

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 112/10
File Number: 5166215

BETWEEN Fiona Kelly
 Applicant

AND Yupang (Helen) Wei t/a
 Rainbow Dairy, Foxton
 Respondent

Member of Authority: Denis Asher

Representatives: Mark Duston & Kelly Coley for Ms Kelly
 Ms Wei represented herself with the assistance of her
 husband, Chuan (David) Yin

Investigation Meeting Palmerston North, 10 & 11 May 2010

Submissions Received At the close of the investigation, on 11 May 2010

Determination: 21 June 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Ms Kelly unjustifiably constructively dismissed by the respondent?

The Investigation

[2] Mediation did not resolve this employment relationship problem.

[3] During a telephone conference on 10 February 2010, and with the assistance of an interpreter, the parties agreed to a two-day investigation in Palmerston North commencing 10 May. Timelines were also agreed for witness statements.

[4] An interpreter was also present, and greatly assisted my investigation, on 10 & 11 May.

[5] Another, very similar, employment relationship problem was also investigated at the same time (see *Kauri v Wei*, 21 June 2010, 5288342).

Background

[6] I am satisfied from the investigation and the evidence provided by the parties that the following is a reliable description of relevant background events.

[7] As affirmed by Ms Wei, the respondent is the owner of the Rainbow Dairy. In her witness statement she explained that, as she wanted to live independently, she bought the dairy on 1 August 2008. Because English is her second language and she has limited skill in it, and because of a lack of management experience, her husband David Yin was initially responsible for the discretionary management of the dairy, from 1 August 2008 to 31 May 2009 (see the first page of his statement emailed to the Authority on 22 April 2010). Mr Yin operates his own business, another dairy, elsewhere.

[8] Ms Kelly was employed by the Rainbow Dairy's previous owner. There was no written employment agreement. Ms Kelly understood at the time of the sale of the business to Ms Wei that her employment and current terms and conditions of employment would not change. No written or verbal employment agreement was entered into by Ms Kelly and the new owner, who she initially understood was Mr Yin but now accepts, is Ms Wei.

[9] Ms Kelly said that, shortly after taking over, Ms Wei reduced the dairy's working hours from 24 per day to 4.00 a.m. to 10.00 p.m. The change did not directly affect the applicant, however Ms Kelly says she was obliged to accept unilaterally

imposed altered hours of work (a change in her start time) in October 2008, or risk losing her job.

[10] Ms Kelly said that in December 2008 Mr Yin proposed that he pay her some of her hours 'under the table': if she did not agree she would lose her job. Mr Yin said that he paid wages under the table to Ms Kelly at her request.

[11] Ms Kelly also alleged other incidents, including: an increase of tension between her and Mr Yin and Ms Wei after asking for, and being refused, a pay increase; being refused sick pay after a work accident arising out of Mr Yin failing to clean away oil spilled on to the store room floor; alleged dishonesty by failing to ring up a complete order; being pushed by Ms Wei; unfair treatment arising out of Ms Wei and Mr Yin and other Chinese staff not speaking English in her presence; Mr Yin saying that he did not like Kiwi workers and he preferred Asians; and a proposal to reduce her hours. Ms Wei and Mr Yin effectively denied these allegations.

[12] On 17 June 2009 Ms Kelly and the applicant in separate proceedings, Ms Kauri, met with Mr Yin; Ms Kelly's sister was present in a support-person capacity. Various problems were aired but no resolution was achieved. Mediation through the Department of Labour followed on 25 June. Ms Kelly says her health started to deteriorate shortly thereafter because of the stress in the workplace, and that her situation was made worse by bereavements and, she said, the respondent's refusal to pay her sick and bereavement leave.

[13] On 3 August Ms Kelly and her representative attended a meeting with Mr Yin where he produced two proposed, written, employment agreements. Ms Kelly said Mr Yin insisted she sign one of the agreements by 17 August or her employment would end, and that she had to return to work despite her doctor's advice not to. Ms Kelly said she felt she had no option but to resign.

Remedies sought by Ms Kelly

[14] By way of a memorandum dated 11 May 2010 particularising her claim, Ms Kelly sought the following remedies:

| Cash Underpayments | \$ |
|--|------------------|
| 12 January 2009 to 16 January: | 124.00 |
| 2 March to 6 March: | 21.00 |
| 23 March to 27 March: | 21.00 |
| 27 March to 1 May: | 63.00 |
| 4 May to 8 May: | 42.00 |
| 11 May to 15 May: | 42.00 |
| Total: | 231.00 |
| Holiday Pay (8%) on \$231.00: | 18.48 |
| Holiday Pay (8%) on cash payments totalling \$1,974.00: | |
| | 157.92 |
| Compensation for humiliation, etc: | 15,000.00 |
| Legal Costs up to and including 11 May 2010: | 4,054.00 |
| Total: | 19,461.40 |

[15] In an earlier memorandum (dated 22 February) Ms Kelly also sought three months lost wages, i.e. \$12.50 per hour, 30 hours per week, or \$4,500.00 gross. However, as conceded by Ms Kelly at the investigation, for some time after her resignation she was medically unfit to return to the workforce and did not do so until November 2009. She was therefore unable to earn wages for that period. Accordingly, she gave up her claim for compensation for lost income.

Discussion

[16] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the

actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

Findings

[17] Ms Wei and Mr Yin have very limited English. Their translated (and affirmed) statements have limited but sufficient and working coherence. I am satisfied however that, despite not being professionally represented, their evidence was effectively given as a result of the energetic and able assistance of the interpreter. In particular, Mr Yin attempted English explanations and also spoke at length to the interpreter in response both to my questions and in respect of how his answers were interpreted.

[18] I am satisfied from the investigation that, despite their seemingly positive intentions and their efforts to obtain advice including from the Department of Labour, Ms Wei and Mr Yin had (and have) little appreciation of their legal obligations as employers in New Zealand. An example of the respondent's lack of appreciation is a 'contract' proposal advanced by Mr Yin that "*employees working at the cash register must be honest. If problems were detected a fine of 10 times*" would apply (5th page, Ms Wei's statement emailed 22 April 2010).

[19] This is the first time Ms Wei has owned a business (11th page of her statement emailed to the Authority on 22 April 2010). Unfortunately for the respondent, that lack of awareness and sophistication in both business and employment matters does not excuse her from her responsibilities at law.

[20] The parties' employment relationship was disorganised from the outset. Language and cultural differences clearly contributed to the parties' difficulties. Trading difficulties were clearly encountered almost immediately, as witnessed by the dairy ceasing its 24-hour operation.

[21] Their difficulties were worsened by the absence of any employment agreement, oral or written, setting out Ms Kelly's terms and conditions of employment.

[22] Operational changes, proposed and actual, no doubt prompted by prudent business considerations, added to the parties' difficulties.

[23] After having full regard to the evidence and risks of inaccuracy arising out of Ms Wei and Mr Yin's limited English skills, I find that Ms Kelly was unjustifiably constructively dismissed. I reach my conclusion for the following reasons:

- a. Mr Yin's oral evidence to the Authority is that it was at Ms Kelly's behest he began paying her under the counter. Ms Wei says she was only belatedly aware of the arrangement (see 5th page, above). The applicant denies the allegation, and says the arrangement was effectively imposed on her. I prefer Ms Kelly's account for two reasons: first, Ms Wei was not obliged to tolerate what is clearly an illegal, tax-avoidance arrangement. Second, the absence of a legitimate wages and time record as stipulated by s. 130 of the Employment Relations Act 2000 (the Act) supports the credibility of the applicant's claim.
- b. Ms Kelly was presented with an unreasonable deadline and options in respect of the employment agreements offered her by Mr Yin at their meeting in August last year, shortly before the applicant's resignation. I accept her evidence that, at that meeting, she was presented with ultimatums that she sign one of two draft employment agreements, both of which substantially altered her existing terms and conditions of employment, or lose her employment, and that she return to work by 17 August despite her doctor's advice to remain on sick leave (refer to the medical certificate of 3 August 2009 attached to the applicant's witness statement dated 10 March 2010). And,
- c. I also find it was unreasonable of Mr Yin, acting on the respondent's behalf, to require the applicant to make a decision in respect of a new employment agreement when Ms Kelly was entitled to require of the respondent that her existing terms and conditions of employment be adhered to.

[24] Further to par 23 a. above, I note here a document produced by Mr Yin at the second day of the investigation, on 11 May, which he claimed was an accurate record of Ms Kelly's pay and hours of work. The document is seriously defective in respect of the requirements of s. 130: it does not include the applicant's name, her postal address, the kind of work on which Ms Kelly was usually employed, whether she was employed under an individual or collective agreement, the hours between which Ms Kelly was employed, or the method of calculation. It does purport to include a record of cash payments to the applicant. It is not clear when this record was compiled, and Ms Kelly is not confident as to its accuracy. Neither am I. The respondent has produced no record of holiday or sick leave payments to the applicant.

[25] I am reinforced in reaching this conclusion by having regard to the findings of Chief Judge Goddard in *Harrod v DMG World Media* [2002] 2 ERNZ 410. In his decision, the Chief Judge observed at par 41 that:

... quite often a resignation in form is a dismissal in substance or its equivalent. In the expression "constructive dismissal" the word "constructive" means "deemed" and a resignation is deemed to be a dismissal when the termination of the employment is at the initiative of the employer, however subtle may be the conduct that leads to the resignation. The expression "constructive dismissal" is not well understood. The Concise Oxford Dictionary defines it as "the changing of an employee's job with the aim of forcing resignation". However, constructive dismissal is far wider than that. I have no difficulty in accepting that it can consist of creating an atmosphere in which an employment is unlikely to be able to continue or to continue for very long. This can take many forms but its existence still needs to be proved.

[26] For the reasons set out above I am satisfied an atmosphere was created by the respondent in which Ms Kelly's employment was unlikely to be able to continue.

Remedies

Compensation for Hurt and Humiliation

[27] Ms Kelly seeks compensation of \$15,000. She gave compelling evidence of the effect on her of the events leading up to her constructive dismissal. Ms Kelly also

acknowledged that, during the same period, she was much affected by the deaths within quick succession of four people to whom she had been very close. The applicant was not paid bereavement leave for the time off that she took. Ms Kelly also attributes becoming mentally unwell to the stress she experienced in the workplace. However, while medical certificates were produced (attachments to her witness statement dated 10 March 2010) no expert evidence witness evidence was produced or sought.

[28] It should also be noted that in assessing remedies payable to the applicant, that had Ms Wei addressed her legitimate business concerns in a manner consistent with New Zealand employment law, the issue of the cost of Ms Kelly's terms and conditions of employment in the context of a deteriorating trading environment, may have resulted in various outcomes, including the parties agreeing to further reduced hours, other savings through changes to Ms Kelly's terms and conditions and/or redundancy.

[29] Having regard to the above I am satisfied an award of \$6,000 compensation for humiliation and hurt is appropriate.

Contributory Fault

[30] When it determines that an employee has a personal grievance, the Authority is required by s. 124 of the Act, in deciding the nature and the extent of the remedies to be provided, to consider the extent to which the employee's actions contributed toward the situation that gave rise to the grievance and, if those actions require, reduce the remedies that would otherwise have been awarded.

[31] I am not aware of any actions by Ms Kelly that require a reduction of the remedies set out above.

Other Remedies

[32] As set out in par 14 above, Ms Kelly seeks to recover various monies for wages and holiday pay she claims have not been paid to her. As is already clear, in the absence of a lawful time and wage record, I prefer Ms Kelly's assessment as to

what is owed her. The respondent is therefore to pay to the applicant the wages and holiday pay claimed (the amounts are set out below).

Determination

[33] Ms Wei unjustifiably constructively dismissed Ms Kelly and is to pay to her:

- a. \$6,000.00 (six thousand dollars) as compensation for the applicant's humiliation and hurt, and
- b. The following gross cash underpayments:

| | \$ |
|--------------------------------|---------------|
| 12 January 2009 to 16 January: | 124.00 |
| 2 March to 6 March: | 21.00 |
| 23 March to 27 March: | 21.00 |
| 27 March to 1 May: | 63.00 |
| 4 May to 8 May: | 42.00 |
| 11 May to 15 May 2009: | 42.00 |
| Total | 231.00 |

- c. Holiday pay (8%) on \$231.00: **18.48**; and
- d. Holiday pay (8%) on cash payments totalling \$1,974.00:

157.92

[34] Costs are reserved. I note here counsel's claim of legal costs of \$4,054.00 for Ms Kelly. For a two-day investigation this is a realistic claim provided a discounting is applied in respect of the benefit of progressing another applicant's claim at the same time.

[35] In other words, and subject to detailed submissions, all up legal costs of approximately \$6,000 for the two applicants would appear realistic.

Denis Asher

Member of the Employment Relations Authority