

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 434
5354907

BETWEEN HYUNG SIK CHA
 Applicant

AND A ONE TODAY MOTORS
 LIMITED
 First Respondent

AND SEUNG CHUL PARK
 Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Moana Kadarmia, Advocate for Applicant
 Seung Chul Park, in person, for First and Second
 Respondents

Investigation Meeting: 25 October 2012

Submissions received: By telephone conference 1 November 2012

Determination: 4 December 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hyung Sik Cha was dismissed without notice from his employment as a Spray Painter and Panel Beater with A One Today Motors Limited (A One) on 26 July 2011. Seung Chul Park, a Director of A One, signed the letter terminating Mr Cha's employment. Mr Cha says he was at home on approved leave when Mr Park brought the letter of dismissal to him. He claims his dismissal was unjustified and seeks lost wages and compensation. Mr Cha also claims payment for four days Mr Park made him take as annual leave, at short notice and without consultation, in the months before his dismissal.

[2] Additionally, Mr Cha says he was forced to sign an employment agreement in October 2010 reducing his working hours and pay. The employment agreement was in English, which he struggles to read, and he says he had to sign it within one day. He seeks the difference between his former pay and the lower pay he received from 6 October 2010 until his dismissal. Mr Cha withdrew one other claim relating to overtime following a telephone conference of the parties in August 2012.

[3] Mr Park says A One had a number of good reasons for dismissing Mr Cha, which were set out in the letter of dismissal. The first reason was that Mr Cha had taken six weeks' annual leave without his employer's approval. In submissions Mr Park highlighted the most serious reasons as the two days' notice Mr Cha gave before starting his leave, and Mr Cha's failure to return to work on 22 July 2011, which Mr Park sees as abandonment of employment.

[4] Mr Park says he gave Mr Cha adequate notice of the new employment agreement Mr Cha signed in October 2010. Mr Park had explained to Mr Cha the company's turnover was down due to the recession, which is why he was offering lower pay and fewer hours work per week.

[5] Attempts to resolve these matters in mediation were not successful. However, Mr Park acknowledged after the investigation meeting that A One owed Mr Cha four days' wages.

Issues

[6] As Mr Park has acknowledged Mr Cha is owed four days' wages, I do not need to consider that matter further. The issues I have to decide are:

- (i) whether Mr Park approved Mr Cha's leave before he commenced it on 20 June 2011
- (ii) whether Mr Cha abandoned his employment by not returning to work on 22 July 2011
- (iii) if Mr Cha did not abandon his employment, whether A One was justified in terminating Mr Cha's employment
- (iv) whether Mr Cha was forced to sign a new employment agreement in October 2010 and, if so, whether he has a valid claim to wage arrears.

Did A One approve Mr Cha's annual leave before he commenced leave on 20 June 2011?

[7] Mr Park acknowledges Mr Cha told him two months before he started his annual leave that he wanted six weeks' leave. Mr Park agreed Mr Cha could take the leave but says Mr Cha did not tell him the exact dates until two days before his leave started. That made it difficult to arrange someone to cover his work. Mr Park cites this as one of the two most serious reasons for dismissing Mr Cha.

[8] On 17 June 2011 Mr Park wrote to Mr Cha about his request for six weeks' annual leave from 20 June to 31 July 2011. He told Mr Cha he would be entitled to two weeks' annual leave as at 31 July 2011, of which he had already used one week. He said Mr Cha had an annual leave balance of three days and, if he took six weeks' leave, most of it would be unpaid.

[9] Mr Cha started his leave on 20 June 2011. He disagreed with Mr Park's assessment of his leave entitlement and his representative, Mr Kadarmia, queried Mr Cha's entitlements with A One. Mr Kadarmia and A One's lawyer appear to have resolved that matter as it was not pursued in the Authority, except for the four days' wages Mr Park has since acknowledged A One owes Mr Cha.

[10] Mr Cha says his employer agreed he could take annual leave from 20 June to 31 July 2011. Mr Park's letter of 17 June 2011 confirmed that agreement in his view. I agree with Mr Cha. If Mr Park did not approve Mr Cha taking leave between those dates he should have clearly stated that in his letter. Telling Mr Cha (wrongly as it turned out) that much of his leave would be unpaid was not the same as telling him that he could not take the leave. I find A One did approve Mr Cha taking leave from 20 June to 31 July 2011 and Mr Park's letter of 17 June 2011 confirmed that approval.

[11] I do not need to determine when Mr Cha told his employer the exact starting date for his leave in view of my finding that Mr Park approved the leave. I note also that, although Mr Park relies on the short notice he says Mr Cha gave before starting his leave as one of the two main reasons for dismissing him, Mr Park did not cite it as a reason for dismissal in his letter of 26 July 2011.

Did Mr Cha abandon his employment by not returning to work on 22 July 2011?

[12] A One says Mr Cha abandoned his employment when he did not return to work on 22 July. Mr Park submits this was one of the two most serious reasons for the dismissal. Mr Park's position is inconsistent because he acknowledges Mr Cha was on leave until 31 July, but also says Mr Cha should have come back to work earlier because he had paid leave only until 22 July.

[13] Mr Park admits he did not tell Mr Cha he was required to return to work on 22 July. He says he tried to reach Mr Cha by telephone but there was no reply and he did not leave a voicemail message. Instead, he says he told Mrs Cha, when she called into the garage, to give a message to her husband about returning to work on 22 July. Mr Cha says he did not receive that message. Whether he did or did not receive the message is immaterial. Mr Park had Mr Cha's telephone contact numbers and knew his home address. If he had an important message to communicate, he should have communicated it to Mr Cha directly, rather than relying on Mrs Cha to pass on that message.

[14] Mr Park relies on clause 9.3, the Abandonment of Employment provision of Mr Cha's employment agreement. The clause does not apply because Mr Cha was on approved leave until 31 July 2011, regardless whether part of the leave was unpaid. I find Mr Cha did not abandon his employment by failing to return to work on 22 July 2011.

Was A One justified in terminating Mr Cha's employment?*Reasons for dismissal*

[15] Mr Park referred to the following performance issues as reasons for dismissal in his letter of 26 July 2011. They were:

- a. Mr Cha had not worked hard enough during working hours, and had been seen working at another garage (Korea Motors) around 8.30 a.m. on 27 May 2011
- b. Mr Cha spent too much time talking to his visitors - approximately two hours a day, two to three times a week

- c. A One had lost credibility with customers because Mr Cha had given them wrong quotations
- d. Mr Cha had tried to purchase a part from A One's supplier for his own use without discussing it with his employer
- e. Mr Cha had been changing repair orders for customers without discussing it with his employer
- f. His workmanship was poor and there had been too many complaints from customers (one example was given where Mr Cha's work on a vehicle had resulted in multiple complaints).

[16] Mr Park says he gave Mr Cha verbal warnings "too often to count" that he would be dismissed if he did not work harder. He says he warned Mr Cha four to five times over talking to visitors too much. Mr Park does not recall any dates for those warnings and says he did not ever issue Mr Cha with a written warning.

[17] Mr Park alleges Mr Cha told a client A One would discount the quoted price of \$180 for a repair to \$100. He did this without consulting Mr Park. He also says Mr Cha had tried to take advantage of A One by using the company's name to obtain car parts for personal use. Mr Park says he reprimanded Mr Cha by telephone for this.

[18] Mr Park says Mr Cha deliberately altered the repair process and did not follow the employer's prescribed process. He produced a table, which appeared to relate mainly to January 2011. It listed information including vehicles; the dates they came into A One; the dates they left the garage; and the cost of repairs. Mr Park alleges Mr Cha did cheaper repairs on vehicles belonging to his friend before more expensive jobs.

[19] Mr Cha's work performance was unsatisfactory, according to Mr Park, and led to many complaints from clients about shoddy work that damaged A One's reputation. Mr Park produced a document and a series of photographs as evidence of Mr Cha's poor workmanship.

Mr Cha's responses to the reasons for his dismissal

[20] Mr Cha disagrees with all the performance-based reasons for his dismissal. He says he worked very hard for his employer and received no warnings, either verbal or written, throughout his employment.

[21] Mr Cha says a friend of his ran Korea Motors and sometimes Mr Cha would call in and help his friend in the mornings before he started work at A One. He says this was in his own time and he was never late for work.

[22] Mr Cha denies spending hours talking to friends at work. He had one friend who popped in a couple of times a week but they never spoke for long and Mr Park had never told him it was a problem.

[23] Mr Cha says he did not give quotations to clients: that was Mr Park's role. He recalls the \$180/\$100 repair job quotation Mr Park had referred to and says the issue arose because the vehicle was under warranty. Mr Cha says he did not talk about the cost of repairs with the client, but did tell Mr Park about the warranty. The incident occurred in April 2011 and Mr Park had not raised it with him before using it as a reason to dismiss Mr Cha.

[24] Mr Cha says he has never used his employer's name to purchase vehicle parts for personal use. On one occasion he telephoned A One's automotive parts supplier to ask about a particular part on behalf of a workmate, but he had sought information only and not ordered the part. Mr Park provided no evidence to support his allegation.

[25] Mr Cha denies changing the repair process and says he never did anything without consulting Mr Park. The "friend" Mr Park had referred to was someone Mr Cha knew through the business, and was not a friend.

[26] Mr Cha says his workmanship was good and Mr Park did not complain about it during his employment. Mr Cha thought he satisfied 98% of the customers and was rarely aware of customer complaints. He recalls the vehicle in Mr Park's photographs and says he and Mr Park worked on it together. The customer was not happy with the result, and he and Mr Park fixed it together. He had not received any warnings about this, or any other, work and denies Mr Park's suggestion that 30% to 40% of his work was the subject of customer complaints.

What the law requires

[27] Section 103A of the Employment Relations Act 2000 provides the test for determining, on an objective basis, whether or not a dismissal or an action was justifiable. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Authority must take four factors into account when it applies the test, as well as any other factors it thinks appropriate.

[28] The four factors¹ I must consider when applying the test to A One's dismissal of Mr Cha are:

- *whether A One investigated the allegations against Mr Cha sufficiently before dismissing him, taking into account the resources available to it; and*
- *whether the employer raised its concerns with Mr Cha before dismissing him; and*
- *whether the employer gave Mr Cha a reasonable opportunity to respond to its concerns before dismissing him; and*
- *whether A One genuinely considered Mr Cha's explanation (if any) in relation to the allegations against him before dismissing him.*

[29] The Authority must not find a dismissal to be unjustifiable solely because of defects in the employer's process if the defects were minor, and if they did not result in the employee being treated unfairly.²

How the law applies to Mr Cha's dismissal

[30] A One dismissed Mr Cha by letter, hand-delivered by Mr Park while Mr Cha was at home on leave. Mr Cha had been on leave for five weeks at that time. Mr Park did not discuss the matter with Mr Cha before giving him the letter of dismissal, so Mr Cha had no opportunity to comment on the reasons for dismissal before it took place. That was clearly unfair to Mr Cha.

[31] Mr Park provided no evidence he had investigated the allegations in the dismissal letter. Also, two of his reasons for dismissing Mr Cha were inconsistent

¹ Section 103A(3) (a) –(d) Employment Relations Act 2000

² Section 103A(5)

with Mr Park's own evidence. For example, Mr Park's first reason was that Mr Cha had taken six weeks' annual leave without his employer's approval, and did not turn up to work on 20 June 2011. This was inconsistent with Mr Park's acknowledgement that he had approved Mr Cha's leave.

[32] Another reason was Mr Cha's failure to return from leave on 22 July 2011, which Mr Park treated as abandonment of employment. However, Mr Park had not told Mr Cha to return from leave on that date and he knew Mr Cha was taking leave to 31 July. If Mr Park had decided he wanted Mr Cha to return earlier, he could have asked him directly if he would do so.

[33] If Mr Park had genuine concerns about the matters he gave as reasons for dismissal, he should have raised them with Mr Cha at, or close to, the time they occurred, giving Mr Cha the opportunity to provide an explanation for each matter before deciding whether disciplinary action was appropriate. The only evidence he had done so was Mr Park's claim, denied by Mr Cha, to have given Mr Cha several verbal warnings about not working hard enough and talking too much with visitors to the workplace.

[34] Mr Park also claimed he had reprimanded Mr Cha over his allegation that Mr Cha had tried to purchase a part under the employer's name from an automotive supplier. If he had determined a verbal reprimand to be appropriate, he could not change his mind later and rely on the allegation as a reason for dismissal.

[35] A One did not meet any of the four tests in s 103A (3) of the Act. The full court of the Employment Court in *Angus and McKean v Ports of Auckland*³ held an employer's failure to meet any one of these tests would make a dismissal unjustified. I find Mr Cha's dismissal was unjustified and the procedural defects were significant. I take into account that A One is a small business with relatively few employees. However, there was evidence before the Authority of A One's lawyer corresponding with Mr Kadarmia over Mr Cha's leave entitlements, which shows it has access to legal advice when necessary. Mr Park could have taken advice from the company's lawyer before dismissing Mr Cha.

³ [2011] NZEmpC 106.

[36] Mr Cha has cited Mr Park as second respondent in his personal grievance proceedings. I find that liability for Mr Cha's personal grievance attaches to A One Today Motors Limited rather than to Mr Park personally.

Is Mr Cha entitled to payment of the difference in pay between his February 2010 and his October 2010 employment agreement?

[37] Mr Cha signed an employment agreement with A One in February 2010. The agreement provided weekly pay of \$1,100 and 45 hours of work per week. Mr Cha signed another employment agreement with A One in October 2010 providing weekly pay of \$955.50 and 39 hours of work per week. Mr Cha says he was forced to sign the October employment agreement with no explanation or consultation from his employer. The employment agreement was in English, which is difficult for him to read, and he had only one day's notice before he had to sign it. In answer to questions during the investigation meeting, Mr Cha said he had not asked for the employment agreement to be translated into Korean, his native language, because he thought it had to be in English. He had not asked for more time before signing the employment agreement because more time would not have helped due to his difficulty in reading it. He did not complain about the lower pay because Mr Park did not have enough work to pay him more.

[38] Section 63A(2) of the Act requires an employer bargaining for individual terms and conditions of employment to do at least the following things:

- (a) *provide to the employee a copy of the intended agreement under discussion; and*
- (b) *advise the employee that he or she is entitled to seek independent advice about the intended agreement; and*
- (c) *give the employee a reasonable opportunity to seek that advice; and*
- (d) *consider any issues that the employee raises and respond to them.*

[39] Mr Park says he held individual meetings with his Korean staff, including Mr Cha, three weeks before Mr Cha signed the new employment agreement to explain work had slowed down because of the recession and he would need to offer reduced working hours and pay. He says he explained to Mr Cha the major changes to his employment conditions in the new employment agreement. Mr Park also says Mr Cha took his February 2010 employment agreement home before signing it so his

daughter could translate it for him. Mr Park says he told Mr Cha that he could take the new agreement away and come back to him if he had any questions about it. He says Mr Cha had the time and opportunity in October 2010 to do the same as he had done with the February 2010 employment agreement.

[40] I prefer Mr Park's evidence. I understand why Mr Cha was disappointed by the lower pay and fewer hours of work, but find his employer did not force him to accept the changed conditions. A One did not breach s 63A(2) in offering the new employment agreement. Mr Cha protested about the new agreement only after he was dismissed from his employment. I infer from this that he accepted, however reluctantly, the new conditions for nine months after signing the new employment agreement until his dismissal.

[41] I find Mr Cha is not entitled to the difference in pay rates between the February and October 2010 employment agreements from the date of signing the October agreement to the date of his dismissal.

Summary of Findings

- [42] (i) A One approved Mr Cha taking leave between 20 June and 31 July 2011
- (ii) Mr Cha did not abandon his employment by failing to return to work on 22 July 2011
- (iii) Mr Cha's dismissal was unjustified and he therefore has a personal grievance under s 103(1)(a) of the Act
- (iv) Mr Cha was not forced to sign a new employment agreement in October 2010 and he has no valid claim to wage arrears arising from the reduced pay rate of that employment agreement

Contribution

[43] Section 124 of the Act requires me to consider the extent, if any, to which Mr Cha's actions contributed to the situation which gave rise to his personal grievance. The reasons given for dismissal included his not being at work on the first day of his leave, and not returning to work 10 days before his leave ended. As Mr Cha was on

leave approved by the employer on both those days, his absence could not reasonably be construed as a contributing factor.

[44] A One also cited performance reasons for dismissing Mr Cha. The actions of an employee must be both causative of the outcome and blameworthy to be taken into account as contributing behaviour⁴. A One dismissed Mr Cha without raising its performance concerns with him in a fair manner, or giving him the opportunity to respond. In those circumstances I find neither causation nor blameworthy behaviour on Mr Cha's part and I am not required to reduce the remedies for his personal grievance.

Remedies

[45] Mr Cha seeks six months' salary, payment of four days he was required to take as annual leave, compensation for unjustified dismissal, and costs. He says he has been unable to find paid work since his dismissal despite actively looking, both through WINZ and on his own initiative. He has recently sought work in Australia as he has been unsuccessful in New Zealand.

[46] Mr Park says Mr Cha has been working in a number of Korean garages in Auckland since his dismissal. A Mr Paul Park (no relation to Seung Chul Park), who regularly supplies paint to garages as part of his job as a paint sales representative, gave evidence he had seen Mr Cha working in at least four different garages, which he named, on a regular basis for at least six months. Mr Cha acknowledges he has spent considerable time helping out at different Korean garages in Auckland. He says he does this to help out the Korean business community, and in the hope of being offered work. He says he is not paid for his time.

[47] I do not fully accept Mr Cha's explanation and award him three months' remuneration under s 128(2) of the Act but decline to exercise my discretion under s 128(3) to award a greater sum. The employment agreement operative at the time of Mr Cha's dismissal provided for weekly pay of \$955.50.

⁴ [2010] NZEMPC 82

[48] Mr Cha's dismissal was a shock to him and I accept that he was hurt and humiliated by it. An award of \$5,000 is appropriate compensation under s 123(1)(c)(i) of the Act.

[49] A One has acknowledged it owes Mr Cha four days' pay. I order payment of that sum. I have calculated the amount based on Mr Cha's ordinary weekly wage as there was some discrepancy between the parties as to the sum owing.

Orders

[50] A One Today Motors Ltd is to pay Hyung Sik Cha:

- (i) three months' ordinary time remuneration in the amount of \$12,421.50 gross, pursuant to s 128(2) of the Employment Relations Act 2000
- (ii) four days' ordinary time remuneration acknowledged by A One as owing (if not since paid) in the amount of \$764.40 gross
- (iii) the sum of \$5,000 (without deduction) as compensation, pursuant to s 123(1)(c)(i).

Costs

[51] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority