Employment Court of New Zealand

Tian v Hollywood Bakery (Holdings) Limited AC41/09 [2009] NZEmpC 107 (20 November 2009)

Last Updated: 25 November 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 41/09ARC 40/08 ARC 76/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN YUN YAN TIAN
Plaintiff

AND HOLLYWOOD BAKERY (HOLDINGS) LIMITED
Defendant

Hearing: 15 and 19 June 2009

(Heard at Auckland)

Appearances: Qiang Li, advocate for the plaintiff
Philip Skelton, counsel for the defendant

Judgment: 20 November 2009

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff has brought two challenges to the Court. The first, under ARC 40/08, is a challenge to a determination dated 30 April 2008 relating to a written warning. The defendant has accepted the Employment Relations Authority's determination that the warning was unjustified and has paid the plaintiff the amount of the Authority's compensation award of $800.
[2] The plaintiff has challenged the amount of the award and now seeks $1,200, Court fees of $270 and other fees of $200 to a total of $1,670. Deducting the amount that has already been paid, the sum of $870 is in dispute in this challenge.
[3] The second challenge, under ARC 76/08, relates to a claim for arrears of wages in which the Authority, in a determination dated 11 September 2008, declined to make any orders. The claim brought by the plaintiff before the Authority was for $4,257.16. The Authority stated that this sum was not explained in any understandable way and was revised between the investigation meetings it held. The Authority then stated:

[4] I have confirmed with Mr Qiang that he now agrees on Ms Tian's behalf that the sum of $668.80 is the amount claimed by her. The calculation of that sum is set out in an unsolicited memorandum of counsel dated 5 June 2008.

The merits

[5] The amount agreed as in dispute is $668.80. It is agreed that the amount in dispute arises because of errors in the calculation of PAYE deductions.

[6] I have no authority to interfere with tax deductions. The correction of errors in tax deductions is a matter between Ms Tian and the Commissioner of Inland Revenue.

The determination

[7] ***I decline to make any formal orders in this matter. For the avoidance of doubt, I decline to grant the remedies sought in amended statement of problem dated 24 April 2008. This investigation is now closed.*** (Emphasis in original determination)

[4] In her statement of claim challenging this determination the plaintiff stated:

On 5 June, the two parties reached agreement that the amount be determined to be $668.8, [sic] *which is in fact the actual wage amount in arrears owned* [sic] *to the applicant by the Respondent in violation of the minimum wage law.*

[5] Notwithstanding the acknowledgment of this agreement, the plaintiff, through her advocate Mr Qiang Li, now seeks the sum of $4,457.16 she originally sought from the Authority, before the agreement was reached. This sum is said by the plaintiff to be made up of $2,257.16 wages with tax included, $2,000 original financial damages due to alleged loss of working hours and appeal costs of $200.
[6] The defendant's statement of defence states that the parties reached an agreement at the Authority's second investigation meeting on 30 May 2008, that the plaintiff's original claim was for an incorrect and inflated sum and that $668.80 was the sum that the defendant had over paid to the Inland Revenue Department as PAYE deductions in respect of the plaintiff's wages. The defendant says that it proposed to the plaintiff that she recovers the $668.80 from the Inland Revenue Department by filing a tax return and seeking a refund; or alternatively it offered to pay the sum of $668.80 to the plaintiff in exchange for the plaintiff authorising the defendant to recover the overpayment from the Inland Revenue Department. The defendant says the plaintiff rejected both proposals.

Application to admit evidence

[7] One of the witnesses that the defendant called in the Authority was the defendant's branch manager for the Westgate Branch, Yi Lin, also known as Vicki Lin. I heard evidence from the defendant's solicitor, David Lin-Chung Liu, who represented the defendant at the Authority's investigations, that the Authority member administered an oath to Ms Lin and she swore that her evidence was true and correct. Ms Lin resigned from the defendant on or about 12 May 2008 and I am satisfied that proper efforts have been made by the defendant's solicitors to contact her but those enquires have not even revealed whether Ms Lin remains in New Zealand. In these circumstances Mr Skelton, the defendant's counsel, sought to have the sworn brief admitted into evidence under the provisions of ss18 or 19 of the Evidence Act 2006. The grounds were that the evidence is said to be reliable, and Ms Lin is not available to give such evidence. It would be appropriate to admit the evidence under those sections but the Evidence Act does not directly apply to the Employment Court which has a much wider jurisdiction to accept and admit and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not (s189(2) Employment Relations Act 2000).
[8] I did not understand that Mr Li opposed the admission of the statement even though he would not have the opportunity of cross-examining Ms Lin. I admitted the statement and note that in at least one material respect, the plaintiff's own evidence and that of the defendant's temporary manager, Ms Yani Zhu was consistent with Ms Lin's evidence.

Factual findings

[9] The plaintiff's evidence was given through an interpreter. She was interviewed by Ms Lin for a position with the defendant's bakery and café in the Westgate Power Centre, Massey. The terms of the employment were not, at that stage, recorded in a written agreement. An issue later developed as to what the nature of the plaintiff's work was to be. Her evidence was that her work in the bakery was to wash the dishes, mop the floor and dump the rubbish but not to assist with work in the kitchen. She claimed that the advertisement she had responded to was that of a dishwasher.
[10] Ms Lin's statement says that the position that was advertised was that of the existing kitchen hand who had been promoted. Ms Lin stated that at the interview she explained to the plaintiff why the position had become vacant and the employment duties that the plaintiff would be required to undertake. This was said to include general cleaning, cleaning equipment, cleaning dishes, putting dishes in the dishwasher, taking out rubbish, helping the cook and the manager and all the tasks that are ordinarily expected of a kitchen hand. Ms Lin's evidence was that the plaintiff was employed as a kitchen hand, was shown the existing duties and trained by the previous kitchen hand, and carried out those duties until Ms Lin left for an overseas trip in early November 2007.
[11] The plaintiff commenced work on 23 April 2007. She says there was a three month trial period during which she was paid $8 an hour. After she had worked 6 months she claims that her wages were increased to $11.50 an hour as a result of requests she made. She also claims that the defendant also increased her working areas.
[12] The Waitakere City Council conducted an inspection of the defendant's premises on 7 November 2007. As a result, a notice was issued to the defendant advising of non-compliance with the legislative requirements for food safety and hygiene. Following receipt of this notice the plaintiff received a warning, which she claimed was unfair as the problem areas were not her responsibility.
[13] What is clear, on the plaintiff's own evidence, is that she did do other cleaning work, prior to an incident which occurred in early November 2007. The dishwashing work consisted largely of stacking dishes in a

dishwasher, and taking them out again, but she appeared to suggest that she did this as a favour to Ms Lin with whom she got on well. When Ms Lin went on a holiday Ms Zhu, who had been employed by the defendant since 2003 and had acted as the Hollywood Bakery's Manukau Café Manager since early 2007, was asked to come and look after the Westgate Branch during Ms Lin's absence.

[14] Ms Zhu began working at the Westgate café about 2 weeks prior to Ms Lin's departure. When she first arrived Ms Lin introduced Ms Zhu to the staff as the acting shop manager during Ms Lin's absence. As Ms Zhu was introduced in front of the staff she was advised of their roles. This included the roles of the plaintiff who was introduced to her as the kitchen hand. During the hand over period Ms Zhu made observations as to the way the café operated and how each of the staff including the plaintiff carried out their tasks. Ms Zhu's evidence was that the plaintiff was doing everything that was normally expected of a kitchen hand and this included washing dishes, taking out the rubbish, cleaning equipment, bringing supplies from storage to the kitchen, and providing general assistance in the kitchen.

[15] The evidence of Ms Lin, which I have already admitted, was to similar effect, but went further and stated that this had all been made clear to the plaintiff at the initial interview by Ms Lin.

[16] In support of the plaintiff's claim, Mr Qiang Li called Ms Lisa Zhang who had worked for the defendant for some 11 years. Ms Zhang claimed to have overheard the interview between the plaintiff and Ms Lin, which was to the effect that Ms Lin told the plaintiff that her work consisted of washing the dishes, doing the rubbish and cleaning the tables.

[17] There was a conflict between the plaintiff and her witness Ms Zhang as to whether or not the plaintiff mopped the floor, Ms Zhang claiming that she never saw the plaintiff mopping the floor before the incident in November. As it will be seen it was the plaintiff's own evidence that one of the three tasks she was employed to do was mopping the floor.

[18] For all these reasons I conclude, as did the Authority, that it was part of the plaintiff's duties to carry out mopping of the floor and general kitchen hand work as well as the work of a dishwasher. Her jobs were not limited in the way she claimed before the Court. I find, on balance, preferring as I do the evidence of Ms Zhu, supported as it was by Ms Lin's statement, that the plaintiff was employed as a general kitchen hand.

[19] It is also clear from the evidence of the plaintiff as well as that of Ms Zhu that the plaintiff was mopping the floor at the time her former husband, Mr Qiang Li, her advocate in the present proceedings, walked into the premises. There was a conflict of evidence between the plaintiff and Ms Zhu as to what then took place. I prefer the evidence of Ms Zhu to that of the plaintiff. The plaintiff's evidence showed a reluctance to answer questions in cross-examination. By contrast Ms Zhu's evidence was straightforward and, although she was subjected to a lengthy and discursive cross-examination by Mr Qiang Li, she was not challenged on her evidence as to his conduct on this occasion. The account given by Ms Zhu therefore forms the basis of the following findings.

[20] The incident in question took place several days prior to the 7 November inspection by the Waitakere City Council. Ms Zhu was working in the café and there were a few customers all of whom appeared to be startled by an explosion of voices from the direction of the kitchen. One of the staff, Ms Lee Crawford, called for Ms Zhu to deal with the situation. When she entered the kitchen she saw the plaintiff mopping the floor and Mr Qiang Li standing next to her and swearing and yelling at her in Mandarin. The plaintiff continued mopping the floor. Ms Zhu told Mr Qiang Li to leave and said she would call the Police if he did not leave immediately. Mr Qiang Li agreed to leave but as he was making his way out of the premises he told Ms Zhu that things were not over.

[21] Ms Zhu approached the plaintiff to see if she needed any help but the plaintiff declined to talk, finished cleaning and left for the day. The following day the plaintiff's attitude to her employment had changed dramatically. Apart from cleaning and washing dishes and taking out the rubbish, she refused to carry out any of her normal duties. Ms Zhu was very concerned about this as the Waitakere City Council inspection was due in a few days. Each time she instructed the plaintiff to carry out cleaning jobs in and around the kitchen the plaintiff would refuse to carry out her instructions and claimed that it was not her job to carry out that type of work. The plaintiff's continuing refusal led to the defendant taking the disciplinary action which resulted in the warning. The warning was signed by Mr Wong, a director of the defendant on 3 December 2007, and stated that there were two areas of concern. First, that the plaintiff's work and working areas had not been maintained to the safety standards set by the New Zealand Government, and secondly that she was not following the instructions of her superior. Despite the warning letter, the plaintiff continued to refuse to carry out her employment duties or any of Ms Zhu's instructions. A further letter was sent on 14 December requiring her to attend a disciplinary meeting on 21 December. She was warned that the issue was her refusal to carry out the reasonable instructions of the defendant.

[22] On 16 December the plaintiff handed Ms Zhu a letter in both English and Chinese, signed by her, denying that it was part of her duties as a dishwasher to carry out the other instructions as to cleaning duties and making further allegations against the defendant and its staff.

[23] Ms Zhu had hoped to discuss all of these matters at the disciplinary meeting on 21 December but the plaintiff did not attend that meeting. The plaintiff was later dismissed.

[24] The defendant has not challenged the Authority's finding that the defendant had given an insufficient explanation to the plaintiff of the food safety standards she had failed to maintain and also found there were no actual instructions given to the plaintiff by Ms Zhu as to the duties she was required to carry out. Ms Zhu's

evidence before the Court clarified the latter aspect and made it clear that full instructions were given. Had the justification for the warning been challenged by the defendant, the outcome may well have been different to that in the Authority.

[25] The plaintiff gave no evidence to the Court as to the effect of the warning letter on her. What is clear however, is that she regarded the accusation of disobeying her manager as a lie and considered that Ms Zhu should bear the blame for the shop not reaching the usual high hygiene standards.

[26] The plaintiff claimed that the warning was unfair and that she had refused to attend the meeting on 21 December if the warning was not withdrawn. The plaintiff gave no evidence in support of the claims for compensation contained in her amended statement of claim In the absence of such evidence it would not have been possible to increase the amount of award.

[27] Further, the findings that I have made as to the plaintiff's duties and her refusal to carry them out in spite of reasonable and lawful orders would have justified a reduction in any award as a result of her contributory conduct. In these circumstances the plaintiff may consider herself fortunate to have maintained the unchallenged award of the Authority which the defendant has paid out to her. Her claim for relief in her challenge under ARC 40/08 must fail and her challenge is dismissed.

[28] Turning to the plaintiff's second challenge, for an award of $4,257.16, like the Authority, I too have struggled to understand how that sum was calculated. That is one of the reasons for the lengthy delay in issuing this decision. The Authority found that the sum was not explained in any understandable way and I share that view.

[29] What became clear was that regardless of how much was claimed in the amended statement of claim or was claimed before the Authority, there is uncontraverted evidence, as pleaded in the plaintiff's amended statement of claim, that on or about 5 June 2008 the two parties reached agreement that the amount outstanding was $668.80. Mr Liu gave evidence that he filed a memorandum setting out and analysing the plaintiff's claim based on wage records provided to him by the defendant. From these calculations Mr Liu concluded there was no holiday pay owing to the plaintiff. Instead he deduced there had been an over deduction of PAYE in the amount of $668.80 which was slightly less than the $669.37 figure that he and Mr Li had calculated was overpaid to the Inland Revenue Department at the 30 May 2009 investigation meeting.

[30] Mr Liu was cross-examined at length, and with considerable aggression by Mr Qiang Li. However, at no stage was he cross-examined on his calculations, the agreement that he had reached with Mr Qiang Li or on his evidence that the amount in question was the sum that the defendant had overpaid for PAYE on the plaintiff's behalf.

[31] On Mr Liu's uncontraverted evidence, supported by the admission in the plaintiff's amended statement of claim I must therefore reject the plaintiff's claim for $4,257.16, but, like the Authority, I agree that $668.80 was overpaid to the Inland Revenue Department by the defendant.

[32] The defendant has made two propositions in relation to this amount. The first is that the plaintiff's remedy would be to file a tax return and obtain a refund. As an alternative, the defendant repeated its offer to immediately pay her that sum if she agreed to authorise the IRD to pay the tax refund directly to the defendant.

[33] Mr Skelton submitted that what the plaintiff cannot do is succeed in a claim for that amount against the defendant and also retain the benefit of the tax refund which he is entitled to on filing a tax return.

[34] I accept Mr Skelton's submissions and agree that this is not a case where the plaintiff should be permitted to resile from the agreement reached by Mr Qiang Li on her behalf in the Authority with Mr Liu as to the amount in dispute. As Mr Skelton has submitted this amounts to an accord and satisfaction and the agreement is binding on the plaintiff.

[35] There is no evidence of any arrears of wages or holiday pay owing by the defendant to the plaintiff. The plaintiff has a remedy available to her by filing a tax return to obtain a refund of the overpaid amount.

[36] The plaintiff's challenge must therefore fail.

[37] At the request of the defendant, costs are reserved and if they cannot be agreed the defendant should file and serve a memorandum in relation to costs within 30 days of the date of this judgment.

[38] The plaintiff may file and serve a memorandum in response within 30 days of receipt of the defendant's memorandum.

B S Travis
Judge

Judgment signed at 2.30pm on 20 November 2009