New Zealand Employment Relations Authority Decisions

Akkompat v Thai Chilli Co Limited [2011] NZERA 90; [2011] NZERA Auckland 72 (24 February 2011)

Last Updated: 12 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 72 5276495

BETWEEN

PRASERT ARKOMPAT Applicant

AND

THAI CHILLI CO LIMITED Respondent

Member of Authority: Representatives:

Alastair Dumbleton

Matt Robson, counsel for Applicant
Paul Gallagher, counsel for Respondent

Investigation Meeting:

1 and 28 September 2010

Further material supplied: 18 October and 22 November 2010

Submissions received:

7 and 14 December 2010

Determination:

24 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated claims brought by the applicant Mr Prasert Arkompat against the respondent Thai Chilli Co Ltd. They are a personal grievance claim of unjustified dismissal and a recovery claim for unpaid wages and holiday pay.

[2] While there are deep conflicts of evidence in respect of many key issues in this case, there is agreement on some core matters. They are in particular that Mr Arkompat worked for one of the Thai Chilli Co restaurants in Auckland as a Thai Chef and did so under a written individual employment agreement. Further, he was employed for a large part of the two year period between December 2005 and December 2007 in which he held a work permit issued to him by Immigration New Zealand.

[3] An immigration consultant Mr Arkompat had engaged was advised by Immigration New Zealand on 3 December 2005 of the approval given for the work permit to be issued. It expressly allowed Mr Arkompat to work for Thai Chilli Co and to remain in New Zealand until 3 December, 2007. The document also stated "while you are in New Zealand you must remain on a valid permit at all times. Failure to do this could result in the New Zealand Immigration Service removing you from New

Zealand ..."

[4] There is no dispute that upon its expiry, on 3 December 2007, Mr Arkompat's work permit was not renewed by Immigration New Zealand.

[5] The start and finish dates of the employment are not so clear. The evidence, which includes entries in his passport, shows that Mr Arkompat visited New Zealand from Thailand for about a week in July 2005, before returning to Thailand. He came back to New Zealand at the end of October 2005 and then returned to Thailand in December that year. His passport shows that he returned a third time to New Zealand at the end of March 2006. Mr Arkompat commenced employment with Thai Chilli Co some time after that. He claims he was employed from April 2006 onwards whereas the employer claims it was later on that he started.

[6] There is also a dispute as to whether he worked until the date in early December 2007 when his permit expired or whether, as Thai Chilli Co claims, it was several weeks earlier that he finished.

Personal grievance and recovery action

[7] Mr Arkompat's personal grievance is a claim that in the latter part of 2007, after he had asked for support with an application to renew his work permit, Mrs Kraiya Archvarin and her brother Mr Yakin Archvarin, who own and manage the Thai Chilli Co restaurant business, asked him for a payment of $30,000 in return for that assistance. Mr Arkompat claims that he refused to make any payment because in Thailand he had already paid $40,000 in return for his employer's support in acquiring a work permit and for an application subsequently to be made for permanent residence in New Zealand.

[8] Mr Arkompat's claim is that his employer's refusal to support his application for renewal of the work permit, by providing ongoing employment, amounted to a dismissal from his employment, as without the permit he was not lawfully able to continue working. He contends that in the circumstances the dismissal was unjustified

[9] In relation to the recovery of unpaid wages Mr Arkompat claims that he worked for Thai Chilli Co during certain periods from April 2006 but was not paid. He claims he was not paid his full entitlement to holiday pay and seeks to recover that money as well.

[10] Thai Chilli Co in its response to the claims has denied breaching in any way the employment agreement it had with Mr Arkompat. The company maintains that it paid his wages and holiday pay for all the time he worked and that it did not dismiss him. It says that Mr Arkompat abandoned his employment to assist his wife who had started setting up a Thai restaurant not far in central Auckland from the one he had been working at for Thai Chilli Co.

[11] Thai Chilli Co denies that it requested money from Mr Arkompat in return for supporting his application for a work permit or a residence permit. The company denies receiving any money from Mr Arkompat for providing him with the job he

started in 2006.

[12] Further, Thai Chilli Co claims that Mr Arkompat did not raise a personal grievance inside the 90 day time limit fixed by s 114 of the Employment Relations Act 2000. The company maintains that there are no grounds upon which the Authority could justly grant leave for Mr Arkompat to raise the grievance after the expiry of the statutory period.

[13] Following the termination of Mr Arkompat's employment, in whatever way that occurred in the last quarter of 2007, it was not until the beginning of August 2009 that he lodged a statement of problem in the Authority. As the matter had not received mediation assistance, the Authority, after receiving a statement in reply, referred it to Mediation Services on 26 August 2009. For some reason it then took until 26 April 2010 before mediation took place, unsuccessfully as it turned out. There were further holdups because of the unavailability of one or other of the parties before the investigation meeting commenced in September 2010.

Main issues

[14] In closing submissions Mr Robson, counsel for Mr Arkompat, identified four major issues arising from this case. I summarise them as:

(a) Whether a personal grievance was raised within the statutory 90 day period by or on behalf of Mr Arkompat and, if not, whether he should be granted leave to raise his grievance on the grounds of exceptional circumstances;
(b) Whether Mr Arkompat was unjustifiably dismissed;
(c) Whether Mr Arkompat was underpaid wages and holiday pay; and
(d) "The credibility of the parties".

Credibility

[15] The last issue emerged as the primary one for the Authority. Not all witnesses told the Authority the whole truth. That is quite obvious from the assertions and denials made by different witnesses in respect of various key facts. Much of this

evidence cannot be reconciled and neither can it be reasonably explained by memory lapse, despite the time that has gone by since some of the events occurred.

[16] The difficulties the Authority encounters from time to time when it investigates and determines a case such as this were compounded by a lack of direct evidence from one key witness in particular, Chikasem Archvarin, who resides in Thailand. Her affidavit evidence raised a number of unanswered questions and could not be effectively tested as she was not available during the investigation meeting.

[17] The principal witnesses in this case were Thai and an interpreter was provided by the Authority to help overcome any language difficulties. The Authority has, though, some doubts about the lack of English claimed by Mr and Mrs Arkompat both of whom, while from Thailand, went to live and work in California for over ten years. Similarly the Archvarins, who own and run the Thai Chilli Co business, have been operating a number of restaurants under that name in the Auckland area for some seven or eight years and in that time might be expected to have picked up more than a smattering of English.

[18] In preparing this determination I have had regard to s 174 of the Employment Relations Act 2000, the purpose of which is expressed to be the delivery of "speedy, informal, and practical justice to the parties". In particular I have not set out a record of all of the evidence heard or received. In some instances I have merely stated relevant findings of fact, as permitted under the provision. Also, where specific findings as to the credibility of any evidence or any person have been made, I have not, or not always, indicated the reason for that. In seeking to deliver speedy, informal and practical justice to both Mr Arkompat and Thai Chilli Co the Authority has been taxed by the limitations in the evidence of the various witnesses, not all of whom I found reliable.

Legal representation

[19] As a further general matter, it is relevant that Mr Arkompat had instructed solicitors by at least October 2008, when the firm of Patel Nand Legal wrote to the Associate Minister of Immigration seeking a work permit by Special Direction given under the Immigration Act 1987. This was about eight months before a statement of problem was lodged in the Authority on behalf of Mr Arkompat.

[20] In final submissions Mr Robson referred to Patel Nand Legal as a specialist immigration law firm that did not therefore give advice on employment matters. I do not accept this as a valid point for the purposes of considering the argument as to whether there were exceptional circumstances allowing a grievance to be submitted out of time. The lodging of the statement of problem and the accompanying letters from Patel Nand Legal in August 2009 show that the firm had taken instructions on employment matters from Mr Arkompat. If the firm considered it was not competent to give that sort of advice then it was bound to refer its client to a specialist practitioner.

[21] The appearance is that the employment law proceedings may have been something of an afterthought, brought for tactical reasons to do with Mr Arkompat's ability to avoid or delay removal from New Zealand. I do not consider there is any reasonable explanation for the delay between October 2008 and August 2009 when the statement of problem was lodged, if that was when a grievance was raised in the circumstances.

[22] The delay in presenting the employment claim and lack of material information given with it have also compounded problems in investigating this case.

[23] Some of the advice given to the Associate Minister of Immigration is not entirely consistent with advice given to the Authority by Patel Nand Legal in its letters of 6 and 7 August 2009 which accompany the statement of problem. This is particularly so with regard to the issue of when the employment terminated.

[24] That issue must be determined by the Authority before it can decide whether a grievance was raised within the statutory 90 day period under s 114(1) of the Act.

When did the employment end?

[25] Mr Arkompat's evidence was that after starting with Thai Chilli Co in April

> 2006, with some breaks he worked through November 2007 although he was not paid for that last month. There is no suggestion in any of the evidence that Mr Arkompat was still working after 3 December 2007, the date his work permit expired. I find that the employment relationship terminated no later than 3 December 2007 when, if he had still been working, his employment is likely to have ended by operation of an implied term that the parties would not continue an employment relationship without a valid work permit.

[26] The evidence of the Thai Chilli Co is that the employment terminated around the end of September 2007. It is not admitted by the company that Mr Arkompat was dismissed. Instead he is described as having been "administratively terminated" after abandoning his employment. The records of wage and holiday payments made using the MYOB programme show that Mr Arkompat received three separate payments in the month of October 2007. The Archvarins say that a mistake led to payment of all holiday pay due to Mr Arkompat being made three times. There is no record showing that Mr

Arkompat worked during November, for which period he claims to recover wages.

[27] I find it likely that his employment terminated around the end of October

> 2007, some weeks before the beginning of December. His wife had decided to open a Thai restaurant in July 2007, as she confirmed in her evidence. That development and Mr Arkompat's likely involvement in his wife's competing business were among the reasons why Thai Chilli Co declined support for the permit applications, causing Mr Arkompat to look for employment elsewhere before his work permit expired on 3 December 2007.

90 day issue

[28] This was expressly identified as an issue in the statement in reply lodged on behalf of Thai Chilli Co in August 2009. To determine it the Authority must decide whether Mr Arkompat raised a grievance of unjustified dismissal within 90 days of either the termination of his employment or of the termination coming to his notice. There has never been a claim that Mr Arkompat was unjustifiably disadvantaged in his employment by any action of Thai Chilli Co.

[29] As the employer did not consent to any grievance being raised after the expiration of the 90 day period, if a grievance is found not to have been raised within that time the Authority has no jurisdiction to consider a claim unless an application has been made and granted under s 114(3) and (4) of the Act. Under those provisions an application may be granted where exceptional circumstances are found to exist and where it is also found to be just to do so.

[30] I have considered whether a dismissal grievance was raised in time against the legal principle under the Act, confirmed by case law, that a grievance cannot be raised in anticipation. The reason for this has been repeated recently in *The Chief Executive of the Department of Corrections v. Aaron Waitai & Ors* [2010] NZEMPC 164, dated 21 December 2010, that to raise a grievance in advance would be inconsistent with the wording in s 114(2) of the Act. It would allow any employee at the outset of employment to give the employer notice of raising a personal grievance for any possible future grievance that might arise.

[31] The evidence of Mr Arkompat was that his employment lasted until at least the end of November 2007, a few days before his permit expired on 3 December. His evidence was that in the months of September and October in particular, before his employment had ended, he raised a grievance orally with his employer arising out of a requirement Thai Chilli Co had made of him to pay $30,000 in return for support with his work permit and residence applications. As he was unable to pay that amount it would have been obvious to his employer, he contends, that his employment would end if Thai Chilli Co maintained its requirement. His permit would expire and he would not be lawfully able to continue working for Thai Chilli Co.

[32] I find that a grievance was not raised by Mr Arkompat within 90 days of his employment ending, which I have found occurred around the end of October 2007.

[33] It has always been clear from the statement of problem lodged in August 2009, and from Mr Robson's response to a notice of direction from the Authority in April 2010 and also from opening and closing submissions by Mr Robson, that the grievance is one of unjustified dismissal based upon the raising of the grievance by Mr Arkompat with his employer, orally, in September and/or October 2007. Given the clarity in the application as to the nature of the personal grievance the Authority is not prepared to invoke s 122 of the Act and find that it is of a type other than that alleged.

[34] I do not accept that the letter to the Minister of Immigration in October 2008 served to raise a grievance although out of time, as the grievance must be raised with the employer. Service on an employer of a statement of problem lodged with the Authority may, irregularly, raise a grievance. If it did so in this case the grievance was not raised until some 20 months after the termination of employment and a very long time outside the 90 day period required under the Act.

[35] Having found that a grievance was not raised by Mr Arkompat within 90 days of his claimed dismissal, the Authority has no jurisdiction to hear and determine the grievance unless there has been a successful application under s 114(3) of the Act to raise a grievance outside of the 90 day period.

Exceptional circumstances application

[36] Section 114(4) clearly contemplates that an application under s 114(3) will be made in sufficient time to allow the employer an opportunity to be heard. In this case the application was made for the first time in the closing submissions of Mr Robson delivered in December 2010. That is far too late, especially given that the 90 day issue was first raised by Thai Chilli Co in its statement in reply lodged in August 2009. The employer is not able to have a reasonable opportunity to be heard on the application. It would be unjust and unreasonable to expect the employer to reply to the application made so late.

[37] Given the time that was made available for preparation for the investigation meeting it would not be reasonable to resume the meeting so that the application can be replied to and considered.

[38] A further major reason against considering the application is that it has been made well over two years after the employment ended around the end of October 2007. There is no apparent reason for that length of delay. When the statement

of problem was lodged in August 2009 an accompanying letter from Patel Nand Legal noted the following:

Mediation has not been attempted as the applicant has been frightened of the employer and has not known about his possible remedies available under the New Zealand law.

[39] However Patel Nand Law had been acting for Mr Arkompat since at least the beginning of October 2008. He therefore had had the opportunity to be apprised of his employment legal rights some nine or ten months before even the statement of problem was lodged, and long before the application itself was made under s 114(3).

[40] A letter obtained by the Authority from Immigration New Zealand shows that Patel Nand Legal who lodged the statement of problem had written to the Associate Minister of Immigration making a request under s 130 of the Immigration Act 1987. The letter set out in considerable detail the claims that Mr Arkompat had been exploited by Thai Chilli Co through improper demands made for money in return for supporting his application for an immigration permit.

[41] Patel Nand's letter of 3 October 2008 is also interesting for what it says about the ending of the employment relationship, although clearly the purpose of the letter is to raise an immigration issue. The letter refers to Mr Arkompat's wife as having decided to open her own Thai restaurant and having incorporated a company of which she was the sole shareholder. The letter goes on:

Upon expiry of his work permit with Thai Chilli restaurant Prasert applied for extension of further work permit on 21 November 2007 to work as a Thai Cuisine Chef for Pattaya Thai Restaurant.

Prasert did not apply for an extension of his permit to work for Thai Chilli Restaurant due to the reason that the owner of the restaurant, Kraiya, demanded a sum of $30,000 before she would provide further assistance towards their work permits/residence applications. Kraiya had also placed another offer to take a percentage share of the profit made from the newly established restaurant business Siam-I-Am Limited. With this change in the attitude of Kraiya the applicants suspected that she was trying to extort money from them.

The applicants could not afford to pay Kraiya any more money and neither could they allow her to take advantage of themselves by taking profits made from the newly established business.

Prasert decided to secure himself employment elsewhere and managed to obtain a job offer from Pattaya Thai Restaurant.

[42] If Mr Prasert Arkompat believed he had been exploited and unjustifiably dismissed, his solicitors could have advised him about that as well as the immigration problem. The letter suggests that he terminated the employment.

[43] Had the application for leave been considered the Authority is likely to have declined it on its merits. Supporting the application is the fact that the written employment agreement did not contain the explanation concerning the resolution of employment relationship problems that is required in this case by s 65 of the Act. I am not satisfied that the delay in raising the grievance was "occasioned" by the absence of such an explanation from the employment agreement. That circumstance does not explain the delay between October 2008, when Patel Nand Legal became involved in this case, and August 2009 when a statement of problem was lodged. It is reasonable to expect that either Patel Nand had the expertise to give Mr Arkompat proper advice when he first consulted about his problems or would have directed him to specialist practitioners who could give that advice.

[44] Neither do I accept that Mr Arkompat was so affected or traumatised by the matter giving rise to any grievance that he was unable to properly consider raising a grievance. Whatever physical or mental condition he was in did not prevent him from pursuing his legal remedies under immigration law some ten months before he lodged a statement of problem.

[45] It is also likely the Authority would have found that an application under s 114(4) did not meet the second requirement that in the consideration of the Authority it is just to grant leave. The scale of delay is contrary to justice.

Merits of unjustifiable dismissal claim

[46] Even if leave had been granted under s 144 and the Authority had been able to consider and determine the unjustified dismissal claim, there are insurmountable difficulties with it and it is unlikely to have succeeded. This is because the termination of employment arguably arose if not by resignation of Mr Arkompat then by operation of an implied term in the agreement that it would continue only for so long as Mr Arkompat was lawfully entitled to work in New Zealand. This is not a case where the employer made false or malicious misrepresentations to the

Immigration Service about an employee to prevent or obstruct the issue of a work permit to that person. Thai Chilli Co simply did not wish to support an application, and Mr Arkompat simply did not make one. Thai Chilli Co had given no guarantee or contractual promise that it would support such an application and I do not consider the Authority is properly in a position to review an employer's reasons for not doing so, provided the employer had not acted in bad faith in any way such as by giving false or misleading advice to Immigration New Zealand.

Exchange of money between the parties

[47] Mr Arkompat contended that Thai Chilli Co declined to support his intended application because he refused to pay $30,000 requested of him by the Archvarins. His refusal was because he had already paid $40,000 in Thailand. Much evidence, a lot of it contradictory, was heard on the question of exchange of funds that may have taken place in Thailand. Mr Arkompat and his wife have always maintained that they paid the equivalent of $40,000 in New Zealand currency to a cousin of Ms Kraiya Archvarin. They claim this was pursuant to an agreement that Mr Arkompat would be given restaurant employment with Thai Chilli Co and as a result become eligible to obtain a work permit. The agreement was also that Kraiya Archvarin, or the employer, would support the Arkompat's application later on for permanent residence in New Zealand.

[48] If the employment ended because of a dispute over the $40,000 allegedly paid in Thailand that is not an employment relationship problem. It is a matter to do with a contract at best collateral to an employment contract. It is a matter to do with a contract entered into in a foreign jurisdiction and in respect of which legal remedies might be able to be pursued in that jurisdiction. It is a matter of public policy as to whether the Authority ought to give through exercise of its jurisdiction any recognition to arrangements whereby New Zealand Immigration approvals which have been given "in principle" are traded for money.

[49] Ultimately, the relevance of this evidence is as to the issue of credibility. No remedy is claimed in respect of the entry into the alleged agreement. No sanction against the alleged breach of it would seem to be available to Mr Arkompat in New Zealand under the Employment Relations Act or other employment legislation such as the Wages Protection Act 1983. In *Mehta v. Labour Inspector* [2003] NZEmpC 110; [2003] 1 ERNZ 451 the Employment Court held that the courts and tribunals of New Zealand have no jurisdiction under employment law over actions committed in overseas countries such as Thailand.

[50] Further, whatever arrangements, whether of a contractual nature or otherwise, that were made and that saw money changing hands in trading over an immigration approval for a permit to be granted, that occurred before any employment relationship was entered into. I find that Mr Arkompat was not offered employment by Thai Chilli Co Limited until 2 November 2006 when he received a written offer signed by Mr Yakin Archvarin.

[51] No doubt from a financial point of view it would be impracticable for Mr Arkompat to pursue legal remedies in Thailand over the agreement he claims was made there, but nevertheless he may have that ability and not be without a remedy in Thailand for things done in that country.

[52] I make no findings about the alleged payment arrangements, but I do have considerable doubt about the truth of the evidence given by Mr Arkompat in relation to that. He produced a loan document purporting to be the conditions on which he lent a person in Thailand (herself apparently a moneylender) the equivalent of NZ$40,000. The transaction seems somewhat implausible, given a lack of terms that usually accompany loans, such as the rate of interest for repayment of the loan. The authenticity of the loan document is denied by the moneylender who says in effect that her signature has been forged on to it. Further, the Authority is left in some disbelief by the evidence of Mr Arkompat that he was able to raise $40,000 to pay for the benefit of an approval in principle granted by Immigration New Zealand. He said the money had belonged to his wife, given to her by wealthy parents, and that she had it stashed away in a safe in their house. His wife said her parents were not wealthy and the money was her savings.

[53] There is also no evidence tracing money paid by Mr Arkompat in Thailand, if that is what he did, to the Thai Chilli Co or to the Archvarins who own and manage the business. The fact that the money was paid to a cousin of Kraiya Archvarin is hardly proof that she or her company benefited from the payment.

Claim for unpaid wages and holiday pay

[54] The only problem referred to in the statement of problem received by the Authority from Patel Nand Legal on 7 August 2009, was a claim of "unjustified dismissal." Attached was a letter from the law firm which added "The applicant also requested from the employer his unpaid wages and holiday pay."

[55] A further statement of problem was lodged on 12 August 2009. The sole problem identified was still "unjustified dismissal," although in relation to the way Mr Arkompat wanted that problem resolved he stated "Loss of wages and holiday pay $460 x 3 months = $5,520."

[56] With this lack of detail or explanation, not surprisingly in the statement in reply lodged on behalf of Thai Chilli Co was the comment "The Respondent has paid all wages and holiday pay owing and it does not understand what the Applicant is claiming". It is reasonable to assume that greater detail about this claim was requested at the mediation undertaken by the parties in April 2010.

[57] At the investigation meeting counsel Mr Robson presented an opening statement in which he elaborated on the claim, which appeared to have escalated from 12 weeks pay in the statement of problem to 17 weeks. Detail was still lacking. In his written evidence Mr Arkompat made statements such as "I was not given my last months pay or any holiday pay and many times I was unpaid during my employment." He said he had no documents or records to show the underpayments. This is

surprising considering his claim that he was not paid from the beginning of his employment for the first three weeks or so, and also considering his claim that he had paid $40,000 to get the job in the first place.

[58] Mr Arkompat said he had kept no timesheets. When he was not paid, as he claimed, Mr Arkompat said he had not spoken up or protested about that. He gave accounts of dates he had travelled back to Thailand during the employment, including two weeks in July 2007. He conceded there was no basis for his claim for two weeks pay in that month. Mr Arkompat agreed that the employer's written records based on the MYOB programme were accurate.

[59] Mr Arkompat's wife, Nipaporn, gave evidence of taking him to work at certain times during the day. She said that her husband had said sometimes he received payment for his work and sometimes he did not. Sometimes he told her that he had not been paid at all. She said that she had said nothing and had made no protest to anyone about it. She was working at the time. When asked why she had not raised the lack of wages with her husband's employer, she said the situation was one they had to accept and not argue about, as they wanted to start their life in a new country on the right track.

[60] I find the evidence in support of the claim for unpaid wages and holiday pay to be unreliable and quite insufficient. Against that unsatisfactory situation on the applicant's side are the MYOB records of Thai Chilli Co showing payments made and dates of employment during each month. I accept that evidence as corroborating the employer's claim that all wages and holiday due to Mr Arkompat were paid to him. I find no arrears are owing.

Determination

[61] For the above reasons, I find that the Authority has no jurisdiction to investigate the unjustified dismissal personal grievance, as it was not raised within 90 days of the termination of Mr Arkompat's employment and no leave has been given to raise it outside of that period.

[62] I also find that on a balance of probabilities Mr Arkompat was paid for all the work he performed and for all the holidays he was entitled to.

Costs

[63] Costs are reserved. Any application by Thai Chilli Co is to be made in writing within 14 days of the date of this determination. Any reply is to be given within a further 14 days. Any extension of time must have prior approval from the Authority.

A Dumbleton
Member of the Employment Relations Authority
