest serving staff at Yong & Co, I will deliver to the best of my capabilities as I have been doing in the past so long as I work at the company.

[16] Mr Wenborn responded by letter dated 19 October 2005. He concluded: -

Being a loyal, and the longest serving staff member, please send by return a written solution to the following situation which came up in the meeting: That your lawful husband owes a sizable debt to Mr Yong, is declared bankrupt, is now being supported by you on a salary you are receiving from Mr Yong.

I look forward to a prompt reply to assist with establishing the role you will play, in the expansion of Yong & Co.

[17] By letter dated 2 November 2005 Ms Chin responded: -

3. I would like also to tell you that I am totally stunned that you should have asked me to send you a "written solution" to the situation of financial problem between Mr Yong and my husband. Please be advised that the meager income I receive from Yong & Co through my hard workings is barely sufficient in meeting my needs, and my husband is living on his superannuation instead of being supported by my salary as you have claimed in your letter.

It is hoped that you could understand that I am not liable, legally or morally, for my husband's indebtedness. I would appreciate it very much if you could put it in writing to explain why you are trying so hard to involve me and yourself into the financial problem between Mr Yong and my husband.

[18] Mr Wenborn responded by letter dated 9 November 2005 and stated: -

The fact that your husband borrowed funds from Mr Yong and they have not been returned is now a moral issue for Mr Yong, and the business.

Your letter is ambiguous, and you have not provided any solution.

[19] Ms Chin wrote to both Mr Wenborn and Mr Yong respectively by letters dated 14 November 2005. To Mr Wenborn she stated: -

I have told you in my previous letter that I am not liable, legally or morally, for my husband's indebtedness. Therefore, I do not think I am obliged to provide you with a solution to the financial problem between Mr Yong and my husband. There is no justification whatsoever for you to bring me into their problem. And their problem really has no relationship to my professional skills and my work at Yong & Co. I want to tell you that this is the last time I respond to your communication on this matter, and will not answer you and questions related to my personal and family private affairs in future. I will be forced to take legal actions if you do not stop harassing me in this connection.

To Mr Yong she wrote: -

Your consultant Mr Andrew Wenborn has written me two letters asking for a solution to the financial problem between you and my husband.

I am saddened by the matter of my husband's business dealings with you. I am obliged to tell you that I had no knowledge whatsoever of those dealings until your wife told me at the beginning of this year. Indeed I feel rather hurt that those business dealings were kept secret, concealed from me, and conducted without consultation with me.

After having learned that your wife has told me about those dealings, you graciously told me that this financial problem is purely a personal matter between you and my husband, and you would never implicate me into it because you know it has nothing to do with me. You also told me that you are capable of distinguishing business matters from personal matters and that you are happy with my performance on my given assignments.

I have told Mr Wenborn that I am not liable, legally or morally, for my husband's indebtedness, thus am not in the position to provide any solution for it. Therefore, it would be highly appreciated if you could be kind enough in telling Mr Wenborn to stop harassing me any more over this subject. A copy of my letter to him is also enclosed herewith for your reference.

I look forward to hearing from you in due course.

[20] Mr Yong responded by letter dated 16 November 2005. He wrote: -

Thank you for your letter dated 14.11.2005 complaining about Mr Andrew Wenborn harassing you over my personal loan to your husband.

It seems to me that you are overreacting over Mr Andrew Wenborn's project working towards restructuring our firm in order to improve efficiency of our firm. I thought that my memo to all staffs recently (attached for your reference) would clarify what the firm motive is heading to.

While in the course of understanding what our firm's present situation is - being clearing out the mess, my personal loan to your husband Mr Julian Chen has been reviewed as it has become a concern to me. The said loan occurred since 10.02.2003 and has not been repaid irrespective of his verbal promises to repay promptly as soon as he received his superannuation fund. My numerous verbal reminders and three letter reminders to him has been ignored as you had been told by Kim. This has badly affected my personal efficiency and my life force has been drained. Obviously, this matter needs to be cleared out before we can effectively restructure our firm.

From what I understand, in order to do well in a professional firm like ours, integrity plays an important role in our work place and is critical and vital to our survival. You are identified as one of the potential candidates to help in this respect but however, your husband's financial affair has been viewed as an irregularity of our practice. Therefore, an investigation of this case is unavoidable. This is to ensure that you are not conspiring with your husband. As a loyal employee of our firm we now require you to

cooperate and assist in this matter. As you are aware of, I am now a member WISE (World Institute of Scientology Enterprises), which require that there are no unethical and unscrupulous staff in our firm. Unfortunately, you are the first one that has to go through this process due to your position in the firm and also your relation with Mr Julian Chen who is now bankrupt.

...

I hope this letter will make you understand that Mr Andrew Wenborn is here merely to carry out his duty as our firm's consultant. Investigating your husband's financial affair is unavoidable in order to restructure our firm. Hence, in order to move forward together I need all of my employees to cooperate with Mr Andrew Wenborn at his/her uttermost sincerity and from the bottom of their heart.

If you wish to continue your stay with us, your cooperation at work towards the best for all of us is needed. If you need a formal written employment contract to replace our verbal contract, please do not hesitate to let me know. As I said earlier it can be printed out for you straight away.

[21] Ms Chin took sick leave during the week beginning Monday 21 November 2005. That very evening Mr Wenborn and Mr Yong turned up at Ms Chin's residence to confront Mr Chan. When they refused to leave, the Police were called.

[22] Ms Chin tells the Authority that she felt Mr Wenborn and Mr Yong had harassed her since September. She says she has suffered headaches and was consulting her doctor. She also refers to disparaging comments made about her to other employees by Mr & Mrs Yong accusing her of conspiring with her husband not to repay the debt owed to the Yongs.

[23] Ms Chin says the situation became intolerable for her and her continued employment rendered untenable. She couriered her letter of resignation dated 25 November 2005 to Mr Yong and never returned to the employment.

The merits

[24] The well settled tests for constructive dismissal are: -

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[25] Clearly Ms Chin did resign. Her advice of 25 November 2005 is conclusive evidence of that.

[26] Mr Yong owed a statutory duty of good faith towards Ms Chin. He also owed her implied duties to treat her fairly and reasonably and not to do anything calculated or likely to destroy the relationship of confidence and trust between them.

[27] I have concluded that Mr Yong acted contrary to his lawful duties owed to Ms Chin. His new found enlightenment and his involvement with the Church of Scientology did not release him from his legal duties owed to Ms Chin. Although I have no doubt that he and Mr Wenborn were genuinely seeking to reduce Mr Yong's stress and the drain on his "life force", Mr Yong's responsibilities and legal obligations to Ms Chin were not rendered inoperative as result.

[28] It seems to me that Mr Yong and Mr Wenborn were seeking to rid the business of *"unethical and unscrupulous staff"* as those concepts are known to those indoctrinated in the Church of Scientology. However, in my assessment, it was wrong to proceed on that basis against Ms Chin because of the loan to her husband.

[29] Mr Yong openly conceded to me that it was after the visit to Ms Chin's home on 21 November 2005 that he began to question whether Ms Chin was conspiring with her husband. That however, was well after the exercise and correspondence with Mr Wenborn began.

[30] I am satisfied that the loan to Ms Chin's husband did not concern Ms Chin. Both her husband and her employer had agreed that it would not. It was only when the transaction did not proceed as intended that Mr Yong decided it was going to involve her. That was wrong in my assessment. It was not fair or reasonable to hold her responsible for it, to expect her to be accountable for it and to persistently demand that she provide "written resolution" for it. All those things were not fair and reasonable and were contrary to the legal duties owed to Ms Chin. I also agree that Mr Yong did make disparaging comments about Ms Chin to other employees suggesting Ms Chin had conspired with her husband to avoid repayment to Mr Yong.

[31] I find therefore Mr Yong's actions breached a duty owed to Ms Chin. I find too that such breach was so serious that a substantial risk of resignation was reasonably foreseeable.

Determination

[32] For all the above reasons, **I find Ms Chin was unjustifiably constructively dismissed and she has a personal grievance. She is entitled to remedies in settlement of that grievance.**

[33] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[34] I do not consider that there is any contributory fault on Ms Chin's part that constitutes blameworthy conduct and which requires a reduction in the award of remedies to her.

[35] I am satisfied that Ms Chin has lost wages as a result of the personal grievance. I am further satisfied that she has taken satisfactory steps to mitigate her losses. She claims lost wages of five weeks. **I order Andrew Yong trading as Yong & Co Chartered Accountants to pay to Yunpei (Sophia) Chin the gross sum of \$3,653.85 (5 weeks @ \$730.77 gross per week) as reimbursement.**

[36] I am satisfied that Ms Chin has suffered loss of dignity and hurt and humiliation as a result of the personal grievance. Having regard to her evidence, her length of service and the nature of the personal grievance, **I order Andrew Yong trading as Yong & Co Chartered Accountants to pay to Yunpei (Sophia) Chin the sum of \$5,000.00 as compensation.**

[37] I am further satisfied Ms Chin is owed holiday pay which was unlawfully withheld from her. **I order Andrew Yong trading as Yong & Co Chartered Accountants to pay to Yunpei (Sophia) Chin holiday pay of \$2,192.31 gross as arrears of wages.**

[38] **I also order Andrew Yong trading as Yong & Co Chartered Accountants to pay to Yunpei (Sophia) Chin interest on the judgment sum of \$2,192.31 at the rate of 9% per annum from 25 November 2005 until the date of payment.**

Costs

[39] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nutsford is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Sharma is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.