

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 182  
3130694

BETWEEN

JAE EUN KIM  
Applicant

AND

VICE-CHANCELLOR OF  
MASSEY UNIVERSITY  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael Kim, counsel for the Applicant  
Hamish Kynaston and Paul Gillespie, counsel for  
Respondent

Investigation Meeting: 9 and 10 March 2022

Submissions received 17 and 18 March 2022

Determination: 4 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**A. Dr Jae Eun Kim was not dismissed by Massey University and does not  
have a personal grievance.**

**B. Costs are reserved.**

## **Employment Relationship Problem**

[1] Dr Jae Eun Kim was dissatisfied with the way her employment with Massey University ended. She formally applied to the Authority, requesting it to investigate and resolve an employment relationship problem.

[2] Before there was an investigation the parties undertook mediation but were unable to settle matters between them.

[3] Under the Employment Relations Act 2000 (the ER Act), the Authority is given wide scope to investigate and resolve problems such as Dr Kim's.

[4] Her problem is that while she notified Massey University of her resignation, she had not chosen freely to leave but was forced out of her job by a breach of duty on the part of her employer. She contends its actions were sufficiently serious for it to have realised there was a substantial risk she would resign rather than accept the University's conduct towards her. She contends that although outwardly she resigned, in reality she was dismissed.

[5] The investigation has been focussed on a claim of constructive dismissal, and one of a particular type, but with the Authority all the while bearing in mind the possibility of a different employment relationship problem, or a different type of personal grievance, emerging from the circumstances as they may be found to exist.

[6] An unjustified disadvantage personal grievance included in Dr Kim's statement of problem, was withdrawn by her at the start of the investigation meeting.

[7] In accordance with s 174E of the ER Act, in this determination findings of relevant facts and relevant issues of law are stated but the Authority does not record all the evidence and submissions provided by the parties and their witnesses.

## **Dr Kim's employment**

[8] Dr Kim was appointed Senior Lecturer in Retailing and commenced in that full-time position at Massey University's Albany Campus in October 2015.

[9] Her position required teaching, examining and administration, as well as research in her area of expertise.

[10] In December 2016, while playing golf, she accidentally fell to the ground and struck her head on a hard surface. As a result, she became unwell and her ability to perform her employment deteriorated. Medical diagnosis identified post-concussion syndrome as the cause.

[11] Although Dr Kim remained employed after the accident, her condition persisted and interfered with attempts by her to work normally and fully apply herself with any continuity. She consulted specialists, underwent treatment and in March 2017 was put under the care of the Accident Compensation Corporation (ACC) and its post-concussion team. Throughout 2017 she was supported on full pay while attempting to resume a normal schedule of work commitments.

[12] In May 2017 a Return To Work plan (RTW) was drawn up by ACC in consultation with Dr Kim's direct supervisor, and with Dr Kim herself and her medical advisors. The plan and subsequent revisions of it provided for a graduated reintroduction to normal work between May and November 2017.

[13] Dr Kim considered that the RTW was not followed after its implementation, because the University pressed her to take on extra work while she was still suffering severe post-concussion side effects. She described a cycle of pressure and stress resulting from this. Post-concussion syndrome can be triggered by stress. Also, Dr Kim considered that while she was trying to fully recover her health, the University seemed sceptical and unsympathetic towards the limited ability to work normally she experienced.

[14] A revised RTW was drawn up at the end of August 2017, recognising that Dr Kim should not be asked to do any particular work outside her field of specialisation. But again she felt herself being pressured to do more than she could manage, and again she became stressed and anxious.

[15] In this regard Dr Kim in her evidence drew particular attention to a meeting she attended to discuss her workload, during which Mr Andrew Chrystall, Associate Head of the Retail School, in her hearing had said to Mr Jonathan Elms, the Retail School's Retail Programme Leader, that Dr Kim had "fucked him up" by pointing to her

employment agreement when declining proposals to do certain teaching work. In evidence she suggested that the use of profanity was an unreasonable response to her concerns and showed a lack of empathy by Mr Chrystall with her medical state.

[16] In December 2017, after she had become concerned about a revised RTW, and after twice requesting and being declined extended leave without pay, she notified the University of her resignation. Her last day under the employment agreement was in January 2018.

### **Personal grievance raised**

[17] A personal grievance was promptly raised on behalf of Dr Kim with her employer on 12 January 2018.

[18] Dr Kim wrote to Massey University in March 2018, making it clear she had not left her job of her own volition and rejecting the existence of any justification for her “dismissal,” as she termed her departure. Dr Kim advised that she wished to be reinstated and to recover all her losses.

[19] Through a combination of ACC payments topped up to 100%, normal pay, paid sick leave and paid annual leave, prior to her resignation Dr Kim lost no salary or pay in 2017, including Kiwisaver entitlements.

[20] Just before the expiry of the three-year statutory limitation period, in January 2021 she lodged her application in the Authority to have the matter investigated and resolved.

### **Constructive dismissal – the principles**

[21] At the core of this investigation is a claim by Dr Kim that her employment was terminated not by her, although it might seem as though she resigned, but by her employer the University. It is a claim of constructive dismissal.

[22] The Employment Court has recently reviewed the principles of constructive dismissal in *Ngawaka v Global Security Solutions Ltd*<sup>1</sup>, at paragraphs [7] to [10]. The situations where a constructive dismissal might occur include:

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<sup>1</sup> [2022] NZEmpC 40

- (a) Where the employee is given a choice of resigning or being dismissed.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to leave.
- (c) Where a breach of duty by the employer leads the employee to resign.

[23] Counsel for Dr Kim assessed the circumstances of her case as falling solely within the third situation. The Authority agrees the first and second are not shown to have been present in the circumstances.

[24] Counsel for Massey University submitted that there was no dismissal of any kind, constructive or otherwise. He submitted that the employer did not breach a duty owed to Dr Kim but that if it did, the breach was not of sufficient seriousness that a substantial risk of resignation was foreseeable.

[25] In principle, the conduct complained of by the employee as giving rise to a constructive dismissal must be serious enough to amount to a repudiation of the employment contract. As observed by the Court in *Ngawaka* (above) at [8], conduct that was just unreasonable is insufficient.

[26] The Court at [10] also restated the principle settled in earlier cases, that constructive dismissal may occur even if the employer was not seeking the resignation of the employee and had wanted to retain that person in employment.

[27] Counsel for Dr Kim submitted that for her personal grievance to be upheld the Authority needed to determine;

1. there was a breach of duty that was sufficiently serious in nature;
2. a reasonably minded person would conclude that the employer did not want to be bound by the contract; and

3. the employer can no longer be relied upon to perform the contract fully and consistently.

### **Work/workload**

[28] The Authority has considered whether a breach of duty by Massey University occurred in relation to the work or workload it wanted Dr Kim to handle in 2017 while she was struggling to recover her health.

[29] Dr Kim has complained that when she engaged with her employer about returning to full duties, the University was uncaring and ignored her medical condition and bullied her. She met and corresponded with several senior managers and professional heads of school, but that seems inevitable given the structure of the University and the responsibilities of different senior personnel within the institution. The communications including her own, all seem to show that the engagements were professional, courteous and often amicable. There is no intimation from these of the University managers behaving in an intimidatory or oppressive way towards Dr Kim in dealing with her.

[30] The Authority accepts the likelihood that Mr Chrystall did say to Mr Elms in the presence of Dr Kim, that she had “fucked him up”. This seems to have been an isolated instance of a crude expression used spontaneously to vent frustration or exasperation, but there is no evidence that Dr Kim was habitually spoken to or about in this way. The Authority considers she has wanted to make more of this than she felt at the time she heard it, which was several months before she resigned.

[31] The evidence shows that the University through the senior staff involved, weighed the work and workload proposals made at various times to Dr Kim against the medical advice and information it had received. This included the RTW which the proposals did not conflict with and which had been devised by ACC and Dr Kim’s own physicians.

[32] The University also agreed that her work should be confined to areas in which she had specialised. Furthermore, the proposals were modified when Dr Kim opposed them or found after taking them up that she could not perform them as intended. On occasions the University engaged contractors to complete work for her. She also retained her entitlement to take sick leave if she needed that.

[33] An email from Mr Stuart McKie, a senior HR Advisor of the University, sent on 6 October 2017 to a representative of the Dr Kim's union, the Tertiary Education Union (TEU), supports a finding that Massey University was acting carefully, considerately and objectively in its handling of Dr Kim's situation. It sets out in some detail the proposals made for Dr Kim to increase her workload as she gradually returned to full time work. Although it is clear from the message that the University became unhappy with Dr Kim's responses to suggestions or proposals as to how she could increase her outputs, the point is made by Mr McKie and is accepted by the Authority, that she was not instructed or directed against her will to be involved in any work. The University had simply sought approval from her as to any additional work she could take on as more time went by.

[34] Based on the evidence heard from all witnesses the Authority accepts the position was as portrayed by Mr McKie in his email to the TEU. His email predates Dr Kim's resignation by some weeks and is a reasonably contemporaneous account of the University's actions over several months in 2017. Allowing for the possibility that he wrote guardedly or strategically because he was writing to Dr Kim's union, Mr McKie's email is likely to be more accurate than witness statements made over 3 years after the crucial events.

[35] The Authority finds that in close consultation with Dr Kim, the University explored but did not step outside the bounds of the RTW in allocating work for her. When she showed she could not manage that allocation at any time, the University was willing to revise it to avoid her suffering any adverse consequences.

[36] Dr Kim and the senior University personnel she dealt with were lay people medically. From early in 2017 Dr Kim was under the care of ACC and its medical advisers as well as own physicians. There is no suggestion the University failed to have due regard to any of the medical advice it received about Dr Kim in proposing her work and workload.

[37] From early in 2017, when Dr Kim's work capacity began to diminish, the University engaged with her and her advisors fully, properly and empathetically, with a view to assisting her recovery and securing her return to full work. The University did not do this with an eye to terminating her employment. It was Dr Kim who brought

matters to a head by applying for leave without pay, while relying on the abundant medical advice and information the University had been given by her and by ACC.

[38] In these circumstances Dr Kim could reasonably be expected to have presented the best information available or obtainable. It was not for the University to decide what different or new medical advice she should seek. Counsel for the University put it plainly in saying that there was no onus or duty cast on her employer to drag information out of Dr Kim. It was obvious to the University that Dr Kim was receiving professional help and care and it could therefore leave it with her to advise of developments and provide relevant information that might influence the decision to be made on any leave without pay application.

[39] While the failure to obtain leave without pay triggered her resignation, it seems likely to the Authority that Dr Kim did not see a repudiation of her employment agreement in this but looking ahead instead saw a possibility that she would be dismissed if she did not recover. She worried that dismissal would tarnish her professional reputation.

[40] In this regard, Dr Kim gave the following evidence;

Becoming aware of the potential dismissal, and the increasing pressure from Massey University to move to full time work, is what lead to my resignation. I feared that if I was dismissed, I would not be able to find alternative employment because of the close-knit and small nature of New Zealand's academic community. As such, in fear, I resigned on 22 December 2017 .... before they could terminate my employment.

[41] Her resignation pre-empted that occurrence.

[42] It is accepted that unreasonable pressure to move to full time work while Dr Kim remained unwell, by itself could have founded a successful claim of constructive dismissal, but on the evidence the Authority finds there was no such pressure exerted by the University.

## **Requests for leave without pay**

[43] Dr Kim's notice of resignation given on 22 December 2017, followed almost immediately after the University declined to change an earlier decision it had made not to grant her leave without pay.

[44] On 19 September 2017 she raised her interest in such leave and asked the University how she should go about applying for it. On 12 October she wrote asking for several months leave without pay. Her doctor supported her by confirming that Dr Kim was happy to have the leave, as she wanted "to take a rest – to take time off – to heal". Her doctor recommended the University and ACC should co-operate to help achieve this.

[45] The University wrote to Dr Kim on 19 October 2017 declining this leave request. Professor Stephen Croucher, Head of the Marketing School, in his letter referred to medical advice the University had received that Dr Kim was fit to work at least 30 hours a week, with a gradual increase in hours until full time work was resumed. He said he did not regard leave without pay as necessary for the three to six months Dr Kim had sought. He also expressed reservations that if she was granted the leave, she might not consider herself fit enough to return at the end of it.

[46] Further in his letter, Professor Croucher did not regard Dr Kim as having been pressured to do anything unreasonable under the RTW plan that had been prepared for her in conjunction with ACC. He offered to have any stressors experienced by her investigated if she made the details known. He said;

In the meantime, you have been deemed fit to work and are required to work up to the limits defined in the medical certificate and fulfil reasonable work expectations.

[47] Professor Croucher emphasised the need for her to return fulltime within a few weeks, and he warned that if Dr Kim was unable to do so and resume performance of full duties, he would give consideration to the sick leave provisions of her employment agreement including, "an assessment of your ongoing employment."

[48] Clause 7.5.3 of the employment agreement mentioned by Professor Croucher, provided a number of responses available to Massey University in the event of Dr Kim remaining absent from her work for a long period due to illness or injury. Those responses included retirement on medical grounds, taking extended leave on reduced pay or no pay at all, and termination of employment.

[49] Dr Kim saw from this advice a looming prospect of dismissal as a possible outcome if she did not return to work on full duties reasonably quickly.

[50] Dr Kim then wrote to Professor Stephen Kelly, Pro Vice Chancellor of Massey Business School, again requesting leave without pay, this time for one year. She wrote compellingly of her reasons for viewing leave without pay as desirable, and of the value the University would have from her being able to continue as a Senior Lecturer once she was fully recovered. She promised she would give notice of resignation three months in advance if during the leave she found herself too unwell to return.

[51] Before he wrote back, Professor Kelly met Dr Kim and discussed her request. During that meeting Dr Kim said she would have to resign if the leave was declined again and she was forced to work full time while remaining unwell.

[52] Professor Kelly wrote back to Dr Kim on 29 November, noting a lack of specific medical advice supporting her request for leave without pay, and adding;

.... you have been deemed fit to resume full duties from 6 November by those parties involved in the return to work plan.

[53] With reference to her saying she would resign if forced to work, Professor Kelly referred to the University's aim as being to secure a return to full duties by Dr Kim rather than secure her resignation.

[54] Dr Kim told the Authority she viewed Professor Kelly's written response as an attempt to pressure her into resigning. She said the University had been encouraged to do this by her announcement that she would leave if she was required to go back to work. She claimed in effect that Professor Kelly had exploited an opportunity to receive her resignation and consequently avoid having to dismiss her.

[55] As submitted for Massey University, it is overly simplistic to view a leave without pay application as just a request for time off: the employee's job must be kept

open during the leave, possibly in times of rapidly changing operational circumstances affecting courses to be offered, student numbers and funding, and such leave, particularly in Dr Kim's case, also carried with it the uncertainty that the employee may not want to return, or be able to, at the end of the period.

[56] The Authority does not agree that the University was wrong to take account of teaching numbers, workloads and planning requirements, while trying to achieve some measure of certainty regarding the future operation of the school. In the applicable leave policy 'Operational needs' was expressly a factor to be weighed by the University in considering any application for leave without pay. It was a balancing exercise and there was no presumption that an application is to be granted unless good reason has been shown not to.

[57] The rejection of the leave without pay application did not mean Dr Kim was left without means to address her illness in the event her condition worsened or there were adverse medical developments while she was trying to fully recover. Sick leave was intended for that purpose and remained available to Dr Kim when needed.

#### **Discharge of duty of good faith**

[58] The University was required to act fairly and reasonably towards Dr Kim in considering her request for leave without pay. The duty of good faith in s 4(1A) of the ER Act requires an employer to be active and constructive, and responsive and communicative.

[59] In considering whether the University discharged its general duty of good faith, it is relevant that the University had not proposed to take any step towards ending Dr Kim's employment. At most, it had alluded to an option it had under clause 7.5.3 of the employment agreement to act if Dr Kim was unable to return to work. The RTW plan the University had been given, confirmed a return to work from 6 November 2017 or close to that date.

[60] The University had no reason to start planning for or even thinking about dismissal as being a desirable or preferable way to resolve the situation. Not a word has been said in this case against Dr Kim as being anyone other than a well performed senior lecturer and employee. But for her accident it is probable she would have

continued to be regarded and treated as a valuable member of the teaching staff of Massey University.

[61] It is relevant that even after she resigned Professor Croucher wrote to her on 4 January 2018 expressing his, .... *strong preference that you would return to resume your full duties*: ..., and he offered to discuss her resignation with Dr Kim. The offer was not taken up.

[62] The Authority accepts that at the time it considered and declined the leave without pay requests, the University did not want to end Dr Kim's employment and had not planned to bring that about. Also, the University did not want Dr Kim to end her employment, although it could not prevent her from resigning if she chose to.

### **The initiative to seek and obtain medical advice**

[63] It is evident from the letters, emails and written communications provided to the Authority that Massey University looked to Dr Kim to provide relevant medical advice as to her condition and any change in that. It did not regard itself as obliged to ask her to obtain information or advice before deciding whether to grant leave without pay.

[64] Professor Croucher in a letter of 16 January 2018, written to Dr Kim's then legal advisor following her resignation notified on 22 December 2017, observed that if her decision to resign had been informed by any medical advice that she was incapable of working full time, that advice had not been provided to the University. He said if such advice had been provided it would have been taken into account.

[65] The responsibilities the University had towards Dr Kim and the seeking and disclosure of medical advice regarding her leave without pay request, were viewed by Professor Croucher in his 16 January 2018 letter, to be as follows;

Dr Kim had the opportunity at least from October when the discussion on leave without pay was raised, to seek a full medical assessment and prognosis from her existing medical advisors, and indeed to seek a second opinion, however she did not. It is not unreasonable for the University to make decisions on the basis of information available at the time, nor is it unreasonable to decline your request at the late point of 14 December to postpone Dr Kim's further return, with a corresponding indefinite disruption to the School.

[66] It is also relevant that Dr Kim had been under the care of ACC and its medical advisers. It was therefore reasonable for the University to look to Dr Kim to obtain and disclose relevant medical information, particularly if there was any significant change in her condition. There is no reason to think that new information or advice would have been ignored or disregarded if provided to the University.

[67] The Authority finds in the circumstances that it was reasonable and natural for the University to expect Dr Kim, with the resources she had available from ACC and her own personal physicians, to decide what further medical advice she should seek and to offer such advice for the University to consider.

[68] This is not a case such as *Lal v The Warehouse Ltd*<sup>2</sup> where the Employment Court considered the circumstances in which the employer may be required to actively seek and consider relevant medical information. In that case the employer had moved to terminate employment as a justifiable response to the employee's prolonged absence on medical rounds. In the instant case the University had not threatened to end Dr Kim's employment, although it had identified a term of the employment agreement under which termination could occur if the clause was invoked.

[69] By simply referring to clause 7.5.3 of the employment agreement, the University had not implied it intended to dismiss Dr Kim. The only implication in that reference was that a return to full work performance was not a matter the University would leave unresolved indefinitely, and that if no resolution seemed achievable in a reasonable timeframe, Massey University was permitted under the employment agreement to explore other alternatives, including termination of employment, medical retirement and leave with or without pay.

[70] The Court in *Lal* (above) also observed, at [36], that an employee should not be passive in engaging with attempts to facilitate a return to work. The same observation may be made of attempts to obtain extensive leave without pay. The University could expect that Dr Kim would be active in updating her medical advice where necessary, and keeping it informed of new or changed advice.

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<sup>2</sup> [2017] NZEmpC 66

## **Post resignation diagnosis**

[71] On 19 December 2017, Dr Kim's doctor wrote in a 'to whom it may concern' note that she had not returned to her pre-injury level of functioning, and this had led to anxiety and conflict in the workplace. He advised that he had referred Dr Kim to a neurologist for assessment. This advice was given three days before Dr Kim wrote her resignation.

[72] Dr Kim's neurologist diagnosed that she lacked capacity to work and would need prescribed treatment to recover from dizziness related symptoms. This diagnosis was given in early 2018, after she had given her resignation.

[73] The Authority considers Dr Kim acted hastily in resigning. She was not forced to do so by any breach of duty, and certainly not by any *serious* breach of duty. From all the evidence in this investigation it seems likely that if Dr Kim instead of resigning had asked the University for time to consult the neurologist or other specialist and resubmit a leave without pay application on the strength of the diagnosis obtained from that consultation, her request would have been granted. Apart from a single instance of Mr Chrystall's indelicate remark, the University had already shown considerable forbearance in its engagement with Dr Kim over her situation. There is no reason to think it would not have maintained that attitude.

[74] On 19 December, perhaps while not yet aware of the doctor's note of the same date, Professor Kelly wrote to Dr Kim's legal representative advising that her renewed request for leave without pay was not approved. He noted that the University had received no opinion from her doctor or a specialist to say that she was medically unfit for work. He also noted that Dr Kim's medical advisors had played an active role in working with ACC, an occupational therapist, the University and Dr Kim herself, for a phased return to fulltime work over some months. He said that the University would review the situation if it received advice that she was no longer able to resume full time work as had been planned.

[75] Professor Kelly's advice was communicated to Dr Kim who, if she wished, could have confirmed that she had very recently been referred to a neurologist and was awaiting a diagnosis. She could have asked the University to await until that was given but instead, she resigned.

[76] On 25 January 2018, Dr Kim's then legal representative said in an email to Mr McKie that the reason she had resigned was because the University had refused to give her leave without pay as requested by her.

[77] The Authority accepts the reason for the resignation was linear. Without being able to have the leave she wanted, Dr Kim would have to continue trying to conform to the RTW, all the time worrying that she would not be able to. The University did not receive any medical advice addressed to that situation, but it had a RTW that had been devised by ACC and Dr Kim's medical advisors, with input from Dr Kim herself. The University was not qualified to simply dismiss the RTW and modify it in conformity with Dr Kim's own assessment of her health and ability to resume normal work without supporting specialist or professional advice.

[78] Leave without pay is discretionary and in the circumstances the Authority finds that the University exercised its discretion fairly and in good faith towards Dr Kim.

#### **Dr Kim does not have a personal grievance**

[79] For the above reasons the Authority finds that Massey University did not breach any duty it owed to Dr Kim in her employment, whether in relation to the assignment of her workload from time to time during 2017, or in considering and responding to her requests for leave without pay. Viewing the circumstances objectively, the Authority is not able to conclude that there was any breach of duty, and certainly not a breach that amounted to repudiatory behaviour by Massey University.

[80] It follows that there was no breach of duty of such seriousness that the University should have foreseen Dr Kim would resign rather than put up with the situation. It further follows that Dr Kim was not dismissed from her employment. She freely chose to resign, albeit reluctantly.

[81] Accordingly, the Authority determines that Dr Kim does not have a personal grievance, whether of unjustified dismissal or any other kind.

## **Costs**

[82] Costs are reserved. If the parties cannot agree on how this question is to be disposed of, application in writing may be made by Massey University to the Authority within 14 days of the date of this determination. Any reply from Dr Kim is to be made within a further 14 days.

[83] Counsel will be aware that a notional daily tariff is often applied by the Authority in fixing costs. Currently the amount is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. That tariff may be adjusted upwards or downwards, depending on the circumstances.

Alastair Dumbleton  
Member of the Employment Relations Authority