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Cheung v Icon Concepts Limited (Auckland) [2011] NZERA 417; [2011] NZERA Auckland 270 (23 June 2011)

New Zealand Employment Relations Authority

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Cheung v Icon Concepts Limited (Auckland) [2011] NZERA 417 (23 June 2011); [2011] NZERA Auckland 270

Last Updated: 7 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 270 5323607

BETWEEN

WING SAN (VINCENT)
CHEUNG
Applicant

AND

ICON CONCEPTS LIMITED Respondent

Member of Authority Representatives:

Information taken by telephone on:

R A Monaghan

Wing San Cheung in person K Kamphuis, advocate for respondent

3 and 17 June 2010

Determination:

23 June 2011

DETERMINATION OF THE AUTHORITY

[1] Wing San (Vincent) Cheung says his former employer Icon Concepts Limited (Icon Concepts) owes him unpaid wages for work done on 14 and 15 October 2010, and holiday pay in respect of an absence on 18, 19 and 20 October 2010. He worked an 8 hour day, and his hourly rate was \$18.

[2] Mr Cheung's employment terminated on or about 20 October 2010. [3] Icon Concepts says Mr Cheung has been paid everything owed to him. **Determination** 1. Unpaid wages

[4] As I understand its position, Icon Concepts acknowledges that Mr Cheung was not paid wages for 14 and 15 October. I discuss its reasons later in this determination.

[5] Since Mr Cheung was not paid for 14 and 15 October 2010, I order that he be paid an amount calculated as:

2 days x 8 hours x \$18/hour = \$288.

2. Holiday pay

[6] Icon Concepts re-employed Mr Cheung in late February-early March 2010 (the new employment), some two months after an earlier termination of his employment with it. It said Mr Cheung had not become entitled to holiday pay because the new employment had lasted for less than a year before it ended again. There was no suggestion that the new employment should be treated as continuous with the earlier period.

[7] The absences on which the claim for holiday pay is based, namely 18, 19 and 20 October 2010, were part of a continued absence which led Icon Concepts to say Mr Cheung abandoned his employment and to treat the relationship as having terminated on 20 October 2010. For that reason I address Mr Cheung's claim as a claim for the payment of holiday pay outstanding at the date of termination of employment.

[8] Icon Concepts' understanding of Mr Cheung's entitlement to holiday pay when his employment terminated before the end of the first 12 months is wrong. [Section 23](#) of the [Holidays Act 2003](#) provides:

23 Calculation of annual holiday pay if employment ends within 12 months

- i. *Subsection (2) applies if -*
 - (a) *the employment of an employee comes to an end; and*
 - (b) *the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of [section 16](#)*
- ii. *An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount*
 - (a) *paid to the employee for annual holidays taken in advance; or*
 - (b) *...*

[9] It transpired that there was a further dispute as to whether Mr Cheung had taken paid annual leave during the new employment. Icon Concepts produced a computerised wage and time record showing Mr Cheung took 40 hours' paid annual leave in the week ending 16 June 2010. Mr Cheung denied taking any paid annual leave in 2010.

[10] The now-former employee responsible for recording and forwarding details of staff attendances gave evidence of the procedure he used in keeping that record. Further, he had independent recall of Mr Cheung taking time off in 2010 although his recollection of the dates in question differed from the record. I therefore accept that Mr Cheung took leave as alleged.

[11] With reference to [s 23](#) of the [Holidays Act](#) I order that Mr Cheung be paid holiday pay calculated as:

[35 weeks x 5 days x 8 hours x \$18/hour] x 8% = \$2,016

Less 5 days x 8 hours x \$18/hour = \$ 720

Total to be paid \$1,296

3. Relevance of alleged overpayments

[12] The statement in reply indicated a view that Mr Cheung had no entitlement to any payment on the termination of his employment because he left his employment without providing the necessary notice. In addition, as noted, Icon Concepts believes Mr Cheung received payment for periods of sick leave and annual leave either before he became entitled to payment or in excess of his accrued entitlement.

[13] For Icon Concepts' information, in general an employer does not have a right to withhold payments due to an employee at any time^[1]. This includes on the termination of employment, whether in response to an employee's failure to provide the necessary notice of termination or for any other reason. To the limited extent that the withholding of a payment might be possible, the circumstances must be authorised in writing by the employee. There was no authorisation here.

[14] Secondly, Icon Concepts very belatedly identified an amount it says Mr Cheung owes to it as a result of the alleged overpayments. It is unlikely that Icon Concepts could recover payments in respect of paid leave to which no entitlement had accrued at the time the leave was taken, particularly in the absence of any applicable written authority, but in any event the matter was not filed as a counterclaim and I do not take it any further.

[15] Finally the misunderstandings of the law, and the repeated shortcomings in the way Ms Kamphuis responded to this employment relationship problem and to the Authority, lead me to suggest that Icon Concepts obtain professional assistance and advice in respect of its employment matters.

Summary of orders

[16] Subject to its obligations in respect of tax, Icon Concepts is ordered to pay to Mr Cheung:

- (a) \$288 (gross) as unpaid wages; and
- (b) \$1,296 (gross) as holiday pay owed at the date of termination.

Costs

[17] Mr Cheung is entitled to the reimbursement of the Authority's filing fee.

[18] Icon Concepts is further ordered to reimburse Mr Cheung in the sum of

\$71.56.

R A Monaghan

Member of the Employment Relations Authority

[1] The law on the matter is found in the [Wages Protection Act 1983](#)