

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 129/09
5122648

BETWEEN YU CHAN (AMY) YE
Applicant

AND RUIFA PRODUCE LTD
Respondent

Member of Authority: James Wilson

Representatives: Yu Chan Ye in person
Sam and Sue Shen for the respondent

Investigation Meeting: 16 December 2008 in Auckland

Determination: 21 April 2009

DETERMINATION OF THE AUTHORITY

Yu Chan (Amy) Ye's employment relationship problem

[1] Ms Ye says that she had no option but to leave her employment with Ruifa Produce Ltd (Ruifa) because she was forced to take annual leave, had her hours of work reduced without consultation and was verbally abused by Mr Sam Shen, one of the owners. She is seeking to be compensated for the financial losses she has suffered and for the hurt and humiliation caused to her by her employer.

[2] Ruifa say that at all times they treated Ms Ye fairly, some of her concerns have not been raised with them and that they feel that she did not, for her own reasons, wish to continue to work for them

The events leading to Ms Ye's departure

[3] Ms Ye commenced working at Fruit World Dannemura, a franchise fruit and vegetable outlet in January 2005. The individual employment agreement signed at that time does not indicate her ordinary hours of work but pay records show that she worked 4 days and a total of approximately 46 hours per week. In July 2007 Fruit World Dannemura was purchased by Ruifa Produce Ltd a company owned by Sam and Sue Shen. Just prior to the change of ownership Ms Ye injured her back and had been off work for approximately 3 weeks and in her first week back at work worked only 32 hours. Although Ms Ye was able to produce payslips indicating that she continued to regularly work 46 hours per week, Ruifa produced the payslip indicating 32 hours to suggest that her hours of work, at the time of the change of ownership were in fact 32 hours per week.

[4] At the time Ruifa Produce took over the business all staff continued to work. Mr and Mrs Shen apparently advised the staff that they would be *on trial* and would be offered permanent employment if they proved satisfactory. Several weeks later, in mid September 2007, the staff, including Ms Ye were asked to sign an application form. This form contained no details regarding Ms Ye's working conditions and in particular did not set out her hours of work. Mr and Mrs Shen say that the franchisor (Fruit World) had advised them that the standard form of employment agreement was being revised and would be provided in due course. However no formal employment agreement was ever provided to Ms Ye.

[5] A few weeks after Ruifa took over the business there was a shortfall in one of the cash registers. Mrs Sue Shen asked Ms Ye if she had any explanation for the shortfall. Ms Ye believes that Mr and Mrs Shen believed that she had taken the money and that her reputation was badly damaged by this allegation. Ruifa say that they had asked all of the staff the same question and had not intended in any way to impugn Ms Ye's reputation.

[6] In February 2008 Ms Ye says that she approached her employers seeking to take leave in June 2008 to travel to China. She says that both Mr and Mrs Shen agreed to this and on the strength of that approval she purchased her air tickets. She says that she subsequently advised Mrs Shen that she would be on leave in June. Mr and Mrs Shen say that while they were aware that Ms Ye wished to take leave in June they had never approved the leave and they were not aware that she had purchased tickets.

[7] On the evening of 6 April 2008 Ms Ye says she received a call from Mrs Shen asking her to take annual leave immediately. She says she was shocked by this request because she had arranged to take annual leave in June and said she did not wish to take leave in April. Ms Ye says that Mr. Shen then spoke to her and became aggressive, told her that “he was the boss” and she must take leave any time he required. Ms Ye says that the next morning she went to work as usual and that Mr. Shen asked her to leave because he didn't want her to work. She says that when she refused to leave, Mr. Shen then required her to do demeaning work such as sweeping the street outside the shop. On that same day she says she found that the work roster had been changed and that she was to be given only two days work a week. When she returned home that evening she says she *mentally collapsed*, could not eat or sleep and was crying all the time. Ms Ye's husband telephoned Mr. Shen and advised that Ms Ye would be taking sick leave commencing after the weekend. A couple of weeks later (26 April?) Ms Ye wrote to Ruifa raising a personal grievance for *harassment*, asking the company to *remedy the serious* issues and suggesting that the company pay her sick leave in the meantime. Ms Ye did not return to work and says in her written statement of evidence:

I had been very depressed for some period of time after the incident, I had sought medical help from my doctor to keep myself calm and have some sleep. Because I was harassed and intimidated in the workplace, the whole shop knew about the incident. I was very afraid of seeing (Mr Shen) again. I was not able to continue to work in the shop without resolving the problem. I requested the company to take remedy action about the problem in my letter to the company on 26 April. I had not received any reply from the company about the matter.

[8] Ruifa Produce's version of these events is somewhat different. Mr and Mrs Shen said that they understood that Ms Ye was having problems with her back and the telephone call on the evening of 6 April was to suggest that she take some time off to assist in its recovery. Mr Shen says he was not aggressive with Ms Ye and when she did not wish to take annual leave suggested she work Monday and Sunday that week. He says that the following day he was not attempting to humiliate her and that all staff took turns at sweeping. Ruifa Produce say they regarded Ms Ye as a part-timer and pointed to the fact that her first week under their ownership she worked only two or three days (32 hours). They say that she had told them that she could not work longer hours or more days because she could not handle the workload and they have always treated her as a part-timer.

[9] It is not clear whether Ruifa Produce received Ms Ye's letter of 26 April 2008. Ruifa say that it was their understanding was that Ms Ye would take first sick leave and then annual leave before returning to work. They say that when her annual leave entitlement was due to run out they rang Ms Ye to ask her to resume work. They say that Ms Ye advise them that she was ill and did not know when she would be returning to work. They say they requested Ms Ye provide them with a medical certificate but were subsequently advised that Ms Ye had lodged an application in the Authority.

Discussion

[10] It is a great pity that Ruifa Produce did not obtain proper advice regarding their employment obligations when they first took over ownership of Fruit World Dannemura. At the time Mr and Mrs Shen took over the business they simply advised the staff that they would continue their employment on a three-month trial. There was no written offer of employment, no employment agreement and, it seems no discussion regarding ongoing conditions of employment. It was reasonable for Ms Ye, and other staff, to assume that their employment conditions would continue as previously and for several months they did. Mr and Mrs Shen say that Ms Ye was lazy, did not take her fair share of work and that they received complaints about her performance from other staff. However there is no record of these matters ever having been discussed with Ms Ye. If Ms Ye was having back problems and Ruifa were concerned about this, the appropriate course of action would have been to

discuss it with her in-person and to explore what could best be done to assist. While I accept that Mr and Mrs Shen may have been acting in good faith, simply phoning Ms Ye at home and suggesting she should take time off, was always fraught with the danger that Ms Ye might misunderstand their intentions. This is exactly what happened and Ms Ye reacted predictably.

[11] Ruifa Produce say that Ms Ye was a part-timer and that they were therefore entitled to change her hours of work at their discretion. Even if Ms Ye was a part-timer (and the evidence would suggest otherwise) she had worked similar hours for several years and any attempt to change those hours would at the very least require consultation. As it happens the evidence suggests that Ms Ye's (unwritten) employment agreement entitled her to work four days, and 46 hours, per week.

[12] Ruifa Produce also seem to have been under the misapprehension that they were able to dictate to Ms Ye when she would take her annual leave. While under some circumstances an employer can dictate when an employee takes their leave (e.g. after proper consultation or at the time of an annual shutdown) this was not the case in these circumstances.

Determination

[13] Ruifa Products may have believed that they were acting appropriately and I accept that they believed they were acting in good faith. However their failures and misunderstandings in respect to their obligations as an employer, cumulatively resulted in Ms Ye believing that she could no longer continue her employment. Rightly or wrongly Ms Ye believed that Ruifa, despite having previously approved her taking leave to travel to China, were attempting to force her to take annual leave when she did not want to. She believed that this would mean she would be required to forfeit the cost of the air fares involved. Ms Ye also believed that Ruifa were attempting to reduce her hours of work without consultation or agreement and were providing a *hostile work environment*. **Ms Ye has a personal grievance against her employer, Ruifa Produce Ltd in that she was unjustifiably constructively dismissed.**

Remedies

[14] I have found that Ms Ye has a personal grievance against Ruifa Produce. She is entitled to be compensated both for her financial loss and for the hurt and humiliation that this series of events has caused her.

Contribution

[15] In terms of section 124 of the Employment Relations Act, I find that Ms Ye did not contribute to the circumstances which gave rise to her personal grievance. It is not therefore appropriate to reduce the remedies to be paid to her.

Recovery of lost wages

[16] Ms Ye says that after getting over her initial depression she started looking for a new job in early May before taking her planned trip to China in June. On returning from China she started casual work doing housecleaning and during the second half of 2008 worked approximately 15 hours per week. At the Authority's investigation meeting Ms Ye produced a medical certificate stating that she had been unfit for work from 23 to 29 April 2008. Given the circumstances surrounding her departure from Ruifa there is no fixed date of "resignation". From the records provided by Ruifa it is difficult to ascertain what, if any, sick leave or holiday pay was paid to her following her departure. In the interests of simplicity and in the absence of proper records Ruifa Produce is ordered to pay Ms Ye the following amounts:

- **if they have not already done so, sick leave at the rate of 46 hours per week from the Ms Ye's last day of work up to and including 29 April 2008.**
- **Any annual leave outstanding as 29 April 2008.**
- **8 weeks wages at \$12 per hour x 46 hours per week. (\$4416.00 gross)**
- **Annual leave calculated at 8% for this 12 weeks wages (\$353.00 gross)**

Hurt and humiliation

[17] Ms Ye gave evidence of feeling humiliated and stressed by the actions of her employer. The levels of stress she suffered were confirmed by the medical certificate provided and supported by the evidence of her husband. She is entitled receive compensation for the distress that these events have caused her. **In terms of section 123(1)(c)(i) of the Employment Relations Act, Ruifa Produce is to pay Ms Ye \$2500.00 without deduction for the hurt and humiliation its actions have caused to her.**

Costs

[18] Ms Ye was not legally represented during the Authority's investigation process and did not therefore incur any legal costs. She is however entitled to be reimbursed for the cost of filing her application in the Authority. **Ruifa Produce is ordered to pay Ms Ye \$70 in reimbursement of her filing fee.**

James Wilson

Member of the Employment Relations Authority