

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 10
5290976

BETWEEN MI SEON AHN
 Applicant

A N D WOO & OK PARTNERSHIP
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McComish, Advocate for Applicant
 Tim McGinn, Counsel for Respondent

Investigation Meeting: 24 and 25 August 2010 at Christchurch

Submissions Received: 3 September & 8 October 2010 from the Applicant
 1 October 2010 from the Respondent

Date of Determination: 18 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Myung Ok Kim and Woo Il Kim in partnership as Woo & Ok Partnership, own and operate TJ Restaurant in Christchurch. Mi Seon Ahn was employed at the restaurant until November 2009. Mrs Ahn says that she was summarily dismissed on 14 November 2009 and that she has a personal grievance as a result. There are also substantial claims for arrears of wages and holiday pay based on Mrs Ahn's account of her hours of work and several claims that turn on an interpretation of the written employment agreement.

[2] I will work through each claim in turn. It is convenient to utilise some of the headings from Mrs Ahn's representative's submissions as the structure for this

determination. I will refer to the respondent as either TJ Restaurant, the partnership or the employer.

Rate of pay

[3] There is a claim that Mrs Ahn should have received \$16 per hour after tax rather than \$16 per hour before tax. The claim arises from the interpretation of the comprehensive written employment agreement.

[4] The agreement was prepared by the employer's solicitors. It comprises a cover page, a table of contents, 12 pages with 20 clauses including subclauses (the main body) and two schedules. For the most part, the main body is drafted so as to be applicable for TJ Restaurant employees generally while the details particular to Mrs Ahn's employment are contained in Schedule 1. There are several cross references in the main body to Schedule 1. For example, clause 1.1 reads:

1.1.1 The employee's employment, and therefore the term of this agreement, will be deemed to have commenced on the date set out in Schedule 1, and will continue until termination pursuant to clause 14 below.

1.1.2 The employee will be employed on a full-time basis (that is, more than 30 hours per week on average over a year) the basis upon which the employee is employed will be set out in Schedule 1.

1.1.3 Where an employee is employed on a part-time basis, he/she will not be entitled to be deemed a full-time employee, unless this is agreed to the employer and recorded in Schedule 1. Part-time employees will be eligible to receive the same entitlements as full-time employees, except on a pro rata basis.

[5] This is just one example of the drafting style used. From this I conclude that it will often be necessary to refer to Schedule 1 when interpreting the employment agreement.

[6] I will set out below the relevant sections from the main body of the contract and Schedule 1 that relate to the dispute about the correct rate of pay.

7.1 Remuneration:

7.1.1 The employee will be paid the remuneration set out in Schedule 1.

7.1.2 The net remuneration due and owing to the employee will be paid as set out in Schedule 1.

7.1.3 ...

[7] Schedule 1 is headed *Employee personal details*. It is laid out in table format with the relevant heading on the left and the applicable details on the right. The seventh and eighth rows of the table read:

<i>Remuneration</i>	<i>\$16.00/hour</i>
<i>Method of payment of remuneration</i>	<i>Into the employee's nominated bank account.</i>

[8] Read in context, clause 7.1.1 refers to the seventh row of Schedule 1 while clause 7.1.2 refers to the eighth row of Schedule 1. That makes it clear that tax is to be deducted from the stipulated rate of remuneration and only the *net remuneration due and owing* will be paid *Into the employee's nominated bank account*.

[9] Reading clauses 7.1.1 and 7.1.2 so that they both refer to only the seventh row of Schedule 1 creates repetition in the main body and inconsistency as to overall meaning. If clause 7.1.2 refers to the seventh row, it unnecessarily repeats clause 7.1.1 and generates confusion about whether the pay rate mentioned in Schedule 1 (\$16 per hour) is before or after tax. In addition, there would then be no reference in the main body of the agreement to the eighth row of Schedule 1.

[10] It is a fundamental rule of construction of employment agreements that phrases and clauses must be interpreted in the context of the whole of the agreement. Doing that, I find that the employment agreement required the Partnership to pay Mrs Ahn \$16 per hour gross, as indeed was done (subject to what follows). I therefore reject the claim for arrears to the extent that it is based on a requirement for Mrs Ahn to be paid \$16 per hour net.

First week of work

[11] There is a further claim based on the interpretation of the employment agreement. Clause 1 reads:

1. *Term of agreement*

1.1 *Term:*

1.1.1 *The employee's employment, and therefore the term of this agreement, will be deemed to have commenced on the date*

set out in Schedule 1, and will continue until termination pursuant to clause 14 below.

[12] The second row in Schedule 1 reads:

<i>Commencement date</i>	<i>Upon the grant of the proposed work permit from Immigration New Zealand</i>
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[13] Mrs Ahn's passport shows 17 September 2008 as the date of issue for her work permit. On that basis, it is argued that she is entitled to wages from that day until the employment was terminated.

[14] It appears that Mrs Ahn worked for the Partnership at the restaurant prior to the grant of her work permit but there are no claims in respect of any earlier period of employment. Mrs Ahn does not say when specifically she started work under the terms of the written employment agreement at issue in this problem. Mrs Kim on the other hand says that Mrs Ahn actually started work on 22 September 2008.

[15] The *employer monthly schedule* forms sent to IRD by the Partnership record Mrs Ahn as having commenced employment on 22 September 2008. The Partnership's pay records also show that Mrs Ahn commenced on 22 September 2008. There is insufficient evidence to establish any other date as the day that Mrs Ahn commenced work under the employment agreement. It is also clear that Mrs Ahn was entitled to be paid only for time worked so 22 September 2008 must be treated as the date on which she commenced her entitlement to wages of \$16 per hour. I take it as the starting date for the assessment of any arrears.

Hours of work

[16] The Partnership did not keep any record of Mrs Ahn's hours or days of work. Because under the employment agreement Mrs Ahn's remuneration was to be calculated at \$16 per hour, it was necessary for the purposes of calculating her pay to keep such records. I accept that Mrs Ahn's ability to bring an accurate claim for arrears of wages has been affected by the Partnership's failure to keep proper time and wage records.

[17] It is common ground that Mrs Ahn normally worked six days per week Monday to Saturday. The evidence for the Partnership is that Mrs Ahn only worked

six hours per day but was paid \$600 rather than \$576 per week to cover any extra time that might be worked from time to time.

[18] It is convenient first to deal with the regular starting time.

[19] In her evidence, Mrs Kim says they agreed that Mrs Ahn would start work at 12 midday each day. However, when questioned, Mrs Kim said that Mrs Ahn usually started work at 11.30am and did vegetable preparation before the restaurant opened for customers at midday. However, she also said that she had not asked Mrs Ahn to come at 11.30am to do vegetable preparation but rather to come at that time to have a meal with them before midday when the restaurant opened for customers. Mrs Kim said that Mrs Ahn simply offered to help with the vegetable preparation work which was never directed nor requested by the employer.

[20] Hyun Jung Lee started working as a chef at TJ Restaurant in January 2009. Her evidence is that Mrs Ahn *almost always arrived at work between 11.30am and 12pm midday*. Mrs Lee's evidence is at odds to some extent with Mrs Kim's written evidence but aligns with Mrs Kim's oral evidence, presumably because Mrs Kim seemed to distinguish between what she says was agreed (her written evidence) and what happened in practice (her oral evidence).

[21] There is also some inconsistency in the applicant's position. In December 2009, Mrs Ahn's representative wrote to the Partnership asserting that she commenced work at *approximately 10 or 11am* each morning. In her written evidence, Mrs Ahn says that she arrived at work at about 10.55am each day. When questioned, she confirmed that she started work at 11am each day. Her husband and her son say that she started work each day at 11am and from about 10.30 to 11am respectively. I place little weight on the evidence from her husband and her son since it is either hearsay or is based on when Mrs Ahn left home to travel to work.

[22] There are two other pieces of evidence about when Mrs Ahn started work each day. First, the employment agreement in Schedule 1 says:

<i>Meal and rest breaks</i>	<i>One hour unpaid meal break each work day where he/she works for more than five continuous hours starting no later than 11am that day; and One 10 minute paid rest break during that work day where he/she</i>
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	<i>works for five continuous hours.</i>
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[23] The employment agreement therefore indicates the expectation that Mrs Ahn might be at work by 11am each day.

[24] In response to the representative's assertion that Mrs Ahn started work as early as 10am routinely, Mr Kim sought information from the Partnership's bank about when Mrs Ahn had presented her pay cheques for cashing between July and November 2009. I have been given the bank statements on which the teller (according to Mr Kim) wrote down the time on each occasion. For the most part, these times fall shortly before 11am, consistent with Mrs Ahn cashing her cheques en route to work for starting at approximately 11am. Mrs Kim says that Mrs Ahn cashed her pay cheques and did some shopping on the way to work but there is no other evidence to support the contention that Mrs Ahn did not go directly to work after cashing her pay cheques. I find that, as a matter of routine, she did go directly to work after cashing her pay cheque. It follows that she routinely started work at about 11.00am on one day a week. It is common ground that Mrs Ahn started work each day at the same time. It therefore seems likely that she started work at 11.00 am each day.

[25] The Partnership has not proven, on the balance of probabilities, that the claim made by Mrs Ahn in her evidence that she routinely started work at 11am is incorrect. Rather, I think the evidence overall is consistent with her routinely starting work at 11am each day.

[26] It is common ground that Mrs Ahn routinely finished the first part of her split shift at 3pm. What is disputed is whether any of the time between 11am and 3pm should be counted as an unpaid meal break deducted from her working time. Mrs Lee's evidence, when questioned, was that there was no set time for a meal break but they usually did have a meal together when it was not too busy which took 20-30 minutes each break. Mrs Ahn's evidence, when questioned by me, was that she did not have a meal break but just did work. Later, when questioned by counsel, she said that her times for a meal break were midday and 5pm but that her break could be interrupted by customers.

[27] I have already set out above the relevant extract from Schedule 1 about meal and rest breaks. The employment agreement (clause 6) states:

- 6.1 *The employee may be entitled to an unpaid 60 minute meal break each full work day, depending on the hours worked on each day.*
- 6.2 *In addition, the employee may be entitled to two paid 10 minute rest breaks during a full work day, depending on the hours worked on each work day.*
- 6.3 *The timing of the meal and rest breaks will be agreed between the employer and the employee, taking into account the requirements of the business and the employee's need for a break at work.*

[28] The evidence establishes that staff (including Mrs Ahn) routinely had a meal together at a quiet time at or near the beginning of the shift for a relatively short duration subject to interruption by customers or other work pressures. I do not accept that Mrs Ahn was allowed an uninterrupted 60 minute meal break (or two 30 minute meal breaks) that was effectively her own time during her shifts and which should be deducted from her working hours for the purposes of calculating pay.

[29] It is common ground that Mrs Ahn started the second part of her split shift at 5pm each day. There is a dispute about her regular finishing time.

[30] Mrs Kim's evidence is that Mrs Ahn worked until 9pm each day only. She says that the restaurant opened from 5pm until 10pm but stopped taking orders at 9pm. Mrs Lee's evidence is that Mrs Ahn *left work around 9pm. At least by 9.30pm she was out the door.* I note that Mrs Lee's evidence is inconsistent with Mrs Kim's evidence. Mrs Lee also said that she and Mrs Kim finished together, later than Mrs Ahn, between 9.30 and 10pm each day.

[31] Mrs Ahn's evidence, when questioned, was that she sometimes finished at the same time as Mr and Mrs Kim and Mrs Lee but sometimes they finished work about half an hour later than her. She said that it usually took her half an hour after the last customers were served to do her cleaning up. She also said that she usually finished work at 10pm but they would close early at 9.30pm if there were no customers.

[32] Paul Simpson gave evidence about regularly picking up his friend who was the chef at TJ Restaurant until about October 2008. His evidence is that his friend finished work in the evenings at around 9.30 or 10pm early in the week but as late as 11pm later in the week. I note the inconsistency with Mrs Lee's evidence who was chef from January 2009. Mr Simpson recalls seeing Mrs Ahn's son or husband waiting in a car to collect her at 9.30pm or later when he was there to pick up his

friend. There is no reason to doubt Mr Simpson's evidence. Mr Simpson's evidence establishes that Mrs Kim's evidence that Mrs Ahn always finished work at 9pm must be wrong, at least to October 2008 and I reject it. There is no reason to think that Mrs Ahn finished work earlier after Mr Simpson's friend's employment ended so I also reject Mrs Kim's suggestion that Mrs Ahn always finished work at 9pm from October 2008 onwards.

[33] There is evidence from Mrs Ahn's husband that he would pick her up from work at night when she finished at *about 10pm*. Mrs Ahn's son sometimes picked her up from work. His evidence was that he always got there to pick her up *after 9pm (sometimes 9.30pm sometimes almost 10pm mostly 9.30pm I think)*. It is difficult to place much reliance on this evidence on its own.

[34] At my request, I was provided with TJ Restaurant's EftPos transaction slips from January 2009 to November 2009. I looked at the slips for January, April, July and October to see when the EftPos settlement transaction was done each trading night. Approximately 45% percent of the trading days were settled between 9pm and 9.29pm, another 45% were settled in the half hour before 10pm and 10% were settled after 10pm. Finalising the day's EftPos transactions was done by either Mr Kim or Mrs Kim as one of the last things to be done each night before everyone left the restaurant. Other staff would have been cleaning up, including mopping floors while the owners dealt with the EftPos settlements. Mrs Kim's and Mrs Lee's evidence, which I accept, is that the other part-time worker finished at 9pm. That left Mrs Ahn as the most junior employee who was likely to be assigned the more menial tasks. Mrs Kim also told me (and I accept) that Mrs Ahn usually mopped up and this was the last job to do in the kitchen. The best estimate I can make of an average finishing time across the whole week for Mrs Ahn from these circumstances is 9.30pm. I note that this is supported by Mrs Ahn's son's evidence.

[35] It is common ground that Mrs Ahn had a meal with the others at about 5pm each night. However, for the reasons expressed above, the time taken by her to eat this meal should not be deducted from her working time.

[36] In summary, I fix Mrs Ahn's routine work hours as 11am to 3pm and 5pm to 9.30pm Monday to Saturday inclusive. That totals 8.5 hours per day or 51 hours per week for which she should have been paid under her employment agreement \$816 per week commencing with Monday, 22 September 2008 and ending on 14 November

2009. That is a total of exactly 60 weeks. Mrs Ahn should have been paid \$48,960 (gross) excluding statutory and annual holidays paid for this work.

Statutory holidays

[37] It is common ground that Mrs Ahn worked on nine statutory holidays during her employment. It is also common ground that the restaurant only opened for the evening service but there is a dispute about whether Mrs Ahn started work at 4pm on these days or at 5pm as usual. I have already resolved the dispute about her finishing time.

[38] I see no reason to disbelieve Mrs Kim's evidence that Mrs Ahn started work on the statutory holidays at her usual time. Accordingly I find that Mrs Ahn commenced work at 5pm and finished work at 9.30pm on each of the statutory holidays. For the reasons expressed above, no deduction is allowed for the time taken by her to eat a meal during each service.

[39] Mrs Ahn is entitled to half time extra pay for the hours worked on these statutory holidays. That totals \$324.

Alternative holidays

[40] Mrs Ahn's normal daily rate of pay was \$136. She is entitled to payment for nine alternative days at that rate, a total of \$1,224.

Annual holiday pay

[41] It is common ground that Mrs Ahn took no leave during her employment. She is entitled to four weeks' annual leave and proportionate holiday pay for the part year starting 22 September 2009. The four weeks' annual leave must be calculated at the higher of the ordinary weekly wage or the average weekly earnings. The latter figure includes the gross payable for work done on statutory holidays giving \$822.23 average weekly earnings. Mrs Ahn is entitled to \$3,288.92 (gross) holiday pay for the annual leave she had become entitled to.

[42] Mrs Ahn earned a further \$6,528 (gross) after her anniversary date so she is entitled to \$522.24 in proportionate holiday pay.

[43] I am asked to apply s.40(3)(b) of the Holidays Act 2003 so as to entitle Mrs Ahn to payment for the Christmas and New Year statutory holidays falling after the termination of her employment. If Mrs Ahn had taken all the annual holidays due to her at the date of the termination of her employment, none of those statutory days would have fallen within that deemed period. Accordingly, I agree with counsel's submission that nothing further is due.

Treatment of payments made

[44] It is common ground that Mrs Ahn must be treated as having received the payments identified in the Partnership's tax return to IRD. That amount totals \$34,600 gross. There is a dispute about the proper treatment of other cash payments which it is acknowledged were received by Mrs Ahn.

[45] First, Mrs Ahn received \$50 cash per week from the Partnership after the first three months had elapsed. Mrs Ahn's evidence is to the effect that this payment was a gratuity and the submission is that it should be ignored for the purposes of assessing any arrears of wages. The Partnership's evidence is to the effect that the payment was made as pay as you go holiday pay. However, it is common ground that the payment cannot reduce Mrs Ahn's statutory entitlement to holiday pay.

[46] I do not accept that the cash payments should be ignored for the purposes of assessing arrears of wages. The payment commenced after the first three months and was paid each week thereafter along with the weekly cheque. The cash payment must be regarded as part of the weekly remuneration received by Mrs Ahn. Counsel submits, and I accept, that a total of \$2,150 was received by Mrs Ahn in respect of these payments. I further accept counsel's submission that an additional cash payment of \$20 per week was received by Mrs Ahn from August 2009 totalling \$300. These cash payments therefore total \$2,450.

[47] The better course is to treat the sum of \$2,450 as part of the net weekly payment received by Mrs Ahn. The Partnership will have to calculate the assumed gross on that net figure and pay the PAYE component to IRD. The gross amount will then be available to reduce the arrears otherwise owing under this determination.

Termination of the employment

[48] There is a significant conflict in the evidence over what happened on Saturday, 14 November 2009 when Mrs Ahn's employment apparently terminated.

[49] In her statement of evidence, Mrs Ahn says that at about 10pm there was an exchange between her and Mrs Kim and then between Mrs Kim and the part-time worker about payments for work on Friday, 13 November which was Show Day. Mrs Ahn says she became angry because she was not being paid her \$50 cash but the part-time worker was being paid time and a half. Mrs Ahn then spoke to Mrs Kim about whether she was being paid correctly and Mrs Kim agreed to check. Soon after, Mrs Ahn told Mrs Kim about having been interviewed for a position at Meadow Mushrooms and Mrs Kim responded saying that she knew about that and that no one wanted Mrs Ahn to stay at TJ Restaurant and she could leave. Mrs Ahn responded by saying that she could not tell Mrs Kim about the interview because she was concerned she might be dismissed and she needed the income. Mrs Kim said *talk to your husband if you need money*. Mrs Ahn then left the restaurant. Mrs Kim followed her out the door and swore at her, calling her a *bitch* and telling her to *fuck off*.

[50] When questioned, Mrs Ahn gave a broadly similar but more lucid account through the interpreter. Mrs Ahn was doing dishes. Mrs Kim brought her pay over but told her that they were deducting the \$50 cash because she had only worked a half day on the Friday. Mrs Kim took the \$50 to give to the other worker. Mrs Ahn was not happy about that. She stopped doing the dishes and asked to speak to Mrs Kim. Mrs Ahn asked why she had never been paid holiday pay and Mrs Kim told her that she had been paid more than they needed to pay. Mrs Ahn said that the job was too hard for her and that she had checked at the mushroom factory for a job. Mrs Kim told Mrs Ahn that she did not need her and that she could go (leave) if she did not like it, and that no one would stop her if she wanted to go. This exchange took place in the restaurant area. Mrs Ahn left the restaurant, probably closing the door *a bit hard*. Mrs Kim then followed her out the door and abused her, calling her something like an *unmannered bitch* and a *fucking bitch* and saying *how can you behave that way over such a small amount of money*. These things happened in the carpark. When questioned by counsel, Mrs Ahn said that the most humiliating thing for her was Mrs Kim taking cash out of her pay packet and giving it to the part-time worker. She acknowledged that Mrs Kim said she would check about the rate of pay. She also said

that Mrs Kim told her to go now, to leave if she wanted to and to ask her own husband if she needed money. At that time, Mrs Ahn's husband was not working and Mrs Kim knew that. I note particularly that during this evidence, Mrs Ahn did not claim that she was told by Mrs Kim to *fuck off*.

[51] Mrs Ahn also gave evidence that she phoned her husband after she left the carpark. She was crying and told him what had happened. She met him coming along the road to pick her up from work. Eric Choong Yol Cho had phoned TJ Restaurant and spoken briefly to Mrs Kim after receiving Mrs Ahn's call. Once he got to the restaurant, he and Mrs Ahn spoke briefly before they went inside to speak to Mrs Kim. Mr Kim was also present. I will return to these exchanges shortly.

[52] Mrs Kim's evidence is that she was asked by an employee to come into the kitchen, there was a commotion and she asked Mrs Ahn if anything was wrong. Mrs Ahn, in a challenging manner, claimed that she should be paid 2.5 times her rate of pay for Show Day and referred to the rate supposedly received by her son at the mushroom factory. Mrs Kim said that she thought the correct rate was time and a half but she would check. Mrs Kim asked why this had not been raised before and Mrs Ahn said because of her (recent) permanent residency she could now make claims as New Zealand was a paradise for workers. Mrs Kim took Mrs Ahn into the restaurant and asked what was the matter with her these days and referred to her recent demeanour. Mrs Ahn answered by saying that she did not like the part-time employee. Mrs Kim's evidence is that she got quite frustrated at this point and suggested that Mrs Ahn should adjust her work hours or take time off if the work was so hard and her blood pressure so high. Mrs Ahn said she could not because she had no money. Mrs Kim explained that she had always paid Mrs Ahn on time and never reduced her wages and told Mrs Ahn that she should not say these things in such a manner to her and should talk to her own husband not her about having no money. In response, Mrs Ahn said *oh yeah, well I quit then*. Mrs Ahn left, kicking the door open with such force that everyone in the restaurant could hear. After a moment, Mrs Kim followed her out saying *how dare you slam the door like that in front of customers. You can't do that, how bad mannered!* Mrs Kim then returned to the restaurant.

[53] When questioned, Mrs Kim admitted speaking angrily to Mrs Ahn after she followed her outside. She was angry because Mrs Ahn had either kicked or slammed the door. Mrs Kim confirmed that when she went outside Mrs Ahn was using her

cellphone at that stage and was about 20 metres away. Mrs Kim's evidence is that she did not have to yell that loud. Mrs Kim also said that she felt angry and betrayed, she having treated Mrs Ahn like a sister and Mrs Ahn in response having shown a completely different face that day. Mrs Kim also said in evidence that:

I expected Mrs Ahn to come to work as normal on the Monday. I also expected an apology. Mrs Ahn didn't resign on the Saturday as far as I was concerned. I thought she said she would quit because she was very angry but I didn't think she would quit. I waited, I expected her to calm down. I didn't contact her.

[54] Counsel submits that there are significant discrepancies between the various accounts given by Mrs Ahn in correspondence and in evidence. However, in my view, there are also important similarities. The first point is that there was an exchange between Mrs Ahn and Mrs Kim about holidays and holiday pay. That is also consistent with Mrs Kim's evidence that Mrs Ahn raised the topic with her. There is considerable overlap between Mrs Ahn's evidence and Mrs Kim's evidence about Mrs Kim's response when challenged about holidays and payments. Mrs Kim's evidence is that she got frustrated but Mrs Ahn's evidence is to the effect that Mrs Kim was indignant and even angry in her response while they were in the restaurant. I find that Mrs Ahn's evidence probably better encapsulates Mrs Kim's manner and words, to the effect that Mrs Ahn had been treated well and she could leave if she did not like her treatment in this employment.

[55] I do not accept Mrs Kim's evidence that Mrs Ahn said *I quit then*. First, as noted, Mrs Kim specifically said in evidence that Mrs Ahn did not resign on the Saturday as far as she was concerned. Second, the letter of 20 November 2009 from the Partnership's solicitor makes no mention of any actual resignation. If Mrs Ahn had said *I quit then*, those words and the resignation would have been mentioned rather than abandonment. The words *I quit then* were not even mentioned in the statement in reply where it is alleged that Mrs Ahn said *I am gone*. All this indicates that Mrs Kim's statement of evidence must be wrong.

[56] What I find happened is that Mrs Ahn ended the exchange between the two women in the restaurant by words to the effect that she was leaving, reflecting her belief that she had been dismissed as a result of her questioning her pay. Both women were upset and angry. I note Mrs Lee's evidence that the exchange between Mrs Kim and Mrs Ahn in the restaurant got louder towards the end. I find that both women contributed to this. Mrs Ahn either kicked the door open or slammed it shut as she

left. That angered Mrs Kim further and she went outside and abused Mrs Ahn. I find that the oral evidence given by Mrs Ahn better reflects what actually happened so I reject Mrs Ahn's evidence that she was told to *fuck off* or similar words of dismissal at this point. As far as Mrs Ahn was concerned, she had already been dismissed by Mrs Kim during their exchange inside the restaurant. However, I do not accept that there was an actual dismissal on 14 November either.

[57] Because there was neither a resignation nor an actual dismissal arising from the exchanges between the two women inside the restaurant and in the carpark, I need to deal more fully with subsequent events.

Abandonment?

[58] It is common ground that Mrs Ahn rang her husband when she got outside the restaurant. She was either ringing him or speaking to him when Mrs Kim yelled at her. Mr Cho then rang and spoke briefly to Mrs Kim, telling her that she should stay there as he was on his way to the restaurant. I accept Mr Cho's evidence that Mr Kim said that Mrs Ahn was overreacting.

[59] Mr Cho arrived at the restaurant and he and Mrs Ahn went inside where they spoke with Mrs Kim and Mr Kim. Mr Cho and Mrs Kim did most of the talking. There were still several customers at a table. It has not been suggested that the customers could give useful evidence.

[60] Mrs Kim's evidence is that Mr Cho was intimidating, yelled at her and made threats about the future of the restaurant. I find that Mr Cho was upset for his wife, but I do not accept that he behaved improperly. I do not accept Mrs Kim's evidence that Mrs Ahn's son (Brian) was *keeping watch* outside the restaurant door. As Brian explained, it would have been improper to involve himself in the dispute between his elders so he stayed outside and kept his distance.

[61] It is not necessary to go through in close detail the exchanges principally between Mr Cho and Mrs Kim. Mr Cho had Mrs Ahn explain her version of events in response to Mrs Kim asking why she was crying. Mr Cho told Mrs Kim that it was not right to treat his wife that way after she had worked there for three years. He said that rumours get around in the Korean community and they should not speak ill of his wife. I accept Mrs Kim's evidence that Mr Cho said they were going to go home and study employment law. The exchange took may be five or 10 minutes and Mr Cho

and Mrs Ahn left. What never happened was Mrs Kim disabusing Mrs Ahn or Mr Cho of the notion that she had been dismissed.

[62] A day or two later, Mr Cho phoned and spoke to Mrs Kim. He told her that they were checking with IRD to make sure that PAYE tax had been paid. Something may also have been said more generally about the wages and holiday pay issues but nothing was said about the termination of the employment.

[63] Next, Mrs Kim instructed the Partnership's solicitor to write to Mrs Ahn which was done on 20 November 2009. The letter reads:

Dear Ms Ahn

Your Employment With TJ Restaurant

1. *We act of TJ Restaurant.*
2. *We note that as at 19 November 2009, you have failed to turn up at work for a period of three consecutive days without written consent from your employer or for no good reason.*
3. *Pursuant to clause 14.11 of the employment agreement between yourself and our client, you are deemed to have terminated your employment without notice. Please be advised that your employment agreement with our client*
4. *...*

[64] This letter drew a prompt response dated 23 November 2009 from Mrs Ahn directly to Mrs Kim which in part reads:

Dear Myung Ok KIM

Madam

I was shocked to receive a letter from your solicitor this morning addressing certain issues you quite honestly know not to be the truth!

You were the one who unceremoniously dismissed me without notice after you lost control during our discussions regarding my holidays & pay etc you were the one who swore & yelled at me on the night in question, Saturday 14th November, in front of witnesses.

Telling me in an extremely guttural and common expletive "don't come back".

Your solicitor points to Clause 14.11 of our employment agreement, Sorry there is no 14.11 in my copy of the agreement.

He talks about me, terminating my employment without notice!

I have already outlined I was not the one who terminated our employment arrangement it was you.

I have been an unfailingly loyal worker for you and to be treated in this absolutely shambolic way is humiliating & distressing, not to mention embarrassing in front Of staff & restaurant guests,

Also the Korean community here in Christchurch being very small were everyone knows each other, is totally unacceptable for any employer to do that.

I have today sort legal advice regarding this matter and have spent the day considering the options that were laid out for my consideration & that are open to me

...

[65] The situation should be analysed in terms of *Boobyer v. Good Health Wanganui Ltd* (unreported, 24 February 1994, WEC3/94), particularly the following extract:

Another type is illustrated by NZPSA v. Land Corporation Ltd [1991] 1 ERNZ 741. That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so or takes advantage of words of resignation known to be unwitting or unintended and an employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case an employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning facilities" Chicken and Food Distributors (1990) Ltd v. Central Clerical Workers' Union [1991] 1 ERNZ 502, 507. Examples of a sudden flare up being treated as a resignation are scattered through the books. Some feature rather extreme actions by the employee including emphatic language and expressing conduct extending to actually walking out or using words of resignation, only to return or recant later. Each case turns on its own facts but it is at least clear that "[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example if the employee's actions or words that largely or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality" Wellington Clerical Workers' Union v. Barraud & Abraham Ltd (1970) 13 MCD 93, 95 per Horn SN. The case is also reported at [1970] BA 347. Then there are cases of abandonment of employment deemed under some employment contracts to arise from unauthorised or unnotified absences from work of defined duration.

[66] Mrs Kim knew that Mrs Ahn had not resigned – she said precisely that in her evidence. Shortly after the angry exchange, Mrs Ahn made it clear that she believed she had been dismissed. In these circumstances, it is not surprising that TJ Restaurant did not at the time treat the situation as a simple resignation. However, nor was it open to TJ Restaurant to treat the situation as one of abandonment.

[67] In *EM Ramsbottom Ltd v. Chambers* [2000] 2 ERNZ 97, the Court of Appeal found that the employer's failure to make inquiries of the employee as to his intentions after he had left the premises and apparently abandoned his employment did not constitute a dismissal. It was not a case where the employer had had a heated argument with the employee leading the employee to think that they had been dismissed. Rather, the factual finding was that the employee walked off the job rather

than wait a short time to clarify his situation with the employer. Nonetheless, the Court also commented:

At a late stage in the oral argument in this Court, Mr Cressey submitted that where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold if contending that the employment ended on the employee's initiative in that way. There is substantial force in that submission and clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.

[68] In *Lwin v. A Honest International Co Ltd* [2003] 1 ERNZ 387, the Employment Court applied this dicta. In *Lwin*, the employee remained absent without proper explanation. The employer wrote to the employee requiring a response by a nominated deadline failing which she would be treated as having abandoned her employment. There was no response within time and the employer treated the situation as one of abandonment in subsequent dealings. The Court held:

Mr Sowman was clearly concerned whether the plaintiff had in fact abandoned her employment and was duly cautious in drawing that inference and took the very proper step of writing to her on 18 June to clarify the position. Had that letter been sent to the correct address then the defendant would have discharged its obligation of trust and fair dealing in the employment relationship. Unfortunately for the parties, the letter did not go to the correct address. This did not allow the plaintiff to clarify the situation but nor did it permit the defendant to assume that she had abandoned her employment and to arrange another teacher in her stead.

[69] While *Lwin* and *Ramsbottom* were cases where there was no written term governing abandonment here, clause 4.11 of the employment agreement covered abandonment. It reads:

14.11 Abandonment of employment: In the event that the employee is absent from work for a period of three consecutive work days without the written consent of the employer, or for no good reason, he/she shall be deemed to have terminated his/her own employment without notice.

[70] Here, Mrs Kim knew that there had been an angry exchange between herself and Mrs Ahn arising from Mrs Ahn questioning her pay and holiday entitlements. Mrs Ahn left the restaurant kicking or slamming the door and Mrs Kim either upbraided her (Mrs Kim's evidence) or abused her (Mrs Ahn's evidence). There was then an exchange involving Mr Cho where it was made clear that Mrs Ahn thought that she had been dismissed. Nothing in the subsequent telephone discussion with

Mr Cho changed that picture. In these circumstances, it probably was not open to a fair and reasonable employer to say that Mrs Ahn had absented herself from work *for no good reason*. It was certainly not open for a fair and reasonable employer to reach such conclusion without first attempting to engage with Mrs Ahn about the latter's intentions about the future of the employment relationship.

[71] I conclude that the letter of 20 November 2009 amounted to a sending away or a dismissal of Mrs Ahn by TJ Restaurant.

[72] In this analysis of the employer's obligations I have adopted the approach of the Authority in *Brown v Five Star Pork Limited* ERA AA216/08, 23 June 2008.

Justification

[73] Whether the dismissal is justified must be assessed objectively by considering whether the employer's actions and how the employer acted where what a fair and reasonable employer would have done in all the circumstances.

[74] TJ Restaurant did not attempt to justify any dismissal. If there had been such an attempt, I would nonetheless have found that TJ Restaurant's actions fell below the standard required of a fair and reasonable employer. At the very least, some inquiry should have been made once matters settled down.

[75] It follows that Mrs Ahn was unjustifiably dismissed and has a personal grievance.

Remedies

[76] I must consider the extent to which Mrs Ahn contributed in a blameworthy way to the situation giving rise to the grievance.

[77] Counsel submits that Mrs Ahn's contribution should be assessed at 75%. She is said to have claimed the wrong rate of pay, failed to have settled for Mrs Kim's assurances that it would be checked out and gave the impression that she was resigning and stormed out the door.

[78] There was nothing blameworthy in Mrs Ahn questioning her rate of pay even if she wrongly said that she should be paid 2.5 times her ordinary rate. There is nothing blameworthy in the way that Mrs Ahn conducted herself in the exchange with

Mrs Kim in the kitchen or in the restaurant. Both women became emotional and angry but Mrs Ahn's conduct to that point did not reach the threshold of being blameworthy conduct meriting a reduction in any remedies. However, in kicking or slamming the door as she left, Mrs Ahn did contribute in a blameworthy manner to the situation. That prompted the angry response by Mrs Kim which extended to sending the 20 November 2009 letter.

[79] I assess Mrs Ahn's contribution as relatively minor, in the order of 10%. Mrs Kim must bear most of the responsibility for the dismissal.

[80] I do not accept that there was anything blameworthy in the subsequent exchanges involving Mr Cho. At first, their concern was about reputational issues and resolving legitimate holiday pay and wages issues. It was TJ Restaurant's 20 November 2009 letter that turned their attention to the dismissal.

[81] There is neither a claim for nor evidence showing any lost remuneration. I must assume that no such loss was suffered.

[82] There is a claim for \$10,000 compensation for distress and some evidence to support this claim. There is evidence of Mrs Ahn's tearful state on the phone to her husband, her tearful state when speaking to her husband after he arrived at the restaurant. Mrs Ahn's evidence is that she felt *really bad, really sad*, kept crying and was shocked to get the 20 November 2009 letter. She gave evidence of being worried about her life and her son's life (meaning I think their future) out of concern that the dismissal could affect their residency status. Mr Cho's evidence is that *she looks very bad and she cannot get sleep easily*. Brian Cho's evidence is along similar lines but more expressive. I also note Mrs Ahn's comments in her 23 November letter. There is no reason to doubt this evidence, all of which I accept.

[83] It leads me to conclude that Mrs Ahn is entitled to an award of \$8,000 to compensate her for these effects, subject to the finding of contribution.

Pay in lieu of notice

[84] There is a claim, again based on the employment agreement, for 4 weeks pay in lieu of notice of dismissal. I take this in effect to be a common law claim of unlawful termination of the employment agreement for which the remedy is damages amounting to the period of notice required under the employment agreement.

[85] The difficulty with the claim is that it overlooks s.113 of the Employment Relations Act 2000. Mrs Ahn was dismissed and the claim for damages in lieu of notice is an attempt to challenge that dismissal. The exceptions set out in s.113(2) of the Employment Relations Act 2000 do not arise. This is not a claim for wages relating to a period of notice; it is a claim for damages for the failure to give notice making the dismissal unlawful at common law.

Penalties

[86] The statement of problem as originally lodged with the Authority did not include any claim for penalties. However, on 26 May 2010 Mrs Ahn's representative lodged with the Authority a document entitled *Amendment to Claim* in which there is reference to penalties in relation to the Minimum Wages Act 1983, the failure to keep proper time and wage records, the failure to keep or provide access to a holidays record and the failure to properly pay Mrs Ahn for statutory holidays or her holiday pay at the termination of her employment.

[87] I agree with counsel's submission that no breach of the Minimum Wages Act 1983 has been established.

[88] S.75 of the Holidays Act 2003 sets out the breaches of that Act which render an employer liable to a penalty. S.76(1) then provides *A Labour Inspector is the only person who may bring an action in the Authority against an employer to recover a penalty under section 75*. The present proceedings are not by a Labour Inspector. Accordingly, there is no power to award a penalty for any breach of the Holidays Act 2003.

[89] In the representative's submissions I am asked to impose penalties for breaches of clause 17.1 of the employment agreement which states that both parties will comply with all legislative requirements. The breaches relied on are the same as the statutory breaches mentioned elsewhere here. I decline to do so. The amended claim sought penalties for statutory breaches not contractual breaches. It is too late to take a different approach.

[90] I am asked to impose a penalty for a breach of s.2 of the Wages Protection Act 1983. S.2 is the definitions section. I presume the reference is to s.4 and s.13 of the Act. Two points are raised by the amended claim. First, *has the employer paid Mrs Ahn by cheque and cash without her written permission to alter the payment*

arrangements? Mrs Ahn received weekly cheques which she was able to cash at the employer's bank the next day even though the written agreement stipulated payment by direct credit. That is not a circumstance that calls for the imposition of a penalty. Second, *Has the employer failed to pay Mrs Ahn the entire amount due without deduction?* The answer to that is obviously yes but only because of the finding about Mrs Ahn's working hours and so forth. The situation does not require the imposition of a penalty. In submissions the representative also refers to the failure to pay Mrs Ahn her annual and statutory holiday pay at termination. It is too late to extend the ambit of penalty claims.

[91] That leaves the issue about the failure to keep proper time and wages records. I do not accept counsel's submission that any breach was inadvertent. This was employment on an hourly rate basis. It was always envisaged that there would be some variability in the actual hours of work because Mrs Ahn's finishing time for her evening shift depended on how busy the restaurant was each night. In addition there are my findings about the actual hours of work. This was never intended as employment from midday to 3pm and 5pm to 9.00pm with two half hour unpaid meal breaks (a total of 6 hours work each day). If it had been that could and should have been included in the written employment agreement: see s.65(2)(a)(iv) of the Employment Relations Act 2000. Here the employer simply wanted to avoid the administrative impost of keeping track of the actual hours of work but give the illusion of paying \$16.00 per hour. This was a deliberate failure. In addition, as noted, the failure to keep proper time and wage records has prejudiced Mrs Ahn's ability to bring an accurate claim for arrears. The best that can be said for the Partnership is that this is the only proven breach of the Employment Relations Act 2000.

[92] The employer is not a corporation so the maximum penalty is \$5,000.00: see s.135(2)(a) of the Employment Relations Act 2000. I assess the appropriate penalty at \$1,000.00. In the absence of any claim to order the penalty payable to Mrs Ahn it is to be paid to the Crown.

Recommendations

[93] I am asked to exercise the power given to the Authority by s.123(1)(ca) to make a recommendation about actions the employer should take to prevent similar employment relationship problems occurring.

[94] The request is misconceived. The power arises only in the context of remedying proven personal grievances. *Workplace conduct or practices* were not a significant factor in the personal grievance which resulted from the partnership wrongly characterising Mrs Ahn's absence following the heated argument between her and Mrs Kim as abandonment. The remedial power in s.123(1)(ca) does not arise in connection with proven breaches of the Employment Relations Act 2000, as here. No doubt the partnership can obtain whatever advice it needs to ensure that it complies with its statutory obligations in the future with the Authority recommending that.

Summary and Orders

[95] Mrs Ahn has a personal grievance of unjustified dismissal. To remedy that grievance the Partnership must pay her \$7,200.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[96] The Partnership is to pay Mrs Ahn arrears of \$324.00 (gross) being half time extra for time worked on statutory holidays.

[97] The Partnership is to pay Mrs Ahn arrears of \$5,035.16 (gross) being holiday pay including alternative holidays due at the termination of her employment.

[98] There are further arrears due to Mrs Ahn from the Partnership to be paid or accounted for totalling \$14,360.00 (gross). The Partnership must calculate the gross applicable to the net cash of \$2,450.00 that was received by Mrs Ahn. The PAYE tax is to be paid to IRD (and accounted for to Mrs Ahn) and the gross sum may then be deducted from \$14,360.00 (gross) leaving the gross arrears owing to Mrs Ahn. Leave is reserved in case of any difficulty.

[99] There is a claim for interest. Interest is to be paid on the aforementioned arrears of wages and holiday pay at the rate of 5% per annum commencing on 15 November 2009 until the arrears are paid in full.

[100] I impose a penalty on the Partnership, payable to the Crown, which I fix at \$1,000.00.

[101] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a

response within a further 14 days. It will be helpful to the Authority for these submissions to repeat comments already made with respect to costs.

Philip Cheyne
Member of the Employment Relations Authority