

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 483/10
5285242

BETWEEN DONG EUI CHOI and SA
 YOUNG KIM
 applicants

AND MANHATTAN TRADING
 LTD, respondent

Member of Authority: James Wilson

Representatives: Eska Hartdegen for the applicants
 Donald Webster for the respondent

Investigation Meeting: 14 June & 29 July 2010 at Auckland

Determination: 17 November 2010

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] In their joint statement of problem the applicant's Dong Eui Choi ("Mr Choi") and Sa Young Kim ("Mr Kim") claimed that they had been unjustifiably dismissed and sexually harassed by the managing director of Manhattan Trading Ltd, Doo Young Chung ("Mr Chung"). In that statement of problem Mr Choi and Mr Kim said that Manhattan Trading ("Manhattan") had failed in its obligation to act as a good employer and had breached its obligation to act in good faith under the provisions of the Employment Relations Act ("the Act") and that Manhattan's actions constituted a breach of implied obligation of trust and confidence. In particular they said that Manhattan had failed to pay the per hour rate agreed between them and had failed to

pay holiday pay or notice. Finally they said that they had been sexually harassed in their employment by the actions of Manhattan's director, Mr Chung.

[2] In that statement of problem Mr Choi and Mr Kim sought:

- (i) Four weeks pay in lieu of notice;
- (ii) Payment of arrears of wages due and payment of accrued annual leave;
- (iii) Penalties for breach of contract and breach of good faith for failing to pay all their wages and accrued annual leave;
- (iv) Compensation of \$10,000 each for the loss of dignity, humiliation, stress and distress the unjustified dismissal had caused them;
- (v) Compensation of \$10,000 each for the sexual harassment;
- (vi) Lost wages from the date of dismissals;
- (vii) The costs of, and incidental to, the making of this application, including legal costs; and
- (viii) Any other relief the Authority deemed just.

[3] In its statement in reply Manhattan said:

- (i) There was no dismissal;
- (ii) Mr Chung strenuously denies that there was any sexual harassment;
- (iii) There was no breach of contract, no breach of good faith and Manhattan did not fail to act as a good employer nor did its actions constitute a breach of the implied obligations of trust and confidence;
- (iv) Manhattan did not fail to pay the applicants the agreed hourly rate and was not required to pay them any notice.

Mr Kim's claims

[4] An investigation meeting to consider both applicants' claims was originally scheduled for 30 March 2010. However due to their absence overseas, and at Ms Hartdegen request, the meeting was rescheduled to 14 June 2010. Mr Choi attended this meeting but unfortunately Mr Kim was still overseas. During the course of the

meeting on 14 June it became apparent that further information would be necessary in order to make an informed determination on some of the matters and I further adjourned the meeting until 29 July 2010. Again Mr Choi attended but Mr Kim did not. Ms Hartdegen informed me that she did not know when Mr Kim would be available to pursue his claims and requested I adjourn my investigation in relation to his claims *sine die*. Mr Webster rightly pointed out that there was potential for his client, Manhattan Trading, to be prejudiced by any further delay. However despite Mr Webster's concerns, my investigation of Mr Kim's employment relationship problem is adjourned until Mr Kim is able to present himself in person at an Authority investigation meeting. At that point the Authority will consider, after hearing from Manhattan regarding any prejudice caused to it by the delay, whether it should reactivate its investigation into Mr Kim's claims.

Mr Choi's claims

[5] In the light of Mr Kim's absence Ms Hartdegen appropriately conceded that, in the absence of Mr Kim's testimony, it would be unlikely that Mr Choi's claims of sexual harassment could be successful, particularly because those claims related principally to Mr Kim. Through Ms Hartdegen, Mr Choi withdrew his claim that he had been sexually harassed by Mr Chung.

Background events

[6] The following sets out the key events relating to the applicants' employment with Manhattan Trading. While some of these events are not disputed, in respect to others the parties are diametrically opposed. These differences are highlighted in the narrative. As Mr Choi has withdrawn his claim of sexual harassment, and Mr Kim did not attend the investigation meeting (or file a written statement) the narrative does not include the disputed events regarding those aspect of the claims originally filed.

[7] The parties agree that Mr Choi and Mr Kim commenced employment with Manhattan in April 2009. They disagree regarding the rate of wages discussed and agreed at that time. Mr Choi says that Mr Chung had told them that he would pay \$15 per hour. He says that they worked up to six days per week and sometimes on Sundays, on occasions working as much as 12 hours. Mr Chung says that the discussion at the commencement of employment revolved around \$10 per hour per person but that at there was no discussion as to whether this was a gross or net wage. He says he explained to the applicants that their employment would be of three different types:

- (i) An hourly rate for a contracted period, usually agreed in advance.
- (ii) A “price per job” usually for work that entailed delivery out of Auckland which meant there were times that the applicants would be simply sitting in the truck doing nothing and at times they would be waiting. The rate for these jobs would be on a fixed price per customer/job no matter how long the job, and
- (iii) a profit share basis for some jobs where Manhattan was undertaking a job for a fixed price – usually one third of the gross shared between the two applicants.

[8] Regrettably Manhattan’s wage and time records are, for all practical purposes, nonexistent. Neither applicant was given an employment agreement and Mr Chung says that the diary in which he kept a record of hours worked and money paid was stolen from his truck in May 2009. He says that he has spent a considerable amount of time reconstructing those records and that from the time of the theft he kept a small pocket diary. He said he had intended to use stolen diary to prepare his PAYE tax returns but because of the theft was unable to do so. He also says that he frequently asked the applicants for their IRD numbers but these are never forthcoming. He says that payments made to the applicants were invariably in cash.

[9] Mr Choi says that, as he and Mr Kim were given nothing in writing by Mr Chung, they both kept diaries of the hours they worked and how much they were paid. He says that they were usually paid in cash but occasionally by cheque. He says that despite asking Mr Chung to pay their taxes to IRD they did not know if he did so or not as he never gave them anything in writing to show what they were paid or how much tax was deducted. Mr Choi also says that he had been advised by a lawyer that they were entitled to receive the minimum wage of \$12.50 per hour from March 2009.

[10] Mr Chung says that in early July 2009 he entered into a business arrangement with a Mr Song to merge their respective businesses. In his statement of evidence Mr Chung says:

The deal was for Manhattan to be given a half share in Blue Sky Ltd and we would work together, sharing the profits. It started on 2 July 2009 and in the jobs that we did after that, Manhattan paid the Applicants on behalf of Blue Sky, Manhattan paid the costs of the job and then Manhattan paid half the profits into Blue Sky. The applicants were around all the time these discussions were taking place so they were aware that the changes had been made.

[11] Mr Chung goes on to say that the business arrangement with Mr Song ended unhappily within a couple of weeks, the new structure never eventuated and Mr Song never gave him the 50% shareholding in Blue Sky that had been agreed. He says that from 11 July 2009 Manhattan did not pay the applicants at all as, from that date, they were employed by Mr Song through his company. He says that he has no record in his accounts of any payments to the applicants after 11 July and points out that they have made no mention of any wages Manhattan has paid to them or any jobs that Manhattan engaged them to do after that date, in the claims against the company.

[12] Mr Choi says that in July and August they asked Mr Chung for the money he owed them. In response Mr Chong paid them \$400 for the work they had done and asked them to sign an agreement, which they did, stating that this was all the monies that they were owed by Manhattan. Mr Choi says that they carried out further work in September but did not receive any money for this work and that on 22 September 2009 Mr Chung contacted them and advised that the work was finished. Also at that time Mr Chung wrote asking for their IRD numbers which they provided.

[13] Manhattan was subsequently assessed by IRD as owing \$2335 in PAYE tax on behalf of Mr Choi and Mr Kim. This amount was paid by Manhattan Trading to IRD in October 2009

Discussion

[14] Mr Kim's failure to attend the Authority's investigation meetings, the complete lack of satisfactory accounting records, the difficulties caused by all of the parties having English as their second language and the direct conflicts in evidence have all conspired to make it extremely difficult to find the truth in this matter. The following represents what I find is, on balance, the most probable interpretation of the evidence I have heard.

Was Mr Choi unjustifiably dismissed?

[15] In my finding Mr Choi was employed by Manhattan Trading on an "as required" basis. i.e. he was to work when work was available. I also find that his employment with Manhattan came to an end when that company merged its business interests with Blue Sky Ltd on or about 11 July 2009. At that point any continuing employment was with the new company and any dismissal was from the new entity. I accept that Mr Chung did his best to ensure that Mr Choi was paid for any work he undertook. If Mr Choi was dismissed by Manhattan it was because Manhattan no longer had work to offer him. Any such dismissal was as a consequence of the "as required" nature of his employment agreement. **Mr Choi was not unjustifiably dismissed by Manhattan. It follows that he is not entitled to compensation in this regard nor to recover wages lost as a result of the termination of his employment.**

Is Mr Choi entitled to payment in lieu of notice?

[16] There was no written employment agreement setting out entitlement to notice of termination and there is no minimum statutory entitlement.. Mr Choi was paid for actual work performed on an “as required” basis and continued to work (albeit on an irregular basis) and receive payment via Mr Chung, for several weeks after his employment with Manhattan ceased. **Mr Choi is not entitled to payment in lieu of notice from Manhattan.**

Did Mr Choi receive his full entitlement to wages and holiday pay?

[17] I am grateful to Ms Hartdegen and Mr Webster’s efforts to assist me in my attempts to understand the various permutations of hours worked and monies paid and owed to Mr Choi. A number of findings and calculations are significant in this exercise.

- (i) Firstly I find that the amount paid to Mr Choi, when he was paid an hourly rate, was \$10 per hour net of tax. Although at the time of payment to Mr Chung may or may not have intended to forward the appropriate amount of tax to IRD at that time he subsequently did so. Given this finding Mr Choi was in effect paid a gross amount in excess of the minimum wage at the time (\$12.50).
- (ii) Secondly, given my finding that Mr Choi was employed by Manhattan only until 11 July 2009 and was not entitled to payment in lieu of notice, I have not made an assessment of amounts paid or payable after that date (I note however that Mr Choi appears to have been appropriately paid for most if not all of the actual work performed after that date.)
- (iii) Mr Choi provided me with a calculation based on his personal record of hours worked and monies received. Mr Webster, at my request, calculated the amounts which would have been payable had Mr Choi been paid for all hours worked at the minimum hourly rate rather than the “fixed price” payments Mr Choi received for some jobs undertaken. This calculation suggests that Mr Choi should have been paid wages of almost exactly what he accepts he

received. Mr Webster contends that a further payment made to Mr Choi by Mr Chung's wife (in an attempt, without her husband's knowledge to settle the matter) more than made up for any shortfall.

[18] Based on the largely unsubstantiated figures I have before me I have reached the conclusion that, on balance, **Manhattan has paid Mr Choi all of the wages to which he was entitled.**

Is Mr Choi entitled to holiday pay?

[19] Mr Webster, on behalf of Manhattan, has conceded that Mr Choi has not been paid the holiday pay to which he was entitled. Based on the figures provided by the parties Mr Choi is entitled to holiday pay calculated at 8% of the gross wages he received i.e. 8% of \$5,502 = \$440. **Manhattan Trading is to pay Mr Choi \$440, less the appropriate amount of tax, as unpaid holiday pay.**

Should Manhattan be required to pay a penalty for breaching Mr Choi's contract and/or a breach of good faith?

[20] It is clear that Manhattan did not fulfil a number of statutory obligations in its employment relationship with Mr Choi. The most fundamental of these was that Mr Choi was not provided with an employment agreement and that Manhattan did not keep adequate wage and time records. If either of these statutory minimum requirements had been met it is probable that at least the dispute regarding Mr Choi's wages would not have arisen. I note that Ms Hartdegen has not requested, on behalf of Mr Choi, that a penalty be imposed for either of these breaches and it is not within the Authority's jurisdiction to impose such penalties on its own motion.

[21] What Mr Choi has requested is that I impose a penalty on Manhattan for *breach of contract and breach of good faith for failing to pay all their wages and for failure to pay accrued annual leave pay*. I have found that although Manhattan did pay Mr Choi his full entitlement to wages they failed to pay him the appropriate annual leave payments. In considering whether or not to impose a penalty however it is necessary to consider whether or not the breach was deliberate and the effect of that breach on other parties. In this case I am satisfied that the breach was the result of Mr Chung simply not understanding his obligations as an employer. I am also satisfied that that his experiencing having to defend these claims in the Authority will ensure that such a breach is not repeated. The order I have made requiring Manhattan to now pay Mr Choi the unpaid holiday pay will rectify the financial harm done to Mr Choi. **I therefore decline Mr Choi's request that I impose a penalty on Manhattan for breach of contract.**

[22] Section 4A of the Act makes it clear that a penalty should be imposed on a party who is deemed to have breached their duty of good faith, only if the breach *was deliberate, serious and sustained or the failure was intended to undermine ... the employment relationship*. I am satisfied that Mr Chung, while he did not fulfil all of his statutory obligations towards Mr Choi, acted in ways that he thought were appropriate and fair. While his actions were deficient, his motivation was not malicious and any breach of good faith was not *deliberate*. I find that, Manhattan did not *deliberately* breach its duty of good faith to Mr Choi. **Mr Choi's request, that I impose a penalty on Manhattan for breaches of its duty of good faith, is declined**

Summary of findings

[23] By way of summary of the findings set out above:

- (i) **Mr Choi was not unjustifiably dismissed by Manhattan. It follows that he is not entitled to compensation in this regard nor to recover wages lost as a result of the termination of his employment.**
- (ii) **Mr Choi is not entitled to payment in lieu of notice from Manhattan.**
- (iii) **Manhattan has paid Mr Choi all of the wages to which he was entitled.**

- (iv) **Manhattan Trading is to pay Mr Choi \$440, less the appropriate amount of tax, as unpaid holiday pay.**
- (v) **I have declined Mr Choi's request that I impose a penalty on Manhattan for *breach of contract*.**
- (vi) **Mr Choi's request, that I impose a penalty on Manhattan for *breaches of its duty of good faith*, is also declined**

Costs

[24] Costs are reserved and the parties are requested to attempt to resolve this matter themselves in the first instance. If they are unable to do so Mr Choi may file and serve a submission in respect to costs within 28 days of the date of this determination. Manhattan will then have 14 days in which to file a response. I note that while Mr Choi has been largely unsuccessful in his claims, Manhattan's failure to keep adequate records has put Mr Choi to a good deal of unnecessary expense in pursuit of his proper entitlements and this is likely to be reflected in any award made.

James Wilson

Member of the Employment Relations Authority