

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 244
3081570

BETWEEN YOUNG GOO KANG
Applicant

AND KYOUNG YONG LEE
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Seungmin Kang, counsel for Applicant
Respondent in person

Investigation Meeting: 11 June 2020

Submissions and further 15 June 2020 from the Applicant
Information Received:

Date of Determination: 24 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] At material times, NZMEC Limited, now in liquidation, operated a business hosting Korean Students in New Zealand during their school holidays.

[2] NZMEC employed Young Goo Kang at various times from late June 2017 until 21 November 2018. Mr Kang claims that for the last five months of his employment he was not paid. Nor, he claims, did he receive payment of his holiday pay entitlements.

[3] Mr Kang applies to the Authority under s 142Y(2)(a) of the Employment Relations Act 2000 (the Act) for leave to recover his outstanding wages and holiday pay from the Respondent, Kyoung Yong Lee. Mr Lee was the sole director of NZMEC and a person whom Mr Kang claims was involved in the breach. Mr Kang also requests the Authority to impose a penalty on Mr Lee.

[4] Mr Lee denies Mr Kang's claims. He maintains that no monies are due by NZMEC to Mr Kang.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The Issues

[6] The issues identified for investigation and determination are:

- a. Should the Authority grant leave to Mr Kang to recover from Mr Lee arrears of wages and other money payable to Mr Kang?
- b. If leave is granted, what amount should Mr Lee be ordered to pay to Mr Kang?
- c. Should the Authority order Mr Lee to pay a penalty to Mr Kang?
- d. Should either party contribute to the costs of representation of the other party?

Background

[7] Mr Kang and Mr Lee have been friends for around 35 years.

[8] In 2017, Mr Kang decided to emigrate from Korea to New Zealand with his family and sought Mr Lee's help to do so. Discussions ensued between the parties whereby they agreed that Mr Lee, through his company NZMEC, would support an application by Mr Kang for a New Zealand work visa under the Essential Skills work category.

[9] On or about 27 February 2017, NZMEC and Mr Kang executed an individual employment agreement (IEA). The IEA, together with an Employer Supplementary Form, were provided to Immigration New Zealand (INZ) in support of Mr Kang's work visa. The Employer form was signed by Mr Lee and declared that NZMEC had made genuine attempts to recruit New Zealanders for the role offered to Mr Kang, had made efforts to train New Zealanders to fill the position, and that it "could not find someone suitable" for the position of Office Manager.

[10] On 30 March 2017, INZ granted Mr Kang a work visa to work as NZMEC's office manager.

[11] For reasons that will become apparent, the IEA was a sham. It did not reflect the true nature of the relationship between the parties in any material way. Contrary to the representations made to INZ, there was no intention for Mr Kang to commence working for NZMEC as its Office Manager upon the issue of his work visa. Mr Kang told the Authority there was no role available for him at NZMEC as it had sufficient employees to carry out its work and it did not need any additional workers. He said he did not advise INZ of his change in circumstances. Instead, he set about working with his wife in a sushi business and/or carrying out other work for third parties or himself.

[12] To avoid suspicion from INZ, Mr Kang and Mr Lee agreed that NZMEC would pay Mr Kang the salary agreed to in the IEA. They thought INZ might be monitoring IRD records so they also agreed NZMEC would deduct PAYE and would note this in the monthly employer deduction certificates that it filed with IRD. While Mr Kang was not working for NZMEC, it was agreed that Mr Lee could access the funds paid by NZMEC to Mr Kang's ASB bank account for his personal use. Mr Kang provided Mr Lee with an EFTPOS card and his password to facilitate this arrangement.

[13] In late June 2017, Mr Kang undertook some work for NZMEC, however not in the role of Office Manager. Rather, Mr Kang was engaged on a part-time basis to guide Korean students during their July/August holidays for which he accepted payment in the sum of \$861.68 net. After completing this work, Mr Kang returned to Korea to care for an unwell relative.

[14] In late October 2017 until early December 2017, Mr Kang undertook some further part-time guiding work showing teachers, and others involved with the Korean Students who undertook NZMEC's holiday programmes, around New Zealand. Mr Kang said this took place on 31 October – 9 November 2017, 20 – 21 November 2017, 27 November – 1 December 2017, and 4-11 December 2017.

[15] It is likely that Mr Kang did not undertake any other work for NZMEC during 2017. Although this conflicts with the oral evidence that Mr Kang provided during the Authority's investigation, and the witness statement he provided the day prior to the investigation meeting, it is consistent with the Statement of Problem that Mr Kang filed with the Authority in November 2019, and the witness statement he filed with the

Authority on 7 February 2020. In both of these documents, Mr Kang stated that he started full-time work with NZMEC from January 2018. His witness statement recording:

I do not have any issue with payment of wages for the first year. I did not work full-time until January 2018 because the company had seasonal works only during school holidays, running educational programmes for exchange students. I was only paid for what I worked and was entitled to. I was not paid when I did not work...

[16] Mr Kang commenced work full-time for NZMEC in January 2018. He then continued working full-time for NZMEC until his dismissal on 21 November 2018.

Issue one: The application for leave

[17] Section 142Y of the Act provides:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
 - (d) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (e) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[18] The term "employment standards" is defined at s 5 of the Act. It includes, but is not limited to, minimum entitlements and payment for those under the Holidays Act 2003 and the provisions of the Wages Protection Act 1983.

[19] Section 142W of the Act defines who may be a "person involved in a breach" as follows:

142W Involvement in breaches

- (1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company ...

Default in the payment of wages?

[20] Mr Kang claims NZMEC did not pay him for the work he undertook in the five-month period from July 2018 to November 2018 inclusive. He does not dispute that he received full payment for the remaining periods that he worked. He also claims holiday pay entitlements for the duration of his employment.

Wage arrears

[21] To assess what wage arrears, if any, NZMEC owes to Mr Kang, I relied upon Mr Kang's three ASB bank statements, and his two ANZ bank statements. These records were the most reliable evidence that the Authority had to establish what monies NZMEC paid Mr Kang for the hours that he worked.

[22] Due to the irregularity of payments made by NZMEC to Mr Kang, I apportioned the wages paid to Mr Kang to the months that he worked rather than to the month the monies were paid into his bank account. My analysis established:

- a. On 11 July 2017, Mr Kang received a sum of \$6,880.90 net into his ASB Bank account. At the time of this payment, Mr Kang had undertaken less than two weeks work for NZMEC. I therefore treat this payment as payment of wages in advance for the periods that he worked during late June through

to August 2017 (\$861.68 net) and from 31 October to 11 December 2017. In terms of the later period, Mr Kang worked an equivalent of five weeks. His evidence was that he was to receive payment for this work based on a rate of \$50,000 per annum (\$794 net per week). \$794 net per week multiplied by five weeks equals \$3,970.

- b. On 18 December 2017, Mr Kang received a sum of \$17,202.25 net into his ASB Bank account for five months' wages. I treat this payment as wages paid in advance of his entitlement for the months of January, February, March, April and May 2018.
- c. On 27 April 2017, Mr Kang received a sum of \$5,449 net into his ASB Bank account. He told me this was for wages. I treat this payment as wages paid in advance of his entitlement (\$3,440.45 net) for the month of June 2018.
- d. On 11 July 2018, Mr Kang received a sum of \$10,321.35 net into his ASB Bank account for three months' wages. I treat this payment as wages paid in advance of his entitlement for the months of July, August and September 2018.
- e. On 18 September 2018, Mr Kang received a sum of \$3,440.45 net into his ASB Bank account representing one months' wages. I apply this as wages paid in advance of his entitlement for the month of October 2018.
- f. On 15 December 2018, Mr Kang received a sum of \$6,880 net into his ASB Bank account representing two months' wages. I apply this against the wage arrears owed to him for working the month of November (\$3,440.45 net).

[23] Having undertaken the foregoing analysis, I conclude that there are no wages owing by NZMEC to Mr Kang. In fact, on my calculations, there has been an overpayment of wages to Mr Kang of \$7,497.32 net being made up of overpayments in the months of July 2017 (\$2,049.22), April 2018 (\$2,008.55) and December 2018 (\$3,439.55). I shall return to consider this overpayment further when addressing Mr Kang's claim for holiday pay arrears.

[24] For completeness, I did consider Mr Kang's claim that NZMEC used the wages paid into his bank account during 2017. However, I was not persuaded that this was the case. While there was clearly an agreement between Mr Kang and Mr Lee that Mr

Lee could access these monies, it is more likely than not that this was for Mr Lee's personal use only and was not for the benefit of NZMEC. A number of the transactions shown in the bank accounts are not the type of transactions NZMEC would have incurred in the running of its day-to-day business. For example, the purchase of personal items such as the purchase of shoes, payments at restaurants and the payment of groceries.

Holiday pay

[25] Calculation of annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where an employee's employment ends and the employee is not entitled to annual holidays because he or she has worked for less than twelve months. In such a case, an employer must pay the employee eight percent of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[26] Mr Kang's bank statements show he was paid a sum of \$50,173.95 net by NZMEC during the periods he worked in 2017 and 2018. From this sum, I deduct the overpayment of \$7,497.32 net leaving net earnings of \$42,676.63. Eight percent of this sum is \$3,414.13 net.

[27] From the sum of \$3,414.13 net, I deduct the 5 days' annual leave that Mr Kang took in advance of his entitlement (\$794 net). Leaving an entitlement to holiday pay of \$2,620.13 net.

[28] Applying the amount of \$2,620.13 net against the overpayment of wages (\$7,497.32 net), I find no monies are due and owing by NZMEC to Mr Kang for holiday pay.

Finding on Issue One

[29] In light of my findings that no wages or other monies are due and owing by NZMEC to Mr Kang, I decline leave to bring an action against Mr Lee.

Penalty

[30] The Statement of Problem asked the Authority to impose a penalty against Mr Kang under the Wages Protection Act 1983. This claim fails as I have found no monies are owing to Mr Kang by NZMEC.

[31] In submissions filed the day prior to the investigation meeting, and in an amended statement of problem filed the day after the investigation meeting, Mr Kang amended his claim. His amended Statement of Problem sought a penalty against Mr Lee on the ground that he had incited, instigated, aided, or abetted NZMEC to breach the individual employment agreement by failing to pay wages, PAYE, and holiday pay entitlements to Mr Kang. I decline leave to file this statement of problem out of time. However, for the avoidance of doubt, even if leave had been granted to amend Mr Kang's claim, he would have failed due to my finding that no monies are owing to Mr Kang by NZMEC.

Costs

[32] Mr Lee was legally represented prior to the investigation meeting. It may be that he incurred costs. For this reason, I reserve costs. The parties are encouraged to resolve any issue of costs between themselves.

[33] If they are not able to do so and an Authority determination on costs is needed Mr Lee may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Mr Kang will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Outcome

[34] The overall outcome that I have reached is:

- a. No wages or other monies are due and owing by NZMEC to Young Kang.
- b. Young Kang's application for leave to bring a claim against Kyoung Yong Lee is denied.
- c. Costs are reserved.

Direction

[35] The individual employment agreement entered into by Mr Kang and NZMEC was a sham, likely designed to mislead INZ into granting a work visa to Mr Kang. For this reason, I direct that the Authority provide a copy of this determination to Immigration New Zealand.

[36] I also direct that the Authority provide a copy of this determination to the Liquidator of NZMEC Limited.

Jenni-Maree Trotman
Member of the Employment Relations Authority