

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 107
5428188

BETWEEN

HYERIM JI
Applicant

AND

DREAM HIGH LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Helen White Counsel for Applicant
Hee Sung Lee for Respondent

Investigation Meeting: 3 and 4 September 2014 at New Plymouth

Submissions received: At investigation meeting 4 September 2014 and
transcript provided on 19 September 2014

Determination: 22 October 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The employment relationship problem is a claim from Ms Hyerim Ji for arrears of wages for work she says she did and was not paid, plus holiday pay. Also she claims she was unjustifiably dismissed. She is claiming lost wages, compensation and costs.

[2] The employment relationship problem involves a family relationship, breakup of the marriage of Ms Hyerim Ji and Mr Hee Sung Lee, their business and employment. Also there has been a deteriorating personal relationship between the two of them involving threats and allegations of lying.



[3] Mr Hee Sung Lee denies all Ms Hyerim Ji's claims. He has on behalf of Dream High Limited counter claimed against her for her to pay him profits, wages and expenses. She has denied his claims.

The issues

[4] How many hours did Ms Ji Hyerim work?

[5] When did she start work?

[6] How did her employment end?

[7] If she was dismissed was there any reason for the dismissal?

[8] Was there a fair process followed by the employer?

[9] Is she owed any wages and holiday pay?

[10] Is the respondent entitled to the claims for profit, wages and expenses in the counter-claim lodged in the statement in reply?

Facts

[11] The sole director of Dream High Limited is Mr Hee Sung Lee. He invested money he borrowed in the business. The business involved the making and selling of sushi and other meals and drinks. The business is located in Hawera in Taranaki and trades as "Sushi High" in a cafe. Mr Hee Sung Lee and Hyerim Yi are 50:50 shareholders in the business and he says that she was the manager. They are married, but separated and have a daughter. Hyerim Ji says that she started to work under an agreement with Hee Sung Lee that she would be paid when the business could afford to pay her. There was no written employment agreement.

[12] Out the outset of the business and employment arrangement Hyerim Ji says she worked up to 11 hours per day six days per week and was not paid.

[13] She says she worked full hours from the start because she had the English skills and the qualifications to cook and meet hygiene requirements with her certificates on the wall and there being no other chef. She says that her child with Hee Sung Lee was looked after by her mother and father in Korea at first when the business was set up. Secondly, she says her mother looked after the child when her mother, father and the child came to New Zealand. Neither parent could speak English. Hee Sung Lee says that Hyerim Ji looked after the child, that she came into the café for coffee and that she did not work other than to help and assist him as she was his wife.

[14] Another cook was employed sometime after the business started, and subsequently when this cook left, Ms Yun Kyung Cho (chef Cho) replaced her.

[15] There were various staff changes with the employment of casuals, local people; and another Korean employee-Ms Jin Young Kim who worked in the “hall” (the public area of the café).

[16] On or about 27 December 2012 Hee Sung Lee left New Zealand and returned to Korea. The witnesses all differ on the reason he left, but it is common ground that he left. Hyerim Ji was left to run the business on her own in Hawera. She believed that Hee Sung Lee had left for good with the intention not to return. However, Hee Sung Lee did return to New Zealand on or about 8 April 2013, and it seems that he initially returned to Auckland. During the time he was away from the business there were four days when in or about April 2013 the eftpos machine’s pin was not available for Hyerim Ji to use, and this created problems for her using eftpos with the customers. To cover for this Hyerim Ji put in place a temporary arrangement with the help of the bank for the 4 days, and used a borrowed machine from the bank and the bank put in place a holding account for the money. She was helped in doing this by a family friend Mr Garth Andrews. Mr Andrews also helped Hyerim Ji’s parents learn English and to help them sit their English tests for Immigration. He also lent Hee Sung Lee a large sum of money. The whereabouts and what happened to the money is unknown and remains unexplained. Hee Sung Lee has accused Hyerim Ji of “embezzling” money from him, and alleged that she employed her parents illegally while he was away. She adamantly denies the allegation of embezzling money. She relies on the accounts and transactions available to support her denial, and that she

borrowed an eftpos machine from the bank and that the bank put in place the holding account for the money.

[17] During this time the personal relationship between Hee Sung Lee and Hyerim Ji broke down. Their relationship became acrimonious with both sides making a number of recriminations and allegations about each other. Suffice to say the difficulties boiled over into the employment relationship. Their relationship took a terrible turn when Hyerim Ji excluded Mr Lee from the family home. He retaliated by cutting off the power and the phone. Also he stopped her pay completely. He put her on notice of his requirement as to what he required of her at work and the possibility of her being “dismissed”. As the situation deteriorated at work Hyerim Ji left on 4 June 2012 when she could not put up with what she claims was Hee Sung Lee’s continuing harassment, threats and behaviour against her. This included alleged verbal abuse, pushing and the use of a photo on the wall. Hee Sung Lee put her photo high up on a wall where she could not reach it. She says this embarrassed her and that Hee Sung Lee did it to embarrass her. He then followed this up with trespass notices.

[18] After the employment relationship problem was raised, and claims made against the company, the parties attended mediation provided by the Ministry of Business, Innovation and Employment. It now falls on the Authority to make a determination and to resolve the employment relationship problem.

Determination

[19] I have read the parties’ submissions. I am not required to reproduce them in the determination. Their submissions have been thoroughly considered by me and pursuant to s 174 (b) of the Employment Relations Act 2000 I see no need to set out a record of all the evidence heard or received and to record or summarise the submissions made by the parties. The parties can be rest assured I have read their comprehensive and full submissions and considered them in detail.

[20] This matter involves credibility on many different facts about who said what to whom, and what Hyerim Ji and Hee Sung Lee say they did and the reasons for doing so. I accept that Hyerim Ji’s version of events and her claims are more likely

than not to be more reliable than Hee Sung Lee's evidence. I have made this finding because of the following:

- That her evidence was consistent and plausible.
- That her evidence was consistent with the documents that she has produced.
- That her evidence whilst challenged was not demonstrably incorrect.
- That the respondent's witnesses were inconsistent and self-interested because of their relationship with Mr Hee Sung Lee.
- That Hee Sung Lee did put Hyerim Ji's photo high up on a wall.

[21] Hyerim Ji was an employee and employed by Dream High Limited at the sushi shop High Street, Hawera. I accept that she worked the hours she has claimed. This is because:

- The evidence supports her being an employee. This is supported by the wages she was paid and that Hee Sung Lee accepted that she was employed albeit for much less time than the claim from Hyerim Ji.
- The chronology of events in regard to Hyerim Ji's parents looking after the child when she says she was working.
- Despite the lack of any records on the hours Hyerim Ji has been consistent about the time she says she worked, the care of her child involving her parents and the nature of the business and the work she was required to carry out.
- Hyerim Ji's evidence was plausible and that she started work at the outset of the business and that there was an arrangement for her to be paid when the business had the money. Also the timing of the employment of the cooks supports Hyerim Ji's evidence. It was Hee Sung Lee's responsibility to have an employment agreement and to keep wage and time records. In the absence of these documents I accept Hyerim Ji's evidence as more likely than not to be more reliable.

[22] Hyerim Ji started work when the business opened on or about 28 March 2011. This because:

- Mr Hee Sung Lee has not been able to adequately rebut her evidence.
- There was no employment agreement.
- There have been no wage time and holiday records kept.
- A second cook had not been employed at the commencement of the business.

[23] Hyerim Ji's employment ended when Hee Sung Lee retaliated in regard to the breakup of their relationship and him being required to leave the family home. He has allowed the matters in their personal relationship to overlap and affect their employment obligations and rights. There is the evidence of his counter claim to support the finding. Her last day of work was on or about 3 June 2013. I have reached this finding because Hyerim Ji was not paid.

[24] There have been wages unpaid during the employment. Other than the respondent denying the claim on the hours worked there has been no challenge made on the actual calculations put before the Authority. I have accepted the calculations and hold that Hyerim Ji is entitled to \$66,627 arrears of wages and \$6,863 holiday pay for the entire period of her claim. This includes the amounts she was paid, which have been deducted as part of the calculation. Her claim for arrears and holiday pay meets the time requirements under the Act.

[25] It is my finding that the dismissal was unjustified. There was no good reason for the dismissal. A fair and reasonable employer could not have acted the way the respondent has here, for no reason and leaving a clear impression that the family and personal relationship matters have become all-consuming between them and the ulterior motive for his decision relating to his action. Also there was no notice of any matters put to Hyerim Ji for her to comment and have input before a decision was made. Therefore, the employer has not satisfied the procedural requirements under s 103 A (3) of the Employment Relations Act. The defects in the procedure are not minor and/or technical. Nor has Hyerim Ji contributed to the situation giving rise to her personal grievance in the employment setting (applying s 124 of the Act).

[26] She is entitled to lost wages. There was no contribution on her part. Her lost wages for 3 months is calculated at 13 weeks. She attempted to mitigate her loss, I hold. There is no deduction. Her entitlement is based on the minimum wage of \$13.75 per hour (11 hours per day 6 days per week). I have kept the amount to a minimum of 13 weeks because although a claim was made in final submissions (arising out of a personal grievance) and the claim was not included in the statement of problem, the Authority must award the lost wages (s 128 (2) of the Act). Her loss amounts to \$11,797.50.

[27] She is also entitled to compensation for hurt and humiliation. Her claim was modest relating to the impact on her of losing her job. I award her \$10,000 pursuant to s 123 (1) (c) (i) of the Act. Her pay was stopped. Mr Hee Sung Lee did not deny putting photos on the walls and he obtained a trespass notice against her from the premises. I accept that Hyerim Ji was humiliated and that her feelings were hurt because of the impact of the way she was dismissed and the way she was treated upon being dismissed by Hee Sung Lee.

[28] Hee Sung Lee's counter-claim is dismissed. This is because of the following:

- That the claims for profit related to estimates on profits that are a commercial matter. There was no documentation anyway to support the claim.
- That any money associated with the start-up of the business was a commercial matter and indeed there does not appear to be anything in writing.
- That any wages for Hee Sung Lee are a matter for the business that is Dream High Limited and not Hyerim Ji personally.
- There is no evidence to support the claim of embezzlement and/or that Heyerim Ji stole money from Dream High Limited.

Summary of the Authority's orders

- [29] Dream High Limited is required to pay Hyerim Ji:
- i. \$66,627 wage arrears and \$6,863 holiday pay
 - ii. \$11,797.50 lost wages due to her dismissal under s 128 of the Employment Relations Act.
 - iii. \$10,000 compensation for hurt and humiliation pursuant to s 123 (1) (c) (i) of the Act.

Costs

[30] There remains the matter of costs. Costs follow the event as Hyerim Ji has been successful. She has been put to the cost of needing to be represented. The daily tariff applies and costs are for 1 ½ days investigation meeting including preparation. Hyerim Ji gave most of her evidence in English, although it is her second language. She speaks and understood clearly what was happening. However, the investigation meeting was longer than reasonably necessary because of the need for the interpreter for Hee Sung Lee and his witnesses. This caused the extended time. As such Hyerim Ji should be reimbursed for the extra time involved with hearing fees.

[31] Dream High Limited is to pay Hyerim Ji \$5,250 costs plus \$71.56 filing fee and \$153.33 hearing fee.



P R Stapp
Member of the Employment Relations Authority

