

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jiyong Jeong (Applicant)
AND Hanyang Corporation Limited (Respondent)
REPRESENTATIVES Jaehon Song, Advocate for Applicant
Anna Fitzgibbon, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 19 July 2006
DATE OF DETERMINATION 2 October 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant submits he has a personal grievance pursuant to s.103 (1) (b) of the Employment Relations Act 2000 in that as a result of an incident in August 2005 his employment was effected to his disadvantage. He also submits that as a result of that same incident he was afraid to return to work and he was therefore unjustifiably constructively dismissed. As a result he also has a personal grievance claim pursuant to s.103 (1) (a) of the Act.

[2] The applicant also submits that the respondent is in breach of the Holidays Act in that holidays were not granted or paid by the respondent.

[3] The applicant also submits the respondent is in breach of s.65 and s.66 of the Act in that the respondent failed to provide him with an individual employment agreement.

[4] The applicant also submits the respondent is in breach of the Health and Safety and Employment Act 1992 in that it failed to have systems in place to protect employees from violence, failed to educate employees in relation to violence and failed to keep a record of the incident in August 2005 and failed to notify OSH.

[5] The applicant also claims that the respondent is in breach of the Wages Protection Act 1983 in that it failed to pay the applicant wages since the incident on 26 August 2005.

[6] To remedy the alleged grievances and breaches the applicant seeks lost remuneration, damages pursuant to s.123 (1) (c) (i), damages for breach of good faith and punitive damages for breaches of the Health and Safety and Employment Act. He also seeks arrears of wages and holiday pay.

[7] The respondent denies the allegations and in particular denies that the applicant was disadvantaged in his employment or that he was constructively dismissed.

Background

[8] Mr Lee and his wife are directors and operators of the respondent company. There is one other director who runs one of the company's retail stores. Hanyang was incorporated in 1999. It is in the business of importing and distributing Korean groceries and products to various retailers throughout New Zealand including its own franchise stores. There are five Hanyang stores in Auckland.

[9] At the time Hanyang took over the existing business in 1999 one of the suppliers to that business was Jiyong Jeong ("Mr Jeong"). Mr Jeong had an ice cream manufacturing business which had been running in New Zealand for some years. Mr Lee came to know him as he supplied ice cream to Hanyang. It is not in dispute that the two men became quite close and that they talked on occasion about Mr Jeong selling his business and coming to work for Mr Lee. It was Mr Lee's evidence that he was keen to have Mr Jeong involved in the business because he was aware that Mr Jeong had a lot of experience working within the Korean community and he felt his experience would be beneficial to Hanyang.

[10] In the event Mr Jeong sold his business at the end of 2004 and went to work for Mr Lee. He commenced on 3 January 2005. Mr Jeong was described on his company card as Sales Manager. It was Mr Lee's evidence that his role was to despatch and deliver Hanyang products and to develop relationships with stores so that Hanyang could supply its products to them. Mr Lee submitted that he provided Mr Jeong with a business card saying he was a Sales Manager as he did with all Hanyang's employees because he felt this title gave them an advantage in talking to store managers about buying Hanyang products.

[11] The evidence discloses that in late June early July 2005 Mr Jeong's brother (Kuyong Jeong) came to see Mr Lee at Glenfield and inquired about purchasing the Hanyang store in Albany. It was Mr Lee's evidence that that branch was owned by one of his business partners and he told Mr Kuyong that and that he would need to speak to her about purchasing the business. It is not in dispute between the parties that Mr Kuyong did not purchase that business because there was no agreement reached on price.

[12] It was Mr Lee's evidence that Mr Kuyong returned to see him again in July 2005 and advised him he wanted to offer to open an Asian grocery store in Albany. He asked Mr Lee if Hanyang would supply him with groceries. Mr Lee's position was that this was a poor business proposition because there was already substantial competition in the Asian food supply market in Albany. It was also his position that Hanyang could not and would not supply groceries to a new operation there because of the conflict it would cause with other Asian stores that Hanyang supplied and its own franchises. He told Mr Jeong's brother this.

[13] Shortly thereafter Mr Kuyong set up an Asian grocery store in Albany.

[14] It is Mr Jeong's evidence that he was told by Mr Lee to call his brother and tell him that Mr Lee would do whatever it took to stop him from opening the business in Albany and if he did open the business then he would do everything in his power to ruin it.

[15] Mr Lee submitted his discussions with Mr Jeong about his brother's business were not threatening. He simply informed Mr Jeong that he felt his brother would find business in Albany difficult due to competition and due to the fact he did not have his own importing and distribution business (which is necessary to ensure a good profit). He does accept that he withdrew his business from the company that supplied products to Mr Kuyong's business. His evidence was that when he became aware that Kim's Howick was going to be supplying product to Mr Kuyong's Asian grocery store he made it clear that he did not want stock supplied by Hanyang to Kim's being sold from Mr

Kuyong's grocery store in Albany. He explained that Hanyang chose to stock product in Albany which is different from other stock sold in Asian grocery stores in the immediate area and if Kim's Howick (supplied by Hanyang) supplied Mr Kuyong's grocery store then that situation would not be able to continue.

[16] It was Mr Jeong's evidence that he was worried about his career with Hanyang after the discussions he submits took place (where Mr Lee instructed him to tell his brother that he would do everything in his power to ruin his business). It his evidence that he suggested to Mr Lee that he would not work in the North Shore area so that he could avoid any potential conflict of interest.

[17] Mr Lee's evidence on this point is that Mr Jeong offered to resign his employment. Mr Lee says he asked Mr Jeong if he was involved in his brother's business. Mr Jeong replied that he was not and that he had little contact with his brother. Mr Lee said he told Mr Jeong there was no need for him to resign his employment. It was Mr Lee's evidence that he was not angry about Mr Jeong's brother starting a business in Albany and if he had been and had been concerned that there was any conflict between Mr Jeong's role and his brother's business he would have let him resign.

Incident on Friday 26 August

[18] On Friday 26 August 2005 a group from the business went to the Hoa Vietnamese Restaurant in Rosedale to welcome a new staff member. As I understand the evidence there were approximately nine people at the restaurant including Mr Lee, his wife Soo Yong Lee and Mr Jeong.

[19] By all accounts it was a happy occasion, and a significant amount of Soju (Korean whiskey) was drunk by the men. The women drank coke as they were driving.

[20] Mr Lee told the Authority that he was not feeling very well at the restaurant and he would have preferred that the evening came to an end when they left the restaurant. However, others in the party wanted to go on to a karaoke bar for what is known in the Korean community as "second shout". As the host Mr Lee felt it was appropriate for him to attend the second shout otherwise the party would have had to break up. Mr Lee and his wife agreed they would stay for 30-40 minutes at the bar.

[21] At the karaoke bar Mr Lee purchased a bottle of Korean whiskey for the group. Most of the group took turns at singing karaoke. Those were not singing at the time sat around a table drinking Korean whiskey and talking. It was Mr Lee's evidence that he wasn't feeling very well and he drifted off into a sleep or semi-sleep.

[22] At some time Mr Lee came to and decided he wanted to go home. He called out to his wife who was sitting on the other side of the table talking to Mr Jeong, but he could not get her attention because the music was loud.

[23] After attempting to catch his wife's attention on a couple of occasions, Mr Lee picked up the half full whiskey bottle which was on the table in front of him and tossed it across the table. His evidence was that he did not intentionally throw the bottle to hit anyone – he simply wanted to get his wife's attention. However he misjudged the throw and the bottle hit Mr Jeong on the head.

[24] It is Mr Jeong's evidence that he lost consciousness right there and then. He was taken to the emergency unit and when he regained consciousness he discovered he had received lacerations next to his eyebrow and he saw Mr Lee's wife and a female workmate standing next to him.

[25] It was Mr Jeong's evidence that it immediately came to his mind that he had been physically assaulted by Mr Lee in retaliation for his brother's new business. However, when the doctor asked

him how he got the lacerations he told the doctor he had fallen down stairs. This is because he thought that as a sole income earner for his family he would lose his job if he told the doctor what had happened (given Mr Lee's wife was standing next to him). When he got home his wife was surprised to see him injured and he told his wife that he fell down the stairs. His evidence was that his wife was doubtful about the answer.

[26] It was the evidence of witnesses for the respondent that Mr Jeong did not lose consciousness when the bottle hit him and that he said "what is this, oh shit".

[27] One of the women in the party (Duck Joo Yoon) went and got some paper towels to apply to his head and she advised him that he needed to go to a medical centre (she is a former nurse). She drove Mr Jeong to the medical centre. It was her evidence that Mr Jeong was saying the accident was his fault and that if he had not insisted that they all go to the karaoke bar it would not have happened. He did not want to tell the medical staff his cuts had been caused by a bottle and he told the receptionist that he had fallen down stairs. Ms Yoon was asked to stick to this story because she was worried about what his wife would say if she knew that Mr Lee had caused the accident. Ms Yoon's evidence was that Mr Jeong said that his wife hated Hanyang and that is why he didn't want to tell his wife about what had happened.

[28] After dropping her husband home, Mrs Lee went to the medical centre where she met with Ms Yoon and Mr Jeong. She apologised to Mr Jeong and he told her she did not need to apologise to him as he accepted it had been an accident. Her evidence too, was that he was worried about what to say to his wife. It was Mrs Lee's evidence that she took Mr Jeong from the medical centre to the car park near the restaurant (where he had parked his car). By that time he felt he was able to drive to his home which was nearby. They talked for a while before he drove home and he told her that he realised that Mr Lee had hit him accidentally with the bottle, but he did not know what to tell his wife.

[29] Mr Lee and Mr Jeong spoke by telephone the next day. It was Mr Jeong's evidence that it was important that Mr Lee came to see him that day and he asked him to come. It was his evidence that had Mr Lee come to see him that day everything would have been resolved between them. However Mr Lee did not come that day because he was too intoxicated. He also said he could not remember how he ended up throwing the bottle and he was sorry for the injury caused.

[30] Mr Lee's recall of their telephone conversation is different. He denies being asked by Mr Jeong to come and see him that day. He said it would not have been possible to go to Mr Jeong's home that day to talk about the events of the night before because he had been told by his wife and staff that Mr Jeong had told his wife he had fallen down the stairs. Mr Lee's evidence was that he asked Mr Jeong how he was and he said he was sorry and didn't know how the incident had happened. He told Mr Jeong to rest and that they would talk later.

[31] After that conversation Mr Jeong's wife questioned him about the events of the previous night and he told her the truth. She was upset and it was Mr Jeong's evidence that she encouraged him to lay a complaint with the police. She also rang Mr Lee.

[32] It is not in dispute that on the Sunday after the incident Mr Lee and his wife went to visit Mr Jeong at his home. However when they went to the house they were told to go away or the police would be called. Mr and Mrs Lee left the house and Mrs Lee rang Mr Jeong on her mobile phone from their car which was parked outside the house. Mr Jeong said he did not want to speak to them and he said that he had decided to refer the matter to the Police.

[33] Then by letter dated 30 August counsel for Mr Jeong wrote to the respondent:

“We act for Mr Jiyong Jeong, the sales manager of your company in respect of the above matter.

We understand that Mr Jeong has suffered from his injuries on his left forehead which were caused by a whiskey bottle thrown by Mr Sam Lee at the All Black Karaoke Bar at or about 11.30 pm 26 August 2005 and this criminal incident has been reported to the Police and the Police investigation is on the way.

Apart from the criminal matters we are instructed to advise you the following:

- 1. Mr Jeong should be granted a leave for two (2) weeks from 30 August 2005. We enclose a copy of the ACC Medical Certificate.*
- 2. Mr Jeong is considering taking all available legal actions against Mr Lee and your company jointly and severally. Please be advised we will serve all the legal documents to the above address unless otherwise we are advised.*

We advise you to take legal advice from your own solicitor concerning the above matters.

Yours faithfully

Song Jae Hon, Lawyers”

[34] This letter was followed shortly thereafter by another letter dated 5 September 2005.

“Further to our letter of 30 August 2005.

Our client Mr Jeong instructs us to advise you as follows:

- 1. Mr Jeong has sustained his physical and mental distress since your criminal assault with a weapon at the All Black Karaoke Bar at or about 11.30pm, 26 August 2005,*
- 2. Mr Jeong has lost his appetite and weight since the traumatic incident;*
- 3. Mr Jeong wishes to resume his work at your company, as he must earn his living costs, but Mr Jeong is very scared to confront with his attacker, Mr Sam Lee when he resumes his work duty at your workplace;*
- 4. Because of the above, Mr Jeong’s employment with you are effected to his disadvantage due to Mr Lee’s unjustifiable actions;*
- 5. Mr Jeong accordingly claims his personal grievance against you in the meaning of s.103 (1) (b) of the Employment Relations Act 2000.*

We consider that, based on the above, Mr Jeong has a very strong case to take the matter to the Employment Authority to obtain appropriate compensation.

However, before advancing the case to the Authority, Mr Jeong considers settling this matter between the parties, and suggests he may be prepared settling this matter with you in the following terms:

- 1. To compensate Mr Jeong's personal grievance and humiliation you pay him a sum of \$50,000; and*
- 2. To compensation Mr Jeong's loss of income of \$21,000 incurred from his foreseeable unemployment for six months.*

Altogether the proposed settlement sum is \$71,000.

Mr Jeong may waive his entitlement of claims to his legal costs and any others if the parties could settle before taking the matter to the Mediation Service at the Employment Relation Service; otherwise Mr Jeong's above offer should lapse and Mr Jeong will take the matter to the Mediation Service for the full claims.

This settlement sum should be paid in full in one sum to our trust account, and the settlement will be full and final.

You are required to reply to this offer within 3 working days from this letter.

We advise you again to take legal advice from your own solicitor concerning the above matters”.

Yours faithfully...

[35] It was Mr Lee's evidence that he had gone to visit Mr Jeong and his wife on the Sunday to apologise for his actions on the night of 26 August 2005. After they were told to leave Mrs Lee rang him from outside the property. She explained they were there to offer an apology. There was a discussion between Mr Jeong and Mrs Lee and Mrs Lee had tried to explain to Mr Jeong that the incident had absolutely nothing to do with his brother's business.

[36] Mr and Mrs Lee were advised that the complaint had been laid with the Police. Very shortly thereafter they received the letter to say that Mr Jeong was taking legal action against them and then they received a letter demanding almost \$80,000 to settle the matter between them. It was Mr Lee's evidence that there was really nothing he could do but to contact his own lawyer.

[37] It is noted that Mr Lee was later charged with assault with a weapon. That charge was subsequently downgraded and he was convicted in the District Court of acting with reckless disregard for the safety of others.

Findings and Discussion

[38] In arriving at a determination in this matter I have had regard to the evidence, the submissions of the parties and to relevant case law.

Credibility

[39] While the essential facts in this matter are not in dispute between the parties credibility findings are important to my findings as to the real reason the employment was terminated.

[40] Mr Lee presented as an extremely credible witness. He was open in admitting this was the most stupid thing he has ever done in his life and his evidence as to the impact on him of the consequences of his actions – a criminal conviction and the shame that has brought to him in his family and community – was compelling.

[41] While not minimizing the effect this incident had on Mr Jeong his evidence lacked credibility particularly on key issues relating to the seriousness of the matter. For instance, Mr Jeong submitted that he lost consciousness when he was hit on the head with the whiskey bottle and that he regained consciousness at the medical centre. All the respondent's witnesses deny this. They submitted that Mr Jeong expressed shock on being hit and that on his way to the medical centre he was saying that he realised it was an accident and expressed concern about what he would tell his wife. There is no mention in the contemporaneous medical and police reports of Mr Jeong losing consciousness and on this point I prefer the evidence of the respondent's witnesses.

[42] Mr Jeong does not dispute the fact he was concerned about his wife finding out the truth. In his oral evidence Mr Jeong said did not tell the doctor the truth of what happened because he did not want his wife to know that Mr Lee had caused the injuries suffered because she did not like Mr Lee and he frequently had to defend Mr Lee to her. In his written brief he submitted he did not tell the doctor the truth because Mrs Lee was present and he was afraid if he told the truth he would be fired and his family would suffer.

[43] In his written brief Mr Jeong stated his first thought on being hit was that this was in retaliation for his brother opening a business that intended to compete with Mr Lee. His oral evidence was that it was not until Mr Lee failed to come and see him on Saturday 27 April that he started to get angry and decided that the incident was a result of his brother's decision to go into business in competition with Mr Lee.

[44] Lastly, Mr Jeong denied the evidence of Mr Young that when they met for dinner at a Korean restaurant a week or two after the incident that he told Mr Young he was going to make Mr Lee bankrupt and that he wanted to get as much money from Mr Lee as possible and that he knew how to do it. It was Mr Jeong's evidence that he did tell Mr Young that he would take money from Mr Lee but just for his treatment costs. This evidence is not credible given that by this time Mr Lee had instructed his legal representative to make claim for settlement in the sum of \$71,000.

[45] There were numerous contradictions within Mr Jeong's evidence and between his evidence and that of the respondent's witnesses. On balance I must find that it is the evidence of the respondent's witnesses that I prefer.

Findings

[46] I find that Mr Lee and Mr Jeong enjoyed an excellent relationship for a number of years prior to and after Mr Jeong became an employee of Hanyang. When Mr Jeong's brother started a business in Albany that competed with the local Hanyang outlet Mr Jeong offered to resign his employment with Hanyang. Mr Lee declined that offer after Mr Jeong confirmed he had nothing to do with his brother's business and stated they had little contact.

[47] I find Mr Lee took steps within his power to protect his own business interests. Those steps were reasonable and nothing more than the steps that would be taken by any prudent businessman in protecting his business interests. He certainly advised Mr Jeong that he thought his brother was making a mistake because he did not have his own importation and distribution business (necessary to securing a good profit margin) and that the competition in the locality would be stiff. However, he did not, I find, threaten to take every measure to destroy the business.

[48] On the night of 26 August workplace relations were in a good state and Mr Lee hosted a dinner for his employees to welcome a new employee. Mr Jeong collected Mr Lee and drove him to the restaurant. The male members of the party drank a significant amount of alcohol. After dinner the group went to a karaoke bar for a “second shout” on Mr Lee. He had advised his wife he was not feeling too well but they went to the karaoke bar because to do otherwise would have meant the group would break up before some members were ready to call it quits for the night.

[49] At the karaoke bar whiskey was ordered and consumed by the men (other than Mr Lee) who were in very good spirits. Turns were taken at the karaoke singing. Mr Lee did not join in and I find he drifted off into a slumber or semi-slumber. When he awoke he picked up a half full bottle of whiskey and tossed it across the table in the direction of his wife and Mr Jeong who were talking together. Mr Lee said he was trying to get his wife’s attention to signal that he wanted to go home. I note his evidence that the next day when he spoke to Mr Jeong he said he did not know what had led to his actions.

[50] What I do find on the evidence however is that it is most improbable that Mr Lee tossed that bottle with the intention of hitting anyone. His wife was sitting very close to Mr Jeong and I am certain he would not have deliberately put her at risk (regardless of the state he was in) and I also find it is most improbable that he intended to hit Mr Jeong. Possibly Mr Lee did want to attract his wife’s attention. What I do find on the balance of probabilities is that he did not intend to injure his wife or Mr Jeong.

[51] It was however a reckless act executed in a moment where Mr Lee’s judgement was impaired and without regard to the safety of those sitting nearby.

[52] Mr Jeong’s state of mind fluctuated from one extreme to the other in the hours and days after he was struck – from “it was an accident and I don’t want my wife to know” to “it was a deliberate assault because Mr Lee is angry about my brother and he must be charged by the police and made to pay”.

Conclusion

[53] This was a difficult set of facts to strike the right balance as to weighing and repairing the harm done to Mr Jeong as a result of Mr Lee’s reckless action.

[54] Often an injury caused by the reckless action of an employer would invite a finding that it entitled the worker to treat the employment relationship at an end and to sue for breach of duty.

[55] However, I see this situation somewhat differently.

[56] Mr Lee and Mr Jeong enjoyed an excellent relationship. Mr Lee was not angry with Mr Jeong with regard to his brother’s business. Had he had concerns with Mr Jeong about that he would have accepted Mr Jeong’s resignation when it was offered. He did not and I find that on the night of 26 August the relationship between the two men was amicable as always.

[57] Mr Lee’s reckless action caused shock and injury to Mr Jeong. While it was an incident that occurred outside of the workplace it was a work function and the nexus to the employment relationship was such that it warrants a finding that it was an unjustified action which undermined the trust and confidence essential to the relationship. It would be a natural consequence of such an incident for the worker to question the cause of the action and what it meant in the context of the employment relationship.

[58] However, I cannot find that Mr Lee's action amounted to a breach of duty so serious that it justified Mr Jeong treating the relationship at an end at least without having talked to Mr Lee about the incident and any fears he had. Mr Jeong's first thought about the incident was that it was an accident – he did not consider there was any intention on Mr Lee's part to injure him. In the context of the good relationship and the fact that much alcohol had been consumed it should at least have been a matter for discussion between the parties – particularly given that Mr Lee spoke to Mr Jeong as soon as he was able to on the Saturday and apologised and came to the house with his wife to offer apologies the next day.

[59] In these circumstances I cannot find that Mr Jeong left his employment because he was afraid to return. The evidence discloses that the more probable reason for Mr Jeong leaving his employment was that his employer's action pointed to the way to the recovery of significant monetary damages. The point is a fine one because an employee is entitled to treat a significant breach of duty as a unilateral termination and to sue. However the departure must be for the breach not the potential compensation.

Determination

[60] Mr Lee's action in tossing the whiskey bottle was reckless and resulted in injury to Mr Jeong. It was an unjustifiable action, which damaged the trust and confidence between the parties. Mr Jeong has a personal grievance (disadvantage) against his former employer.

[61] Mr Jeong was not constructively dismissed from his employment.

Remedies

[62] Mr Jeong did not contribute in any way to the events that led to his grievance.

Lost Remuneration

[63] Mr Jeong's injuries were described as moderate and he was put off work for a fortnight. He is entitled to recover lost remuneration for that period and I direct the respondent to pay to the worker the sum of two weeks pay based on his full remuneration (PAYE deducted).

Compensation

[64] Mr Lee's action in throwing the bottle whilst in an impaired state was reckless and had no regard to the safety of Mr Jeong. It was an unjustified action that undermined the relationship of trust and confidence and justifies an award of compensation for hurt and humiliation and injury to feelings.

[65] In all the circumstances I direct the respondent to pay to Mr Jeong the sum of \$5,000 net to compensate him under this head.

Holiday Pay and Other Claims

[66] I understand outstanding holiday pay has been paid. If I am wrong on this point then the parties have the right to return to the Authority to have the matter settled.

[67] The other claims made by the applicant are either misconstrued or Mr Jeong was complicit in the breach (failure to provide an IEA) and must be declined.

Costs

[68] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of Employment Relations Authority