New Zealand Employment Relations Authority Decisions

Ha v IFF 21 (New Zealand) Limited (Christchurch) [2011] NZERA 928; [2011] NZERA Christchurch 29 (21 February 2011)

Last Updated: 23 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 29
5303113

BETWEEN TAE WOOK HA Applicant

A N D IFF 21 (NEW ZEALAND) LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Jong Sun Lim, Counsel for Applicant

Craig Mundy-Smith and Graeme Riach, Counsel for Respondent

Investigation Meeting: 3 September and 29 September 2010 at Christchurch

Submissions Received: 17 December 2010 from Applicant

1 February 2011 from Respondent

Date of Determination: 21 February 2011

SECOND DETERMINATION OF THE AUTHORITY

Introduction

[1] This is the second determination of the Authority in this matter, the first having issued on 23 November 2010. That earlier determination was concerned solely with the claim by the applicant (Mr Ha) that he was owed holiday pay from the employer. The present determination deals with the balance of Mr Ha's claim against the respondent employer (IFF).

[2] For the sake of completeness, it is noted that, for practical reasons, the investigation meeting was conducted in two parts on separate dates. Because Mr Ha became financially embarrassed during the course of the Authority's investigation, and because Mr Ha was the applicant, I gave him certain latitude to recover his finances sufficiently to be able to pay outstanding legal fees to his counsel so as to

enable the matter to be concluded, particularly by way of final submissions. There was a significant delay between the conclusion of the Authority's investigation and the receipt of those submissions but the reason for that delay is the Authority's clear decision to allow some latitude to Mr Ha to enable him to honour his obligations to counsel and thus enable counsel to assist the Authority by the furnishing of final submissions on Mr Ha's behalf.

Employment relationship problem

[3] The balance of Mr Ha's claim involves an allegation of unjustifiable dismissal together with a request for orders

pertaining to Mr Ha's claim that his employment was covered by Part 6A of the Employment Relations Act 2000. IFF resists those claims.

[4] Mr Ha was employed as a cleaner and he worked principally at the Eastgate shopping centre in Christchurch. In the period from April 2008 down to August 2009, Mr Ha was employed, in that capacity, by an entity incorporated as Lux Services Limited. From August 2009, Mr Ha became an employee of the respondent, IFF. There was no written employment agreement between Mr Ha and either of the employers.

[5] On 3 December 2009, Mr Ha was told to cease work by IFF. IFF maintains that that was a temporary cessation of work at the Eastgate site pending a redeployment elsewhere while Mr Ha contends that he was dismissed. Mr Ha supports his contention by alleging that he and the team that he worked with at the Eastgate shopping centre were replaced by IFF, on the same day, by a new team.

[6] The parties attended mediation on 25 March 2010 but were unable to resolve their differences and the matter proceeded from there to the Authority for investigation.

Issues

[7] The two issues for the Authority to determine are whether Mr Ha was unjustifiably dismissed and whether Part 6A of the Employment Relations Act 2000 (the Act) applies to the employment relationship.

[8] If Part 6A of the Act does apply, then the Authority will need to consider whether there are consequences that flow from that conclusion, or not.

Was Mr Ha unjustifiably dismissed?

[9] I conclude that Mr Ha was unjustifiably dismissed from his employment by IFF. It is clear that at the time that the employment relationship between these parties came to an end, Mr Ha was engaged in his cleaning duties at Eastgate shopping centre. The evidence from IFF is that its client, the Countdown supermarket in the shopping centre, was unhappy about, and complained about, Mr Ha's work. Conversely, Mr Ha's evidence is that, far from being unhappy with his work, what Countdown wanted was for Mr Ha to do more work, that is, to work for longer hours. Mr Ha told me *what happened was that Countdown was just more demanding*.

[10] Whatever the truth of Countdown's position, it is common ground that IFF relied on problems with Countdown to address Mr Ha on 3 December 2009. IFF says that Countdown had insisted that Mr Ha would not be permitted back onto the Eastgate Countdown site. Mr Ha says he was told that by IFF and immediately thereafter was told that *a new team was going to take over and that they would do the job from now. So the new team had already been arranged before Mr Kim* [a representative of IFF] *spoke to me*. Mr Ha acknowledged that he was not told at any time that he had been fired or dismissed but that Mr Kim told him *I was replaced and not to work there any more*.

[11] IFF's evidence is that Mr Ha was told by Mr Kim that his job was safe but Mr Ha explicitly rejected this suggestion in the investigation meeting before me. He said *it is not true. I asked Mr Kim if he would let me work at another place. I pleaded with him. He is a much younger man than I am. I lose face by asking him for another job*. Responding to the contention that Mr Kim had proposed that Mr Ha take some leave and then contact Mr Kim to discuss redeployment options, Mr Ha told me *I deny it. I told Mr Kim I needed a regular income and I pleaded with him to find alternative work for me. He made no mention of me taking time off or me being redeployed elsewhere. Because I lost my job my wife's business which she was just starting out, failed because I could not help her financially*.

[12] It is clear that Mr Ha did not contact Mr Kim Jnr (the man who had spoken to him at the 3 December meeting) ever again. He did, however, contact Mr Kim Snr by

telephone. There is a dispute about the nature of that telephone call between Mr Ha and Mr Kim Snr. Mr Kim Snr says that by failing to use respectful language to his superior, Mr Ha behaved in a *highly offensive* manner but Mr Ha absolutely denied any *intention to cause offence*.

[13] The issue for determination here is when the termination of the employment happened because the timing of the event determines culpability. As I have just recited, Mr Ha is adamant that he was *sent away* by Mr Kim Jnr in the face-to-face discussion on 3 December 2009. Mr Kim Jnr is equally clear that what he told Mr Ha was that he was *out of the site* (meaning the Countdown Eastgate site) and that *he needed to decide what he wanted to do* (meaning he needed to decide whether he wanted to be a supervisor of other cleaners or whether he wanted to continue doing cleaning himself). Mr Kim Jnr went on in his evidence to say *culturally he may have taken my approach as equivalent to a dismissal but it wasn't*.

[14] If, as IFF maintains, the employment relationship was still intact after this conversation, then the focus must turn to the subsequent telephone discussion between Mr Ha and Mr Kim Snr (Mr Kim Jnr's father). Mr Kim Snr is a director of IFF while Mr Kim Jnr is merely a shareholder and a manager in the company. Both Mr Kim Snr and Mr Kim Jnr reside in Auckland. Mr Kim Jnr's evidence is that he was present, with his father, when Mr Ha telephoned Mr Kim Snr. Mr Kim Jnr's evidence is that

the approach from Mr Ha appeared to be *rude* so far as he could judge from his father's responses. Mr Kim Snr told me that he received this call from Mr Ha about a week after the 3 December meeting between his son and Mr Ha. He said that Mr Ha used *very rude language and did not treat me respectfully and that he kept saying to me you want to fire me from the job*.

[15] Mr Kim Snr formed the view that Mr Ha *doesn't want to work for me any more* because of his *bad language* and *so I thought he was signalling that he wanted to quit this job*.

[16] Mr Kim Snr concluded this part of his evidence with the following statement:

I don't want to see his evil face again but I would pay him compensation. Losing face is very serious in Korea. If I see him again I would hit him!

[17] I am satisfied that the evidence before the Authority is that Mr Ha was dismissed from his employment by Mr Kim Jnr at the face-to-face meeting on

3 December 2009. I accept this may not have been Mr Kim's intention, but I think it was the consequence of the discussion. What Mr Ha heard was that he was no longer to work at Eastgate (and that much is common ground) and that he was to be immediately replaced with other employees (again, common ground). There is, however, no agreement about what happened next with Mr Kim Jnr maintaining that he told Mr Ha to take some time off and think about what he wanted to do while Mr Ha maintaining that he heard no such message.

[18] On this aspect, I prefer Mr Ha's evidence to Mr Kim Jnr's although I must say that I was impressed with the straightforward nature of the evidence given by all three witnesses in this matter. My reason for preferring Mr Ha's recollection of events to Mr Kim Jnr's on this point is principally that Mr Ha's subsequent telephone discussion with Mr Kim Snr makes no sense at all if Mr Ha was still employed. The only way of making sense of that telephone discussion is on the footing that Mr Ha had lost his job and was seeking to get it back by effectively petitioning the senior man (Mr Kim Snr) to be reinstated. While Mr Ha did not accept that he was rude to Mr Kim Snr, there is some common ground between Mr Kim Snr and Mr Ha as to the content of the discussion. Even on Mr Kim Snr's evidence, Mr Ha was saying that Mr Kim wanted to *fire me from the job*. If that discussion between the two men was intemperate, as I accept it was, then it is more likely than not that Mr Ha was cross about having lost his job and seeking to petition his employer to get it back than the alternative view where Mr Ha was to continue in employment but on what basis remained uncertain. In that latter event, one would have expected Mr Ha to approach the conversation with Mr Kim Snr quite differently from the way he obviously did.

[19] It follows then that I conclude Mr Ha was dismissed from his employment by the effect of the discussion with Mr Kim Jnr on 3 December 2009 and that by reason of the nature of that discussion, the immediacy of it, the absence of notice, and the complete absence of any process, the dismissal was an unjustified one and Mr Ha has a personal grievance as a consequence.

Is the employment covered by Part 6A of the Act?

[20] Mr Kim Snr gave evidence to me about the relationship between Lux (the first employer of Mr Ha) and IFF. It is clear first that there was no formal documented commercial relationship, although there was an informal one. That informal relationship, I hold, was in the nature of a subcontract. Mr Kim Snr told me that

Korean practice was not to enter into written commercial arrangements until the subject business was successful and that was the case in this instance. He had an informal arrangement with Lux and that arrangement, which I am satisfied was a subcontract arrangement, would remain undocumented until the parties were satisfied that the business arrangements were successful.

[21] In fact, the business arrangements were, according to Mr Kim Snr, somewhat unsatisfactory in the initial stages. Mr Kim Snr had told me how he had started his cleaning business in Sydney in 2001 and expanded to New Zealand thereafter and that he was now the governing director of the New Zealand operation. He said that by

2008, the New Zealand business had blossomed in the North Island but the only Christchurch contract was the Countdown premises at the Eastgate shopping centre. Mr Kim told me that he *needed a partner* and that he met with Mr Lee of Lux and provided the services under that contract through Lux. Of course, as Mr Ha has testified, he was employed by Lux at the relevant time.

[22] Mr Kim Snr told me that he came down to Christchurch in July 2009 to meet with Mr Lee again because, by then, he had obtained further contracts for cleaning services within Christchurch and he wanted to develop those further commitments with Mr Lee. Mr Kim could not find Mr Lee and in Mr Lee's absence, Mr Kim met Mr Ha for the first time. Mr Ha told Mr Kim that Mr Lee had gone back to Korea and it transpired that Mr Lee was unwell. Subsequently, Mr Kim himself went back to Korea and he met with Mr Lee there. He told me that he was *really angry* about Mr Lee because Mr Lee had not kept in touch with him and told him what was happening. Mr Kim told me that he found Mr Lee in bed *doing nothing* but that he was *getting paid by me* at the time. Mr Kim thought that he would finish with Mr Lee and deal with Mr Ha. That subsequently happened and Mr Kim's evidence is that from 1 August 2009, he paid Mr Ha on exactly the same conditions as Mr Ha had

been paid by Lux.

[23] The question for the Authority to resolve is whether that sequence of events brings Mr Ha's employment relationship within the terms of Part 6A of the Act and what, if any, consequences flow from that original decision. The purpose of Part 6A is *to provide protection to specified categories of employees* (including Mr Ha) *if their employer proposes to restructure its business so that their work is to be performed for a new employer and, to this end, to give employees ...* rights to transfer to the new

employer and to bargain for redundancy compensation or, in the event of that bargaining being unsuccessful, having the Authority set the redundancy entitlements.

[24] It is clear that Mr Ha is in the category of a protected employee for the purposes of Part 6A. It is also clear that Mr Ha was not provided with any election to transfer to any new employer.

[25] However, in a practical sense, nothing changed for Mr Ha and both his evidence and Mr Lee's evidence is he was effectively providing services to IFF's client, whether employed directly by IFF (from 1 August 2009) or whether receiving payment via Lux for the earlier period.

[26] I think as a matter of law the Authority is bound to conclude that Part 6A of the Act applies. The factual position was that Mr Ha commenced employment with one employer and, by common consent, ceased employment with that employer effective 1 August 2009 and became employed by another employer doing precisely the same work. That work was in one of the *specified categories*, that of a cleaner. Mr Ha lost his right to make an election as to whether he wished to transfer or not and lost the other opportunities that may have been available to him had the law been applied according to its tenor. However, those losses are probably more apparent than real as I am satisfied that, from the beginning of Mr Ha's employment, he was effectively under the *control* of IFF, providing services to its clients, albeit in part through a subcontract arrangement with Lux.

[27] I have already determined that Mr Ha's employment came to an end with IFF not as a consequence of redundancy but as a consequence of an unjustified dismissal so the principal benefits of Part 6A of the Act, had they been appropriately applied in Mr Ha's case, as they should have been, would not have availed him in any event.

Determination

[28] I am satisfied Mr Ha has been unjustifiably dismissed and, subject to questions of contribution which I consider next, is entitled to remedies.

[29] I do not think that Mr Ha contributed in any way to the circumstances giving rise to his personal grievance by way of unjustified dismissal. This is because I have already held that his dismissal was effected on 3 December 2009 by Mr Kim Jnr. Mr Kim Jnr's reason for taking the steps he did were complaints about Mr Ha's

workmanship (according to IFF), but IFF took no proper steps to address that and give Mr Ha the opportunity to respond. Further and finally, any rudeness which Mr Ha may have been guilty of in his subsequent telephone discussion with Mr Kim Snr a week after the dismissal cannot, of course, be called in aid by the employer for contribution if the dismissal had already taken place.

[30] The evidence to justify hurt, humiliation and injury to Mr Ha's feelings was evident to the Authority during the course of the somewhat elongated investigation process. Mr Ha told me of his loss of face in the Christchurch Korean community as a consequence of having lost his employment and he referred particularly to the humiliating effect of not being able to provide for his family once he was dismissed. That circumstance was exacerbated by Mr Ha having to rely on moneys borrowed by his wife to sustain the family after his dismissal. Thus, not only was Mr Ha humiliated in the wider Korean community for losing his job, but he was further humiliated because, in the absence of moneys to sustain his family, he had to rely on his wife for sustenance. Further, he was unable to find alternative employment in Christchurch and eventually had to leave New Zealand altogether. Mr Ha now lives and works in Melbourne where he has maintained his role as a cleaner.

[31] Accordingly, I direct that the following sums are to be paid by IFF to Mr Ha to remedy the latter's personal grievance. In making these awards, I take account of the technical failure to comply with Part 6A of the Act:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act

2000 in the sum of $5,000;

(b) A contribution to lost wages in the gross sum of $1,000 (the actual losses sustained by Mr Ha being difficult to quantify from his evidence on the point);

(c) The Authority's filing fee of $70.

[32] I decline to make orders in respect of the claim for penalties or in respect of the contention that the Inland Revenue Department has not been properly accounted to for Mr Ha's earnings. As to the first, I am not persuaded IFF has been guilty of wrongdoing sufficient to justify a penalty and I agree with the observations of counsel for IFF that the failure to comply with Part 6A of the Act ought not to attract any opprobrium. As to the allegation that the Inland Revenue Department has not been

properly accounted to for Mr Ha's earnings, that allegation was not demonstrated to the Authority's satisfaction and I take the matter no further.

Costs

[33] Costs are reserved. Counsel are directed to engage with each other with a view to trying to resolve matters by agreement in the first instance. If matters cannot be resolved within 21 days of the date of this determination, counsel may seek an award of costs from the Authority.

[34] I observe for the sake of completeness that the costs claimed by counsel for Mr Ha in the course of his submission on the substantive matter (and without any supporting documentation) are completely inappropriate for a matter of this kind. Costs, if any, for this sort of proceeding would, of necessity, be a great deal more modest.

James Crichton

Member of the Employment Relations Authority
