

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Weiling Huang (Applicant)
AND New Zealand Education Services Centre Limited (Respondent)
REPRESENTATIVES Weiling Huang In person
Wayne Huang, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 16 September and 19 October 2005
SUBMISSIONS RECEIVED 11 November 2005
DATE OF DETERMINATION 12 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] New Zealand Education Services Centre Limited ("NZESCL") is an education provider. Wayne Huang is the registered director of the company, and the principal of the school which the company runs.

[2] The school offers day time block courses, and after hours classes. It employed Weiling Huang to provide after hours Chinese classes. Mr Huang dismissed Ms Huang by reason of redundancy, on the ground that there were not enough enrolments to warrant continuing some of the classes, or in turn to continue Ms Huang's employment.

[3] Ms Huang says the dismissal was unjustified. She also says Mr Huang failed to pay commissions he had promised to her.

[4] Prior to the resumption of the investigation meeting in October 2005 Ms Huang questioned whether she was entitled to holiday pay. That matter was addressed at the resumed investigation meeting and is incorporated in this determination.

Ms Huang's employment

[5] There was no written employment agreement, although no penalty has been sought in that respect. The precise terms and conditions of Ms Huang's employment would have been considerably clearer had there been a written agreement. In particular Ms Huang's hours of work and rate of pay would have been spelled out, as would her entitlement to the commission she now claims. For Mr Huang's information s 65 of the Employment Relations Act 2000 not only obliges

employers to provide employees with a written employment agreement, but requires the agreement to include details such as arrangements relating to hours of work.

[6] Ms Huang was employed by verbal agreement, commencing in July 2003. Mr Huang's plan was to set up community-based after hours classes. The after hours classes were not part of NZESCL's main business, and were intended to pay for themselves through relatively modest fees charged to students. At the time Mr Huang was focussing in particular on establishing an after hours Chinese language programme, referred to in this determination as the Chinese language school. Because the 'project' as he put it was a start up, there were no established courses and no students. As well as teaching Ms Huang was encouraged to work both on establishing the courses and recruiting students, which she did.

[7] The parties discussed this in an interview in July 2003. They also discussed how Ms Huang would be paid. They agreed she would be paid at \$20 per lesson for classes of less than 7 students, a higher rate for classes of 7-10 students, and a higher rate again for classes of more than 10 students. To cover the initial period while she recruited students and established courses, Ms Huang was offered some administrative work associated with international students. She was paid separately for that.

[8] During the rest of 2003 and 2004 the after hours programme built so that two tutors, including Ms Huang, taught Chinese language classes. Art, maths and English classes were added during this time. However Mr Huang said in evidence that in about December 2004 he concluded that continuing the Chinese classes was not economic. He purported to close the 'Chinese school' and establish a 'Synergy Art school' focussing on art, maths and English classes. He said that meant there was no work to offer Ms Huang.

[9] Ms Huang was not told any of this at the time. Towards the end of January 2005, when the new school year was about to commence, she was still wondering which classes she would be teaching and why no-one had said anything about the matter to her.

[10] Having made fruitless attempts to enquire by telephone, Ms Huang went to the school premises to ask when classes would begin and which classes she would be teaching. She was adamant she did so on Thursday 27 January 2005, while Mr Huang was adamant she did so on a Saturday. Ultimately nothing turns on this because key aspects of the resulting exchange were clear.

[11] In summary Ms Huang approached another employee, Sharon Zhong, at the reception desk and asked to speak to Mr Huang. Mr Huang was teaching a day class, but briefly took time out of it to suggest to Ms Huang that she speak to Vicky, the tutor in charge of the after hours classes. Ms Huang went to Vicky's office, but Vicky said she was busy and asked Ms Huang to wait outside the office. While Ms Huang was waiting Mr Huang saw her. There was an altercation during which Mr Huang told her she should make an appointment if she wanted to talk, and asked her to leave. She refused to leave. Mr Huang threatened to call the Police, so she did leave.

[12] By letter dated 8 February 2005 Ms Huang wrote to Mr Huang recording her view of the incident and saying: "I am still your employee since I haven't received any official notice saying that I have been dismissed from your school." She also requested the commission payment she says is owed.

[13] By letter dated 10 February 2005 Mr Huang advised:

"Due to recent restructuring arrangements within NZ Education Services Centre Ltd, for purely commercial reasons therefore I find it necessary to apply the redundancy clause of your relief-based employment and notify you that from 25 Feb 2005 your position within the company will no longer be available."

[14] There was no ‘redundancy clause’ and no ‘relief-based employment’.

The justification for the redundancy

[15] Ms Huang does not believe the redundancy is genuine, and says its implementation was unfair. In particular she finds unacceptable the way she was treated on her visit to the premises in January 2005, and what she says was the ongoing refusal to discuss her concerns about her employment.

1. Genuineness of redundancy

[16] Because Mr Huang was relying on an assertion that it was not economic to continue to offer the Chinese classes, I asked him on several occasions to substantiate the assertion by at least providing details of the number of students at the after hours classes during 2004. That proved unexpectedly difficult. A similar problem arose when I asked for supporting financial information. Either the school’s record-keeping is very poor or Mr Huang was being evasive.

[17] Mr Huang only ever provided figures for student attendances in October, November and December 2004, and even then Ms Huang did not accept they were accurate. They showed Ms Huang’s Thursday classes attracted 2 students, as did one of her Saturday classes. Ms Huang’s other Saturday class attracted 11 students. Three other classes not taught by Ms Huang attracted 4 or 5 students each. Ms Huang’s point was that her own record indicated a slow but steady increase in the total numbers of Chinese language students, although she did not provide a breakdown of the classes they attended. She also disputed that one of her classes attracted only 2 students, saying there were 5. I am prepared to accept her record of the total number of students at the after hours Chinese classes, but the fact there was an overall increase does not necessarily mean it was economic to continue to offer the classes. On any assessment, the number of students was small.

[18] There was one exchange in the evidence which supported the borderline economic basis of the operation of the Chinese language school. Mr Huang said he discussed with Ms Huang that he needed 4-5 students per class, and if there were any fewer he would talk to the teacher concerned about teaching on a voluntary basis. He said one teacher did work that way.

[19] Ms Huang denied being aware that Mr Huang sought a minimum of 4-5 students, yet said elsewhere in her evidence that she suggested starting with four as a minimum. Whatever the detail of the conversation, I consider it likely there was a mutual understanding of the necessary minimum student numbers per class. Also although Ms Huang was not offered an opportunity to work on a voluntary basis at the time of her redundancy, on her own evidence the question of what would happen if student numbers dropped too low was discussed on many occasions. She said Mr Huang told her the teacher would have to take whatever the students paid, and her response was that was not practical. She was aware that one teacher worked on that kind of basis.

[20] Thus despite the unsatisfactory nature of Mr Huang’s response to my requests for information, I accept there was genuine reason to say it was uneconomic to continue the Chinese language classes as they were being run.

[21] Another aspect of the genuineness of the redundancy is that Mr Huang characterised as a ‘restructuring’ the closure of the Chinese language school and the opening of the Synergy Art school. While I would accept he sought a change of emphasis away from Chinese language teaching, in 2005 Chinese language classes were still offered under the banner of the ‘Synergy Art School’. Arts, maths and English classes continued to be offered, as they had been when there was a ‘Chinese language school.’

[22] Moreover the evidence suggested that, other than a possible intention to change the focus of the classes offered, little changed in respect of the Chinese language classes except that Ms Huang was no longer involved in them. Instead, according to an early timetable, several tutors taught them. Mr Huang said in evidence that he left the Chinese classes to whoever wanted to teach them. Accordingly tutors would put their names and classes on a noticeboard, and prospective students would put their names down for those classes they wished to attend. Figures for March and April show each class averaged 4 – 5 students, with one tutor averaging about 7 students per class. Overall numbers did not differ significantly from those of late 2004.

[23] I asked Mr Huang why Ms Huang's employment ended rather than someone else's, and he said there was no role for her when the structure was changed. Ms Huang's English is not strong, and Mr Huang sought competent English speakers in order to target New Zealand-born students with good English themselves. Even so, he went on to say it all depended on what 'the market' wanted.

[24] I would accept that some of the tutors were retained for valid reasons such as the level of their English skills and their ability to teach classes other than Chinese language classes, but if Mr Huang was adopting the kind of hands-off approach to the Chinese classes he indicated then I see no reason why Ms Huang could not have been given an opportunity to offer classes if she wished. The tone of her evidence suggests there was a chance she would have declined to continue if, for example, her pay would be less if student numbers were very low, but whether or not that is so she should have been given the opportunity to consider the matter.

2. The procedure used in implementing the redundancy

[25] This brings me to the lack of consultation with Ms Huang. Obviously there was no consultation at all. Mr Huang said the closing of the Chinese language school was discussed in staff meetings which were held periodically after Saturday classes. Ms Huang was unwilling to stay beyond the end of class time without pay, but said too that she had commitments and that she was not notified in advance when meetings would occur. If Mr Huang had the discussions he said he did, then they were important enough that Ms Huang should have had advance notice of them and an opportunity to make arrangements to attend.

[26] The only other potential hint to Ms Huang of what was to come was a draft list of details of 'Staff at Synergy Art School', dated 16 December 2004. Seven names appeared on that list, and Ms Huang's was not one of them. Next to each name was a list of that person's responsibilities. From that list it can be seen that some tutors would be involved in teaching art courses, some in minor business skills courses, some in maths and science, and two would teach a variety of courses including Chinese. That is not enough to notify Ms Huang adequately of her impending redundancy.

[27] The handling of the termination itself was not satisfactory either. That nothing was said to Ms Huang until after she had forced the issue by attending the school's premises and demanding an answer is unacceptable.

[28] For these reasons I conclude that the dismissal was unjustified and Ms Huang has a personal grievance.

Remedies

1. Reimbursement of lost remuneration

[29] It was common ground that Ms Huang earned on average \$100 per week during the school term.

[30] She is entitled to the reimbursement of remuneration lost as a result of her personal grievance. Ms Huang has been earning an income from home tutoring, and has earned more than \$100 per week since June 2005. She had no income while she sought that work, and earned an average of \$60 per week from April to June.

[31] The period of lost earnings is some 8 weeks at \$100 per week to April, then some 9 weeks averaging \$60 per week from April to June. There were two weeks of school holidays in April, when no income would have been earned anyway, leaving 7 weeks. The total loss of earnings is $[8 \times \$100] + [7 \times \$40] = \$1,080$.

2. Compensation for injury to feelings

[32] From her demeanour, as well as the evidence of Mr Huang and Ms Zhong, I consider it likely that Ms Huang's behaviour when she went to the school in late January was considerably more disruptive than she would admit. Moreover, in several items of correspondence after that she expressed her outrage that the Police had been called when she was aware there had been no more than a threat to that effect.

[33] While Ms Huang is entitled to compensation for the obvious injury to her feelings caused by her personal grievance, her own abrasiveness must be taken into account. NZESLC is therefore ordered to compensate her for injury to her feelings in the sum of \$3,500.

3. Other remedies sought

[34] Ms Huang also wants NZESCL to send her a formal letter of apology, and provide her with a formal reference. While requests like those can be the subject of negotiation and agreement - and frequently are, especially during mediation - they are not among the remedies available by order of the Authority so I make no orders in respect of them.

The commission payment

[35] Ms Huang alleged there was agreement that, if the after hours school could recruit up to 30 students, she would receive a share of the income generated. Mr Huang denied there was such an agreement. Ms Zhong, who was present at the meeting when the matter was allegedly discussed, also denied it.

[36] Accordingly I am not persuaded there was an agreement of the kind Ms Huang alleged. Even if I was persuaded there was an agreement regarding a bonus or commission of some sort, the vagueness as to how Ms Huang's 'share' of the income was to be quantified would be fatal to the claim. I make no order in respect of the claim for a commission payment.

Holiday pay

[37] Ms Huang did not receive any holiday pay. Mr Huang said a holiday pay component was included in her ordinary pay, which Ms Huang denied. In support Mr Huang sought to characterise Ms Huang's employment as casual, which Ms Huang also denied. Again, a written agreement would have made those matters clear.

[38] There was no evidence of any kind of agreement between the parties to the effect that holiday pay was incorporated in Ms Huang's rate of pay, or for that matter that the employment was casual. Express written agreement is necessary before an arrangement incorporating holiday pay into the usual rate of pay can be given effect. Thus regardless of whether there was an intention on the school's part that holiday pay be incorporated into Ms Huang's rate, the required agreement was lacking.

[39] Ms Huang is therefore entitled to be paid holiday pay in respect of her employment at the school. Because obtaining proper information about Ms Huang's earnings proved as difficult as obtaining details of class numbers, precise quantification is not possible. Bearing in mind that difficulty, I assess the matter on the basis that Ms Huang earned \$100 per week from July 2003 to December 2004. Holiday pay is to be calculated and paid at 6% x (\$100 per week x number of weeks worked). I am unable to quantify the total because I do not know how many school holiday weeks there were.

[40] I expect the parties to complete the calculation. Leave is reserved to seek a further order from the Authority if there are any difficulties.

Summary of orders

[41] NZESCL is ordered to pay to Ms Huang:

- (a) \$1,080 as reimbursement of earnings lost as a result of her personal grievance;
- (b) \$3,500 as compensation for injury to her feelings; and
- (c) holiday pay in respect of the entire period of Ms Huang's employment, in an amount to be calculated on the basis of earnings of \$100 per week.

Costs

[42] Costs are reserved. If the parties seek a determination of the matter by the Authority they are to file and exchange written statements setting out their positions on the matter by the close of business on 23 December 2005.

R A Monaghan
Member, Employment Relations Authority