IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 143
5620862

	BETWEEN	DR QIAN XU Applicant
	AND	SURGIONIX LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	May Moncur for Applicant Dr Pranesh Kumar for Respondent
Investigation Meeting:	13 December 2016
Further information received on:	16 December 2016 and 10 January 2017 from Applicant 20 December 2016, 10 January and 10 February 2017 from Respondent
Determination:	11 May 2017

DETERMINATION OF THE AUTHORITY

A. **Surgionix Limited was not in breach of the Wages Protection Act 1983 regarding Dr Qian Xu.**

B. **Dr Xu has not established that Surgionix Ltd breached s 4 of the Employment Relations Act 2000 concerning good faith.**

C. **Dr Xu has not established that Surgionix Ltd conducted unfair bargaining under s 68 of the Employment Relations Act 2000.**

D. **Costs are reserved. A timetable is set regarding submissions on costs, in the event that such a timetable is needed.**

Employment relationship problem

[1] Surgionix Limited (Surgionix or the company) is a small startup company which develops and manufactures medical devices, including surgical drill bits. It is a subsidiary of Churgery Ltd (Churgery). Dr Pranesh Kumar is the director and majority shareholder of Churgery.

[2] Dr Qian Xu initially worked for Surgionix for six months from April 2014 as an intern whilst completing her PhD degree in Engineering. From October 2014 to September 2015 Dr Xu worked for Surgionix as the research and development manager. Initially this was in a full time capacity and then from April 2015 it became part time.

[3] Dr Xu claims that in the period from October 2014 to March 2015 almost half of her salary was deducted by Surgionix to go towards shares in Churgery. She brings a wage arrears claim seeking that the money deducted be paid to her. She also claims unfair bargaining and a breach of the Wages Protection Act 1983 (the WP Act).

[4] Surgionix denies that there was any unfair bargaining or breach of the WP Act. It says that Dr Xu voluntarily chose to save a sum from her salary to buy shares and that as the shares have since been issued, this is now a shareholder issue.

[5] An investigation meeting was held by the Authority on 13 December 2016, and evidence was heard from Dr Xu, Dr Kumar and Nigel Curteis (accountant for the company). At the investigation meeting it became apparent that further documents were needed and subsequently documents were filed by both parties.

[6] A case management conference was held by telephone on 24 January 2017 to discuss how to progress this matter. Submissions on behalf of Dr Xu were heard during the conference call and no further opportunity to make submissions on her behalf was sought. Surgionix was given an opportunity to provide further submissions in writing regarding a new document filed by Dr Xu.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the

parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for determination are:

(i) Did Surgionix satisfy the requirements of s 63A (2) of the Employment Relations Act?
(ii) Did Surgionix breach the Wages Protection Act, and if so, are wage arrears owed to Dr Xu?
(iii) If Surgionix breached the Wages Protection Act what penalty (if any) should it pay and to whom?
(iv) Was Surgionix in breach of its duty of good faith to Dr Xu?
(v) Did Surgionix undertake unfair bargaining, and if so, what remedy (if any) should Dr Xu receive?

The intern agreement

[9] Dr Xu's work at Surgionix was her first full time employment. She came to New Zealand about 10 years earlier as an international student and had studied since then. Her previous employment was limited to university tutoring work and summer holiday jobs for a university and a research centre. For those positions, Dr Xu had had to sign scholarship agreements, rather than employment agreements.

[10] Dr Xu's internship at Surgionix was funded from an external grant. Her role at the company was to develop a cost-effective manufacturing method for drill bits. At this time Dr Xu was completing her doctorate on a student visa, which included the ability to work.

[11] Surgionix and Dr Xu entered into a fixed term individual employment agreement for Dr Xu's internship (the intern agreement). That agreement was for a six month term from 1 April 2014.

Negotiation of another employment agreement

[12] In September 2014 Dr Kumar had a discussion with Dr Xu to assess how the internship had gone. Dr Xu was interested in staying with the company. Surgionix had previously had someone in the R & D Manager role who had transferred to another role in the Churgery group. The company considered that Dr Xu was very specialised, and not experienced in some other aspects of the R & D Manager role, but had been impressed by her capabilities during her internship.

[13] On behalf of Surgionix, Dr Kumar offered Dr Xu the position as R & D Manager for a fixed term period of six months from October 2014 to March 2015.

[14] Surgionix was in need of capital although there was a possible investor interested. The parties disagree on who first raised the possibility of Dr Xu becoming a shareholder. They did however discuss an amount being saved or deducted from Dr Xu's salary and being put into company shares.

[15] Dr Xu says that Dr Kumar assured her that this was only a temporary arrangement for about a month. When the investor's money was in place he would pay her the full salary in cash.

[16] Dr Kumar describes the share arrangement as an experiment but says that he had hoped that Dr Xu would continue to work for him long term. The share arrangement was not something which had been undertaken with other employees.

The written agreement

[17] At the investigation meeting there was a lack of clarity regarding the formation of the written employment agreement in late September and early October 2014. Dr Kumar's witness statement says that Dr Xu drafted the employment agreement, which she denies. However, Dr Kumar's statement was made on the basis of not having seen (or received) Dr Xu's written statement prior to drafting and filing his.

[18] Once Dr Kumar saw Dr Xu's statement at the investigation meeting he accepted that his statement in this regard was based on his recollection or the general practice in the business. The previous R & D Manager had drafted Schedule One

(Employee Specific Details) of his own employment agreement, attached to a standard Surgionix agreement. Mr Curteis confirmed having been told that this occurred. Dr Kumar thought that the previous R & D Manager may also have drafted Dr Xu's agreement.

[19] Dr Kumar's approach was that the agreement was going to cover the employee so the employee should have the opportunity to consider it first (via drafting) and he would then read and sign it. It was also a time saving device for him.

[20] The Authority sought further documentary evidence on the formation and drafting of the October 2014 employment agreement. An email of 30 September 2014 was filed showing the previous R & D Manager sending to Dr Kumar Surgionix's fixed term contract form and Dr Xu's contract for him to modify.

[21] Dr Kumar sent a draft of the employment agreement to Dr Xu on 1 October 2014. The two then had some initial discussion about the pay rate in the draft being somewhat different to the amount that was originally specified, due to an issue about whether the figure included annual leave or not. There was further discussion on 3 October 2014 which resulted in the salary figure returning to what was originally specified in the discussion in September. Dr Kumar amended the contract and printed it out. Both of them signed the employment agreement on 3 October 2014 (the October agreement).

The share arrangement

[22] The draft and final versions of the October agreement contain the following provision:

> **50%** of the salary will be paid in **Equity and 50%** as **Cash.**
> **Churgery Ltd.** shares will be paid as equity at the rate of **$80/Share**
> During or at the end of the term of this contract, Employer can offer to buy back the shares at the purchased rate. [1]

[23] The employment agreement did not provide that the share arrangement was only to operate for a limited time, until a set date or an investor was found or confirmed. Dr Xu thought that the reference to the company buying back shares referred to the temporary nature of the arrangement.

[1] Schedule One, Remuneration provision

[24] Dr Xu was not given a shareholder agreement or shown company documentation relating to shares. Dr Xu says that Dr Kumar specified a figure that his company Churgery was worth and said that the share price paid by a previous investor was $80 per share so that is what he would give her shares for. No supporting documentation was sought or provided regarding how the value of the company was calculated.

Events after the October employment agreement was in place

[25] Around the time the agreement was signed, Mr Curteis was consulted as the company's accountant. Mr Curteis was an external accountant rather than an employee, but he did hold some shares in Churgery. He did spend some time at the company's office.

[26] Mr Curteis proposed that tax should be paid on the whole of Dr Xu's salary and then a rounded figure (down from 50%) should be deducted to go towards the shares, and the remainder paid in cash (credited to Dr Xu's account).

[27] This proposal was adopted. Dr Xu's total pay was $2000 gross per fortnight. This was taxed leaving $1639.48 net. From that sum, $800 was deducted, in most fortnights. This was described on her pay slips as "Convertable to Share", quantity of 10 and rate of 80. Dr Xu would then receive the remaining $839.48 net.

[28] Dr Xu says that she was later told that the proposed investment by the external investor had not been achieved.

[29] Prior to Christmas 2014 Dr Xu spoke to Dr Kumar. There is a dispute between the parties about whether that conversation amounted to a request to stop the deductions for shares altogether, or whether it was a request for a temporary halt so that Dr Xu had sufficient money for the Christmas period. Dr Xu says that Dr Kumar seemed disappointed that he was not able to pay her the whole pay (without share deduction). No money was deducted from Dr Xu's pay in the 21 December 2014 pay period. There was no written request to stop the deductions.

[30] A similar situation occurred in March 2015, again with the exact content of the discussion disputed by Dr Xu and Dr Kumar. In one pay period in March 2015 only $400 was deducted rather than the usual $800.

[31] Mr Curteis's sense was that Dr Xu was agreeable to the share arrangement and understood the payment scheme. During the six month period from October 2014, he was not aware that she wanted to withdraw from it completely. Mr Curteis was aware that on occasions Dr Xu asked for all or part of her wages in cash, which was done.

[32] At the end of March 2015 Dr Xu discussed with Dr Kumar the arrangement not being financially viable for her. It was agreed that the deductions for shares would cease, and that Dr Xu would reduce her hours of work.

Events after employment finished

[33] The part time arrangement continued until September 2015, whilst Dr Xu was looking for another job. Dr Xu says that she asked Dr Kumar on several occasions when she would be paid the other half of her salary. Initially he said it would happen in six months, and then later extended that time.

[34] Dr Xu requested, as suggested by her then lawyer, a share certificate. In early 2016 Dr Xu was issued with a share certificate evidencing that she holds 115 shares in Churgery Ltd said to be valued at $9200.

[35] Dr Kumar acknowledged in an email on 28 June 2016 that he now realises that Dr Xu did not understand the importance of being a shareholder or appreciate the responsibilities. There was discussion including an offer to buy the shares by another shareholder but this was not accepted, and neither was a counter offer by Dr Xu.

Length of share deduction arrangement

[36] Dr Xu says that the money for shares arrangement was only for a month or so that was needed as "processing time" for the potential investor. Dr Xu seemed uncertain regarding what she thought was to happen at the end of the month in terms of the payments made during that first month. Dr Kumar did not consider that there was any reference to the arrangement only being for a one month period.

[37] The employment agreement does not specify a one month period and the provision regarding the company buying back shares refers to this possibility during or at the end of the term of the agreement. It would be unusual that an employee share purchase arrangement would be entered into for only a one month period. I am not satisfied that there was agreement with contractual effect that the arrangement would last only for a month.

Section 63 A of the Employment Relations Act

[38] Dr Xu's initial claim did not appear to concern s 63A of the Act, which concerns the requirements for individual bargaining. However, during the investigation meeting it was raised on Dr Xu's behalf that she was not advised about the prospect of taking independent advice, or did not have sufficient time to seek it, and thus the s 63A requirements were not met by Surgionix. This argument appeared to be based on there being no reference to those things in a letter or the email attaching the draft agreement.

[39] However, Dr Xu's intern agreement and the October agreement both include the same declaration, which reads:

- …she has been given a copy of this Employment Agreement and all its schedules and has been informed that …she is entitled to seek independent advice regarding the contents of such documents; and
- …she has been given a reasonable opportunity to seek independent advice, and
- …she has been advised of their right to raise any issues with the Individual Employment Agreement with their Employer prior to acceptance. The Employer will consider such issues with an open mind.
- …she has read and understood the conditions of employment (including the schedules…), and accepts them fully.

[40] Both agreements follow the following pattern. There is a coversheet, then there is Schedule One with the employee specific details. The declaration set out above is at the end of Schedule One on the second page of that document. It is immediately above signature provisions for both parties. Then on the next page there is the bulk of the document under the heading "Main Terms and Conditions of Employment".

[41] It is common practice for a covering letter to proposed employment agreements to outline the entitlement of an employee to seek independent advice about the proposed agreement. The employer is required under s 63A (2)(b) of the Act to inform the employee of that entitlement. However, there is no requirement that that take a particular form. I am satisfied that the requirement of s 63A (2)(b) is satisfied in this case.

[42] Section 63A (2)(c) of the Act requires the employer to give the employee reasonable opportunity to seek that advice. In this case there had been discussions between the parties about the share arrangements in September 2014 about one to two weeks before the draft agreement was provided on the afternoon of 1 October. Neither party could be more precise than that about the timing of the discussion. However there is an email from Dr Xu on 23 September 2014 referring to an offer of employment with a share buying arrangement.

[43] When the agreement was provided there was no time set by the company for the signing of the agreement. The contents of the agreement were the same as the agreement which Dr Xu had signed six months before, except for Schedule One.

[44] Dr Xu says that she felt rushed by the fact that she was working but had not signed a contract. She was concerned primarily about what her pay rate would be, and perhaps somewhat less about the possibility of not having a job at all. She accepts that the company had not given a timeline or deadline.

[45] Dr Xu says that she did not have time to seek independent advice between the first and the third of October. She did not say that she attempted to do so but was unable to access anyone. She had had a week or two to think about the share arrangement between her discussions with Dr Kumar and the draft agreement being provided. Although I accept that this is not the same as having the agreement in writing, the content of the agreement was exactly the same as her previous one, except for the schedule.

[46] The agreement was signed by the parties two days after the draft agreement was provided. In other circumstances this may be too short a period to be considered reasonable under s 63A (2)(c) of the Act. However, here the issue of the share arrangement had been discussed by the parties a week or two earlier and Dr Xu was

being offered an agreement which was largely the same as her previous agreement, with the new provisions regarding the salary rate and the share arrangement. The company had not put any particular deadline on the signing of the agreement. Dr Xu felt that she needed to sign the agreement as her employment (post internship) had started and she did not have a written agreement yet in place. However, there was no indication that this pressure came from the company.

[47] I am not satisfied that Dr Xu has established that s 63A (2)(c) of the Act was not complied with.

Wages Protection Act

[48] Under the WP Act employers shall, when any wages become payable to an employee, pay the entire amount to that employee without deduction. [2] However, under s 5 of that Act deductions may be made with the employee's consent.

[49] The Wages Protection Amendment Act 2016 made changes requiring deductions from wages not to be unreasonable. However, these changes only came into effect from 1 April 2016, after the deductions were made by Surgionix. Dr Xu's case is therefore considered under the legislation in place until 31 March 2016. That provided that an employer may make deductions from wages for any lawful purpose with the written consent of the employee or on their written request[3].

[50] I am satisfied that the whole of Dr Xu's fortnightly wages were payable, namely the net figure of $2000 gross. The employment agreement specifically sets the remuneration as being a salary of $52,000 per annum.

[51] Dr Xu clearly did not receive all of her salary in money. However, s 5 (1) of the Act is an exception to the requirement to pay all in wages. It allows employers to, for a lawful purpose, deduct from wages payable with the written consent of the employee.

[52] Payment for shares in the employer company would be a lawful purpose of deductions. The remuneration provision of Schedule One of Dr Xu's October

[2] Section 4
[3] Section 5 (1)

agreement states that the salary will be split between equity/shares and cash. Unless Dr Xu can establish a basis to challenge the validity of that provision, the remuneration provision amounts to consent by her to deductions and therefore the deductions were permitted under s 5(1) of the WP Act. The claim of unfair bargaining is discussed below.

[53] On Dr Xu's behalf reference was also made to ss 9 and 12 of the WP Act. Section 9 concerns agreements to pay wages by way of means other than cash and section 12 prevents employers from imposing requirements on how wages are spent. However, where an employee has agreed to a deduction from wages that must take that money out of the realm of those sections. Deductions authorised by an employee in writing to be sent to their superannuation scheme or to their union for union fees would not usually be said to breach section 9 or 12 of the WP Act. I am not satisfied that there was a breach of ss 9 or 12 of the WP Act in Dr Xu's situation.

[54] For the sake of completeness I record that although under s 7 of the WP Act wages are to be paid in money only, I am not satisfied that s 7 was breached in this case. Dr Xu's employment agreement does initially provide for payment in money in the sense that an annual salary is stipulated. Also the fortnightly portion of that salary figure was taxed. The money nominated for equity was a deduction from salary.

Withdrawal of consent

[55] On Dr Xu's behalf it was suggested that she had withdrawn her agreement to deductions but deductions continued. Dr Kumar disputed that Dr Xu had withdrawn her agreement prior to March or April 2015 when the parties agreed that the arrangement would not continue.

[56] Under s 5 (2) of the WP Act consent to deductions may be withdrawn but that must be by the giving of written notice. Dr Xu accepted that she had not given written notice to Surgionix to withdraw her agreement to deductions. Her consent was therefore not withdrawn in the manner required for the purposes of the WP Act.

Good faith

[57] It was alleged that Surgionix was in breach of its duty of good faith to Dr Xu through its suggestion that an investor was going to become involved in the company and then Dr Xu's purchasing of shares would not need to continue.

[58] Dr Xu says that during their September 2014 discussions Dr Kumar referred to a potential investor. She saw that person visiting the company's office and met him. She believed that the share arrangement was only for a month, which suggests to me a high degree of confidence in the investor committing. The claim made on her behalf is that she was misled regarding the certainty of the investment and the therefore the length of the share arrangement.

[59] Statements made on behalf of Surgionix in September 2014 were made at a time when Dr Xu was its employee under the intern agreement. However, I am bound by the Employment Court's decision in *Hayden v Wellington Free Ambulance Services* [4] that good faith obligations in such circumstances are limited to the employment relationship in place, rather than the proposed relationship. Any statements on behalf of Surgionix in relation to the new agreement for the new role were not covered by s 4 of the Act.

Unfair bargaining claim

[60] Dr Xu claims that Surgionix unfairly bargained with her under s 68 of the Act. In summary, section 68(1) of the Act provides that bargaining is unfair if:

(a) a party, person A (in this case allegedly the employee) was in particular circumstances (set out in subs (2)) at the time of bargaining or entering into the agreement; and

(b) Person B (the employer here) knew or ought to have known of the employee's circumstances.

[61] The circumstances in s 68 (2) of the Act include that person A was:

(a) unable to adequately understand the agreement by reason of diminished capacity, due to for example, age, mental or emotional disability or emotional distress;

[4] [2002] 1 ERNZ 399 at [30]

(b) reasonably relied on the skill, care or advice of person B (or someone acting on person B's behalf); or

(c) induced to enter into the agreement by oppressive means, undue influence or duress.

[62] In this case Dr Xu's claim was framed on her being a vulnerable young person with very limited employment history, no business experience, who was distressed and worried about securing employment in light of her immigration status. As there were aspects of various categories in s 68 (2) referred on, I will consider together factors and evidence relating to all of the categories.

Factors supporting unfair bargaining

[63] Dr Xu was in her mid-twenties at this time, so a relatively young woman. She had limited employment experience, having not signed an employment agreement prior to her time at Surgionix. She did not have any business or investment experience. By contrast Dr Kumar was a business owner who operated a few companies, although each probably fairly small.

[64] I accept that Dr Xu felt under some pressure to get the agreement signed as she felt that she did not have certainty of employment. However, she continued working after the expiry of the previous intern agreement and could provide no evidence that the company or Dr Kumar had raised this issue or attempted to rush the negotiation or signing process. From Dr Kumar's perspective there was no need for the agreement to be signed quickly. He considered that Dr Xu had already started the job and they could sign the agreement whenever it suited.

[65] In terms of the immigration issue, Dr Xu was on a student visa when the October 2014 agreement was negotiated and says that she felt she was unable to bargain because of that. The visa was not immediately to finish, as the expiry date was March 2015. However, there was also the strong prospect of her getting a job search visa, which allows a year's residency after a student visa expires. A job search visa would have taken her entitlement to stay in New Zealand until about March 2016. Dr Kumar thought that Dr Xu would have got that job search visa.

[66] There was no evidence of any discussion between the parties regarding Dr Xu's immigration status at the time of the employment agreement negotiations.

[67] I accept that the expiry of her student visa gave Dr Xu some sense of uncertainty about her future. However, she was aware that there were the possibilities of a job search visa or a work visa, even though she was not aware of the details or which one might be a better option for her. She says that she spoke to Immigration New Zealand in about November 2014. She did apply for and received a job search visa in April 2015.

Factors against unfair bargaining

[68] There is other evidence which speaks against this being unfair bargaining. Dr Xu is clearly an intelligent person having completed her PhD whilst at Surgionix and there was no evidence of her being sick or under any disability.

[69] This was not an especially rushed process. The parties had discussions in September 2014 about Dr Xu's continued employment and the share arrangement and seemed to be in agreement.

[70] During the period before the written agreement was offered, Dr Xu received an email from a university professor referring to a lectureship position in the United Kingdom which had been advertised. Dr Xu replied on 23 September 2014 that she had been offered a job by Surgionix and was discussing the salary and the company share situation. She says that she had not made up her mind yet, as the position was a good opportunity but the salary was not good. The content and tone of Dr Xu's email was not of someone who was being oppressed or was subject to duress.

[71] A week or two later Dr Kumar sent Dr Xu a proposed written employment agreement. The tone of Dr Kumar's 1 October 2014 email does not particularly suggest that the employer was applying undue pressure or the like. It referred to the enclosed agreement as a draft and stated:

> I have tried to include what we discussed.
>
> Any queries, feel free to discuss.

[72] Dr Xu then proceeded to do just that regarding the salary rate. She says that the verbal agreement in September with Dr Kumar was for a salary of $52,000 gross,

but when she received the draft written agreement it specified $48,148 as the salary. This figure was based on the way Dr Xu's previous salary was worked out, which was taking the grant figure and taking off holiday entitlements to give a salary figure. The same was initially done to the figure Dr Xu and Dr Kumar discussed. This was not Dr Xu's impression of what was going to happen so she took this issue to Dr Kumar. Dr Kumar agreed to return the salary figure to that originally discussed.

[73] There are other suggestions of Dr Xu taking an active role in discussions. Dr Xu says that during the discussions she had raised the prospect of a 60/40 cash/shares split but Dr Kumar did not agree to that, so the 50/50 split was set.

[74] There was also discussion about making the employment agreement an indefinite one. However, neither party wanted the share agreement to necessarily continue indefinitely, so a fixed term employment agreement containing the share arrangement was agreed to.

[75] These discussions indicate that Dr Xu had active involvement in bargaining and was not merely a recipient of whatever agreement was put up by the employer.

[76] There was also the impression of Mr Curteis, as someone not directly involved in the bargaining, had that Dr Xu was agreeable to the share arrangement.

[77] Later, Dr Xu's email to Dr Kumar of 11 September 2015, resigning from her employment, included a reference to her really enjoying working at Surgionix and thanking Dr Kumar very much for his support. The subsequent exchange of emails suggests a warm relationship between the two, with Dr Kumar concerned about Dr Xu's family situation. Dr Xu says that had it not been for Surgionix's financial situation, she would like to have stayed there for longer. This evidence does not suggest Dr Xu felt at that point that she had been oppressed or illegitimately pressured.

[78] Another factor is that the October agreement was for a fixed term, then subsequently when Dr Xu said that she did not want to continue with the arrangement of money being taken out for shares, Surgionix agreed to continue her employment without share deductions. Her work was reduced to three days a week, but she did receive payment for her entire work.

Conclusion regarding unfair bargaining

[79] There are aspects of Dr Xu's situation which led to her feeling pressured. However, her evidence did not support the requisite degree of incapacity, reliance or oppressive means used by Surgionix. I am not satisfied that she had diminished capacity, that she relied on the skill, care or advice of the company or Dr Kumar, or that she was induced to enter the employment agreement by oppressive means, undue influence or duress. Her claim under s 68 of the Act thus fails.

Costs

[80] Costs are reserved. The parties are invited to resolve the matter. Usually costs follow the event, with the successful party being entitled to claim costs. However, in this case Surgionix was not represented by a lawyer or hired advocate and it would need to establish any costs which it claimed.

[81] If the parties do not resolve costs Surgionix shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Dr Xu shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority