

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 54/07
5037688**

BETWEEN JIAJU LI
 Applicant

AND ASTRAL MANAGEMENT
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mike Dawson, Advocate for the Applicant
 Brian Nathan, Counsel for the Respondent

Investigation Meeting: 2 March 2007 at Christchurch

Determination: 15 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Jiaju Li (“Ms Li”) alleges that she has suffered disadvantage by the unjustifiable actions of the respondent Astral Management Ltd (the employer) and that she was unjustifiably constructively dismissed.

[2] The employer resists those claims denying unjustifiable action causing Ms Li disadvantage and denying that she was constructively dismissed.

[3] There is a significant gulf between the factual matrix advanced by Ms Li in support of her claims and that proffered by the employer.

[4] Ms Li says that she commenced full time employment with the employer on 6 December 2004; the employer says that the full time employment relationship started in January 2005. By reason of the nature of the remuneration arrangements for Ms Li at that time, it is difficult to be certain exactly when the employment relationship

started. Ms Li says that she was not paid actual wages at this time because there was allegedly a debt owed by her to Astral which was to be paid back by the application of her weekly wages.

[5] To facilitate this arrangement, Ms Li was effectively provided with subsidised board and lodging by Astral, initially upstairs above the restaurant and subsequently at the home of the two principal parties involved in the governance of Astral Ms Jenny Wang and Mr Mike Yang.

[6] Ms Li alleges that she was asked to sign an individual employment agreement on commencement of her duties which provided for a wage rate of \$13 per hour.

[7] On 10 May 2005, Ms Li signed a further individual employment agreement which, on the face of it, has different provisions, in particular a provision wherein she is paid a salary of \$24,000 per annum rather than an hourly rate. For its part, Astral deny that there were ever two individual employment agreements and contend that the first document to which Ms Li refers was in fact simply a job description for a job which she might have done. It is certainly a fact that a full copy of the initial so-called first individual employment agreement has not been provided to the Authority.

[8] Ms Li claims that she worked for Astral 12 hours a day, six days a week. Astral, for their part, deny that allegation and say that Ms Li's hours were normally 40 hours per week worked over five days and on a split shift basis with Ms Li being required to work over the lunch period from 12 noon to 3pm and then over the dinner period from 5.30pm to 9.30pm on weekdays and 10.30pm on weekends.

[9] The effect of Ms Li's claim that she worked the additional hours referred to is that she says that she is owed some \$47,000 by Astral.

[10] Ms Li says that she was literally driven out of her employment by the lack of money whereas Astral say that Ms Li abandoned her employment after an extensive period of effectively unexplained absence.

Issues

[11] In order for the Authority to determine this matter, it will be necessary to consider the following matters:

- (a) What employment agreement applies;
- (b) Was Ms Li paid a salary or a wage;
- (c) What hours did Ms Li work
- (d) Are there arrears of wages due to Ms Li;
- (e) Is Ms Li due any other payments;
- (f) Is there evidence of a constructive dismissal;
- (g) Is there evidence of an unjustifiable action causing Ms Li disadvantage.

What employment agreement applies?

[12] When the statement of problem was filed in the Authority, attached to the statement of problem were two documents each of which Ms Li alleges are individual employment agreements pertaining to her employment by Astral. Astral, for its part, denies that the first of these agreements is in truth a separate document.

[13] The first of the two documents is referred to as document "A". It is clearly not a complete document comprising in fact only three pages, the first of which shows the number 3, the second of which shows the number 14 and the third of which shows no number at all but purports to be a job offer for a role as a "marketing assistant" on Astral Management Ltd letterhead. During the investigation meeting, Ms Jenny Wang gave evidence that she knew nothing about the genesis of this particular page of document "A".

[14] Astral say that document "A" is not an employment agreement which Ms Li signed when she commenced her employment and that document "A" is no more and no less than a collection of pages drawn from various different sources. I accept this evidence on its face. It is self evident that document "A" is not a complete document. The execution page which is attached as part of document "A" appears to be a photostat copy of the execution page from document "B" which is a complete employment agreement. Furthermore, document "A" contains on its first page (in fact Page 3) evidence that it has not actually been completed; the first line of the agreement reads as follows:

1.1 This agreement shall commence on the [1] day of [January] 200[5], and its ...

That seems to me to imply that the writer of the employment agreement had yet to complete the date on which the agreement was to start. Neither party in these proceedings alleged that the employment relationship commenced on 1 January 2005.

[15] Further and finally, the third page of document “A” is as I have described a job offer as a marketing assistant. There is no evidence before the Authority that Ms Li ever worked as a marketing assistant although the evidence does support the conclusion that there were discussions about that possibility to assist her to obtain permanent residency. Given that Ms Wang gave evidence that she knew nothing about the genesis of this job offer document, (and I accept that evidence) it is difficult to see how one can advance document “A” as being evidence of a concluded bargain between the parties for a role as a waitress in the restaurant.

[16] Document “B” has the advantage of being absolutely complete at least to the end of the contract proper which includes the execution of the parties. The final page attached to document “B” is entitled Schedule 1 and then describes the job title as “Marketing Assistant”. No satisfactory explanation was ever provided to the Authority as to why this employment agreement concluded with a schedule which purported to have Ms Li fulfilling the role of marketing assistant when plainly that was not work that she actually did. Despite this difficulty, Astral invited me to accept that this was the operative employment agreement.

[17] Then, to make matters worse, during the course of the investigation meeting Astral produced yet another employment agreement which appeared to be in exactly similar terms to document “B” except that it attached not one but two pages of schedules, the first of which under the intituling Schedule 1 contained a description of the job title “Restaurant Staff” and then set out below that the relevant pay scale and the hours of work.

[18] The following and final page contains two additional schedules, one being a job description for the job title “Restaurant Staff” and Schedule 3 being a list of the key duties of that role, all of which related to the operation of the restaurant.

[19] There is no difference whatever between the employment agreement proper tabled at the investigation meeting and document “B”. The only difference is in the schedules.

[20] I am satisfied that the document tabled at the investigation meeting is indeed the employment agreement that Ms Li worked to. I do not accept that the relationship was governed by any other document and I am satisfied that the work that Ms Li did is the work that is described and detailed in the employment agreement tabled at the investigation meeting which for the balance of this determination I will refer to as “the operative employment agreement”. This agreement, amongst other things, provides for an annual salary of \$24,000 per annum (also expressed as \$2,000 per month) and for a 40 hour week. The work required of the position is the work that one would normally imagine a restaurant worker would perform.

[21] In addition, in Schedule 2 under the heading “Job Description” there is reference to marketing work being part of the role. The representative for Ms Li invites me to reach a conclusion that this is somehow suspicious. I do not accept that conclusion necessarily follows. Ms Li admits that she did do some marketing work and Astral, in their evidence, say that she would have done more if her English had been stronger.

A salary or a wage?

[22] Clearly, given my finding that the document tabled at the investigation meeting is in fact the operative employment agreement, it follows that Ms Li was, under the terms of that employment paid a salary and not a wage.

[23] Ms Li asks me to reach the conclusion that she was paid a wage because it makes it easier for her to allege that she was not properly paid for the large number of hours that she was claiming that she actually was required to work. I am also invited to reach the conclusion by Ms Li that there is something sinister about the confusion about the operative employment agreement and that in fact the respondent employer Astral falsely tabled the operative employment agreement during the investigation meeting in order to confuse the Authority and to salary-ise an employment relationship that had in truth been a waged relationship.

[24] I think those claims are fanciful. I accept there was confusion about the correct operative employment agreement but that confusion was fostered as much by Ms Li as

it was by Astral. In my opinion, the only agreement which appears complete, appears to cover what the evidence discloses Ms Li actually did and appears to have been duly signed by both parties is in fact the document that I am describing as the operative employment agreement and I am satisfied that that document is the document which governed the employment relationship.

[25] It follows that Ms Li was paid a salary and not a wage and it also follows that her hours of work were defined as 40 per week. However, if the Authority reaches the conclusion that Ms Li's hours greatly exceed the 40 per week which are prescribed in the operative employment agreement, then I will need to turn my attention to whether in fact those additional hours have, in equity and good conscience, been properly remunerated.

What hours did Ms Li work?

[26] Mr Li's evidence is that she worked what her representative referred to in her closing submissions as *draconian hours*. The actual quantification of these hours produces a total of 1,516 unpaid hours according to Ms Li's claim which represents a 66 hour week for the bulk of the period that she worked for Astral and a 72 hour week for a period of some three months at the very beginning of her employment by Astral.

[27] There are no wage and time records which would enable independent verification of the claimed hours to be made. In principle that is a breach of s.130 of the Employment Relations Act 2000 which casts an obligation on employers to keep a wage and time record. Astral say that because the statutory requirement proceeds on the footing that those records are only required *where necessary for the purpose of calculating the employee's pay* ...and this employee was paid a salary, there is in fact no requirement to maintain records. I accept that submission. It is clear that for salaried workers such as Ms Li, it is not necessary for the purpose of calculating pay for there to be a record of hours kept by the employer.

[28] Notwithstanding that position, Ms Li relies on s.132 of the Act which is the section which provides that on a wage arrears claim the employee may call evidence to show a failure by the employer to keep proper records and that that failure prejudiced the employee's ability to bring an accurate claim. In those circumstances,

the Authority may accept as proved the worker's claim unless the employer proves the claim to be incorrect.

[29] Ms Li supports her claim for these significant hours of work by producing a number of witnesses all of whom gave evidence that, within their knowledge, Ms Li worked at least some of the extended hours that she claims. That is to say these witnesses gave testimony to the effect that on the particular occasions that they were present and remembered to note the situation, they saw Ms Li working hours beyond the hours which the employer Astral say she actually worked.

[30] These witnesses include two so-called "secret" witnesses who gave evidence on the footing that their identity not be disclosed to Astral but also includes other witnesses who were happy to be named and who appeared in the normal way. I observe that the effect cumulatively of these witnesses' evidence is simply to create a series of examples of days when it appears that Ms Li worked longer hours than the ones that Astral claim she was paid for.

[31] I also observe that there is a difference between being physically present in a workplace and actually being engaged in the prosecution of the employer's business. The evidence is clear that Ms Li spent significant time at the employer's business, the Marina Restaurant. It is conceivable that the time that she spent at the Marina Restaurant was not all time when she could reasonably be expected to receive remuneration. Astral's position was that she worked on average 40 hours per week and she worked on a split shift basis, that is to say that she worked across the lunch period, then had the bulk of the afternoon off, then returned to duty for the dinner period, finishing in the late evening. So far as Astral were concerned, Ms Li was not working in the morning and was not working for, speaking generally, half the afternoon. It follows that from Astral's perspective, Ms Li was working around eight hours a day.

[32] Astral refer me to the leading case of *Southland Hotel IUOW v. Milford Lodge Limited* 1990 3NZILR 1005 where the Court had to consider a claim by a salaried worker that that worker had not been paid appropriately for the hours actually worked. The essence of the decision of course is that the Court felt it was unable to quantify, to an appropriate standard, the claimed hours.

[33] Ms Li gave evidence by way of various documents that the Marina Restaurant was open during the afternoon period when Astral's evidence was that it was closed. She refers in her evidence to business cards for instance, which appear to show that the restaurant does not close in the afternoon and I was also referred to advertisements in a publication called Asian Media for various months including months Ms Li was employed, that refer to the restaurant being open from 11.30am – "later".

[34] Ms Li also advances the proposition, in support of her contention that she worked through the afternoon, that the restaurant needed to be prepared for the evening customers by cleaning, stocking the bar and the like.

[35] On the balance of probabilities I have reached the conclusion that it is more rather than less likely that Ms Li did work the afternoons on at least some occasions, although I am cautious about making this finding mindful as I am of the phrase used by Judge Palmer in the *Southland Hotel* case when he referred to calculations of this type being *an exercise in speculative guess work*.

[36] If, as I have found, Ms Li did in fact work some afternoons despite Astral's conviction that she was employed on a split shift arrangement and was not supposed to work at all during the afternoon, then I need to consider whether in fact she is entitled to additional remuneration for that work given my finding that she was employed on a salary.

What arrears of wages (if any) are due?

[37] Clearly, Ms Li has no entitlement to additional remuneration pursuant to the operative employment agreement. I have already decided that she was paid a salary and therefore if she did work hours beyond the 40 hours that were expected of her in terms of the operative employment agreement, that was to be covered by the salary payment, in terms of the bargain that the parties made. However, I need to consider the effect on this whole transaction of the Minimum Wage Act.

[38] I am satisfied, having examined the rates of pay that have been paid to Ms Li over the period of her employment, that at no stage was she paid less than the minimum wage for the period in question. It follows that the Minimum Wage Act has no bearing on the matter in question.

[39] There is no other basis on which a claim for arrears of wages can lie. Even although I accept that from time to time Ms Li may have worked during the afternoon when her employer's evidence was that it was not intended that she should, I see no proper basis on which I can award additional remuneration to Ms Li given the finding that I have made in respect to the operative employment agreement.

Are there other payments due to Ms Li?

[40] Ms Li alleges that, in addition to the other matters pleaded in her application to the Authority, she is entitled to recover from Astral two sums, one of \$5,000 the other of \$6,500. In her evidence to the Authority, Ms Li claims that she was required to pay \$6,500 for a lawyer to get her permanent residency and a further \$5,000 for GST. She says that, as she did not have these sums of money available to her, she borrowed those sums either from Astral or from Mr Yang personally. Then she says that money was gradually repaid by her to its lender by deductions from her wages.

[41] There are a number of conundrums in this evidence. The first is whether in fact the money was borrowed, if it was whether it was paid back in whole or in part and if it was paid back in whole or in part whether it is proper for Ms Li to expect it to be now returned to her as part of these present proceedings.

[42] Ms Li's evidence is that the \$6,500 amount was repaid on her behalf by her mother and the evidence before the Authority confirms that a document which appears to be evidence of a telegraphic transfer drawn on the Agricultural Bank of China for 45,000 Yuan was paid to Astral. I was advised and I accept that 45,000 Yuan equates to about NZ\$8,000 or at least equated to that figure at the time that the payment was made. Both Ms Li and Astral agree that this payment apparently from Ms Li's mother, effectively paid back the \$6,500 amount which Ms Li refers to.

[43] The other amount of \$5,000 which Ms Li said she understood was for *GST* was she says deducted from her wages and according to her, the whole amount was paid back. As I mentioned, Ms Li seeks recovery of both those sums from Astral.

[44] Astral's evidence is that the \$6,500 was not only for legal fees but was also money lent to Ms Li to pay off personal debts including a significant debt she incurred as a consequence of a car accident that she was a culpable party in. Astral's Mr Yang says that the money was lent to Ms Li by him personally, it came out of his personal

account and that there was originally a documented receipt for the advance. Mr Yang says that once the advance was repaid in full by the payment from Ms Li's mother, he destroyed the receipt as to use his words the loan was "*all clear now*".

[45] I am frankly at a loss to understand why Ms Li thinks she should be able to claim back the \$6,500 from Astral. Whatever else is true, it is plain that that sum was lent to Ms Li for some purpose or purposes by it seems Mr Yang, and the amount has now been repaid in full by Ms Li's family. Nothing I have heard suggests there is, or was, anything improper in the intention to advance that sum to Ms Li and I see no reason why she should now recover that sum as part of employment proceedings.

[46] If anything, the situation is even more confused in relation to the \$5,000. Ms Li says this was for GST but that flies in the face of commonsense. Astral through Ms Jenny Wang say there was never an amount of \$5,000 lent to Ms Li or indeed repaid by Ms Li in whole or in part. Ms Wang wonders whether Ms Li is confused about the incidence of PAYE tax on her salary which co-incidentally would have amounted to about \$5,000.

[47] Certainly, on the evidence I heard, I am not persuaded that Ms Li is entitled to recover either of these amounts from Astral.

Has Ms Li suffered disadvantage?

[48] Ms Li claims that she has been affected to her disadvantage by unjustifiable actions of Astral. As the foregoing analysis confirms, I have not been persuaded that the evidence supports any wrong doing by Astral. Certainly it is true that the employment relationship seems to have been activated by an unreasonable amount of confusion but that of itself is not sufficient to ground a disadvantage action.

[49] On the evidence that I heard in the investigation meeting and on the documentary evidence which has been presented to the Authority, I am not persuaded that Astral is guilty of any unjustifiable actions which have caused Ms Li disadvantage.

Was Ms Li constructively dismissed?

[50] I am also not satisfied that the evidence discloses a constructive dismissal situation. Ms Li pleads that her constructive dismissal is of the *breach of duty* kind and as I have found no evidence whatever of any wrong doing by Astral, this claim must of necessity fail.

[51] The factual position is that Ms Li was absent for various periods at the end of the employment relationship. She was absent from work and not on holiday from 5 December 2005 to 13 December 2005. Ms Li says she was *mentally sick* during this period. Ms Wang's evidence which I accept, was that she met Ms Li during this unarranged absence, which followed Ms Li's failure to obtain permanent residence, and that Ms Li told Ms Wang that Ms Li might have to change jobs if she wanted to apply for permanent residency again.

[52] The restaurant was closed during most of January for holidays. Ms Li was expected back to work towards the end of January and although she worked on 28 and 29 January and then again on 1 February she then absented herself without explanation until 7 February when, despite numerous attempts by Astral to contact her, without success, Ms Li sent Astral a text message saying she was ill.

[53] This was followed with further text messages on 8 February 2006 and 12 February 2006 and then Astral's attempts to establish her intentions resulted in their being warned off by a friend of Ms Li.

[54] On 13 February Astral say Ms Li returned the restaurant's key and removed her personal belongings. There was a further message from Ms Li on 14 February saying she needed some rest and would return to work soon and then no further contact from her.

[55] The employment relationship subsequently came to an end without a resignation from Ms Li nor any indications of when or even if she might return to work. Astral's best information came from a friend of Ms Li who indicated she had found another job.

[56] In effect she had left her employment without explanation on 1 February and then, over the next fourteen days, maintained only sporadic contact with Astral but never returned to work and never resigned.

[57] In those circumstances I do not think Astral can be held blameworthy about the end of the employment relationship.

Determination

[58] For reasons which I have already articulated, the Authority finds that Ms Li has no sustainable personal grievance nor any claim against Astral in respect to allegedly unpaid wages save for the acknowledged omission of Astral to pay Ms Li holiday pay for six public holidays that she worked on. The parties representatives are to arrange payment of that outstanding sum within 14 days of the date of this determination.

Costs

[59] In the normal course of events I would reserve the issue of costs to enable the parties representatives to engage with each other and seek to resolve matters by agreement.

[60] However, in the particular circumstances of this case, I judge Ms Li's financial resources to be such as to really preclude her from making any realistic contribution to Astral's costs.

[61] It follows that in the unique circumstances of this case, I direct that costs in this matter are to lie where they fall.

James Crichton
Member of Employment Relations Authority