

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 216
5560107

BETWEEN KEITH KAR
Applicant

A N D BAKERS MAGNUM LIMITED
t/a BAKERS HARVEST
Respondent

Member of Authority: Rachel Larmer

Representatives: Stella Chan, Counsel for the Applicant
Sumudu Thode, Counsel for the Respondent

Investigation Meeting: 20 July 2015 at Auckland

Date of determination: 23 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 30 March 2014 Mr Kar was employed by Bakers Magnum Limited trading as Bakers Harvest (Bakers Harvest) as a Baker under an individual employment agreement. Mr Kar worked for Bakers Harvest until April 2015. At the time his employment ended Mr Kar had been promoted to Supervisor of the Baking Department.

[2] Mr Kar claims he was unjustifiably dismissed on 8 April 2015. Bakers Harvest denies that Mr Kar was dismissed.

[3] Mr Kar did not pursue his wage arrears claim for underpaid holiday pay upon termination. Bakers Harvest admitted there had been an error with its final holiday pay calculations so it paid the holiday pay arrears that were owed to Mr Kar prior to the Authority's investigation meeting.

[4] Mr Xiaotang Huang and Mr Hongbin Zhu (both directors and shareholders of Bakers Harvest) were in a car together on 02 April 2015 when Mr Huang spoke to Mr Kar on the car's speaker phone about concerns Mr Kar had disclosed his pay rate to another employee who was being paid less than him.

[5] Bakers Harvest say that during this conversation Mr Kar abandoned his employment by:

- a. saying his work should be given to another employee;
- b. hanging up the phone while Mr Huang was talking to him;
- c. failing to answer his phone when Mr Huang immediately called him back.

Relevant background

[6] Mr Kar says he injured his wrist at work on 04 March 2015 when a trolley he was pulling tipped over squeezing his hand between the trolley and the door. Mr Kar did not immediately fill out the ACC incident register because he thought the injury was minor.

[7] However after continuing to work for the next two days Mr Kar says it became apparent that his injury was more serious than he had originally thought so he filled out a record of accident or incident form on 06 March reporting the injury. This identified the accident as having occurred at work. Mr Kar saw his doctor the next day and was signed off work on ACC.

[8] Mr Kar admits he attended work for Bakers Harvest while on ACC. The number of days he worked while on ACC is disputed as are the activities he undertook. There is no dispute that Mr Zhu asked Mr Kar to work on 30 March because they were short staffed due to another employee being hospitalised unexpectedly.

[9] Mr Kar says that working on 30 March aggravated his injury and resulted in him being signed off work on ACC for another two weeks. Mr Kar says he dropped his new medical certificate off at his work in person on 02 April and picked up his pay slip at the same time.

[10] Bakers Harvest alleges that whilst Mr Kar was at work on 02 April he showed another employee, Mr Kevin Watt, his (Mr Kar's) payslip which created problems for the business when Mr Watt discovered he was being paid less than Mr Kar. Bakers Harvest says Mr Kar's pay was confidential information so should not have been disclosed to anyone else.

[11] Bakers Harvest considers Mr Kar's actions put its business at risk because Mr Watt was very agitated and upset about the pay differential. That was a problem because at that time Mr Watt was covering his own normal workload plus Mr Kar's duties while Mr Kar and another employee were both on sick leave. Mr Watt was therefore essential to the operation of the business. Bakers Harvest believes Mr Kar was deliberately trying to cause dissention and disharmony in the workplace.

[12] On 02 April Mr Zhu and Mr Huang were advised (whilst driving together in a car) that Mr Watt was very upset due to Mr Kar's actions. Mr Huang called Mr Kar while Mr Zhu was in the car with him and the conversation was conducted on the car speaker phone in Mandarin, which all three are fluent in.

[13] Mr Zhu claims Mr Kar initially denied showing his payslip to Mr Watt, then changed his story to say that Mr Watt took Mr Kar's payslip from Mr Kar's hand and read it. Mr Kar says he did not show Mr Watt his payslip so Mr Watt must have seen it as Mr Kar held it in his hand. Mr Watt says that Mr Kar opened his payslip and held it up to him so he (Mr Watt) could see he was being paid less than Mr Kar.

[14] Mr Huang says he asked Mr Kar why he had discussed his pay with Mr Watt when Mr Kar knew he was being paid more than Mr Watt. Mr Huang and Mr Zhu say Mr Huang told Mr Kar that Mr Watt had been a lot of help while Mr Kar was on sick leave and that Mr Huang praised the great job Mr Watt had been doing while Mr Kar had been away on ACC.

[15] Mr Zhu says Mr Kar got very impatient and angry and replied "*then give my job to Kevin, I'm not going to do it*" and hung up. Mr Huang says Mr Kar yelled "*then give my job to Kevin. I am not going to do any work for you anymore*" and hung up. Mr Zhu and Mr Huang believe Mr Kar's comments meant he did not intend to return to work.

[16] Mr Kar says he said “*If Kevin can handle my job, don’t call me while I am on sick leave to come back to work.*” Mr Zhu and Mr Huang dispute that Mr Kar said anything about just giving Mr Watt his work to do whilst Mr Kar was on sick leave.

[17] Mr Kar admits hanging up the phone and then to not answering it when Mr Huang immediately called him back. Mr Kar says he was driving but admits he was also upset. Mr Kar says the next day was Easter so he decided to follow up with Mr Huang after the Easter holiday.

[18] On 08 April Mr Kar discovered he had received a large payment into his bank account from Bakers Harvest. Mr Kar had not been expecting payment because he was on ACC so he called to find out what it was for and was told it was his final pay.

[19] As a result of that Mr Kar went into work and spoke to Mr Zhu. Mr Kar asked why he had been paid his final pay and Mr Zhu replied “*you don’t have your letter? You don’t need to come back to work again.*” Mr Kar asked for a copy of the letter and was handed an unsigned letter dated 02 April. Bakers Harvest says the letter had been signed by Mr Huang on 02 April and posted to Mr Kar that same day. Mr Kar received a signed version of this letter in the post on 10 April.

[20] The letter stated:

Your deliberate action today is in breach of confidentiality rules and serious misconduct under our employment agreement which created ill feelings amongst staff. When we spoke to you by phone you showed no regret for such action you had taken and you then stated that you would like your job handed over to other staff and therefore you are now actually abandoning your position with Bakers Magnum.

You are required to return the keys that you hold for the premises and any other items of property that pertain to Bakers Magnum Limited.

This letter is to formally advise you that your employment with Bakers Magnum is now formally terminated.

Should you wish to discuss this and have a representative with you, you may do so.

Issues

[21] The following issues are to be determined:

- (a) Was Mr Kar dismissed?

- (b) If so, was his dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) Should interest be awarded on any lost remuneration Mr Kar may be awarded?
- (e) Is Mr Kar owed wage arrears?
- (f) What if any costs should be awarded?

Was Mr Kar dismissed?

[22] Because Bakers Harvest denies Mr Kar was dismissed he bears the onus of proving on the balance of probabilities that his employment ended because he was dismissed. Once he meets that threshold the onus passes to Bakers Harvest to establish that Mr Kar's dismissal was justified in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[23] No particular form of words is required in order for there to be a dismissal. Whether or not an employee was dismissed is usually a question of fact. Therefore a dismissal may still occur in law even though the employer may not have expressly told the employee that they are dismissed.

[24] Dismissal occurs where there has been a sending away or ending of the employment which occurs at the employer's initiative. Abandonment of employment by an employee does not amount to a dismissal by an employer.

Did Mr Kar abandon his employment?

[25] Clause 17.3 of Mr Kar's employment agreement relates to abandonment. It states:

When an employee is absent from work for a continuous period of two days without the consent of the employer, or without offering an explanation acceptable to the employer, that employee shall be deemed to have terminated his/her employment.

[26] I find that Bakers Harvest is unable to rely on clause 17.3 as having ended Mr Kar's employment.

[27] Mr Kar was on certified sick leave. On 02 April Mr Kar provided Bakers Harvest with a medical certificate that signed him off work for two weeks. Mr Kar was therefore not absent from work without explanation. Bakers Harvest knew why Mr Kar was not at work and that he would not be back at work before 16 April.

[28] The fact that Mr Kar hung up on Mr Huang and did not answer Mr Huang's call when he phoned back does amount to abandonment under clause 17.3 of Mr Kar's employment agreement.

Did Mr Kar resign?

[29] During the investigation meeting Bakers Harvest suggested that Mr Kar had resigned. I do not accept that.

[30] Clause 17 of Mr Kar's employment agreement requires him to give four weeks' notice of termination. I find that Mr Kar did not give Bakers Harvest contractual notice.

[31] Hanging up the phone and/or not answering one phone call does not amount to giving notice of termination under the terms of Mr Kar's employment agreement. There was also no discussion regarding notice which would have been expected to have occurred if Mr Kar had genuinely resigned.

[32] Even if Mr Kar did say the words Mr Zhu and Mr Huang attribute to him (which Mr Kar denies) such comments could not fairly or reasonably be viewed as a resignation. Mr Kar was upset, there had been a 3-5 minute conversation, the conversation had been cut off, both parties were driving at the time of their conversation and the contractual notice obligations had not been fulfilled. No further clarification of Mr Kar's intentions had been sought or obtained by Bakers Harvest.

[33] I find that in the absence of a clear and unambiguous resignation by Mr Kar, Bakers Harvest is not entitled to seize on words (which I find were not intended to or were capable of amounting to resignation) in order to end his employment.

[34] Given that the parties had not completed their discussion, I consider Bakers Harvest should have ensured that it had properly communicated with Mr Kar regarding its view that he had resigned without notice before acting on its view that Mr Kar's employment had immediately ended on 02 April.

[35] I consider that Bakers Harvest's failure to make any inquiries into Mr Kar's intention regarding his ongoing employment was a breach of the good faith obligation to be active and constructive in establishing and maintaining a productive employment relationship as required by s.4(1A) of the Act.

Dismissal finding

[36] I am satisfied to the required standard that Bakers Harvest dismissed Mr Kar.

[37] Bakers Harvest paid Mr Kar his final pay without first speaking to him. Mr Zhu told Mr Kar when they met on 08 April that he was not to come back to work. Bakers Harvest sent Mr Kar a letter dated 02 April which referred to "*serious misconduct*" and recorded that his employment had been "*formally terminated*". When Mr Kar told Mr Zhu on 08 April that he had not resigned or abandoned his employment Mr Zhu maintained the employment had ended.

[38] I am satisfied that these actions constitute a dismissal because there was a sending away that occurred at Bakers Harvest's initiative.

Was Mr Kar's dismissal justified?

[39] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Bakers Harvest's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Kar was dismissed.¹

[40] The Authority must consider the four procedural fairness tests in s.103A(3) and as under s.103A(4) of the Act any other appropriate factors, including compliance (or otherwise) with good faith obligations.

[41] I find that Bakers Harvest is unable to justify Mr Kar's dismissal.

[42] I find that Bakers Harvest did not comply with its good faith obligation. It failed to be active or constructive in maintaining a productive employment relationship in breach of s.4(1A)(b) of the Act.

¹ Section 103A(2) of the Act

[43] Bakers Harvest also failed to provide Mr Kar with access to information relevant to his ongoing employment or an opportunity to comment on that information prior to his dismissal contrary to the requirements of s.4(1A)(c) of the Act.

[44] I further find that Bakers Harvest did not comply with any of the four procedural fairness tests in s.103A(3) of the Act which fundamentally undermines its ability to justify Mr Kar's dismissal. There was no process at all – it just processed his final pay and sent him a termination letter.

[45] I consider these process defects were serious and resulted in Mr Kar being treated unfairly so the Authority is not precluded by s.103A(5) of the Act from finding that Mr Kar was unjustifiably dismissed.

[46] I find that Mr Kar's dismissal was not substantively justified. There was no good reason for his summary dismissal. Mr Kar's alleged actions (which he denied) were not capable of being viewed as serious misconduct in all of the circumstances. The lack of any process and breaches of good faith also fundamentally undermine the substantive justification of the dismissal.

[47] Accordingly I find that Mr Kar's dismissal was procedurally and substantively unjustified.

What if any remedies should be awarded?

Mitigation

[48] Mr Kar says he searched on nz.jora.com but did not find any opportunities to apply for. He also approached the Bakery Manager at Countdown Lynmore for a job in May and June of 2015 but was told that there was no vacancy.

[49] Mr Kar was on ACC and medically unfit to work up until 06 July. Mr Kar was also away from New Zealand from 14 June until 05 July 2015 so was not actively seeking employment over that period. On 06 July Mr Kar's physiotherapist certified him as fit to return to work.

[50] On 06 July Mr Kar hand delivered his CV to three potential employers. He also applied for income assistance from WINZ on 16 July. Mr Kar was interviewed for a café position on 15 July and started a trial period on 21 July 2015. I am satisfied Mr Kar has adequately mitigated his loss.

Lost remuneration

[51] Mr Kar says he seeks lost remuneration of \$184.40 gross per day from 02 April 2015 which he has calculated based on average daily work hours of 9.22 hours per day excluding public holidays. Mr Kar says he has calculated his lost remuneration based on working six days per week.

[52] Mr Kar was on ACC and unfit to work until 06 July so he cannot claim lost remuneration prior to that date. Mr Kar says that ACC has required him to repay \$980.20 because his final holiday pay resulted in him being overpaid weekly compensation by that amount. The Authority does to have jurisdiction over Mr Kar's ACC entitlements as that is a matter between him and ACC. No order is made regarding this overpayment.

[53] Mr Kar seeks reimbursement of that amount from Bakers Harvest.

[54] The overpayment relates to period 08 - 21 April 2015 because Mr Kar apparently received holiday pay and ACC over that period. Mr Kar's claim to be reimbursed for that ACC overpayment does not succeed. Overpayment relates to his ACC entitlements while still employed so it is not relevant to an assessment of his lost remuneration which relates to his losses incurred subsequent to dismissal.

[55] Mr Kar is awarded lost remuneration for the period 06 July (being the date he was certified as fit to return to work) to 23 July 2015 (being the date of this determination) calculated at the rate of \$184.40 gross per day (calculated for 9.22 hours per day) for six days per week.

[56] Bakers Harvest is ordered to pay Mr Kar \$2,950.40 under s.128(2) of the Act.

Distress compensation

[57] Mr Kar believes his unjustified dismissal has harmed his reputation and has adversely affected his pride. Mr Kar says his health deteriorated. He was unable to eat and sleep properly. Mr Kar was also unable to provide for his family.

[58] Bakers Harvest is ordered to pay Mr Kar \$4,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Holiday pay

[59] Bakers Harvest is ordered to pay Mr Kar \$236 holiday pay (being 8% on the \$2,950.40 total gross lost remuneration he has been awarded). The parties agree that all other holiday entitlements have been paid in full.

Contribution

[60] Having determined that Mr Kar has an unjustified dismissal grievance, s.124 of the Act requires me to consider the extent to which Mr Kar's actions contributed towards the situation that gave rise to his grievance and, if so to address remedies accordingly.

[61] Contribution denotes blameworthy conduct which must be proven on the balance of probabilities. I find the evidence presented does not meet that threshold so Mr Kar's remedies are not reduced.

Should interest be awarded?

[62] Mr Kar seeks interest at the rate of 7.5% on his lost wages. Bakers Harvest is ordered to pay Mr Kar 7.5% interest (being the applicable rate under the Judicature Act 1908) on the amount of \$3,186.40 (lost remuneration plus holiday pay) from the date of this determination until that amount has been paid in full.

What if any costs should be awarded?

[63] Mr Kar as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to agree costs. If that is not possible then Mr Kar has 7 days within which to file his costs submissions, Bakers Harvest has 7 further days to file its costs submissions with Mr Kar having a further three working days within which to rely.

[64] The parties are invited to specifically identify any factors which they say should result in an adjustment to the notional daily tariff which is currently \$3,500.

Rachel Larmer
Member of the Employment Relations Authority