

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 377
3123734

BETWEEN	BOMI YOON Applicant
AND	MGK HOMES LIMITED First Respondent
AND	MINGON KANG Second Respondent

Member of Authority: Sarah Blick

Representatives: Seungmin Kang, counsel for the applicant
Mark Beech, counsel for the respondents

Investigation Meeting: 27 April 2022 at Tauranga

Submissions received: 18 May 2022 from the applicant
7 June 2022 from the respondents

Determination: 9 August 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant, Bomi Yoon, worked for the respondent, MGK Homes Limited (MGK) as an office manager. Ms Yoon says MGK unjustifiably dismissed her and claims \$20,000 in compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). She also seeks reimbursement of 18 weeks lost wages and reimbursement of fees she paid to her immigration lawyer and associated costs.

[2] Ms Yoon says MGK breached her employment agreement by dismissing her without cause, and that Mr Kang, MGK's director, aided that breach. She seeks

penalties against the respondents in relation to that alleged breach, and for any penalties ordered to be partially payable to her. Ms Yoon also says MGK failed to keep wages and time and holiday and leave records, or alternatively failed to produce them when requested. Ms Yoon sought penalties for these record-keeping breaches in her statement of problem, but raised the failure to provide the records only as a provision of relevant information issue in an amended statement of problem. Following the investigation meeting, she indicated penalties were still sought in relation to that matter.

[3] The respondents say Ms Yoon did not raise her personal grievance within the 90-day limitation period for raising a grievance. They say in any event that Ms Yoon was not dismissed - rather her employment was terminated by mutual agreement. The respondents further say Ms Yoon has failed to mitigate her losses.

[4] In relation to Ms Yoon's penalty claims, the respondents say the established process in the employment agreement was not required to be followed because there was a mutually agreed end to the employment. The respondents say there is no basis to impose penalties in this instance, and that they are discretionary in nature. MGK says it did not fail to keep records as it operated under the reasonable assumption Ms Yoon was attending to that aspect of office administration as part of her role.

What has the Authority's process been?

[5] Both the preliminary issue of whether Ms Yoon raised her personal grievance within 90-days and the substantive personal grievance were heard together at the investigation meeting.

[6] Ms Yoon and Mr Kang provided witness statements and two common bundles. At the beginning of the investigation meeting, counsel for the respondents provided a number of text messages between an MGK manager and Ms Yoon. These were admitted as evidence without objection from Ms Yoon.

[7] A Korean-speaking interpreter was unfortunately unavailable to attend the investigation meeting in-person in Tauranga. However, the Authority made arrangements for one to attend via audio visual link (Zoom). Unfortunately the interpreter was unable to connect via Zoom at the commencement of the investigation meeting. The Authority then arranged for the interpreter to assist via telephone. Due to issues with that interpretation, a proposal was made to use Mr John Park as an

interpreter, who was present in person as Mr Kang's support person. Ms Yoon consented to Mr Park being used as an interpreter. While unusual, the Authority proceeded on the basis no prejudice would arise, as Ms Yoon's counsel is fluent in the English and Korean languages, and was in a position to raise any issues or objections regarding the interpretation of any evidence given. Mr Park took an interpreter's affirmation and the investigation meeting resumed. Mr Park's services were then used as and when required.

[8] Counsel for Ms Yoon cross-examined Mr Kang about the genesis of Mr Park's employment with another company of which Mr Kang is the director and shareholder, Astoria Development Limited (ADL) and its relevance to Ms Yoon's employment ending. In light of that unexpected development, Mr Park gave some evidence about his employment with ADL and the nature of his duties.

[9] Each witness answered questions under affirmation from the Authority and counsel. Following the investigation meeting, counsel filed helpful written closing submissions.

[10] The evidence has been carefully evaluated and consideration has been given to how reasonable, plausible and probable the evidence is. Where the evidence between witnesses is not consistent I have made findings based on the balance of probabilities as to which version is more likely than not. I have been assisted in my evaluation and consideration of the evidence by taking into account the documents provided by the parties.

[11] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[12] The following are the issues for investigation and determination:

- a. What was the effective end date of Ms Yoon's employment?
- b. If Ms Yoon has not raised a personal grievance within 90-days, should leave be granted for her to do so?
- c. Was Ms Yoon dismissed from her employment?

- d. If so, was the dismissal unjustified?
- e. If it was unjustified, is Ms Yoon entitled to a consideration of the remedies sought including:
 - i. Lost wages pursuant to section 123(1)(b) of the Act?
 - ii. Compensation pursuant to section 123(1)(c)(i) of the Act?
 - iii. Special damages for fees incurred in seeking visa variation?
- f. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Yoon which contributed to the circumstances which gave rise to her grievance?
- g. Has MGK breached the relevant clause of the employment agreement by dismissing Ms Yoon “without cause”?
- h. If so, did Mr Kang aid and abet that breach?
- i. Has MGK fail to keep wages and time and holiday and leave records, or alternatively failed to produce them when requested?
- j. If any breach or failure is made out, is a penalty warranted, and if so should any part thereof be awarded to Ms Yoon?
- k. Is either party entitled to an award of costs?

What happened?

[13] MGK is a registered company and Mr Kang is its sole director and shareholder.

[14] Ms Yoon is a South Korean national. In about July 2019 she arrived in New Zealand and initially held a visitor visa. She says her immigration agency introduced her to MGK. She had an interview with Mr Kang who agreed to offer her employment as an office manager. She says he agreed to support her application for a work visa.

[15] On about 4 October 2019, the parties signed an employment agreement. The agreement stated that two weeks’ written notice was to be provided on termination of employment. Ms Yoon understands MGK completed an employer supplementary form in support of her employment.

[16] On 16 October 2019 Ms Yoon was granted an Essential Skills work visa valid for three years. Her visa provided she may only work in the Bay of Plenty for MGK as an office manager.

[17] Ms Yoon relocated from Auckland to Tauranga to take up the role, and in about early November 2019 started working for MGK.

[18] Ms Yoon says she carried out work for both MGK and ADL as part of her role, but was paid by MGK. Ms Yoon says another employee she worked with (who I will refer to as Mr L) was employed by ADL. Ms Yoon says MGK and ADL used the same office, and they had the same “boss”, Mr Kang.

[19] In April 2020, during New Zealand’s COVID-19 lockdown, Ms Yoon continued her tasks working from home while Mr Kang, her manager Young Soo Lee (Mr Lee) and Mr L worked at the office.

[20] One of Ms Yoon’s tasks was making monthly Excel spreadsheets recording the MGK’s contractors and their bank account details, and paying them. She says before she was employed, Mr L had manually typed all company names, their bank account details and payments in the Excel spreadsheet, and then gone onto the internet banking system to manually type the same information again to make the payments every month. She believed that system was inefficient and was told numerous errors had been made using it. Ms Yoon says she changed the system by putting all information in Xero (which the company was already paying for but not using) and integrating it onto the internet banking system to save time and reduce mistakes. She says that the Excel spreadsheet was then only for checking costs to be paid that month (not for the bank account details).

[21] Ms Yoon says on one day in April 2022, while she was still working from home, she duplicated the previous month’s spreadsheet and then changed the names of the contractors. She says she had not yet changed the contractor’s bank account details because the right bank account details were already saved in the internet banking system and thought she would make the payments as usual. She says for some reason someone else then made the payments without telling her first, and payments were made to the wrong accounts. Ms Yoon assumes it was Mr L who processed the payments, as he had done this task in the past.

[22] Translated email correspondence dated 15 April 2020 from Ms Yoon to Mr Lee indicates that on that date, Ms Yoon attached the relevant spreadsheet. Mr Kang says that a crucial part of Ms Yoon’s role was to ensure the spreadsheet was accurately

updated before payments were made. He says Ms Yoon sent the spreadsheet without updating the bank account details, resulting in the incorrect payments being made. Email correspondence dated 22 April 2022 shows Ms Yoon saying she was sorry and that she was meant to check it again when she updated the spreadsheet and had not changed what had previously been done. In an email in response, Mr Lee outlined what had to be done to remedy the issue regarding payments and that he hoped she organised it and made no mistakes in future.

[23] Mr Kang says that while this caused immense stress and additional administrative time to correct, there were no consequences for Ms Yoon. It is common ground she did not face any disciplinary action at the time.

[24] In his witness statement Mr Kang referred to Ms Yoon making other mistakes during her employment “including but not limited to, paying herself incorrectly”. He says despite not being entitled to it, Ms Yoon also included herself in KiwiSaver payments. In response Ms Yoon says someone else outside MGK advised her that KiwiSaver was not supposed to be deducted for a temporary visa holder (which she was) so these payments were cancelled during her employment. Mr Kang said he only found out about that after Ms Yoon left employment.

[25] Ms Yoon says on 12 May 2020 Mr Kang telephoned her and suggested they have a meeting. She says this invitation came as a surprise because New Zealand was still in Level 3 lockdown, and she had not been at the office since late March 2020. Ms Yoon says she was not given any information as to what the meeting was about or whether she could have legal representation. The meeting was held at MGK’s office and Mr L was also present. Ms Yoon says Mr Kang advised her and Mr L that he had employed other experienced employees and they were therefore no longer needed. Ms Yoon says Mr Kang said that the best he could do for her would be letting her work from home during her notice period, and that she should discuss that further with Mr Lee. Under cross-examination, Ms Yoon said she could not remember if she and Mr Kang spoke about her visa during their meeting.

[26] After the meeting, Ms Yoon says she made a record of what was discussed at the meeting by sending an email to herself. A copy of that email in the Korean language along with a certified English translation was filed with the Authority. I accept the

email was sent on the day of the meeting. The translated email outlines what can be described as a raw account of the 12 May 2020 meeting:

He said that he already employed specialist. And he asked me what I was going to do after I lost my job. I answered that I had nothing to say since the situation already came to an end and everything had been decided. He told a lie that the specialists whom he employed were paid below my wage. And he said that there was no place as they employed someone else at the office. He said that the person would work from the next week. But the person did not proceed with a visa. (illegal?)

He blamed all issue on me unconditionally and said that it was because of my lack of ability. I explained that there was certainly an institutional problem. I had to take all responsibilities in a situation where the problem repeated itself. He did not intend to hear the explanation. (my explanation) He did not say anything at all. He said that he came here as he had something to say. (his story) He asked me how much time I needed due to visa issue.

I thought that I did not say I'd quit but I was forced. He said that he did not do anything wrong. And he asked if he swore or made an unreasonable demand. His question was ridiculous and outrageous. (when he fire me) Of course, they were not supposed to happen.

I thought that he made me do something that constituted sexual discrimination, such as requesting lunch box, dish-washing and personal errand.

As [Mr L] said that he would quit his job 4 weeks later, he asked me to work until then. I said that I could not consider it in the situation of receiving four weeks' notice. As [Mr L] left the office, he spoke ill of [Mr L] by saying that he was not responsible even though he had been employed for a long time. I thought that he expelled person who worked hard for him for a long time and a lot of the staff who had been through this would institute a lawsuit.

He told me not to feel bad. I thought that I could not communicate with them and did not react emotionally. So I did not say anything and got out. He said that he was considerate of the time needed as much as he could (?). And he said that he allowed me to work from home if I could not come to work because of interview or other schedule. I plan to request for working from home for the remaining period. He asked me to let him know after thinking about it and talking with the manager.¹

[27] Ms Yoon says that there was no other option but to accept MGK's repudiation of her employment, so she discussed going on paid leave with Mr Lee after the meeting. They agreed she would go on paid leave until the end of June 2020.

[28] In his witness statement Mr Kang said he requested both Mr L and Ms Yoon come to his office on 12 May 2020 to discuss the payment error and to discuss how they can ensure it does not occur again. However, when questioned by the Authority about the genesis of the meeting, Mr Kang said he did not call Ms Yoon in, and that he assumed Ms Yoon and Mr L just came to apologise for the payment error. Under cross-examination, Mr Kang said he was told to come to the office and wait. When asked about why his witness statement appeared inaccurate on who requested a meeting, Mr

¹ While the email makes reference to sexual discrimination, Ms Yoon did not pursue that claim as a personal grievance in the Authority.

Kang said he was busy and did not remember too much detail at that time and was unsure if Ms Yoon and Mr L were asked to come to a meeting. Mr Kang also stated his belief that a person who made a mistake should come to apologise, but that it took Ms Yoon and Mr L a month to do so.

[29] Mr Kang says he discussed the spreadsheet error with Ms Yoon at the meeting, but the meeting was not disciplinary in nature. He says his intention was to discuss the importance of being accurate. Mr Kang says he was not angry during the meeting and did not blame Ms Yoon for the error, but he says he did “scold” her and asked why this was happening and what she was going to do about it. Mr Kang denies telling Ms Yoon and Mr L that he had employed other experienced employees and that they were no longer needed.

[30] In his witness statement, Mr Kang said at the end of the discussion, Ms Yoon gave notice. His statement also says the employment relationship came to an end by mutual agreement. When questioned about the meeting, Mr Kang advised Mr L said he will quit and go to Australia, and that Ms Yoon did not say a word. When asked to comment on Ms Yoon’s claim she did not offer her resignation, Mr Kang said she did not give it to him but gave it to Mr Lee soon after the meeting.

[31] Mr Kang says although the notice period of two months was much longer than what was required under the employment agreement, he believed it was necessary for Ms Yoon to find another job and to support her visa. Mr Kang says he intended to notify Immigration New Zealand (INZ) of her resignation on 12 May 2020, the day notice was given, but decided to wait until the notice period was over. He gave evidence he did not contact INZ at any point. Mr Kang says after the meeting he had no further contact with Ms Yoon – after that it was all between Mr Lee and Ms Yoon.

[32] It is common ground that Ms Yoon did not come into work during the notice period but was paid her usual wages. She says she continued to perform some tasks.

[33] On 28 or 29 June 2020, Ms Yoon discussed with Mr Lee over the phone about extending her leave. Ms Yoon says Mr Lee agreed she could take unpaid extended leave until the end of August 2020. Ms Yoon said they discussed her visa and that if her employment ended it would cause a problem with it. After the discussion Ms Yoon sent an email to Mr Lee requesting leave from July 2020, and Mr Lee responded saying

he would process it. While the email correspondence does not refer to the agreed leave extending to the end of August 2020, Mr Kang acknowledged in evidence that leave was granted to that date.

[34] Ms Yoon received her final holiday pay on 9 July 2020, which she said was a surprise to her. Despite this, text messages between Ms Yoon and Mr Lee show Ms Yoon requested her final pay between 2 to 9 July 2020.

[35] Ms Yoon says she did not perform any work during July and August 2020. Ms Yoon said she could not remember when she returned her laptop to MGK. During cross-examination, Ms Yoon acknowledged that her request to extend her leave on an unpaid basis was to protect her position in relation to her work visa.

[36] Ms Yoon says she searched online to see whether MGK had listed job advertisements to hire any “experienced employees” and if so, what they looked like. She found two advertisements for ADL which she says is MGK’s “sister company”. Because Ms Yoon had been asked to work on ADL’s administrative tasks as part of her role with MGK, she believes that the advertisements were for roles intended to replace her. The original advertisements were in the Korean language and have been officially translated into English.

[37] The first ADL advertisement is dated 20 April 2020. Ms Yoon says it was posted on NZKoreapost.com, a popular Korean online community, for three different positions based in Tauranga, including a junior administrator position.

[38] The second ADL advertisement is dated 8 May 2020 and was posted on Seek.co.nz for a full-time Office Manager role based in Tauranga. The advertisement says applicants would ideally have experience in a similar position and a bachelor degree in business, with experience and/or a bachelor degree in accounting would be a strong advantage. Role responsibilities are described as including:

- Undertaking general office support tasks including purchase of office supplies and staff amenities.
- Managing records and accounts of the company and preparing financial statements for management and shareholders.
- Examining operating costs and expenditure to report to the directors.
- Ensuring health and safety compliance.
- Answering the phone queries.
- Liaising with service providers, eg. Internet and telephone.
- Supporting directors and other senior staff with their daily tasks when needed.

- Assisting construction manager with staff allocating and performance review.
- Other ad-hoc tasks.

[39] Mr Kang says that ADL is a different company from MGK with a completely different objective and purpose. He says ADL buys property and organises funding for building residential homes, and MGK is a building construction company that has responsibility for doing the builds. He says ADL is not MGK's "sister company" as described by Ms Yoon. It is common ground that the two companies shared their office space, and that Mr L had been ADL's only employee. Mr Kang said a person named Cindy was externally hired as a contractor to process ADL's payroll, and that she was engaged to help Ms Yoon do the company accounting as Ms Yoon could not do it despite saying she could when hired. Mr Kang also says that due to Ms Yoon's level of English there was no one she could work with.

[40] Ms Kang further says no one was hired to replace Ms Yoon. The first job advertised was not to replace Ms Yoon's position but was for a junior Quantity Surveyor. Mr Kang says the advertisement was responded to, and a Quantity Surveyor was hired in May 2020. Mr Kang says the advertisement was placed prior to the meeting on 12 May 2020. He says any other employees hired during this period were for roles entirely separate from Ms Yoon's. He says Ms Yoon locating job advertisements for ADL at the time of her alleged dismissal is therefore not relevant.

[41] The employment agreement filed with the Authority relating to Ms Yoon's employment does not contain a job description. It was not clear from the parties' evidence why this was the case. In his witness statement Mr Kang referred to a job advertisement as Ms Yoon's "job description", which was filed as part of the common bundle. Mr Kang says this document outlines Ms Yoon's duties. Apart from in two respects, her "job description" exactly mirrors the role responsibilities listed in the 8 May 2020 ADL advertisement. That ADL advertisement contains only two additional responsibilities - preparing financial statements for management and shareholders and examining operating costs and expenditure to report to the directors. When asked about the 8 May 2020 advertisement at the investigation meeting, Mr Kang said ADL needed someone who knew about funding and accounting, being a person who had actually studied it. When asked about how the responsibilities closely matched what Ms Yoon was doing, Mr Kang described how Ms Yoon "could not do anything", and was not good enough to be an office manager. He said prior to employing her, Ms Yoon said

she could do “everything”. He then took the opportunity to say he never fired her, and wanted to continue her employment, and if he wanted to fire her he would have done it in her first three months, during her probationary period.

[42] Mr Kang also gave oral evidence that while Mr L had been employed by ADL, in about May 2020 he transferred to MGK to complete a project and because he did not have the background for the ADL role advertised. Mr Kang says Mr L did not resign from ADL until about August 2021.

[43] Mr Kang says that after Ms Yoon left employment, he carried out her duties.

[44] During cross-examination, Mr Kang was asked about email correspondence dated 8 May 2020 from a licensed immigration adviser (LIA) to MGK’s email address, being a few days prior to the 12 May 2020 meeting. Mr Kang says the LIA named in the correspondence is his brother in law. The email correspondence identified “Keetae/John Park – Job Advertisement” in its subject line. The LIA’s email was forwarded to Ms Yoon’s email address on the same date, telling Ms Yoon to post “this advertisement on TradeMe”. The MGK email address was the same address used by Mr Lee in April 2020 to address the Excel spreadsheet issue with Ms Yoon. Ms Yoon responded on 8 May 2020 stating the advertisement had been posted and included a web link to the listing. While the Authority cannot now access the listing, the address is to “...jobs/office-administration/office-management/listing...”.

[45] As a result of this evidence, the Authority heard evidence from Mr Park regarding the advertisement. Mr Park confirmed the LIA had acted for him in his immigration matters, that he applied for a visa in New Zealand in about June or July 2020 and that he commenced employment with ADL in about August 2020. Mr Park says he studied accounting in Australia and had worked as an accountant prior to his employment with ADL. Mr Kang’s evidence was that the TradeMe advertisement was not filled until August 2020. I find the advertisements listed on Seek and TradeMe for an “Office Manager” dated 8 May 2020 must relate to the same ADL role. Mr Park says that he carries out a number of the responsibilities outlined in the Seek advertisement dated 8 May 2020.

[46] Mr Kang says he provides all office staff with a mobile plan. He says Ms Yoon removed herself from her plan on 12 June 2020, which was consistent with her

resignation. Ms Yoon says she wanted to change her plan because it was not working well and thought Mr Kang would be happy with that because he wanted her to stop working for MGK. She says at that point she had already been told of her dismissal so saw no problem with removing herself from the plan.

[47] Mr Kang says when Ms Yoon left her employment, she unilaterally disconnected MGK's email domain without handing it over to a colleague, as required by her employment agreement. He says MGK has been unable to access emails and all its data has been lost, including evidence to further support MGK's position in this matter.

[48] I note here that Ms Yoon and Mr Lee each used email addresses ending in "@astoria.nz". Mr Kang says in February 2020 Ms Yoon set up MGK's email for the employees, but she created the addresses under ADL's name. Email correspondence appears to show Ms Yoon did set up the email domain and addresses at that time.

What was the effective end date of Ms Yoon's employment?

[49] Ms Yoon says she remained employed, initially on paid garden leave and then on unpaid garden leave, until 31 August 2020. Ms Yoon says she remained bound by her employment agreement with MGK during that time and could not raise a personal grievance for unjustifiable dismissal after 31 August 2020. She says while MGK had repudiated the agreement, it had not yet properly terminated it. She says the dismissal arising from the meeting on 12 May 2020 was finally perfected on 1 September 2020, being the day after her extended leave ended. Counsel for Ms Yoon submits that the 90-day limitation period should run from 1 September 2020, and the personal grievance was therefore raised in time on 1 October 2020.

[50] Ms Yoon says MGK's payment of her final holiday pay on 9 July 2020 and her ending of work mobile plan does not override the fact her employment continued beyond 12 May 2020, with MGK's agreement.

[51] Ms Yoon relies on *Underhill v Coca-Cola Amatil (NZ) Ltd*², which involved an express written termination clause. In that case, notice of termination was given to the plaintiffs in a face-to-face meeting, but written notice was found not to be provided

² *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117; [2017] ERNZ 693 at [57]-[60].

until several weeks later. Dismissal was only “perfected” and occurred on the date written notice was provided. The limitation period therefore started from the date the dismissal is perfected. In this matter, the employment agreement provided that unless otherwise set out in the agreement, either party could end employment by giving two weeks’ notice in writing. Neither party in this matter claim written notice of termination was provided by either party at any point.

[52] The respondents say Ms Yoon had actual or constructive knowledge on 12 May 2020 that she, in her own mind, had been wronged and was aware of any potential grievance. She knew that the employment relationship had come to an end on 12 May 2020, and the date of accrual of the cause of action began on 12 May 2020. The respondents say following the meeting, it was clear that both parties had no expectation that there was an ongoing relationship.

[53] Mr Kang says he believed he and Ms Yoon had parted ways on an amicable note and that he was assisting Ms Yoon with her visa requirements by accepting her requests to go and remain on both paid and unpaid garden leave. MGK says it did so in good faith and not to acquiesce giving Ms Yoon extra time to bring a grievance. Mr Kang further relies on the legal doctrine and defence of acquiescence and laches - that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the other party as a sort of “legal ambush”.

[54] While Mr Kang may feel frustrated about the situation now, there is no dispute MGK agreed to Ms Yoon taking extended periods of leave until 31 August 2020. It is well-settled that a dismissal occurs when employment actually ceases and not on the day when an employer gives notice that it will cease.³ The Employment Court has further held that a dismissal grievance cannot be raised during a notice period, and the limitation period accordingly starts at the end of the notice period given to the employee.⁴

[55] I accordingly find that Ms Yoon’s employment did not cease until 31 August 2020, when her extended leave ended. Accordingly, the first date Ms Yoon could have raised a dismissal grievance was on 1 September 2020. She raised her personal grievance on 1 October 2020, within the limitation period.

³ *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC).

⁴ See also *New Zealand Automobile Assoc Inc v McKay* [1996] 2 ERNZ 622 (EmpC).

[56] Alternatively, at the latest Ms Yoon's employment ceased on 8 or 9 July 2020. Her final payslip shows 2 July 2020 to 8 July 2020 as her pay period, and 9 July 2020 is recorded as the date she was paid for that pay period. Even based on this date, Ms Yoon raised her personal grievance within the limitation period.

[57] Given my finding that Ms Yoon raised her personal grievance within the limitation period, I do not need to consider whether to grant leave to raise the grievance after its expiry. I also do not need to consider whether MGK consented to a personal grievance being raised after the expiration of the limitation period.

Was Ms Yoon dismissed?

[58] The key question in this matter is whether MGK dismissed Ms Yoon or whether her employment ended by mutual agreement. The issue of mutual ending of employment has recently considered afresh by the Employment Court:

[16] There are a number of ways in which employment relationships can come to an end, ranging from a decision that is fully the employee's, to one that is fully the employer's. There are also cases where termination is foisted on the parties by external events or circumstance. The justification or otherwise for a termination is a separate issue. At one end of the spectrum are cases which may be categorised as (employer) dismissal; at the other end of the spectrum (employee) resignation. There is a shady area around the middle of the spectrum. The point of equilibrium (what has been referred to as mutual consent to terminate) sits at the epicentre. It goes without saying that terminations which occur in the shady area carry a degree of risk for both parties.⁵

[59] The respondents say on 12 May 2020 the parties held a frank discussion which naturally included a discussion about the spreadsheet error. They did not suggest a support person could be present because this was a normal business meeting. The respondents say it would be unfeasible, poor business practice and highly unusual for the spreadsheet error not to be addressed - a prudent employer needs to ensure processes are streamlined and errors are minimised. The respondents say concerns about the payment error unlikely came as a surprise to Ms Yoon. They say despite the spreadsheet error, Mr Kang had no intention of dismissing Ms Yoon at the meeting. They say the meeting did not commence with the intended purpose of dismissing Ms Yoon or Mr L. Mr Kang says Ms Yoon offered her resignation voluntarily and MGK accepted it. The respondents say Ms Yoon was not put under any pressure to resign and she did so on her own accord.

⁵ *Elish v Network Service Providers Ltd* [2021] NZEmpC 175.

[60] Having very carefully considered the parties' evidence about what occurred around the 12 May 2020 meeting, I prefer Ms Yoon's account. Ms Yoon's contemporaneous account of the meeting is contained in a detailed email sent to herself on the day of the meeting, which is overall consistent with her witness statement and oral evidence.

[61] I take into account Ms Yoon's employment agreement which provided for two weeks' notice in writing to end employment. MGK does not suggest that Ms Yoon gave notice in writing in accordance with the agreement at any point.

[62] I note Ms Yoon's ability to remain lawfully in New Zealand was reliant on her employment with MGK. She was only entitled to work for MGK at the time of the 12 May 2020 meeting. Her teenage daughter's ability to remain lawfully in New Zealand on a student visa was reliant on Ms Yoon's status as the principal visa holder. In those circumstances, it is unlikely Ms Yoon would offer her resignation without having secured alternative employment, or at least attempted to do so. Email correspondence from Ms Yoon shows she began her search for alternative employment by 20 May 2020, around a week after the meeting.

[63] Mr Kang's evidence about the meeting was not reliable or supported by contemporaneous documentary evidence. I note Mr Kang's oral evidence contradicted his witness statement on how the meeting came about. Additionally, while Mr Kang said in oral evidence that Ms Yoon gave notice of resignation shortly after the meeting to Mr Lee (which contradicted his witness statement) he also says the employment relationship came to an end by mutual agreement. It is not clear to the Authority how these two possibilities - resignation and mutual agreement - are compatible with each other.

[64] Mr Kang's evidence also showed that he was clearly unhappy with the way Ms Yoon had been performing in the role, citing the spreadsheet error and other alleged mistakes or matters he was not happy with. His evidence amply demonstrated he had some motivation to end Ms Yoon's employment at that point.

[65] Further, Mr Kang acknowledged he did not remember too much detail about that time. When asked by his counsel why that was, Mr Kang outlined that a major

construction issue had arisen resulting in a project being put on hold for several months. It appears this was a stressful time for Mr Kang and his focus likely lay elsewhere at the time Ms Yoon's employment ended.

[66] I accordingly find that Ms Yoon and Mr L were asked to attend the meeting on 12 May 2020, rather attending of their own volition. I find Mr Kang told Ms Yoon he had employed another employee and that she was therefore no longer needed. I also find Ms Yoon did not offer her resignation at or shortly following the meeting.

[67] I find the initiative for ending employment clearly came from Mr Kang, who was acting on behalf of MGK. Mr Kang acknowledges Ms Yoon was reticent during the meeting, which is consistent with her evidence of having not offered her resignation. His actions are consistent with him holding an intention to "replace" her with someone else, as there was no discussion about whether she might continue in employment at the meeting. Mr Kang could have adjourned the meeting and encouraged Ms Yoon to seek advice and support regarding the ending of her employment. He did not do that, and this could have minimised the risk of Mr Kang's actions being found to constitute a dismissal. In my view, his actions at the meeting constituted an unequivocal sending away on behalf of MGK. I accept that mutual agreement was subsequently reached as to the terms of Ms Yoon's departure – namely, that she would take periods of leave – but there was no mutual consent to terminate her employment. While it is concerning that the parties agreed to terms which allowed Ms Yoon to remain employed on unpaid extended leave only for the apparent purpose of avoiding immigration consequences, that is the deal they struck.

[68] Accordingly, I find Ms Yoon was dismissed from her employment.

Was the dismissal unjustified?

[69] Justification is to be assessed in accordance with the test in s 103A of the Act. This requires the Authority to objectively determine whether the MGK's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[70] While Ms Yoon may have had some responsibility for providing a spreadsheet containing incorrect information, which was then used by another staff member, MGK

did not undertake any investigation into the matter to ascertain what had actually occurred. Also, MGK did not address other alleged issues it had with Ms Yoon's performance in her role.

[71] Because of that, I find MGK failed to comply with any of the four minimum procedural fairness requirements set out in s 103A(3) of the Act to address the situation. Ms Yoon was told to come for a meeting on the same day, without any explanation as to what the meeting would be about and whether she could have a support person or representative. It did not sufficiently investigate its concerns in a timely manner before it dismissed Ms Yoon, in breach of s 103A(3)(a) of the Act, nor did it sufficiently raise its concerns with Ms Yoon before she was dismissed, in breach of s 103A(3)(b) of the Act. Ms Yoon was not given a reasonable opportunity to respond to MGK's concerns before she was dismissed, in breach of s 103A(c) of the Act. Finally, MGK did not genuinely provide Ms Yoon with a genuine opportunity to provide an explanation to its concerns, in breach of s 103A(3)(d) of the Act. I further note that an employer who denies dismissing an employee is unlikely to be able to establish justification for its dismissal, because it would not have taken any steps to have complied with any of the procedural fairness tests of the justification test in s 103A(3) in the Act. That is the case here.

[72] Section 103A(5) of the Act does not preclude the Authority from finding MGK's dismissal of Ms Yoon was unjustified solely because of minor process defects that did not result in her being treated unfairly. The process defects that occurred in this case were serious, fundamental and resulted in substantial unfairness to Ms Yoon.

[73] Having established that the way in which Ms Yoon's dismissal occurred was procedurally unjustified, I now consider whether MGK had good reasons, based on reasonable grounds, for dismissing Ms Yoon. I am not satisfied Ms Yoon's actions, if indeed she was responsible for the incorrect payments to contractors or there were other performance issues, could have justified summary dismissal.

[74] While I have already found Ms Yoon was unjustifiably dismissed, I must also address Ms Yoon's claim that she was replaced in her role. I find on the balance of probabilities that Ms Yoon did carry out some tasks for ADL as part of her role with MGK. While the two companies may have had different functions, they were clearly closely associated. They shared a common director in Mr Kang, resources and office

space. At the time, ADL only employed one employee, Mr L. The spreadsheet issue demonstrates well the fluidity between the two companies. Email correspondence provided by the respondents shows Ms Yoon emailed the spreadsheet to Mr Lee, and Mr L was copied into several of the communications. In one email, Mr Lee refers to how the three of them will work together regarding invoices and payments “from now on”. Further, Mr Kang dealt with Ms Yoon and Mr L as the people responsible for the spreadsheet error, as demonstrated by his invitation and presence at the 12 May 2020 meeting.

[75] I find that Ms Yoon was asked to place the 8 May 2020 advertisement for an ADL Office Manager on TradeMe, which she did. The advertised responsibilities of the office manager role mirrored Ms Yoon’s role with MGK, apart from two additional responsibilities - preparing financial statements for management and shareholders and examining operating costs and expenditure to report to the directors. It seems clear a new position within ADL was created and advertised which was substantially similar to Ms Yoon’s role. This appears to be in response to perceived deficiencies around Ms Yoon’s performance, and to have created a redundancy situation at the time. MGK wholly failed to undertake any process which might satisfy the good faith requirements of s 4(4) of the Act, and dismissal as a result would clearly have been unjustified. Because I have already found Ms Yoon’s dismissal was unjustified, the facts relating Ms Yoon’s replacement will instead be addressed as part of my consideration of remedies.

Is Ms Yoon entitled to a consideration of remedies?

[76] Ms Yoon has a personal grievance for unjustified dismissal and is entitled to consideration of remedies.

Lost wages pursuant to section 123(1)(b) of the Act

[77] Ms Yoon seeks reimbursement of 18 weeks’ lost wages of as a result of her dismissal, pursuant to s 123(1)(b) and s 128 of the Act.

[78] Ms Yoon says she found a new employer who agreed to support her in applying for work visa. She has filed an extract from her work visa application lodged on 16 September 2020 for a role as an Assistant Restaurant Manager. Ms Yoon says her

application was granted and she commenced employment on 3 November 2020. She says she remains in that employment.

[79] Ms Yoon says she did not have any income between 1 July and 3 November 2020 in which period she would have earned \$15,576.84 (gross) if she had not been dismissed.

[80] After reviewing the evidence of loss and Ms Yoon's significant number of attempts to secure alternative employment after her dismissal, the Authority is satisfied she did what she could to mitigate her losses and is entitled to an award of lost remuneration for a period of 18 weeks, amounting to \$15,576.84 (gross).

Special damages for fees incurred in seeking visa variation

[81] Ms Yoon held an Essential Skills work visa supported by MGK and her daughter held a Dependent Child student visa at the relevant times. I accept that had MGK not dismissed Ms Yoon, their visas would likely have remained valid during the period she was employed and they would not have needed to apply for new visas at the time they did. Because of the dismissal and because of the employer-specific condition, Ms Yoon says if she was to work for another employer, she needed to apply for a new work visa supported by the new employer.

[82] Ms Yoon instructed an immigration lawyer to apply for new visas, to whom she paid \$4,544.25. Ms Yoon provided evidence of the relevant invoice. I find it is appropriate to exercise the discretion I have under s 123(1)(b) of the Act as the sum identified was lost as a result of the grievance. I award Ms Yoon \$4,544.25 under this provision.

Compensation pursuant to section 123(1)(c)(i) of the Act

[83] Ms Yoon seeks \$20,000 compensation under s 123(1)(c)(i) of the Act. I accept Ms Yoon suffered a high degree of mental and financial distress as a result of the MGK's actions. The manner in which Ms Yoon was advised of her dismissal on 12 May 2020 was insensitive. Prior to this, she had been asked to post a job advertisement for a role I find was intended to replace her, given the roles involved duties she was performing. Ms Yoon was unable to find alternative employment for several months. She says she did not have any income to pay rent, and had to borrow money from family

in South Korea which humiliated her, and had to sell chattels to meet minimum expenses and her immigration lawyer's fees. She is a single parent, and says she and her teenage daughter had to start "couch-surf" at her friends' houses for a while. Ms Yoon says she became extremely distressed, worrying about her and her daughter's unstable visa status and life generally, which involved a sleep disorder and depression symptoms.

[84] The Authority is satisfied Ms Yoon has the experienced harm claimed, and having regard to the particular circumstances of this case other awards of compensation, I consider that an award of \$20,000 under section 123(1)(c)(i) is entirely appropriate. I accept Ms Yoon's submission that had MGK not alleviated the effects of the unjustified dismissal by agreeing Ms Yoon could take extended unpaid leave, the amount of compensation awarded under would likely have been higher.

Should any remedy awarded be reduced for contribution?

[85] Section 124 of the Act states that I must consider the extent to what, if any, Ms Yoon's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. Having carefully considered the evidence, no aspect of what Ms Yoon did or did not do was sufficiently blameworthy to require a reduction of the remedies awarded for her grievance. Accordingly, no reduction in remedies is required.

Has MGK breached the employment agreement by dismissing Ms Yoon without cause?

[86] Ms Yoon says MGK breached its employment agreement with her by dismissing her without cause. If a breach has occurred, this has been addressed by the remedies awarded for the personal grievance. No penalty is imposed on MGK under this head.

Has Mr Kang aided and abetted any breach of the employment agreement?

[87] Given my finding above in relation to MGK above, no penalty is imposed on Mr Kang.

Has MGK failed to keep wages and time and holiday and leave records, or alternatively failed to produce them when requested?

[88] Ms Yoon says MGK failed to keep wages and time records under s 130(1) of the Act and holiday and leave records under sections 75(2)(e) and 81 of the Holidays Act 2003 (the HA Act). She alternatively says it failed to produce those documents when requested under s 130(2) and sections 75 and 82 of those Acts.

[89] The respondents say there is no basis to impose penalties and that they are discretionary in nature. MGK says it did not fail to keep records as it operated under the “reasonable assumption” Ms Yoon was attending to that aspect of office administration as part of her role.

[90] Under s 130(1) of the Act and s 81 of the HA Act, the duty to maintain records lies squarely with employers – not employees. An employer cannot discharge that obligation based on a reasonable assumption that an employee is keeping them. Where an employee holds responsibility for maintaining records as part of their role, an employer should have systems in place to ensure that task is carried out in accordance with the legislation. There is no evidence before the Authority that MGK had any such systems in place, or even that Ms Yoon clearly had responsibility for this task. I accordingly find that MGK has failed to keep records under the Act and HA Act.

If any breach or failure is made out is a penalty warranted, and if so should any part thereof be awarded to Ms Yoon?

[91] Ms Yoon raised the alleged failure to keep records in her statement of problem as both a “disclosure” issue and a penalty issue. She sought penalties for MGK’s failure to keep wages and time records under s 130 of the Act, and failing to keep or produce holiday and leave records pursuant to ss 81 or 82 of the HA Act, respectively. However, in an amended statement of problem filed, Ms Yoon sought only penalties under s 134 of the Act for the alleged breaches of her employment agreement.

[92] Despite the Authority clarifying the breaches claimed with the parties during a case management conference and outlining them in a subsequent minute issued on 9 September 2021, Ms Yoon did not indicate record-keeping breaches were still sought until closing submissions were filed on 18 May 2022, after the investigation meeting. While I have found MGK failed to keep or produce records, I do not think it is appropriate in this instance to award penalties in light of this.

What are my orders?

[93] MGK Homes Limited is ordered to pay to Bomi Yoon the following within 28 days of the date of this determination:

- a. \$15,576.84 (gross) lost wages under s 123(1)(b) and s 128 of the Act;
- b. \$20,000 under s 123(1)(c)(i) of the Act;
- c. \$4,544.25 special damages under s 123(1)(b) of the Act.

Is either party entitled to an award of costs?

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

[95] If they are not able to do so and an Authority determination on costs is needed a party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party 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.

[96] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁶

Sarah Blick
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.