



New Zealand Employment Relations Authority Decisions

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Deng v Wang (Auckland) [2018] NZERA 1; [2018] NZERA Auckland 1 (3 January 2018)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 1
3013871

BETWEEN YING DENG Applicant

A N D NANCY WANG First Respondent

A N D GOOD FUTURE AUCKLAND LIMITED

Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person

Nancy Wang for Respondents

Investigation Meeting: 19 and 27 September 2017 at Auckland

Submissions Received: At investigation meeting

Date of Determination: 3 January 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ying Deng was employed by the Second Respondent, Good Future

Auckland Limited.

B. Ms Ying was unjustifiably dismissed by Good Future Auckland Ltd.

C. Within 28 days of the date of this determination Good Future

Auckland Ltd is ordered to pay Ms Ying the following: (i) \$ 969.52 gross as reimbursement of lost wages;

(ii)\$29.09 gross as the employer's KiwiSaver contribution on those lost wages;

(iii)\$2,700.00 as compensation for humiliation, loss of dignity and injury to feelings;

(iv)\$1417.50 gross as holiday pay; and

(v) \$71.56 for the Authority's filing fee.

Employment relationship problem

[1] Ying Deng (Ms Ying) worked as a cook at New Windsor Aged Care, an Auckland rest home also known as De Fu Cun Rest

Home. She suffered an accident in 2014, breaking her leg, and resigned as a result. In early 2016 she was contacted by the rest home's manager Nan (known as Nancy) Wang (Ms Wang) about coming back to work again, which she agreed to.

[2] In March 2017 Ms Ying says that Ms Wang, altered her working schedules three times and then stopped offering her work from 27 March 2017. She brings a claim about this which the Respondents deny.

[3] At the investigation meeting I heard evidence from Ms Ying, Ms Wang, another previous owner of New Windsor Aged Care Yao Shaung (Ms Yao), and several other former or current rest home staff members. I was assisted by an interpreter of the Mandarin language.

[4] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[5] The identity of Ms Ying's employer needs to be determined.

[6] Although Ms Ying expressed some concerns about earlier aspects of her treatment, her claim focused on events in March and April 2017 when the issue of changes to days of work and then failure to offer her any shifts arose. Initially this appeared to be a claim for unjustified action by Ms Ying's employer to her disadvantage in terms of not offering work. She claimed wages lost as a result and compensation for her mental distress. However, the issue of Ms Ying's status, namely whether she was still an employee also arose. The Respondents say she is still an employee, although she has had no work since March 2017.

[7] Ms Ying also claims that she is owed holiday pay by her employer.

[8] Ms Ying raised a number of issues regarding Ms Wang's management of the rest home but they did not relate to her personally and are not within the Authority's jurisdiction to determine. Ms Wang rejected the allegations. Both parties also raised criticisms of each other which went more to character but which I did not find assisted my determination of their employment relationship problems.

Dispute between owners

[9] Ms Wang and Ms Yao were joint shareholders and directors of Good Future Auckland Limited. The two fell out and this case has to some extent become caught up in that battle. Ms Yao gave evidence for Ms Ying. It appears that staff ended up either on Ms Wang or Ms Yao's side.

[10] After a resolution process, Ms Wang has taken over the business.

Identity of the employer

[11] Ms Ying originally filed her claim against Ms Wang, referring also to New Windsor Aged Care. However, there is no registered company called New Windsor Aged Care or of a similar name, and so I take that as a trading name. There was some uncertainty over whether Ms Ying was employed by the First Respondent Ms Wang, or the Second Respondent, Good Future Auckland Ltd.

[12] In early 2016 Ms Ying was approached directly about coming back to New Windsor Aged Care and there was therefore no advertisement for the role. Neither was there a letter of appointment.

[13] Ms Ying's evidence at the investigation meeting was that she thought that she was employed by two employers, Ms Wang and Ms Yao, as business partners trading as New Windsor Aged Care. Her employment agreement referred to her employer as New Windsor Aged Care.

[14] The Respondents say that Ms Ying was employed by the Second Respondent
Good Future Auckland Ltd.

[15] Some of the documentation, such as the rosters, refer to New Windsor Aged Care only. The pay slips refer to New Windsor Aged Care at the top and in an earlier period refer to Good Future Auckland Ltd at foot as the MYOB licensee. Payslips from late May 2016 onwards make no reference to the employer. A payslip from October 2016 refers to "Goodfuture Auckland Ltd". Then slips from December 2016 onwards refer to Good Future Auckland Ltd. Ms Ying's bank statement shows her pay as coming from Good Future Auckland Ltd New Windsor.

[16] The Authority was informed that the district health board's agreement is with Good Future Auckland Ltd and that company owns the land on which the rest home operates. These matters were confirmed by Ms Yao.

[17] It would be most unusual for Ms Ying who worked for the rest home business, to be employed by one owner of the

business individually, rather than in some joint basis, whether through a partnership or company. There was no evidence of any New Windsor Rest Home employees' employment arrangements changing after Ms Wang bought out Ms Yao's interest.

[18] An assessment of the evidence overall supports Good Future Auckland Ltd, the Second Respondent, being Ms Ying's employer.

Employment agreement

[19] There was no written employment agreement filed regarding Ms Ying's earlier period of employment with New Windsor Aged Care.

[20] An agreement which notes employment as starting in February 2016 was filed. The parties agreed that this was not signed actually until late August 2016. Ms Ying says that she was not given an agreement prior to August 2016. Ms Wang says that there was an earlier agreement but when a check was undertaken a few employees'

agreements were found to be missing, including Ms Ying's one. This resulted in further agreements being signed.

[21] In any event there was no indication that any earlier agreement contained any different terms to the agreement which the Authority has. Ms Wang says that the terms were the same.

[22] I therefore proceed on the basis of the written agreement filed.

Hours of work clause

[23] The agreement provides that rostered hours of work shall be set by the employer in advance, with the roster being supplied at least 7 days in advance, except in the event of an emergency.

[24] Clause 6.5 is headed Minimum Hours of Work per Week or Pay Period. In the blank space "22.5" hours is recorded by hand. No choice is then made between the options of per pay period or per week. Pay was paid fortnightly.

[25] Ms Ying says that there was no discussion when the contract was provided or signed as to what the hours of work would be. Her sense was that her contract was for three days a week, although that was not always what happened in practice. The agreement does not provide for fixed shifts on particular days, although in practice there were often fixed days provided.

Hours of work in practice

[26] When Ms Ying was asked by Ms Wang to come back to work the women agreed on Ms Ying working two shifts of seven and a half hours a week. This is what occurred from February to July 2016. They were fixed days of the week. Ms Ying does not remember clearly which days they were. She thinks it was Monday and either Thursday or Friday. Rosters, which Ms Ying does not accept were all accurate, show her working Tuesdays and Fridays in this period.

[27] From mid July 2016 Ms Ying changed to three days per week. Ms Ying does not recall anything being said about whether the change was short term or long term. A chef had finished work and Ms Ying took over one of his shifts. The rosters show Ms Ying working three days a week, mainly Monday to Wednesday, from July until the end of August 2016.

[28] Ms Ying went on holiday back to China in September 2016. When she resumed work in late September 2016 she worked two days per week. Ms Ying says that she talked to Ms Wang during this period about returning to working three days a week, but this did not eventuate on a regular basis. There was no evidence of Ms Ying raising a personal grievance, seeking mediation or filing proceedings at this time. Some weeks Ms Ying did work three shifts per week.

Food incident

[29] Ms Ying saw the later problem with her shifts as stemming from a disagreement in February 2017 with Ms Wang about a resident's food. Ms Wang had removed some food from a resident which Ms Ying had prepared for the resident. Ms Ying considers that Ms Wang harboured ill feelings against her as a result.

[30] I was unable to establish that the food incident was the reason for later changes in hours and find it more likely that changes resulted from rostering requirements relating to the staffing situation.

Changes in days of work

[31] As Ms Ying was only getting two shifts a week at New Windsor Aged Care she looked for other work. From the middle of February 2017 she was doing the other job on Mondays and Tuesdays. There is a dispute about when Ms Wang knew about that.

[32] The hours of work in Ms Ying's two jobs began clashing. It was somewhat difficult to get a clear picture from the parties as to when particular discussions between them were occurring. However, there are some text messages between the parties on the issue of days of work. On 26 February 2017 Ms Wang messaged Ms Ying saying that she could only arrange her work on Wednesday and Thursday. Ms Ying replied okay.

[33] On 8 March Ms Wang sent a message to Ms Ying. This referred to Ms Wang feeling helpless about seeing Ms Ying so unhappy and feeling awkward to see her.

Ms Wang asked that Ms Ying works Thursday, or two days, Thursday and Friday. Ms Ying replies, up to you.

[34] The relationship between the two women deteriorated with Ms Ying unhappy that she was not able to get shifts which fitted with her other work. At the investigation meeting Ms Ying said that she gave up the other job at some point in March, although in a message from 26 March 2017 she says that she (still) has the other job and cannot work a shift rostered at New Windsor Aged Care. It appears that the relationship between the two owners of the business was also deteriorating around this time.

[35] I accept that Ms Wang was having difficulties arranging shifts to suit the people undertaking the cook's role. Some staff were refusing to work Sundays. Ms Ying had not previously worked on Sundays. However, on 19 March 2017 Ms Wang messaged Ms Ying. She said that she had taken care of Ms Ying for a long time regarding Ms Ying not wanting to work on Sundays but she now cannot find any others to work on Sunday. She requested Ms Ying to ask permission from her Lord Jesus, that she not go to church on Sunday, but work instead. Ms Wang said that if possible she would change it back. Ms Ying replies, you can't make arrangements discontinuously, and why do you do this?

[36] Three versions of the roster for the week starting 20 March were filed, with Ms Ying working Saturday and Sunday in the first, Thursday and Sunday in the second and Thursday and Saturday in the third. Some of the later versions may have come out after the roster week started.

20 March confrontation

[37] Ms Ying and Ms Yao went in to the rest home to confront Ms Wang on 20

March 2017. The visit was motivated by Ms Yao trying to get the code for the CCTV access as well as Ms Ying's issue about days of work. The discussion was heated and the parties were unable to reach agreement.

[38] The parties presented different versions of events regarding this day. Ms Wang called her lawyer in for assistance. In any event the confrontation was not the subject of Ms Ying's claim and I do not need to discuss it further.

Acrimonious voice messages and social media postings

[39] On 24 March 2017 Ms Wang messaged asking Ms Ying to work on Sunday as other named people cannot work then. She notes that if possible she will rearrange. Ms Ying objects strongly saying that the shift changes were illegal and she would sue Ms Wang.

[40] Many voice messages were exchanged between Ms Ying and Ms Wang. These included Ms Ying saying that Ms Wang made the job arrangement (which did not suit her) on purpose and just wants to dismiss Ms Ying. Ms Wang said that if she has a chance she will change the time for Ms Ying. Both suggest that they might sue the other.

[41] Ms Wang and Ms Ying were part of a group set up on WeChat, a Chinese social media application. The group included most or all of the rest home staff and one rest home resident. Later on 24 March 2017, apparently after the various voice messages, Ms Ying posted on WeChat, asking in Chinese, "Have you ever seen such a boss? She repeatedly change my shift. She got any mental problems? I didn't say I didn't want to work". Further postings describe the changes to the roster being unreasonable and against the law and that Ms Ying would sue.

[42] Ms Wang then blocked receiving WeChat messages from Ms Ying.

Further messages on roster issues

[43] Ms Wang messaged Ms Ying directly on 26 March 2017 asking Ms Ying to work on Monday and Tuesday from next week. Ms Ying replied saying that she is unable to work on those days at the rest home due to her other job. She complains about shift changes. In her message she denies saying that she cannot work and says it is Ms Wang who put up obstacles to her working. The reply from Ms Wang is that she works the proposed days next week. However, I have been unable to identify a roster which with Ms Ying down for shifts on those days.

[44] On 4 April 2017 Ms Ying messages Ms Wang saying that one of the staff told her that her shifts were Wednesday and Thursday and that Ms Wang wants to talk to her. Ms Ying questions why, saying that they had already spoken and Ms Wang recognised "it" (unspecified) was not her fault. Ms Ying says that the requests for a discussion came after she had sought the

assistance of the Mediation Service, implying that Ms Wang may have been tailoring the messages. Ms Wang denied that she heard from the Mediation Service until 6 April 2017.

Letters from Ms Wang

[45] On 5 April 2017 Ms Ying received three letters dropped off to her mailbox. Both Mandarin and English versions of the letters were available to the Authority, although the Mandarin versions were hand dated 5 April and the English versions were hand dated 25 March. No explanation for those differences was provided. All came from Ms Wang on behalf of New Windsor Aged Care. Two of the letters were warnings, one regarding what had happened on 20 March and the other about posting defamatory material on social media.

[46] There was no disciplinary process leading up to the warnings being given, as

Ms Ying was simply given the letters.

[47] The third letter concerns shifts. It recognises Ms Ying's work in covering other shifts to meet the rest home's requirements. Further, it says that the new roster for 3 to 9 April 2017 has been announced and the schedule cannot adjust to meet Ms Ying's needs. Ms Ying is asked to rearrange her time between the two jobs and reply. Ms Ying's name is not on that roster.

[48] Ms Ying's name is not on subsequent rosters and she did not work at New Windsor Aged Care again. There was no evidence of Ms Wang contacting her again. Ms Ying sought to resolve the employment relationship problem by seeking mediation. Ms Wang did not attend the mediation, and says that she was too busy with an audit. No other representative was sent.

Dismissal

[49] Being unrepresented, Ms Ying's claim was not formally pleaded as relating to any particular category of personal grievance. Initially I took her claim to be in the nature of an unjustified action claim to her disadvantage. However, the Authority has the power to concentrate on resolving the employment relationship however

described.¹ Having heard the evidence I consider that Ms Ying's claim should be considered as an unjustified dismissal claim. Under [s 122](#) of the Act I am able to find a personal grievance of a different type from that alleged.

[50] No shifts have been offered to Ms Ying by New Windsor Aged Care since the week ending 26 March 2016. Ms Wang purported to give Ms Ying warnings on 5

April 2017 and said that she had no issue with Ms Ying returning to work but could not accept her arguing. However, despite Ms Ying indicating on several occasions that she was willing to work and able to do a number of days of the week, if not all, Good Future Auckland Ltd failed to offer her any shifts after 26 March 2016. This amounted to a sending away and therefore a dismissal of Ms Ying.

[51] What I must do under [s 103A](#) of the Act is determine whether on an objective basis, the employer's actions, and how the employer acted, were what a reasonable employer could have done in all the circumstances.

[52] Previously Ms Ying had been able to work fixed shifts and there had been occasional changes in days which both sides had been able to accommodate. However, in February and March 2017 this became more difficult. The relationship between Ms Wang and Ms Ying deteriorated. At a similar time, and possibly related to that was the deterioration of the relationship between Ms Wang and Ms Yao. There was no disciplinary process undertaken in terms of Ms Ying's unavailability for certain days. Ms Wang on behalf of Good Future Auckland Ltd simply gave up offering any days.

[53] I am not satisfied that the employer acted in a way which a reasonable employer could have done. Ms Ying's dismissal was therefore unjustified.

Remedies

[54] Having found that Ms Ying's dismissal was unjustified I turn to a

consideration of remedies. She seeks reimbursement of lost wages and compensation for mental distress as a result of her grievance.

¹ S 160(1)(3) of the Act

Lost wages

[55] Ms Ying claims lost wages for the period between 30 March and 19

September 2017. Ms Ying made no attempt to find other work as she says that she was too stressed. No medical evidence was

supplied to support this claim.

[56] As the status of her employment at New Windsor Aged Care was unclear from April 2017 it might have been understandable that Ms Ying did not attempt to find other work if she had been wanting to return to work at New Windsor Aged Care. However, when asked by the Authority, Ms Ying said that she had not thought about the prospect of returning to work at the rest home. That can therefore not be a reason for the failure to apply for other positions.

[57] Ms Ying had previously obtained other part time employment, whilst still employed at the rest home. It seems most unlikely that she would not have been able to find any employment in the almost six months after her last work at the rest home. Other than being stressed Ms Ying put up no reason for being unable to obtain other work. I consider that Ms Ying has failed to adequately mitigate her loss.

[58] I therefore make a reduction to the three months' lost wages which I would otherwise be required to award under s 128 (2) of the Act. I consider that Ms Ying should be entitled to four weeks' lost wages at a rate of \$269.31 gross per week before consideration of contribution. This is based on her average earnings from the first pay in November 2016 until March 2017. The total for four weeks is \$1077.24 gross.

[59] On top of lost wages Ms Ying seeks her employer's KiwiSaver contribution. Her payslips show that she was a Kiwisaver member and employer contributions of

3% were recorded. Three per cent of \$1077.24 is \$32.32.

Compensation for distress

[60] Ms Ying claims \$10,000 for mental stress. When asked about the claim Ms Ying said that she had found Ms Wang not arranging work for her very stressful and had financial difficulties. She puts her failure to seek other work down to that stress.

[61] I accept that Ms Ying found the changes of hours and then removal of work stressful. However, there was no evidence, despite questioning, of effects other than stress and financial pressure. I find that an award of \$3,000 would be appropriate before any consideration of contribution.

Contribution

[62] I am required to consider whether a deduction should be made from Ms Ying's remedies for contribution. The comments which Ms Ying made on social media about Ms Wang having mental problems are likely to have been a factor in the approach which Ms Wang took to Ms Ying's situation. I make a 10% reduction for that. This means that Ms Ying awards are \$969.52 gross for lost remuneration,

\$29.09 gross for Kiwisaver contributions on that, and \$2,700 for compensation for non-pecuniary loss.

Holiday pay

[63] Ms Ying claims outstanding annual leave of \$1417.50 gross.

[64] Ms Ying received some holiday pay for when she had leave in September

2016. Ms Wang initially claimed that a payment made in October 2016, which was effectively double the usual pay, was holiday pay for the entire period which Ms Ying was off work in September 2016. However, she accepted Ms Ying's evidence that this was for the previous pay period's work which had not been paid at the usual time due to a timesheet issue, which was not Ms Ying's fault.

[65] Therefore holiday pay is still outstanding and Good Future Auckland Ltd is to pay Ms Ying the sum of \$1417.50 gross.

Costs

[66] Neither party was represented. Good Future Auckland Limited is ordered to pay Ms Ying the sum of \$71.56 for the filing fee.

Nicola Craig

Member of the Employment Relations Authority