IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 115
3012875

	BETWEEN	DAE HUI SEON Applicant
	AND	SUNGSOO HONG & HAE KYUNG UM PARTNERSHIP T/A TOKYO EXPRESS Respondent

Member of Authority:	Robin Arthur
Representatives:	John Hall, Counsel for the Applicant Vanessa Bainbridge, Advocate for the Respondent
Investigation Meeting:	1 and 2 February 2018
Determination:	11 April 2018

DETERMINATION OF THE AUTHORITY

A. The employment of Dae Hui Seon by the Sungsoo Hong and Hae Kyung Um partnership ended by constructive dismissal.

B. Within 28 days of the date of this determination Mr Hong and Ms Um must settle Mr Seon's personal grievance by paying him the following amounts as remedies, which have been reduced by 20 per cent due to his contribution to the situation giving rise to his grievance:

(i) $6,528 in reimbursement of wages lost; and

(ii) $7,200 as compensation for humiliation, injury to feelings and loss of dignity.

C. No arrears of wages are owed to Mr Seon.

D. Mr Seon's application for various penalties to be imposed on his former employer is declined.

E. Costs are reserved with a timetable for memoranda set if an Authority determination on that issue is needed.

Employment Relationship Problem

[1] Dae Hui Seon worked as a chef in two sushi restaurants run by the partnership of Sungsoo Hong and Hae Kyung Um, who are husband and wife. Their restaurant business trades under the name of Tokyo Express. Both Mr Hong and Ms Um work in the business as does their daughter Kelly Hong. She holds the job title of operations manager. Her day to day duties include dealing with staff matters.

[2] Mr Seon resigned from his employment by the partnership during a disciplinary meeting held on 9 January 2017. The meeting was called after a discussion he had begun with Mr Hong and then continued with Ms Hong at one of the restaurants on 15 December 2016. Mr Seon begun that discussion by complaining Mr Hong was spreading rumours about him. As it continued the exchanges between Mr Seon and Ms Hong became heated and were loud enough to be overheard by some customers who came into the restaurant. When Mr Seon said he felt unwell and wanted to leave to see a doctor, he and Ms Hong also clashed over whether he was ill or not. The argument continued for around one hour. During that time Ms Hong attempted to issue Mr Seon with a final written warning. According to him, she also asked Mr Seon to sign a letter of resignation. Mr Seon then left the premises and went to see a doctor. His doctor gave him an ACC injury claim form and a medical certificate stating he would be fit to return to work on 22 December. The form recorded an injury to Mr Seon's shoulder from lifting a box at work on 14 December. His evidence was that the injury claim came about as a result of his answers to questions the doctor asked about the headache symptoms Mr Seon had presented with at the surgery. Over following days he remained away from work on sick leave although Ms Hong initially disputed the basis for him taking that leave.

[3] On 20 December 2016 Ms Hong sent Mr Seon an email outlining five allegations of serious misconduct; two of stealing food (by taking home leftovers); one of leaving the cash register unattended; one of using his mobile phone at work and shouting at Ms Hong in front of customers; and one of having "unauthorised possession" of food belonging to his employer while he was at work.

[4] The 20 December email called him to a disciplinary meeting to respond to those allegations on 22 December, the morning he was due to return to work from sick leave. However the disciplinary meeting was delayed until 9 January while arrangements were made for Mr Seon to be accompanied there by three people: his lawyer Mr Hall, his brother Shaun Seon, and Joan Watson, a human resources consultant. Soon after the meeting, and his resignation during it, Mr Seon raised a personal grievance for unjustified dismissal. He said his resignation was really a constructive dismissal. His application to the Authority also sought orders for the Hong and Um partnership to pay wage arrears, penalties for alleged breaches of statutory obligations, and costs.

[5] The partnership's statement in reply disputed all claims made in Mr Seon's application to the Authority. Their reply also referred to a letter sent to his representative on 10 January 2017 that had offered Mr Seon an opportunity to reconsider his resignation and to meet to discuss issues he had raised. No response had been made to that offer by the time Ms Hong sent Mr Seon a letter on 13 January confirming his resignation was accepted, effective 9 January.

The Authority's investigation

[6] Mr Seon, Ms Hong, Mr Hong and Ms Watson attended the Authority's investigation meeting. Under oath, they each confirmed what they had said in written witness statements and gave further oral evidence by answering questions. An interpreter of Korean assisted witnesses, where needed, by translating questions and answers.

[7] Mr Seon's lawyer had lodged an affidavit from one other former employee. It was set aside as that witness did not attend the investigation meeting and her evidence could not be tested by questions. Mr Seon's lawyer had obtained a witness summons to serve on that employee but was not able to do so.

[8] During the first day of the Authority's investigation meeting the parties' representatives had the opportunity to ask questions of the witnesses present. On the morning of the second day of the investigation meeting the representatives returned to provide closing oral submissions on the issues for determination.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] Findings are made on the civil standard of proof, that is on the balance of probabilities or what is more likely than not to have occurred. This requires an assessment of what the witnesses said in light of likelihoods and whatever corroborative evidence there may be, including any relevant documents or records made at or around the time. In this case there was little to corroborate starkly different accounts between what Ms Hong or Mr Hong said about various events compared with what Mr Seon said. Part of that evidence comprised what was said to be a written translation of recordings Mr Seon took on his mobile phone of his conversations with Mr Hong and Ms Hong. Ms Hong and Mr Hong criticised the accuracy of that translation. They said it recorded comments from them but omitted much of what Mr Seon said himself during those conversations. The timetable set for the parties to prepare for the investigation meeting allowed time for Ms Hong and Mr Hong to arrange a translation of their own to be added as evidence but they had not used that opportunity. The transcript provided by Mr Seon was of some value in confirming at least that some topics were traversed or some comments were made. However the omissions of some of what Mr Seon had said made limited that value.

[11] For reasons given in this determination, this case has engaged the two sides of the evaluation required by the Act. Firstly, under s 103A, the Authority must consider what the employer, through the employer's representative, said and did. If those actions are less than what a fair and reasonable employer could have done in all the circumstances, and resulted in the employee being treated unfairly, those actions will be found to be unjustified. Secondly, any remedies awarded for those unjustified actions may be reduced where the conduct of the employee contributed in a blameworthy way to the situation giving rise to her or his grievance. In this way the Act allows the Authority to reach an outcome that balances the accountability of both the employer and the employee for their conduct.

The issues

[12] Arising from the wide-ranging nature of the claims made in Mr Seon's statement of problem, the following issues required resolution:

Constructive dismissal claim

(i) Had the employer breached duties owed to Mr Seon (including the duty of fair treatment) by:
   (a) requiring him to begin work before he had a valid work visa; and/or
   (b) making allegations that he was in a sexual relationship with another employee; and/or
   (c) making unfounded allegations that he had taken money; and/or
   (d) unreasonably denying him time off to see a doctor following an injury; and/or
   (e) issuing him with a final written warning; and/or
   (f) unreasonably carrying out a disciplinary inquiry regarding allegations he had unauthorised possession of company property, stole company food, left the cash register unattended, used a mobile phone and shouted at a manager on 15 December 2016; and
   (g) ignoring greetings and not talking to him during shifts when he returned to work following a period of leave on ACC?

(ii) If one or more such breaches were established, were they sufficiently serious that a reasonable employer could have foreseen Mr Seon would end the employment relationship rather than tolerate them?

(iii) If the employer's actions did amount to an unjustified constructive dismissal, what remedies should be awarded, considering:
   (h) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
   (i) Compensation under s123(1)(c)(i) of the Act?

(iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Seon that contributed to the situation giving rise to his grievance?

Wage arrears claim

(v) Is Mr Seon owed any arrears of wages as a result of failures by his employer to pay the following when due:

(a) Minimum wages for hours worked (in an amount to be quantified); and/or

(b) Overtime (in an amount to be quantified); and/or

(c) Holiday pay for public holidays (of $216) and for alternative holidays (of $432)?

Penalties

(vi) Should penalties be imposed on the respondents for

(a) Not providing a written employment agreement at the beginning of the employment (in breach of s 65 of the Employment Relations Act 2000); and/or

(b) Not maintaining an adequate holiday and leave record (in breach of s 81 of the Holidays Act 2003); and/or

(c) Not paying public holiday and alternative leave entitlements (in breach of s 50 and s 56 of the Holidays Act 2003).

The constructive dismissal claim – resignation due to employer's breach of duty?

[13] What appears to be a voluntary resignation by a worker may, in some circumstances, be deemed to have really been a dismissal. One such circumstance is where the resignation resulted from some unjustified action of the employer that was intended to get a worker to leave. Another is where it was reasonably foreseeable that the worker would not put up with the situation created by the employer's breaches and would instead resign. In both such circumstances the end of the employment is described, in employment law, as a constructive dismissal because it resulted from actions of the employer.

[14] Mr Seon's claim of constructive dismissal identified seven ways in which his employers were said to have breached duties owed to him so he could not have confidence he would be treated fairly by the disciplinary process begun on 20 December 2016 and during which he resigned on 7 January 2017. Each alleged breach had to be examined in turn before considering whether any that were established to be unfair treatment than had the cumulative effect on him that Mr Seon said resulted in his decision to resign.

1. Any work required before a valid visa issued?

[15] Mr Seon, a Korean national, said his parents lived in New Zealand but in early 2016 he was here under the terms of a work visa that allowed him to work for another employer. In February 2016 he met Mr Hong for an interview for a chef's position and was offered the job. Mr Seon then began arrangements to have his visa transferred so he could work for the partnership.

[16] Mr Hong gave Mr Seon a simple three-page template employment agreement that he used for other employees but Mr Seon did not sign and return it. Instead Mr Seon provided an 18-page employment agreement prepared by his own immigration lawyer. Mr Seon asked Mr Hong to sign that agreement as it was said to be more suitable to provide in support of his visa amendment application. Mr Hong's evidence was that he happily signed Mr Seon's preferred agreement and said Mr Seon could start work once he was granted the new visa.

[17] The employment agreement included a term saying it would come into force as soon as the employee became "entitled to undertake the position offered by the employer". There was no doubt the entitlement referred to in this term was the necessary amended visa that would allow Mr Seon to work for the partnership.

[18] Mr Seon was granted that visa, identifying the Hong & Um partnership as his employer, on 23 March 2016. Mr Hong's evidence was that Mr Seon showed him this visa soon after that date and he arranged for Mr Seon to start work after the Easter holidays. Mr Hong said Mr Seon began work on 4 April 2016. He denied Mr Seon's claim that Mr Seon worked on a trial basis in the period between his February interview and before his visa amendment was granted.

[19] Mr Seon's oral evidence was that he had worked 55 hours a week from when he was offered the job in February and was paid in cash for the work. He provided no evidence, apart from his own assertion, of having worked in that period as he said. There were, for example, no texts, emails, or photographs with other staff during those dates that might have established he was working with them then. His claim failed to clear the threshold of being more likely than not to be true. At best it was no more likely than the evidence of Mr Hong and Ms Hong. They said the only time Mr Seon came to one of the restaurants during that period was after his visa was granted

on 23 March. They said he called in for about ten minutes to pick up a uniform for use when he started work on 4 April.

[20] No breach of duty was established on this ground.

2. Spreading rumours about Mr Seon?

[21] Mr Seon's evidence was that he became upset on the morning of 15 December when two other staff members told him Mr Hong was spreading rumours about him. He said those rumours were about him being in a relationship with another employee and about "stealing money from the store". The other employee referred to had recently left the job. Mr Seon confirmed in his oral evidence during the Authority investigation meeting that he had been "dating" her at the time.

[22] Mr Hong's evidence was that Mr Seon did not change into his uniform or come into the kitchen area when he arrived at the restaurant that morning. Instead Mr Seon had stayed in the public area and was shouting about Mr Hong speaking behind his back about his relationship with another employee. Mr Hong denied he had asked any other staff member about Mr Seon's personal relationship with that former employee.

[23] The partial transcript of recordings Mr Seon made that day show Mr Hong responded to Mr Seon's concerns by denying he had said anything to anyone other than his wife, Ms Um. It also records the following statement by Mr Hong: "Well, I need you too. Now I'm at a loss what to do since you unexpectedly said you wanted to leave. You know I like you. Why suddenly …"

[24] Those comments accord with Mr Hong's written witness statement in which he said he had expected Mr Seon to bring a letter of resignation that morning. Mr Hong said his wife told him of a conversation with Mr Seon and one other employee the previous day. Mr Hong said Ms Um spoke to Mr Seon and that other employee on 14 December about taking food without permission. He said she later told him that Mr Seon had admitted doing so and apologised. He also said she told him Mr Seon had said he would bring a letter of resignation the next day.

[25] Mr Seon's account differed. He said Ms Um had accused him on 9 December of stealing $200 she found was missing from the till when she had counted its

contents on 8 December. He said Ms Um had also called him a thief on 14 December and "pressured me to quit my job". Mr Seon insisted he had not told her he would resign.

[26] The problem with the accounts of both Mr Hong and Mr Seon about the roots of their argument on 15 December was they each relied on what they said they were told by others – Mr Hong by Ms Um and Mr Seon by two other employees. There was the inevitable risk that those supposedly passed-on comments were exaggerated or misunderstood. However, given the size and nature of the business and its staff, it was more likely than not that Mr Hong had spoken to other employees, or had been overheard talking, about both Mr Seon's personal life and Mr Hong's suspicions about money said to be missing from the till. Gossip about personal relationships would be of little import in most situations but it would not be appropriate for Mr Hong to either carelessly or deliberately mention such serious allegations about missing money to other employees, unless they were being questioned as part of some formal process of inquiry by the employer. While Mr Seon's reaction to rumours about his personal relationship was probably oversensitive, suggesting to others that he might be responsible for missing money was unfair. It was an unjustified disadvantage to him in the context which it occurred.

3. Unfounded allegations that Mr Seon took money?

[27] As Mr Hong said in his oral evidence an allegation that an employee had taken money from a till was "a sensitive subject". Pressed, he conceded that he had thought Mr Seon was responsible for taking money but accepted he had no evidence to support the allegation. He said the matter had been dealt with by Ms Um talking to Mr Seon and the other employee about a clear separation of their duties. As a cook, Mr Seon should stay in his work area and not use the cash register. The other employee who worked on the counter was a cashier.

[28] Mr Seon's explanation was that he had used the cash register at times when it was necessary to serve customers, such as when the cashier was on a break or was busy with other work. He firmly denied taking any money.

[29] This particular allegation was not included in the five alleged instances of serious misconduct raised with Mr Seon in the letter of 20 December that began the partnership's formal disciplinary process. It was, however, part of the context and

circumstances in which that process began and continued. Whatever remaining doubt Mr Hong, Ms Hong and Ms Um had over whether Mr Seon had taken money from the till may well have reinforced their decision to pursue other allegations in the disciplinary process – that he had, dishonestly, taken food home without permission and, in one instance, put some food aside with the intention of taking it home later. While an inference about the subsequent effect of that doubt could be made, the information from the witnesses really only established that the concern about missing money was raised but not pursued in the later process due to a lack of evidence available to the employer at the time. What was done, in raising the concern and then supposedly putting it aside, was not established to have been a clear breach of duties owed to Mr Seon in the circumstances at the time.

4. Denied time off to see a doctor?

[30] During the course of his argument with Ms Hong on 15 December Mr Seon said he had a headache and was leaving to see a doctor. Ms Hong, who in her oral evidence said she had become "worked up and angry" by then, challenged his reason for leaving. She told him he did not look sick. When Mr Seon said he wanted to use a sick day, they argued over whether he could do so.

[31] From Ms Hong's point of view, she had some cause for cynicism. Mr Seon was saying he was too sick to work but was well enough for an extended, vigorous argument with her. He also wanted to be paid for time off work after being challenged in recent days over whether he had taken money and food from the business. Although Mr Seon was later paid for the sick days covered by his medical certificate, Ms Hong's cynicism continued to be expressed in text and email exchanges with Mr Seon over the next few days testing the reasons for his absence. On 16 December part of a text she sent Mr Seon gave this account of events:

> You abandoned a shift with no permission and only told me you have a sudden headache and said you will go to a GP and get a medical certificate, when I said you visibly look completely fine to work and just stood there arguing for an hour.

[32] A letter she sent him, also on 16 December, contained what the letter described as a "reasonable management directive" that "[e]ffectively immediately the company requires you to provide a medical certificate as evidence for any period of sick leave". It said this was "in line with the evidence requirements set out in the

Holidays Act 2003". Mr Seon had already sent her the medical certificate his doctor gave him the previous day.

[33] While s 68 of the Holidays Act 2003 allows an employer to require proof of sickness or injury for periods less than three days, Ms Hong's letter did not explain that an employer may only do so where it agrees to meet a worker's reasonable expenses in obtaining the proof. Her letter made no such offer.

[34] Whatever cynicism she may have had, Ms Hong's response to Mr Seon's assertion that he was ill and needed to see a doctor was not what a fair and reasonable employer's representative could have done in all the circumstances at the time. The unreasonableness of her approach was compounded by her subsequent misrepresentation of the employer's statutory rights to require proof of illness. Those actions were a breach of the duty of fair treatment owed by an employer to an employee.

5. Issuing a final written warning?

[35] During their 15 December argument Ms Hong handwrote and asked Mr Seon to sign a note with the following words:

> Final written warning
> Dae Hee Sun *(sic)*
> Disciplinary meeting held
> 15 Dec 2016 10:22am
> - use of mobile phone while at work
> - leaving shift suddenly
>
> Signed
> Kelly Hong Dae Hee Sun *(sic)*

[36] Ms Hong signed the note. Mr Seon refused to sign the note. Instead he took a photograph of it with his mobile phone. He said Ms Hong also wrote out another note that said he agreed to resign but she had screwed up and thrown away that note when he tried to photograph it too.

[37] In her written witness statement Ms Hong gave this account of how she came to write the warning note after the argument with Mr Seon began on 15 December:

> He was standing there, not even entering the kitchen, looking at his mobile phone for a lengthy time. When I asked him not to use his mobile phone

> during work hours, as he had been warned countless times before not to use his phone during work hours, he suddenly raised an argument, asking why we were talking about his personal life (ie his relationship with another employee who had just quit) behind his back. My father and I had no idea what he was talking about, and asked him where his resignation letter is. He said that he never said he was resigning, and said he will continue working here. This was when I roughly wrote the "final written warning" notice and asked him to sign it, and he took a photo of it then said he refuses to sign it, and then I was going to throw it out and he accused me of writing something illegal and forcing him to resign.

[38] In her oral evidence Ms Hong accepted there was no disciplinary meeting as described on the note. She gave this explanation of what she had done:

> I wanted to make it a final written warning because I felt he had crossed every line and it was gross misconduct. I did it in the heat of the moment. I retracted it. He took photos. I scrunched it up and threw it in the bin. When I calmed down I followed the proper procedure. He had worked me up and it was not right and I was not thinking properly and it was heat of the moment rage. When he was taking photos it occurred to me that I should not be doing this.

[39] The interactions between Ms Hong and Mr Seon that day were, most probably, affected by the reality that, as she explained, Mr Seon was a similar age and disposition to Ms Hong's own younger brother. Mr Seon was clearly not as respectful of Ms Hong's status as a manager as she would have wished and she found it difficult to get his compliance with what she saw as the interests of her family's business. However, whatever legitimate disciplinary concerns there may have been about Mr Seon's attitude, those concerns needed to be addressed in a more measured manner. As Ms Hong accepted in her evidence, her attempt to impose a final written warning was "not right". What she attempted that morning was not what a fair and reasonable employer's representative could have done in all the circumstances at the time. What she did was a breach of the duty of fair treatment owed by an employer to an employee.

6. Unreasonably carrying out a disciplinary inquiry?

[40] Mr Seon had not resigned as Mr Hong and Ms Hong had expected him to do at on the morning of 15 December. He made it clear he expected to be able to continue to work for the business. In that light the disciplinary process Ms Hong initiated on 20 December inevitably faced some doubt as to its purpose. Was it really intended to achieve the outcome Mr Seon had denied the business by not handing in a resignation letter on 15 December? And would any explanations Mr Seon offered at a disciplinary

meeting, in response to the five allegations made in the letter calling him to it, be genuinely considered before any decision was made?

[41] Before sending her letter of 20 December Ms Hong had obtained some advice from an advocacy service for employers. Her advisors also provided her with a script for running the disciplinary meeting. She followed the formal steps required for a fair process by giving Mr Seon notice of the allegations against him, an opportunity for him to get representation, and giving him at least some information about the evidence relied on.

[42] The allegations made were the type of concerns that an employer could legitimately raise where there was some reasonable basis for making them. If established, those allegations each involved behaviour that could amount to serious misconduct.

[43] During the 9 January disciplinary meeting Mr Seon's representatives made some weak criticisms about the process Ms Hong followed. They told her she could not take any account of some CCTV footage that Ms Hong thought showed Mr Seon taking food off the premises. They did so because, for a technical reason, that CCTV footage was not available for them to view at the venue of the 9 January meeting. However the representatives had been offered earlier access to the footage but did nothing to arrange to see it. They also insisted Ms Hong could take no account of some written statements she sought to provide from other employees as she had not sent them to Mr Seon with the letter calling him to the disciplinary meeting. Fairness really only required he have adequate time to see and comment on whatever might have been in those statements. The time fairly needed to do that might have extended the length of the disciplinary inquiry, but did not require the artificial exercise of 'excluding' them.

[44] However there were more fundamental flaws in what happened. There was legitimate doubt about the apparent fairness of Ms Hong's role as decision-maker in the disciplinary process she initiated.

[45] Firstly, one of the allegations she had to determine was whether Mr Seon had committed serious misconduct by shouting at her in an exchange where her own evidence described herself as acting on "heat of the moment rage". She was both

complainant and decision-maker in respect of an allegation that required assessment of the extent to which she may have been at fault as well as Mr Seon.

[46] Secondly, deciding on the allegations about food would require Ms Hong to assess the credibility of the accounts given by Mr Seon or that of Mr Hong, her father, and Ms Um, her mother. In answering the allegation of stealing food on 12 and 13 December, Mr Seon accepted Ms Um had told him not to take leftovers home on 7 December but he said he understood she had meant only that day. He also said Mr Hong had seen him taking left-overs home on both mid-December days and not queried him about it at the time. Mr Hong's evidence was emphatically different. He denied he acquiesced to that conduct. He said he had questioned Mr Seon on 13 December, when he believed Mr Seon had taken some sushi to his car. He said he told Mr Seon to throw the sushi away immediately as the heat in the car could cause rapid and extremely dangerous bacterial growth and lead to food poisoning. Mr Hong also insisted all employees were clearly told taking leftovers home was prohibited due health and safety concerns. Mr Seon, as emphatically, denied Mr Hong had talked to him about that subject on 13 December.

[47] The allegation of "unauthorised possession" of food also required Ms Hong to deliberate between the account of her father and Mr Seon. Mr Seon accepted he had put two sushi boxes of food under the store counter on 6 December but denied the implication of the allegation, that he had done so as part of a plan to take that food home when he left work at the end of his shift. Mr Seon's explanation was that a customer came in and placed an order for salmon sashimi, prawns and vegetable fritters but had not returned to collect the order he had made up and put in two sushi boxes. Mr Seon said he had written the order in the order book but Mr Hong had said he could not find it. Further inquiries of other staff and checking of CCTV footage, to identify the customer said to have placed the order, would probably have been needed to support any negative finding against Mr Seon on that count.

[48] The allegation of leaving the register unattended appeared to have a make-weight character to it. Mr Seon and one other employee were involved. The other employee was responsible for the register but Mr Seon, in his role as chef, was said to be senior and responsible for co-ordinating breaks. It was a one-off event where no clear policy appeared to be in place about how breaks were properly handled when

only two staff were on duty at the store. The other employee was not subjected to any disciplinary consequence.

[49] Because Mr Seon resigned before Ms Hong declared any conclusion to the disciplinary process she conducted, it was not possible to be entirely sure she would have dismissed him. Ms Hong said she and her father had talked before the disciplinary meeting about likely outcomes. She told him she did not want to see Mr Seon or work with him again but Mr Hong had suggested she "let it go". However, in the context of the conclusions already reached in this determination about earlier breaches of duty to Mr Seon, he most likely would have been dismissed at the end of the disciplinary process. His decision to resign pre-empted what was, more likely than not, the inevitable outcome. But holding a disciplinary investigation did not, in and of itself, necessarily breach any duty owed to Mr Seon. It was a measure that an employer could fairly take to properly address concerns it might have and to provide a forum, if conducted reasonably, for an employee to have a real opportunity to respond. Because Mr Seon resigned before the process was complete, no firm conclusion could be made in the particular circumstances of this case that the employer's decision to carry out a disciplinary inquiry was unfair.

7. Not talking to him on return to work?

[50] Mr Seon had returned to work for the period from 22 December until the disciplinary meeting was held on 9 January. His statement of problem alleged he was "ignored" during this period. The allegation was not really developed or explained in his subsequent written or oral evidence. While the working atmosphere was no doubt somewhat tense during that period, there was insufficient evidence to conclude that tension amounted to any breach of duty to Mr Seon.

Breaches established – reasonably foreseeable resignation?

[51] From the foregoing review of the evidence three instances were established as unfair treatment of Mr Seon: spreading rumours about him, particularly of taking money; querying his sick leave and requiring him to provide a medical certificate on a basis inconsistent with the statutory requirements; and Ms Hong's attempt to issue him with a final written warning on 15 December.

[52] Two questions arose from that conclusion. Firstly, did those breaches then cause Mr Seon's resignation? Secondly, were those breaches sufficiently serious to make it reasonably foreseeable Mr Seon would likely resign rather than remain working in those circumstances?

[53] There was no doubt those established breaches were part of the circumstances that led to his decision to resign during the disciplinary meeting. Although he and his advisors clearly believed dismissal would most likely result anyway, this did not negate the causative effect of those earlier breaches on his decision. It was also reasonably foreseeable he would resign in circumstances where his employer clearly believed he was no longer to be trusted. The resignation therefore arose from unjustified actions of his employer that amounted to a constructive dismissal. Mr Seon was entitled to an assessment of remedies for that personal grievance.

Remedies

Lost wages

[54] Mr Seon gave limited evidence in support of his claim for reimbursement of wages lost as a result of his constructive dismissal. In the period from January to June 2017 he found work for only two weeks, earning $940 gross, and applied for six jobs. By June he had found work at a restaurant paying a higher rate than he earned when employed by the partnership. His evidence was sufficient to support an order for lost wages of three months' ordinary time remuneration under s 128(2) of the Act but did not warrant an award for a longer period as permitted under s 128(3) of the Act. At the hourly rate of $17.50 he was paid by the partnership for his 40 hours of ordinary time, the gross amount for three months was $9,100.[1] After deducting his earnings made from the two weeks he worked for another employer during that period, the total for the amount ordered in reimbursement of lost wages was $8,160.

Compensation for humiliation, loss of dignity, and injury to the feelings

[55] Mr Seon's evidence in support of his claim for compensation under s 123(1)(c)(i) of the Act supported an award at the lower end of the range. He said he was surprised and shocked in the beginning about how his employment ended but he

[1] $17.50 x 40 = $700 x 52 = $36,400 divided by 12 = $3,033 x 3 = $9100.

described no severe or enduring effects of those events. Mr Seon said he had stopped working at the restaurant he was employed in from June 2017 and was "kind of resting" and travelling around. However the end of his employment by the partnership had also put paid to his plans to apply for permanent residence in New Zealand as his parents also live here. He was only able to keep working in 2017 by getting a working holiday visa. The effect on his immigration status was distressing for him.

[56] In those particular circumstances, and considering the range of awards generally, $9000 was an appropriately modest award of compensation under s 123(1)(c)(i) of the Act.

Contributory conduct – reduced remedies due to blameworthy conduct by Mr Seon?

[57] Under s 124 of the Act the Authority must, when determining remedies, consider whether any actions of Mr Seon contributed to the situation that gave rise to his grievance. If they did, those actions may require a reduction of remedies that would otherwise be awarded to Mr Seon.

[58] The allegations that were the subject of the 9 January disciplinary meeting do not figure in this assessment. This is because the evidence available for the Authority investigation did not establish the alleged misconduct was more likely than not to have occurred. There were significant gaps in the evidence that Ms Hong relied on and what was done to corroborate the alleged misconduct, such as the instance of the sushi boxes of food placed under the counter. They remained allegations, albeit ones that Ms Hong and Mr Hong considered correct.

[59] However there were two respects in which Mr Seon's own evidence confirmed his conduct was blameworthy and contributed to the situation giving rise to his grievance. Firstly, his reaction to the rumour or gossip about his personal life was disproportionate. It was a concern he could have discussed more maturely, and in private, with Mr Hong. Secondly, and more significantly, he made the situation much worse by continuing a heated and loud argument with Ms Hong in the restaurant, including when customers were present. Both he and Ms Hong were both to blame for carrying on that argument in the way that they did. Ms Hong's contribution to that

situation is marked in the remedies that the employer must pay. Mr Seon's contribution is to be marked by a twenty per cent reduction of those remedies.

[60] Applying that adjustment for contribution, the remedies due to be paid by the Hong and Um partnership to Mr Seon are $6,528 in reimbursement of lost wages and $7,200 as compensation under s 123(1)(c)(i) of the Act.

[61] Because Mr Seon was employed by the partnership, Mr Hong and Ms Um are jointly and severally liable for those remedies.

Wage arrears claim

[62] Mr Seon's evidence failed to establish, to the balance of probabilities, any aspect of his claim for wage arrears.

[63] Firstly, he said he was owed wages for work carried out for the business between February and April before his amended visa was granted. Mr Seon's evidence was insufficient to establish his allegation that he had worked during that period. However, even if he had, his oral evidence was that he was paid cash for that work anyway. If that were the case, he had received payment for the work and no arrears were due.

[64] Secondly, Mr Seon sought an order for payment of overtime. His oral evidence revealed two problems with that claim. He said he had worked overtime hours, in addition to his ordinary weekly hours, and been paid cash for doing so. On that basis he had already been paid for those extra hours of work. However it became clear from his oral evidence that he believed he should have been paid a higher hourly rate for that work, that is an overtime loading. The problem with that claim was that the employment agreement he had himself provided, and had Mr Hong sign, made no provision for overtime hours to be paid at a higher rate.

[65] Thirdly, Mr Seon claimed he was owed arrears in holiday pay for working on public holidays and alternative days in lieu for having done so. Mr Hong's evidence was that one restaurant was closed on public holidays. At the other restaurant he, Ms Um and Ms Hong worked on public holidays so as not to incur the higher cost of paying staff to work on those days. Mr Seon pointed to one entry in his employer's

pay records that showed he was paid for work on a public holiday. This was said to contradict Mr Hong's statement that staff did not work on public holidays. However, on closer inspection and as accepted during the investigation meeting, the record simply showed he was paid for a public holiday, not that he had worked on that day. It fell on a day that would normally be a working day, he was therefore entitled to a paid day off and he was paid for it. This aspect of Mr Seon's claim also failed.

Penalties

[66] Mr Seon also failed to establish the three grounds on which he sought an order for penalties to be imposed on the Hong and Um partnership.

[67] He said Mr Hong had failed to provide a written employment agreement at the beginning of the employment. However Mr Hong produced an employment agreement he gave to Mr Seon at the time of the job offer was made to him in February 2016. It was not signed and returned because, as noted earlier in this determination, Mr Seon had come back with an agreement prepared by his immigration lawyer and Mr Hong had signed that agreement. There was no breach of the obligation of an employer to provide a written employment agreement.

[68] Mr Seon claimed his employer had not maintained an adequate holiday and leave record in breach of the Holidays Act 2003. Mr Seon's evidence did not establish the employer's records were inadequate.

[69] The same conclusion had to be reached on his claim for a penalty for failure to pay public holiday and alternative leave entitlements. The evidence established no shortfall in payment of those entitlements to Mr Seon so the employer was not liable to any penalty on that ground.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[71] If they are not able to do so and an Authority determination on costs is needed Mr Seon may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service

of that memorandum the Hong and Um partnership would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[72] The parties could expect the Authority, if asked to do so, to determine costs on its usual notional daily rate applied to one and one quarter days, that is a total of $5000, unless particular circumstances or factors required an upward or downward adjustment of that tariff.[2]

Robin Arthur
Member of the Employment Relations Authority

[2] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].