

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mi Sook Hwang (Applicant)
AND Boyne Company Ltd t/a Goodday Newspaper (Respondent)
REPRESENTATIVES Clive Bennett, Advocate for Applicant
Mark Ryan, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 10 March 2004
DATE OF DETERMINATION 13 April 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

- [1] In an application filed with the Employment Relations Authority on 1 December 2003 the applicant, Ms Hwang (“Ms Hwang”) claimed that she was unjustifiably dismissed by the respondent, Boyne Company Ltd trading as Goodday Newspaper (“Goodday”).
- [2] In their statement in reply Goodday say Ms Hwang was not dismissed.
- [3] On behalf of the applicant the Authority heard evidence from Ms Hwang and Mr Bevan Tinker. On behalf of the Respondent the Authority heard from Mr Jeon junior (“Mr Jeon”) who is the Editor in Chief and has the overall responsibility for the day to day running of the Newspaper; Ms Christine Choi (“Ms Choi”) who is the General Manager of the Newspaper and has a desk in the same area as Ms Hwang and Mr Choong Gil An, Sales Manager.

Background

- [4] Goodday are in the business of publishing a weekly newspaper for Korean readers. The company is owned by Mr Jeon senior (“the President”) who resides in Korea.
- [5] It is common ground that before, during and after her employment with Goodday, Ms Hwang undertook additional paid work on her own account, doing graphic design work for clients. Some of those clients came to her directly as a result of the work she did at Goodday and were Goodday clients as well. Such extra work was done outside her normal working hours.
- [6] Ms Hwang commenced employment in January 2003 as a graphic designer. There was no written employment agreement.

- [7] Ms Hwang worked Monday to Friday inclusive from 9.00am to 5.00pm except on deadline days when she would work until the job was completed. This was sometimes until 1.00am the following morning. The newspaper was published on Wednesday of each week and delivered to customers on Thursdays. Ms Hwang assisted in the delivery of the Newspapers.
- [8] Ms Hwang was paid an annual salary of \$33,000 which was paid fortnightly.
- [9] At the commencement of the employment relationship Mr Jeon indicated to Ms Hwang that after 3-6 months employment there may be an adjustment in her salary by way of review.

Events leading to the ending of the employment relationship

- [10] The events leading to the ending of the employment relationship began on 1 August 2003.
- [11] At approximately 10.00am that day Ms Hwang approached Mr Jeon and asked for an increase in her salary.
- [12] A fellow designer had left the newspaper the previous week and as a result Ms Hwang claimed her workload had increased.
- [13] Mr Jeon told Ms Hwang that she was the highest paid employee and an increase was out of the question due to the economic situation of the business.
- [14] It is common ground that there was a discussion between Ms Hwang and Mr Jeon about changing the way Ms Hwang was paid. Mr Jeon suggested one option was to pay Ms Hwang an hourly rate so that she could be paid for each hour worked. It was Ms Hwang's evidence that she discussed with Mr Jeon a maximum of \$15.00 per hour. Mr Jeon says he discussed a rate of between \$13.00 per and \$15.00 per hour.
- [15] Mr Jeon's evidence is that he would have to discuss any changes in salary with the President. Mr Jeon says he also told Ms Hwang that because of the financial state of the company he could not give her an increase and that if she wanted more money she would have to think about another job.
- [16] At the end of her discussion with Mr Jeon, Ms Hwang went out into the open office area where she entered into a discussion with Ms Choi.
- [17] Ms Hwang told Ms Choi that Mr Jeon had offered to pay her \$15.00 per hour and asked what her weekly pay would be including overtime if the \$15.00 per hour was accepted.
- [18] Ms Hwang's says she was told by Ms Choi that if Ms Hwang worked for 40 hours in a week it would amount to \$600.00. She says that Ms Choi told her that the President might dismiss her if the matter was discussed with him.
- [19] Ms Choi's evidence is that she had only been working at the Newspaper for 3 weeks and did not have any authority to discuss such matters.
- [20] At 11.00am Mr Jeon sent an email to the President outlining the discussion he had had with Ms Hwang. A copy of that email was not made available to the Authority.

Applicant's Evidence

- [21] Ms Hwang says that at about 1.00pm Ms Choi showed her a fax addressed to Mr Jeon signed by the President. What follows is an English translation of the fax:

"To Mr Jeon, General Manager of Editorial Department

I read your email. We are now in difficult situation in terms of running the business. We can't work with those who are only interested in their own benefits. Although they are very capable, we can't employ them, when we consider the situation of the company. If they insist only their own rights without considering the situation of company that is in difficult situation in its operation and has operated just less than 1 year. Notify those matters to the staff and dismiss anyone who does not change their mind. We can't help it. Work with those who come to an understanding even though there is only one person remained. Tell the staff the intention of president as it is. I demand you to do so even though you suspend one or two publications."

- [22] Ms Hwang says that this fax instructed Mr Jeon to dismiss her. Ms Hwang says that she asked Ms Choi if she was fired and that Ms Choi told her she might be.
- [23] Ms Hwang says she then approached Mr Jeon and asked him how long she would continue working there and that he responded by saying his father had told him to dismiss her that day.
- [24] Ms Hwang says she then approached Ms Choi to ask about how salary and holiday pay would be dealt with if someone was fired. She says she was told by Ms Choi that the company expected to give or receive two to three weeks notice and that Ms Hwang would receive 6% of her accumulated salary depending on whether the company could afford it or not.
- [25] Ms Hwang then says she rang her husband and advised him she had been fired. Her husband advised her that she should leave immediately as she did not owe the company anything as a result of what it had done.
- [26] Ms Hwang says that as she had no way of getting home so stayed and completed her work before leaving at the usual time.

Respondent's Evidence

- [27] Ms Choi disputed Ms Hwang's evidence about discussing the fax with her at 1.00pm. Ms Choi says that she did not have the fax and does not know how Ms Hwang came to get a copy of it.
- [28] Mr Jeon says that all during the day Ms Hwang was asking whether a decision about her salary review had been made. He says that he received a phone call from the President at about 3.30pm telling him that a fax was on its way.
- [29] Mr Jeon went out into the main office area to retrieve the fax. The fax machine is located next to Ms Hwang's desk.
- [30] As he was taking the fax back to his office Mr Jeon said Ms Hwang was asking what the fax was about. Mr Jeon says that when he got to his office Ms Hwang asked what was going on. Mr Jeon responded that the President was not happy. Ms Hwang asked if she was fired and asked how long she could work. Mr Jeon's evidence at the investigation meeting, was that Ms Hwang had not been fired, but could work until she found another job.
- [31] Mr Jeon's evidence was that he thought it was enough to say that Ms Hwang was not fired.

- [32] It is common ground that at the end of the discussion with Mr Jeon, Ms Hwang wrote down Mr Jeon's home phone number and advised him that she would ring him over the weekend. Ms Hwang's evidence was that the telephone call was to confirm whether she would work out her notice period. Mr Jeon says the telephone call was to advise him whether Ms Hwang would return to work.
- [33] Ms Choi says that at about 4.00pm Ms Hwang took her into the Directors room and asked her if she [Ms Hwang] was fired. Both Mr Jeon and Ms Choi gave evidence that when Ms Choi and Ms Hwang came out of the room Ms Choi asked Mr Jeon "*did you fire her?*" to which Mr Jeon responded "*no definitely not*".
- [34] Both Mr Jeon and Ms Choi say that a short time later Ms Hwang cleaned out her desk and left the office.
- [35] It was Mr Jeon's evidence that he believed Ms Hwang was trying to make a "deal" with the aim of forcing him to give her a pay increase. This was due to the fact that one designer had left and this meant that Ms Hwang was the only designer left to do the work.
- [36] Ms Hwang did not turn up for work on Monday, 4 August 2003. Mr Jeon did not attempt to contact her. On Tuesday, when Ms Hwang did not turn up for work Ms Choi says she tried to telephone Ms Hwang but with no success.
- [37] Ms Hwang sought advice about her situation on Wednesday, 6 August 2003 and a letter dated 7 August 2003 was faxed to Mr Jeon raising a personal grievance for unjustified dismissal.
- [38] On that same day (Thursday, 7 August 2003) Mr Jeon wrote a letter to Ms Hwang requesting Ms Hwang to contact him and explain the reasons for her absence. In that letter Mr Jeon also set out his view that Ms Hwang's absence had caused difficulties for the company.
- [39] From the evidence produced at the investigation meeting it is apparent that the fax from Ms Hwang's representative and the letter from Mr Jeon crossed paths. It was Mr Jeon's evidence he did not have an opportunity to check his mail or faxes coming into the office on Thursday because he was very busy given Ms Hwang's absence.
- [40] On Friday, 8 August 2003 Mr Jeon wrote once again to Ms Hwang and requested written explanations of her absence promptly. It was Mr Jeon's evidence that at the time this letter was written he still had not seen a copy of the fax from Ms Hwang's representative.
- [41] Ms Hwang produced the newspaper published by Goodday on 7 August 2003 as evidence that she had been dismissed before the exchange of letters. The newspaper would normally have included Ms Hwang's name in the list of editorial staff. In the newspaper dated 7 August 2003 Ms Hwang's name was not included. In response to this Mr Jeon told me he had left her name out of the newspaper as she had not contributed to it that week.
- [42] On 11 August 2003, Mr Jeon once again wrote to Ms Hwang advising her that he considered she had voluntarily resigned. By this time Mr Jeon had had an opportunity to read the fax dated 7 August 2003. Mr Jeon's evidence was that he did not take the fax seriously.
- [43] In the letter dated 11 August 2003 Mr Jeon asked Ms Hwang to reply to the letter or he will consider that she has voluntarily resigned. The letter also outlined a complaint that Ms Hwang had spoken to a client of Goodday about her alleged dismissal.

- [44] In response to the 11 August 2003 letter Mr Bennett, on behalf of Ms Hwang, advised Mr Jeon that Mediation Services had been contacted regarding a date for mediation. Mr Bennett also acknowledged the company had sent letters to Ms Hwang and that she had been requested to refrain from advising people she had been dismissed. Mr Bennett requested Mr Jeon to stop harassing Ms Hwang and to direct all communications to his office.
- [45] On 13 August 2003 Mr Jaehon Song, on behalf of Mr Jeon, disputed Ms Hwang's contention that she had been dismissed.
- [46] On that same day, Mr Jeon wrote to Ms Hwang advising her that as she had not contacted the company he considered that she had voluntarily resigned her employment and advised her to visit the company to complete procedures of voluntary resignation.
- [47] At the investigation meeting Ms Hwang acknowledged that she had received all 4 letters from the company.

Summary of Submissions made on behalf of the parties

[48] On behalf of the Applicant Mr Bennett submitted that:

- Ms Hwang had not resigned or abandoned her employment. He submitted that the more likely answer is that Ms Hwang had been unjustifiably dismissed as a result of having had the temerity to raise the question of whether an increase to her salary was possible. Mr Bennett claims that if Ms Hwang did resign then it should be considered a constructive dismissal.
- In the absence of a specific provision in an employment agreement the applicant could not be deemed to have abandoned her employment.
- Ms Hwang was advised that she could no longer work for the company and that she was to be dismissed either on notice or at such time as she had found another job.
- In the alternative, Mr Jeon's complete lack of good faith in response to the applicant's request to consider increasing her salary and it's very clear lack of regard for it's legal obligations unjustifiably disadvantaged the applicant to the extent that she believed she had no option other than to leave work rather than face the shame and embarrassment of either working out her notice or until she found another job.

[49] On behalf of the respondent Mr Ryan submitted:

- There was no dismissal or sending away of the Applicant. The 1 August 2003 fax was a private communication between the President and the Editor in Chief. Ms Hwang's name was not mentioned in the fax nor did it state that Ms Hwang should be dismissed. On enquiry with her employer, the Respondent clearly advised Ms Hwang that she had not been fired.

Credibility

[50] Credibility findings are important to give context to my findings overall.

- [51] In trying to reconcile the different versions of the conversations with which I am presented I have reflected on the evidence as a whole.
- [52] With regard to the evidence around the timing of receiving the fax and the provision of it to Ms Hwang I prefer the evidence of the respondent. Ms Hwang says she discussed the fax with Ms Choi at 1.00pm. This could not have happened as the date and time stamp on the fax relates to the date and time the fax was sent from Korea not received in New Zealand.
- [53] The date and time stamp on the fax indicates that the fax was initiated from "BOYE" at 12:29 on 2003-08-01. Korea is 3 hours behind New Zealand. This means the fax could not have been received in New Zealand until at least 3:29pm.
- [54] Ms Hwang used the words from the fax to persuade the Authority that Mr Jeon had dismissed her. I accept that the fax certainly states that staff who do not change their minds after discussion should be dismissed. I do not accept that the fax specifically says Ms Hwang was to be dismissed that day.
- [55] Ms Hwang wrote notes in Korean when she got home on the Friday night 1 August 2003. The notes were translated by a friend during the weekend of 2/3 August 2003. The notes were provided to the Authority
- [56] The notes state that in the past Mr Jeon had put another employee into the Sales Department even though the President had instructed him to fire her and that this was pointed out to her by Mr Jeon in the first meeting he held with her on 1 August 2003.
- [57] This demonstrates that Ms Hwang knew that Mr Jeon did not blindly follow the instructions of his President.
- [58] It was not open to Ms Hwang to simply decide she had been dismissed on the basis of seeing the fax from the President.
- [59] When Ms Hwang told Ms Choi that Mr Jeon would give her \$15.00 per hour this statement was not accurate. It was clearly the evidence of both parties to this employment relationship problem that the \$15.00 per hour discussed was a maximum.
- [60] These points may seem to be minor. However, they are included to confirm the view I have arrived at that Ms Hwang has tended to put a slant on her conversations during her employment and the fax presented to the Authority in a way which will further her own position. Because of this, on balance I prefer the evidence of the Respondent.

Determination

Was there an actual dismissal?

- [61] The initial onus is on the Applicant employee to show that a dismissal occurred and that there is a prima facie case of grievance (*Wellington Drivers IUOW v Fletcher Construction Co Ltd* [1982] ACJ 663).

- [62] Ms Hwang never made contact with Mr Jeon after leaving the premises on 1 August 2003 until 7 August 2003 when Ms Hwang's representative wrote to the company raising as a personal grievance the contention that Ms Hwang had been unjustifiably dismissed. The respondent attempted to make telephone contact on 5 August 2003 and then wrote to the applicant on four separate occasions asking her to make contact with the company.
- [63] The respondent has not argued that Ms Hwang abandoned her employment; instead they say they did not dismiss Ms Hwang.
- [64] I do not accept there was a "sending away" sufficiently clear so as to amount unequivocally to a dismissal.
- [65] I have concluded on the evidence presented that Ms Hwang was not dismissed on 1 August 2003.

Was there a constructive dismissal?

- [66] Mr Bennett has submitted that the Respondent acted with complete absence of good faith when Ms Hwang requested a pay increase and that this disadvantaged Ms Hwang to the extent that she believed she had no option other than to leave her job.
- [67] I am satisfied from the evidence presented by both parties that the information provided by Mr Jeon at the time he was approached about the salary increase was honest and not misleading in any way. The information regarding the economic situation of the company was substantiated by the fax received from the President.
- [68] During their discussions Mr Jeon suggested an option to change the basis on which Ms Hwang was paid. This was obviously open for discussion and Ms Hwang must have considered that it deserved serious thought, given that her first reaction was to seek further information from Ms Choi as to what her resulting pay would be if she agreed to a change.
- [69] I have concluded on the evidence presented that Ms Hwang was not disadvantaged in her employment to the extent that she was constructively dismissed on 1 August 2003.
- [70] Ms Hwang's claim is dismissed. She does not therefore have any entitlement to the remedies sought.

Costs

- [71] Costs are reserved. The parties are to attempt to resolve the matter of costs between them. If they cannot do so they are to file and serve submissions on the subject within one calendar month of the date of determination.

Comment

[72] The Employment Relations Act has now been the legislation guiding employment relationships for more than 3 years. It is no longer acceptable for employers to plead ignorance when they have failed to provide employees with the written terms and conditions of their employment as required by the Act. The Department of Labour has provided a “Build your own Employment Agreement” document on their website www.dol.govt.nz . Employers are able to access this information and can write their own employment agreements free, using the ranges of clauses available.

Vicki Campbell
Member of Employment Relations Authority