

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Kwang Yong Kim
AND	Millenium Limited
REPRESENTATIVES	Mark Ryan for Applicant Brent Kang for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	22 November 2006
FURTHER INFORMATION RECEIVED	23 November 2006 6 December 2006
SUBMISSIONS RECEIVED	6 December 2006 from Applicant 8 December 2006 from Respondent
DATE OF DETERMINATION	19 February 2007

DETERMINATION OF THE AUTHORITY

[1] Mr Kim was employed by Millennium Limited ("Millennium") which operates three BB's outlets in Auckland, at Manukau City, Papatoetoe and Queen Street in Auckland city. Mr Kim worked at the Manukau store and was responsible for the baking of muffins and bread.

[2] Mr Kim claims that he was disadvantaged in his employment with the respondent. He claims the disadvantage arose when his terms of employment were unilaterally altered by Mr Park. Mr Kim also claims that he has been unjustifiably dismissed from his employment. He says that about June 2006 without warning or reasonable process, he was advised that due to the small numbers of bread and cakes that needed to be baked his employment would be terminated with two weeks' notice.

[3] Mr Kim seeks remedies in relation to both personal grievances.

[4] Millennium denies both claims and says that Mr Kim was dismissed by reasons of redundancy following the sale of the Papatoetoe store in June 2006.

[5] I am required to scrutinise Millennium's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions,

and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, AC52/06, 14 September 2006).

The employment relationship

[7] As there was some confusion as to Mr Kim's actual start date, I directed Mr Park to produce the wages and time records for the duration of Mr Kim's employment. These were duly produced, but not until I had made a formal direction for their production. This was in spite of the fact that Mr Park had one of the wages and time record books in his possession at the investigation meeting. The quality of the information contained in the records leaves a lot to be desired and a number of records have not been provided.

[8] The records provided to the Authority are for the following dates:

- Week ending 15 October 2004 up to and including 3 April 2005;
- Week ending 23 October 2005 up to and including 25 June 2006.

[9] The witness statements for Mr Kim and Mr Park set the period of employment as commencing in October 2005 which is at about the same time as Mr Kim was granted a work permit. However, based on the preponderance of the evidence provided to the Authority, including the clarification relating to the dates provided in the wages and time records, I find that Mr Kim commenced work for Millennium in October 2004. Mr Kim's wife commenced employment with Millennium at the same time.

[10] Mr Kim's wife was in receipt of a long term business visa, which means she was not eligible to work as an employee in New Zealand. Because of this, Mr Park says he paid Mr Kim not only his wages but also his wife's wages with all PAYE accounted for through Mr Kim's IRD tax number.

Disadvantage grievance

[11] Mr Kim told me he signed a written employment agreement and he produced a copy of a signed document which he purported was the employment agreement he signed with the respondent. The agreement is dated 18 September 2004. The relevant provisions of the agreement include:

- The position is stated as being Branch Manager of the Manukau Super Centre BB's branch;
- A salary of \$30,000 per annum;
- Hours of work - 40 hours per week from 8.30am to 5.00pm Monday to Friday;

- Duties include making bake material, purchase, stock checking, customer service and cash handling.

[12] Mr Kim says that after signing this agreement, Mr Park unilaterally changed his employment terms and conditions when he told him that he would just be baking bread and cakes and that these would be delivered to the three bakeries owned by Mr Park. He claims Mr Park told him his rate of pay would be \$9.00 per hour and he would work from 1.00am to 5.00am, three days a week. Mr Kim produced the employment agreement he says reflects the changes made by Mr Park. This agreement is also signed by both parties and is dated 7 October 2004. Mr Kim claims he signed the second agreement because he did not want to lose his job. The second agreement does not mention specific hours of work. The only reference in this agreement is a clause providing for hours worked in excess of 40 hours per week to be paid for at the rate of \$9.00 per hour.

[13] Mr Park told me at the investigation meeting that the signature on the first agreement was not his, he claims he had never seen the first agreement prior to the parties attending mediation. After questioning Mr Kim on the background to the document dated 18 September 2004, Mr Kim acknowledged that the agreement was not put together by Mr Park, but rather by Mr Park's accountant. Mr Park denied any knowledge of ever instructing his accountant to put together the employment agreement for Mr Kim.

[14] After some discussion with the parties, and in order to resolve the question as to the validity of the 18 September 2004 document, I arranged through the Authority support staff, to interview Mr Jin H. Ahn via a telephone conference call. Mr Ahn is an accountant and a partner of Business Advisors and Accountants. Mr Ahn is Mr Park's accountant. Mr Ahn also works as an immigration consultant from time to time and acted as the immigration consultant for Mr Kim.

[15] Mr Ahn told me during the conference call that the individual employment agreement signed on 18 September 2004, was an agreement he had a friend put together for the purpose of assisting Mr Kim in his application for a work visa permit. Mr Ahn told me Mr Kim paid for the drafting of the agreement.

[16] I questioned Mr Ahn about the signature on the document and advised him that Mr Park denies signing this document. Mr Ahn admitted that it was not Mr Park who signed the document, rather, he thinks he signed the document in Mr Park's name.

[17] When I asked him whether the date of September 2004 was the correct date, he told me that as far as he could remember the date was right. When I asked him if he had any authority to sign the individual employment agreement in the name of the respondent, Mr Ahn said "no". Mr Ahn then changed his evidence and told me the authority for him to sign the document with Mr Park's signature was implied. I do not accept that evidence. When I enquired as to where his instructions came from regarding the terms and conditions contained

in the document, being a Manager's role, the salary of \$30,000 per annum and the working hours being daytime working hours, he could not recall, but thought it might have been from Mr Kim.

[18] I am satisfied that it is more likely than not that Mr Ahn signed Mr Park's name on the September 2004 employment agreement and then used that document to assist Mr Kim to apply for a work permit. Mr Ahn's actions raises questions about his professionalism and the integrity of his dealings with immigration, but this, of course, is not within my jurisdiction and I will make no further comment about it.

[19] Central to Mr Kim's claim of disadvantage is the validity of the 18 September 2004. I am satisfied that the document is a sham, it was never sighted or signed by the employer and does not reflect the actual dealings between the parties during the employment relationship. This finding is supported by the wages and time records provided by Mr Park, which show that Mr Kim was, at all times during his employment, paid at the rate of \$9.00 per hour.

[20] Given my finding that the 18 September 2004 agreement was a sham, it can not be argued that this agreement was every unilaterally departed from.

I find the claim for disadvantage is not established.

Unjustified dismissal

[21] In June 2006 Mr Kim was given two weeks notice of redundancy and his employment was terminated at the end of that notice period. The two issues for determination under this heading are firstly, whether the redundancy was for genuine commercial reasons and secondly, whether the process used to implement the decision to make Mr Kim redundant was fair and reasonable.

Was the redundancy genuine and carried out in a fair and reasonable manner?

[22] Genuineness is considered in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005). An employer must act genuinely and not out of ulterior motives. Business decisions about the number of positions required in an organisation are for the employer to make and not the Authority (see *Simpson Farms v Aberhart*).

[23] It was common ground at the investigation meeting that Mr Park sold his Papatoetoe store. There was no dispute that all the staff employed at the Papatoetoe store were made redundant as they were no longer required by Mr Park. Mr Park says he also had to reduce the number of bakers because the amount of baked goods required for the two remaining stores had reduced accordingly.

[24] Section 4 of the Employment Relations Act 2000 requires Millennium to deal with Mr Kim, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[25] The duty of good faith set out in the Act requires an employer, proposing to make a decision that will have an adverse affect on the continuation of employment of an employee, to provide to that employee access to information relevant to the continuation of the employee's employment, and an opportunity to comment on the information before the decision is made. The requirement to consult is therefore, a statutory obligation.

[26] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[27] Mr Park told me Mr Kim could not communicate with his customers who were predominantly English speaking (English is not Mr Kim's first language and the Authority was assisted throughout the investigation meeting by an interpreter). He also told me that he required Mr Kim to bake particular recipes which were only provided in English. He says Mr Kim could not read the recipes and failed on a number of occasions to bake the required product to the required standard. In particular he failed to bake the muffins or bread completely and Mr Park was receiving regular complaints about the quality of the baked goods. Mr Park told me that he spent some time training Mr Kim in what to look for and how to check that the product coming out of the oven was in fact baked correctly. It seems to me that if Mr Kim's ability to follow the recipes which were written in English was as much of an issue for Mr Park as he claimed, it would have been a simple matter for Mr Park to translate the recipes into Korean, a language that both Mr Park and Mr Kim had in common. He did not do that.

[28] It was common ground that on one occasion Mr Kim had attended work while intoxicated, only half baked the product that day, but also reimbursed the respondent for the spoiled product. It was common ground also that during Mr Kim's employment, Mr Park did attempt to rectify his performance by providing advice and assistance to improve his baking. However, I

am satisfied that no warnings were given to Mr Kim during his employment, that his job was in jeopardy as a result of his performance.

[29] Mr Park says he met with Mr Kim about one month before he was given notice of redundancy. Mr Park says they discussed the fact that one of his shops was being sold. Mr Kim disputes they met a month before the shop was sold. He says the only meeting they had was after Mr Park had given Mr Kim notice to stop working. The notice was written on the bottom of a bread order and simply told Mr Kim to stop working in two weeks. Mr Kim says that after he read the note he met with Mr Park and told him he needed to work to obtain permanent residence and begged Mr Park to let him work. Mr Park would not reconsider his position and terminated Mr Kim's employment at the end of the two weeks.

[30] Mr Park told me the decision to make Mr Kim redundant was two fold. Firstly it was based on Mr Park's decision that only one baker was required since the sale of the Papatoetoe store. Secondly, it was based on Mr Kim's performance on the job and his inability to communicate with customers.

[31] I have concluded on the balance of probabilities that at no time, before the decision was made to give Mr Kim notice of redundancy, did Mr Park advise Mr Kim of any proposals to reduce the number of bakers, or that redundancies at the Manukau store were a possibility if the Papatoetoe store sold.

[32] It was common ground that prior to making Mr Kim redundant, Mr Park instigated investigations into the genuineness of Mr Kim's qualifications. He obtained copies of the documents Mr Ahn had produced to immigration in support of Mr Kim's application for a work permit. Mr Park claims the qualifications are not genuine.

[33] Mr Kim discovered Mr Park was investigating his qualifications. Mr Park says that following his termination, Mr Kim approached him at the shop and bad mouthed him and threatened his two sons. Mr Park called the Police and advised them of the threats. Mr Kim does not deny approaching Mr Park and accusing Mr Park of making false accusations about him, however, he denies threatening Mr Park's sons. A copy of a letter to Mr Park, written by Mr Kim, was produced to the Authority. The letter is undated, however, I am satisfied that it was written after Mr Kim's employment had terminated. In his letter Mr Kim accuses Mr Park of making false accusations about him and his wife. A number of the statements made in his letter indicate that when he wrote it Mr Kim was angry and upset.

[34] Having heard from the parties at the investigation meeting I have concluded that it is more likely than not that the principal reason for Mr Kim being made redundant was Mr Park's belief that Mr Kim had misrepresented his qualifications at the time of his employment when Mr Kim told him he could bake. Mr Park had formed a clear view during Mr Kim's employment that Mr Kim could not bake. The respondent relies on its allegations that the certificates

confirming Mr Kim's qualifications are not genuine, to support his proposition that Mr Kim was not qualified to bake bread and muffins. However, the information relating to the genuineness or otherwise of Mr Kim's qualifications was never put to Mr Kim for his explanation prior to making the decision to give Mr Kim notice for redundancy.

[35] I find that the decision to make Mr Kim redundant was profoundly unfair. Mr Kim was never given formal notice that redundancy was a possibility and there was no consultation over the possibility of the redundancy, in a situation where consultation is expected. The lack of consultation and the manner in which the notification of dismissal was implemented (a note on a bread order) means that none of the usual actions associated with the fair and reasonable treatment of employees in such situations were present.

Given the inherent unfairness in the determination and implementation of the redundancy it can not be said that the redundancy was genuine. I find that the dismissal of Mr Kim by reason of redundancy to be unjustified.

Remedies

[36] Mr Kim has been successful in one of his two claims against Millennium Limited and is entitled to remedies for that claim.

Lost wages

Initially Mr Kim told the Authority he did not undertake any paid employment following his dismissal because Mr Park had notified immigration that he had been dismissed and immigration had revoked his work permit. However, that evidence changed and it became apparent Mr Kim had undertaken paid employment, whether legally or otherwise. Mr Kim says he earned \$125.00 during the period from June 2006 until the date of the investigation meeting. I have found Mr Kim's evidence generally to be unreliable. During the course of the investigation meeting his evidence changed significantly, on a number of occasions when challenged with contrary evidence.

[37] The applicant submitted he should receive payment for the lost wages at the rate of \$30,000 per annum. In making this submission the applicant seeks to rely on the agreement I have determined to be a sham. For obvious reasons I do not accept this submission.

[38] The applicant has the obligation in the first instance to mitigate his lost income following a dismissal. In this case I am not satisfied Mr Kim has met this obligation, however, given his evidence that Mr Park took steps to have his work permit revoked (which was not denied by Mr Park) I am inclined to award Mr Kim three months lost remuneration based on his hourly rate of \$9.00 per hour. However, I am not satisfied with the evidence from either party on the hours Mr Kim actually worked throughout his employment. As I have already noted the

information contained within the wages and time records provided to the Authority is dubious. I am therefore unable to calculate and determine the amount of wages lost as a result of the dismissal.

The parties are directed to mediation to resolve this issue. If they are unable to resolve it then I reserve leave for the parties to return to the Authority at which time I would expect the parties to provide clearer and better evidence as to the actual loss incurred.

Compensation

[39] Mr Kim gave unequivocal evidence of the embarrassment and humiliation he suffered as a result of his dismissal. The embarrassment was exacerbated by the accusations Mr Park made about him and his wife to others in the community. The impact of the dismissal on Mr Kim is self evident in the letter he wrote to Mr Park following his discovery that Mr Park had investigated his qualifications. The letter demonstrates Mr Kim's distress and anger at the sudden loss of his job and work permit.

Millennium Limited is ordered to pay to Mr Kim \$3,000 pursuant to section 123(1)(c) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Contribution

[40] Mr Kim did not contribute to the circumstances that gave rise to his personal grievance.

Costs

[41] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority