IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 113/10
File Number: 5288342

	BETWEEN	Adele Kauri Applicant
	AND	Yupang (Helen) Wei t/a Rainbow Dairy, Foxton Respondent

Member of Authority:	Denis Asher
Representatives:	Mark Duston & Kelly Coley for Ms Kauri Ms Wei represented herself with the assistance of her husband, Chuan (David) Yin
Investigation Meeting	Palmerston North, 10 & 11 May 2010
Submissions Received	At the close of the investigation, on 11 May 2010
Determination:	22 June 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Ms Kauri unjustifiably dismissed by the respondent?

The Investigation

[2] Mediation did not resolve this employment relationship problem.

[3] During a telephone conference on 10 February 2010, and with the assistance of an interpreter, the parties agreed to a two-day investigation in Palmerston North commencing 10 May. Timelines were also agreed for witness statements.

[4] An interpreter was also present, and greatly assisted my investigation, on 10 & 11 May.

[5] Another, very similar, employment relationship problem was also investigated at the same time (see *Kelly* v *Wei*, 21 June 2010, 5288342).

Background

[6] I am satisfied from the investigation and the evidence provided by the parties that the following is a reliable description of relevant background events.

[7] As affirmed by Ms Wei, the respondent is the owner of the Rainbow Dairy. In her witness statement she explained that, as she wanted to live independently, she bought the dairy on 1 August 2008. Because English is her second language and she has limited skill in it, and because of a lack of management experience, her husband David Yin was initially responsible for the discretionary management of the dairy, from 1 August 2008 to 31 May 2009 (see the first page of his statement emailed to the Authority on 22 April 2010). Mr Yin operates his own business, another dairy, elsewhere.

[8] Ms Kauri was employed by Mr Yin, on the respondent's behalf, as a cleaner in February 2009. The applicant was dismissed on 17 June 2009. Ms Kauri initially believed Mr Yin to be her employer but now accepts it was Ms Wei.

[9] Ms Kauri's evidence is that Mr Yin said her hours of work were from 6.00 p.m. to 9.00 p.m. Monday to Sunday inclusive. Ms Kauri also alleges Mr Yin told her she was to give two-weeks' notice if she found another job.

[10] The applicant's terms and conditions of employment were not set out in a written employment agreement.

[11] Despite providing Mr Yin with her banks account details and IRD number, Ms Kauri received her wages by cheque. She advised Mr Yin she wanted her employment to be legal and for PAYE to be paid (par 8 of the applicant's witness statement). Ms Kauri says there were ongoing issues with her pay in that Mr Yin would provide her each week with a crossed-cheque that meant she had to wait at least 3-days to have it cleared.

[12] Ms Kauri says she refused Mr Yin's suggestion through a third party that she be paid under the table.

[13] Ms Kauri says she approached Mr Yin about payment in accordance with the Holidays Act for the 3 statutory holidays she worked for the respondent: she says Mr Yin refused to pay her additional wages or provide a day in lieu and said if she did not like it she would be replaced.

[14] On the Tuesday after Easter Monday the applicant says she was told by Mr Yin she was not required to work, and that she was to show a new Asian employee how to do the cleaning. She was not paid for that day.

[15] Ms Kauri says that, on or around 17 June 2009, she was asked by Mr Yin if Ms Wei had spoken to her. The applicant replied no; Mr Yin then gave her two weeks' notice of termination of employment. Ms Kauri protested his actions. She then spoke by telephone to Ms Wei: the latter confirmed her termination.

[16] An informal meeting followed with Mr Yin: during that meeting he agreed that Ms Kauri would keep her job until after a Department of Labour mediation on 25 June but, unfortunately, resolution was not achieved.

[17] During my investigation Mr Yin confirmed Ms Kauri's evidence as to her terms and conditions of employment and that she was not paid anything additional for statutory holidays, and was provided with no time off. He also confirmed the applicant was dismissed as *"she was not needed"* (oral evidence), and that Ms Wei and a companion/other employee intended undertaking the applicant's cleaning duties. Ms Wei confirmed to me that she relied on Mr Yin talking to Ms Kauri about her job coming to an end, and that she and another employee now did the applicant's work.

Remedies sought by Ms Kauri

[18] By way of a memorandum dated 11 May 2010 particularising her claim, Ms Kauri sought the following remedies (which I have corrected to take out a simple error of addition):

Work on Public Holidays	**$**
Waitangi Day – 6 February 2009, 3 hours @ $18.00 (1.5 hours x $12.00)	54.00
Good Friday – 10 April 2009, 3 hours @ $18.75 (1.5 x $12.50)	56.25
Easter Monday – 13 April 2009, 3 hours @ $18.75 (1.5 x $12.50)	56.25
ANZAC Day – 25 April 2009, 3 hours @ $18.75 (1.5 x $12.50)	56.25
Queens Birthday – 1 June 2009, 3hours @ $18.75 (1.5 x $12.50)	56.25
Sub-total	279.00
Requested not to work	
Tuesday 14 April 2009, 3 hours @ $12.50	37.50
Notice Period	
14 days notice given on 17 June 2009, i.e. to 1 July, 10 days non-payment x 3 hours @ $12.50	375.00
Lost Wages	
(12 weeks) @ 3 hours per day @ $12.50, less unemployment benefit payments received of $1,320.00	1,830.00
Holiday Pay (8%) on $2,559.00	204.72

Compensation for humiliation, etc	5,000.00
Legal Costs up to and including 11 May 2010	4,054.00
Total	11,780.22

Discussion

[19] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

Findings

[20] As I noted in the *Kelly* determination (above), Ms Wei and Mr Yin have very limited English. Their translated (and affirmed) statements have limited but sufficient and working coherence. I am satisfied however that, despite not being professionally represented, their evidence was effectively given as a result of the energetic and able assistance of the interpreter. In particular, Mr Yin attempted English explanations and also spoke at length to the interpreter in response both to my questions and in respect of how his answers were interpreted.

[21] I repeat again my finding, from the evidence presented to the investigation, that despite their seemingly positive intentions and their efforts to obtain advice including from the Department of Labour, Ms Wei and Mr Yin had (and have) little appreciation of their legal obligations as employers in New Zealand.

[22] This is the first time Ms Wei has owned a business (11th page of her statement emailed to the Authority on 22 April 2010). Unfortunately for the respondent, that lack of awareness and sophistication in both business and employment matters does not excuse her from her responsibilities at law.

[23] The parties' employment relationship was disorganised from the outset. Language and cultural differences clearly contributed to the parties' difficulties. Trading difficulties were clearly encountered almost immediately, as witnessed by the dairy ceasing its 24-hour operation.

[24] Their difficulties were worsened by the absence of any employment agreement, oral or written, setting out Ms Kauri's terms and conditions of employment.

[25] After having full regard to the evidence and risks of inaccuracy arising out of Ms Wei and Mr Yin's limited English skills, I find that Ms Kauri was unjustifiably dismissed. That is because of the absence of consultation with the applicant as required by ss. 4 (1A) (c) (i) & (ii) of the Employment Relations Act 2000 (the Act), as the duty of good faith *"requires an employer who is proposing to make a decision that will … have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected – access to information, relevant to the continuation of the employees' employment, about the decision; and an opportunity to comment on the information to their employer before the decision is made"*.

[26] Unlike the outcome in the Employment Court's decision in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825, I am not confident that in this case it could be said that the termination of Mr Kauri's employment because of redundancy was inevitable. That is because, unlike the fact scenario set out in *Simpsons Farms*, Ms Kauri's termination occurred without any consultation and no warning of her employer's thinking. No alternate positions were explored with her, and no invitations extended to apply for any new position. No discussion occurred as to Ms Wei's thinking as to the benefits of her and another employee, who was also a companion and lived in the respondent's premises, undertaking the work previously done by Ms Kauri.

[27] In other words, consistent with the Act and well-known case law, I am satisfied fair and reasonable employers consult their employees in respect of possible job loss arising out of redundancy. Fair and reasonable employers, consistent with the exigencies of demonstrable trading difficulties, are also expected to discuss alternatives to redundancy; fair and reasonable employers do not simply arbitrarily dismiss workers without prior warning.

[28] Ms Wei's failure to meet these fundamental requirements meant that Ms Kauri was unjustifiably dismissed and, and in light of the evidence of her efforts to mitigate her losses, can fairly and reasonably seek compensation for 3-months lost wages as prescribed by ss. 128 (2) of the Act.

Remedies

Compensation for Hurt and Humiliation

[29] Ms Kauri seeks compensation of $5,000. She gave modest but sufficient evidence of the effect on her of her arbitrary dismissal.

[30] Having regard to her evidence and the above I am satisfied an award of $4,000 compensation for humiliation and hurt is appropriate.

Contributory Fault

[31] When it determines than an employee has a personal grievance, the Authority is required by s. 124 of the Act, in deciding the nature and the extent of the remedies to be provided, to consider the extent to which the employee's actions contributed toward the situation that gave rise to the grievance and, if those actions require, reduce the remedies that would otherwise have been awarded.

[32] I am not aware of any actions by Ms Kauri that require a reduction of the remedies set out above.

Other Remedies

[33] As set out in par 18 above, Ms Kauri seeks to recover various monies including wages and holiday pay she claims have not been paid to her. As I made clear in the *Kelly* determination (above), in the absence of a lawful time and wage record, and given Mr Yin's admissions in respect of not compensating the applicant fully in respect of her working statutory holidays, I prefer Ms Kauri's assessment as to what is owed her. The respondent is therefore to pay to the applicant the wages and holiday pay claimed (the amounts are set out below).

Determination

[34] Ms Wei unjustifiably dismissed Ms Kauri and is to pay to her:

a. $4,000.00 (four thousand dollars) as compensation for the applicant's humiliation and hurt, and

b. The following gross wages payments:

Work on Public Holidays	**$**
Waitangi Day – 6 February 2009, 3 hours @ $18.00 (1.5 hours x $12.00)	54.00
Good Friday – 10 April 2009, 3 hours @ $18.75 (1.5 x $12.50)	56.25
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Notice Period

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Lost Wages

(12 weeks) @ 3 hours per day @ $12.50,
less unemployment benefit payments received of $1,320.00 **2,559.00**

Holiday Pay (8%) on $2,559.00 **204.72**

[35] Costs are reserved. I repeat here the observation I made in the *Kelly* determination (above). I note counsel's claim of legal costs of $4,054.00 for Ms Kauri. For a two-day investigation this is a realistic claim provided a discounting is applied in respect of the benefit of progressing another applicant's claim at the same time.

[36] In other words, and subject to detailed submissions, all up legal costs of approximately $6,000 for the two applicants would appear realistic.

Denis Asher
Member of the Employment Relations Authority