**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

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

[2021] NZERA 196
3081012

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| | BETWEEN | HUNMO KANG<br>Applicant |
| | AND | SAENA COMPANY LIMITED<br>Respondent |

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| Member of Authority: | Vicki Campbell |
| Representatives: | Seungmin Kang, counsel for Applicant<br>Cristina Pitas, counsel for Respondent |
| Investigation Meeting: | 24 February 2021 |
| Submissions Received: | 2 March 2021 from Applicant<br>3 March 2021 from Respondent |
| Determination: | 11 May 2021 |

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## DETERMINATION OF THE AUTHORITY

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**A.** **Mr Kang was not unjustifiably dismissed or disadvantaged in his employment.**

**B.** **Saena Company Limited breached s 130 of the Employment Relations Act 2000 and s 81 of the Holidays Act 2003.**
**Seana Company Limited is ordered to pay penalties of $2,000 to the Authority within 28 days of the date of this determination.**

**C.** **Seana Company Limited's claims against Mr Kang have been declined.**

**D.** **Costs are reserved.**

**Employment relationship problem**

[1] Saena Company Limited (SCL) operates a sushi restaurant. Mr Kang worked for SCL from 16 September to 21 October 2019. Mr Kang alleges he was unjustifiably dismissed on 21 October 2019, that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of SCL and that SCL breached its statutory duty of good faith.

[2] Mr Kang asks the Authority to impose penalties on SCL for breaches of the Employment Relations Act 2000 (the Act) when it failed to act in good faith, failed to provide him with a copy of a written employment agreement and failed to keep and maintain a wages and time record that meets the requirements of the Act. He also seeks penalties for a breach of the Holidays Act 2003 (the HA) when SCL failed to keep and maintain a holiday and leave record.

[3] SCL denies the claims. In its statement in reply SCL seeks payment of compensation for emotional and financial losses. It also seeks a letter of apology from Mr Kang for reputational damage.

**Issues**

[4] In order to resolve Mr Kang's application I must determine the following issues:

a) Was Mr Kang unjustifiably dismissed?

b) Were one or more conditions of Mr Kang's employment affected to his disadvantage by the unjustifiable actions of SCL?

c) If the answer to a) and/or b) is yes, what, if any, remedies should be awarded?

d) Did SCL breach the Act or the HA and if so, what if any penalties should be imposed?

e) Should SCL succeed in its claims for compensation and a letter of apology from 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 as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

**Background**

[6] At the time he was employed by SCL Mr Kang held a valid work visa allowing him to work for any employer in any occupation in New Zealand. While his circumstances are a little different to other migrant workers, in that his employment was not tied to one specified employer, I am satisfied his circumstances put him in a category of employee whom the Employment Court has characterised as inherently vulnerable.

[7] Mr Kang and his wife, Ms Yoojin Chung, both worked for SCL.

[8] On 21 October 2019 Ms Chung, became embroiled in a heated discussion with Ms Ok-sil Won, the director's wife. The argument ended with Ms Chung removing her apron and hat and which she cast onto the top of the sushi rice container. Ms Won invited Ms Chung to leave the premises. Ms Chung left and advised Ms Won that she did not wish to work for the company any longer.

[9] Shortly after the altercation between Ms Won and Ms Chung, Mr Hwang, SCL's sole director and shareholder, told Mr Kang to leave which he did.

[10] Later that day the following exchange of text messages took place between Mr Kang and Ms Won (verbatim):

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| Mr Kang: | Good afternoon. I am texting you since it's business hours. You said that I had to leave my job immediately. But I got to work today. What do I do from tomorrow? |
| SCL: | Let's go our separate ways. I appreciate what you've done so far. |
| SCL: | When your wife said she would leave her job, you told your wife to leave first. Then you said that you would leave you job by following her. I think that you expressed your intention to leave your job. |

> Mr Kang: When my wife got off work, she greeted by saying 'See you later' everyday. I think you misheard her. Thank you for your effort.

[11] The number used by Mr Kang to text his employer was the number he had used in his initial contact with SCL when he first secured his employment. He believed the number belonged to Ms Won. However the person texting Mr Kang was not the employer, but was the Head Chef.

[12] Mr Kang formed the view that he had been dismissed when Mr Hwang asked him to leave the workplace and then after receiving the text message advising him that they would go their separate ways.

[13] The following day on 22 October 2019 Mr Hwang and Mr Kang spoke on the telephone. During that call Mr Hwang asked Mr Kang to return to work. Mr Kang requested more time to consider the request, which was agreed to by Mr Hwang.

[14] By 23 October 2019 the parties entered into further discussions with a view to Mr Kang returning to work. During these discussions Mr Kang was offered a written employment agreement setting out his terms and conditions of employment. The employment agreement was back dated to reflect the start date of Mr Kang's employment with SCL of 16 September 2019.

[15] No agreement could be reached and Mr Kang has not returned to work for SCL.

**Was Mr Kang dismissed?**

[16] The onus of proving a dismissal in this case rests with Mr Kang. Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.[1] The assessment of whether the employer's statement is an unequivocal sending away is a question based on an analysis of not just the statement but also the circumstances giving rise to it. The question is whether it was reasonable for somebody in Mr Kang's position to have considered his employment had been terminated.[2]

[17] The events of 21 October 2019 occurred in a situation where Mr Kang's wife had been upset and voices were raised. Mr Kang was not part of the heated exchange

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[1] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).
[2] *Cornish Truck & Van Limited v Guldenhuys* [2019] NZEmpC 6 at [45].

between Ms Chung and Ms Won but he did wish to support and calm his wife. While Mr Hwang told Mr Kang to go I find this was more likely than not done to encourage Mr Kang to leave the premises so he could support his wife who was clearly upset.

[18] The text message advising Mr Kang that they should go their separate ways may have amounted to a dismissed if it had not been followed immediately by another text which raises a question about whether Mr Kang initiated the separation of the employment relationship when he had expressed an intention to leave his job.

[19] I am not satisfied that on 21 October 2019 there was a sending away amounting to a dismissal.

[20] If I am mistaken in that conclusion it is reasonable to examine the actions taken after the parties had an opportunity for a cooling down period. On 22 October 2019 Mr Kang and Mr Hwang discussed the situation and Mr Hwang encouraged Mr Kang to return to work. They also met with the assistance of their church pastor where further efforts were made to have Mr Kang return to work.

[21] While initially Mr Kang may have believed he had been dismissed, after a cooling off period of less than 24 hours, the parties had talked on more than one occasion and it seemed to all that Mr Kang would be returning to work. In anticipation of Mr Kang returning to work Mr Hwang provided a copy of a written employment agreement. Mr Kang asked for and was given time to consider the content of the agreement.

[22] Mr Kang rejected the employment agreement and determined for himself that he would not return to work.

[23] Mr Kang points to an advertisement placed by SCL seeking to employ a "kitchen and roll maker" to support his assertion that he had been dismissed and SCL was seeking to replace him.

[24] I have concluded the advertisement was to seek a replacement for Ms Chung who had made it clear, when she left the premises, that she did not intend to return to work. Ms Chung carried out roll making and kitchen duties.

[25] Mr Kang did not undertake duties in roll making and so it is unlikely a replacement for his position would be required to carry out this task.

[26] Mr Kang has not established to my satisfaction that he was dismissed. Accordingly his application for remedies is declined.

**Disadvantage grievance**

[27] Under s 103(1)(b) of the Act an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[28] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[29] Mr Kang says he was disadvantaged in his employment as a result of not having a written employment agreement. He told me that if he had a written employment agreement SCL would not have dismissed him because it would have known that a procedure needed to be followed. He told me he would not have been stressed to seek advice as the procedure for him to follow would have been set out in the employment agreement.

[30] Mr Hwang told me the reason Mr Kang was not provided with a written employment agreement from the outset of his employment was as a direct result of a request from Mr Kang. Mr Kang requested he not be required to sign an employment agreement until after the first three months of his employment. Mr Hwang agreed with his request. I have accepted this evidence as being more likely than not.

[31] I am not satisfied one or more conditions of Mr Kang's employment were affected to his disadvantage by not having a written employment agreement. Having a written agreement would not have affected the events on 21 October 2019 or the discussions held immediately afterwards, from 22 October 2019. In any event, in response to a request from Mr Kang, Mr Hwang provided Mr Kang with a written employment agreement for his consideration.

[32] Mr Kang has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage. Accordingly his application for remedies is declined.

**Breaches of the Act**

***Employment Agreement***

[33] Section 65 of the Act requires all employers to provide an employee with a written employment agreement. Mr Kang says SCL breached the Act when it failed to provide him with a copy of the employment agreement until five weeks after he started working for SCL.

[34] I have accepted Mr Hwang's evidence that at the commencement of the employment relationship Mr Kang requested not to sign the employment agreement until after three months had been worked.

[35] On 23 October 2019 Mr Kang set out a number of conditions relating to whether he would return to work. One of those conditions was that Mr Hwang document the duties Mr Kang was required to undertake. As a result of Mr Kang's request Mr Hwang arranged for a written employment agreement to be provided to Mr Kang on or about 24 October 2019.

[36] SCL breached its statutory duty to provide a written employment agreement to Mr Kang from the outset of his employment. However, I have accepted Mr Hwang's explanation that Mr Kang did not wish to sign the employment agreement at the outset of the relationship and was provided with a copy of the written agreement after the events on 21 October 2019 as part of the discussion by SCL to have Mr Kang return to work. Given these circumstances it is not appropriate to impose a penalty on SCL.

***Good faith***

[37] Mr Kang claims SCL failed to comply with its duty of good faith. In particular Mr Kang points to the conduct of Mr Hwang when he left the premises on 21 October 2019.

[38] I am satisfied there was no conduct by SCL that could be said to amount to a breach of good faith. If I am mistaken in that conclusion I am not satisfied Mr Hwang's conduct on 21 October 2019 amounted to conduct that was deliberate, serious or

sustained and neither did it undermine the employment relationship. Accordingly Mr Kang's application for a penalty to be imposed is declined.

***Wages and time records***

[39] Mr Kang claims SCL breached s 130 of the Act when it failed to keep and maintain wages and time records that met the criteria set out in s 130(1) of the Act. In particular Mr Kang says the wages and time records do not contain:

(a) The employee's postal address;

(b) The kind of work on which the employee is usually employed;

(c) Whether the employee is employed under an individual or a collective agreement;

(d) The number of hours worked each day in a pay period and the pay for those hours; and

(e) The wages paid to the employee each pay period and the method of calculation.

[40] SCL has provided a copy of Mr Kang's timesheet which sets out the number of hour worked each day during the course of his employment. The Authority has also received extracts from SCL's payroll system which sets out the total wages paid to Mr Kang for each week of his employment.

[41] I am satisfied the records, when read together meet the requirements of (d) and (e) above. There are however, deficiencies in the records maintained by SCL which leaves it in breach of the requirements of s 130 of the Act.

[42] The failure to maintain accurate records in accordance with s 130 of the Act is a breach of minimum employment standards and a consideration of penalties for the breach is appropriate.

**Breach of the Holidays Act 2003**

[43] Mr Kang claims SCL has breached s 81 of the HA when it failed to keep and maintain accurate holiday and leave records.

[44] No holiday and leave records have been provided and I have concluded that no records were kept or maintained as required by the HA.

[45] The failure to maintain accurate records in accordance with s 81 of the HA is a breach of minimum employment standards in a consideration of penalties for the breach is appropriate.

**Penalties**

[46] SCL has breached s 130 of the Act and s 81 of the HA and I am satisfied penalties should be imposed on SCL.

[47] The framework for assessing and fixing penalties is contained in s 133A of the Act and set out in *Borsboom v Preet PVT Limited*.[3] In *A Labour Inspector v Matangi Berry Farm Limited* Judge Corkill applied an approach to penalty setting which assessed the factors in s 133A of the Act and then applied those and other considerations using the four step process in *Preet* to quantify the penalty.[4] I have followed that approach in reaching my conclusions as to penalties in this case.

***Statutory Considerations***

*Objects of the Act*

[48] The Act's declared objects include building productive employment relationships, addressing the inherent inequality of power in those relationships and promoting effective enforcement of employment standards.[5] Those objects support the need to impose a penalty on SCL for its actions in failing to meet minimum standards.

[49] As noted earlier, Mr Kang is a migrant worker whose circumstances put him in a category of employee whom the Employment Court has characterised as inherently vulnerable. SCL's actions in failing to keep and maintain accurate records undermined employment standards.

*Nature and extent of the breaches*

[50] SCL has committed two breaches applying to one employee. The total maximum penalty available to be imposed on SCL in respect of the two breaches is $40,000 being $20,000 per breach.

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[3] *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [67] and [68].
[4] *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43; [2020] ERNZ 67; (2020) 17 NZELR 353.
[5] Employment Relations Act 2000, s 3.

*The nature and extent of loss or damage suffered by the worker*

[51] Mr Kang has not raised any concerns about the wages he received or his holiday entitlements. This puts the breaches at the lower end of the scale.

*Whether the breaches were intentional, inadvertent or negligent*

[52] I am not satisfied the breaches were intentional. On balance I have concluded the breaches were inadvertent or at best, negligent. Ignorance of the rules about maintaining accurate employment records, however, does not excuse SCL.[6]

*Circumstances of the breach and vulnerability*

[53] The factors under this heading have largely already been referred to. The employee was a migrant worker although his ability to work was not dependent on a visa tied to SCL.

*Previous conduct*

[54] There is no evidence SCL has come to the attention of the Labour Inspectorate and it has not previously been before the Authority.

***Preet Step 1 – Nature and number of the breaches***

[55] The first step in *Preet* requires me to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches forming Mr Kang's claim. Globalisation is about reducing the number of breaches for penalty purposes so that the actionable breaches are representative of the overall conduct and the starting point for penalties is realistic.[7]

[56] It is appropriate to globalise the two breaches into one breach. Both breaches relate to the keeping and maintaining of accurate records for the purpose of payment of wages and ensuring holiday entitlements are met.

[57] This means the starting point for quantifying penalties amounts to $20,000.

***Preet Step 2 – Severity of the breaches***

[58] This steps involves a consideration of the severity of the breaches including deterrence, culpability and aggravating and ameliorating factors.

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[6] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [29].
[7] *A Labour Inspector v Parihar* [2019] NZEmpC 145 at [39].

[59] The breaches in this case are of minimum standards. As such it is important that a penalty is set at a level where it deters employers from failing to maintain accurate records.

[60] In this case the degree of culpability is low.

[61] The aggravating features of this case are not the most serious conceivable breaches so the starting point for deductions or credits should not be the maximum penalty.[8]

[62] I have assessed the starting point as being 50 per cent of the total making the total provisional penalties at this point of $10,000.

[63] In regard to ameliorating factors, I have taken into account that no claims for arrears of wages or holiday entitlements have been made by Mr Kang. On that basis I have concluded on the balance of probabilities that Mr Kang received his full entitlement to wages and holidays.

[64] I have reduced the resulting figure by a further 50 per cent having regard to the ameliorating factors including the recognition that the company was a "first offender" in the Authority.[9] This leads to potential penalties of $5,000.

***Preet Step 3 – Means and ability of the respondent to pay***

[65] There has been no evidence as to SCL's ability to pay penalties and accordingly no reduction will be made at this step.

***Preet Step 4 – Proportionality***

[66] This step is about the ensuring the final amount of any penalty is proportional to the breaches.

[67] It is desirable that penalties imposed are consistent with other similar cases. I have considered other cases that are about, or have aspects of, record keeping breaches.[10] Some of the cases are distinguishable on their facts where there were

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[8] *Preet*, above n 2, at [167].
[9] *Brahmbhatt & 3 Ors v Kohli & 1 Or* [2019] NZERA 507 at [91].
[10] A *Labour Inspector v New Zealand Mountain Hunting Ltd & 1 Or* [2019] NZERA 568; *Aviation Workers United Inc. v Gate Gourmet New Zealand Ltd* [2020] NZERA 179; *Stefanovijk & Ors v Akina Trading Ltd* [2019] NZERA 280; *Labour Inspector v Dansan Investments Limited & 2 Ors* [2020] NZERA 379.

elements of deliberate attempts to disguise non-compliance, evidence of very long hours' worked, arrears of wages and money withheld, and very vulnerable employees.

[68] The end result of the comparisons and my reflection on proportionality is that I am satisfied a further reduction to $2,000 is appropriate.

[69] Seana Company Limited is ordered to pay penalties to the Authority totalling $2,000 within 28 days of the date of this determination. On receipt the penalties will then be paid into a Crown bank account.

**SCL's claims**

[70] In its statement in reply SCL claims Mr Kang should be fined for breaching his visa conditions and penalised for providing forged translations and misleading information.

[71] Mr Hwang seeks compensation for mental, emotional, physical and financial losses amounting to $5,000 and letter of apology for the reputation damage SCL has suffered.

[72] There is no basis on which the Authority may award the compensation sought by Mr Hwang and it does not have jurisdiction to order Mr Kang to issue a letter of apology.

[73] SCL's application for remedies against Mr Kang are declined.

**Costs**

[74] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the parties shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further seven days in which to file and serve memoranda in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[75] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards. There has been a mixed measure of success by the parties and I have formed a preliminary view that costs should lie where they fall.

Vicki Campbell
Member of the Employment Relations Authority