

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Chris Tapuaki Tulagi (Applicant)

AND Chris and Joy Jang (Respondent)

REPRESENTATIVES Applicant In Person
Respondents In Person

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 11 April 2005

DATE OF DETERMINATION 13 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The employment relationship problem between these parties is Mrs Chris Tulagi's ("Mrs Tulagi") claim that she was unjustifiably dismissed.

[2] The Respondents Mr Chris Jang ("Mr Jang) and his wife Mrs Joy Jang ("Mrs Jang") say Mrs Tulagi voluntarily resigned as Senior Housekeeper at their motel the Airport Goldstar Motel (the "Goldstar").

The nature of the employment

[3] Mrs Tulagi had been employed at the Goldstar for eight years prior to Mr and Mrs Jang taking over in January 2003. Mrs Tulagi signed a very basic employment contract on 22 February 2003 which designated her as a casual worker "on call 7 days". The contract was not signed by the employer.

[4] Mrs Tulagi's employment had features of regularity and permanence and was not casual but rather was a flexible part-time employment. She averaged 30 - 36 hours per week. She worked over 7 days. I am satisfied Mrs Tulagi was not a casual worker.

The facts

[5] Mr Jang became concerned about the motel's wage costs. He proposed contracting out the motel's cleaning on a fixed price contract. He offered that contract initially to Mrs Tulagi and her family but they declined the offer.

[6] At end of September 2003 Mr Jang proceeded with the contracting out. On 3 October 2004 he asked Mrs Tulagi to train the new contractors. She quite understandably refused to do so in apprehension of her own demise. She asked Mr Jang about her continued employment. Mr Jang told her she would receive a letter from him.

[7] The following day on Monday 4 October 2004 Mr Jang wrote to Mrs Tulagi and stated:-

We advise you that our current cleaning system will be changed to the one on the contract basis as I told you yesterday. We are now looking for some proper people who have experienced in motel cleaning.

You can work continuously for a considerable time - one week or more, if you want to do, after we make a cleaning contract with any one. Of course, the contract is still open to be made with you. If you want, we have an intention to contract with you.

It should be highly appreciated if you would let us know what your intention is.

[8] English is a second language for Mr Jang. He explained to me that the reference to “*an intention to contract with you (Mrs Tulagi)*” related to the offer made to Mrs Tulagi for a fixed price contracting out arrangement and not employment. That letter of 4 October 2004 despite being sent by courier was not delivered to Mrs Tulagi until the morning of Thursday 7 October 2004.

[9] Mrs Tulagi worked on Wednesday 6 October 2004. At the end of her shift she asked Mrs Jang about her continued employment. Mrs Jang told her she had been sent a letter. Mrs Tulagi had not yet received the letter of 4 October 2004. She became agitated and told Mrs Jang she was going to take advice about the situation. She made an appointment with the Labour Department for the following day.

[10] The next day on Thursday 7 October 2004 Mrs Tulagi received the letter of 4 October 2004. She took that advice with her to the Labour Department. That Labour Department adviser telephoned Mrs Jang and sought clarification about the letter. Mrs Jang confirmed that Mrs Tulagi’s employment was terminated.

[11] The next day on Friday 8 October 2004 Mrs Tulagi went to the Goldstar to collect her final wages. She was given a letter dated 7 October 2004 which stated:-

Further to our letter of October 4, 2004, we advise you that the contract between you and us has been terminated owing to the change of our cleaning system.

*Kind regards
Chris Jang*

Was the decision to terminate justified?

[12] I am satisfied that Mr and Mrs Jang made a genuine commercial decision aimed at reducing their overheads. They were entitled to make that decision and the Authority does not concern itself with second guessing such commercial decisions. The decision to contract out was a decision that Mr and Mrs Jang were entitled to make as part of their management prerogative.

[13] However, the decision to terminate Mrs Tulagi’s employment must be carried fairly and sensitively. That is because the law implies in all contracts of employment a duty of fair and reasonable treatment.

[14] Even though I accept that Mr and Mrs Jang offered a fixed price contract to Mrs Tulagi, that offer and those discussions did not constitute proper and sufficient consultation with Mrs Tulagi about her particular employment. The discussions were general discussions about tendering out cleaning services. They did not address Mrs Tulagi's individual employment at all whether by way of inviting her to have input as to alternatives or as to options for redeployment etc. The general discussion held about contracting out were not a substitute for specific consultation with Mrs Tulagi about her particular employment. In these particular circumstances consultation with Mrs Tulagi was practicable.

Determination

[15] Mrs Tulagi's input was never sought in relation to the justification for her dismissal and therefore, she had no opportunity to provide feedback on it. It must follow then, that her dismissal for redundancy was unjustifiable because it was not effected in a fair and reasonable manner. I find that Mrs Tulagi has a personal grievance. She is entitled to remedies in settlement of that personal grievance.

[16] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[17] I find that Mrs Tulagi did not contribute in any way to the situation that gave rise to the unfairness in the process by which her employment was terminated and there was no blameworthy conduct on her part which could constitute contributory fault. There is therefore no basis for reducing the nature and extent of the remedies to be granted to her.

Remedies

[18] As I have found that Mr and Mrs Jang made a commercial decision which they were entitled to make, there can be no claim for reimbursement of lost wages.

[19] Mrs Tulagi is entitled to be compensated for the unfairness in the process by which her position was deemed to be superfluous to the employer's needs. I accept that she has suffered humiliation, loss of dignity and injury to her feelings because of that unfairness. In compensation for that hurt and humiliation and the injury to her feelings, I award her the sum of \$3,000.00. **Chris Jang and Joy Jang are ordered to pay to Chris Tulagi the sum of \$3,000.00 as compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.**

Costs

[20] As neither party was represented there will be no orders for costs. Mrs Tulagi is entitled to have her lodgement fee on this application reimbursed and **Chris Jang and Joy Jang are ordered to pay to Chris Tulagi the sum of \$70.00 in respect of her lodgement fee.**

Summary of Orders

1. Chris Jang and Joy Jang are ordered to pay to Chris Tulagi the sum of \$3,000.00 as compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.
2. Chris Jang and Joy Jang are ordered to pay to Chris Tulagi the sum of \$70.00 in respect of her lodgement fee.