

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 150

File Number: 5311160

BETWEEN Fuqiang (James) Yu
Applicant

AND Xin (Bill) Li and Symbol
Spreading Limited
Respondents

Member of Authority: Denis Asher

Representatives: Mr Yu represented himself
Mr Li represented himself and the Company

Submissions Received By 4 August 2011

Determination: 23 September 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] I earlier determined that Mr Yu was an employee of the respondent Company and was entitled to compensation of \$2,000 for hurt and humiliation (see [2011] NZERA Wellington 61).

[2] I also set out, at par 52, the following formula so as to calculate what if any wages were owed to the applicant:

Minimum weekly adult rates for the period April 2009 to 20 July 2010, less weekly base payments for services of \$250 less weekly commissions earned by,

or payable to, Mr Yu = in the event of a shortfall, minimum wages payable to the applicant, plus holiday pay calculated on the greater amount.

[3] I also noted that, for the period 1 April 2009 to 31 March 2010 the minimum weekly wage payable to an adult worker was \$500, and that, for the period 1 April 2010 to 20 July 2010 the figure increased to \$510 per week; I directed the parties to apply this information and attempt to resolve on their own terms the question of what if any wages were owed to Mr Yu. I also directed the parties to undertake mediation on the matter if agreement could not be reached. Mediation did not result in the parties settling this problem.

[4] Costs were reserved. I noted that, as the parties represented themselves and as costs typically follow the event, Mr Yu was entitled at least to recover his filing fee (par 62, above).

The Investigation

[5] Following the parties' failure to reach agreement I directed that they provide me with written submissions so that I might determine the matter.

Applicant's Position Summarised

[6] In submissions received on 18 July and 4 August, Mr Yu says he is owed:

- a. Unpaid wages for June and July 2010 of \$5,500;
- b. 20% on commission bookings from August 2010 to April 2011 of \$2,793;
- c. Unspecified holiday pay and sick leave;
- d. Compensation of \$2,000; and
- e. Costs of \$180.

Respondent's Position Summarised

[7] In a submission received on 29 July 2011 the Company says amongst other things that Mr Yu was not entitled to pay for the Xmas period 19 December 2009 to 10 January 2010 as it was closed for 3-weeks during this time.

[8] The Company says Mr Yu admitted to 22 days leave for personal reasons during the period 1 May 2009 to 20 July 2010; he had no bereavement or sick leave.

[9] Mr Yu took 5 days off during April 2009 to look after his partner and their newborn baby.

[10] The Company relies on its contractor's agreement with Mr Yu in respect of the June payment of \$1676.44 and his July payment was \$962; *"Hence according to the Authority's decision, the minimum wage required applies"* (par 4, above).

[11] Mr Yu was paid \$29,708 in total (refer to the signed receipts attached to the Company's submission).

[12] The Company does not agree to pay Mr Yu's filing fee for the Disputes Tribunal of \$100.

Discussion & Findings

[13] This is not an opportunity, as both parties have attempted, to relitigate the matters determined in my earlier, substantive decision. It is instead an exercise in applying the formula set out in par 52 of that determination.

[14] As recorded at par 6 of my earlier, substantive determination, the parties agree that Mr Yu worked for the Company from April 2009 until 20 July 2010, i.e. he was an employee of the respondent for 68 weeks. The minimum weekly adult rate for the period 1 April 2009 to 31 March was \$500. By way of applying the formula set out above, $\$500 \times 52 = \$26,000$. The minimum weekly adult rate of \$510 applied from 1

April 2010: $\$510 \times 16 = \$8,160$. Mr Yu was therefore entitled to minimum pay of $\$34,160$ for the period of his employment with the Company.

[15] His holiday pay for the same period is 8% of $\$34,160$, or $\$2,732.80$, i.e. total wages owed Mr Yu were $\$36,892.80$.

[16] Mr Yu does accept (and has signed for) the following commission payments:

	\$
May '09	1,198
June '09	1,611
July '09	1,930
August '09	1,956
Sept. '09	2,560
Oct. '09	2,570
Nov. '09	2,313
Dec. '09	2,059
Jan. '10	1,712
Feb. '10	3,140
March '10	3,198
April '10	3,523
May '10	1,935
June '10	0
July '10	0
Total	29,705

[17] As recorded at par 50 of my earlier determination, and in respect of Mr Yu's claim for unpaid commission earnings from June 2010, "*On the evidence before the Authority it is impossible to quantify what if any unpaid commission earnings are owed to Mr Yu*".

[18] There is no evidence of weekly base payments being paid to Mr Yu in June and July 2010. I therefore calculate the total week base payments to him as $61 \times \$250$, or $\$15,250$.

[19] I am therefore satisfied that the difference in outstanding and unpaid wages owed to Mr Yu is: minimum weekly adult rates or \$34,160, plus holiday pay of \$2,732.80, i.e. \$36,892.80, less weekly base payments totalling \$15,250, less weekly paid commissions of \$29,705 = -\$8,062.20. In other words, Mr Yu is not owed any outstanding wages.

[20] The unreliability of Company records in support of claims of leave taken by Mr Yu when weighed against his statutory entitlements persuades me it is inappropriate to factor those absences into the above calculation.

[21] The Company has not challenged the substantive determination and has no lawful reason to not pay as ordered compensation to Mr Yu of \$2,000 for hurt and humiliation: it must do so and promptly.

Determination

[22] The Company is to pay to Mr Yu, as already determined by the Authority, compensation of \$2,000 (two thousand dollars) for hurt and humiliation; and costs of \$70 (seventy dollars), being reimbursement of his filing fee.

Denis Asher

Member of the Employment Relations Authority