

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 344  
5391278

BETWEEN

YANFEI (FIONA) YU  
Applicant

A N D

DA HUA SUPERMARKET  
CENTRAL LIMITED T/A DA  
HUA SUPERMARKET  
Respondent

Member of Authority: K J Anderson

Representatives: May Moncur, Advocate for Applicant  
Jiajian Song, Advocate for Respondent

Investigation Meeting: 24 July 2013 at Auckland

Date of Determination: 7 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Ms Yu, claims she was unjustifiably dismissed on 15 July 2012. Ms Yu also claims that she was only paid \$8 per hour for working 62.5 hours; rather than the legal minimum pay rate of \$13.50. Ms Yu says that she was unjustifiably disadvantaged because she was underpaid. Ms Yu seeks reimbursement of the sum of \$459 being the difference between the rate that she was paid and the minimum pay rate. Ms Yu also claims holiday pay on the total sums paid and due to her, of \$843.50: being \$67.48.<sup>1</sup>

[2] The remedies sought by the applicant are:

- (a) Payment of outstanding wages and holiday pay;

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<sup>1</sup> This is the corrected sum. The claim was for \$67.50.

- (b) \$5,000 compensation for unjustifiable disadvantage;
- (c) \$10,000 compensation for unfair dismissal;
- (d) Compensation for lost income;
- (e) A penalty of \$20,000 for failure to provide an employment agreement;
- (f) A penalty of \$20,000 for breach of the Wages Protection Act 1983;
- (g) A penalty of \$20,000 for failure to provide wage and time records upon request.

[3] For completeness, I now record that following discussion at the investigation meeting, Ms Moncur, for the applicant, indicated that the penalties sought in regard to failure to provide an employment agreement and the failure to provide wage and time records are withdrawn. I also record that the claim for a penalty in regard to a breach of the Wages Protection Act 1983 is also incorrect in that the claim should be for a breach of the Minimum Wage Act 1983. Ms Moncur informed the Authority that Ms Yu is now seeking a penalty of \$1,000 to be paid to the Crown rather than to the applicant.

### **Background**

[4] The evidence of Ms Yu (via a written statement) is that on 18 June 2012, while grocery shopping at the Da Hua Supermarket (“the Supermarket”), she asked a cashier if there was a vacancy. Ms Yu says that she was advised to speak to the manager, a woman called JoJo. [This person has now been identified as Ms Ying Lu]. Ms Yu attests that she spoke to Ms Lu and explained to her that she had previously worked at the Supermarket (under a different ownership and trading name). Ms Yu says that Ms Lu “seemed satisfied” and indicated that she would give Ms Yu a trial and she should wait for a telephone call.

[5] The further evidence of Ms Yu is that the following day (19 June 2012), she received a phone call from Ms Lu and was asked to come to the Supermarket that afternoon. Ms Yu attests that she did so and worked from 1:00p.m. until 7:00p.m. (closing time). It seems to be accepted by Ms Yu that the afternoon of work was a trial period for her.

[6] Ms Yu says that upon finishing work that day, she asked Ms Lu if she was satisfied with the work trial. Ms Yu says she informed Ms Lu that she was looking for a fulltime position as she had graduated from university and needed to work. The evidence of Ms Yu is that Ms Lu informed her that there would be “no problem” about obtaining a fulltime job later, but she would have to start with a part-time job.

[7] Ms Yu attests that Ms Lu also told her that it was the practice of the company to pay employees \$8 per hour for the first 80 hours of a trial training period and then, the minimum wage would be paid. It is the evidence of Ms Yu that it is “commonly known” within the Chinese migrant community that some companies pay migrant workers less than the minimum wage. Ms Yu says that she needed the job and was not in a position to bargain with the company and she agreed to the pay rate. Ms Yu attests that she was told to start work on 21 June 2012 and that her hours of work would be between 10:30a.m. and 7:00p.m. with a half hour unpaid lunch break.

[8] Ms Yu has provided to the Authority a record of the hours that she worked and she says that she was informed by Ms Lu on each Sunday when she was required to work.

[9] The evidence of Ms Yu is that on 2 July 2012, when she finished work for the day, she was given a plastic bank coin bag by Ms Lu which contained \$192 in cash. This money was, apparently, payment for working on 21 June, 26 June and 28 June 2012: a total of 24 hours. Ms Yu attests that on Sunday, 15 July 2012 she did not receive the “expected phone call” from Ms Lu to inform her of the work requirements for the next week. Ms Yu says that after making several phone calls to Ms Lu she finally got to speak to her and was told not to come into work the next week or the week after. Ms Lu told Ms Yu that the company needed to give more hours of work to long serving employees and therefore could not give any more work to Ms Yu.

[10] On Monday, 16 July 2012, Ms Yu went to the supermarket to collect her wages and received \$260 in cash being for 32.5 hours worked between 2 and 13 July 2012.

### **The evidence of Ms Ying Lu**

[11] The evidence of Ms Lu is that she recalls meeting with Ms Yu when she came into the supermarket. But Ms Lu says that she doesn't have any authority to employ

people and that she told Ms Yu that she would have to speak to Mr Song.<sup>2</sup> Ms Lu says that she gave Ms Yu the information that the cashiers use (the product codes) to have a look at. Ms Lu says that she told Ms Yu that if she was interested, after looking at the cashier information, she could talk about things later. Ms Lu says that Ms Yu phoned her several times and during the first phone call, she asked for a job. Ms Lu's evidence is that Ms Yu came into the supermarket once and told her that she knew about the product codes because she had worked at the supermarket about two years previously. Ms Lu says that she told Ms Yu that she could have a look at what the cashiers were doing. Ms Lu denies that she ever gave Ms Yu a job. Ms Lu was also very vague about other matters pertaining to the evidence of Ms Yu when questions were put to her. On some occasions she was clear about certain matters but in regard to various matters relating to whether Ms Yu may have been employed at the Supermarket, she said several times she: "*didn't know*". Ms Lu largely portrayed that she only spent a few minutes each day in the supermarket as she had a young child to care for. Ms Lu denies that she has any management responsibilities.

### **The evidence of Mr Song**

[12] The Managing Director of the company, Mr Song, says that he is the only person who employs staff to work at the supermarket. When asked if it was possible if Ms Yu could have been employed, Mr Song responded that it: "*maybe happened*" and that: "*maybe the manager made a mistake*". When this dispute was first raised, Mr Song submitted in the *Statement in Reply* that he couldn't give Ms Yu a job because she didn't present her passport and/or visa.<sup>3</sup> Mr Song also records in the statement in reply that: "We paid money for her [Ms Yu] interview time cost and transport ...". And: "we ask her to pay her income tax herself".

### **The further evidence of Ms Yu**

[13] Ms Yu returned to China prior to the investigation meeting but she has provided a signed witness statement. On the day of the investigation meeting Ms Yu was interviewed via Skype and apart from some breakdowns in the link with Ms Yu in China, the reception was good and Ms Yu was in clear focus on the computer screen. The substantive evidence of Ms Lu and Mr Song was put to Ms Yu for her

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<sup>2</sup> Mr Song is the Managing Director of Da Hua Supermarket Central Limited.

<sup>3</sup> But the evidence is that Ms Yu has residential status and she denies that she was asked to produce evidence relating to her right to work in New Zealand.

response. I found Ms Yu's evidence to be consistent and credible and I accept her evidence in preference to that of Ms Lu and Mr Song; pertaining to the substantive matters.

### **Determination**

[14] I accept the evidence of Ms Yu as being substantially credible. However, I doubt that she was offered permanent part-time work. Notwithstanding that the employment relationship was very brief indeed (8 days including the trial day), there is no discernible pattern to the days that Ms Yu worked, hence I conclude that the working arrangement that existed was, more probably than not, casual employment.

[15] I find that Ms Yu was not dismissed as she alleges, rather, it is more probable that she was simply told that there was no further casual work available for two weeks. Ms Yu acknowledged that she never made any enquiry about the possibility of future work opportunities. Rather, she immediately pursued a personal grievance. I conclude that there were no grounds for an unjustifiable dismissal personal grievance at that time and Ms Yu's claim to the contrary is dismissed. However, I do accept that Ms Yu has a valid personal grievance as she was disadvantaged in her employment by an unjustifiable action by the employer. This is because she was underpaid for the short period that she was employed. However, given the overall circumstances and the absence of any meaningful evidence about the affect of this, I decline to make any order for compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. Nonetheless, Mr Song should be under no doubts that should an appropriate matter, providing more tangible evidence, come to the Authority; relating to similar employment practices to those that Ms Yu experienced, the outcome may be quite different.

[16] I accept that Ms Yu was only paid \$8 per hour for the hours she worked and that she was entitled to be paid the minimum pay rate of \$13.50 per hour at that time. It is also accepted that Ms Yu worked 62.5 hours in total and was only paid the sum of \$452 when she was entitled to be paid \$843.50: the difference is \$459<sup>4</sup>.

[17] It is also accepted that Ms Yu is entitled to be paid holiday pay pursuant to s.25 of the Holidays Act 2003 at 8% of the total gross amount: being \$67.48.

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<sup>4</sup> Notwithstanding that Ms Yu was paid \$452 in cash, but it is not for the Authority to calculate the tax versus net pay entitlements.

[18] Finally, there is the matter of the breach of the Minimum Wage Act 1983 for which a penalty is sought. Section 10 of this Act provides in regard to “**Penalties and jurisdiction**”:

Every person who makes default in the full payment of any wages payable by that person under this Act and every person who fails to otherwise comply with the requirements of this Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act 2000.

[19] Therefore, while I am satisfied that there has been a breach of the Minimum Wage Act, for a penalty to be recovered for the breach, an action must be brought to the Authority by a Labour Inspector hence the Authority does not have the jurisdiction to impose a penalty without proceedings being commenced by a Labour Inspector.<sup>5</sup>

### **Orders of the Authority**

[20] Pursuant to the Minimum Wage Act 1983 and the Holidays Act 2003, Da Hua Supermarket Central Limited is ordered to pay to Ms Yanfei Yu:

- (a) The gross sum of **\$459.00** as wage arrears. This represents 62.5 hours at \$5.50, being the difference between the \$8 per hour paid and the minimum adult pay rate at the time of \$13.50;
- (b) Annual holiday pay of **\$67.48** (gross) being 8% of \$843.50: being the total wages due;
- (c) The total sum due to Ms Yu is the gross amount of **\$526.50**. This sum must be paid within 14 days of the date of this determination.

### **Costs**

[21] Costs are reserved. The applicant has 28 days from the date of this determination to file a costs memorandum. The respondent has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**

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<sup>5</sup> See also section 161(1)(m) of the Employment Relations Act 2000.