

NOTE: An order for the payment of a penalty appears at p 7 of this determination

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Krittaphak Thanakornmanaporn (Applicant)
AND Boonyaphat Company Limited (Respondent)
REPRESENTATIVES Barry Leveson, advocate for Krittaphak Thanakornmanaporn
Kathryn Beck, counsel for Boonyaphat Company Limited
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 4 September 2006
SUBMISSIONS RECEIVED 2 and 11 October 2006
DATE OF DETERMINATION 8 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Boonyaphat Company Limited ("BCL") employed Krittaphak Thanakornmanaporn as a chef at the Wang Thai restaurant in Auckland. It recruited Mr Thanakornmanaporn in Thailand, and the visa allowing him to work in New Zealand was linked with his employment by BCL.

[2] The employment relationship ended in circumstances leading Mr Thanakornmanaporn to say he was unjustifiably dismissed, while BCL says he left his employment. Mr Thanakornmanaporn says he has a personal grievance. He also says he is owed unpaid wages.

[3] In addition the statement of problem sought penalties for unspecified 'breach of the [Employment Relations] Act and/or the contract of employment.' Vague claims of this kind are not helpful. At the commencement of the investigation meeting the advocate for Mr Thanakornmanaporn identified the relevant breaches as:

- (a) breach of the obligation to provide an opportunity to obtain advice when the employment relationship was entered into;
- (b) the payment of Mr Thanakornmanaporn's salary in Thai baht rather than in New Zealand dollars; and
- (c) deductions from Mr Thanakornmanaporn's salary payments in respect of accommodation, food and telephone accounts.

[4] I did not allow the claim in (a) to proceed on the ground that it had been raised outside the time limit in s 135 of the Employment Relations Act 2000. The claims in (b) and (c) proceeded. I also drew to the advocate's attention the provisions of the Wages Protection Act 1983.

Late filing of statements of evidence

[5] Both parties' statements of evidence were filed after their timetabled dates. Although the advocate for Mr Thanakornmanaporn pointed out the lateness of BCL's statements on the day after they were due, he did not seek an adjournment of the investigation meeting. BCL's statements were eventually filed on Friday 1 September 2006, with the investigation meeting scheduled to start at 10.00 am on Monday 4 September 2006.

[6] The start of the meeting was delayed so Mr Thanakornmanaporn and his advocate could read BCL's statements. Although the advocate complained about the late filing, he did not seek a full adjournment of the meeting. The advocate was to advise the Authority when he was ready to proceed. He did so. The meeting started at 1.00 pm.

[7] The advocate said in submissions that new more detailed information had been provided in the statements, although neither the information nor the associated prejudice he claimed was identified. Moreover the advocate had in any event advised the Authority he was ready to proceed. It is not appropriate for him to assert in submissions that he was not given enough time to confer.

The employment relationship

[8] The parties entered into a written employment agreement in December 2003, although Mr Thanakornmanaporn did not take up his duties in New Zealand until 6 May 2004. A provision of the agreement was:

"This contract is in effect for a two (2) year period from 25 February 2004. Subject to a valid work visa allowing the employee to work in New Zealand being obtained and held by the employee. The contract may be renewed by mutual agreement in writing subject to relevant work permit."

[9] There was also a provision headed 'other entitlements', which read in part:

"After successful completion of the two years contractual period, a further one-way ticket will be provided returning the employee to Bangkok International Airport. The employer guarantees repatriation."

[10] BCL recruited many of its staff in Thailand. It had a practice of holding these people's passports for safekeeping, and to safeguard against the possibility of an employee breaching the terms of a work visa and placing the company in a 'difficult position with the Immigration Department'. Passports would be returned if the holders needed them for purposes such as providing evidence of their identity. BCL would then take the passports back. That happened with Mr Thanakornmanaporn – BCL held his passport although on occasion it had been returned to him when he asked for it.

[11] Towards the end of 2005 Wang Thai's manager, Ms Phatraranee Phatraprasit, sought from Mr Thanakornmanaporn, and others recruited in Thailand at the same time as he was, an indication of whether they would seek a further term of employment on the expiry of their existing agreements. Mr Thanakornmanaporn indicated he would like to stay.

[12] By January 2006 he had changed his mind. He was considering travel to the USA. He advised Mrs Orawan Phatraprasit, a director and shareholder of BCL, of his interest in travel to the USA, and that he did not seek a further term of employment. It was common ground that he confirmed he would stay at the Wang Thai until his term of employment expired, being the date two years from his actual start date.

[13] On or about 5 March 2006 Mr Thanakornmanaporn advised Ms Phatraprasit that he had been offered a job at another restaurant in New Zealand. His evidence was that he still intended to complete the existing term of the employment agreement. Although he raised the offer of another job, he did not say to Ms Phatraprasit that he was leaving the Wang Thai early. There was a general discussion about the job being offered.

[14] Mr Thanakornmanaporn also asked for his passport. Ms Phatraprasit asked what he wanted it for, and he replied that it was for a driver's licence. Ms Phatraprasit did not believe

him. She was already aware of the offer of another job, and believed Mr Thanakornmanaporn wanted his passport because he planned to leave the Wang Thai immediately. According to Mr Thanakornmanaporn, Ms Phatraprasit told him she would give him the passport if he was telling the truth about his intentions.

[15] At the time the matter went no further. It was common ground that Ms Phatraprasit said she would speak to her father, another of the shareholders, and would see what she could do. For his part Mr Thanakornmanaporn was angry about not being given his passport, and I accept he was sulky and unco-operative at work.

[16] Mr Thanakornmanaporn's behaviour led Ms Phatraprasit to speak to him on 9 March. She asked him what was wrong, and told him his behaviour was unacceptable. Mr Thanakornmanaporn was still annoyed because he had not received a final answer about the return of his passport. However he did not explain that to Ms Phatraprasit. Instead he indicated he was unhappy and too many boundaries were placed on him. He said in evidence that his concern was with his access to his passport. Again there was no discussion of that at the time, rather he expressed his dissatisfaction in wider terms. Ms Phatraprasit told him that, if the two of them could not get along, he had a right to go. She also told him that, if he wanted to work or travel somewhere else, immigration requirements meant he would have to go back to Thailand and apply for the appropriate visa from there. BCL would pay for his flight from Auckland to Bangkok, as provided in the employment agreement.

[17] Ms Phatraprasit told me she knew Mr Thanakornmanaporn was annoyed about the passport. She said she did not know what to do, and asked Mr Thanakornmanaporn what he wanted to do. It was common ground that he said he would continue working at the Wang Thai and things would go back to normal.

[18] Ms Phatraprasit thought the discussion had cleared the air, but that was not the case. Mr Thanakornmanaporn still wanted his passport. Later that evening someone identifying himself as an immigration officer telephoned Ms Phatraprasit to advise that Mr Thanakornmanaporn's passport should be returned to him. That information was correct. Mr Thanakornmanaporn was entitled to have his passport regardless of the reasons for his request.

[19] Ms Phatraprasit then sought to speak to Mr Thanakornmanaporn again. She said in evidence she felt let down because she thought the matter of the passport had been resolved. She also told Mr Thanakornmanaporn he could have his passport if he wished, and he said he did. Her evidence, too, was that he "advised he really did want to leave and he agreed that, in that event, he would return to Thailand." When giving her oral evidence she was not sure, however, whether he made that statement before or after she returned the passport, and there was no suggestion the making of the statement was what prompted her to return the passport.

[20] Nevertheless, Ms Phatraprasit understood Mr Thanakornmanaporn to be saying he was leaving his employment. There was a further discussion about arrangements for a flight to Thailand in a few days.

[21] Ms Phatraprasit indicated she would not require Mr Thanakornmanaporn to report for work again, so he left and did not return. He did, however remain in New Zealand and now has alternative employment here.

Was there a dismissal

[22] I accept that, in the early part of 2006, Mr Thanakornmanaporn had lost motivation and probably interest in his job at the Wang Thai. He was making other plans. However in January 2006 he had confirmed his intention to complete the agreed term of employment. While his alternative plans might have developed further by early March 2006, he did not say to Ms Phatraprasit during the March discussions that those plans meant he would be leaving his employment early. Instead Ms Phatraprasit believed he intended to leave early, and in effect

saw the request for the return of his passport as confirmation of that belief. She did not have sufficient grounds for her conclusions.

[23] Both parties came to link the return of Mr Thanakornmanaporn's passport with the termination of his employment. The logic appears to be that, from Ms Phatraprasit's point of view, Mr Thanakornmanaporn had lost interest in his job, was planning to go elsewhere, and intended to do so before the expiry of the parties' employment agreement. He wanted his passport so he could address visa-related matters arising from a change of employer. His insistence on its return confirmed his wish to leave. Eventually he acknowledged that he wanted to leave, and accepted his passport in that context.

[24] From his point of view, Mr Thanakornmanaporn wanted his passport. It may be that he was planning to arrange work elsewhere, but he had confirmed more than once that he would stay at the Wang Thai to the end of the agreed period. Nevertheless he came to understand that, to Ms Phatraprasit, the return of the passport meant he was leaving his employment early. He said at the investigation meeting he felt he had no choice in the matter because he wanted his passport.

[25] Missing is any evidence that Mr Thanakornmanaporn expressed an intention to leave his employment early. The evidence of his dissatisfaction at work did not go far enough to permit an inference to fill the gap. Secondly, even if the real reason Mr Thanakornmanaporn sought the return of his passport was to pursue employment plans elsewhere, that did not in itself mean he would leave the Wang Thai before 6 May.

[26] Accordingly I do not accept that Mr Thanakornmanaporn resigned or voluntarily left his employment. Although I accept that Ms Phatraprasit was not seeking to dismiss Mr Thanakornmanaporn, I find her actions amounted to the initiative for the termination of the employment. She formed a conclusion about his intentions, and in acting on that conclusion she pushed him out of his employment. In that sense Mr Thanakornmanaporn was dismissed.

[27] Inevitably, since it was based on a misunderstanding, the dismissal was not justified. Mr Thanakornmanaporn has a personal grievance

Remedies for unjustified dismissal

[28] Mr Thanakornmanaporn's employment with BCL would not have lasted for longer than two years. He wanted to leave no later than the expiry of that term. Accordingly his entitlement to reimbursement of remuneration lost as a result of his personal grievance is limited to the period 10 March 2006 – 5 May 2006.

[29] Mr Thanakornmanaporn's evidence about his activities after he left the Wang Thai was vague and he became evasive. He did, however, say that the restaurant venture in which he had hoped to be employed did not go ahead. He did not seek other employment while that matter was resolved, and took the opportunity to attend some English language courses for a few hours a week in April, May and June. The difficulty Mr Thanakornmanaporn had in responding to the simple question of what he did after he left the Wang Thai has left me unconvinced of his attempts to mitigate his loss and I have made a small adjustment to reflect this.

[30] Calculated at $6/52 \times \$27,000$, the gross amount lost is \$3,115.38. BCL is ordered to reimburse Mr Thanakornmanaporn in that amount.

[31] There was little evidence of injury to Mr Thanakornmanaporn's feelings. He was angry about the failure to return his passport, but was already unhappy at work and intended to leave his employment soon anyway. For that reason only minimal compensation is called for and BCL is ordered to compensate Mr Thanakornmanaporn in the sum of \$1,000.

Penalties

[32] The advocate for Mr Thanakornmanaporn purported to address in submissions claims for penalties based on various specified breaches of the employer's good faith obligation.

[33] The claim for a penalty for breach of good faith had not been raised expressly – let alone with any particularity - before the investigation meeting, and was not incorporated in the Authority's investigation. It was not appropriate to raise it in submissions and I do not treat it as part of this employment relationship problem. I will say, however, that the evidence touched on associated matters, but not to the extent of raising grounds for concern that BCL was engaging in deliberate, serious and sustained breaches of the good faith obligation in terms of s 4A of the Employment Relations Act. Ms Phatraprasit was attempting to observe BCL's obligations as an employer, as she understood them to be.

[34] I turn to the claims that were the subject of the investigation.

1. The payment of salary in Thai baht

[35] Not all of the arrangements relating to Mr Thanakornmanaporn's employment were reduced to writing, although Mrs Phatraprasit discussed them with Mr Thanakornmanaporn before the employment began. It was common ground that the parties agreed part of Mr Thanakornmanaporn's monthly salary payment would be remitted directly to a bank account of his in Thailand. The relevant amount was 20,000 Thai baht, and it was duly remitted.

[36] In those circumstances I do not accept there was a breach of the employment agreement in respect of the payments in baht, let alone that a penalty should be imposed as a result.

[37] However the Wages Protection Act provides in part:

- (a) an employer may make deductions from the wages (or salary) payable to an employee with the employee's written consent or upon the employee's written request;
- (b) with certain exceptions, wages (or salary) must be paid in money only;
- (c) wages (or salary) can be paid by cheque or direct credit to a bank account held in the name of the employee, with the employee's written consent or upon the employee's written request; and
- (d) penalties may be payable for failure to comply with the Act.

[38] Neither the employment agreement nor any other document referred to the payment of wages into a bank account – whether in New Zealand or in Thailand. Thus, although it seems Mr Thanakornmanaporn gave his oral consent to such payment, the requirement that consent be in writing was not met. I do not believe that a breach of this kind calls for the imposition of a penalty, but BCL should amend its employment agreements to address the matter.

2. Deductions in respect of accommodation, food and telephone

[39] The employment agreement was silent on deductions in respect of accommodation, food and telephone. The wages clause provided only:

"An annual salary of NZ\$27,000 gross will be paid in local currency ... monthly in arrears. As meal are being provided by Boonyaphat Company Limited. (sic)"

[40] The 'other entitlements' clause included:

". Daily food requirements for personal consumption"

[41] Again, however, the parties had discussed these matters. Mrs Phatraprasit calculated the monthly equivalent of the annual salary as NZ\$2,250, or 43,000 baht. As she put it, the agreement was that BCL would meet costs of accommodation, food, power, and water up to the value of the remaining 23,000 baht per month. Any left over amount was paid to Mr Thanakornmanaporn in New Zealand dollars. As Mr Thanakornmanaporn put it, the agreement

was that he would receive free food, free accommodation and 20,000 baht per month. There was no real disagreement here. While he might have seen those benefits as being 'free', Mr Thanakornmanaporn knew that the balance of the agreed salary was being applied to them and accepted that he received additional (though modest) payments in New Zealand dollars each month.

[42] Mr Thanakornmanaporn also accepted in evidence that he had agreed telephone payments should be deducted from his salary.

[43] Since none of these deductions were the subject of written consents, they were made in breach of the Wages Protection Act. It was submitted on behalf of BCL that the associated costs should not be seen as deductions, but rather as part of an agreed package. I do not see the arrangement that way.

[44] Regarding the penalty to be imposed, not to put too fine a point on it BCL's administration of and accounting for Mr Thanakornmanaporn's terms and conditions of employment has been confused. I was told in submissions that it has learned from this problem, is reviewing its systems and seeking guidance on any changes it may be required to make. That is to its credit.

[45] A penalty is warranted here, but there are mitigating factors. The first is that there was at least an oral agreement to the deductions, and the second is that BCL recognises it has made mistakes and is prepared to address them. I therefore order BCL to pay a penalty in the sum of \$1,000 in respect of the cumulative effect of its failure to obtain written consent for the deductions it made.

The claim for unpaid wages

[46] The claim for unpaid wages was not quantified and the basis for it was not specified. There seemed during the investigation meeting to be a suggestion Mr Thanakornmanaporn had not been paid for all of the hours he worked, and was not paid at the correct hourly rate of pay. I questioned the advocate on the matter in an attempt to clarify whether that was the claim. As well as referring to the hours Mr Thanakornmanaporn allegedly worked, he pointed to a letter dated 27 November 2003 from BCL to the New Zealand Immigration Service. It contained the following passage:

"The position is full time for a minimum of 35 hours per week. The salary/wages paid will be \$27,000 per annum/\$14.83 per hour. ..."

[47] I understood it was being said that Mr Thanakornmanaporn should be paid at the rate of \$14.83 per hour for each hour he worked.

[48] However the 27 November letter is merely an account which the employer party to a subsequent employment agreement has provided to a third party. In the present circumstances it is not evidence of the agreement between Mr Thanakornmanaporn and BCL. That evidence takes the form of the parties' written agreement, which does not contain an hourly rate of pay. While there was evidence of additional oral terms, that evidence did not include an agreement between the parties that Mr Thanakornmanaporn be paid at an hourly rate of \$14.83 for each hour worked.

[49] Since the basis for the claim for unpaid wages remained unclear at the end of the investigation meeting, I asked for a quantification of the amount said to be owed, and why.

[50] The quantification was provided in submissions. It was said that:

- (a) \$21,208.32 is owed in respect of the unlawful deductions for accommodation and food during the period of Mr Thanakornmanaporn's employment; and
- (b) \$779.03 is owed in respect of unlawful deductions for the telephone for the same period; and

- (c) \$6,606.68 is owed in respect of the difference between PAYE amounts actually paid to the Inland Revenue Department and an amount (said to be \$451.75 per month) that should have been remitted to the IRD over the same period.

1. Deductions for food and accommodation

[51] The deductions for food and accommodation were unlawful only to the extent they were in breach of the Wages Protection Act by not being made pursuant to a written consent. They were the subject of oral agreement, and the food and accommodation was provided. There are no grounds on which to order any further payment.

2. Deductions for the telephone

[52] For the same reason, there are no grounds on which to order any further payment in respect of the use of the telephone. Mr Thanakornmanaporn accepted that he had the use of the telephone.

3. PAYE

[53] Correct accounting for employees' PAYE deductions is a matter between BCL and the IRD. If Mr Thanakornmanaporn has been wrongly taxed, that is also a matter to be addressed with the IRD. These are not matters for the Employment Relations Authority. I am unable, anyway, to identify any legal basis on which an employer should be required to account to an employee in the manner contended here. Nor was such legal basis provided.

Summary of orders

[54] BCL is ordered to pay:

- (a) \$3115.38 to Mr Thanakornmanaporn as reimbursement of lost remuneration resulting from his personal grievance;
- (b) \$1,000 to Mr Thanakornmanaporn as compensation for injury to his feelings resulting from his personal grievance; and
- (c) \$1,000 as a penalty for breach of the Wages Protection Act, payable to the Crown bank account.

Costs

[55] Costs are reserved.

[56] The parties are invited to agree on the matter. If they seek a determination from the Authority they are to file and exchange memoranda setting out their positions within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority