

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 505/10  
5303545

BETWEEN CHUNLIN JING  
Applicant  
AND SKY CUISINE LIMITED  
Respondent

Member of Authority: Dzintra King  
Representatives: Jun Liu, Advocate for Applicant  
Guanjun Zhang, Advocate for Respondent  
Investigation Meeting: 29 November 2010 at Auckland  
Determination: 9 December 2010

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**DETERMINATION OF THE AUTHORITY**

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**EMPLOYMENT RELATIONSHIP PROBLEM**

[1] The applicant, Mr Chunlin Jing, says he is owed wages by the respondent, Sky Cuisine Limited. Mr Guanjun Zhang is the director of the respondent.

[2] Mr Jing started work as a chef on 23 April 2009. From 6 November 2009 until Mr Jing left his employment on 5 January 2010 no wages were paid. The respondent does not dispute this.

[3] Mr Jing was employed on a salary of \$32,000 for a 40 hour week. This equates to a salary of \$615.38 gross per week. The respondent's records show that \$498.66 net was paid to the applicant. In fact, Mr Jing was only paid \$400 net as the respondent deducted without consent the sum of \$98.66 per week. Mr Zhang said this was to ensure that he obtained repayment of the agent's commission for arranging Mr Jing's employment in New Zealand.

[4] Mr Zhang also claimed that Mr Jing owed him money for accommodation despite the fact that the letter of offer setting out the terms and conditions specify that *“The company will provide accommodation and food at free of charge.”* Although Mr Zhang claimed \$50 per week when questioned he said the amount for rent was open to negotiation. It is apparent that no deductions were actually made.

[5] Mr Zhang also claimed reimbursement of telecommunications charge and payment of an immigration fee. There was no agreement regarding either of these matters. Mr Zhang also sought the reimbursement of the cost of advertising for a new chef and the loss incurred by Mr Jing’s departure. Mr Zhang cannot be reimbursed for any of these items. Mr Jing left his employment because Mr Zhang unlawfully withheld his wages.

[6] There was a dispute regarding the number of hours worked. Mr Zhang said Mr Jing worked 40 hours. Mr Jing said he worked 72 hours. There was also disagreement regarding the opening hours of the restaurant.

[7] The respondent did not keep records. Mr Jing was paid in cash each week. Mr Jing did not have records of hours worked. In light of the fact that the evidence regarding the hours of work was unsatisfactory I have taken the signed employment agreement as correctly setting out the working hours: 40 per week. I have based my calculations on a 40 hour week at an annual salary of \$32,000.

[8] Mr Jing asserted the restaurant was open on public holidays. Mr Zhang said it was not open during the day. I have calculated public holiday pay on the basis of the restaurant being open in the evenings on public holidays.

[9] Mr Zhang has claimed for work on 25 April (Anzac day), 1 June (Queen’s Birthday), 26 October (Labour Day), 25 December (Xmas day) 26 and 28 December (Boxing day) 1 January 2010 (New Years day), 2 and 4 January 2010.

[10] 26 and 28 December are alternate days as are 2 and 4 January. Payment cannot be made for both.

[11] All days of the week were normal working days for Mr Jing, except that on Tuesdays he worked only in the evenings. I accept that Mr Jing worked on public holidays. For that the public holidays that he worked he is entitled to be paid at the rate of time and a half for the hours worked.

[12] April 25 and December 26 and January 2 were Saturdays. The restaurant was open for 7.5 hours.

[13] June 1 and October 26 were Mondays. The restaurant was open for 4 hours.

[14] December 25 and January 1 were Fridays. The restaurant was open 6 hours.

[15] Mr Jing is entitled to be paid for 42.5 hours at .5. His hourly rate was \$15.39 so the payment for .5 of 42.5 hours is \$326.92 gross.

[16] Mr Jing was to have been paid the sum of \$615.38 gross per week or \$498.66 net. However, he was paid only \$400 net per week. Payments ceased altogether as from 6 November 2009. Mr Jing left his employment on 5 January 2010.

[17] For the period when no payments were made (8 weeks and four days) Mr Jing is to be paid the sum of \$5,274.64 gross.

[18] For the earlier period of employment, when the sum of \$98.66 net was illegally withheld each week for 28 weeks, Mr Jing is to be paid \$2762.48 net.

[19] The deductions were illegal because there was no written agreement that deductions be made.

[20] Mr Jing has not been paid holiday. His gross income for the period of employment was \$22,832.33. He is entitled to holiday pay at the rate of 8%: \$1,826.59 gross.

[21] Mr Jing was left with no option but to resign when his employer ceased to pay him. This constitutes a constructive dismissal and the dismissal was unjustified.

[22] Pursuant to s 123 (1) (b) Employment Relations Act 2000 Mr Jing is entitled to be reimbursed a sum equal to the whole or any part of wages lost as a result of the grievance. This will be the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration.

[23] If the parties are unable to agree on a calculation of the lost income leave is reserved to return to the Authority for that purpose.

[24] Neither party had legal representation so there is no issue of costs. Mr Jing is however entitled to be reimbursed the \$70 filing fee.

[25] In summary, the respondent is to pay to the applicant:

- Public holiday pay \$326.92 gross
- Unpaid wages \$5,274.64 gross
- Annual holiday pay \$1,826.59 gross
- Illegal deductions \$2,762.48 net
- Filing fee \$70.00

Dzintra King

Member of the Employment Relations Authority