

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 127
5499559

BETWEEN PRADEEP GREWAL
 Applicant

A N D FRESH AND MORE
 FARMERS SUPERMARKET
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: D Gelb, Advocate for the Applicant
 J Nguy, Counsel for the Respondent

Investigation Meeting: 5 May 2015 at Auckland

Submissions Received: Oral submissions from both parties at the investigation
 meeting

Date of Oral
Determination: 5 May 2015

Date of Written
Determination: 6 May 2015

ORAL DETERMINATION OF THE AUTHORITY

A. The personal grievance application is dismissed.

B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] This is an application about a personal grievance of unjustified dismissal. The applicant, Pradeep Grewal, had also applied to determine a personal grievance of unjustified disadvantage and recovery of wage arrears. Both applications are no longer being pursued and/or have been settled and are dismissed.

Facts leading to dispute

[2] In July 2013, Mr Grewal was employed by the respondent company, Fresh and More Farmers Supermarket Limited, as its general manager. The respondent operates a liquor store. Mr Grewal was at all material times its sole permanent employee. He held a manager's liquor licence and worked 50 to 60 hours per week.

[3] On 15 July 2014, Mr Grewal attended work to start his shift at 4pm. Soon after he started, there was a conversation with the respondent director Jian Liu's son, Ren Xiu Liu also known as Leo. There is a dispute whether Mr Grewal was dismissed during that conversation. Mr Grewal left the premises soon after.

[4] Leo sent a text message asking for the keys. Mr Grewal replied asking why he had been fired.

[5] Mr Grewal returned later that day and recorded a conversation between himself and Leo. There is a dispute whether, during that conversation, Leo confirmed that Mr Grewal had been dismissed. Mr Grewal left again.

[6] Mr Grewal returned a second time and recorded another conversation with Leo pertaining to wage arrears he was owed. He then left the premises.

[7] At no time during the conversations was Leo aware he was being recorded.

[8] On 16 July 2014, Leo sent a text message to Mr Grewal setting out a number of options. Option 1 included his ability to *"come back to the shop at 12pm and start working again. You are still an official employee of the company"* otherwise the respondent *"will regard that as leaving work without giving a reason, and will call Immigration and ask them to cancel your visa immediately"*. Mr Grewal also had the option of submitting a resignation letter and Leo would tell Immigration about the change in work. The third option sought to recover two record books Mr Grewal had taken. Leo asked for their return or he would call the Police and let them deal with Mr Grewal. He went on to say *"taking things from the shop without permission is theft. Theft is a crime. Feel free to sit in jail holding those two books"*.

[9] Mr Grewal returned to the premises after the text message. He handed Leo a personal grievance letter alleging, amongst other things, that he had been unjustifiably dismissed. At the same time, Leo handed Mr Grewal a warning letter alleging

performance concerns, referred to the taking of the record books and invited him to meet with the respondent to discuss those matters further.

[10] No further action was taken by the Police despite a complaint being made. The wage and time records were returned by consent on 28 July 2014.

[11] The parties were unable to resolve this matter at mediation. It now remains before me for determination.

Issues

[12] There is a single issue for determination, namely whether the applicant was unjustifiably dismissed by Ren Xiu Liu aka Leo on 15 July 2014. If he was dismissed, the respondent concedes the dismissal would be unjustified because it does not meet the tests set out in s.103A of the Employment Relations Act 2000 (the Act).

Determination

[13] The applicant submits that I should not accept the evidence given by Ren Xiu Liu aka Leo because he has no credibility. His submission that he had no authority to act on behalf of the respondent is implausible because his father was not in the country at the time the dismissal occurred. He submits that it was implausible that he would have left this job. The applicant relied upon this job as his sole and primary source of income and it was important to him that he retained the job for immigration purposes. He further alleges that he was constantly threatened with deportation throughout his employment. He submits para.13 of Leo's brief of evidence states he was being told off by his father because he had no authority to dismiss. The applicant submits that there would be no reason to discuss authority to dismiss if Leo had not in fact dismissed the applicant on 15 July 2014. The applicant points to inconsistencies in Leo's evidence, in particular para.20 of his brief of evidence which was inconsistent with what he says today. The motive for Leo dismissing him may have been due to his youth. Despite the allegations the respondent would not have dismissed Mr Grewal because he was its sole full time employee with a manager's liquor licence, that it was still able to open the following day. Further, the applicant submits that the letter Leo sent to Immigration on 23 July 2014 was untruthful.

[14] The fact the applicant's employment was terminated is not accepted. The applicant submits he was dismissed by Leo on 15 July 2014. The respondent disputes this.

[15] There is an evidential onus upon the employee to show that termination has in fact occurred by the actions of the employer on the balance of probabilities.

[16] There is a substantial conflict in evidence between these two parties. This requires me to make express findings of credibility upon the evidence I have heard and have received via written briefs.

[17] There are two bases on which to assess credibility. First, the witness personally and the story this witness tells me. Factors which are relevant to personal credibility are demeanour, inconsistencies and contradictions of all kinds, prevarication, reasons to lie and concessions made where due despite any perception by that witness of a risk to credibility in giving that evidence in the first place.

[18] Credibility of the story is an assessment within the context of other evidence such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making this conclusion inevitable?

[19] I am entitled to draw inferences and fill gaps in evidence by application of commonsense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.

[20] In my view, it is plausible that the applicant would have walked away. He was given the opportunity to return on 16 July 2014 but refused to do so. This mitigates against his submission about the importance of this job.

[21] Although there have been allegations of generic threats of deportation throughout the employment, I have no detail. There are no dates or times these threats were made nor is there any detail about the content of the threat to deport Mr Grewal.

[22] It is plausible Mr Grewal was aware Leo had no authority to dismiss. Leo is an 18 year old full time student. He worked on a voluntary basis. It is clear from the text messaging I have seen in the bundle of documents Mr Grewal was often referred to Jian Liu, Leo's father. The applicant's employment agreement states he reports to Jian Liu or other representative designated by the respondent. All of the correspondence sent on behalf of the respondent has been signed by Jian Liu. The applicant worked for the respondent for about 1 year. Jian Liu was absent for four months. There is no evidence another representative was designated by the

respondent. I have little doubt the applicant knew the true line of authority that existed between Leo, Jian Liu and himself.

[23] The evidence in para 13 of Leo's brief is equivocal. It is may be a reference to the limits on Leo's authority as opposed to an admission he had in fact dismissed Mr Grewal. In respect of Leo's inconsistent evidence in para 20, both parties were at times inconsistent. It is the credibility of the story that assists resolution of this matter as opposed to the credibility of the parties themselves.

[24] I accept it is unlikely this respondent would have fired the applicant on 15 July 2014 as he was the only full time employee with a manager's liquor licence. Although this respondent might have been able to open the following day, I understand that was due to Leo being able to obtain a temporary licence and he had to call in an employee who had been brought in on a trial basis previously. Mr Grewal cannot rely upon Leo's youthful exuberance as a basis for dismissal. It is illogical he would make a decision to hurt his own family business. There is no evidence of any dispute or other reason for Leo to make such a decision.

[25] I think it more likely, after hearing from both parties that Leo was somewhat surprised when Mr Grewal asked if he was being fired. Mr Grewal's evidence that Leo had told him to calculate his wages because this was his "*last shift*" meaning he was fired lacks credibility. This is especially where the job is so important to him that he does not seek to change Leo's mind. He accepts this and leaves.

[26] Perhaps more tellingly he returns and covertly records his next two conversations with Leo. There seems no fair and reasonable motive for a covert recording of two meetings subsequent to a dismissal other than to try and trap Leo. There seemed no need to go back and meet with Leo again if, as the applicant submits, he had been fired at the first meeting.

[27] I have taken some time to read through the transcripts of the various meetings. There are times where Leo both appears to confirm and deny the applicant was fired. The evidence is at best equivocal. The allegation he was fired does not accord with the text messaging on 16 July 2014 stating the applicant could come back to the shop and work and he was still an employee. The respondent's position that it had not fired the applicant is also spelt out in a letter to Immigration Services dated 16 July 2014. Although the applicant made something of this letter showing the pressure applied by

Leo regarding his immigration status, I accept Leo's evidence that the respondent was required to inform immigration if Mr Grewal left their employ.

[28] I also wonder why, if this job was so important, the applicant did not seek to preserve it. Nowhere in correspondence and meetings subsequent to the alleged dismissal did Mr Grewal seek to retain his job.

[29] I am not sure, on the balance of probabilities, that it was the action of the respondent employer that caused the applicant's alleged dismissal. It is more likely, there had been a miscommunication between the applicant and Leo about his continuing employment. Mr Grewal apprehended Leo had fired him because he asked him to calculate his wages and that it was his "*last shift*". Leo says he asked him to calculate his wages because there was a dispute and any comment about last shift did not mean he was fired. When Mr Grewal left, Leo believed he did so of his own accord. He then returned twice and the transcribed meetings took place. This may infer the applicant was unsure if he had been dismissed at all.

[30] The situation worsened after Leo became aware the applicant had taken the respondent's record books including the wage and time record and covertly taped two of their meetings. Leo offered the applicant continued work but threatened Police involvement to recover the respondent's property. The applicant served Leo with a personal grievance letter. Leo served the applicant with a warning about performance. The applicant refused to return. It would seem by 16 July the agreement terminated because neither party was willing to continue working together. Both appear to have walked away.

[31] As a consequence, the personal grievance application is dismissed.

[32] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority