

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 437
5511511

BETWEEN YIQUN HU
Applicant

A N D SOUTH PACIFIC PHOENIX
SOLAR COMPANY LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Daniel Zhang for the Applicant
No appearance for the Respondent

Investigation Meeting: 16 October 2014 at Auckland

Date of Determination: 24 October 2014

DETERMINATION OF THE AUTHORITY

- A. Mr Hu was unjustifiably constructively dismissed by South Pacific Phoenix Solar Company Limited (South Pacific Phoenix). South Pacific Phoenix is ordered to pay Mr Hu lost remuneration totalling \$525 gross within 14 days of the date of this determination. No order for distress compensation is made.**
- B. Mr Hu is owed wages by South Pacific Phoenix in the sum of \$1,050 gross. I order South Pacific Phoenix to pay Mr Hu \$1,050 gross within 14 days of the date of this determination. South Pacific Phoenix is ordered to pay Mr Hu interest at the current rate of 5%¹ on \$1,050 from 22 June 2014 until it has been paid in full.**

¹ Section 87 Judicature Act 1908 and clause 14 Judicature Prescribed Rate of Interest Order 2011



- C. Mr Hu is owed holiday pay of \$2,184 gross. I order South Pacific Phoenix to pay Mr Hu \$2,184 gross holiday pay within 14 days of the date of this determination. South Pacific Phoenix is ordered to pay Mr Hu interest at the current rate of 5%² on \$2,184 from 22 June 2014 until it has been paid in full.**
- D. South Pacific Phoenix deducted but failed to remit to the Inland Revenue Department (IRD) Mr Hu's PAYE during the period of his employment.**
- E. South Pacific Phoenix failed to provide Mr Hu with his wages and time records when requested to do so. A penalty of \$500 is imposed on South Pacific Phoenix in respect of this breach. South Pacific Phoenix is ordered to pay the penalty of \$500 imposed upon it directly to Mr Hu within 14 days of the date of this determination.**
- F. Costs are reserved.**

Non-appearance of respondent

[1] South Pacific Phoenix Solar Company Limited (South Pacific Phoenix) has not engaged with the Authority's process at any point.

[2] On 3 September 2014, the Authority arranged for service of the statement of problem filed by the applicant, Mr Yiqun Hu to be couriered to the registered office of South Pacific Phoenix being C/- HY Accountants, 53B Sentinel Road, Herne Bay. However, the statement of problem was returned by Courier Post because the person upon whom it was sought to be served refused to take the item.

[3] To ensure South Pacific Phoenix was aware of the statement of problem, the Authority arranged for CourierPost to serve the proceedings on the sole director of South Pacific Phoenix, Sangmi Lee at the residential address listed for her at the Companies Office. The document was again returned by CourierPost.

² Section 87 Judicature Act 1908 and clause 14 Judicature Prescribed Rate of Interest Order 2011



[4] On 7 October, the notice of investigation meeting was personally served by Ms Shirley Walters at the registered office of South Pacific Phoenix. Ms Walters has filed an affidavit of service confirming that:

*The documents were handed to an Asian female who confirmed it was the address of HY Accountants. She refused to accept the documents on behalf of **SOUTH PACIFIC PHOENIX SOLAR COMPANY LIMITED**. The document was placed at her feet.*

[5] At the investigation meeting on 16 October 2014, there was no appearance for South Pacific Phoenix. I am satisfied that the Authority has done everything it can reasonably do to inform South Pacific Phoenix of the claim against it and to give it a proper opportunity to be heard in relation to the claims that Mr Hu makes against it.

Employment relationship problem

[6] Mr Hu was employed by South Pacific Phoenix as a chef de partie from 1 July 2013 until his resignation with effect on 22 June 2014. Mr Hu was employed at South Pacific Phoenix's Birkenhead Villa Café preparing breakfasts and lunches.

[7] Mr Hu had an individual employment agreement (the agreement) which he and Ms Lee both signed on 17 June 2013.

[8] During his employment by South Pacific Phoenix, Mr Hu was paid \$15 gross per hour and he worked 35 hours per week. Mr Hu's weekly wages amounted to \$525 gross per week. South Pacific Phoenix paid Mr Hu net wages of \$400 a week by way of direct credit into Mr Hu's ASB bank account.

[9] South Pacific Phoenix never provided Mr Hu with any payslips and despite requests, has failed to provide him with wages and time records for the period of his employment.

[10] On approximately 5 June 2014, Mr Hu logged on to the Inland Revenue Department's (IRD) website to get a tax refund. Mr Hu discovered that there was no record that he had worked for South Pacific Phoenix or that the IRD had received PAYE on his behalf. Mr Hu attempted to resolve the issue with IRD directly but was informed that it was South Pacific Phoenix's obligation as an employer to rectify the situation.



[11] Upon discovering the situation with the IRD and after raising the matter with Ms Lee and Mr Jason Liang, Mr Hu decided he had no option but to resign. Mr Hu was concerned that the actions of South Pacific Phoenix in failing to register him as an employee and to pay his PAYE tax to the IRD may affect his employment record and his immigration status. Mr Hu resigned on 10 June with effect on 22 June.

[12] Mr Hu claims his resignation amounted to a constructive dismissal which was unjustified in the circumstances. Mr Hu seeks remedies including compensation of \$10,000 under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for hurt and humiliation suffered by him in respect of the alleged unjustified dismissal. Mr Hu also seeks annual leave on the basis that it was a loss of benefit which he would have expected to obtain if he had not been unjustifiably dismissed and three months' remuneration.

[13] Mr Hu says he has not been paid wages from 9 June 2014, the day before he notified South Pacific Phoenix that he was resigning, until the date he actually left his employment on 22 June 2014. The unpaid wages amount to \$1,050 gross.

[14] Further, Mr Hu says he is owed holiday pay of \$2,184 gross for his period of employment.

Issues

[15] The issues for determination by the Authority are:

- (a) Was Mr Hu unjustifiably constructively dismissed by South Pacific Phoenix;
- (b) If so what remedies are owed to him;
- (c) Is Mr Hu owed wages for the period from 9 to 22 June 2014;
- (d) Is Mr Hu entitled to 8% holiday pay for the period of his employment by South Pacific Phoenix;
- (e) Did South Pacific Phoenix deduct but fail to remit to the Inland Revenue Department (IRD) PAYE in respect of Mr Hu; and
- (f) Did South Pacific Phoenix fail to provide Mr Hu with his wages and time records when requested to do so?



First Issue

Was Mr Hu unjustifiably constructively dismissed by South Pacific Phoenix?

[16] The law in relation to constructive dismissals in New Zealand is well settled. In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*³, the Court of Appeal considered situations in which an employee's resignation may constitute constructive dismissal. The Court identified three situations (non-exhaustive) in which a constructive dismissal may occur:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads an employee to resign.

[17] It seems from Mr Hu's evidence that he is relying primarily on the third category of constructive dismissal referred to in *Woolworths* (supra). Mr Hu says he discovered on approximately 5 June 2014 that South Pacific Phoenix had not registered him as an employee with IRD for the purposes of paying PAYE. Mr Hu also discovered the weekly deductions of \$125 for PAYE made by South Pacific Phoenix from his gross wages of \$525 had not been paid to IRD. Mr Hu was concerned about the situation and in particular how it could affect his working experience and immigration status in New Zealand.

[18] Immediately upon discovering that South Pacific Phoenix had not registered him as an employee or paid the PAYE deducted from his wages, Mr Hu raised the issues with Mr Liang and Ms Lee. Their response was there was nothing they could do. Mr Hu resigned shortly afterwards on 10 June but agreed to stay until 22 June so that South Pacific Phoenix had the opportunity to obtain a replacement Chef.

[19] In para.15 of his witness statement, Mr Hu says:

On 10 June 2014, I resigned from my employment. I did not want a bad reference from the respondent so I did not say why I decided to resign. I was also concerned that I needed to keep the respondent on my side in order to rectify the IRD issue. I was also concerned that if



I made a fuss about the IRD issue this could affect my immigration applications which was also dependent on my employment.

[20] South Pacific Phoenix did not pay Mr Hu wages for the period of his notice of resignation from 9 to 22 June and did not pay him any holiday pay.

[21] On 31 July, Mr Hu's lawyers sent a letter to South Pacific Phoenix. The letter requests South Pacific Phoenix to rectify Mr Hu's situation with IRD and also seeks payment of unpaid wages and holiday pay. A request is also made on Mr Hu's behalf for the parties to attend mediation in order to resolve matters between them. South Pacific Phoenix failed to respond.

[22] It is my view that Mr Hu was unjustifiably constructively dismissed by South Pacific Phoenix. As an employer South Pacific Phoenix has a number of statutory obligations which include registering new employees with IRD, deducting PAYE and ensuring payment is made to IRD.

[23] I accept that South Pacific Phoenix failed to discharge its statutory obligations with the IRD in respect of Mr Hu and in doing so has no doubt exposed itself to scrutiny by IRD. These failures amount to serious breaches of Mr Hu's employment agreement.

[24] Mr Hu requested South Pacific Phoenix to rectify these breaches with IRD and it failed to do so. In my view it was reasonably foreseeable that Mr Hu was going to resign in the circumstances. Mr Hu could not continue to work for South Pacific Phoenix in such circumstances.

[25] South Pacific Phoenix's actions were such as to destroy Mr Hu's continued trust and confidence in it. Mr Hu obtained another position at the Autobarn Café on 1 July 2014.

[26] On the balance of probabilities I accept Mr Hu has established his resignation amounted to a constructive dismissal. Having concluded that Mr Hu was dismissed the onus passes to South Pacific Phoenix to justify the dismissal. Justification is objectively assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[27] South Pacific Phoenix did not comply with any of the s.103A(3) procedural fairness tests in the Act. I find that South Pacific Phoenix's actions and the way it



acted were not what a fair and reasonable employer could have done in all the circumstances. South Pacific Phoenix is therefore unable to justify Mr Hu's dismissal. Accordingly, I find that Mr Hu's dismissal is unjustified.

[28] The answer to the first issue is "Yes".

Second Issue

If there is an unjustified constructive dismissal what remedies are owed to Mr Hu?

[29] Mr Hu's employment by South Pacific Phoenix ended on 22 June and he started his new job at the Autobahn Café on 1 July. Mr Hu lost remuneration for 5 days.

[30] South Pacific Phoenix is ordered to pay Mr Hu \$525 gross (being 5x \$105 (7 hours at \$15 gross an hour)) lost remuneration under s.128(2) of the Act.

[31] I am not satisfied Mr Hu suffered any humiliation, loss of dignity and injury to feelings as a result of his constructive dismissal. I decline to make an award for compensation under s.123(1)(c)(i) of the Act.

[32] Having determined Mr Hu was unjustifiably constructively dismissed, s124 of the Act requires that I consider whether Mr Hu's actions contributed to his dismissal and if so to reduce remedies accordingly. I find Mr Hu did not contribute in any way to his unjustified constructive dismissal so to reduce his remedies.

Third Issue

Is Mr Hu owed wages for the period from 9 to 22 June 2014?

[33] South Pacific Phoenix gave no evidence. I accept Mr Hu's uncontested evidence that he is owed unpaid wages for the period he worked between 9 and 22 June 2014. The amount owed is \$1,050 gross.

[34] I order South Pacific Phoenix to pay Mr Hu \$1,050 gross unpaid wages within 14 days of the date of this determination.



[35] South Pacific Phoenix is ordered to pay Mr Hu interest at the current rate of 5%⁴ on \$1,050 from 22 June 2014 until it has been paid in full.

Fourth Issue

Is Mr Hu entitled to 8% holiday pay for the period of his employment by South Pacific Phoenix?

[36] For the same reasons, I am satisfied that Mr Hu is owed holiday pay of \$2,184 gross.

[37] I order South Pacific Phoenix to pay Mr Hu \$2,184 gross holiday pay within 14 days of the date of this determination.

[38] South Pacific Phoenix is ordered to pay Mr Hu interest at the current rate of 5%⁵ on \$2,184 gross from 22 June 2014 until it has been paid in full.

Fifth Issue

Did South Pacific Phoenix deduct but fail to remit to the Inland Revenue Department (IRD) PAYE in respect of Mr Hu?

[39] Mr Hu was paid \$525 gross a week by South Pacific Phoenix. Mr Hu received \$400 net a week into his bank account and understood PAYE of \$125 was remitted each week to IRD on his behalf by South Pacific Phoenix. Mr Hu checked this with IRD and not only was he not registered with IRD but no PAYE had been remitted to it. I accept Mr Hu's evidence. I find that South Pacific Phoenix deducted but failed to remit to the Inland Revenue Department (IRD) PAYE in respect of Mr Hu.

Sixth Issue

Did South Pacific Phoenix fail to provide Mr Hu with his wages and time records when requested to do so?

[40] Mr Hu gave evidence that he requested South Pacific Phoenix to provide him with his wages and time records but they failed to do so. South Pacific Phoenix did not attend the investigation meeting and no such records were provided to the Authority. I accept Mr Hu's evidence.

⁴ Section 87 Judicature Act 1908 and clause 14 Judicature Prescribed Rate of Interest Order 2011

⁵ Section 87 Judicature Act 1908 and clause 14 Judicature Prescribed Rate of Interest Order 2011



[41] I find that South Pacific Phoenix failed to provide Mr Hu with his wages and time records as requested by him. South Pacific Phoenix is in breach of s.132 of the Act and is liable to a penalty. I impose a penalty of \$500 payable directly to Mr Hu under s.136(2) of the Act within 14 days of the date of this determination.

Costs

[42] Mr Hu as the successful party is entitled to costs. Mr Hu has 7 days in which to file a memorandum as to costs. South Pacific Phoenix has 7 days in which to file its reply.



Anna Fitzgibbon
Member of the Employment Relations Authority

