

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Howard Kim (Applicant)

AND International College of Linguistics Limited (Respondent)

REPRESENTATIVES Jae Min, counsel for Applicant
Marie Wisker and Caitlin Wright, counsel for Respondent
Eva Ho, counsel for NZ Early Childhood Education Group Limited

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 2 June 2006

DATE OF DETERMINATION 6 June 2006

DETERMINATION OF THE AUTHORITY

Application to join a party

[1] In March 2006 Mr Howard Kim applied to the Authority to have a claim of personal grievance resolved. It was brought against the International College of Linguistics Limited (ICL), which company Mr Kim alleged had unjustifiably dismissed him from an employment relationship.

[2] In its formal response to the claim ICL admitted that it had employed Mr Kim and had later terminated the employment, but it denied that it had unjustifiably dismissed him. ICL claimed that the termination was on the grounds of genuine redundancy resulting from a transfer of the company's undertaking, a language school, in which Mr Kim had been employed. ICL claimed that his employment had been transferred to the new owner of that business, a company called New Zealand Early Childhood Education Group Limited (ECEG).

[3] ICL accepts that it may have some liability arising from the transfer and the way it was carried out, but it contends that ECEG is answerable for the dismissal of Mr Kim after the transfer. For that reason ICL has applied to have ECEG joined as a second respondent party to Mr Kim's grievance claim.

[4] Section 221(a) of the Employment Relations Act 2000 allows the Authority to direct the joinder of parties where that will enable the matter before it to be more effectually disposed of by the Authority. It is contended that joinder will avoid the need for a further application being made by Mr Kim against ECEG in relation to the ending of his employment at the language school.

[5] Mr Kim supports the application for joinder, which has been investigated by the Authority as a preliminary matter to a determination of the substantive grievance claim.

[6] The Authority has heard and examined the evidence of Mr Andrew Krukziener a director of ICL, and Mr Simon Newberry a director of ECEG. The evidence of Mr Brydone Davidson, ICL's accountant, and of Mr Kim was also heard.

[7] On behalf of their companies, Mr Krukzeiner and Mr Newberry negotiated the terms of transfer of the language school in which Mr Kim was then employed. On 30 December 2005 the two directors signed an agreement for the sale by ICL to ECEG of the business named "International College of Linguistics." Possession of the college was on the same date.

[8] After transfer the college remained on the same premises and operated under the same trading name, International College of Linguistics. The corporate entity ICL continued in existence but no longer carried on a business.

[9] I find that Mr Kim had become employed by ICL in March 2005 when he signed an employment agreement appointing him Marketing Director. The agreement was expressed to be a "fixed individual employment agreement." The Term of the Agreement provision at clause 3.1 concluded with, "this agreement will commence on 10 March 2005, for 2 years."

[10] Reference was also made in the agreement to the employment being "casual," but what was intended by this is unclear and is in any event not directly relevant to the joinder application. What is clear is that every fortnight between March 2005 and the middle of December 2005, Mr Kim was paid by ICL the salary stipulated for his position of employment and for which he was expressly required to work four hours each day on Monday to Friday of each week.

[11] In December 2005 a director of ICL, Ms Teresa Kim, sold her shares in the company to a holding company of ICL in which Mr Krukzeiner had a controlling interest. Mr Howard Kim was, I find, told by Ms Kim of the share sale at about the same time and was given an assurance that his existing employment contract would continue. The existence of ICL was not affected by the change of ownership of its shares.

[12] Mr Krukzeiner had wanted the building in which ICL's language school operated from but was not interested in the business itself, so ICL found a buyer and transferred the business on 30 December 2005, when the sale and purchase agreement was signed.

[13] Mr Kim, I find, had no knowledge of the sale of the college when it occurred. ICL accepts that it gave Mr Kim no notice of the transfer and I find ICL made no attempt to communicate with him about it at any time before he was asked to leave the college by Mr Newberry of ECEG on 13 January 2006. The school year had finished earlier, on about 23 December 2005, and the employees had commenced their annual holidays and were not due back at the college until Monday 9 January 2006. As well as the time of year making communication with staff about the change of ownership difficult, a level of secrecy seems to have been deliberately maintained over the sale, according to ICL's accountant Mr Davidson who was involved in it. The final pay Mr Kim received (by direct credit) from ICL in December 2005 is unlikely to have alerted him to the pending termination of his employment but is likely to have been looked on as containing holiday pay for the Christmas-New Year period.

[14] Mr Krukzeiner spoke in evidence of having "sold" the employment contracts of ICL to ECEG as part of the sale and purchase of the language school. ICL accepts that it did not obtain the consent of Mr Kim for any transfer of his employment to ECEG. In transferring the business, vendor and purchaser made the common mistake of thinking that without the college employees' consent they too could be transferred along with the language school itself.

[15] As was held by the Arbitration Court in *Wellington etc local Bodies' Officers' Industrial Union of Workers v Fielding Borough Council* [1983] ACJ 629;

It is not possible to transfer the services of an employee from one employer to another unless there be some contractual arrangement which authorises such transfer.

There was no such arrangement and in any event Mr Davidson did not see Mr Kim's employment agreement before the transfer, to ascertain what was in it. As the employment agreement was signed in March 2005 it should have contained an employee protection

provision, as required by s.69M of the Employment Relations Act 2000. This requirement was inserted in the Act by amendments passed in December 2004. The Act defines what an employee protection provision is. They are to cover exactly the situation that occurred in this case, where there was a transfer of the language school business and arising from that a question about whether Mr Kim would be employed in it by the new owner or not.

[16] As the transfer of the college was overseen by lawyers for both parties, it is reasonable to expect the sale and purchase agreement accurately expressed the intention of the parties. Whatever Mr Krukzeiner and Mr Newberry may have discussed about ICL employees being offered new employment by ECEG, I find that the transfer agreement signed by them contained no enforceable term requiring any such offers to be made. Indeed the only reference (in clause 15) to employment by the purchaser, was crossed out and the change initialled by the parties. I am unable to find as Mr Krukzeiner and Mr Davidson said in their evidence was the case, that Mr Newberry "agreed" to employ Mr Kim or any other employee as a term of the sale and purchase. Mr Newberry denied doing so. The written terms of transfer provided only that ICL would discharge all debt due to its employees for wages, holiday pay and other monies owed from employment up to the possession date of 30 December 2005.

[17] Consistent with a lack of contractual obligation to employ any ICL staff, when Mr Newberry met the employees on their first day back at the college after the Christmas-New year break he told them, I find, that their ICL contracts were not valid with ECEG. He offered them what was in effect a trial for a week to enable him to assess their suitability for new employment by ECEG. A number of them were offered employment after that trial period, but Mr Kim was not one of those and was asked by Mr Newberry to leave the college on Friday 13 January 2006.

[18] I find that up to the time Mr Kim was told to leave on 13 January 2006, he was still an employee of ICL. ECEG did not offer to employ him between 9 and 13 January and Mr Kim said he had had no intention of being employed then by ECEG, whose existence he was unaware of in any event. There is therefore no basis for treating him as a person intending to work under s.6 of the Act, as no underlying "contract of service" was formed for the purposes of that provision. Neither was the conduct of Mr Kim sufficient to construct, as it were, the existence of an employment agreement. He worked without pay for a mere few days on a trial basis. Mr Newberry said in evidence that he supposes in the circumstances there was some obligation to pay Mr Kim something for his weeks work, but in view of my conclusion that ECEG did not enter into an employment relationship it is not a matter the Authority can take further.

[19] On behalf of ICL it was submitted that Mr Kim's employment with that company had ceased on 30 December 2005, as an automatic consequence of the sale of college to ECEG. I agree that the transfer of the business created grounds for dismissal but I cannot agree that the sale and purchase transaction when completed, at the same time and without more, terminated the employment contract between ICL and a third party, Mr Kim, who was not a signatory to the transfer and was not even made aware that it was taking place. Potentially dismissal could have been lawful if there was genuine redundancy situation, which seems to have been the case here, but there was still a requirement to terminate in a fair and reasonable manner. Termination by dismissal remained an act to be initiated and performed by ICL, necessitating some notification to or communication with Mr Kim.

[20] In the *Fielding Borough Council* case (above), the termination of the workers' employment was held to be effective from the date of the sale of the business they were employed in, but it clear that the workers were told, at the same time as the sale, that their employment with the vendor was terminating as a consequence of the sale. By contrast Mr Kim was told nothing at all by ICL at any time before 13 January 2006, when he was asked to leave the college. Even then it was Mr Newberry of ECEG who made known that requirement. While the employer remained in existence, as ICL did, it was obliged to directly or indirectly notify him of his termination before that could become effective.

[21] In submissions for ICL the Authority was referred to *Square 1 Service Group v Butler*

[1994] 1 ERNZ 667, a case in which joinder was ordered in circumstances where there had been a sale of a business between two companies. A major point of distinction between that case and the instant is that Mr Kim had no knowledge of any sale and had not entered into negotiations with the purchaser of the business to become employed by it, unlike Mr Butler who had been involved in such negotiations, although they had broken down on the day the sale and purchase was concluded. In his case there was factually therefore a much stronger basis for joining the purchaser of the business, so that at the substantive hearing the possibility could be fully explored that the purchaser had become Mr Butler's employer.

[22] I find therefore that ICL continued to be bound by the March 2005 employment agreement as the employer of Mr Kim. ICL must bear responsibility for the way he finished working for the language school on 13 January 2006, even although neither ECEG or Mr Newberry was an agent of ICL or were parties over which it had control as to how they behaved towards Mr Kim. By not communicating with Mr Kim, ICL assumed the risk that through the purported "sale" of his employment agreement he would be treated in a dismissive or repudiatory way by the new owners of the business, and would suffer humiliation as a result.

Determination

[23] For the above reasons I find that joining ECEG into Mr Kim's claim would serve no useful purpose in the circumstances, as that company did not achieve the status of being a party to an employment relationship with Mr Kim. Without that relationship the Authority would have no jurisdiction to make any orders against the company, whatever wrong it might be shown to have done to Mr Kim. I decline the application therefore.

[24] Mr Krukzeiner readily conceded the responsibility of ICL for some of what happened to Mr Kim. ICL made it clear it accepted that there was an arguable case against it, at least in relation to the procedure followed in ending the employment relationship it had with Mr Kim. Arguably ICL did not comply with the requirement to give Mr Kim reasonable notice of termination, and there are issues arising from the lack of consultation with him. During the investigation meeting I was advised that following talks between the parties a settlement had been, or is likely to be, reached with him. In that case the substantive grievance claim against ICL will not require investigation and determination.

[25] Mr Kim through counsel is to advise the Authority whether he wishes to proceed further with his grievance claim.

[26] Costs are reserved.