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THE ADVOCATE

EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

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90,000 Win for Head Chef

Boon Chwee Tan worked as a chef and subsequently as '*Head Chinese Chef*' at Asha restaurant in Christchurch for a period of 8 years from 10 December 2000 until 28 December 2008. Three separate employment agreements were signed throughout the course of Tan's employment however no records were kept about hours worked, any additional payments made or annual leave.

Tan took her employer to the Employment Relations Authority, claiming that she did not have any paid holidays, was not paid for working on public holidays, worked overtime for which she was not paid, was subjected to verbal threats, discriminated against, and was contracted to work up to 40 hours a week, but worked up to 57 hours over 6 days. Tan also claimed to have been dismissed constructively.

In terms of her claim for unpaid money, s.142 of the Employment Relations Act 2000 provides a limitation period for actions other than personal grievances. It provides that no action may be commenced in the Authority or Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose. Accordingly the Authority in this case found that as the claim was lodged with the Authority on 6 May 2009 no action could be commenced in relation to unpaid hours or in relation to time worked on public holidays and/or an entitlement to payment for working on a public holiday, prior to 6 May 2003.

Due to a lack of records the Authority was required to reach a fair conclusion based on the evidence of various witnesses, and noted that in "*the absence of records such a conclusion will not be able to be made with the same degree of accuracy had those records been available".*

Based on the evidence of the witnesses the Authority concluded that over the six year period Tan worked an average of 54 hours per week. All three employment agreements made provision for overtime payments.

For the period of Tan's employment the Authority calculated the hours worked and concluded that the following sums (gross) were owing to Tan:

a) $58390.02 for the shortfall in wages and for working on public holidays;
b) $10428.00 for alternative days accrued as a result of working on public holidays;
c) $18486.00 for annual holiday pay
d) The Authority also ordered that interest be paid at a rate of 4% on the alternate days and annual leave payment from the last day of employment to date of payment and additionally ordered that interest be paid at the rate of 4% for hours worked and for working on public holidays from the date of determination to the date of payment. The Authority stated that the reasoning for arriving at different dates for "*assessing interest for these matters [was] because there was significant dispute about the hours and identity of Ms Tan's employer that required careful analysis and determination*."

With regard to the personal grievance of unjustified constructive dismissal the Authority accepted the submissions on behalf of the employer that Tan could not raise such a grievance in terms of the general allegation that she had suffered verbal abuse and harassment for the 8 years of her employment. The Authority did however accept that Ms Tan was able to raise a claim in respect to her allegedly being threatened and/or unjustifiably dismissed when she asked for Christmas Day off in 2008 and the personal grievance claim in respect to these allegations had been sufficiently raised within the requisite 90 day period.

The final question for determination therefore was whether Tan was dismissed constructively or actually dismissed. The Authority was not satisfied on the evidence heard that Tan was threatened about working on Christmas day and therefore could not conclude that she resigned because of a breach of her employer. The Authority determined that in all probability Tan gave two week's notice of resignation as required under her employment agreement and that Tan was unjustifiably dismissed during this notice period, due to her employer asking her to leave after one week.

The Authority made an award of $3,000.00 compensation pursuant to s123(1)(c)(i) for the undignified way the employment relationship ended.

Two important lessons can be learned from this case. Firstly ensure clear and accurate wage and time records are kept. The significant payment by way of arrears of wages arose at least in part because of the failure to have an accurate wage and time record. The employer was therefore in the position of having to establish their view of the employee's hours and pay without reference to wage and time records. Secondly, even though an employee has given notice, where the employer terminates employment before the end of the notice period, the employee may still be able to raise a personal grievance claim of unjustified dismissal.

Immigration Act 2009

– effective from 29 November 2010

In April 2006 the government announced a comprehensive review of immigration legislation. After public consultation and consideration of around 4000 submissions Cabinet agreed on the new immigration legislation. With regard to employers there are important changes to be aware of.

The 2009 Act narrows the '*reasonable excuse'* defence for employing a foreign national not entitled to work in New Zealand. Currently, if an employer has received from the employee an IR 330 tax code declaration then this is a defence for inadvertently employing an illegal worker. This '*lack of knowledge'* defence will no longer be available.

The new Act does not apply to employers who inadvertently employed an illegal worker who supplied an IR 330 declaration and was employed before 29 November 2010.

Penalties an employer may be subject to include a fine of up to $10,000.00 pursuant to s.350 of the Act for employing a foreign national who is not entitled to work in New Zealand. Further a penalty of $50,000.00 may apply where an employer allows or continues to allow a foreign national to work knowing that the person is not entitled to work. Additionally the maximum penalty for exploiting a foreign national who the employer has allowed to work while knowing that person was not entitled to work is imprisonment for seven years or a fine of $100,000.00 or both.

A defence to a charge under s.350 may be found where the employer did not know that the person was not entitled to do the work and took reasonable precautions and exercised due diligence to ascertain whether the person was entitled to do the work.

It is important to bear in mind that in certain situations Immigration New Zealand officers on behalf of the Department of Labour will be able to enter and inspect the records of employers to require the production of specific information and documentation.

'*Visa View'* is a service available on the Department of Labour website which allows registered employers to access records held by Immigration New Zealand and to check whether a person who is not a New Zealand citizen is entitled to work in New Zealand. It is important that you have systems in place during your recruitment process to check on the validity of a foreign national's entitlement to work in new Zealand.

If you require further advice or information about the new Act then please contact one of our team.

Employees Working on Show Day or Xmas Day ???

☑ Yes Are you aware of your obligations in regard to paying employees for working on public holidays?

☒ No Are you aware of your obligations in regard to paying employees not working on public holidays?

☑ Yes Are you planning a '*shutdown*' over the festive season? If so are you aware of the statutory requirements in this regard?

The answers to these questions and many others regarding annual and public holidays can be answered by the team at McPhail Gibson & Zwart Ltd.

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McPhail Gibson & Zwart - Level 2, 155 Kilmore Street PO Box 13-780, Christchurch **Tel** (03) 365 2345 **Fax** (03) 365 2347 **www.mgz.co.nz**

Neil McPhail - Email neil@mgz.co.nz Mobile 0274 387 803 **Raewyn Gibson** - Email raewyn@mgz.co.nz Mobile 0274 387 802

Peter Zwart - Email peter@mgz.co.nz Mobile 0274 367 757