

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 69/09  
5151631

BETWEEN                      BYUNG CHUL KIM  
Applicant

AND                              KENZO LIMITED  
Respondent

Member of Authority:      James Crichton  
  
Representatives:              Jong Sun Lim, Counsel for Applicant  
   Susie Tait, Counsel for Respondent  
  
Investigation Meeting:      21 May 2009 at Christchurch  
  
Determination:                27 May 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Kim) commenced his employment with the respondent (Kenzo) on 22 November 2007 as a sushi chef at the Japanese restaurant run by Kenzo. He was employed pursuant to an individual employment agreement although the hours prescribed in that agreement were, at best, contradictory. Mr Kim alleges that he was unjustifiably dismissed by Kenzo, not treated with good faith by his employer, and not paid public and annual holiday leave due and owing.

[2]     Kenzo resist that claim save in respect to the allegation of holiday pay due and owing where Kenzo allege that the sum owed is in dispute. As to the other claims of Mr Kim, Kenzo deny unjustifiably dismissing Mr Kim, deny breaching good faith and counterclaim for various breaches of the employment agreement by Mr Kim which caused Kenzo loss.

**Process**

[3] All of the principal protagonists in this matter are Korean nationals and speak Korean as a first language. Accordingly, the Authority's support staff arranged for a Korean interpreter to attend at the investigation meeting. This had been the position at the unsuccessful mediation as well.

[4] In order to minimise the amount of translation of documents which would be required if briefs of evidence had been filed and served, I directed that the parties simply attend with their witnesses and be prepared for an oral examination.

[5] At the end of the investigation meeting, I adjourned to consider my decision and then reconvened the meeting to give an oral decision. This determination is based on that oral decision and, of course, reaches the same conclusion.

**Issues**

[6] In effect there are only three issues of moment in this application. The first is whether there was holiday pay due and owing and what amount of holiday pay is payable (if any). The second issue is whether there was an unjustified dismissal and an absence of good faith on the part of the employer, and the third is whether there was a viable counterclaim or not.

[7] I will deal with each of these issues in turn.

**Holiday pay**

[8] At the investigation meeting, there was a useful discussion about holiday pay and the short point is that an agreement was reached very quickly on the fact that holiday pay was owed and on the amount that ought to be payable.

[9] The problem with the holiday pay was essentially around computation. There were in effect at first blush four different sources of information as to the hours Mr Kim had actually worked. There were two different computations in the employment agreement, the first providing for 49 hours per week and the second 37 hours per week, the date and time record provided yet another computation and the records of the Inland Revenue Department provided the fourth.

[10] It became accepted by both parties that the wages and time record was accurate and that the other sources of worked hours from both the employment agreement and the Inland Revenue Department were not accurate.

[11] In relation to the Inland Revenue Department, I note that the material which was available to the Authority from the Department was somewhat out of date and did not take into account the most recent material filed on Kenzo's behalf by its accounting firm.

[12] Further, the wage and time record which was finally accepted across the table by both parties did take into account a payment of \$1,000 made by cheque from Kenzo to Mr Kim on 27 May 2008. Mr Kim initially doubted the receipt of that payment but during an adjournment at the investigation meeting consulted his bank who confirmed that such a payment had in fact been received by him into his account.

[13] The parties are to be commended for their willingness to agree on the amount owing in respect to holiday pay across the table and I record at this point that the amount agreed to was \$1,373.54 net (that is after the deduction of the appropriate tax).

### **The termination of the employment**

[14] Mr Kim says that he was unjustifiably dismissed from his employment and that this happened on 25 November 2008. Mr Kim also alleges that events on that day and leading up to that day are also evidence of a breach of good faith by Kenzo.

[15] The factual position is that Mr Kim is a very capable sushi chef and Kenzo were keen to retain his services in their new business. The evidence is quite clear that Mr Kim at some point in mid November 2008 (after he had been employed by Kenzo for about one year) talked to his employer about his intention to resign his employment. The parties disagree about what happened next but both agree that Mr Kim then formalised this information by confirming his resignation. Kenzo say this happened on 21 November but Mr Kim told me that he resigned earlier than that date but was not sure exactly when.

[16] It is clear that after receipt of Mr Kim's verbal resignation (and it was never reduced to writing) Kenzo tried to retain Mr Kim's services by a variety of devices such as offering him time off or a lump sum payment. Referring specifically to the lump sum payment, Mr Kim told me that if he had been paid in a lump sum, he would

have either had to pay that amount back or would have not had ongoing income to live off because it was not proposed that he get an extra lump sum but rather than he get a lump sum of wages paid in advance. He also said that the lump sum payment offer *hurt his pride*.

[17] The 25th of November 2008 was the date that the employment relationship irrevocably came to an end. There was an argument between Mr Kim and Kenzo management at about 12.30pm and Mr Kim left the employment never to return. He went to see his lawyer who quite properly urged him to return to his employment and patch things up, but he did not.

[18] Kenzo hoped that he would return for the evening shift. This started at 5.30pm. When Mr Kim did not reappear at 5.30pm, Mrs Han, one of Kenzo's principals rang Mr Kim and, on the basis that there was to be no continuation of the employment relationship, made arrangements for the return of the key to the restaurant.

[19] A sub-set of this conversation between Mrs Han and Mr Kim is the question of money being missing from Kenzo's till. Mrs Han told me at the investigation meeting that there had been a problem with money being taken from the till. She did not know who was responsible and she had never accused anyone. When Mrs Han asked Mr Kim to leave the key with a neighbouring business, she certainly mentioned to Mr Kim that there had been a problem with money going missing from the till. She says (and I accept) that that observation was simply the explanation for why she wanted the key back and that she was not accusing Mr Kim of being the thief.

[20] Mr Kim, in his evidence, appeared to give me two versions of what Mrs Han had said. He alleged at one point that she had accused him of stealing in this 25 November telephone conversation but on another occasion he said that she had simply told me that the money was missing and that is why she wanted the key returned.

### **The counterclaim**

[21] Kenzo allege that they have suffered significant financial damage by reason of Mr Kim's breach of his employment agreement both by direct and by indirect costs. The direct costs are in Mr Kim's failure to give the four weeks notice that is required by his employment agreement and the indirect costs are occasioned by, in particular,

the various urgent steps which Kenzo had to take in order to fill the vacancy left by Mr Kim's sudden departure. I was told that the total cost of both these aspects was \$8,320.40.

[22] Kenzo also sought the imposition of a penalty and interest. In addition, Kenzo gave evidence of the stress and distress which Mr Kim's sudden departure caused the principals of the restaurant and the continuing staff.

[23] As a sub-set to the counterclaim, Kenzo allege that Mr Kim worked for another restaurant called Sura in breach of his employment agreement and during the period when he ought to have been working out his notice with Kenzo.

[24] Mr Kim told me that he started work at Sura restaurant on 1 December but that Sura had paid him a lump sum of \$1,000 after he started work but in consideration of work that he had done for them before 1 December 2008.

### **Determination**

[25] As I mentioned above, I am required to consider three separate but interrelated issues in determining this matter.

[26] First there is the question of holiday pay which turns on what hours the holiday pay is to be calculated on. As I noted, during the course of the hearing, it became apparent that the wage and time record was accurate, as amended by the most recent calculations of the accountant, and agreement was reached across the table that an amount of \$1,373.54 net was due and owing by Kenzo to Mr Kim. I note for the sake of completeness that this payment takes into account an additional \$1,000 paid by cheque by Kenzo to Mr Kim on 27 May 2008.

[27] The second issue relates to the termination of the employment relationship. Mr Kim alleges he was unjustifiably dismissed and that the employer breached its obligation of good faith to him. I do not find it so. The facts seem to me to be clear. Mr Kim confirmed that he told the employer he was resigning. He said this happened before 21 November 2008 (when the employer says it happens) but nevertheless he said it did happen.

[28] Discussions continued between the parties after the resignation with Kenzo trying desperately to retain Mr Kim's services. He was a very able chef and they

sought to have him stay. Kenzo offered Mr Kim a lump sum payment to try to get him to stay but he says that this offer hurt his pride.

[29] Matters came to a head on 25 November 2008 when at about 12.30pm Mr Kim left the restaurant for the last time after a brief argument about whether or not he was being respectful to Kenzo management. I do not find any fault with Kenzo in relation to this conversation.

[30] Kenzo no doubt hoped Mr Kim would return. When he did not do so for the commencement of the evening shift at 5.30pm, Mrs Han for Kenzo rang him and asked him to leave the restaurant key at the neighbouring business.

[31] She did this, I am satisfied, in the context of telling Mr Kim that money had been taken from the till and she was unhappy about having an extra key out there. Mr Kim took this remark to mean he was under suspicion although I am satisfied that was not Mrs Han's intention.

[32] I do not accept Mr Kim's contention that by saying what she did, Mrs Han effectively terminated Mr Kim's employment. He had already done that himself by resigning his employment earlier in the month, something he confirmed in his own evidence.

[33] By leaving the employment suddenly on 25 November, Mr Kim was clearly in breach of his employment agreement, which required that he give four weeks written notice. His sudden departure cost Kenzo a significant amount of money and caused its principals great personal distress which does Mr Kim no credit. As well as the non-quantifiable loss by way of emotional distress, there was significant monetary loss to Kenzo which they seek to recover.

[34] Furthermore, and bound up with this claim, is the allegation that Mr Kim, in breach of his employment agreement, worked for another restaurant called Sura which still employed Mr Kim at the date of the investigation meeting.

[35] On Mr Kim's own evidence, it is clear that while his notice period should have been running, that is up to and including 18 December 2008, Mr Kim was in fact working for Sura. He told me he started work there on 1 December having simply walked away from Kenzo without giving any proper notice.

[36] I make the following findings then in relation to the present application:

- (a) Kenzo is to pay to Mr Kim his unpaid holiday pay of \$1,373.54;
- (b) Mr Kim has not satisfied me that he has been unjustifiably dismissed or that Kenzo has breached the good faith obligation and accordingly Mr Kim's claims in that regard are dismissed;
- (c) I am satisfied that Kenzo's counterclaim is made out and that Mr Kim should pay to Kenzo the sum of \$2,264.40 in unworked notice as some partial contribution to the significant loss suffered by Kenzo as a consequence of Mr Kim's arbitrary termination of the employment relationship. I make no other order in this regard, neither to impose a penalty or interest, nor to reimburse Kenzo for their other losses. I consider the payment of unworked notice adequately responds to the actual losses suffered;
- (d) I am also satisfied Mr Kim has breached his employment agreement in working for Sura when he should have been working his notice out with Kenzo but I make no order in that regard;
- (e) Counsel are to meet and resolve how these orders are to be implemented and at the same time, are to deal with the question of costs. In the event that counsel are not been able to resolve the implementation of the orders that I have made in this determination, then the Authority is to be advised and I will issue a supplementary determination dealing with the implementation of these orders and the question of costs.

James Crichton  
Member of the Employment Relations Authority