

Mr Ghanem returned home after being bailed, he went to Mr Elfeil's room and while with Mr Elfeil the latter took a call from a Mr Dwayne Smith who was the production supervisor of SPM.

[5] Mr Elfeil's evidence was that during this telephone discussion that he had with Mr Smith, Mr Smith asked Mr Elfeil to tell Mr Ghanem that Mr Ghanem had been replaced in his role with SPM. Mr Elfeil's evidence was that, during the course of this conversation with Mr Smith, he (Mr Elfeil) asked Mr Smith whether Mr Smith wished to speak to Mr Ghanem (who was physically present with Mr Elfeil during the conversation), but Mr Smith indicated that it was not necessary that he speak with Mr Ghanem. Mr Elfeil confirmed that he did not specifically say to Mr Smith that Mr Ghanem was in the room at the time that this conversation took place but he was very clear that he did ask Mr Smith if Mr Smith wished to speak directly to Mr Ghanem.

[6] Mr Elfeil promptly communicated the message to Mr Ghanem who then moved to Christchurch where his wife lived from which point he made a number of attempts to telephone Mr Smith and says he was finally successful in speaking with him. Mr Ghanem produced to the Authority records of his cellphone calls as evidence for his attempts to communicate with SPM.

[7] In his evidence to the Authority, Mr Ghanem alleged that when he finally spoke to Mr Smith he complained about his dismissal but that Mr Smith confirmed that *Mr Ghanem's job had gone*. Mr Ghanem said he remonstrated with Mr Smith saying that he could not be dismissed for *doing nothing* and that he (Mr Ghanem) would need to take it further through legal channels. Mr Ghanem gave evidence that he was sure that Mr Smith understood that he was serious about this and that Mr Smith promised to get back to him but never did. Mr Ghanem says that this telephone call raised the grievance.

[8] On 11 December 2007, fully a year after the alleged dismissal, Mr Ghanem's barrister wrote allegedly confirming details of the personal grievance originally raised. The letter from Mr Ghanem's barrister proceeded on the footing that Mr Ghanem, having been acquitted of the rape allegation on 29 November 2007, now wished to deal with the outstanding employment issue as well.

[9] SPM says that it has no record of the grievance having been raised in early December 2006 (as Mr Ghanem alleges), and Mr Smith is no longer employed by SPM and his whereabouts are unknown so he was unable to give evidence before the Authority.

[10] However, SPM says that Mr Smith would have had no authority to dismiss a worker, that Halal slaughtermen were difficult to recruit and thus would be unlikely to be dismissed lightly and that, in any event, the firm's employment records do not record Mr Ghanem as having been dismissed but rather show his employment file as still open, thus suggesting abandonment of employment rather than dismissal.

Issues

[11] There are two issues for the Authority to decide. The first is whether there was a dismissal and the second is whether a personal grievance was raised.

Was there a dismissal?

[12] The investigation meeting heard evidence from Mr Elfeil about the telephone discussion he had with Mr Dwayne Smith. As I have already noted, Mr Smith was not able to be found to give evidence to the Authority, so the only source of evidence of this conversation was the evidence of Mr Elfeil. I must say that I found Mr Elfeil's evidence credible and believable. I cannot imagine why he would have made up a story that he had had a telephone discussion with Mr Smith if no such discussion had taken place. It is clear that Mr Ghanem also believed that the telephone discussion took place as he relied on Mr Elfeil's advices about the nature of that telephone discussion.

[13] It follows then that my considered view is that there was a telephone discussion between Mr Dwayne Smith and Mr Elfeil and that the message that Mr Elfeil got from that discussion was that Mr Ghanem had been dismissed. I think it is possible that Mr Elfeil misunderstood the message and overstated the effect of the conversation. It may be that Mr Smith simply sought to convey the intelligence that Mr Ghanem had been temporarily replaced until such time as he was able to return to duties. But if that was the message which Mr Smith sought to transmit, it was clearly not the message which Mr Elfeil received. Mr Elfeil was very clear at what he heard and I have to say that, having heard Mr Elfeil's evidence given in English, my view

was that his English was good enough for him to reasonably understand a message conveyed to him over the telephone.

[14] I think it is also of significance that Mr Elfeil, while confirming that he did not tell Mr Smith that Mr Ghanem was physically present during the telephone call, did ask Mr Smith if he wished to speak to Mr Ghanem and was told by Mr Smith that that was not necessary.

[15] I think this is significant because I accept the submission of SPM to the effect that the very reason Mr Smith sought not to talk directly to Mr Ghanem was because, in truth, the purpose of his call was not to deal with Mr Ghanem at all but rather to establish the whereabouts of Mr Elfeil. It was Mr Elfeil who Mr Smith rang for and it was Mr Elfeil's absence from work which Mr Smith was pursuing. Mr Elfeil's absence was simply explained; the two men had a car between them and Mr Ghanem had the car keys and clearly was in serious jeopardy with the Police, Mr Elfeil being naturally concerned about his friend's situation. I think it more rather than less likely that Mr Smith mentioned Mr Ghanem in passing only, and in the context of meaning to convey that his job was covered in the meantime, not that he was dismissed from his employment. I accept that was not the message Mr Elfeil heard, nor, as a consequence, the message Mr Elfeil gave to Mr Ghanem.

[16] Even if I am mistaken about the conclusion I reach here on the safety of accepting Mr Elfeil's understanding of that telephone communication, if indeed there was any mistake in the message that was received by Mr Elfeil, then one would have expected that to be teased out in the subsequent discussion which Mr Ghanem says he had with Mr Smith later on (probably early in December 2006), assuming that conversation took place at all.

[17] In that conversation, Mr Ghanem's evidence was that he had complained about the dismissal and he says that that was the conversation (the only conversation in fact he had with Mr Smith) in which he raised the personal grievance. Again, I have to say that I found Mr Ghanem a credible witness whose command of English was such as to encourage me in the view that he was capable of communicating in English and capable of understanding perfectly well what was being said to him. Mr Ghanem said that Mr Smith told him that *his job had gone*. If Mr Smith had not intended to dismiss but had simply intended to indicate that the position occupied by Mr Ghanem would be filled by someone else until Mr Ghanem returned to duty, then

assuming this conversation took place in the way that Mr Ghanem says it did, one would have expected Mr Smith to remonstrate with Mr Ghanem and to explain that he had not in fact been dismissed.

[18] If Mr Ghanem spoke to Mr Smith in the manner he says he did, then it is difficult to see how such a conversation is not a proper raising of a personal grievance. Even SPM accept that proposition. The real question though, is whether Mr Ghanem has accurately conveyed what happened. It seems likely Mr Ghanem was told by Mr Elfeil that his job was lost although I have already decided that Mr Elfeil was probably mistaken in his conviction that that is what Mr Smith told him. With Mr Ghanem already pre-programmed to confront his employer about a lost job or a dismissal, it is certainly possible that Mr Ghanem misunderstood any conversation he may have had with Mr Smith.

[19] The only other explanation I can think of is that Mr Ghanem and Mr Elfeil are conspiring together to concoct this story. I do not think that is a credible explanation. I was impressed with the straightforward evidence given by both these men and I think it more rather than less likely that their evidence was as truthful as they could make it.

[20] I am not assisted by SPM's evidence that Mr Smith had no authority to dismiss. That may well be the case, but neither Mr Ghanem nor Mr Elfeil could be expected to know that. I accept Mr Ghanem's evidence that he had never dealt with anybody except Mr Smith and that although Mr Harry Hansen was the plant manager and gave evidence to the Authority, both Mr Hansen and Mr Ghanem confirmed that they might have met each other just once and then neither seemed sure that that had actually happened. It seems to me to follow then that Mr Ghanem would reasonably have imagined that advice conveyed to him by Mr Smith was able to be relied upon as the company position. In my opinion, Mr Ghanem was in no position to identify whether Mr Smith had authority for the views he advanced or not.

[21] Further, Mr Hansen, in his evidence, accepted that Mr Smith, as the production supervisor, was intimately involved with the recruitment and management of Halal slaughtermen at the plant and so it is not unreasonable for Mr Ghanem to see Mr Smith as being the focus for any management issue.

[22] I understand Mr Hansen's reliance on the employer's paper trail as evidence for the view that Mr Ghanem was not dismissed. In essence, Mr Hansen makes the important observation that there is no record of the dismissal in the company's file and that Mr Ghanem's personnel file is effectively still open.

[23] My conclusion then is that, on the balance of probabilities, I find that Mr Ghanem was not in fact dismissed by Mr Smith in a telephone conversation with Mr Elfeil on 23 November 2006 and that, at best, Mr Elfeil was told in passing that Mr Ghanem's position was being filled temporarily by others until he could pick it up again.

Was a grievance raised?

[24] Having decided that there was no dismissal, the issue of whether a grievance was raised becomes academic.

[25] However, I am inclined to believe Mr Ghanem that there was a conversation in which he spoke with Mr Smith and raised a "personal grievance" in regard to a non-existent dismissal, and that Mr Smith may perhaps have pointed out the employment agreement could not currently be performed. Whatever the truth of the raising of the grievance, the employment agreement between Mr Ghanem and SPM was frustrated by Mr Ghanem's inability to perform it. As a result of the allegation of rape made against him, Mr Ghanem was bailed to Christchurch with strict bail conditions requiring daily reporting to the Police at Hornby. That remained the situation until he was acquitted of the charge fully twelve months later. It follows that for that whole twelve month period Mr Ghanem would have been unable to fulfil his employment obligations to SPM. I am satisfied that, as a matter of law, Mr Ghanem's employment agreement came to an end through frustration from the moment he was bailed to Christchurch.

Determination

[26] I have arrived at the conclusion that there was never a dismissal of Mr Ghanem and that, although he may well have had a conversation with Mr Smith about the alleged dismissal and even put matters on the footing of a personal grievance, given there was no dismissal, there could be no grievance either.

[27] Further my considered view is that Mr Ghanem's employment agreement terminated through frustration immediately he was bailed to Christchurch by the Invercargill District Court.

[28] That being the position, I have not found Mr Ghanem's grievance proved.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority