

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA AUCKLAND 135
5373717**

BETWEEN TAE SUB SHIN
Applicant

AND TAEHA NEW ZEALAND
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Soon Deuk Kim, Advocate for Respondent

Investigation Meeting: 9 April 2013 at Auckland

Determination: 19 April 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Tae Sub Shin, claims that he was unjustifiably dismissed by the Respondent, Taeha New Zealand Limited (Taeha), after he returned to New Zealand following a protracted overseas visit.

[2] Taeha denies that Mr Shin was unjustifiably dismissed and claims that the termination of his employment was a mutual decision reached following negotiation between the parties.

Issues

[3] The issue for determination is whether Mr Shin has been unjustifiably dismissed.

Background Facts

[4] Taeha owns and operates two restaurants in Auckland, one on the North Shore and one in Howick. Mr Shin was offered and accepted employment as a Chef at the North Shore restaurant, and commenced work with Taeha on or about June 2009

[5] Mr Shin said that there had been an agreement that he would work 35 hours per week and be remunerated at the annual rate of \$45,000.00; however from the outset of his employment his working hours had actually been 66 hours per week worked over 6 days, and his weekly wage rate had been \$800.00 net paid in cash.

[6] Ms Soon Duek Kim, sole Director of Taeha, explained that she and her husband, who at that time had been the Chef and Manager at the Howick restaurant, had agreed to sign an employment agreement drawn up by Mr Shin for the purposes of his obtaining a permanent residency visa through the New Zealand Immigration Service.

[7] Ms Kim said that the employment agreement had stipulated terms of employment which included a working week of 35 hours and annual remuneration of \$45,000.00, but that these had been set out by Mr Shin to meet the Immigration requirements for obtaining a permanent residency visa.

[8] Ms Kim said that it had been agreed by Mr Shin that he would work actual hours of 66 per week at a weekly wage of \$800.00.

[9] I accept, having considered the representations of the parties and the fact that Mr Shin had worked 66 hours per week and been paid \$800.00 per week until his departure for Korea on 23 January 2011 without his having raised a personal grievance in connection with these terms of employment, that these were the actual terms which had been agreed by the parties.

[10] In January 2011 Mr Shin said that he had applied for a two month period of leave to return to Korea for medical reasons. Ms Kim agreed that she had granted approval for the trip to Korea.

[11] Mr Shin, who said that he had not received any statutory annual holiday entitlement apart from an annual break from 1 to 4 January each year, said that the period of leave had been unpaid.

[12] Ms Kim said that Mr Shin had taken two days paid leave during the period of his employment when his parents had visited New Zealand, and further stated that Taeha had paid Mr Shin one week of holiday entitlement when he had commenced the leave period.

[13] Mr Shin explained that he had had to extend the period he was in Korea due to his wife developing a serious medical condition. Mr Shin said that he had spoken to Ms Kim's husband, who had agreed to the extended period of leave after the two month period.

[14] Ms Kim said that Mr Shin had not maintained contact with Taeha during his absence in Korea. Ms Kim said that she and her husband had struggled to run the two restaurants during Mr Shin's continued absence and she had made several efforts to contact Mr Shin after the two month period to ascertain his return date, however she had not been able to speak to him nor did he return her calls.

[15] Mr Shin said he had returned to New Zealand following a telephone call from Taeha.

[16] Ms Kim said Mr Shin had contacted her husband two days before he returned to New Zealand, however she had understood that Mr Shin's return had been primarily connected with Immigration requirements in connection with his permit residency visa rather than to return to his employment at Taeha.

[17] Mr Shin said that he had worked a total of eight days at the North Shore restaurant, however he had then been asked to relocate to the Howick restaurant. Mr Shin said that he had rejected this proposal on the basis that his wife did not want to live in Howick.

[18] Mr Shin said his employment had been terminated with immediate effect by Taeha on 11 June 2011. Mr Shin said he had been offered two weeks' wages in lieu of notice, however he had not been paid this sum, nor had he been paid for the eight days he had worked following his return to New Zealand.

[19] Ms Kim explained that during Mr Shin's period of leave in Korea, her husband had been working as the Chef at the North Shore restaurant and had wished to remain at that location. Following his return to New Zealand and his employment at Taeha, Ms Kim said Mr Shin had been offered the position of Chef at the Howick restaurant.

[20] Ms Shin said that as a result, there had been negotiations between the parties, however as Mr Shin refused to go to Howick, she and her husband had informed him that they could no longer work with him, and Mr Shin's employment had been terminated.

The Law

[21] Mr Shin was dismissed on 11 June 2011. The statutory test of Justification is set out in s 103A of the Employment Relations Act 2000 (the Act) which states::

S103A Test of Justification

- i. 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 applying the test in subsection (2).*

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- iii. *In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- iv. *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- v. *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

Determination

[22] The Test of Justification requires that the employer had acted in a manner that was substantively and procedurally fair.

[23] I appreciate that Mr Shin's prolonged period of absence placed a strain on what was a small business, however Taeha, having accepted and approved the initial two month period of absence, there was a reasonable expectation on Mr Shin's part that he would return to work at the North Shore restaurant at the end of that period.

[24] Although the period of absence had been extended beyond what had been originally agreed, I find that there had been tacit approval on the part of Taeha to Mr Shin extending the period of absence.

[25] Mr Shin returned to his original place of work at the North Shore restaurant as he was reasonably entitled to do, however Mr and Ms Kim wanted him to transfer to work at the Howick restaurant. I find that this represented a significant change in his working conditions, especially given that Mr Shin was at that time living on the North Shore.

[26] When Mr Shin said he did not want to relocate to Howick, Taeha had terminated his employment summarily.

[27] Taeha terminated Mr Shin's employment summarily. Summary dismissal is a severe measure and usually merited only in cases of serious misconduct. In this case there is no suggestion that Mr Shin was not performing satisfactorily, nor that he had committed any act of misconduct.

[28] I find that there were no substantive grounds for Taeha to have terminated Mr Shin's employment. I find that a fair and reasonable employer would not have terminated Mr Shin's employment summarily in the circumstances.

[29] Although there appeared to have been some degree of consultation between the parties, I am not convinced that Taeha entered into that consultation with an open mind as to the outcome following discussion with Mr Shin.

[30] I find that the termination of Mr Shin's employment to be without a substantive or procedural basis.

[31] I determine that Mr Shin has been unjustifiably dismissed.

Remedies

[32] Mr Shin has been unjustifiably dismissed and he is entitled to remedies.

Notice Period

[33] Mr Shin is entitled to a reasonable period of notice in the situation in which there is no employment agreement setting out notice period. Given the nature of Mr Shin's employment, and the offer of Taeha to pay two week's wages upon the termination of his employment, I consider two weeks to be reasonable notice.

[34] I order that Mr Shin is to be paid \$1,600.00 net in respect of the unpaid notice period.

Lost Wages

[35] Mr Shin was not paid for the 8 days he worked following his return to Taeha on 3 June 2011. Mr Shin is entitled to be paid for those 8 days.

[36] Mr Shin said that he had been unable to find suitable alternative employment following the termination of his employment with Taeha, but at the Investigation Meeting admitted when questioned that he had purchased a business on or about July 2011.

[37] I order that Mr Shin be paid the sum of \$1066.67 net in respect of the 8 days he worked from 3 June 2011.

[38] I order that Mr Shin be paid the sum of \$2,400.00 net in respect of lost wages for the period 11 June 2011 until 3 July 2011, less the two week's payment of \$1,600.00 net in lieu of notice, resulting in a net payment of \$800.00.

Annual Leave Entitlement

[39] Mr Shin is entitled to be paid for annual leave entitlement worked but not taken in the period 30 June 2009 to 23 January 2011. Mr Shin is entitled to be paid for annual leave entitlement calculated as 30 days, less:

- 4 days taken on 3 and 4 January 2010 and 2011;
- 2 days taken on the occasion of Mr Shin's parents' visit to New Zealand; and
- 6 days paid when Mr Shin went to Korea in January 2011.

[40] I order that Mr Shin be paid the sum of \$2,400.00 net in respect of annual leave entitlement worked but not taken in the period 30 June 2009 to 23 January 2011.

Statutory Public Holidays

[41] Mr Shin is entitled to be paid for statutory public holidays worked but not taken in the period 30 June 2009 to 23 January 2011 at the rate of time and a half of his hourly payment rate, in addition to a payment in respect of the alternative days entitlement which he did not receive, less 4 statutory public holidays taken on 1 and 2 January 2010 and 2011. This equates to a total equivalent of 30 days payment.

[42] I order that Mr Shin is to be paid the sum of \$4,000.00 in respect of statutory public holidays worked and not reimbursed during the period of his employment.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[43] Mr Shin is also entitled to compensation for humiliation and distress.

[44] I order that Mr Shin be paid the sum of \$3,000.00 in respect of humiliation and distress pursuant to s 123(1) (c) (i).

Contribution

[45] Mr Shin had been granted two months leave of absence to return to Korea, which I accept presented some problems in what was a small business. During that period of absence I accept the evidence of Ms Kim that Mr Shin had failed to maintain contact as regularly as could have expected of an employee once the two month period had expired.

[46] I find that Mr Shin had not exercised the good faith expected of an employee as set out in s 4(1A)(b) of the Act by being: *”active and constructive in establishing an employment relationship in which the parties are, among other things, responsive and communicative”*.

[47] I further find that Taeha had offered Mr Shin alternative employment as a Chef at the restaurant in Howick; however Mr Shin said he had chosen not to accept this on the basis that his wife wished to remain living on the North Shore.

[48] I note that the business which Mr Shin purchased shortly after the termination of his employment with Taeha is situated in Howick close to the restaurant owned by Taeha, which I find to cast some doubt on whether or not he negotiated in respect of the proposed change of his working location by Taeha in good faith and with an open mind.

[49] In these circumstances I find contribution on the part of Mr Shin, and reduce the amount ordered as compensation by 50%.

Summary

[50] The sums to be paid by Taeha to Mr Shin are:

- **\$1,600.00 net in respect of the unpaid notice period.**
- **\$1,066.67 in respect of the 8 days worked but not paid from 3 to 11 June 2011.**
- **\$800.00 net in respect of lost wages for the period 11 June 2011 until 3 July 2011**
- **\$2,400.00 net in respect of unpaid annual leave entitlement.**

- **\$4,000.00 net in respect of public holidays worked and not reimbursed in the period of his employment.**
- **\$1,500.00 in respect of humiliation and distress pursuant to s 123(1) (c) (i).**

Filing Fee

[51] Mr Shin is to be reimbursed the filing fee of \$71.56.

Costs

[52] While costs are reserved, I note here that, subject to his submissions, the Applicant was not legally represented and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority