

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 327/10
5159114**

BETWEEN HAE LEE
 Applicant

AND HYOUNGRO YOON AND
 JIYEUN KIM
 Respondents

Member of Authority: R A Monaghan

Representatives: A Vujnovich, counsel for applicant
 E Kuo, counsel for respondents

Investigation Meeting: 25 June 2010

Further submissions
provided: 8 and 15 July 2010

Determination: 23 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hae Lee says her former employers, Hyoungro Yoon and Jiyeun Kim, dismissed her unjustifiably. Mrs Lee also seeks payment of unpaid wages and holiday pay.

[2] Mr Yoon and Ms Kim say there was no dismissal.

Background

[3] In June 2007 Mr Yoon and Ms Kim purchased a 'Gold Coin' retail outlet. Mrs Lee was already working in the store, and her employment continued when Mr Yoon and Ms Kim purchased the business. Mrs Lee was the sole full time sales employee, with Mr Yoon assisting with sales although focussing on supplier

relationships and Ms Kim providing administrative support. Ms Kim also spent time at and took responsibility for a separate motel business the couple operated, and which was located a short distance from the Gold Coin shop.

[4] Mrs Lee's weekday hours of work were from 9 am to 5 pm, or 5.30 pm on Thursday and Friday. On Saturdays she worked from 9 am to 5 pm and on Sundays she worked from 10 am to 3 pm. Every second Sunday was a day off and was treated as a paid holiday. Her rate of pay was \$12 per hour.

[5] The employment relationship proceeded relatively uneventfully except that in May 2008 Mrs Lee's work permit expired and in September 2008 her family's application for permanent residence was declined. Mrs Lee was obliged to obtain a visitor's permit, so that during the second half of 2008 she did not hold a work permit although she continued to work at the Gold Coin shop and was paid. She was also experiencing marital difficulties, and this was known to Mr Yoon and Ms Kim.

[6] During her attempts to secure the legal right to work in New Zealand on her own account rather than as the partner of a worker Mrs Lee was introduced to an immigration consultant named Kimberly Kim, who was also a friend of Mr Yoon and Jiyeun Kim's. Mrs Lee met with Kimberly Kim in November 2008. Kimberly Kim advised Mrs Lee that her best option was to apply for a work permit, but that her chance of success was limited in that she may not meet criteria regarding skills and experience. Another alternative was to seek a long term business visa, but that would require the purchase of a share in a business.

[7] Mrs Lee's primary aim was to obtain permanent residence, and there was some confusion over precisely what was required to qualify for this. There also appeared to be some confusion over whether there was a link between obtaining a long term business visa, and permanent residence.

[8] However Mrs Lee applied for a work permit on the ground that she was employed as a retail manager by the partnership of Mr Yoon and Jiyeun Kim. With the support of Mr Yoon, in December 2008 Mrs Lee was successful in obtaining the work permit.

[9] Mrs Lee was working in the Gold Coin shop on 30 January 2009 when her husband made a number of phone calls to the shop. Mrs Lee did not wish to take the calls so Jiyeun Kim, who was present at the time, answered them. Jiyeun Kim was so concerned about the calls that she telephoned Mr Yoon (who was at home) and asked him to come to the shop. Jiyeun Kim was also concerned because a person named Gary Denny, with whom she and her husband believed Mrs Lee had conducted an extra-marital affair, was also attempting to contact Mrs Lee.

[10] When Mr Yoon arrived at the shop he asked Mrs Lee not to bring her personal problems to work, and enquired why Mr Denny was telephoning her since Mr Yoon understood the extra-marital affair was over.

[11] Mrs Lee did not reply. She explained to the Authority, but not to Mr Yoon at the time, that she did not know why Mr Denny was calling her on 30 January. She also considered Mr Denny to be a friend of hers and a supplier to the shop, and said at the investigation meeting that from time to time he would contact her to ask whether she was interested in products he held in his warehouse. I observe that purchasing was not part of Mrs Lee's role, rather it was part of Mr Yoon's. Mr Yoon said goods had been purchased from Mr Denny once in June 2008, with his permission and on Mrs Lee's recommendation. He did not consider Mr Denny to be a supplier.

[12] Mr Yoon's evidence was that Mrs Lee went on to say she needed permanent residence, and that she wanted a 50% share of the Gold Coin business for free or else she would open a competing business with Mr Denny. Mr Yoon expressed his shock and disappointment that such a demand was being made, especially after all the assistance his family had provided to her. Mrs Lee told him she had no choice as she needed permanent residence. She threatened to leave, to which Mr Yoon replied by saying he could not trust her any more.

[13] In her oral evidence Mrs Lee's account was that, after asking why Mr Denny was calling, Mr Yoon went on to say that he could not trust Mrs Lee if Mr Denny kept phoning her. Mrs Lee knew that meant she was going to be fired. She said she begged to stay at the shop, but Mr Yoon said no. She also said that Mr Yoon asked her what she would give him if he gave her half of the business, and she replied she had nothing to give.

[14] Accordingly it is at least clear there was a discussion about Mrs Lee's obtaining a share in the business, and that Mrs Lee would not be able to pay for the share. I would not go as far as to say Mrs Lee demanded a share of the business 'for free', rather that was the effect of her inability to pay. Otherwise there is a dispute over who raised the matter, and in what context.

[15] I address the dispute by turning first to another aspect of the conversation.

[16] Mrs Lee denied that she threatened to open a competing business with Mr Denny. However she also said in evidence that she wanted the safety she believed a permanent residence visa would give her, and that a work permit alone was not sufficient. The matter was very important to her. She had already been making enquiries of other immigration consultants about obtaining permanent residence. Further Kimberly Kim gave evidence, which Mrs Lee did not deny, that when Mrs Lee visited her office on or about 2 February to uplift her passport and file there was a discussion about Mrs Lee setting up business with Mr Denny.

[17] Next I take into account that, after Mrs Lee left the store that day and began to walk home, she telephoned Mr Denny who then came to collect her. At the least, Mr Denny was more to her than someone she knew as a supplier to the Gold Coin shop.

[18] In all of the circumstances, and particularly in the light of the increasing heat in the conversation on 30 January, the importance to Mrs Lee of obtaining permanent residence, her wish for more than just a work permit, and her association with Mr Denny (whatever its nature), I consider it likely that Mrs Lee threatened to leave and set up a business with Mr Denny. Since that threat must have been prompted by something, I consider it likely to have been prompted by confirmation that she would not be able to obtain a share in the Gold Coin business.

[19] A further area of conflict in the evidence concerned Mrs Lee's statement that she begged to be able to stay at Gold Coin. Mr Yoon said she offered to work until he found another staff member, and he responded that was up to her. In the light of the findings just set out, I prefer Mr Yoon's account as the more likely.

[20] It was common ground that Mr Yoon then went to speak to his wife at the counter. Mrs Lee said she thought about what to do. Since she believed she had already been dismissed, she could not stay. She walked up to the counter, and when Mr Yoon asked if she was going she said 'yes'. She gave him the keys to the shop and left.

[21] Mr Yoon said Mrs Lee was a valued worker and he did not want her to leave. If she had apologised he would have taken her back, and he sought to convey this to her through a friend for whom her husband had worked. For her part Mrs Lee said that when she visited Kimberly Kim on or about 2 February, Ms Kim was already aware something had happened and suggested she apologise. Mr Yoon's offer was also conveyed in a letter dated 3 March. Mrs Lee was unaware of either of Mr Yoon's approaches, but said that by 3 March too much time had passed and she would have declined the offer had she known of it.

[22] Mrs Lee did pursue a form of business association with Mr Denny. Mr Denny and a partner were the directors and shareholders in a company named Thai Treasures 2008 Limited (TTL). The company was planning to open a shop a few doors down from Gold Coin, although from the account of the products now sold at the TTL shop I doubt the shop can accurately be described as a competitor of Gold Coin's.

[23] An application was made to the New Zealand Immigration Service in early March 2009 to vary Mrs Lee's work permit to allow her to work for TTL. The application was approved in May 2009, at about the time when the TTL shop opened for business. Mrs Lee has worked there on a full time basis since.

Whether there was a dismissal

[24] On the facts as I have found them Mrs Lee walked out of the Gold Coin shop after an argument with Mr Yoon about her obtaining a share in the business, and a threat to open a competing business with Mr Denny. Mr Yoon's voicing of concern about whether he could trust Mrs Lee was a reasonable reaction to the way Mrs Lee was conducting herself.

[25] I find further that Mrs Lee's was the repudiatory conduct. I might have accepted that she made the threats she did because of fears about her immigration status rather than any real wish to end her employment there and then, except that she moved promptly to further the possibility of a business association with Mr Denny and I did not find persuasive her reasons for not responding to Mr Yoon's overtures regarding her return to work. Even if the argument on 30 January began as a misunderstanding, that it led to Mrs Lee's leaving the shop and pursuing alternatives as she did is a state of affairs for which she had the primary responsibility.

[26] For these reasons I find that the initiative for the termination of Mrs Lee's employment was hers. There was no dismissal.

Wages and holiday pay

1. Wages

[27] Mrs Lee seeks payment of unpaid wages as follows:

- a. \$5,661 (gross) being unpaid time worked daily past 5 pm calculated as [581 days of employment + 48 days post employment] x [.75 hr x \$12]; and
- b. \$3,325 being overtime worked on Sundays and not paid for at the rate of T 1½, calculated as [83 weeks of employment + 12 weeks post dismissal] x \$35 per Sunday.

[28] Regarding the claim for time worked past 5 pm Mrs Lee asserted that she was paid as if she finished work at 5 pm, but although the shop closed at that time some duties remained for her to perform and it was not the time when she finished work. I would accept that could be the case but I do not accept Mrs Lee's estimate that the extra time amounted to 30 – 60 minutes every day or that she is entitled to claim an extra 45 minutes (or .75 hr) per day as a result. Nor, since I have found there was no dismissal, do I take into account the claim in respect of the post-dismissal period.

[29] In addition Jiyeun Kim produced a record of hours of work which she maintained during Mrs Lee's employment. The record was made available to Mrs Lee to allow her to properly quantify her claim.

[30] When Ms Kim was not present in the shop to record Mrs Lee's hours she relied on information about hours which Mrs Lee conveyed to her by telephone. She assumed that the time at which Mrs Lee called her at the end of the day was also the time of Mrs Lee's departure. Mrs Lee may not actually have left there and then.

[31] However this is not sufficient to satisfy me that Mrs Lee is entitled to additional payments of .75 hours for every day on which she worked. Not only was any short payment the result of her failure to provide accurate details, but the allegation was very broadly-stated and I do not accept that the short-payments alleged actually occurred as alleged. Moreover the record indicates a number of occasions on which Mrs Lee left work early, or started late, and Mrs Lee accepted that this occurred. Her claim would have been more credible if it had contained appropriate acknowledgements of these occasions, and had not over-stated the frequency or likely length of time required to perform any duties remaining after she telephoned Ms Kim. As matters stand I am not satisfied that any grounds for payment have been made out.

[32] For the above reasons I do not accept this claim.

[33] Further to the claim for overtime payments for Sunday work, there was no written employment agreement between the parties. Mrs Lee says that she was entitled to payment at T 1½ for Sundays because that was a term of the agreement she had with the previous owners of the shop. She said her terms and conditions remained the same when she transferred to the employ of Mr Yoon and Ms Kim.

[34] Mr Yoon and Ms Kim had not turned their minds to the matter at the time and they also failed to meet their obligation to provide Mrs Lee with a written employment agreement when they employed her. Although a standard form of employment agreement was made available by an immigration consultant much later and for the purposes of Mrs Lee's application for a work permit, it did not accurately record many of the terms of employment under which the parties had been working. Nor was the copy filed in the Authority signed by anyone.

[35] I therefore accept that the terms and conditions of Mrs Lee's employment with her former employer were preserved when the business was purchased by Mr Yoon and Ms Kim. She should have been paid at T 1½ on Sundays.

[36] If there were 83 Sundays during the employment period, Mrs Lee did not work on all of them. By my count of the detailed record rather than the summary provided there were 21 Sundays on which Mrs Lee did not work, leaving 62 Sundays. As Sunday work was 5 hours per day, the calculation of wages owed is 5 hours x (\$12 x .5) x 62 Sundays = \$1,860.

[37] Payment is ordered accordingly.

2. Holiday pay

[38] Beyond Mrs Lee's allegation that she was required to work as slave labour, neither party addressed the lack of any regular unpaid time off work in the parties' hours of work arrangements. No claim was made and no remedy sought directly in respect of the matter. It is now many years since New Zealand had express statutory restrictions on the number of hours or days that can be worked in a week, but although small-business owners in particular may work 7-day weeks they may run into difficulty if they expect their employees to do the same.

[39] Here at least the hours of work were agreed. The Minimum Wage Act 1983, which permits the fixing of hours of work at more than 40 per week by agreement,¹ was not breached as Mrs Lee was paid at the minimum rates in force at the time. In the absence of any argument on the matter I take it no further.

A. Public holidays

[40] There were 16 public holidays during the period of Mrs Lee's employment. Mrs Lee has quantified her claim for payment in respect of them as \$2,520 (gross).

[41] Ms Kim's record of hours worked shows that Mrs Lee worked on all of the public holidays except Christmas Day 2007, and New Year's Day, 2 January and

¹ s 11B(2)

Good Friday 2008². All of the holidays were days on which she would otherwise have worked. She was paid correctly at her ordinary hourly rate for the Christmas and New Year's Day holidays on which she did not work, but was not paid for the 2 January and Good Friday holidays on which she did not work.

[42] The calculation in respect of public holiday pay is:

| | |
|---|----------------|
| . payment for 2 public holidays not worked and not paid for 8 hours x \$12 x 2 | \$ 192 |
| . payment for 12 public holidays worked but not paid for at T 1½ 12 days x 8 hours x [.5 x \$12] | \$ 576 |
| . payment in respect of alternative holidays not taken 12 days x 8 hours x \$12 | \$1,152 |
| TOTAL | \$1,920 |

[43] Payment is ordered accordingly.

B. Annual leave

[44] Mrs Lee sought the payment of unpaid annual leave calculated as 8% of a further calculation which amounted to an assessment of total earnings during the full period of employment plus a post-dismissal period. The sum so calculated came to \$5,673.60 (gross).

[45] The Holidays Act 2003 sets out the scheme for calculating payment for annual leave. Both parties' calculations should have followed it. At its most fundamental the scheme is that after the end of the first year of her employment Mrs Lee was entitled to not less than 4 weeks paid annual holidays,³ calculated with reference to her average weekly earnings for that 12-month period.⁴ For the next part year of her

² I record that Mrs Lee did not work on Easter Sunday 2008, and although provisions regarding shop trading hours apply to Easter Sunday it is not a public holiday.

³ Holidays Act s 16

⁴ s 21(2)

employment Mrs Lee was entitled to 8% of her gross earnings since she last became entitled to annual holidays, less any amount paid for holidays taken in advance.⁵

[46] During the first 12 months of her employment Mrs Lee received 13 paid Sundays off. The days off were paid for at $[13 \times 5 \times \$12] = \780 . The equivalent daily rate is \$60.

[47] Mrs Lee's average weekly earnings for that 12-month period were \$639. Her average ordinary daily earnings were \$91.30. She should have been paid at that rate for her time off, so that there was a shortfall of $13 \times [\$91.30 - \$60] = \$406.90$.

[48] The total amount of leave underpaid in the first year of employment is \$406.90.

[49] During the second part year of her employment Mrs Lee received 5 paid Sundays off and one other paid day off. The days were paid for at $[5 \times 5 \times \$12] + 8 \times \$12 = \$396$. She had an outstanding entitlement to seven days' annual leave, calculated as $7 \times \$91.30 = \639.10 . The difference is \$243.10.

[50] Her total gross earnings for that part year were \$16,367. She is owed a further $[\$16,367 \times 8\%] + \$243.10 = \$1,552.46$.

[51] The total owed in respect of unpaid annual leave is $\$406.90 + \$1,552.46 = \$1,959.36$.

[52] Payment is ordered accordingly.

Orders for payment

[53] Mr Yoon and Jiyeun Kim are jointly and severally ordered to pay to Mrs Lee:

- a. \$1,860 (gross) as unpaid wages;
- b. \$1,920 (gross) as unpaid public holiday pay; and
- c. \$1,959.36 (gross) as unpaid holiday pay.

⁵ s 25(2)

[54] There was one week for which Mrs Lee was paid twice in error. The overpayment is \$648 (gross), and may be deducted from the sum owed to Mrs Lee.

[55] Interest is to be paid on the amount remaining at the rate of 3.25% calculated from 30 January 2009 to the date of payment.

[56] Two other payments were made to Mrs Lee at or about the Christmas 2007 – 2008 period, but they were made as discretionary payments at the time and I do not make any further deduction in respect of them.

Request for order for payment by instalment

[57] Mr Yoon and Ms Kim accepted in submissions that they owe money to Mrs Lee, and asked that any order for payment allow for payments by instalment.

[58] Section 131(1A) of the Employment Relations Act 2000 permits such orders ‘only if the financial position of the employer requires it’. There was no evidence that was the case, and even if the information contained in submissions was to be treated as evidence I would not find it adequate to meet this test.

[59] There will be no order for payment by instalments, but leave is reserved to make an application under s 131(1A). If no application is made within 28 days of the date of this determination the reservation of leave will lapse.

Costs

[60] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority