IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA453/09
5126735 & 5148671

	BETWEEN	KONG FOOK SENG First Applicant
	AND	NYAT DING NGO Second Applicant
	AND	SUNSHINE TILING LTD Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Royal Reed, counsel for Applicants Garry Pollak, counsel for Respondent
Investigation Meeting:	20 March and 5 May 2009
Submissions Received	5 and 22 May 2009
Determination:	16 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Arising out of employment with the same employer, the applicants Mr Kong Fook Seng and Ms Nyat Ding Ngo each bring a personal grievance claim of unjustifiable dismissal and unjustifiable disadvantage for investigation and determination by the Authority.

[2] Although mediation was undertaken the employment relationship problems have remained unresolved.

[3] Mr Kong and Ms Ngo are Malaysian nationals and partners who came to New Zealand on temporary work permits. Mr Kong commenced employment with the respondent Sunshine Tiling Limited in about August 2007 and, after Ms Ngo had joined him here, she obtained a job with the same company in about November 2007.

[4] After performing his job as a tiler for some time Mr Kong complained of soreness in his wrist which was affecting his ability carry out that work. He considered that the response of Sunshine Tiling management to his condition gave cause to raise a personal grievance claim of unjustifiable disadvantage, which he did.

[5] Before that claim could be resolved and while Mr Kong was still employed, representatives of Sunshine Tiling visited him and Ms Ngo at their home and inquired about the latter's immigration status. When she confirmed that the permit allowing her to work in New Zealand for six months had expired she was given a letter advising the following:

> *18 June 2008*
>
> *To: Ngo*
>
> *Due to the fact that your holiday working visa was unable to be extended we are no longer able to employ you.*
>
> *Under NZ law immigration legislation you can no longer work in New Zealand.*
>
> *We would strongly suggest you leave the country so there is no future implications regarding your possible desire to return to New Zealand.*
>
> *Under NZ immigration law we are obliged to inform immigration of your status.*
>
> *Good luck in your future endeavours.*
>
> *Regards*
>
> *Alex*

[6] There is no dispute that Ms Ngo's working holiday visa had expired in May 2008, a month before the visit from her employer in June. Ms Ngo told the Authority that when she had realised this she consulted a lawyer to have her permit renewed.

[7] Ms Ngo claims that the letter of 18 June was the communication by Sunshine Tiling of her dismissal and that the employer's action was unjustifiable. The employer also regards itself as having dismissed Ms Ngo but contends its action was justifiable, to prevent a breach or continuing breach of the law.

[8] The law to be observed in this case was the Immigration Act 1987, s 5(1) of which provides:

> *(1) A person who is not a New Zealand citizen may undertake employment in New Zealand only if that person is –*
>
> *(a) The holder of a residents permit; or*
> *(b) The holder of a work permit; or*
> *(c) The holder of any other type of temporary permit whose conditions have been varied in accordance with this Act to authorise the holder to undertake employment in New Zealand …*

[9] The sanction for a breach of s 5 of the Immigration Act is removal from New Zealand, by compulsion if necessary.

[10] The Immigration Act also makes it an offence for an employer to employ someone they know is not entitled to work in New Zealand;

> *(1) Every employer commits an offence against this Act who allows or continues to allow any person to undertake employment in that employer's service knowing that the employer is not entitled under this Act to undertake that employment.*

[11] Upon conviction for this offence an employer is liable to a fine not exceeding $50,000.

[12] Also relevant is the obligation under s 45 of the Act:

> *(1) From the moment that a person is in New Zealand unlawfully until that person leaves New Zealand, he or she has a obligation to leave New Zealand unless subsequently granted a permit.*

[13] Therefore Ms Ngo had been bound to resign or cease working for Sunshine Tiling from the moment her permit expired. She has only herself to blame for forgetting that was going to happen in May 2008, six months after the permit had been issued upon her arrival in New Zealand.

[14] Ms Ngo overstayed in New Zealand after May 2008 and it was not until February 2009 that she was told by Immigration New Zealand that her application for a new work permit, which she had submitted in 11 July 2008, had been approved. The letter noted that the permit had been issued as an exception to normal government policy, so as to allow Ms Ngo to work lawfully and support her partner Mr Kong who

from June 2008 had become an ACC beneficiary. The new permit was valid until 2 August 2009.

[15] Ms Ngo was responsible from the time of the expiry of her permit to remove herself from the unlawful situation by stopping working for Sunshine Tiling, or resigning. She was also obliged to leave New Zealand from that time on but did not.

[16] The employer's action in the circumstances at the time must almost inevitably be found to have been that of a fair and reasonable employer, within the test required to be applied by s103A of the Employment Relations Act 2000. A fair and reasonable employer having found out that an employment relationship it had was illegal would take immediate steps to rectify that situation by not offering further work, thereby bringing the unlawful relationship to an end.

[17] In the situation faced by the employer there can be little place for a "process to terminate" employment, as was submitted by Ms Royal must be observed. Both employer and employee were legally required to immediately desist from breaking the law, and that is what Sunshine Tiling did by dismissing Ms Ngo once she had confirmed that her permit had expired. That action was justifiable I find. Although Ms Ngo may not see it this way, the employer's action kept her from breaking the law any further and getting any deeper into trouble with the authorities.

[18] Ms Royal in submissions for Ms Ngo also referred to the decision in *Otago Hotel IUOW v Donaldson & Youngman* (1988) 2 NZELC 95,895. This was a case where an employee was dismissed after a permit had expired, but it was an under-rate workers permit not an immigration permit. Unlike Ms Ngo's case, the expiry of the permit did not affect the ability of the parties to continue the employment relationship although it had some bearing on the rate of pay the worker should have received for work done after the permit had expired. Also unlike Ms Ngo's case, the employer dismissed, unjustifiably as it was held by the Court, for reasons of performance. The case is therefore of no assistance to the Authority.

[19] In the circumstances any discussion by Sunshine Tiling with Ms Ngo about her applying for another permit and resuming employment, necessarily could only take place with the employment relationship terminated, as was required to be brought about immediately, whether by Ms Ngo or Sunshine Tiling or both. The absence of

such discussion could not become the subject of a personal grievance as there was no employment relationship.

[20] The submission that the dismissal was predetermined must also be rejected. The letter of dismissal was prepared in advance as part of a plan the employer was reasonably entitled to make and implement if Ms Ngo confirmed she could no longer lawfully work, as she did. The need to have the dismissal conveyed in writing was obviously for proof of the employer's actions, should that have been required by the Immigration authorities at any time.

[21] Ms Ngo has tried to pass responsibility for her immigration situation on to her employer and blame her failure to attend to renewing her permit on the distraction she had with her partner's medical and employment problems she had been assisting him with. That cannot be the responsibility of the employer, which did not control the ability of Ms Ngo to obtain and retain a permit.

[22] It was also argued that the employer acted unfairly and unreasonably because it had allowed another employee, a Vietnamese, to remain employed when he too was not permitted to work. I accept that this man Henry was not employed by Sunshine Tiling at all but by a separate although associated titling business. I make no finding about Henry's immigration status at relevant times of, but consider that even if he had been employed by Sunshine Tiling unlawfully that situation could not benefit Ms Ngo in any way; two wrongs do not make a right as they say. The principles of employment law relating to disparity of treatment are unlikely to apply where continuing the employment so as to avoid or correct a perceived disparity would be illegal.

[23] Ms Ngo also claimed that during her employment she was not paid overtime for all hours worked. These were often 55 hours a week and her claim is to recover a total of $2,100 unpaid overtime.

[24] Unlike her partner Mr Kong, she was not given a written employment agreement specifying the terms and conditions of her job. Sunshine Tiling believed it had employed her as a casual but thought, wrongly, that a written agreement was not required by law. Ms Ngo reasons that because her partner had been entitled to receive overtime the same terms and conditions must have applied to her. Her partner

was employed as a tiler whereas she worked as a grouter, which was less specialised work for which she was paid a correspondingly lower rate.

[25] I find that there were no express oral terms as to the payment of overtime that were breached by Sunshine Tiling. In my view the terms of employment must be determined by the conduct of the parties and in that regard Ms Ngo was paid the same hourly rate consistently for all the hours she worked throughout the employment. She knew with each pay she received that overtime was not being paid but made no complaint. In accepting pay over six months without protest she affirmed the arrangement under which overtime was not an agreed term of employment.

[26] Although a claim for holiday pay due to Ms Ngo at termination was made it appears this has now been resolved with payment made to her recently.

Determination – Ms Ngo

[27] I therefore determine that Ms Ngo does not have a personal grievance of any kind in relation to the termination of her employment or any of the terms and conditions of that employment. I also determine that she has no claim to recover overtime.

Mr Kong's grievance

[28] Mr Kong began working as a tradesman tiler for Sunshine Tiling when he arrived in New Zealand in about August 2007.

[29] There is no dispute that after complaining of pain in his wrist at the beginning of 2008, by the middle of the year he was diagnosed as having de Quervains disease, a condition which can be triggered by overuse as well as other causes. It is apparently treatable and Mr Kong eventually had surgery in November 2008.

[30] There is also no dispute that ACC approved payment of weekly compensation to Mr Kong from about 22 June 2008, on the basis that his condition was the result of a work related accident. From then on Mr Kong did not perform any more work for Sunshine Tiling. He continued receiving ACC payments for eight months or so, until about the beginning of March 2009.

[31] Sunshine Tiling disputed with ACC that Mr Kong's condition had been caused by a work related accident. The employer maintained there had been a pre-existing

condition, as he was known to have experienced difficulty with his wrist from the time he started with Sunshine Tiling in 2007, and also there had been no report by Mr Kong at the time of any accident in February 2008 when he claimed it had occurred. Further Mr Kong had claimed the accident had happened at a particular worksite that Sunshine Tiling had no involvement or connection with.

[32] Nevertheless, despite the employer's opposition ACC accepted the claim and began paying Mr Kong compensation.

[33] With regard to the claim of unjustifiable dismissal Sunshine Tiling accepted in submissions it had dismissed Mr Kong but contended that its action was justified because of Mr Kong's long term inability to perform the employment agreement in the way the parties may be presumed to have intended. Mr Kong did not return to work after June 2008 and even by the time of the investigation meeting Mr Kong considered he still had not recovered enough from his condition to be able to resume tiling.

[34] As grounds for the dismissal the employer pointed to a clause of the employment agreement expressly permitting termination by the employer if the employee has been medically assessed as being so disabled or incapacitated as to be unable to fulfil his position for a continuous period of eight weeks.

[35] I accept that this provision was capable of being invoked in the circumstances. Sunshine Tiling had received medical certificates and considerable information from ACC that showed long term medical incapacity on the part of Mr Kong.

[36] It is not clear to the Authority from the evidence when it was the employer consciously and deliberately dismissed Mr Kong by telling him that was what it was doing. In his evidence Mr Kong was unsure as to when or even whether he had been dismissed. By early September 2008 the company notified the Immigration Service that *"we are not in a position to keep his* [Mr Kong's] *employment open."*

[37] There was a communication problem as Mr Kong, I find, once his claim for ACC payments had been approved in June 2008, failed to remain in direct contact with the employer. Although he forwarded some medical certificates Mr Kong shifted house and did not tell the employer where he could be found for direct discussion about the future of his employment. The last direct contact was in June,

about the time the employer had visited the home of Mr Kong and Ms Ngo to enquire as to the latter's immigration status.

[38] I find that the dismissal of Mr Kong was justifiable according to the test at s 103A of the Employment Relations Act. In the circumstances as they existed at the time a fair and reasonable employer would have dismissed. The inability of the employer to discuss the outlook for a return to work by Mr Kong before reaching a conclusion whether to continue his employment was the fault of Mr Kong. In that regard he was in breach of his duty of good faith by not remaining reasonably communicative with his employer.

[39] I agree with the submission of Mr Pollak that the employer was not reasonably required or expected to keep Mr Kong's employment open indefinitely and that it had become sufficiently aware of his medical incapacity and long term prognosis for recovery as to allow the company to make an informed decision about terminating the employment relationship.

[40] With regard to his claim of unjustifiable disadvantage, 11 separate points were argued for Mr Kong. They are addressed as follows.

[41] His medical situation was well documented in the various doctors' certificates and correspondence from ACC and specialists, material the employer saw and which was placed before the Authority in evidence.

[42] There was considerable conflict between the evidence of Mr Kong on the one hand and representatives of Sunshine Tiling on the other as to how the employer responded to the situation. I must rely on the evidence of the witnesses when considering issues such as whether or not Mr Kong was given light duties to allow for his condition and help him recover.

[43] It is the weight of evidence that resolves the conflict in the employer's favour, I find. Three company witnesses, Ms Chris Tan, Mr Eric Pedersen and Mr Alex Hoi, said that Sunshine Tiling had responded to the medical advice by giving Mr Kong light duties while he was working in periods from April to June 2008. This was grouting work which did not require the heavy lifting needed in tiling. The employer, I find from the evidence, also participated with ACC in formulating a light duties programme and rehabilitation programme for whenever Mr Kong was assessed as being fit enough to return to work

[44] I therefore reject the claim that Mr Kong was unjustifiably disadvantaged through being compelled by his employer to work in a way that was contrary to the advice printed on the medical certificates.

[45] The employer I find did heed the medical advice. Mr Kong received his entitlement to have time off on compensation, through his ACC claim. This was in effect the paid sick leave he claims not to have been offered.

[46] I do not accept from the evidence that Mr Kong was threatened with dismissal if he did not continue performing his usual duties as a tiler. I note that Mr Kong had a very limited command of English.

[47] I agree with Mr Pollak that the question of whether there was a pre-existing condition became immaterial once ACC accepted that the injury was work related. The employer was given an opportunity to put its views forward to ACC which reached a different conclusion. The giving of questionable evidence by the employee Twala about Mr Kong's medical treatment in Tonga can therefore be disregarded.

[48] The employer I find had no need to obtain its own medical opinion, as there was ample documented information available from practitioners in that regard.

[49] It remained Mr Kong's responsibility to ensure that he had the correct travel documents for going to Tonga. The permit was personal to him and he was not inexperienced in international travel.

[50] The overtime and holiday pay owed to Mr Kong has been paid, I find, since his claim was brought to the Authority.

Determination – Mr Kong

[51] The Authority determines that Mr Kong has no personal grievance of any kind and does not have a claim to recover payments due to him from his employment.

Costs

[52] The applicants are legally aided (very surprisingly in Ms Ngo's case) and this is likely to limit the ability of Sunshine Tiling to obtain an award of costs at the usual 'reasonable contribution' level. Any application by the company is to be made before 24 December 2009. Any response from the applicants is to be filed before 20 January 2010.

A Dumbleton
Member of the Employment Relations Authority