

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 211  
3102595

BETWEEN	YONGNAN KANG Applicant
AND	ONE PURE INTERNATIONAL GROUP LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Mere King, counsel for Applicant  
Rob Towner, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 and 22 May 2020 from Applicant  
21 and 25 May 2020 from Respondent

Determination: 26 May 2020

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. The application by Mr Kang for interim reinstatement pending the Authority's investigation and determination of his personal grievances is declined.**
- B. Costs are reserved.**

**Interim non-publication orders**

[1] Mr Kang has sought an order of the Authority prohibiting the publication of the following information:

- a) Any information relating to the November 2018 share valuation and purchase price of One Pure International Group Limited;
- b) Any financial information relating to One Pure, including financial performance, sales figures, profits and losses and income;
- c) Any information related to customer and supplier arrangements; and
- d) Any information related to the specific quantum of the remuneration received by Mr Kang and any other One Pure employees.

[2] One Pure consents to the orders.

[3] I am satisfied from the information provided by the parties that it is necessary and appropriate to exercise my discretion to issue an interim non-publication order pending resolution of the substantive personal grievance claims by the applicant.

[4] Accordingly, I exercise my discretion and make an interim non-publication order prohibiting the publication of the information set out in paragraph [1] a) to d) above until further order of the Authority.

### **Employment relationship problem**

[5] On 22 May 2020 Mr Kang's employment ended after he was given notice of dismissal as a result of a restructuring. Mr Kang says his dismissal was unjustified because there was no genuine commercial rationale to justify the disestablishment of his position and the consultation process was not fair or reasonable.

[6] The substantive employment relationship problems between the parties include personal grievance claims that one or more conditions of Mr Kang's employment were affected to his disadvantage by the unjustified actions of One Pure and that his dismissal was unjustified.

[7] Until those substantive claims can be investigated and determined Mr Kang has applied for an order from the Authority that he be reinstated to his position on an urgent interim basis. As part of his application for interim reinstatement Mr Kang provided an undertaking as to damages.

[8] One Pure denies it unjustifiably dismissed Mr Kang and it opposes the application for interim reinstatement.

[9] The parties agreed to the Authority determining the preliminary issue of interim reinstatement on the papers. These papers included the contents of the statements of problem and reply, affidavit evidence from the parties, relevant background documents lodged with those affidavits, and submissions made by the parties' representatives.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated relevant findings of fact and law that I am able to make at this interim stage so that I can express a conclusion on whether the interim order should be granted or declined. While I have not referred in this determination to all the information and submissions received I have carefully considered everything.

### **Background**

[11] On 31 August 2012 Mr Kang incorporated One Pure International Group Limited. At that time Mr Kang was the sole director and shareholder of the company. One Pure operates a water bottling business with its head office in Auckland and its manufacturing facility in Napier.

[12] On 1 August 2014 Mr Kang signed an employment agreement with One Pure recording his position as Chief Executive Officer (CEO). Mr Kang describes his key duties as including managing of all aspects of the business with a particular focus on driving sales, marketing and profitability.

[13] On 29 November 2018 Mr Kang sold 75 percent of his shares to Mr Jianping Wang. Mr Wang and his family have an ownership interest in 17 other companies in New Zealand which operate under the Huadu Group and provide services in the construction and development, English language teaching and tourism industries.

[14] On the date of the sale Mr Kang retained a 25 percent shareholding in the company, his position as a director and his employment as CEO. The Shareholders Agreement entered into by Mr Kang and Mr Wang on 29 November 2018 recorded:

D The parties also intend this Agreement to record the manner of administration, management and operation of the Company and the rights and obligations of each Shareholder.

...

4.2 Mr Kang shall have authority to make decisions about the operations of the Business within New Zealand for 1 year from the Commencement Date, including all aspects of running the bottling plant in Napier, as well as the overseas markets other than China. The New Shareholder shall have the authority to make decisions about the operations of the Business within China.

...

6.1 The Shareholders acknowledge that the Board will delegate day-to-day responsibility for the operation of the Company and for overseas markets (excluding China) to Mr Kang for one (1) year from the Commencement Date and the operation of the Company in China to the New Shareholder or the Director(s) it appoints...

[15] On 7 December 2018 two additional directors were appointed including Mr Wang and Mr Michael Geng. Mr Geng is also a director of companies operating under the Huadu group of companies.

### ***Appointment of Global President/CEO***

[16] At a meeting of the Board on 7 June 2019 the directors, including Mr Kang, unanimously agreed to appoint Mr Baoyu Guo as the Global President of One Pure. His duties included the establishment and organisation of One Pure's systems and processes, supervision of production management and the organisation of sales tasks. A written employment agreement was signed by Mr Guo and One Pure on 8 June 2019 confirming Mr Guo's appointment as One Pure's Global President.

[17] Mr Paul Kim, the then General Manager for One Pure, emailed the directors and set out a summary of notes from the Board meeting. In his email Mr Kim records Mr Guo's position as Global CEO. This indicates that the terms Global President and Global CEO are intended to be interchangeable to describe Mr Guo's role from 8 June 2019.

### ***First proposal to restructure***

[18] At a meeting of the Board of directors on 1 November 2019 the directors, including Mr Kang, unanimously agreed to separate the responsibilities for the management of the business into two areas. Operations and Sales. Mr Kang was, together with Mr Guo, Ms Peng Guo and Mr Verry, to be responsible for sales.

[19] Prior to the meeting an information pack was circulated to the directors. The pack included a number of documents and proposals to be discussed at the Board meeting. The pack included an organisation chart showing the proposed new structure for the sales team. The proposal would see a shift for Mr Kang to take responsibility for sales in South East Asia.

[20] As events transpired Mr Kang was not appointed to the South East Asia Sales role, however, in all other respects the proposed company structure was implemented. This included Mr Guo taking a lead role in the organisation as Global CEO.

[21] The minutes of the meeting record Mr Kang as indicating he was very confident in the operation and management team under the leadership of Mr Wang. He undertook to work out a sales layout and proposals to lay the foundation for the following year's sales performance.

[22] After the meeting Mr Kang refused to confirm the minutes as being accurate. He required more information about his proposed new position. In his email Mr Kang did not dispute that he and the two other directors had voted to accept the proposed new structure.

### ***Second proposal for restructure***

[23] In preparation for the February 2020 Board meeting, a meeting pack was circulated to the directors. This pack included a further proposal to restructure the company. The proposed organisation chart which was included in the pack did not identify a position for Mr Kang. After he pointed this out a new copy of the proposed organisation chart was circulated. The proposed structure remained the same but all the names had been removed.

[24] As with the earlier proposal, the aspects of the proposal affecting Mr Kang did not proceed.

[25] Mr Kang deposed that after the Board meeting Mr Guo approached him and told him he was under instructions from Mr Wang to seek his resignation as CEO. Mr Kang refused to resign and Mr Guo left for China on 26 February 2020. Mr Wang denies he gave Mr Guo any instructions to seek Mr Kang's resignation.

### ***The third restructure proposal***

[26] On 3 April 2020 One Pure provided Mr Kang with a document setting out a further proposal to restructure the management of the business including a proposal that the role of CEO be disestablished. One Pure's reasons for the proposal included:

- a) A surplus of senior management positions for the size of the company - the company had management employees filling positions as the Global CEO, CEO, and Operations Manager. The company is a small employer with a total of 16 employees working out of two locations. Five employees worked in Auckland where Mr Kang was located and 11 employees work at the bottling plant in Napier.
- b) The requirement for tasks to be undertaken in Auckland had reduced significantly as a result of the Human Resources and Finance and Sales functions being undertaken independently.
- c) There was long-term market uncertainty owing to the Covid-19 situation.

[27] Following a consultation process Mr Kang was given notice that the proposal to disestablish his position would proceed and in the absence of any redeployment options his employment would end on 22 May 2020.

### **Interim application**

[28] An application for interim reinstatement involves the exercise of discretion. The basis on which applications for interim orders are to be decided can be summarised as follows:<sup>1</sup>

- a) Mr Kang must establish there is a serious question to be tried, that One Pure has unjustifiably dismissed him and that I should order One Pure to reinstate him;
- b) Consideration must then be given to the balance of convenience, and the impact on the parties of granting of, or the refusal to grant, an order.
- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[29] The merits of this case, insofar as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in affidavits and what can be discerned from the pleadings and documents provided by the parties.

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<sup>1</sup> See, *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 at [7] referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[30] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

### **Serious question to be tried**

[31] The threshold for a serious question is that the claim is not frivolous or vexatious.<sup>2</sup> The assessment of whether there is a serious question to be tried requires a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[32] In a claim such as this the question of whether there is a serious question to be tried raises two sub-issues:

a) Is there an arguable case that Mr Kang was unjustifiably dismissed?

and

b) Is there an arguable case in relation to the claim for permanent reinstatement?

### ***Serious question to be tried regarding unjustified dismissal***

[33] Mr Kang has been dismissed so in terms of the unjustified dismissal claim the onus shifts to One Pure to establish that his dismissal was justified in line with s 103A of the Act. In a redundancy situation this requires consideration of whether the redundancy is genuine which involves considering the underlying business reasons for the dismissal and that the notice and consultation requirements of s 4 of the Act have been complied with.<sup>3</sup>

[34] Mr Kang has advanced his claim on the basis that there was no underlying business reasons for the restructuring and that the process of consultation over the proposed restructuring was not fair.

#### Genuine commercial reasons

[35] Mr Kang says the restructuring was a sham which was both substantively and procedurally flawed. He says the reasons given by One Pure for the removal of the CEO position arose from having too many senior managers but he was not provided with the details of the new structure or any supporting information.

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<sup>2</sup> Ibid.

<sup>3</sup> *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].

[36] Mr Kang submits:

- a) That even if there were a surplus of senior management employees he was not told why One Pure considered his role and not others were considered surplus. He argues his role is integral to One Pure's success and continues to exist.
- b) There were ulterior motives for the restructure motivated by Mr Wang's desire to remove him in response to a shareholder dispute and concerns raised by Mr Kang about Mr Wang's actions as a director, rather than sound commercial motives.

[37] One Pure submits that the justification to disestablish Mr Kang's position was essentially what he and Mr Wang had agreed in the Shareholders Agreement in November 2018. It says the restructuring was consistent with the restructuring and reallocation of duties which the Board had unanimously decided on since June 2019.

[38] Having considered the parties submissions I find One Pure's submissions to be more persuasive. Mr Kang was involved in all of the decisions affecting the changes to the management of the business in his role as a director and this was provided for when he sold the shares of the business.

### Consultation

[39] Mr Kang submits that the process of consultation used by One Pure was neither fair nor reasonable.

[40] Consultation requirements include:<sup>4</sup>

[54] ...the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[41] Mr Kang claims:

- a) One Pure failed to provide relevant information despite repeated requests. This impacted on his ability to reasonably understand and respond to the commercial rationale behind the restructuring proposal. This included a

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<sup>4</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71 at [54].

failure to provide sales evidence to support One Pure's claim that Covid-19 was impacting on the business;

- b) One Pure failed to genuinely consider alternative structures or redeployment options. He says as the decision maker, Mr Guo, had a self-interest in preserving his own position which made it unreasonable for him to be the decision-maker;
- c) The outcome of the proposal was pre-determined and One Pure did not enter into the consultation process with an open mind.

[42] One Pure submits:

- a) Its process was fair and adequate;
- b) It provided Mr Kang with sufficient information to understand the basis of the proposal and allow him to provide feedback, which he did;
- c) Mr Kang was represented throughout the process;
- d) Redeployment was considered but it was readily apparent there were no other positions to which Mr Kang might be redeployed;
- e) The decision was not pre-determined.

[43] There is an arguable case that the dismissal may be found to be unjustified but in my view it is not strong. Mr Kang had been aware since the 1 November 2019 Board meeting that the Board believed the role of CEO was surplus to the needs of the business. The CEO's role had been removed in the first, second and third iterations of the restructuring proposals presented to Mr Kang in his role as a director. The one area that needs more investigation is what, if any consideration was given to removing other management roles.

#### ***Serious question to be tried regarding reinstatement***

[44] Section 125(2) of the Act provides that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[45] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Mr Kang could be a

sufficiently harmonious and effective member of One Pure if he were ultimately reinstated to his former position or a similarly advantageous one.

[46] The Court has stated that practicability means more than simply being possible irrespective of consequence.<sup>5</sup> A real risk of reversion to dysfunctional relationships is a factor to weigh in considering the practicability of reinstatement.<sup>6</sup>

[47] Mr Kang deposed that he is ready, willing and able to return to work. He is proficient in all areas of the business and there have been no issues about his conduct or performance. He submits that One Pure is able to have trust and confidence in his abilities, there has been no irreconcilable breakdown in the employment relationship and he is willing to work productively with both Mr Guo and Mr Wang.

[48] Mr Kang submits that it is in his interests to act faithfully in the best interests of the company given his 25 percent shareholding.

[49] One Pure submits:

- a) Permanent reinstatement would not be either practicable or reasonable. It relies on Mr Kang's previous conduct where he has refused to accept Mr Guo's authority and a serious breakdown in the relationship between Mr Kang and Mr Wang;
- b) That there is simply no position to which Mr Kang can be reinstated. The Napier plant has its own management structure and there is no requirement for two CEO's to oversee the Auckland Office or the company;
- c) That as a result of decisions made by the Board, including Mr Kang, Mr Kang's duties have been taken on by other employees including Mr Guo;
- d) That the current restrictions on overseas travel as a result of Covid-19 means Mr Kang cannot travel overseas to develop new markets.

[50] Mr Kang has not established a strong arguable case for permanent reinstatement. It seems more likely than not that there is no position available for him. The number of managers employed by One Pure seems to be out of kilter with a small business with only 16 staff.

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<sup>5</sup> *Hong v Auckland Transport* [2019] NZEmpC 54.

<sup>6</sup> *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [288].

[51] The untested evidence indicates the relationship between Mr Kang and Mr Wang has become acrimonious. Mr Kang has made some serious accusations about Mr Wang's conduct as a director and seems to support One Pure's submission that Mr Wang has lost trust and confidence in Mr Kang.

[52] My finding under this heading should not be taken as any indication of how the potential remedy of reinstatement would be addressed by the Authority after a substantive investigation because at that stage the Authority will be better placed to assess whether or not the Act's s 125 test for reinstatement has been met.

### ***Conclusion***

[53] My assessment at this early stage is that while Mr Kang has an arguable case that he was unjustifiably dismissed and for reinstatement, his case is not strong.

### **Balance of convenience**

[54] The question of balance of convenience requires an assessment of the impact on the parties of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[55] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on Mr Kang to be weighed against the potential impact to One Pure and the extent to which such risks might be managed or minimised.

[56] Mr Kang submits he will face significant detriment if he is not reinstated on an interim basis and that this detriment outweighs any potential detriment faced by One Pure. As One Pure's founder Mr Kang says he has a strong emotional and sentimental connection to the business. He has worked hard to build his reputation, trade relationships and networks all of which will be lost if he is not reinstated.

[57] When Mr Kang sold his shares to Mr Wang, he agreed to a five-year non-competition restraint. He submits he will face considerable challenges in obtaining alternative employment due to the seniority of his role, the current job market, and the method of his dismissal from the company. Added to that is the reputational effect, which Mr Kang says will be significant.

[58] Mr Wang deposed that if One Pure is required to reinstate Mr Kang it will create financial hardship to the company. This is contrary to Mr Kang's untested evidence that on or about 25 February 2020 he was approached by Mr Guo who offered to continue paying Mr Kang's salary by way of directors fees if he resigned from his employment.

[59] One Pure submits that this is a situation in which a business has been sold and the founder/owner stays on for a transition period. It submits no stigma attaches to the vendor of a business in such circumstances and there is nothing unusual or negative in Mr Kang being removed from his managerial role after the transition period.

[60] In assessing the balance of convenience I must consider whether there are adequate alternative remedies available to Mr Kang. I am satisfied Mr Kang can be adequately compensated by an award of lost wages and/or compensation for distress for any loss he may suffer if he is subsequently found to have been unjustifiably dismissed.

[61] Mr Kang has not provided any detailed financial evidence indicating he will suffer financial hardship pending the substantive investigation of his claims, if interim reinstatement is not granted. My consideration of this factor includes my awareness that Mr Kang received a significant sum in consideration for the sales of his shares.

[62] Overall, it is my view that Mr Kang is able to bear the burden of not being reinstated in the interim.

### **Overall justice**

[63] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.<sup>7</sup>

[64] Standing back from the evaluation of whether there is an arguable case and a consideration of the factors in the balance of convenience, I have concluded that the overall justice of the matter favours declining Mr Kang's application for interim reinstatement. Mr Kang will still have the full range of remedies available to him including permanent reinstatement following the substantive investigation.

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<sup>7</sup> Above n 1.

## **Conclusion**

[65] I conclude the overall interests of justice follow the balance of convenience and favours declining Mr Kang's application for interim reinstatement.

## **Next steps**

[66] One Pure has asked the Authority not to progress matters further until Mr Kang follows the process outlined in his employment agreement for dealing with employment relationship problems.

[67] Mr Kang raised with One Pure, throughout the process leading up to the termination of his employment, all of the concerns he has now raised in his statement of problem. It seems to me that the process outlined in the employment agreement is to ensure One Pure is on notice of any concerns so it can address them at an early stage. I am satisfied One Pure has been on notice since April 2020 of the employment relationship problems which are now before the Authority.

[68] Accordingly, there is no basis for delaying the progression of Mr Kang's application. An Authority Officer will be in touch with the parties in due course, to discuss and agree on suitable dates for an investigation meeting.

## **Costs**

[69] Costs are reserved pending the substantive investigation of this matter.

Vicki Campbell  
Member of the Employment Relations Authority