

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 354  
5375876

BETWEEN                      SUI SIENG TENG  
   Applicant  
  
A N D                              AONGATETE COOLSTORES  
   LIMITED  
   Respondent

Member of Authority:        K J Anderson  
  
Representatives:              Sui Sieng Teng in Person  
   Nell Dawson, Advocate for Respondent  
  
Investigation meeting:        8 August 2012 at Tauranga  
  
Date of Determination:        10 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**The matter before the Authority**

[1] Ms Sui Sieng Teng (Ms Teng) brings a matter to the Authority regarding the fact that she was unable to return to her seasonal employment at Aongatete Coolstores Limited (ACL). On the surface, the matter that Ms Teng has brought to the Authority is something that it cannot assist with; and this was indicated to the parties during a conference call on 11 June 2012. However, as an outcome of my discussions with Ms Teng and Ms Nell Dawson, the Operations Manager for ACL, it was agreed that they would attend an investigation meeting on the basis that the problem that has arisen may be able to be resolved. Because the parties were unrepresented and given the overall lack of clarity in the claims of Ms Teng, pursuant to s.160(3) of the Employment Relations Act 2000, I felt it was necessary to investigate the matter further in order to ensure that the matter was not of a different nature than had been described by Ms Teng.

[2] The matter that Ms Teng brings to the Authority is that she had worked for ACL from 2007 to 2011 (inclusive) during the respective kiwifruit seasons, but was not offered employment for the 2012 season.

[3] The circumstances applying to the employment relationship between ACL and Ms Teng are somewhat unusual. ACL operates a kiwifruit packing operation in the Bay of Plenty. Because of the seasonal nature of the harvesting and processing of kiwifruit, there is a demand for labour from approximately March to August each year.

[4] Ms Teng is a citizen of Malaysia and along with other people from that country, the Solomon Islands, Vanuatu and Tonga; she was employed on a seasonal basis under an Agreement to Recruit (ATR). The ATR requires the approval of Immigration New Zealand, upon application being made by ACL. For example, for the 2012 kiwifruit season, ACL was granted an ATR to employ 108 workers from the above countries; 21 of whom came from Malaysia. For the 2011 season, 18 workers came from Malaysia. The application for an ATR is made by ACL in late August each year in advance of the forthcoming season. And due to fluctuating labour availability in New Zealand, there is no guarantee as to the number of workers that Immigration New Zealand will allow to enter this country each season. Nonetheless, Ms Teng, along with several other workers from Malaysia, had been returning for consecutive years and she justifiably, had a reasonable expectation of returning for the 2012 kiwifruit season.

[5] During the 2011 season, it appears that some problems arose in regard to the standard of the accommodation that ACL had provided for Ms Teng and others. There was also an issue about one person (Lam) who was married and purportedly she should have been staying with her husband in separate accommodation. The evidence of Ms Teng is that Lam complained about the accommodation. Ms Teng believes that she was held responsible by ACL management for the complaints.

[6] Ms Teng also says that accusations were made about unsatisfactory performance on her part in regard to the grading of fruit. It appears that these accusations may have come from other workers. Ms Teng says that she asked to go home to Malaysia early rather than complete the season, because of the conflict that had arisen. Or alternatively, she requested to be removed from grading the fruit and placed into an area where she could be packing it.

[7] It seems that while there was a discussion about a number of issues that had arisen, nothing in particular was resolved and further, the details of exactly what was going on in relation to the interpersonal relationships between Ms Teng and others is somewhat unclear. However, what is established is that Ms Teng worked out the 2011 season and then returned to her home in Malaysia, as her work visa expired on 13 September 2011.

[8] Upon returning to her home, Ms Teng discovered a letter. It informed:

Dear Sui Sieng Teng,

As we are at the end of the packing season, it is time for us to evaluate the quality and productivity of our Packhouse work. We are grateful for the part you have played in our Team, but have decided not to bring you back to work for Aongatete next year. We hope you have a safe trip home and a wonderful reunion with your friends and family.

Yours sincerely,

Clive Exelby  
Packhouse Manager

[9] The letter is dated 31 August 2011 and was apparently compiled before Ms Teng left her employment with ACL. Ms Dawson explained that this was probably because Mr Exelby went on leave and would have compiled the letter before he left. But that does not adequately explain why the letter was not given to Ms Teng before she left her employment at the end of the kiwifruit season. Also, most oddly, the letter does not appear to have been posted as there is not a postmark on the envelope, albeit it has a stamp and airmail sticker on it. It seems that while it may have been the intention to post the letter, somewhere along the line it was hand delivered to Ms Teng's home, by some unidentified person.

[10] Understandably, Ms Teng was most upset to receive this letter as there had been no indication given to her, prior to her departure from ACL at the end of the season, that she would not be invited back for the 2012 season.

[11] Ms Teng says that she has been unfairly treated after five years of service for ACL and she asks the Authority to provide her with a remedy. But difficulties arise for Ms Teng. First, the employment agreement is a fixed term agreement that recognises the seasonal nature of the work provided. At clause 5.2 of the agreement, it is stated that:

The parties to this agreement agree that the nature of the relationship is a casual arrangement for a fixed period over the 2011 kiwifruit season. The seasonal period will depend on what work the Employee is engaged to undertake. There is no guarantee of work being available and nothing in this agreement shall expressly or by implication be read as providing an entitlement to an expectation of on-going work, either throughout the 2011 kiwifruit season or thereafter. The Employer agrees to provide reasonable notice to the Employee regarding when they will be requested to perform duties and the Employee agrees to take reasonable steps to be available for work during the 2011 kiwifruit season.

[12] Then at clause 5.3 of the agreement, it is stated:

The Employer and the Employee are entering into a casual agreement for a fixed period for a maximum of seven months. The fixed period shall start on ..... and shall end on ..... . The reason for the fixed period is until work during the 2011 kiwifruit season is completed. The parties also confirm that the Employee has been advised by the Employer when discussing employment, the reasons for the employment ending in this way.

[13] Then further, at clause 21.1 of the agreement, it is stated:

As an employee employed to undertake work over the 2011 kiwifruit season, the Employer is under no obligation to provide continued employment to the Employee and therefore may withdraw availability of work at any time.

[14] Then finally, at clause 5.4 of the agreement, it is stated:

Nothing in this agreement shall prevent the parties from entering into a subsequent agreement of employment by mutual agreement; but nothing in this agreement shall be interpreted or understood to give the Employee any expectation that this agreement will be renewed, or that any subsequent agreement will be entered into, and no assurance or arrangement for any renewal, variation or subsequent agreement shall bind either party unless such assurance or arrangement is in writing signed by both parties.

### **Analysis of the problem**

[15] Ms Teng is not pursuing a personal grievance specifically, but even if she was, it would be out of time as it has not been raised within 90 days of the receipt of the letter dated 31 August 2011. Further, given the fixed term nature of the employment arrangement, Ms Teng does not have a ready avenue of redress available to her. It is clear that Ms Teng was engaged on a fixed term employment agreement, wholly dependent on the length of the kiwifruit season. The employment arrangement and the associated evidence about this appear to meet the requirements of s.66 of the Employment Relations Act. Because the nature of the work is seasonal and the

number of overseas people employed is subject to Immigration New Zealand approval for each season, these are factors that make it extremely difficult for someone in the position of Ms Teng to have any redress if they are not offered employment for the next season.

[16] Ms Teng was employed on a seasonal basis only, with each season being a separate and distinct fixed term of employment. There was no assurance of being employed for the next season, albeit it is established that she was considered suitable to be employed by ACL for five consecutive seasons. Indeed, Ms Dawson has acknowledged that Ms Teng was an experienced and capable employee. I do not accept that the decision not to re-employ Ms Teng was related to the ATR for the 2012 season as it is established that this decision was made prior to the end of the 2011 season. I am reasonably satisfied that Ms Teng could have returned to work in New Zealand along with the other Malaysian workers.

[17] I regret to say that I cannot help but conclude that even if Ms Teng is mistaken in her perception of some matters, she was treated most unfairly and without a modicum of good faith. The employer failed to observe the requirements of the good faith provisions of section 4 of the Employment Relations Act and if the circumstances had been different, a penalty for breaching the Act may have been appropriate. Indeed, even if Ms Teng was at fault to some degree in regard to the workplace relationship problems that arose, that does not excuse the cavalier manner in which she has been treated by ACL. The workplace relationships could have been managed by ACL without taking the draconian step of refusing to offer Ms Teng employment for the 2012 season.

### **Conclusion**

[18] Given the express fixed term nature of the employment relationship, regrettably I am not able to assist Ms Teng with the problem that she has brought to the Authority. However, I would ask ACL to now exercise some good faith towards Ms Teng and give favourable consideration to re-employing her for the 2013 kiwifruit season.

**K J Anderson**  
**Member of the Employment Relations Authority**