

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 167/09
5128450

BETWEEN ELSIE NEIL
 Applicant

AND TING LONG ZHONG and
 BOON TIEN ZHONG
 Respondents

Member of Authority: P R Stapp

Representatives: Barry Nalder and Wendy Silver, for Applicant
 Maggie Wan, Assisting the Respondents

Interpreters: Tat Ming Wong, Cantonese
 Kosal Parseth, Cambodian

Investigation Meeting: 4 May 2009 at Whangarei

Determination: 25 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Elsie Neil has claimed that she is owed wages and holiday pay. She has also claimed that she was unjustifiably required not to return to work after the Christmas/New Year break 2007/2008. Mrs Neil says she came to the reasonable conclusion that her employer had ended her employment at that time. She did not return to work.

[2] Mr and Mrs Zhong denied Mrs Neil's claims.

The issues

[3] There are two main issues: first a wage and holiday pay claim; and second a personal grievance claim.

- Are any additional wages and holiday pay owed to Mrs Neil?

- What were the circumstances regarding the arrangement for Mrs Neil to return to work in 2008?

The facts

[4] Mrs Neil worked in a bakery business called the Maunu Hot Bread Shop, located in Whangarei. In 2000 Mr and Mrs Zhong purchased the business, where Mrs Neil worked, from the then owner.

[5] Mrs Neil was employed to assist in the bakery shop located at the front of the business, initially for three days per week (Monday, Thursday and Friday). Mrs Neil's husband became ill and she reduced her days at work to two days per week (Thursday and Friday). There was agreement for Mrs Neil to take some unpaid time off work from 31 August 2007. During this break from work, on 10 September 2007 Mrs Neil's husband died. By agreement she returned to work on 4 October 2007 to work two days a week, on Thursdays and Fridays. Mrs Neil was paid \$11.50 per hour. There was no written employment agreement.

[6] Each year there would be a Christmas shut down. Mrs Neil would start back at work in January and she did this each year from 2001 until 2007. She was expected back on the reopening day and would arrive back on her own volition without needing to be contacted. Mr Zhong confirmed he went to China every year but returned before the bakery opened.

[7] During her employment she worked on public holidays when they fell on her ordinary days at work.

[8] On 21 December 2007, Mrs Neil says Mrs Zhong informed her that she would not be required to work until Mr Zhong telephoned her in February, if she was needed. This contrasted with the arrangements that had existed for Mrs Neil to return to work in previous years. Mrs Neil says that Mrs Zhong's comments led her to believe that her employment had ended. She says that Mr Zhong was not present when Mrs Zhong made her comment on 21 December. Mr and Mrs Zhong denied these allegations. They say:

- That she was not told by Mrs Zhong to wait for a telephone call in February if she was needed; and

- That Mr Zhong was at work on 21 December 2007, when he was in the back of the bakery.

[9] Mr and Mrs Zhong confirmed the bakery reopened on 14 January 2008 and that Mrs Neil did not turn up for work. Mrs Zhong believed that Mrs Neil might have been on holiday, which explains why she did not attempt to telephone Mrs Neil during January, but needed to in February because her children who had been helping out returned to school. Mr and Mrs Zhong did not have the details of Mrs Neil's new home address but did have her telephone number. They say they tried to ring Mrs Neil in February without any success. Mrs Neil says there had been no call while she was at home and no messages left with her son who lives at home with her. Mrs Neil's telephone did not have a message recording system.

[10] Mr Zhong had no idea why Mrs Neil had not returned to work. Mrs Neil told me she did not go away on holiday.

[11] In the meantime, Mrs Neil obtained the services of a representative, and he wrote a letter dated 5 March 2008 which he sent to Mr and Mrs Zhong. He requested them to provide wage, time and holiday records. The letter also raised a personal grievance over the way Mrs Neil's employment ended.

[12] On 13 March 2008, Mrs Zhong telephoned Mrs Neil. They both have a different recollection of this telephone conversation. In essence, Mrs Zhong asked when Mrs Neil was going to return to work, and Mrs Neil informed Mrs Zhong that she would not be returning.

[13] Mrs Neil decided that she could not return to work after what she says happened. Mrs Neil says she never had to wait for a telephone call before and the information she was given on 21 December led her to believe her employment had ended.

[14] The parties attended mediation twice to try and sort the matter out. A labour inspector from the Department of Labour was requested to assist both parties and go through the wage and time records. The parties remained in dispute despite the inspector's recommendation on Mrs Neil's entitlement.

[15] Mr Zhong provided Mrs Neil with two cheques to pay the amount of \$2,073.84 (gross) calculated by the inspector before the Authority's investigation

meeting. The labour inspector did a commendable job calculating the wages and holidays from very untidy records. Despite the inspector's efforts the parties still disagreed with the inspector's calculation because the records produced by Mr and Mrs Zhong were open to different interpretations.

[16] Mrs Neil says that there is still an amount owing on her entitlement to be paid her lieu days for working on statutory holidays, her relevant daily pay for the statutory holidays on the days that she would have worked but for the holiday, and the remaining annual holiday pay properly calculated.

Wages, holiday pay and days in lieu

[17] At the outset of my investigation, I raised the matter of s.142 of the Employment Relations Act 2000 that makes provision for:

*142 Limitation period for actions other than personal grievances
No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.*

[18] While the statement of problem was filed in the Authority on 27 June 2008, the wages claim related to days worked in March 2000 when the money fell due, and that part of the claim therefore falls outside the 6 year period to file it in the Authority.

[19] The claim for all the days in lieu not fully paid, statutory holiday payments and the correct annual holiday payments fell due on Mrs Neil's last day at work, i.e 21 December 2007. This part of claim was therefore filed in time.

[20] Mr Zhong accepted during his evidence in the Authority that Mrs Neil worked on the statutory and public holidays when they fell on her Monday, Thursday and Friday work days. She is entitled to the payment of the days in lieu due from her last day of work.

[21] Mrs Neil is also entitled to be paid for the days that were statutory holidays that she would have otherwise worked. This was one day: Christmas Day transferred to 27 December 2004.

[22] The annual holiday pay was never properly calculated by Mr Zhong and at the end of each year Mrs Neil was paid an appropriate percentage of her earnings. The

difference owing on the proper method of calculation has been claimed and fell due when her employment ended.

[23] The recalculated sum amounts to \$1,019.45 that included pay for days in lieu, the relevant daily pay for statutory holidays not worked that fell on her ordinary work days and the annual holiday adjustment. The amount also includes a deduction for \$220 paid in July 2006 by Mr Zhong to cover the pay owed, one overpayment of \$9.00 and the receipt of the cheques to pay the sum calculated by the labour inspector.

[24] It is my finding that Mrs Neil is owed \$1,019.45.

How did the employment end?

[25] It is my conclusion on the balance of probabilities that it is more than likely Mrs Neil understood that she was to wait for a telephone call in February, if she was needed. I reach this conclusion because:

- Mrs Zhong did nothing in January to follow up Mrs Neil's failure to appear at work. I do not accept that it was reasonable for Mrs Zhong to think that Mrs Neil might have taken a holiday. This is especially so considering there had been a consistent and regular arrangement to return to work every year. Mrs Neil had not given any indication that she was going away.
- Mrs Zhong did not contact Mrs Neil in January and used her children to help out until they returned to school in February.
- Mrs Zhong tried to contact Mrs Neil in February without any success because she needed Mrs Neil, and this is consistent with Mrs Neil's claim that she understood she was to wait for a telephone call if she was needed.
- Mrs Zhong telephoned Mrs Neil on 13 March, but only after she received a letter of claim for holiday pay and wages and a personal grievance.

- Mrs Neil had a break from work before Christmas due to her husband's death, but this was not a reason to consider she might not return given Mrs Neil had worked regularly since 4 October 2007.
- Mrs Neil worked a number of weeks before the Christmas shutdown without there being any prior issues in her employment.
- Mr and Mrs Zhong did not have any details of Mrs Neil's new address where she was living.
- Mrs Neil and one of her witnesses accepted that English was Mr and Mrs Zhong's second language, despite evidence that Mrs Zhong allegedly spoke better English than she was letting on. I am satisfied that Mr and Mrs Zhong's English was sufficient for them and Mrs Neil to understand each other at work. The allegation that Mrs Zhong spoke better English than she was letting on is not enough to satisfy me that she was not telling the truth about what she said on 21 December 2007, but it is possible Mrs Zhong led Mrs Neil to the understanding she had to wait until she received a telephone call if she was needed. Mrs Neil was emphatic about what she says she was told.
- Any delays by Mr and Mrs Zhong paying the entitlement calculated by the labour inspector do not establish that they are not telling the truth. That is because English is their second language and they genuinely needed help over the claim and the methods of payment required on the holiday pay. They engaged Ms Wan to help them interpret the claim. I do not accept that Mr and Mrs Zhong are sophisticated enough to fake a lack of any understanding of the methods of paying holiday pay to make a concession in front of me to absolve them from the other claims. In other words I accept that they genuinely did not understand the methods required to pay holiday pay and the issues. As such it is possible that Mr and Mrs Zhong did not understand Mrs Neil's employment rights. This is also supported by the absence of a written employment agreement.

[26] Turning the matter around: would Mrs Neil have reasonably expected to return to work in January 2008 but for her understanding to wait for a telephone call in

February if she was needed. It is probable that she would have expected to return to work in January but for the understanding she says she reached. This is because of her length of service; that there were no formal arrangements to end the relationship; there were no apparent problems in the employment relationship; there was no employment agreement and it was usual for the work to recommence after the Christmas close down in January of each year.

The requirement to be active and constructive and responsive and communicative

[27] Both parties are required under s 4 (1A) (b) of the Act to be responsive and communicative. This is one of the instances where an employee has a mutual obligation to be active and constructive in the employment relationship. This is a matter that required both parties to be active and constructive and responsive and communicative including Mrs Neil.

[28] Mrs Neil could have reasonably come to an honestly held belief that her employment had ended. It was entirely reasonable for her to believe what Mrs Zhong said because Mrs Zhong was a partner in the business. However, Mrs Neil also had an obligation to follow up and clarify what Mrs Zhong might have said to her on 21 December with Mr Zhong, as he paid her wages and arranged her work. This is particularly so if Mrs Zhong and Mr Zhong are correct that he was present at the bakery on 21 December. If he was not at work or Mrs Neil did not see him then it would have been reasonable to expect Mrs Neil to have gone into work during January or at least sometime in February to check what was happening.

[29] Mrs Neil had on every previous occasion returned to work on the reopening day, which always was in January. There were no identifiable problems at work and indeed it is common ground there was a friendly cordial relationship.

[30] Mr and Mrs Zhong have not assisted in best practice to alleviate this matter either, because they could have done more to show that greater efforts were made to telephone Mrs Neil and that they should have kept better records and up to date contact details.

[31] Mr and Mrs Zhong's telephone call on 13 March 2008 must be considered in light of Mrs Neil's representative's letter dated 5 March 2008. The letter dated 5 March put them on notice of a significant claim with regard to a personal grievance

and the possibility that there may be wages and holiday pay outstanding because of the request for the wage, time and holiday records. Mrs Neil believed that she would not have heard from Mr and Mrs Zhong if her representative's letter dated 5 March had not been sent. The sequence of the dates does not leave a favourable impression of Mr and Mrs Zhong's intentions and their motives. Mrs Neil could reasonably have reached an unfavourable conclusion about Mr and Mrs Zhong's motives, except that Mrs Zhong had a reason to telephone her when the children went back to school.

[32] Mrs Neil decided on 13 March 2008 not to return to work when she had an opportunity to do so. Mrs Neil's decision to wait and not do anything to return to work was related to what she understood she was told on 21 December, but is affected by her failure to meet her requirement to be active and constructive, especially given the length of the employment relationship, there being no prior issues and breaking up for Christmas on friendly terms.

[33] Mrs Neil has a personal grievance because she reasonably concluded that she was to wait until February for a telephone call if she was needed. Her employer's action was unjustified affecting her employment to her disadvantage where her employment ended. She was entitled to think she had been dismissed on 21 December given the understanding she says she had.

Remedies

[34] Mrs Neil's successful claim for a personal grievance means she is entitled to remedies. She could not have contributed to the situation giving rise to her personal grievance and blamed for any understanding she reached about her employment: s 124 of the Act applied. However, Mrs Neil did not sufficiently mitigate her loss and unreasonably failed to take up the opportunity to return to work when it was a possibility. Her failure to be active and communicative has impacted on the situation. This does impact on the amount of lost wages she has claimed. Taking into account Mrs Neil's failure to properly mitigate her loss and not reasonably taking up the possibility to work at the bakery and her failure to be active and communicative I have assessed her loss equivalent to two weeks notice in the absence of a written employment agreement. I have assessed her entitlement to two weeks notice on the basis of her length of service; she worked two days a week; and she worked in a bakery shop and was paid weekly. Two week's wages amounts to \$368.

[35] Mrs Neil is entitled to consideration for compensation. However, it was not enough for her to make assertions about the impact on her without providing more details and corroboration, given the nature of the evidence I heard. She simply failed to provide me with sufficient details of any impact of the situation on her. Having regard to her decision to sit at home and wait for a phone call I have decided not to award any compensation because she should have been more active and constructive about her employment.

Conclusion

[36] In conclusion Ting Long Zhong and Boon Tien Zhong trading as the Maunu Hot Bread Shop owe Mrs Elsie Neil the sum of \$1,019.45 for holiday payments that fell due on 21 December 2007. In addition Ting Long Zhong and Boon Tien Zhong trading as the Maunu Hot Bread Shop are to pay Mrs Neil \$368 lost wages.

Costs

[37] Mrs Neil was successful in establishing her claims, although not the monetary claims. This matter has not been assisted by the employer's lack of understanding of the holiday pay arrangements and calculation of holiday pay. That should have been reasonably settled much earlier. Both parties used mediation, which is an indication of them trying to save costs. The employer's failure to keep tidy and well ordered wage time and holiday records and failure to provide an employment agreement did not assist the applicant in preparing her claim. Help was provided by the involvement of the labour inspector from the Department of Labour working out a calculation. Mr Zhong could have reasonably made his concession that Mrs Neil worked on the statutory holidays much earlier, and it would have been reasonable for the parties to have settled the outstanding calculation. Mr and Mrs Zhong could have reasonably come to a better understanding of the method relating to holiday payments much earlier and avoided getting it explained at an Authority investigation meeting. That has caused the applicant unnecessary costs.

[38] Costs follow the event for Mrs Neil. She has been successful with most of her claim. She reasonably obtained assistance for the preparation of her claim and attendance at the Authority's investigation meeting. I have had regard to the matter of her portion of the claim that was outside the time limitation period and that an adjustment was needed on the sum being claimed. It would have been reasonable for

that issue to have been dealt with before the investigation meeting and the proper calculation being claimed and a new summary produced. However, not a lot of time was spent on it, and the recalculation was reasonably straight forward, and would not have involved much more in costs. I would add that it is commendable that arrangements were made to calculate the claim from the untidy wage time and holiday records that are available.

[39] The investigation meeting lasted for about 4 ½ hours with short breaks. All the statements, documents and papers were efficiently produced.

[40] It is my assessment on the tariff approach to costs that Mr and Mrs Zhong are required to pay Elsie Neil \$1,500 contribution towards her costs and the \$70 filing fee. This is at the lower end of the tariff.

Summary of orders

[41] Ting Long Zhong and Boon Tien Zhong trading as the Maunu Hot Bread Shop are to pay Mrs Elsie Neil jointly and severally:

- The sum of \$1,019.45 for holiday payments.
- The sum of \$368 lost wages.
- \$1,500 contribution towards costs and \$70 filing fee.

P R Stapp
Member of the Employment Relations Authority