

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 167  
5290976

BETWEEN MI SEON AHN  
Applicant

AND WOO & OK PARTNERSHIP  
Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McComish, Advocate for Applicant  
Tim McGinn, Counsel for Respondent

Conference: 19 October 2011

Determination: 31 October 2011

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**DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 18 January 2011 I upheld some of the applicant's personal grievance and arrears of wages and holiday pay claims. Costs were reserved for each party to lodge and serve a memorandum. That process was disrupted by the February 2011 earthquake. When counsel for the respondent lodged his submissions he raised several matters as explained below. Their progress had to wait for the retrieval of my hearing notes from the Authority's Christchurch central city building. I then convened a conference with both representatives to discuss the points raised by counsel.

[2] During the Authority's investigation the applicant was represented by Andrew McComish, the principal of Think Solutions Limited. Mr McComish, in the applicant's claim for costs, included an invoice from a company called Hercules International Limited for \$3,375.00 *For the interpretation of documents and communications and to investigate veracity of such in respect of Personal Grievance:*

*Letters, Emails and submissions from Think Solutions Ltd, Dept of Labour, the ERA and the Kim's representatives.*

[3] Counsel learnt from his inquiries that the principal associated with the company Hercules International Limited is Paul Simpson. Mr Simpson gave evidence supportive of the applicant's claims about her hours of work, a point fundamental to the arrears of wages and holiday pay. However, Mr Simpson's role in providing chargeable services to the applicant's representative was never explained during the investigation process. Mr Simpson was regarded by me as a disinterested witness with no connection to the applicant or her claims other than having sometimes witnessed her finishing times when he was waiting to pick up a friend of his who also happened to work at the respondents' restaurant. The discovery of Mr Simpson's financial interest in the outcome of the applicant's claims caused counsel to ask whether there may have been a miscarriage of justice.

[4] I am asked to consider whether the Authority should exercise the power to reopen its investigation. Clause 4(2) of Schedule 2 to the Employment Relations Act 2000 says:

*The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.*

[5] A conference was convened on 19 October 2001 to hear the parties' views about whether the Authority should reopen the investigation, they having been formally alerted to that possibility by earlier notice. This determination resolves whether the investigation should be reopened, and if so, on what terms.

[6] The respondents failed to keep any record of the applicant's hours of work. I referred to that failure at paragraph [16] of the earlier determination. I therefore had to assess evidence from several different sources about what time the applicant finished work. I will refrain from repeating here the discussion set out in the earlier determination but I am referring to paragraphs [29] to [35]. There was evidence from Mr Simpson about what time his friend finished work up to October 2008, from Ms Lee the chef who replaced Mr Simpson's friend, from the applicant and her family members, from the respondent (Mrs Kim), and some documentary evidence. The documentary evidence called for by the Authority was eftpos transaction records from

January 2009 until November 2009. I reviewed four months of these records as a way of assessing the applicant's finishing times.

[7] After reviewing the available material and evidence, at paragraph [36] I fixed the applicant's evening finishing time at 9.30pm Monday to Saturday. That differed from Mr Simpson's evidence that his friend finished work between 9.30pm and 10.00pm early in the week and as late as 11.00pm later in the week. It is fair to say that the finding reflected something of an averaging process across the whole week and was driven by the eftpos records to a significant extent. As a result, the rejection of Mrs Kim's evidence about a 9.00pm finish, driven by the expressed preference for Mr Simpson's evidence, added little to the conclusion. The discussion over all reflects a conservative approach to fixing the finishing time even though it was open to apply s.132 of the Act and simply accept as proven what was being said by and for the applicant.

[8] Overall I agree with Mr McComish that the finding about the applicant's finishing time would in all probability stand even if Mr Simpson's evidence was disregarded. It follows that no miscarriage of justice was caused by me not being alerted to Mr Simpson's interest in the outcome of the proceedings.

[9] Part of the respondent's case was that the applicant resigned or abandoned the employment to go to another job. In the end I was satisfied that there was a dismissal or sending away by reason of the respondents, without inquiry, treating the applicant as having abandoned her employment. It emerged from exchanges over Mr Simpson's connection to the proceedings that he had been involved in seeking information about whether the applicant had arranged other employment prior to the termination of this employment relationship. It may be that I had an incomplete picture of those dealings. However, Mr Simpson's true connection to these proceedings makes no difference to the conclusions reached about the personal grievance claim. If the respondents were dissatisfied with this part of the determination they should have challenged it.

[10] The final point for consideration is counsel's request that remedies be paid by instalment pursuant to s.123(2) of the Employment Relations Act 2000. This request was made as part of submissions on costs. I think it is too late. S.123(2) says *When*

*making an order ...the Authority may order payment to the employee by instalments,*  
... That indicates that the matter should be dealt with by the Authority at the time of making orders, not later when the only matter reserved for consideration is costs. As a matter of practice the point should be raised at the time of the investigation meeting as it also requires consideration of whether *the financial position of the employer requires it.*

## **Conclusion**

[11] I was invited to consider whether the Authority of its own motion should reopen matters but for the reasons given above I will not reopen the investigation.

[12] Costs remain for decision. During our conference I made some comments about the previous costs submissions. It is not necessary to hear further about the costs issues arising from the original investigation but I will allow an opportunity for the parties to comment about any additional costs arising from the present matter. I should say that my preliminary view is that Mr Simpson's role should have been disclosed when he gave evidence. The failure to do so may have caused unnecessary extra costs. Any claim for costs as a result should be lodged within 14 days and the other party may have a further 14 days to reply.

[13] Because it was the source of some uncertainty I should record that the Authority has never issued a stay on the orders made in the determination dated 18 January 2011.

Philip Cheyne  
Member of the Employment Relations Authority