

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 158/10
5286231

BETWEEN TIANXING YU
 Applicant

AND SYMBOL SPREADING
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Simon Martin for Applicant
 Bill Li and Liang Qiu for Respondent

Investigation Meeting: 3 August 2010 at Wellington

Written Submissions: By 18 August 2010

Determination: 1 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Yu commenced training with Symbol Spreading Limited (SSL) from October 2008 until mid January 2009. On 19 December 2008 Mr Yu was presented with an individual employment agreement by Mr Bill Li managing director. The agreement was signed off on 26 January 2009 after Mr Yu discussed it with his parents.

[2] SSL publishes a newspaper called the New Zealand Chinese Times in Wellington.

[3] Mr Yu worked as a newspaper advertisement and set type/web designer, and he started paid work at SSL on 2 February 2009. The employment agreement made provision for an annual salary of \$27,040 to be paid monthly. Mr Yu was paid

monthly at 8 hours per day with no extra payment for any overtime (employment agreement). The employment agreement contained both parties' contact details when the contract was signed off (clause 4).

[4] The employment relationship ended in late August 2009. Mr Yu says he left work on 31 August 2009 because he was sick, which he says related to the employer's failure to provide a letter of support for immigration purposes to get permanent residence in New Zealand, and after being requested by Mr Li, as a condition for his support, to sign off a "*guarantee to work and forfeiture of wages*" document (called the "*Employer Satisfaction Guarantee*" (19 August 2009)). Mr Yu went to a doctor, and obtained a doctor's certificate. He took in to his work the medical certificate on 1 September 2009. The medical certificate contained the detail of his new residential address. Mr Yu accepted that he did not keep his employer up to date as to his changed residential address and land line telephone number originally contained in the employment agreement.

[5] Later that same day Mr Yu received a letter from Mr Li and Liang Qiu claiming that he had walked off the job. Mr Li and Ms Qiu say they tried to contact Mr Yu and when Mr Li could not contact him by cell phone their first thought was to contact the Police for help to get the keys and a second swipe card issued by the property owner, because of the stress they were under to meet the newspaper's publishing time. Mr Yu returned the company key on 2 September 2009 after being contacted on his telephone by the Police for allegedly "*illegally withholding company property*".

[6] Mr Yu accepts that on 2 September 2009 he and Ms Qiu walked out of the premises together, but they have different views about what they said to each other in regard to Mr Yu working for SSL. I accept Ms Qiu's version for reasons I will give later.

[7] Mr Yu has claimed he has been unjustifiably dismissed. He has claimed remedies for a personal grievance. He has claimed 4 weeks pay and also his accrued holiday pay not paid by SSL. In his statement of problem he claimed that SSL breached his employment agreement, breached the requirement to act in good faith under the Employment Relations Act and breached the Wages Protection Act and has

claimed penalties. He also claimed that SSL made deductions to his wages when he was late for work. Mr Li denied that claim.

[8] Mr Yu has also claimed wages for the time he was engaged in training from about October 2008 until mid January 2009. This claim has been denied by SSL.

[9] SSL has counterclaimed that Mr Yu owes one weeks salary for walking off without notice and pay the company a balance of 2 months' and one week's salary for training costs under the employment agreement because he failed to work 18 months.

Issues

[10] What were the circumstances in which the employment ended?

[11] Does Mr Yu have a personal grievance?

[12] Does SSL owe Mr Yu any outstanding pay and holiday pay?

[13] Does SSL owe Mr Yu any money while he was training in October 2008 until mid January 2009?

[14] Does Mr Yu owe SSL one week's forfeiture of wages for leaving without giving notice?

[15] Does Mr Yu owe SSL a balance of 2 months' one week's wages for training costs during his employment?

[16] Have there been any breaches by SSL warranting penalties?

The facts

[17] The employment agreement made provision for:

6 VARIATIONS

- 6.1 *Notwithstanding the provisions of any Clause of this Agreement, the terms and Conditions contained in this Agreement may be varied by agreement between both parties. Such agreement shall be recorded in writing.*

10 OPPORTUNITY TO SEEK ADVICE

- 10.1 *The Employee acknowledges that he or she was given a reasonable opportunity to seek independent advice before entering into this Agreement.*

FIRST SCHEDULE

4 TRAINING

- 4.1 *The employer will provide the Employee with on the job training. The cost of this training is the equivalent of three months salary.*
- 4.2 *If the Employee remains in the position for 36 months, the Employer agrees to pay the training fee.*
- 4.3 *If the Employee's employment is terminated after 18 months, the Employee agrees they must contribute one half of the training fee to the Employer.*
- 4.4 *If the Employee's employment is terminated prior to the completion of 18 months continuous service, the Employee agrees they must repay the entire training fee, of three months salary to the Employer.*

SECOND SCHEDULE

1 HOURS OF WORK

- 1.1 *The Employee shall be required to work 40 hours per week from 9.00am to 6.00pm, Monday to Friday (both inclusive).*
- 1.2 *Deductions shall be made from the Employee's pay for lateness...*

FOURTH SCHEDULE

1 TERMINATION

- 1.1 *Unless by mutual agreement, the notice period shall be no more and no less than three (3) months. This agreement may be terminated by either party upon the specified notice being given in writing. The Employer, at its discretion, may make a payment in lieu of notice and not require the Employee to work out the notice period. Where the required notice is not given, one (1) weeks ordinary pay may be paid or forfeited as the case may be.*

- 1.2 *Unless otherwise agreed by the parties, the period of notice shall be exclusive of the whole or part of any period of annual holidays or public holiday allowed in accordance with legislation or this agreement.*
- 1.3 *The Employer shall be entitled to terminate this agreement without notice in the event of serious misconduct.*

5 ABANDONMENT

- 5.1 *Where the Employee is absent from work for a continuous period of three days without the consent of the Employer, the Employee shall be deemed to have terminated their employment.*

[18] It is common ground that Mr Li did not write a letter for Immigration New Zealand to support Mr Yu's permanent residence. Mr Li was not satisfied with Mr Yu's performance at work, which included Mr Yu being late for work and making too many mistakes. It is also common ground that Mr Li presented Mr Yu with a document purporting to be an "*Employer Satisfaction Guarantee*" (19 August 2009). Mr Yu says that Mr Li required him to sign the guarantee before he would provide the letter for the Immigration Service to support his application for permanent residence. Mr Li denied making such a demand.

[19] Mr Yu says on 30 August 2009 he told Mr Li that he would not sign the guarantee, and he claimed that Mr Li became angry, which Mr Li denied. Mr Yu denied that he offered Mr Li money to provide a letter to the Immigration Service. He says that Mr Li may have become confused about a comment he made along the lines of "*what do you want*" with an offer of money.

[20] Mr Yu went home as he says he felt stressed and went to a doctor. He did not return to work after returning the keys/swipe card on 2 September 2009.

[21] Mr Yu and his lawyer tried to get Mr Li to attend to the employment relationship problem by mediation (11 & 23 September 2009), but had to file an employment relationship problem in the Authority when SSL did not reply. It was only after the employment relationship problem was filed in the Authority that mediation took place on 22 February 2010.

[22] On 14 September 2009 Mr Li wrote to the Immigration Service informing them that Mr Yu no longer worked for SSL. Mr Yu's permit was revoked on 26

November 2009 and has been reinstated to enable him to remain in New Zealand, but his permit continues to require him to work for SSL until March 2011.

Pre-employment training

[23] There was no pre-employment training agreement. It is common ground that there was training in the period late October 2008 until early January 2009. Also, it is common ground that Mr Yu was not paid. There were no terms for any training and it appears Mr Yu agreed to undertake training without any pay in that period. There are no grounds upon which a claim can now be made, I hold. This is because Mr Yu has not been able to provide sufficient supporting evidence to rely on the real nature of the relationship, although he claims his work was used and he was required to attend the newspaper for at least 3 days per week and this increased to 5 days after the first 5 weeks. There were no other details of any actual hours and time provided. There were no details of the role provided and to distinguish any training that Mr Yu was a party to. The employment agreement certainly did not apply during that time. This claim has only come about after the break up of the relationship. Thus, I have decided that there is not enough proof that the real nature of the relationship was one of employment during this time.

Personal grievance claim

[24] Mr Yu says that Mr Li got angry on 30 August when he refused to sign the "*Employer Satisfaction Guarantee*". Mr Li denied that claim. I accept Mr Li's evidence that he did not get angry, and my reasons will follow.

[25] Mr Yu has not been able to produce any independent evidence of any demand by Mr Li to sign the "*Employer Satisfaction Guarantee*" in return for support with his application for permanent residence, I hold.

[26] Mr Li's letter dated 4 September to the Immigration Service was blunt and forthright, but it is not enough for me to assume that he was angry on 30 August because English is his second language. Also, the letter dated 1 September is not enough to prove he was angry either because there was some foundation to his conclusions, which I will comment on again later.

[27] Mr Yu left work on 31 August 2009. The initiative for this was Mr Yu's claim that Mr Li would not sign a letter to the Immigration Service to support Mr Yu's application for permanent residence. Mr Yu considered that time was an imperative because his consultant had told him of an Immigration Service deadline, thus, he got angry and went home. I hold that Mr Li presented his *Employer Satisfaction Guarantee* genuinely to Mr Yu on 19 August because he was concerned about Mr Yu not being on time to start work and his performance. Mr Yu says in his evidence that it was handed to him. Also, it is likely that the timing of Mr Li given the document to Mr Yu was before Mr Yu made a request to Mr Li to support the application for permanent residence, I hold. I accept that Mr Li did not want to be seen to misrepresent himself with the Immigration Service and genuinely wanted Mr Yu to be on time and perform his duties to the required standard before providing any support.

[28] It is common ground that a medical certificate was handed in by Mr Yu on 1 September and left in Mr Li's office. The medical certificate did not contain any reasons for Mr Yu's non attendance at work for two days from 31 August 2009. This explains Mr Li's scepticism about it.

[29] SSL did try to communicate with Mr Yu by leaving a letter at his new address (obtained from the medical certificate) and getting help from the Police, albeit to get his swipe card and keys back. The letter reads as follows:

1 September 2009

We understand that you went to Phoenix International this afternoon and claimed that you were fired by Symbol Spreading Ltd. The fact is that you walked off the job and did not return to work.

Hereby we require you to return all the company's belongs (sic) including all the keys to the management within 24 hours of this notice between 9.am and 6 pm office hours.

Please note we have reported to the Police that you are illegally withholding the company property and that this has been filed for action.

[30] I hold that the letter clearly indicates that the employer believed that Mr Yu left his employment. In the context of what happened on 31 August and 1 and 2 September, where Mr Yu walked out, the letter is not a dismissal letter, I hold.

[31] Mr Li and Ms Qiu say they tried to contact Mr Yu, and when Mr Li could not contact him by his cell phone first, their first thought was to contact the Police for help to get the keys and second swipe card for the premises, because of the stress they were under to meet the newspaper's publishing time. Mr Yu did not challenge the evidence from Mr Li that there was a limited number of keys/swipe cards.

[32] I accept that Mr Li and Ms Qiu decided that Mr Yu had walked out and they came to the conclusion that Mr Yu had no intention of returning because they had found out that he was telling somebody else that he had been fired, and this was supported by a document produced. This information caused them to be more sceptical of Mr Yu's claimed sickness. The letter clearly supports that the employment relationship had ended, and this was confirmed on 2 September when Mr Yu left with his personal property. The question remains at whose initiative was the employment ended?

[33] Mr Yu has been critical of Mr Li's and Ms Qiu's decision that on 1 September he walked out and that this decision was reached during the period of the medical certificate. However, they were defending the claim that they had heard that he was saying he had been fired. The letter does not refer to the medical certificate or that Mr Yu took the medical certificate into work the same day. Mr Yu had left work angry and he was reporting that he had been fired. This was not challenged by Mr Yu. Mr Li and Ms Qiu also learnt he was looking for other work. This was not challenged by Mr Yu either. Thus, I accept Mr Li's and Ms Qiu's version of what they say happened.

[34] Mr Yu returned the company key/swipe card on 2 September 2009 after being contacted on his cell phone by the Police for allegedly "*illegally withholding company property*". There has been no other action taken by the Police, and thus, I conclude that Mr Li and Ms Qiu were trying to get the keys and swipe card for genuine reasons to do with the need to employ a contractor to finish Mr Yu's work, get access with the limited number of keys/swipe cards available, and to meet the

newspaper deadline. Mr Yu accepted that on 2 September 2009 he and Ms Qiu walked out of the premises together, but they have different views about what they said to each other in regard to Mr Yu working for SSL. I hold that it is more likely that Mr Yu was angry about not getting a supporting letter from Mr Li for an immigration deadline. He took his personal possessions. During the Authority's investigation Mr Yu accepted that he did make a comment that he believes Mr Li could have misinterpreted as a request for a favour in return for a sum of money. Also, Mr Yu did not have deductions made from his salary payments as he had claimed in his evidence before the Authority. The evidence from SSL of wage calculations and details of payments makes it clear that there were no deductions made from the wages for lateness as claimed by Mr Yu. Mr Yu's anger made it probable that his real issue was about the permanent residence application and his need for his employer's support. Mr Yu never mentioned until the Authority's meeting that he had taken in his medical certificate on 1 September and obtained Mr Li's letter later. Also, there is no record from Mr Yu that he was even relying on his medical certificate by this time, I hold. Finally it is possible that the "*Employer Satisfaction Guarantee*" was provided to Mr Yu on or about 19 August and had more to do with Mr Yu's lateness and performance and Mr Li's intention to get some improvement. For these reasons I hold that Ms Qiu's and Mr Li's evidence is more reliable about what happened on 2 September. The events of 2 September and the context of the events negate any criticism of the decision made that Mr Yu had left work for good and that this decision had been reached at about the same time as Mr Yu left his medical certificate for Mr Li.

[35] There was no further contact between Mr Yu and Mr Li until Mr Yu's lawyers wrote to SSL on 11 September 2009.

[36] There is also evidence from Mr Li that he engaged a reliever contractor to help with the work initially to meet the newspaper deadline and was not replacing Mr Yu. I hold that Mr Yu walked out of his employment and it was not at the initiative of the employer. Even if it did it did not involve a serious enough breach of trust and confidence that made it foreseeable Mr Yu would leave. Mr Yu never challenged this evidence. This supports that Mr Li did not want to lose Mr Yu. There was no dismissal, actual or constructive I hold. There can be no remedies for a personal grievance.

Wages and holiday pay claims

[37] Mr Yu is entitled to his last pay and outstanding holiday pay. The last payment of wages and holiday pay has been withheld by SSL. Without giving notice Mr Yu forfeits a weeks' pay under the terms of the employment agreement. He is entitled to three weeks' pay. His hourly rate was \$13 per hour. He was entitled to 40 hours per week under the employment agreement and the amount owing was detailed by the employer as \$2,184 and was not challenged by Mr Yu. With a deduction for 5 days (\$520) the amount owing would be: \$1,664.

[38] Eight percent (8%) of Mr Yu's gross wages (\$15,705) in the period from February 2009 until 31 September 2009 is \$1,256.32.

SSL's counter-claim for three months salary for training

[39] I now turn to the employer's counterclaim. I entirely agree with Mr Yu's lawyer's submissions. This claim amounts to a premium for employment.

[40] Section 12 A (1) of the Wages Protection Act makes the following provision:

No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[41] The present claim for three months reimbursement of the sum paid in wages is a repayment of earnings. The benefit the employer had was that it agreed, and Mr Yu agreed, to a training period before he commenced work without pay. Thus, I hold that the sum now claimed would not be proper to award and indeed would be unlawful. Furthermore the evidence does not indicate with any precision the cost of the training, the time of the training, there were no receipts produced, there was no training programme produced and no evidence to suggest that the training period was for three months.

Claims for breaches and penalties

[42] Finally I turn to the claim for penalties. The penalties claims relate to alleged breaches of the employment agreement, a breach of good faith and a breach of the Wages Protection Act.

[43] Firstly, the claim of a breach of the employment agreement relates to the alleged employer's failure to follow the steps set out in clause 7 of the Fourth schedule of the employment agreement that deals with employment relationship problems. This claim relates to the employer's alleged failure to discuss openly with Mr Yu the problems, but instead it made assumptions about the applicant's intentions. The fact is that the applicant did not further contact the employer after his attendance at work on 2 September when he handed in his keys as requested. He took his personal belongings and did not make any further contact until 11 September 2009 when clearly the problem escalated with the lawyer's letter. By 2 September the employment relationship had come to an end and the employer had at least tried through the Police and in writing to contact the applicant to get back property he had in his possession. Also, Ms Qiu had tried to find him at his new residential address. Further, the issues around how the employment ended go to the heart of the applicant's claim for constructive dismissal. As such, given that facts concluded on the balance of probabilities about what happened and where both parties have different versions of the matter, I hold this is not a case for any penalty.

[44] Secondly, the applicant has relied on alleged misleading and deceptive actions of the employer when it allegedly took advantage of the applicant's immigration status and using the "*employer satisfaction guarantee*" document.

[45] I hold that there is no evidence that the applicant's immigration has been used by the employer for any advantage when the applicant had time to get independent advice in regard to the individual employment agreement. There was a lawful work permit involving SSL named as the employer. Also, my findings support that the document was prepared to get Mr Yu to address his lateness for work and performance.

[46] Also it has been claimed that the respondent has acted in bad faith by:

- (a) Ignoring the applicant's lawyer's request for mediation.
- (b) Writing to Immigration that the applicant no longer worked for SSL.
- (c) Refusing to pay the applicant wages and holiday pay for his last four weeks.
- (d) Requiring the applicant to return all company property with 24 hours when the applicant provided a medical certificate.
- (e) Involving the Police.
- (f) Failing to pay the applicant in the pre-employment training period.

[47] Dealing with (f), the last matter first, I disposed of this claim earlier. There has been no deliberate and wilful breach given the agreed arrangements involving both parties.

[48] I now turn to the claims that SSL has acted in bad faith in (a) to (e) above:

- (a) It was not good practice for Mr Li not to reply to Mr Yu's lawyer's letter and not to assist in an early mediation. The Act does require parties to be open and communicative and the respondent could have done more to achieve this by replying to the letter dated 11 September. Courtesy would demand it, I hold. Instead Mr Li ignored it. The whole purpose of the dispute resolution procedure under the Act and in the employment agreement is to save costs and deal with matters quickly at the source of the problem. As it transpired the parties did attend mediation once the Authority became involved. The applicant has not been disadvantaged given the nature of the claims he instructed his lawyer to pursue. Whilst it was not sensible of the respondent not to go to mediation at that earliest opportunity the fact is that the applicant had made a substantial legal claim and he had given notice that the matter could be lodged in the Authority. SSL took the risk to delay the inevitable and lost a benefit of an early attempt to settle. It does not follow that this action was a deliberate and wilful breach of

good faith because Mr Li has fully responded and replied in the course of time.

- (b) The employer was entitled to write to the Immigration Service with its view that the employment had ended because the work permit had SSL's name on it. There is no evidence that this was done to deliberately impact on the applicant, but to convey information that the employer believed it had a responsibility to send. However, that particular letter was written in a very sharp and critical style that could be interpreted in a negative way against Mr Yu. Mr Yu had an opportunity to deal with that through the Immigration Service.
- (c) SSL did fail to pay wages and holiday pay. This in breach of the employment agreement. There was no provision to off set such sums in the employment agreement for other money. This was a deliberate act by SSL to counter Mr Yu's claims, and as such attracts a penalty. I order SSL to pay \$500 penalty and for the penalty to be paid to the Crown.
- (d) I have accepted that there were difficulties for Mr Li and Ms Qiu contacting the applicant in regard to attempts to call him by his cell phone and with the letter dated 1 September, and they had reasons to want the keys/swipe card.
- (e) In context I accept the reason why Mr Li and Ms Qiu decided to call the Police to help. This does not amount to a breach of good faith. There were other options available under the dispute resolution process that could have been followed, but that was a matter for SSL to decide, I hold.

[49] Therefore, I conclude that whilst the employer has not acted in good practice it has not acted in bad faith as claimed. It has breached Mr Yu's right to be paid wages and holiday pay and this attracts a penalty.

Orders of the Authority

[50] Mr Yu's claim for a personal grievance is dismissed.

[51] Symbol Spreading Limited is required to pay Mr Yu:

- (i) The sum of: \$1,664 wages owing; and
- (ii) The sum of: \$1,256.32 outstanding holiday pay.

[52] Symbol Spreading Limited is to pay a \$500 penalty to the Crown for failing to pay wages and holiday pay.

[53] Symbol Spreading Limited's claims for three months salary for training are dismissed.

[54] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority