

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 345
3034480

BETWEEN JAEHYEOK MOON
Applicant

AND KHARTOUM PLACE CAFÉ
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Roland Samuels for Applicant
Xiaolin Mo for Respondent

Investigation Meeting: 8 November 2018

Oral Determination: 8 November 2018

Record of Oral Determination: 9 November 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Mr Moon was unjustifiably dismissed.**
- B. Khartoum Place Café Limited is ordered to pay to Mr Moon the following sums within 14 days of the date of this determination:**
- a) **\$2,561.60 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000; and**
- b) **\$7,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**

C. Khartoum Place Café Limited is ordered to pay arrears of wages for unpaid holiday pay of \$236.03 gross under s 131 of the Employment Relations Act 2000 within 14 days of the date of this determination.

D. Khartoum Place Café Limited is ordered to pay penalties of \$500 to Mr Moon within 14 days of the date of this determination.

Employment relationship problem

[1] Khartoum Place Café Limited (Gloria Jeans) owns and operates Gloria Jeans coffee house in Khartoum Place, Auckland city. Mr Moon is a Korean national and worked at Gloria Jeans under a working holiday visa.

[2] Mr Moon left New Zealand and returned to Korea on holiday in June 2018. He returned two weeks later in July 2018. When Mr Moon left to travel to Korea he expected he would return to his job at Gloria Jeans.

[3] While he was away Mr Moon was alerted by other members of the staff that he would not be rostered on when he returned. He claims the failure to roster him on was a dismissal and the dismissal was unjustified. Mr Moon also claims his employment was affected to his disadvantage, that he is owed arrears of wages and has asked the Authority to impose penalties on Gloria Jeans.

[4] Gloria Jeans denies the claims and says Mr Moon did not seek the requisite approvals before travelling and he had no right to return to his employment.

Issues

[5] In order to resolve Mr Moon's employment relationship problems I must determine the following issues:

- a) Was Mr Moon unjustifiably disadvantaged in his employment and if so what, if any remedies should be awarded?
- b) Was Mr Moon unjustifiably dismissed from his employment and if so what if any remedies should be awarded?

c) Is Mr Moon owed any arrears of wages?

d) Should the Authority impose penalties on Gloria Jeans?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Disadvantage grievance

[7] Mr Moon says one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Gloria Jeans. In particular Mr Moon says that the failure to provide a written employment agreement, being paid in cash for the first seven weeks with no tax remitted to the Inland Revenue under his name and the lack of any communication from Gloria Jeans about his employment were all actions leading to his disadvantage.

Written employment agreements

[8] It was common ground that Mr Moon was never provided with a written employment agreement. Mr Xiaolin Mo, Managing Director says that at the time Mr Moon was employed he was distracted with personal issues and did not provide a written agreement to Mr Moon. He says all other staff received a written agreement. I have not accepted Mr Mo's evidence as being credible. Three witnesses gave evidence in support of Mr Moon's application and not one of the three had a written employment agreement.

[9] Mr Moon's employment or one or more conditions were affected to his disadvantage by not having a written employment agreement. Had he had a written agreement it is possible the rules around how leave was approved would have been clear. The failure of Gloria Jeans to have a written employment agreement in place cannot be justified and was not the action an employer acting fairly and reasonably could take in all the circumstances.

Payment of wages in cash

[10] Mr Moon says that by receiving the payment of wages in cash for the first seven weeks of his employment led to one or more conditions of employment being affected to his disadvantage. I do not agree. Section 7 of the Wages Protection Act 1983 requires wages to be paid in money only. Through an express agreement, such as through the written employment agreement an employee may agree to payment of wages by another method. However, that did not happen in this case because there was no written employment agreement.

Failure to declare tax

[11] Mr Moon wished to claim a refund on tax paid. When he checked with the Inland Revenue he discovered the payments of his wages for the first seven weeks of his employment had not been accounted for to the Inland Revenue. No PAYE had been remitted on his behalf.

[12] On 15 October I directed Gloria Jeans to lodge with the Authority a copy of Mr Moon's wages and time records. No wages and time records have been produced.

[13] Mr Moon has maintained his own records which show that for the first seven weeks he was paid at the rate of \$14 per hour for each hour worked without deduction. The minimum wage rate applicable during this seven week period was \$15.75. Gloria Jeans denies it only paid Mr Moon \$14 per hour.

[14] I have looked at the information provided by Mr Moon. On balance it is more likely than not that he was paid less than the minimum wage and that tax was not deducted.

[15] Mr Moon has recorded that he worked 22.5 hours in his first week. He received a payment of \$315 cash which equates to the rate of \$14 per hour. If Mr Moon had been paid correctly his gross earnings would have been 354.38 with a tax deduction of 48.09 leaving the sum of 306.29.

[16] For his second week of work Mr Moon records that he completed 28.5 hours work and was paid \$399.00 which again equates to the rate of \$14 per hour. If Mr Moon had been paid correctly his gross earnings would have been \$448.87 with a tax deduction of 65.94 leaving the sum of 382.93.

[17] I have made my calculations using the Inland Revenue's online PAYE calculator.

[18] If Gloria Jeans had calculated Mr Moon's pay correctly then it has overpaid Mr Moon in each of the two examples above. There has been no explanation from Gloria Jeans as to why no tax has been remitted to the Inland Revenue under Mr Moon's name. Mr Moon confirmed at the investigation meeting that he had provided Gloria Jeans with his IRD number.

[19] I am not satisfied the failure to declare tax deducted from wages has affected Mr Moon during his employment, it has certainly had an impact on him after his employment which is when he discovered the problem.

[20] The way Mr Moon's pay has been calculated and paid during the first seven weeks of his employment is concerning. I have directed that a copy of my determination be sent to the Labour Inspectorate of the Ministry of Business Innovation and Employment for their records.

Lack of communication regarding employment

[21] Mr Moon says that during his time in Korea he was advised by other employees that he did not have a job to return to and received no communication from Gloria Jeans about his ongoing employment.

[22] Mr Mo was critical of Mr Moon for not communicating with him directly about his leave and told me all employees know that if they want to take time off they had to seek his approval directly. That is not the evidence of at least one of the witnesses giving evidence in support of Mr Moon. That witness told me that he himself took three weeks off to travel and that he was granted permission to take the time off by Mr He and did not have to get permission from Mr Mo.

[23] The lack of communication from Gloria Jeans about Mr Moon's employment before or during his leave resulted in one or more conditions of his employment being affected to his disadvantage.

[24] The Act recognises the imbalance of power in the employment relationship. This imbalance is exacerbated where both parties to the relationship speak different

languages with little English and where the employee is subject to visas to allow them to work.

[25] It was incumbent on Gloria Jeans to be clear with Mr Moon about who could approve leave and how that approval process worked. If it was not intended to keep Mr Moon's job open for him on his return that needed to have been made clear to him at the outset. The actions of Gloria Jeans in not communicating clearly with Mr Moon are not the actions an employer acting fairly and reasonably could take in all the circumstances.

Unjustified dismissal

[26] Mr Moon says the employment relationship was proceeding well until he left to travel back to Korea for a wedding. Mr Moon told me he discussed his leave with Mr He and was told it would be okay. When Mr Moon returned and enquired about why he was not on the roster he was told there were enough staff and that his services were no longer required.

[27] Mr He told me Mr Moon did ask for an assurance of a job on his return but says he told Mr Moon that he did not have the Authority to make this decision and referred him to the owner, Mr Mo. Mr Moon denies this. Three witnesses giving evidence in support of Mr Moon's claims told me they were aware of Mr Moon's impending leave and of his expectation that he would be returning.

[28] One of the witnesses was present when Mr Moon requested the leave and confirms Mr He agreed Mr Moon could take the time off and that it would be okay when he returned. This evidence is consistent with other evidence I heard that at least four other employees took leave for a similar period and all four of these employees returned to their jobs. It is also consistent with evidence from one of the witnesses that he also took a period of leave and it was approved by Mr He with no reference to Mr Mo.

[29] Through its actions of not making work available for Mr Moon on his return from Korea Gloria Jeans dismissed him.

[30] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

whether Gloria Jeans actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[31] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, Gloria Jeans sufficiently raised its concerns with Mr Moon, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[32] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Moon being treated unfairly.¹ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[33] It was common ground that Mr Moon was not paid his holiday pay when he left on his travels. I find that unusual. If it was not intended that Mr Moon return to his work at Gloria Jeans following his leave then his holiday pay would have been paid out at the time he left.

[34] Gloria Jeans has not met any of the mandatory considerations set out in s 103A(3) of the Act. Gloria Jeans had not raised any concerns with Mr Moon about his impending travels prior to him leaving and then failed to communicate with him while he was away to clarify that he would not have a job on his return. It was common knowledge among the other staff at the café that Mr Moon was intending to return to his job. This is consistent with the evidence of both Mr He and Mr Mo who both confirmed that Mr Moon had not resigned from his employment prior to him leaving on his travels to Korea. The defects on the part of Gloria Jeans were not minor and resulted in Mr Moon being treated unfairly.

[35] The actions of Gloria Jeans and how it acted were not the actions an employer acting fairly and reasonably could take. Mr Moon's dismissal was unjustified and he is entitled to remedies.

¹ Employment Relations Act 2000 (the Act), s 103A(5).

Remedies

[36] I have found one or more terms and conditions of Mr Moon's employment were affected to his disadvantage by not having a written employment agreement and due to Gloria Jeans failure to communicate with him while he was away from work. I have also found that he was unjustifiably dismissed.

[37] Mr Moon seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings to resolve his personal grievances. I have taken a global approach to the remedy for compensation given that the actions of Gloria Jeans overlap between both personal grievances.

[38] The lost wages has not been quantified by Mr Moon. In that case I have calculated Mr Moon's average weekly earnings for the period 2 April to 24 June 2018 inclusive. During this period of time Mr Moon was paid correctly including relevant deductions for PAYE. Also, the minimum wage increased on 1 April to \$16.50 and this is correctly factored into the wages paid to Mr Moon.

[39] Mr Moon's average weekly earnings amount to \$640.40 gross. Mr Moon told me he was out of work for four weeks. His lost wages therefore totals \$2,561.60.

[40] There was little evidence of the impact the dismissal had on Mr Moon. One of the witnesses gave evidence of the stress he witnessed in Mr Moon after he had returned to New Zealand and before he had secured alternative employment. Mr Moon told me he was unable to meet his financial obligations and had to borrow money to pay his rent. In all the circumstances of this case an appropriate award under s 123(1)(c)(i) is \$7,000.

[41] Khartoum Place Café Limited is ordered to pay to Mr Moon the following sums within 14 days of the date of this determination:

- c) \$2,561.60 gross being reimbursement of lost wages under s 123(1)(b) of the Act; and
- d) \$7,000 compensation under s 123(1)(c)(i) of the Act.

Arrears of wages

[42] Mr Moon claims unpaid holiday pay. While some holiday pay has been paid Mr Moon says Gloria Jeans did not take into account the seven weeks paid in cash from the start of his employment and claims a further \$236.03 is owed to him.

[43] Gloria Jeans has failed to provide Mr Moon's wages and time records despite a direction to do so. In this case s 132(2) of the Act applies and I have accepted as proven Mr Moon's claim.

[44] Khartoum Place Café Limited is ordered to pay arrears of wages for unpaid holiday pay of \$236.03 gross under s 131 of the Act within 14 days of the date of this determination.

Penalties

[45] Mr Moon claims penalties for breaches of good faith. The alleged breaches include the failure to provide a written employment agreement, failure to remit PAYE on his behalf and failure to pay holiday pay when it was due. I find the failure to remit PAYE is a breach of good faith in that it was not constructive in maintaining a productive employment relationship and is serious and sustained.

[46] The alleged breaches relating to the failure to provide a written employment agreement and the failure to pay holiday pay when it was due are more properly dealt with under s 65 of the Act and s 75 of the Holidays Act 2003. That is not how these claims have been pleaded and the respondent is not on notice that three separate penalty actions are being claimed. I have declined to impose any penalties for these breaches.

[47] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach.

[48] The Court in *Borsboom v Preet Pvt Limited & Ors* established a series of steps which the Authority must take into account when considering the imposition of penalties.²

[49] I find there was one breach for which the maximum penalty amounts to \$20,000.

[50] The impact of the breach on Mr Moon was not insignificant. The failure to remit Mr Moon's PAYE has become a serious impediment to him claiming any tax refund due to him.

[51] I have no evidence of the ability of Gloria Jeans ability to pay a penalty. Taking into account aggravating and ameliorating factors, and proportionality of the outcome I find an appropriate penalty in the circumstances for the breach of good faith to be \$500. The penalty is to be paid to Mr Moon.

[52] Khartoum Place Café Limited is ordered to pay penalties of \$500 to Mr Moon within 14 days of the date of this determination.

Costs

[53] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Moon shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Gloria Jeans shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[54] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority

² *Borsboom v Preet Pvt Limited & Ors* [2016] NZEmpC 132 at [137] – [151].