

IN THE EMPLOYMENT RELATIONS AUTHORITY

AA 247/07
5041764

BETWEEN SEUNG KYU PARK
Applicant

AND K & C HOWICK LTD T/A
HOWICK KIM'S CLUB (IN
LIQUIDATION)
First Respondent

SAVE MAX LIMITED
Second Respondent

Member of Authority: Dzintra King

Representatives: Brent Kang, Counsel for Applicant
Katherine Beck, Counsel for Respondent

Investigation Meeting: 4 and 24 April 2007, 9 May 2007

Submissions received: 25 May 2006 from Applicant
20 June 2006 Respondents

Determination: 14 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant contends that he has been unjustifiably disadvantaged and unjustifiably dismissed. He seeks:

- Compensation;
- Reimbursement of lost remuneration;
- Payment in lieu for working on statutory holidays;
- Unpaid annual leave;
- Overtime payments;

- Reimbursement of monthly unpaid salary of \$854.90 per month for a period of nine months.

[2] A further issue is the identity of the employer. Mr Park says he became an employee of the second respondent on 22 January 2006. The respondents say that K & C Howick Ltd (“K & C”) was at all times Mr Park’s employer, that he was dismissed on the grounds of redundancy and was given adequate opportunity to discuss the redundancy situation but refused to do so.

[3] A complicating factor in these proceedings was the fact that Mr Park had either invested or loaned the sum of \$300,000 to the first respondent. This matter falls outside the Authority’s jurisdiction. However, it is clear that Mr Park’s anxiety about recouping his money and his feeling that he was forced to invest or lend it in order to keep his employment, which he needed in order in order to gain residency, coloured the working relationship and created an environment of mistrust and ill feeling.

[4] The first respondent was placed in liquidation two days after I completed hearing the matter.

[5] I had a conference call with the parties at which stage the applicant had not applied to the liquidator. However, on 24 July I received a letter from Mr Kang enclosing a letter from Mr David Josland, Solicitor for the Registrar of Companies, indicating that the Registrar of Companies had accepted Mr Park’s objection to the removal of the company from the Register under s 321 (1) (b) Companies Act 1993 on the basis that the company was a party to legal proceedings.

[6] In *Pacific Holding Ltd v Hudson NZ Ltd & Ors*, HC Auckland, CIV 2005-404-531, Faire J referred to s.248 Companies Act 1993 and noted that the section did not provide an express prohibition precluding the Court from entering judgment.

Background

[7] Mr Park is Korean and at the time the grievance arose was in New Zealand on a work visa seeking permanent residency. His visa was dependent on his retaining employment with an accredited employer for two years. K & C was such an employer.

[8] The first respondent, K & C traded as a wholesaler and retailer of Asian groceries. On 1 October 2004 Mr Park was employed as the company's Marketing Manager on what purported to be a fixed term agreement of thirty months' duration at a salary of \$45,000.

[9] The location of the employment was originally at Harris Road in East Tamaki.

[10] On 21 October 2005 Mr Kyoung Eo, a director of K & C, incorporated another company, Save Max Limited, the second respondent. Mr Eo resigned as director of K & C on 3 May 2006, leaving Mr Woo Ki Hong as the sole shareholder and director.

[11] The retail part of the business of K & C was sold to Save Max around 2 December 2005 and the operation of the retail business ceased on 22 January 2006.

[12] On or about 25 January 2006 the business relocated to Burswood Drive in Howick, which is the registered address of Save Max Limited. Unbeknown to Mr Park, when Mr Hong had entered into a sale agreement in December 2005 he had agreed to second the staff of K & C for a period of between three and six months to Save Max to help set up Save Max's retail business. Nor did Mr Park know the retail business had been sold.

[13] In return for purchasing the stock at a standard wholesale price Save Max obtained K & C's goodwill to attract the retail customers. Mr Hong said he hoped that during this three to six month period Save Max would offer employment to Mr Park but this did not eventuate although another K & C employee was employed by Save Max. The offer was made in March and an employment agreement was signed in June 2006.

[14] Mr Park should have been informed of the sale and should have been consulted about the “secondment”.

[15] Mr Hong said K & C shifted the wholesale operation of K & C to the Save Max premises in May 2006, although the shop in East Tamaki was still used for storage. Mr Kang asked Mr Hong what happened with the wholesale business of K & C between May and September. Mr Hong said he could only remember that it continued till May and he could not remember how long K & C continued to operate.

[16] On 4 January Mr Park indicated that he wanted to have two days off. Mr Hong denied the application – this is agreed. Mr Park says Mr Hong told him not to come to work any more. Mr Hong disputes this. Mr Park says that on 9 January Mr Eo also suggested that Mr Park not come to work and told Mr Park that in order to help him meet his residency requirements the company would continue to pay PAYE for him. Mr Eo does not deny the latter part of this and agrees that he did suggest that Mr Park look at employment with another company.

[17] Mr Park says that the company had ceased to employ contractors to clean the toilets and that he and other employees were told they would be responsible for toilet cleaning. Mr Park refused.

[18] On 31 March 2006 Mr Park says he was ordered to move his desk from his office on level one downstairs beside the cashier’s desk. K & C accepts that this occurred but says that all staff moved downstairs, including Mr Hong, as the floor space was needed for storage. Mr Park also says he was told not to do any work unless expressly instructed to do so.

[19] He was prevented from using the computer, Mr Hong took over the computer parts work, the Ian Caravan work, the home shopping mall work and the internet phone work. He was told to sit on a chair and not do anything. This went on for about a month.

[20] Mr Hong agreed that much of the work had been removed from Mr Park. Part of the rationale was that he did not trust Mr Park because he had heard that Mr Park had threatened to release confidential information to get his money back.

[21] On 1 May he was told to remain in the shop on the ground floor and to walk around the shop but not to do any work unless instructed.

[22] Mr Hong said Mr Park was asked to come to meetings from March to August but did not attend. Mr Park said there were no meetings to which he was asked and he was never given instructions, as asserted by Mr Hong, to create new work. Upon further questioning of Mr Hong as to whether he had asked Mr Park to come to meetings, he responded that he didn't need to ask him because everyone knew and perhaps the employee who was to ask Mr Park had not in fact asked him. Mr Hong said he could not force Mr Park to come and the other employees felt better if Mr Hong was absent. I asked why he did not take disciplinary action. Mr Hong said he was very confused and it was very emotional and Mr Park was threatening him with release of confidential information. It is readily apparent that while Mr Hong may have meetings Mr Park was not asked to the meetings and was given no instructions.

[23] It is clear that workplace relationships were at a very low ebb.

[24] In April and May 2006 Mr Park was not paid his salary. On 3 May, Mr Kang, acting for Mr Park, wrote to K & C asking for immediate payment of the arrears. No response was received.

[25] On 7 June 2006 an application for urgency was received regarding a personal grievance for disadvantage and wages arrears.

[26] A direction to mediation was issued. The first respondent agreed to pay the outstanding salary but the other issues were not resolved. Two further mediations followed in an unsuccessful attempt to resolve other employment issues.

[27] Mr Park says that towards the end of July he was approached by two people who looked like gangsters who demanded that Mr Park resolve his outstanding

personal grievance issues without recourse to the courts. Other people deposed to also having seen the “gangsters”. None of them had heard any threats being made and the view that the people were gangsters appeared to be based on their appearance resembling that of gangsters in films.

Redundancy

[28] On 8 August Mr Park was given a letter asking him to attend a meeting on 10 August 2006 to discuss the future of his employment. It said:

As you are aware, our retail business was closed down on 22 January this year and sold to Save Max Ltd. We now only trade in the wholesale area although up until recently we have been providing vendor assistance to Save Max Ltd....

The vendor assistance period has now ended which has the effect that our business is now limited to the wholesale market. This necessarily has an impact on your position as marketing/Development manager. The effect is that your duties are now limited to the wholesale business and there is now substantially less to do at that senior level. From our perspective there is now a real question about whether there is still a need for the role of Marketing/Development Manager in the light of the closure of our store operation. However, we have not come to any conclusion as yet and will not do so until we have discussed the situation with you,

The letter went on to say that there were two options: to disestablish the position or vary the position – a possible secondment to Korea was mentioned and also the possibility of an importing manager’s position. The letter also said that as a matter of good faith the company was letting Mr Park know its position before the mediation scheduled for the following day.

[29] On 9 August Mr Kang replied saying he did not believe a meeting was appropriate given there was an ongoing mediation and that Mr Park would agree to

attend a meeting once certain information was provided. There was reference to s 4 (4) Employment Relations Act 2000.

[30] On 10 August Mr Hong wrote saying that “this current arrangement whereby you are not carrying out any duties cannot continue and some work related discussion between us must be made regardless of our differences over other issues at today’s mediation”.

[31] On 11 August, in response to the 9 August letter from Mr Kang, Mr Hong said that any information relevant to the decision would be provided before the meeting.

[32] On 28 August Mr Hong wrote:

As asked previously, it is vital that we meet and discuss your role in the company. I simply cannot continue prolong the employment when you do not perform any task (as there is none to do as a marketing manager) and when you refuse to attend meetings suggested to discuss other duties and roles that may suit you and the company’s current situation.

I request that you return the company documents at once and attend a work meeting at 10am on 29 August. You demanded to see the company’s financial information. At the meeting I will show you relevant financial information to you.

...

If you do not attend the meeting or refuse to return the company information immediately, you must be aware that you will leave me with no choice but to terminate your employment with the company on the basis of serious misconduct of taking the company information and also on the ground of redundancy.

[33] On 28 August Mr Kang replied saying the company had no grounds to withhold the information and that there would not be a meaningful meeting without it being provided.

[34] On 6 September Mr Hong wrote saying that since the sale of the business there had been insufficient work to sustain Mr Park's role, that in the absence of hearing from Mr Park the company was minded to disestablish the position but would not implement that decision until 5.00pm on 7 September to allow Mr Park to provide further responses or information.

[35] On 22 September Mr Hwangbo, acting for the first respondent, wrote to Mr Kang saying that given Mr Park's refusal to attend meetings that K & C would make a decision regarding Mr Park's position the following Monday.

[36] On 25 September Mr Kang wrote saying Mr Park wanted to meet but not without being supplied with the relevant information.

[37] On 27 September Mr Hong couriered a dismissal letter to Mr Park terminating his employment on the grounds of redundancy.

[38] K & C says that Mr Park unreasonably refused to attend meetings, created conflicts and an adverse atmosphere and threatened to divulge the company's confidential information.

[39] The first respondent says that Mr Park's role had been gradually disestablished since the closure of the retail shop.

Failure to return documents/confidentiality

[40] K & C claims it was reluctant to provide the company's financial information because that was not the purpose of the first meeting. Also, Mr Park had confidential information and had not returned it.

[41] As a person with a financial stake in the company, be it as investor or lender, Mr Park was entitled to have financial information. What he did with it, or threatened to do with it, is a different matter.

[42] The first respondent was unable to identify exactly what confidential information the applicant had.

[43] When I asked Mr Hong why he had not supplied the information requested he said he could not clearly recall why. He said he had not supplied it before the 9 August meeting because he found it difficult to handle the matter. He said it was a very emotional time and that since March 2006 he had been considering how he could revive the company as well the confidential flow of information between staff members. He said that given where things were Mr Park's seeing the documents would not have changed much and would not have helped much.

[44] Mr Hong said that he learned of Mr Park's having confidential information through Mr Nam when on 30 April 2006 Mr Nam told Mr Hong that Mr Park had showed him some documents. I asked Mr Hong whether he knew directly from Mr Park that he had confidential information he was threatening to release or whether he assumed it from Mr Park's changed behaviour. Mr Hong said that Mr Park had not said to him that he had confidential information and Mr Park said he did not have any. All he had was a profit and loss document he had received from the accountant. He said Mr Hong had given him the financial accounts and he had the right to view those because of his \$300,000 investment. Mr Park said he had worked on the company's financial information on the computer under Mr Hong's instructions and knew that he had not paid tax and had paid money under the table but that he did not have any supporting documents as the information was in the company's computer. He was given the financial report when he invested the money.

[45] Mr Park said he did seek advice about what to do regarding the tax irregularities and he discussed that as a possible means of ensuring that he got his loan money back.

[46] Mr Park said he did not attend the meetings because he was threatened by gangsters, a mediation was in progress and he had talked to his lawyer and wanted to see the documents.

Identity of the Employer

[47] One of the issues that Mr Kang wanted the Authority to determine was whether the second respondent was independent of the first respondent. That is not the same issue as ascertaining the identity of the employer. I accept there were close links between the two companies – Mr Eo and Mr Hong are cousins. Provision was made for K & C to use Save Max's premises without a formal lease. It may be that Mr Hong and Mr Eo have some undisclosed financial arrangements. I can understand that Mr Park feels suspicious about Mr Eo buying the retail part of the business and sees it as a device for enabling Mr Hong to retain his \$300,000.

[48] At no stage was an employment agreement entered into by Mr Park with Save Max Ltd. I was provided with an individual employment agreement for Mr Jung Nam Kim with Save Max Ltd. This was made on 21 June 2006.

[49] Mr Park was paid by cheques which were from K & C and this continued after Save Max purchased the retail business.

[50] The mediated settlement regarding wages was between K & C and Mr Park not between Save Max and Mr Park.

[51] Mr Park says he became an employee of Save Max in January 2006 but he was not even aware that the retail part of K & C had been sold until August 2006.

[52] Correspondence from Mr Park's representative dated 18 May 2006 and 21 September 2006 was addressed to K & C and not to Save Max.

[53] Mr Park was initially and remained an employee of the first respondent.

Disadvantage Issues

[54] The employer was entitled to decline annual leave.

[55] I suspect there was a suggestion rather than an instruction not to come to work. Mr Park did not treat it as an instruction.

[56] Mr Park said he was ordered to sit on a chair and to remain there during work hours until approximately 30 April 2006. I think there is some substance to this allegation.

[57] Mr Park claimed that from May 2006 until his dismissal he was instructed not to enter the place of business. When I asked Mr Park whether he had been prohibited from entering the business premises Mr Park said he was on the premises but walking around doing nothing. He said he was allowed in the shop but was not allowed to touch anything.

[58] There is evidence to substantiate Mr Park's claims not only from other witnesses but also given the unpleasant working relationship. The working relationship between Mr Hong and Mr Park had been highly unsatisfactory for quite some time.

[59] Mr Park did not help matters by expressing his dissatisfaction with Mr Hong and hinting that he could release confidential information.

[60] Mr Park alleged he was intimidated by Korean gangsters. Mr Jang Hoon Choi said he had also seen these men in the company of Mr Hong. However, the only alleged threat was that it was better to sort out the personal grievance without going to court. Mr Kim told me he knew they were gangsters because of the problems between Mr Park and Mr Hong and that they looked like gangsters. I accept that Mr Park felt intimidated by the two alleged gangsters but there is no evidence to prove that they were in fact gangsters or that they had been hired by Mr Hong to intimidate Mr Park.

Unjustified Dismissal

[61] The dismissal was unjustified. Mr Hong did not tell Mr Park about the sale of the retail business until well after it had taken place and it is clear that much of the

work of the Marketing Manager had ceased to exist well before any notification of a possible redundancy. Some of the work was taken over by Mr Hong because he did not trust Mr Park.

[62] Mr Hong should have notified Mr Park of the sale of the retail part of the business and discussed the possible ramifications of that at the time. It was evident that all aspects of Mr Park's work relating to the retail business would cease. The failure to notify and discuss was a breach of good faith as was the failure to discuss the "secondment". That cannot be cured by a later attempt to go through a consultative process as the process was by that stage nothing other than a sham.

Overtime Payments

[63] There is no contractual or statutory entitlement to overtime.

Annual Leave

[64] The amount of leave taken was agreed during the hearing. Mr Park's relevant daily pay was \$173. He had 14 days accrued leave to 1 October 2006. That comes to \$2,527.00. He is also owed 6% for the balance of the notice period from 1 October 2006 to 27 October 2006. That amount is \$199.73. The total amount owed is \$2,726.73. The first respondent has agreed to pay that amount.

[65] Mr Kang has arrived at a different amount but his calculations are based on overtime payments. As I have found that there is no legal entitlement to the payment of overtime Ms Beck's calculations are correct.

Statutory Holidays

[66] This claim appeared for the first time on Mr Kang's closing submissions. I have heard no evidence regarding this issue. Mr Kang contended that the Authority could find that, pursuant to s 122 that a personal grievance was of a type other than that filed and that therefore I could find that there was a personal grievance for

non payment for statutory holidays. This is not a personal grievance but a wages claim and certainly not something that could be determined without hearing evidence.

Unpaid Monthly Salary

[67] At the hearing it was agreed that eight deductions of \$854.90 had been made. However, the deductions were not from Mr Park's salary or wages but from the loan repayment. I note that it is curious that the amount deducted coincides exactly with the tax paid by the first respondent on Mr Park's salary. I do not accept Mr Hong's assertion that these deductions were agreed. However, as this matter is unrelated to his employment I can make no order for reimbursement.

Wages Issue

[68] The reason for not paying the wages was never made clear. At first I was told that the company had no money, but it became apparent that was untrue. Mr Eo agreed that he had told Mr Hong to pay the wages and had himself offered to pay the wages. Other staff had been paid during this period. It is difficult to escape the conclusion that the failure to pay wages had to do with the poor relationship that had increasingly developed between Mr Hong and Mr Park as a result of ongoing disputes about the loan/investment made by Mr Park to the company.

Remedies

[69] Mr Park is not able to claim reimbursement because the work had disappeared. There was no position.

[70] The first respondent's non payment of wages constitutes a disadvantage.

[71] The failure to deal with the situation that arose in the workplace in an appropriate manner constitutes a disadvantage. A good employer will not deal with a difficult situation by refusing to confront it directly and instead issue instructions that place the employee in a humiliating situation.

[72] Mr Park is entitled to compensation for the manner of the dismissal and for the disadvantage. I set that amount at \$4,000.

[73] The first respondent is to pay the unpaid holiday pay of \$2,726.73.

Contributory Behaviour

[74] Section 124 requires that if there is a personal grievance consideration must be given as to the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance; and, if those actions so require, to reduce the remedies accordingly.

[75] Mr Park did not contribute to the failure to notify him about the sale or the failure to discuss the “secondment” – he was totally unaware of these. Nor did he contribute to the non payment of wages. It is difficult, however, to escape the conclusion that Mr Park’s comments regarding confidential information did contribute to the bad atmosphere that arose. This in turn clearly made resolution of any problems difficult.

[76] In the circumstances a deduction of 25% for compensation is in order. The \$4,000 award is reduced to \$3,000.

Costs

[77] Costs were reserved. If the parties are unable to resolve this issue the parties should file memoranda within 28 days of the date of this determination.

Dzintra King

Member of the Employment Authority