

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 264/08
5112548

BETWEEN DONG SOO HAN
 Applicant

AND KO & WON LIMITED
 TRADING AS KINO SUSHI
 Respondent

Member of Authority: Vicki Campbell

Representatives: Joanne Watson for Applicant
 Julie Hardaker for Respondent

Investigation Meeting: 14 May 2008 at Hamilton

Submissions Received: 6 and 20 June 2008 for Applicant
 16 June 2008 for Respondent

Determination: 21 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Dong Soo Han claims outstanding wages which he says have not yet been paid, and he claims he was unjustifiably dismissed from his position as Chef on 14 September 2007.

[2] Ko & Won Limited trading as Kino Sushi (“Kino Sushi”) denies the claims and says Mr Han failed to provide the documents requested of him, to show that he was legally entitled to work in New Zealand and therefore the dismissal was justified.

Background

[3] It is common ground that Mr Han and Mr Won met and discussed Mr Han working at Kino Sushi before Mr Han was employed there. Mr Won assisted Mr Han in making an application for a work permit and a letter outlining the offer of employment was provided as part of this application.

[4] The position offered to Mr Han was as Chef with the hours of work stipulated as being 8 hours per day to be worked on six days of the week Monday to Saturday inclusive. Mr Han was to receive a salary of \$30,000 per year.

[5] Mr Han received his work permit from New Zealand Immigration on 16 August 2007 and began working at Kino Sushi as a chef on 20 August 2007. Mr Han says that around the time he commenced employment he gave Mr Won a copy of his work permit, along with a copy of the first pages of his passport together with a copy of the offer of employment used for the application to immigration to show that he was now legally entitled to work in New Zealand.

[6] Prior to 20 August 2007 Mr Han had been working at Kino Sushi undertaking training on a voluntary basis, that is, he was not paid remuneration for this training period.

[7] Mr Won says that from the outset of the employment relationship he had requested Mr Han to provide the documents so that he could prepare an Employment Agreement. He says Mr Han failed to do so.

[8] I do not accept this evidence from Mr Won. I am satisfied that on the balance of probabilities it is more likely than not that Mr Han showed Mr Won the copy of his work permit from his passport on his first day of paid employment. Up until 20 August, Mr Han had been training at the restaurant for no pay. It seems unlikely that suddenly Mr Won was happy that Mr Han should be paid, if he was not satisfied Mr Han was legally entitled to work.

[9] I am supported in my conclusions by Mr Won's own evidence where he says he would not give Mr Han his recipes or secrets until he was officially working for him. That occurred on 20 August 2007.

[10] Mr Han says that from September 2007 he was working 9 hours per day instead of the 8 provided for in the letter of offer. On or about 7 September Mr Han approached his employer and requested that he revert back to the 8 hours per day. At the same time Mr Han raised some issue relating to food safety, specifically with regard to the cleanliness of the chopping boards, food scraps being washed into the

waste water system, and a lack of appropriate food storage. Mr Han says that when he approached Mr Won he was told that the issues he raised were none of his business.

[11] Mr Won says Mr Han approached him seeking an increase in his salary, for his breakfast to be provided and advised Mr Won that he would be leaving work early and not taking a break. Mr Won says that the next day, he told Mr Han he could not pay him any more but also says he wrote on a piece of paper \$35,000 which he says Mr Han rejected.

[12] I am satisfied it is more likely than not that Mr Han raised the issues he says he raised with Mr Won and that Mr Won has interpreted these issues as being a request for more money. However, if Mr Han was simply looking to increase his wages then I find it difficult to believe he would turn down an offer of a \$5,000 increase. I have accepted Mr Han's version of events as being the more likely.

[13] Mr Han says he had a further meeting with Mr Won on 10 September when he says Mr Won told him he had to leave the restaurant and his job and was only to work out the remainder of the week. Mr Won denies he gave Mr Han notice and says he told Mr Han he could not pay him any more money, but that he would support Mr Han if he could find alternative employment.

[14] I am satisfied it is more likely than not that on 10 September 2007, following Mr Han raising issues of his hours of work and food safety issues, Mr Won gave Mr Han one weeks notice to terminate his employment.

[15] On Friday 14 September 2007 Mr Han was asked for his keys and told not to come to work from the following day. Mr Han, believing he had been dismissed, wrote to Mr Won on 17 September seeking the reasons for his dismissal.

[16] Mr Won says before he sent Mr Han away on 14 September he wrote a letter which is dated 13 September to Mr Han and formally requested the relevant immigration documents and advised that on receipt of the documents an employment agreement would be drafted. Mr Won says that as soon as the documents were produced Mr Han could have started working again.

[17] The envelope which contained the letter was produced to the Authority. The envelope is postmarked 17 September 2007. I have therefore concluded that Mr Han did not receive this letter until 18 September 2007 at the earliest. The letter was posted on the same day as Mr Han gave a letter to Mr Won seeking written confirmation of the reasons for his dismissal.

[18] On 18 September Mr Han wrote to Mr Won again. Mr Han reiterated his understanding that he had been dismissed and that he had already provided copies of the documents requested by Mr Won.

[19] Mr Won wrote to Mr Han again on 20 and 25 September requesting him to attend a meeting and to provide copies of the documentation as proof of his ability to work legally in New Zealand.

[20] Mr Han's response was to confirm that as far as he was concerned he had been dismissed.

[21] On 4 October 2007 Mr Won wrote to Mr Han one last time expressing the need for the documents and advising his perception that Mr Han did not wish to work for him. The letters from Mr Won are consistent in that they all make reference to the fact that Mr Han need only produce the documents requested and he can continue with his work. He was requested to attend a meeting on 24 September at 6.00am with the documents. Mr Han did not attend that meeting.

[22] Mr Han was asked to attend a second meeting on 29 September 2007 at 6.30am and to bring with him the documentation. Mr Han did not attend that meeting, believing he had already been dismissed and that the request for documents was somehow designed to put Mr Won into a better position, with regard to the personal grievance Mr Han had raised over his dismissal.

[23] At the investigation meeting there was a dispute as to when Mr Han was given a key to the restaurant. Mr Han says he received the key on the first day (20 August) as he was first to arrive at work each morning and had to do the food preparation for that day. Mr Won says he gave Mr Han a key one week after he started work. Whichever version of events is correct, it is common ground that Mr

Won gave Mr Han a key to the restaurant. I am satisfied it is unlikely Mr Won would have done this if he believed Mr Han was not legally entitled to work for him.

[24] Further, at no time during any of the discussions Mr Won says he had with Mr Han in September, did Mr Won raise any issues with regard to Mr Han's immigration documentation. If Mr Won was seriously concerned about this aspect of Mr Han's employment then there were steps he could have taken without sending Mr Han away on 14 September 2007. For example, he visited Mr Han at his home on Sunday 26 August. It would have been a simple matter for Mr Won to ask Mr Han if he could view the documentation at that time, if it was an issue for him.

[25] I find Mr Won gave Mr Han notice on 10 September that his employment would end on 14 September and that on 14 September Mr Han worked his last day for Mr Won in accordance with Mr Won's intention. I am satisfied Mr Han has discharged the burden of showing he was dismissed on 14 September 2007. This was probably because Mr Han had raised issues as to food safety and with regard to his hours of work.

[26] As to the letters Mr Won sent to Mr Han following 14 September 2007. The letters sent to Mr Han only appeared after Mr Han had written to Mr Won seeking the reasons for his dismissal. I am satisfied the letters, including the one apparently dated 13 September 2007 were created and sent to Mr Han in an attempt by Mr Won to resile from the dismissal and to portray the situation as one where Mr Han had failed to meet his legal obligations and therefore the employment agreement could be cancelled. I am satisfied that the portrayal is a sham. Nor am I persuaded that the statements made by Mr Won in his letters that Mr Han's employment remained available to him were genuine.

[27] Mr Han was dismissed from his employment on 14 September 2007. The dismissal was carried out in the absence any procedural fairness and with no basis for justification. It follows the dismissal is unjustified.

Remedies

Lost wages

[28] Mr Han claims, and I accept that he has not been paid for the final two weeks of his employment. Mr Han also claims lost wages from 15 September 2007 until he found alternative employment on 30 November 2007. Mr Han is entitled to be paid for the two weeks he worked and for which he did not receive remuneration.

[29] Mr Han did not consider the offers that his job would be available to him if he produced the documentation to be genuine and so he took no steps to meet those demands. As set out earlier in my determination, I have found the letters were not genuine but were created to portray Mr Han's dismissal as something other than what it was. Mr Han is entitled to be reimbursed his lost wages for the period 15 September to 30 November 2007.

Ko & Won Limited trading as Kino Sushi is ordered to pay to Mr Han, within 28 days of the date of this determination, the sum of \$1,153.84 gross, pursuant to section 123(1)(b) of the Employment Relations Act.

Ko & Won Limited trading as Kino Sushi is ordered to pay to Mr Han, within 28 days of the date of this determination, the sum of \$6,346.15 gross, pursuant to section 123(1)(b) of the Employment Relations Act.

[30] Mr Han seeks payment of the difference between his salary at Kino Sushi and his new employment for a period of two years. Mr Han says he had a fixed term employment agreement with the Respondent for a two year period.

[31] The letter of offer which was attached to Mr Han's application for a work permit states that the period of the job is for two years. The letter is the only written statement setting out the terms and conditions of employment. While the letter states the employment period is for two years, the letter does not meet the requirements of section 66 of the Employment Relations Act. It does not state in writing the way in which the employment will end, and the reasons for it ending in that way. Mr Han is unable to rely on the letter as being an effective fixed term agreement. This aspect of Mr Han's claim fails.

Compensation

[32] Mr Han seeks \$10,000 for distress and humiliation. The position at Kino Sushi was an important job for Mr Han. His ability to legally work in New Zealand

was tied in with his employment as the work permit was issued to allow him to work specifically for Mr Won.

[33] Mr Han gave compelling evidence as to the effect the dismissal had on himself and his family. I am satisfied his distress was exacerbated by Mr Won's attempts to portray the dismissal as Mr Han's fault.

[34] Having regard to the particular circumstances of this case and the general level of awards of compensation in cases of this type, Mr Han is awarded \$3,000 (without deduction) under s.123(1)(c) of the Act.

[35] As required under s.124 of the Act I have considered whether any remedies should be reduced because of actions of Mr Han contributing towards the situation giving rise to the personal grievance. I am satisfied there was no blameworthy conduct of a level requiring reduction for contribution.

Ko & Won Limited trading as Kino Sushi is ordered to pay to Mr Han, within 28 days of the date of this determination, the sum of \$3,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act.

Costs

[36] Costs are reserved and the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority