

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 30
5563719

BETWEEN AKMED AKMEDOV
Applicant

AND KH INTERNATIONAL LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Peter McKenzie-Bridle, Counsel for Applicant
 Michael Smyth, Counsel for Respondent

Investigation Meeting: 4 and 5 February 2016 at Wellington

Submissions Received: At the investigation meeting with supplementary
 submissions on 14 February 2016 from Respondent and
 17 February 2016 from Applicant

Determination: 10 March 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Akmed Akmedov, claims he was unjustifiably dismissed by the respondent, KH International Limited (KH), on 17 April 2015.

[2] Mr Mr Akmedov also claims he suffered an unjustified disadvantage by virtue of workplace harassment and bullying. He says the bullying involved:

- (a) Being threatened with dismissal by Kai Cui, a director and 50% shareholder of KH, in March 2015 and being abused when asking for an apology for said threat;
- (b) Having a donut thrown at him by a colleague (Jim);

- (c) Being sworn at by Jim (one instance in December 2014); and
- (d) Regularly being told by Jim he had to leave the employment.

[3] KH denies Mr Akmedov was dismissed. It also denies he was harassed or bullied and adds the disadvantage claims are, in any event, precluded as they were not raised within 90 days of the alleged events as required by the Act.¹

[4] KH has lodged a counterclaim alleging Mr Akmedov should incur a penalty for breaching the duty of good faith. It is alleged he failed to be responsive and communicative by hanging up on KH's on 17 April 2015 and then refusing to answer when KH attempted to continue the telephone conversation. It is also alleged he deliberately attempted to entrap Mr Cui during a telephone conversation on 23 April.

Background

[5] Mr Akmedov was employed at a Donut King franchise in Queensgate Mall, Lower Hutt, in 2012. He worked for different franchisees and this included KH as of 9 September 2013. From that date, the franchise was managed by Mr Cui.

[6] Mr Akmedov claims he saw questionable practices including, for example, watering down of ingredients and the use of less than prescribed amounts. He says he raised this with Mr Cui but was simply told *F... off, do your job*. KH denies the allegations regarding its products or that Mr Akmedov raised any concerns.

[7] Mr Akmedov claims shortly after raising those concerns he began to experience the workplace bullying.

[8] KH denies there was any bullying. It says Mr Akmedov's attitude to colleagues, customers and the staff of neighbouring retailers was unacceptable. KH says Mr Akmedov was told that should his errant behaviour continue his employment may be in jeopardy and this is recorded in a written warning regarding *Verbal Altercation - Use Of Abusive Language* dated 6 July 2014. It tells Mr Akmedov he is to stop using abusive language; stop staring at others and to provide evidence to support accusations other were laughing at, or joking about, him. Mr Akmedov is adamant neither the warning nor the subsequent letter were ever given to him.

¹ Section 114(1) of the Employment Relations Act 2000

[9] Irrespective of whether or not he received the warning there were problems at the time and on 9 July 2014 Mr Akmedov gave the following note to Mr Cui:

On the 6th July, 2014 I reported to you a true account of what was said about me while I was working at my station.

If this happens again I will have to seek out an employment lawyer. Due to the fact that I feel like now I am being harassed.

[10] Here it should be noted there are undated notes and various allegations from the staff of neighbouring shops about Mr Akmedov and his *crazy* behaviour. For example one says *He thinks everyone is talking about him* and advises people not to look at Mr Akmedov.

[11] The disharmony continued with Mr Akmedov saying he believes Mr Cui subsequently endorsed or otherwise encouraged a continuation of negative behaviour toward him rather than act on his complaint(s). KH's view is illustrated by a further admonition Mr Cui sent Mr Akmedov on 17 October 2014. It advises:

... I request you if anything happens, I will need you to write me a report regarding it, an stop speaking to other people directly. The other people means either our staffs or people from other shops.

I will deal your problem after your report, and let you know the outcome as quick as possible.

[12] Again Mr Akmedov denies he received the admonition but, again, it is clear there were issues. On 1 November 2014 he sent the following to Mr Cui:

As per our recent discussion, regarding harassment against myself by fellow Donut King staff, I do not feel you have done any action as the harassment continues.

If the harassment continues I will have no option but to seek legal employment advice.

[13] Mr Akmedov says the harassment continued and on 18 March 2015 he approached his doctor about his situation. He says she diagnosed depression which she attributed to work stress and prescribed anti-depressants. The doctor attributes her diagnosis of cause to information provided by Mr Akmedov.

[14] Mr Cui agrees there were continuing issues. For example he says that in February he noticed Mr Akmedov writing what he (Cui) thought were notes when he

thought people were laughing at him. The notes appeared long but Mr Cui never saw them. Mr Akmedov accepts he was writing notes as alleged and says he was doing so to frighten Mr Cui.

[15] Mr Cui summarises his view by saying *As each day went by his madness seemed to be getting worse.*

[16] In March complaints again came from a neighbouring shop. It is alleged Mr Akmedov yelled at staff because he thought they were laughing at him. This concerned Mr Cui as it appeared to be a reoccurrence of the events of the preceding year ([10] above).

[17] Mr Akmedov says Mr Cui threatened him with dismissal on 21 March 2015 and when he asked for an apology he was sworn at. Mr Akmedov took that up with the Police and furnished a written complaint. The precise of reported events says he (Akmedov) was told by Mr Cui he was working too slowly and to speed up. He says he replied that was not possible as he could not start preparing a new batch of ingredients until the current one was finished. The note goes on to say:

Kai (Cui) said "if you're slow again nxt time I'm kicking you out". I replied "you cannot do this" in which Cui said "f... off". I told him to apologise and he said "f... off" a further two times.

[18] Mr Akmedov says the Police told him it was a civil matter and to get legal assistance.

[19] On 15 April 2015, Mr Akmedov again visited his doctor as he was feeling increasingly depressed by the workplace experience.

[20] A further event occurred on 17 April and led to Mr Akmedov visiting his doctors premises upon leaving work. He was, however, unable to procure a consultation. He then went home, phoned Mr Cui and told him he would not be at work the next day. Mr Akmedov says Mr Mr Cui responded by swearing at him before saying *You're not sick. Nothing wrong with you. You don't come in I kicking you out.*

[21] Mr Cui says the call occurred at 3.25pm and he tried asking for a medical certificate but Mr Akmedov hung up.

[22] Mr Cui says he tried to continue the conversation (3.29pm) but Mr Akmedov did not answer his call. He therefore left a message. It advises:

Hi this is Kai from Donut King Queensgate. I would like to speak to Akmed. Can you ask Akmed to call me, my phone number is It is very important cos I am going to tell him he is no longer working at Donut King. So he is fired. So please ask him to call me.

[23] Mr Cui accepts he used those words but says he did so *in the heat of the moment out of frustration*² and in order to get Mr Akmedov's attention. He goes on to say he didn't intend dismissing Mr Akmedov but was trying to convey a message that unless Mr Ahkmedov *called me back I was going to fire him.*³

[24] Around this time Mr Akmedov telephoned his doctor and that is why he says he did not answer the phone – he was already using it. Telephone records support Mr Akmedov's explanation in this respect.

[25] Mr Cui says his message of 3.29pm had the desired effect as Mr Akmedov called back at 6.48pm and advised, during the conversation, he was going to comply with the request he provide a medical certificate. Mr Cui says the call lasted 53 seconds and it was clear Mr Akmedov then knew he had not been dismissed. Mr Cui says the call ended as Mr Akmedov hung up when he (Cui) asked to be allowed to discuss the employment situation with Mr Akmedov's lawyer.

[26] The *situation* referred to in above is Mr Cui belief Mr Akmedov had been *exhibiting signs of extreme paranoia which in turn caused an unsafe working environment for my clients staff, customers to its store, and others within the mall in which my client's store is situate.*⁴

[27] Mr Akmedov accepts the call occurred. He says he said he would bring a medical certificate in response to Mr Cui's request he do so but says there was no discussion as to why this was necessary.

[28] The call was witnessed by Mr Akmedov's flatmate. He says it was very short; even as short as 30 seconds and Mr Akmedov did most of the talking though telephone records support Mr Cui's view as to the call's length.

² Letter Smyth to Vincent dated 15 May 2015

³ Brief of evidence at [39]

⁴ Letter Smyth to Vincent dated 13 May 2015

[29] Mr Cui says he had understood Mr Akmedov's original advice of illness to mean he would return on 19 April. As he did not do so Mr Cai called again. He says Mr Akmedov did not assert he had been dismissed but simply advised he was still sick. Mr Akmedov has no recollection of this call or another which both Mr Cui and his phone records say occurred on 18 April. That said, Mr Cui also says his recollection of both is hazy.

[30] Mr Akmedov saw his doctor on 22 April. She completed both an ACC application and a medical certificate. The ACC application describes the *accident* as *Other and Worsening of depression due to severe stress and pressure at work over past 3 months*.

[31] The medical certificate says he was suffering *Stress related to work. Worsening of depression* and that Mr Akmedov was unfit for work for 14 days.

[32] The ACC application was later rejected on the grounds mental injury can only be covered when it is the result of a single traumatic event.

[33] On 22 April 2015 Mr Akmedov initiated his personal grievance and there was a further telephone conversation with Mr Cui after Mr Akmedov returned home from the doctor. Mr Akmedov says he telephoned to ask for his final pay and this call was also recorded. It developed into a convoluted discussion whereby Mr Cui demanded a medical certificate to confirm Mr Akmedov's mental health was such he could return to work and the latter saying that was unnecessary as he had been sacked.

[34] Mr Akmedov returned to work on 23 April but only to deliver the medical certificate. He says he did so as Mr Cui had asked for it on 17 April and ACC had told him he was required to give a copy of the certificate to KH given the claim for a work related injury. Mr Cui saw presentation of the certificate as confirmation the employment continued.

[35] Mr Cui responded to the medical certificate with a letter dated 23 April advising Mr Akmedov would not be allowed to return to work until he provided a medical certificate advising he as fit to do so.

[36] Needless to say he has not returned and the issues remain unresolved.

Determination

[37] After the delivery of submissions I gave an oral indication of the likely outcome. Both parties asked they be allowed to furnish further submission and the request was granted. Those submissions primarily addressed remedies.

[38] There are a number of issues to be determined. They are:

- a. Was Mr Akmedov dismissed;
- b. If so, was the dismissal unjustified;
- c. Was Mr Akmedov unjustifiably disadvantaged by virtue of workplace harassment and bullying; and
- d. Did Mr Akmedov breach the duty of good faith by refusing to answer the telephone or hanging up when he did so on 17 April 2015 and/or attempting to entrap Mr Cui during the conversation of 23 April.

[39] Turning first to the question of whether or not Mr Akmedov was dismissed. As already said KH's position is *The voicemail left with the applicant on 17 April was not a dismissal and neither was it understood by either party to amount to a dismissal. It was left in the heat of the moment and when the parties spoke the ongoing nature of the employment was clarified.*⁵ KH asserts the parties subsequently acted as if there as an ongoing employment relationship.⁶

[40] I disagree. Notwithstanding KH's assertions about intention there are very few ways in which the words *he is no longer working at Donut King* and *So he is fired* can be interpreted. A dismissal is a sending away and that is, I conclude, the only way the above words can be construed. This was, I find, a dismissal.

[41] That raises the question of whether or not the dismissal can be justified. The answer is no.

[42] Section 103A of the Act, states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were

⁵ Statement in Reply at 3(a)

⁶ Statement in Reply at 3(b)

what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[43] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated its concern. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[44] KH's defence is Mr Akmedov was not dismissed. That implies the answer must be no and Mr Smyth conceded in submissions that if I concluded there was a dismissal KH could not justify it. The dismissal was effected via a phone message left during a short call. There is no mention of KH's concerns let alone a putting thereof. It also follows, given Mr Akmedov was not on the call, he did not tender an explanation so one could not have been considered. It is evident the requirements of s103A were not met.

[45] While KH is a small employer there is no question a lack of resources excuses these deficiencies. Putting aside evidence KH had access to professional advice I must be cognizant of the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley*.⁷ At paragraphs [94] and [95] the Court noted such all-encompassing failures were neither excusable nor minor (s.103A(5)).

[46] The conclusion the dismissal is unjustified raises the question of whether or not the dismissal was rescinded by subsequent events. In particular there is the question of whether or not the parties agreed the employment continued during the last telephone conversation of 17 April.

[47] Again I conclude the answer is no. I have concluded Mr Akmedov was dismissed. It is a general principle that a repudiatory breach cannot later be rectified and that has now been incorporated into employment law in England.⁸ I see no reason why the same should not apply here. In any event I note notice of termination cannot be withdrawn in the absence of consent.⁹ That consent should be unequivocal. There is nothing to suggest Mr Cui expressly advised his earlier advice of dismissal had been rescinded or that Mr Akmedov consented to the withdrawal of the dismissal.

⁷ [2013] NZEmpC 152

⁸ *Bournemouth University Higher Education Corp v Buckland* [2010] ICR 908

⁹ *Malaysian Airline System BHD (New Zealand) Ltd v Malone* [2003] 1 ERNZ 494 (EmpC)

[48] Mr Akmedov also claims he was unjustifiably disadvantaged by virtue of harassment and bullying.

[49] Mr Akmedov's unjustified disadvantage claim relies on four specific incidents. Each of those was a one-off incident which raises questions about whether the claim satisfies the normally accepted principle harassment and bullying results from repetitive and continuous behaviour.

[50] I must also consider KH's argument at least three of the cited incidents occurred more than 90 days before the grievance was raised. In the absence of a section 114 application that provides a strong argument I should not consider those claims. That leaves one single event, *the donut throw*, and that falls well short of continuous and repetitive behaviour which might constitute harassment and bullying.

[51] When presenting his evidence Mr Akmedov did, however, try to raise other examples of inappropriate and ongoing harassment. I have to say the evidence was confused, weak and at times contradictory. In the face of consistent employer denials, I conclude it is insufficient to establish a *prima facie* case requiring a defence.

[52] In any event I am also of the view a detailed consideration of these claims is not required given the remedies sought. Mr Akmedov sought lost wages, holiday pay there-on and compensation under s.123. His claim was holistic with the one set of remedies applying to both grievances. In addition the amounts sought are, when compared to some claims that come before the Authority, refreshingly reasonable and the total sought would be attainable on the back of the dismissal claim with which Mr Akmedov has already been successful.

[53] The conclusion Mr Akmedov was unjustifiably dismissed leads to a consideration of remedies. He seeks lost wages, compensation in the sum of \$5,000 and holiday pay on the lost wages.

[54] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis.

[55] This raises the fact Mr Akmedov has, since his dismissal, been certified as incapable of working and is on a sickness benefit. His condition has also affected attempts to mitigate his loss and, for example, he concedes he is not currently seeking

work. He attributes his condition to the dismissal but the evidence has not established a causal link. Here I note the supplementary submission that in the normal course of events Mr Akmedov would have had a couple of days off and then returned but there is no evidence to support the contention that would have happened in this instance. The only know fact is that Mr Akmedov has, since dismissal, been deemed incapable of working.

[56] That means he was been incapable of earning via employment and there cannot, therefore, have been a loss. There is also the claim for holiday pay. As there is no recoverable wage loss there is no holiday pay but, in any event, I would not have made the award if wages had been awarded. Section 128 provides a statutory entitlement with respect to lost wages. To add holiday pay alters and extends it.

[57] Turning to compensation. As already said the amount being sought is a modest claim especially when the Court is encouraging increased awards.¹⁰ It is not unreasonable especially as there was ample evidence supporting a conclusion Mr Akmedov was hurt by his dismissal and the manner thereof. Parties should not be discouraged from making modest and realistic claims by then having them reduced. The amount claimed will be granted in full.

[58] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Mr Akmedov contributed to his dismissal in a way that warrants a reduction in remedies. There is no evidence he did.

[59] KH gave two reasons for the dismissal. The first was the fact Mr Akmedov hung up the telephone. I am not surprised at that reaction given Mr Cui admits he told Mr Akmedov he was not believed and do not, given those circumstances, consider it the sort of behaviour which would warrant a reduction in remedies.

[60] The second reason and, I suspect, the proverbial straw that broke the camel's back was KH's dissatisfaction with ongoing events and Mr Akmedov's relationship with others. While there is evidence Mr Akmedov's conduct may have been less than perfect it is clear both parties could have been more communicative and that may well have addressed these issues. Given the prime onus in this respect falls on the employer I again conclude there should be no reduction for contribution.

¹⁰ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [87] endorsed in *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 at [345]

[61] Finally there is the counterclaim. KH claims Mr Akmedov acted in bad faith and seeks the imposition of a penalty. In particular it takes issue with the fact Mr Akmedov hung up during the first call at 3.25pm on 17 April; that he failed to answer the telephone when Mr Cui rang back a few minutes and that he tried to entrap Mr Cui during the conversation on 23 April.

[62] This claim will not succeed. As already said I am not surprised Mr Akmedov hung up during the first call on 17 April ([59] above). I also discount the fact he failed to answer the phone at 3.29. After some confusion it was established he was at that time on the phone trying to call his doctor. That leaves the entrapment claim. It is asserted this is established by virtue of the fact the call was recorded. First it was Mr Akmedov's flatmate who decided to record the call and second Mr Cui was told the call was being recorded not long after it commenced.

Conclusion and orders

[63] For the above reasons I conclude Mr Akmedov has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, KH International Limited, pay the applicant, Akmed Akmedov, \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[64] Mr Akmedov's unjustified disadvantage claims are dismissed as is KH's counterclaim.

[65] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority