

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 251  
5433367

BETWEEN                      LIANG ZHAO  
   Applicant

AND                              D & C SCAFFOLDING  
   (EASTERN AUCKLAND)  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              L Zhao in person  
   N Liang, advocate for respondent  
  
Investigation meeting:        14 February and 23 May 2014  
  
Determination:                18 June 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Zhao did not raise a personal grievance under the Employment Relations Act 2000 and is not entitled to any of the remedies available for a personal grievance.**
- B. D & C Scaffolding breached the notice obligation in the employment agreement and is ordered to pay to Mr Zhao two weeks' wages.**
- C. D & C Scaffolding breached the Wages Protection Act 1983 by withholding holiday pay and is ordered to pay a penalty of \$1,000.**
- D. The penalty is to be paid to Mr Zhao.**

[1] D & C Scaffolding (Eastern Auckland) Limited (D & C Scaffolding) employed Liang Zhao as a truck driver, commencing in February 2012. The company is in the business of providing and erecting scaffolding on building sites.

[2] Mr Zhao's job was to deliver the scaffolding from the company's warehouse to the sites where it was to be erected. He had the HT licence required to drive the truck used for the purpose, and was the only person employed as a dedicated driver.

[3] On or about 13 August 2013 the general manager informed Mr Zhao that the truck had been sold. In fact D & C Scaffolding had leased the truck, and it was being returned to its owner.

[4] On or about 16 August 2013 the executive director and majority shareholder, Normand Liang, gave a letter to Mr Zhao setting out the terms on which his employment would end. The letter said that *'due to a change of company structure some of the positions in company have been affected.'*

[5] The letter went on to advise that *'from 15/8/13'* the company hoped Mr Zhao would *'find new job in other company (Prior to 30/08/13)*. The meaning of this was far from clear. At the time Mr Zhao understood it to be that he would have the next two weeks off work while he looked for another job.

[6] The letter also said the company would compensate Mr Zhao by paying him another two weeks' wages.

[7] Mr Zhao reported to work between 15 and 22 August, but not between 23 and 30 August. He says he was not paid for the second of these weeks and did not receive the holiday pay owed to him on the termination of his employment.

[8] D & C Scaffolding did not pay Mr Zhao his wages because he did not report to work during the last week in August, and it did not pay him his holiday pay until November 2013.

[9] Mr Zhao's employment ended on 30 August 2013. On that day he was handed another letter. The letter amended the 16 August letter by adding the following to the provisions quoted above:

*... as the truck have been sold our company do not need truck driver anymore. The company regretfully inform you that, from 15/8/13 the company do not have a position of truck driver, and we hope you can find new job in other company (Prior to 31/8/13) during the time (15/8/13-31/8/13) you still have to work but can go for interview for new job.*

*The company agrees to compensate you another two weeks wage after 31/8/2013. ...*

[10] The two weeks' wages by way of 'compensation' was not paid because Mr Liang took the view that Mr Zhao had not confirmed his acceptance of it. Indeed Mr

Zhao did not accept it. The delay in the payment of holiday pay occurred because D & C Scaffolding was seeking Mr Zhao's signature on a termination of employment form.

[11] For his part Mr Zhao sought legal advice from a community law centre, and was given the names of some employment law practitioners. At the same time he lodged a statement of problem in the Authority on 23 September 2013.

[12] The statement of problem sought payment of unpaid wages and holiday pay. It also included requests for the remedies available when a personal grievance is alleged, but did not expressly assert that Mr Zhao had a personal grievance and nor did it provide any details at all of the nature of or background to any personal grievance to which those remedies related.

[13] Mediation had not been attempted. The matter was referred to mediation in accordance with the Authority's practice in those circumstances. It came before a member for the first time on 18 December 2013, after the parties were unable to resolve it in mediation.

[14] This determination addresses whether:

- a. a personal grievance was raised; and
- b. Mr Zhao is owed any unpaid wages or holiday pay.

### **Was a personal grievance raised**

[15] The contents of the statement of problem reflected a common misconception that all claims in the Authority, even if no more than claims for unpaid wages and holiday pay, are characterised as personal grievances. A related misconception is that all claims in the Authority can attract the remedies available for personal grievances.

[16] However if a claim does not fall within the definition of personal grievance contained in s 103 of the Employment Relations Act 2000<sup>1</sup> those remedies - including

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<sup>1</sup> Including that the employee was:

- unjustifiably dismissed;
- disadvantaged in employment by an unjustifiable action of the employer's;
- discriminated against;

the orders for reinstatement and reimbursement of lost remuneration which Mr Zhao seeks - are not available.

[17] During a teleconference between the Authority and the parties I sought to clarify with Mr Zhao what his personal grievance was, if he had one, and when he raised the grievance.<sup>2</sup> Mr Zhao said that he raised a grievance orally with Mr Liang when he was advised of his dismissal. Having now heard Mr Zhao's evidence I find he did not raise with Mr Liang a personal grievance as defined in the Act. At most he queried or disagreed with the 'compensation' he was to receive.

[18] During the Authority's investigation meeting Mr Zhao said his approaches to the company's accountant after his dismissal amounted to the raising of a grievance. That argument would fail in any event because the company's accountant was not the employer. Moreover the concerns Mr Zhao raised with the accountant were with the calculation of wages and holiday pay and the failure to pay what was owed as at the date of termination. Again this does not amount to the raising of a personal grievance as concerns of this kind do not fall within the definition in the Act

[19] Other than expressing to the Authority his dissatisfaction with the failures to pay wages and holiday pay, and making a general statement that the 'compensation' offered was not enough, Mr Zhao has not raised any issue capable of amounting to a personal grievance under the definition in s 103.

[20] As no personal grievance has been raised Mr Zhao is not entitled to the remedies available for a personal grievance.

[21] In particular he is not entitled to orders for reinstatement and the reimbursement of lost remuneration. There will be no such orders.

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- sexually harassed;
  - racially harassed;
  - subjected to duress in relationship to membership or non-membership of a union; or
  - [failure to comply with Part 6A]subjected to duress in relationship to membership or non-membership of a union; or
  - [failure to comply with Part 6A]

<sup>2</sup> By the date of the teleconference, no personal grievance had been raised with the employer within the 90 day period beginning with the date on which the action amounting to a grievance occurred. Although Mr Zhao had lodged his statement of problem in the Authority within that time, the contents did not meet the requirements for raising a grievance set out in *Creedy v Commissioner of Police* [2006] ERNZ 517.

**Are wages and holiday pay owed**

[22] Mr Zhao seeks the following payments:

- (i) wages;
- (ii) holiday pay; and
- (iii) overtime

**1. Wages**

[23] Mr Zhao seeks unpaid wages in respect of the final week of his employment, and the additional payment of two weeks' pay he was offered in August 2013.

*Final week's pay*

[24] D & C Scaffolding accepted Mr Zhao was not paid for the final week of his employment, and said that was because he did not report for work.

[25] Mr Zhao said he did not report for work in reliance on his understanding that he could take time off to find another job. However he was actually told he could take time off to attend interviews. That did not amount to authority to take the entire week off on pay, let alone to do so without informing his employer of his intended absence or confirming that he was attending interviews.

[26] Little, if any of that time was spent attending interviews. Mr Zhao was wrong to absent himself from work without notice as he did, and since his absence was not authorised he is not entitled to payment.

[27] There will therefore be no order for payment.

*Additional payment of two weeks' pay*

[28] The offer of two weeks' pay was not accepted, and Mr Zhao was not obliged to accept it. In turn, he had no entitlement to such a payment on the basis he has claimed.

[29] However cl 12.6 of the employment agreement read:

*In the event the employee's employment is to be terminated by reason of redundancy, the employee shall be provided with 1 month notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*

[30] Mr Zhao's employment ended by reason of redundancy. He did not receive the one month's notice in writing to which he was entitled. Instead (and at best) he received two weeks' notice in writing, together with the offer of a further two weeks' pay intended as 'compensation'.

[31] I find Mr Zhao is entitled to a further two weeks' wages, reflecting the balance of the period of notice he should have received. Payment is ordered accordingly.

## 2. Holiday pay

[32] D & C Scaffolding said Mr Zhao was owed 20 hours' leave as at 30 August, when the employment ended. It accepted this was not paid until 10 November 2013. Mr Zhao has not sought to challenge the amount he was eventually paid, rather he now makes the point that payment should not have been withheld.

[33] D & C Scaffolding purported to withhold the payment while it attempted to secure Mr Zhao's agreement to the 'compensation' it offered. It relied in addition on a 'policy' of not making final payments until the employee's signature on a termination of employment form was obtained.

[34] As I have said, Mr Zhao was not obliged to agree to the 'compensation'.

[35] Further, the form in question stated that the employee was terminating the employment relationship, when it was the employer who terminated the relationship here. The evidence suggests D & C Scaffolding has not understood the proper approach for securing an agreed termination of employment or an agreed settlement of any employment issues.

[36] Aside from any of this, D & C Scaffolding has breached the Wages Protection Act 1983. The Act obliges employers to pay the entire amount of wages payable to an

employee, at the time the wages become payable.<sup>3</sup> Although deductions may be made on the written request or consent of the employee<sup>4</sup>, that does not mean payment can be withheld while the desired written consent is sought and can later be made when consent to the deduction is obtained. Although there are provisions in the employment agreement which refer to the Wages Protection Act,<sup>5</sup> they do not apply to Mr Zhao's circumstances. In the light of the Act both the policy and the form are flawed and should be reviewed.

### *Penalty*

[37] The breach was so fundamental that I raised the prospect of a penalty being ordered against D & C Scaffolding.<sup>6</sup> It responded by relying on its policy.

[38] During the course of the investigation in the Authority it became plain that the company has misunderstood and misapplied its obligations in a number of respects, including this one. A penalty is appropriate. I make an order for the payment of a penalty in the sum of \$1,000, and order further that the payment be made directly to Mr Zhao.

### 3. Overtime

[39] The employment agreement provided for overtime as follows:

#### *6. Hours of work*

##### *6.1 ...*

*The employee's normal hours of work shall be 45 hours per week between the hours of 7.00 am and 16.30 pm on Monday to Friday. The employee may also be required to perform such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. The employee's salary fully compensates them for all hours worked.*

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#### *7. Wages/salary/allowances*

##### *7.1 Annual salary*

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<sup>3</sup> s 4

<sup>4</sup> s 5

<sup>5</sup> cl 8.1, cl 13.2

<sup>6</sup> s 13

*The employee's salary shall be \$56,160 per annum ...*

[40] The above provisions mean that Mr Zhao's salary covered all of the hours he worked, including hours worked outside the 'normal' hours specified in the employment agreement. The agreement also obliged him to work outside normal hours, provided this was a reasonable requirement of the employer's. Thus even if Mr Zhao worked outside normal hours, he has not raised any argument concerning the reasonableness of the employer's requirement that he do so and has not identified any ground on which any additional payment could be sought.

[41] There will be no order for any payment of overtime.

### **Costs**

[42] Costs are reserved.

[43] The parties are invited to resolve the matter. If either party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file and serve a written account of what is sought and why. The other party shall have a further 14 days from the date of receipt of that account in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority