IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 106
EMPC 432/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LONGSHENG LING Plaintiff
AND	SUPER CUISINE GROUP LIMITED Defendant

Hearing: 15 June 2023
(Heard at Auckland)

Appearances: P Young, advocate for plaintiff
W Tan, advocate for defendant

Judgment: 13 July 2023

JUDGMENT OF JUDGE KATHRYN BECK

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[1] These proceedings involve a non de novo challenge to a determination of the Employment Relations Authority.[1] The issue to be resolved is whether the Authority erred when it determined that the plaintiff was not constructively dismissed. If the Court finds in favour of the plaintiff, then it will also be necessary to determine what, if any, remedies are available. Mr Ling also initially challenged the Authority's findings in relation to penalties sought by him. He is no longer pursuing that claim.

[2] Mr Ling was employed for a relatively short period of time by Super Cuisine Group Ltd (Super Cuisine) at Top Seafood Restaurant as a chef.[2] He resigned to take up a new role as head chef at Fu's Restaurant Ltd.

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1 *Ling v Super Cuisine Group Ltd* [2021] NZERA 145 (Member Campbell).
2 Five months from 7 August 2018 to 6 January 2019.

[3] In the Authority, Mr Ling claimed that his resignation amounted to a constructive dismissal because he was not paid for all hours worked. He claimed remedies for unjustified dismissal, payment of arrears of wages, and asked the Authority to impose penalties for breaches of the Minimum Wage Act 1983 and the Holidays Act 2003.

[4] The Authority agreed in part. It found that, based on Mr Ling's contracted hours of work, he was entitled to be paid for eight hours worked on each Sunday. This equated to $3,520.00 (gross) calculated on eight hours per Sunday for 22 weeks.[3] A further sum of $281.60 was ordered, being eight per cent holiday pay on those wage arrears.[4]

[5] While the Authority accepted that Super Cuisine breached its duty to Mr Ling when it failed to correctly pay him for all hours worked, it did not consider that his resignation was caused by that breach. It concluded that he resigned as a result of finding alternative employment.[5]

[6] In relation to the penalty sought by Mr Ling, it found that the application was out of time and must fail.[6]

[7] Mr Ling has been paid the wages and holiday pay owing. He challenges the Authority's finding in relation to constructive dismissal.

Law

[8] The question in these proceedings is whether Mr Ling's resignation was, in reality, a constructive dismissal.

[9] The legal principles relating to constructive dismissal are well established and not in dispute.

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3 *Ling v Super Cuisine Group Ltd*, above n 1, at [22].
4 At [26].
5 At [37]–[41].
6 At [47].

[10] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd* the Court of Appeal noted three situations where a constructive dismissal can arise:[7]

(a) an employer gives an employee an option of resigning or being dismissed;

(b) an employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or

(c) a breach of duty by the employer leads an employee to resign.

[11] The Court of Appeal considered the third type of situation further in *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)*.[8] The Court clarified that resignation must be a reasonably foreseeable consequence of the employee's breach for a constructive dismissal to occur:[9]

> In such a case as this we consider that the first relevant question is *whether the resignation has been caused by a breach of duty on the part of the employer*. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is *whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing*: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[12] When considering whether there is a substantial risk of resignation which is foreseeable, the question must be approached from an objective perspective rather than from the subjective perspective of the employer.[10] As the test is objective, it follows that reasonable foreseeability depends not only on what the defendant knew at the time but also upon what it ought reasonably to have known.

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7 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374–375.

8 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR 415 (CA).

9 At 419 (emphasis added); and *Business Distributors Ltd v Patel* [2001] ERNZ 124 (CA) at [12].

10 See *Edmonds v Attorney-General* [1998] 1 ERNZ 1 (EmpC) at 13−14.

[13] The expression "reasonably foreseeable" was also discussed in some detail by Chief Judge Goddard in *Green v Schering-Plough Animal Health Ltd.*[11] In that decision, he discussed a criminal case relating to road user charges and licensing for trucks. He observed:[12]

> A statutory defence to this offence arose if it was not possible to obtain the licence between the time when the need for it was reasonably foreseeable and the time when the offence was committed. It is necessary to explain that the amount of the licence fee varied according to the weight of the load carried. It was held by the High Court on appeal that, to satisfy the test of not reasonably foreseeable, the operator was not entitled to "just trust to luck", but had a duty to ensure compliance which was a duty to exercise reasonable foresight according to the standards of the reasonable person who, the Court held, would have taken all reasonable steps to become informed of the circumstances of the particular load and of the licence that, in substantial probability, the load would require. As the reasoning in that case shows, reasonable foresight does not have to extend to exceptional cases or to the small minority of cases. The question for the Tribunal in this case was in a sense whether only exceptionally would employees, treated as the appellant had been, resign instead of putting up with the situation. *One of the elements of the case from which I have been citing is that there was no satisfactory evidence of any inquiries having been made by the operator. In the present case, the respondent's duty was to inform itself firstly as to the state of its contractual obligations to the appellant and secondly of the likely effect on him of an invasion of those rights (if necessary by listening to him) and not just to trust to luck that he would not complain if his rights were invaded.*

[14] In essence, the Court in *Green* provided that the employer must be pro-active in informing itself of its obligations and the likely effect of any breach of those obligations. That approach is also consistent with s 4(1A)(b) of the Act, which states that the duty of good faith requires "the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship".

Issues

[15] The Authority has already found that Super Cuisine breached a duty owed to Mr Ling.

[16] Accordingly, the key issues in this case are:

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11 *Green v Schering-Plough Animal Health Ltd* [1999] 2 ERNZ 733 (EmpC).

12 At 745–746 (emphasis added), citing *Taieri Dynes Haulage Ltd v Ministry of Transport* [1981] 2 NZLR 354 (HC).

(a) Did that breach, or another breach, cause the resignation?

(b) Was the resignation foreseeable?

(c) What, if any, remedies are available?

[17] Mr Young, advocate for Mr Ling, submitted that Mr Ling's situation could also encompass the two other situations where a constructive dismissal may arise.[13] The evidence did not support such a submission.

[18] Mr Ling did not suggest that at any point he was given the option of resigning or being dismissed, nor did he outline or allege a course of conduct undertaken by Mr Chi, manager of the restaurant, with the deliberate and dominant purpose of coercing him to resign. He did allege that Mr Chi, early on in the relationship, abused him by saying that he was "worse than pig or dog, roll back to China". However, this was one event that could not on its own amount to a course of conduct. On the other hand, it could amount to a breach of duty by the employer, and I consider it in that context below.

Facts

[19] Mr Ling was recruited for a chef job with Laoguangzhou Cuisine Group Ltd through an immigration consultant in June 2018. He arrived in New Zealand on 6 August 2018 and started work as a chef with Super Cuisine on 7 August 2018.[14]

[20] He worked Tuesday to Sunday (six days) each week and was paid a weekly salary of $800.

[21] Sometime in mid-September 2018, Mr Ling says that Mr Chi came into the restaurant late one night in a bad mood, having incurred losses at gambling, and told him that he was "worse than pig or dog, roll back to China". He says this is a grave

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13 See above at [10].

14 His work visa was amended to reflect the changed name of the company on 13 September 2018 by way of a work visa variation.

insult in the Chinese culture and caused Mr Ling significant offence and upset. Mr Chi denies that such an event ever took place.

[22] Mr Ling says he could not sleep for a few days after having been so insulted but felt there was nothing he could do about it at that time as a new immigrant to New Zealand, with no English. Accordingly, he began to look for alternative employment. He successfully applied for a chef position at Fu's Restaurant Ltd sometime in September 2018.

[23] With the assistance of an immigration consultant, he then applied for a variation to his work visa on or about 27 September 2018.

[24] He says he did not say anything to Mr Chi about how unhappy he was with how he had been spoken to.

[25] On 20 December 2018, Mr Ling sent a message to Mr Chi requesting a pay increase of $100.

[26] The wording of the WeChat message is recorded in the Authority's decision:[15]

> I have worked in the restaurant for over four months and am quite confident in handling my job and I can help others too. As you promised that you will subsidize my accommodation. Now the business is pretty good, could you please consider pay-rise?
>
> I am now paid $800 for 60 hours per week, and the average wage is about $13 per hour. I wish to get $100 more per week.

[27] Both Mr Chi and Mr Ling agree that they met the next day and discussed Mr Ling's request. Mr Chi refused the pay increase. He says that a pay rise is based on various factors and that Mr Ling did not meet the requirements for an increase and so his request was refused. Mr Ling did not say anything about resigning unless he received a pay increase. Neither party appears to have turned their mind to the wording of the employment agreement or possible breaches of minimum wage requirements.

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15 *Ling v Super Cuisine Group Ltd*, above n 1, at [32].

[28] On 30 December 2018, Mr Ling advised Mr Chi that he was resigning from his position with Super Cuisine to take up a new role. He confirmed that he had obtained a variation to his work visa.

[29] Mr Ling then worked a further week for Super Cuisine. His last day was on 6 January 2019.

[30] The letter formally approving the variation of Mr Ling's work visa from Super Cuisine to work as a chef for Fu's Restaurant Ltd is dated 3 January 2019, although it seems that Mr Ling was aware that he had this approval when he submitted his resignation on 30 December 2018.

Analysis

The breach of duty

[31] As noted above, it has already been established that Super Cuisine failed to pay Mr Ling what he was due for the hours he worked. The Authority found that he regularly worked on Sundays in addition to the five days set out in his employment agreement. It did not accept that the work undertaken by him on a Sunday could be considered reasonable overtime as contemplated by the wording in the employment agreement and as submitted by the employer. It found that this work was in addition to the hours set out in the employment agreement and that the salary did not encompass a six-day week or it would have been specified.

[32] On that basis, the Authority found that Mr Ling was entitled to be remunerated for his Sunday hours over and above his salaried rate, and it awarded him $3,520, calculated on eight hours per day for 22 weeks at his ordinary rate of $20 per hour.[16]

[33] Accordingly, Super Cuisine breached its duty to Mr Ling when it failed to correctly pay him for all hours worked.

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16 *Ling v Super Cuisine Group Ltd*, above n 1, at [20]–[22].

[34] Mr Ling also says that Mr Chi's abuse of him, by calling him "worse than pig or dog", was also a breach that caused him to start looking for another job. He says this is a significant insult in Chinese culture and it upset him deeply.

[35] While Mr Chi denies making such a statement, it was about this time that Mr Ling started to look for alternative employment. Given that it was just over a month from starting a new job in a new country, something occurred to trigger his search for a new role, and I consider it was more likely than not that it was the disparaging remark from Mr Chi.

[36] Such an insult is a breach of Super Cuisine's obligation to deal with Mr Ling in good faith.

[37] Having established there were breaches, the question is whether those breaches were causative of the resignation or sufficiently serious to make it foreseeable.

Did the breach(es) cause the resignation?

[38] Mr Tan, advocate for Super Cuisine, submits that even if Mr Chi did make the disparaging remark, it did not cause Mr Ling to resign. He submits instead that Mr Ling sought other employment because he was not satisfied with his pay rate even as early as mid-September.

[39] Mr Ling says that if Mr Chi had given him a pay rise, he would not have applied for another job. He also says that even at the time of his resignation, he would have stayed had Mr Chi agreed to a pay increase, although he did not tell Mr Chi this at the time.

[40] In light of Mr Ling's evidence, it is clear the disparaging comments made to him by Mr Chi were not sufficient on their own to make him resign. This is because despite his feelings of hurt, he says he would have stayed had he been paid more. I accept that the disparaging remarks caused him to begin looking for new employment. However, that step merely enabled him to resign. Mr Chi's remarks were not a material cause of the resignation when it occurred more than three months later in December 2018.

[41] It is apparent on the evidence – and the defendant agrees – that Mr Ling left his employment because he was unhappy with what he was being paid. In his WeChat message, he notes that he was working 60 hours per week and only being paid $800, which would equate to only $13.33 per hour when the minimum wage at the time was $16.50 per hour.[17]

[42] I note that the Authority Member was not satisfied with either party's evidence on the hours worked by Mr Ling. She did not accept that he worked 60 hours per week and did not consider there to be an issue with breaches of minimum wage requirements. However, she did accept that Mr Ling was underpaid for the work he performed on Sundays.

[43] As a result, Mr Ling had good cause to be dissatisfied.

[44] He says – and I accept – that these concerns about underpayment were what drove him to look for another job. By the time he came to resign on 30 December 2018, they remained his primary concern.

[45] The Authority held that the cause of Mr Ling's resignation was that he had found another job. However, that is only part of the story. To end the analysis there ignores the context within which Mr Ling was operating. He was in New Zealand on a working visa that specifically named Super Cuisine as his employer. He could not leave and lawfully work elsewhere until that had been varied. He needed to continue to work to support himself; otherwise, in his words, he would have been "wandering around the street". Therefore, I conclude that Mr Ling's new employment did not cause his resignation; it merely enabled him to resign.

[46] Ultimately, he resigned from Super Cuisine because he felt he was not paid enough, and he was correct. He may not have known it was a breach at the time, but that is not the test. The test is whether the breach caused the resignation. I consider it did.

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17 Minimum Wage Order 2018.

Was the resignation foreseeable?

[47] The next issue for consideration is whether the underpayment was of sufficient seriousness to make it reasonably foreseeable by Super Cuisine that Mr Ling would not be prepared to work under the conditions prevailing?[18]

[48] As noted above, Mr Ling was underpaid by $160, which was effectively a day's work, for 22 weeks. In light of the seriousness of the breach, there can be little doubt that if such a breach was carried out knowingly, resignation would be a reasonably foreseeable consequence.

[49] However, the present case is complicated by the fact that Mr Ling, while unhappy, was not aware of the breaches, and Super Cuisine claims that it did not know it was breaching its obligations towards Mr Ling. Except for his WeChat message on 20 December 2018 and his discussion with Mr Chi the following day, Mr Ling never raised concerns about his wages before his resignation. Further, there is no evidence that Super Cuisine turned its mind to whether Mr Ling was being paid in accordance with the terms of his employment agreement at any time before the Authority proceedings, despite Mr Ling saying he was being paid an average of $13 per hour.

[50] The fact that Mr Ling was unaware of the breach, or was at least unaware of the particular nature of that breach,[19] cannot be relevant to the question of whether the resignation was foreseeable to Super Cuisine, particularly in the circumstances of this case where Mr Ling was a new immigrant with limited or no English. He cannot be expected to have a full grasp of his rights or the proper interpretation of the terms of his individual employment agreement (which was in English).

[51] Turning to consider the employer's knowledge, the question is not what the employer knew at the time but what objectively was reasonably foreseeable by it. An employer in New Zealand is required to comply with employment law as it relates to their business, and they have a duty to inform themselves of the state of their contractual obligations. Therefore, Super Cuisine ought to have known about the

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18 See above at [11].

19 He just thought he was not being paid enough for the hours he worked.

breach. As noted above, reasonable foreseeability depends on what an employer ought reasonably to have known, as well as on what they actually knew.[20]

[52] Further, when Mr Ling sought a pay rise on 20 December 2018, Super Cuisine was, in a sense, on notice. A reasonable employer acting in good faith would have considered whether its payments to Mr Ling were in breach of the Minimum Wage Act or in breach of the employment agreement, which should have uncovered the breach.

[53] It would be wrong if both parties' ignorance of the law meant that Mr Ling was left without a remedy for being in the stressful position of having to find another job a relatively short time after coming to New Zealand.

[54] Therefore, in the circumstances, it was reasonably foreseeable by Super Cuisine that if it underpaid Mr Ling by $160 per week for 22 weeks, he would not be prepared to continue to work for them.

[55] I find that Mr Ling was constructively dismissed and that the dismissal was unjustified for the purposes of s 103A of the Employment Relations Act 2000 (the Act).

Remedies

[56] Mr Ling had no lost remuneration and is only seeking compensation under s 123(1)(c)(i) of the Act.

[57] He says he suffered stress and humiliation for being shouted at. However, as held above, the incident with Mr Chi was not causative of the resignation and so not causally linked to the constructive dismissal.[21] Mr Ling also spoke about his worry of being in a new country with no friends and having to find another job so that he was not "wandering around the street".

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[20] See above at [14].
[21] See above at [40].

[58] While there was little evidence given of the effect of the situation on Mr Ling, I accept that there would have been some stress suffered by him.

[59] The Court has adopted a banding approach to the quantification of an award under s 123(1)(c) of the Act.[22] There are three bands: band 1 involving low level loss or damage; band 2 involving loss or damage at a mid-range; and band 3 involving high level loss or damage. In *GF v Comptroller of the New Zealand Customs Service*, band 1 was updated to be $0–12,000, band 2 at $12,000–50,000, and band 3 at over $50,000.[23]

[60] Mr Ling sought an award of $50,000. There is no evidence in support of such a claim. I consider band 1 to be the correct band in the circumstances. The stress caused to Mr Ling was at a low level. Fortunately for him, he had the confidence to apply for another role and seek a variation to his work visa despite his difficult circumstances. An award of $8,000 is appropriate.

Conclusion

[61] The challenge is successful.

[62] The Authority erred when determining that Mr Ling was not constructively dismissed. That aspect of the Authority's determination is set aside, and this judgment stands in its place.

[63] The following order is made in the plaintiff's favour: The defendant must pay the plaintiff the sum of $8,000 by way of compensation under s 123(1)(c)(i) of the Act within 21 days of the date of this judgment.

[64] Costs are reserved. In the event the parties are unable to agree on costs, the plaintiff will have 14 days within which to file and serve any memorandum and

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22 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; and *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

23 *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162].

supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 9 am on 13 July 2023