

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 296  
5285438

BETWEEN                      ZHIJUN LIU  
   Applicant  
  
AND                                WINLAW LIMITED  
   TRADING AS WINSTON  
   WANG & ASSOCIATES  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Dave Vinnicombe for Applicant  
   Ray Parmenter for Respondent  
  
Investigation Meeting:     6 April 2011  
  
Submissions Received:    12 April 2011 from Applicant  
   11 April 2011 from Respondent  
  
Determination:              8 July 2011

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**DETERMINATION OF THE AUTHORITY**

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- A      Ms Liu was not dismissed, but resigned from her employment as a result of her medical condition.**
- B      Ms Liu was not unjustifiably disadvantaged in her employment.**
- C      Ms Liu has failed to establish that she was discriminated against in her employment.**
- D      Neither party has breached their obligations of good faith, however, Winlaw Limited trading as Winstone Wang and Associates has breached section 63A of the Employment Relations Act and is ordered to pay a penalty of \$2,000.**
- E      Costs are reserved.**
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[1] Ms Zhijun Liu was employed by Winlaw Limited trading as Winston Wang & Associates on 24 June 2009 as a junior lawyer. Ms Liu had previously worked for the firm as a contractor and as a Legal Executive and it was common ground at the investigation meeting that Ms Liu was close friends with Mr Wang and his wife Ms Cynthia Liu.

[2] Ms Liu says that prior to her appointment Mr Wang was aware that she had been trying to become pregnant and that she had previously miscarried. Ms Liu says that during her interview Mr Wang asked her to agree that if she did become pregnant after being employed, her employment would end on the date at which she gave birth. There was no written employment agreement between the parties.

[3] As events transpired Ms Liu did become pregnant and at 5 weeks she began to bleed. Ms Liu's doctor advised Ms Liu to rest for 3 days and she was provided with a medical certificate. On 10 September 2009 Ms Liu was reassessed and advised to remain off work until 21 September 2009. Ms Liu kept her employer informed of her situation. She also advised Mr Wang that her doctor had recommended that she work part time after 21 September 2009.

[4] Ms Liu says that when she rang Mr Wang on 10 September 2009 to advise him of her situation and the doctor's advice to her, Mr Wang told her, her employment would be terminated immediately.

[5] Ms Liu has four claims before the Authority. She claims that she:

- Was unjustifiably dismissed;
- Suffered a disadvantage in her employment;
- Was discriminated against; and
- That Mr Wang breached the Employment Relations Act 2000.

[6] Mr Wang denies the claims.

**Was Ms Liu dismissed?**

[7] Ms Liu phoned Mr Wang on 10 September 2009 to report on the recommendations made by her doctor with respect to her health and the health of her unborn child. Ms Liu says Mr Wang dismissed her without notice. Mr Wang says that when Ms Liu rang him on 10 September 2009 she told him she did not know when she could work for him again and agreed that he should find a replacement employee for her.

[8] Mr Wang points to the fact that on that same day he placed an advertisement seeking a permanent Legal Executive/Junior Solicitor to support his contention that Ms Liu had resigned. The position was filled on 21 September 2009.

[9] Mr Wang then phoned the Law Society and requested a refund of Ms Liu's practicing certificate fee. He was told he had to have Ms Liu's written confirmation. Ms Liu says that she telephoned Mr Wang and told him that she wished to work part time and that she would pay for the fees herself. Mr Wang told her that there was no part time position available for her and asked Ms Liu to write to the Law Society for a refund of her fees.

[10] On 24 September 2009 Mr Wang again requested Ms Liu to provide written confirmation that she was no longer working for him to the Law Society. Ms Liu advised Mr Wang that she had found another job and that she would transfer her practicing certificate in 1-2 weeks. She says Mr Wang became angry and shouted at her. Ms Liu's husband then took the phone and spoke to Mr Wang. Mr Sam Duo Ning promised Mr Wang that he would send a post-dated check for the practicing certificate fee based on Mr Wang's calculations.

[11] On 28 September 2009 Ms Liu wrote to Mr Wang raising a personal grievance and enclosing a post dated cheque in the amount of \$1,018. Mr Wang banked the cheque early causing Ms Liu's bank account to go into overdraft. Mr Wang then emailed Ms Liu and accused her of cheating, denying the dismissal and threatening Ms Liu, which Auckland was a small world.

[12] There is no dispute that Ms Liu was expecting on 10 September 2009. There is also no dispute that when Ms Liu entered into the employment relationship with Mr Wang, that both parties were in agreement that the employment would end if Ms Liu became pregnant and at the time the baby was to be born.

[13] I am satisfied that on 10 September 2009 Ms Liu's pregnancy was not stable and there was doubt about whether it would be advisable to return to her full time job, if she returned at all. I find it is more likely than not that Ms Liu was not prepared to risk any harm to herself or her unborn child and advised Mr Wang that she did not know if she would return to work or when that may occur. Ms Liu agreed that Mr Wang could fill her position as she was not sure of when or if she would be returning to work. I find it is more likely than not that she intended for the replacement to be a permanent arrangement.

[14] I am supported in my conclusions by Ms Liu's evidence that she had a conversation on or about 17 September 2009 with Ms Cynthia Liu (Mr Wang's wife) about job sharing Cynthia's Legal Executive role, once Cynthia became pregnant. Further Ms Liu confirmed at the investigation meeting that she reminded Cynthia during the telephone call that a settlement for a client was due that day and enquired as to whether they had found a new employee. Cynthia advised Ms Liu that a newly graduated solicitor had been interviewed the previous day.

[15] During her call on 17 September 2009 Ms Liu also suggested to Cynthia that they should find an experienced legal executive as they would not need to spend much time on training.

[16] I find Ms Liu effectively resigned from her position on 10 September 2009. I am unable to be of further assistance with this claim.

### **Disadvantage claim**

[17] Ms Liu claims that when Mr Wang dismissed her, he did so in contravention of the Parental Leave and Protection Act which prohibits employers from dismissing employees on the grounds of pregnancy or ill health caused by pregnancy.

[18] Ms Liu says that she was disadvantaged in her employment because she was unable to take paid parental leave as she did not become eligible to parental leave.

[19] I have found Ms Liu resigned from her employment and was not dismissed. It follows that she would not have become entitled to paid parental leave and therefore her claim for disadvantage has not been established. I am unable to be of any further assistance to Ms Liu regarding this claim.

**Discrimination**

[20] Ms Liu claims that in telling Ms Liu that her employment would end on the date she gave birth was discrimination. That is a long bow to draw on an agreement Ms Liu entered into with a friend. At the investigation meeting Ms Liu initially denied she was friends with Mr Wang and his wife Cynthia, however, after further questioning in this area Ms Liu acknowledged they were all friends.

[21] I find it is more likely than not that Ms Liu was offered employment on the basis described by her, only because of their friendship. That is not to say that Mr Wang would not have employed her on any other basis, but the facts indicated strongly that Mr Wang approached Ms Liu and they discussed between them the difficulties Ms Liu was having getting pregnant. I find it is more likely than not that Ms Liu was happy to discuss and agree on a work arrangement that would allow her to gain her practicing certificate and experience as a junior solicitor in the safety of knowing that if she experienced difficulties in getting pregnant or during a potential pregnancy, she would not be concerned about having to work at the same time as dealing with health issues.

[22] Having said that, the Act makes it unlawful to enter into such agreements as they offend against the prohibited grounds of discrimination. Section 105 of the Act sets out the prohibited grounds of discrimination and includes pregnancy and childbirth.

[23] The Act at s 103 provides that an employee has a personal grievance if the employee was discriminated against in their employment. The Act at s 104 defines discrimination as being a direct or indirect action by an employer in situations where the employer:

- (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- (b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

- (c) Retires that employee, or requires or causes that employee to retire or resign.

[24] Ms Liu relies on her claim that she was dismissed by Mr Wang because of her pregnancy to support her claim under this heading. I have previously found that Ms Liu resigned and was not dismissed. I find also, that Ms Liu was not required to resign but did so of her own volition.

[25] Ms Liu has not established her claim that she was discriminated against and I am unable to be of further assistance to her.

### **Breaches of the Employment Relations Act**

[26] Ms Liu has two claims under this heading. Ms Liu claims Mr Wang breached his obligations of good faith (s 4) and failed to provide a written employment agreement (s 65).

#### *Breach of good faith*

[27] This claim has not been established by the evidence provided to the Authority. I am satisfied there has been no breach of good faith by either party.

#### *Failure to provide written employment agreement*

[28] I am satisfied Ms Liu has established a failure by Mr Wang in not providing a written copy of the employment agreement between the parties. I find that had an agreement been developed for the parties clearly setting out the agreements reached, the need for this investigation meeting may well have been negated.

[29] The Employment Relations Act has been in place for more than ten years. There is simply no excuse for employers failing to provide written agreements as required by s 63A of the Act. This is particularly so in a law firm where knowledge of legislation and legal obligations ought to be front of mind.

[30] Ms Liu seeks the imposition of a penalty against Winston Wang & Associates for its failure, pursuant to s 63A(3) of the Act.

[31] I am satisfied the breach of s 63A of the Act was deliberate, serious and sustained and in all the circumstances I find a penalty of \$2,000 is appropriate. In determining this amount I note the breaches preceded the 1 April 2011 amendment of the Act which has doubled the fines for breaches of this type.

**Winlaw Limited trading as Winston Wang & Associates is ordered to pay a penalty of \$2,000 to the crown within 28 days of the date of this determination.**

### **Costs**

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Winlaw Limited trading as Winston Wang & Associates may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Ms Liu will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[33] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell  
Member of Employment Relations Authority