

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 582
3137186

	BETWEEN	JUHYUN LEE Applicant
	AND	MR&MRS LEE LIMITED t/a MOTOR KING First Respondent
	AND	KIHYE RACHEL LEE Second Respondent
Member of Authority:		Rachel Larner
Representatives:		Seungmin Kang, counsel for the Applicant Stephen Langton and Sarah Lyn, counsel for the Respondents
Investigation Meeting:		5 and 6 July 2022 at Auckland
Submissions and Further Information Received:		14 July 2022 from the Respondents 20 July 2022 from the Applicant 3 August 2022 from the Respondents 9 August 2022 from the Applicant
Date of Determination:		9 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] The first respondent, Mr&Mrs Lee Limited trades as Motor King. It operates a family run automotive service workshop based in Kelston, Auckland. Mrs Lee is the sole director and Mr and Mrs Lee are each 50% shareholders in the first respondent. Mrs Kihye (“Rachel”) Lee is the second respondent.

[2] Mr and Mrs Lee and the applicant are Korean. Mr Lee is a qualified mechanic and he is in charge of Motor King's workshop. Mrs Lee has a background in administration, so she runs that side of the first respondent's business.

[3] The applicant, Juhyun Lee has been referred to in this determination as "*the applicant*" to distinguish him from Mr Hoonjong Lee, who has been referred to in this determination as "*Mr Lee*". References to the first respondent are to the company entity "*Mr&Mrs Lee Limited*", which trades as Motor King.

Applicant's employment

[4] The applicant is an experienced motor mechanic with ten-plus years' experience. He started his career as a mechanic in the Korean Army and his most recent experience before coming to New Zealand was working as a mechanic at a luxury vehicle dealership in Korea.

[5] In June 2019 the applicant accepted an offer to work for the first respondent as a motor mechanic. He was provided with a job description, employment agreement and written offer of employment letter and the first respondent supported his work visa application.

[6] The applicant was granted a New Zealand work visa on 29 August 2019 that permitted him to work for three years as a "*Motor Mechanic in Auckland for Mr&Mrs Lee Limited*". The applicant started work for the first respondent on 9 September 2019 and on 5 October 2020 he resigned by giving the first respondent two weeks' written notice.

Resignation

[7] The applicant claimed his resignation was a constructive dismissal. He said he had resigned because he had "*been provided with an unsafe work environment and treated unfairly as below, that I feel remaining in the job is unsafe and no longer an option.*" The refer to the "*as below*" was to the three reasons the applicant had identified for his resignation. These have been summarised by the Authority as:

- (a) On 21 September 2019 the applicant claimed to have got rust in his eye because the safety goggles he used failed to protect his eye from debris and dust (this has been referred to in this determination as "*the eye injury*");
- (b) On 14 May 2022 the applicant said he raised concern about having to work on trucks without the proper training or experience while being paid less than a

truck technician. He said he was worried he could be injured (this is referred to in this determination as “*the truck work*”);

- (c) On 8 July 2020 the applicant injured his shoulder while working on a truck, and he claimed that happened because he had not been provided with a safe work environment. He also alleged the first respondent had not treated him properly after his injury (this is referred to in the determination as “*the shoulder injury*”).

13 October 2020 meeting

[8] Mrs Lee and the applicant met on 13 October 2020 to discuss his resignation. This was recorded and a transcript was provided to the Authority. The first respondent said the applicant’s resignation letter on 5 October was the first time it was aware of his concerns. He had not previously raised issues about the work environment being unsafe or that he was worried he would be injured at work.

[9] Mrs Lee attempted to discuss the issues raised in the resignation letter but the applicant did not explain why he believed the workplace was unsafe or what he wanted his employer to do about his concerns. When Mrs Lee asked the applicant if he would withdraw his resignation if the work environment was improved he said he would not.

[10] The meeting did not resolve the issues, so the applicant raised a personal grievance claim.

Personal grievance claim

[11] The applicant’s lawyer wrote to the first respondent on 20 October 2020 raising a constructive dismissal claim that referred to the same three concerns identified in the resignation letter. It also stated that his grievance included that “*he had to work on panel beating tasks, which is outside his job description.*”

[12] The first respondent replied on 11 November 2020 denying that the applicant had been constructively dismissed. It further said:

- (a) There was no medical certificate confirming he got rust debris in his eye and it was not possible for the first respondent to determine whether his eye injury was a workplace injury. If it had happened at work then the applicant must have selected goggles that did not have side shields, instead of safety goggles that would have protected his eye;

- (b) The applicant did not do heavy truck work. The first respondent only dealt with light trucks and only provided basic services such as issuing a certificate of fitness, replacing oil, light bulbs or brake pads, which did not require specialist knowledge or skill;
- (c) The applicant accidentally hit his shoulder against the body of a truck, so it was not the type of injury that was caused by workplace safety issues;
- (d) The first respondent did not do panel beating work so the applicant was not required to do panel beating. From time to time he had to remove minor surface rust but that did not require a panel beating qualification. This work fell within the “*repairing body damage and maintaining vehicle appearance*” task listed in his job description.

Applicant’s claims in the Authority

[13] The applicant lodged a Statement of Problem with the Authority on 30 April 2021 and Amended Statements of Problem on 3 and 17 December 2021.

[14] The applicant alleged he had been constructively dismissed and/or unjustifiably disadvantaged as a result of the eye injury, the truck work and the shoulder injury. He claimed to have resigned because of the first respondent’s “*prolonged breach of its duties*”.

[15] The Applicant claimed the first respondent breached the health and safety obligations in his employment agreement and he claimed the second respondent had aided and abetted these breaches.

[16] The applicant sought penalties against both respondents and he asked that these be paid to him and not the Crown.

Respondents’ position

[17] The respondents said:

- (a) The Authority did not have jurisdiction over the disadvantage claims as these were raised for the first time on 30 April 2021, well outside the 90 day time limit in s 114(1) of the Employment Relations Act 2000 (the Act);
- (b) The applicant was not dismissed, he resigned because he did not like the type of hard physical work he had been employed to do;

- (c) There was no breach of duty or of health and safety obligations;
- (d) The applicant's employment agreement was not breached, so there were no grounds to impose penalties on either respondent;
- (e) Even if the employment agreement had been breached (which was denied) it was not reasonably foreseeable that the applicant would resign.

[18] The first respondent also said the applicant had not raised safety concerns while employed and it noted that there had been:

- (a) A ten months' gap between the eye injury on 21 September 2019 and the shoulder injury on 8 July 2020; and
- (b) More than 12 months between the eye injury on 21 September 2019 and the applicant's resignation on 5 October 2020.

Authority's investigation

Interpreters

[19] The Authority was assisted by Korean and Cantonese interpreters during its investigation. For a portion of the investigation meeting the English language was translated into Korean by the Korean interpreter and then also translated into Cantonese by the Cantonese interpreter.

Witnesses

[20] The Authority held a two day in person investigation meeting in Auckland. The Authority heard from the applicant (Mr Juhyun Lee), his wife Ms Wonjung Seo, Mr Hoonjong Lee, Mrs Rachel Lee and Mr Hooi Kai (Akai) Ng.

Mr Ng

[21] Mr Ng used to own and operate the Motor King workshop before he sold it to the first respondent. Mr Ng continued to work in the Motor King business on a part-time basis (from Wednesday to Friday) following the sale.

[22] Mr Ng resigned from his employment with the first respondent in December 2021. Mr Ng was witness summonsed to attend the Authority's investigation meeting. He gave evidence with the assistance of the Cantonese interpreter.

Videos

[23] The applicant filed a number of short video clips he had taken of the rust repair work said he had done while employed by the first respondent. The videos were taken by the applicant on 24 and 25 October 2019 and 22 June 2020.

[24] These videos were reviewed during the investigation meeting. All parties had an opportunity to comment on the content of each video immediately after it had been shown. These videos showed the size and amount of rust on vehicles that the applicant had worked on.

Post IM information

[25] Both parties provided additional information after the Authority's investigation meeting.

[26] The applicant filed information about his Australian visa application and his subsequent withdrawal of that application. The respondent provided a copy of its accident register that it had kept during the applicant's employment. It also provided an incident report regarding the applicant's shoulder injury that had occurred on 8 July 2020.

[27] Both parties filed written submissions after the Authority's investigation meeting.

Withdrawal of one disadvantage claim

[28] During the investigation meeting the applicant withdrew his disadvantage claim about the eye injury, because he accepted that it had not been raised within the 90 day time limit required by s 114(1) of the Act. However, the applicant asked the Authority to consider the eye injury as part of his constructive dismissal claim.

Issues

[29] The following issues are to be determined:

- (a) Did the Authority have jurisdiction over the applicant's unjustified disadvantage claims?
- (b) If so, was the applicant unjustifiably disadvantaged during his employment?
- (c) If so, what if any remedies should he be awarded?
- (d) Did the first respondent breach the applicant's employment agreement?

- (e) If so, should a penalty be imposed for any breaches that may have occurred?
- (f) Did Mrs Lee aid and/or abet any breaches by the first respondent of the applicant's employment agreement?
- (g) If so, should a penalty be imposed on her personally?
- (h) If penalties are imposed, should some or all of the penalties be paid to the applicant instead of or as well as the Crown?
- (i) Was the applicant dismissed?
- (j) If so, was his dismissal justified?
- (k) If not, what if any remedies should he be awarded?
- (l) What, if any, costs and disbursements should the successful party be awarded?

Material facts

The eye injury

[30] The applicant claimed to have got rust debris in his eye at work on the morning of Saturday 21 September 2019.

[31] The applicant said he injured his eye while doing rust work on a vehicle because he was not provided with safety goggles that had side shields on them. That was denied by the respondents. They say there were three types of safety goggles available and that Mrs Lee had shown the applicant all of the safety goggles during his induction.

[32] The Authority did not accept the applicant's evidence that the only safety goggles available to him did not have sides on them. Mr Lee explained about the three different types of safety goggles the first respondent had; goggles for direct sunlight, goggles with side shields and clear goggles without the shields. The Authority was also shown photos of the different safety goggles the first respondent had in the workplace.

[33] All goggles were up to prescribed industry standards and they each served different purposes. Mr Ng also confirmed the range of safety goggles Mr Lee had identified were available in the workplace and that these had formed part of the business sale when the first respondent purchased the Motor King business from him (Mr Ng).

[34] The applicant was an experienced general mechanic so he should have known what goggles he needed to wear for the different tasks he did. The applicant had an obligation to

protect his own safety, so if he believed the only safety goggles available to him were open sided, then he should have raised it with the first respondent as a serious safety concern. He did not do that.

[35] Even when Mrs Lee asked the applicant how he could have got something in his eye if he was wearing safety goggles, the applicant did not explain how that had happened. Nor did he raise any concern about the adequacy of the safety goggles that the first respondent had in the workplace. He did not raise any concern about the goggles until his 5 October 2020 resignation letter, in which he alleged “*insufficient eye protection*” had caused his eye injury.

[36] It was not credible that the applicant would injure his eye because he had inadequate safety goggles available to him, but then continue working for another 12 months. without making any comment about the inadequacy of the safety goggles the respondent had made available to him, particularly when Mrs Lee had expressly encouraged him to look after his eyes.

[37] Mr Lee and Mr Ng were both owner operators who worked in the workshop themselves, so it was very unlikely they would not have had a range of safety goggles available that enabled them to have properly protected their own eyes. Mrs Lee was concerned to hear about the applicant’s eye injury and she encouraged him to take his eye health seriously. It was unlikely she would have allowed the first respondent to run its business without appropriate safety goggles.

[38] The first respondent was a member of the Motor Trade Association and the inspecting organisation for warrant of fitness and certificate of fitness was in the process of assessing its premises and practices. In such circumstances it was not credible that the first respondent would not have had appropriate safety goggles available in the workplace.

[39] Motor King had applied for its WoF inspector license so health and safety was at the forefront of Mr and Mrs Lee’s mind. Failure to have proper safety goggles available in the workplace would have jeopardised the first respondent’s ability to get a WoF inspector license.

[40] The applicant’s evidence that he told Mr Lee during work hours about the eye injury but that Mr Lee did not do anything about it was also not credible. The Authority preferred Mr Lee’s evidence that if he had known the applicant had got something in his eye at work then he (Mr Lee) would have used the saline solution in the first aid kit at work to rinse out the applicant’s eye.

[41] The Authority considered it unlikely Mr Lee would have done nothing (as the applicant claimed) because Mr Lee immediately helped the applicant by giving him first aid when he had his shoulder injury.

[42] The Authority noted that on 21 September 2019 the applicant did not leave work early to get medical attention. It was a Saturday, so he left work at his normal time of 1pm and drove himself home. He never reported a workplace eye injury to the first respondent before leaving work. The applicant sought medical attention later that day but he did not report his eye issue as a workplace injury to the doctor who examined him. Nor did the applicant provide a medical report or certificate to the first respondent that said he had got rust in his eye at work.

[43] The first time the applicant claimed that Mr Lee ignored his eye injury was when he filed his Statement of Problem on 30 April 2021. That was odd because when the applicant queried why he had not been paid for the two days he had off work due to the eye injury Mrs Lee had told him the first respondent did not know if it was a workplace injury.

[44] Mrs Lee pointed out that the first they knew about the eye injury was when the applicant sent an uncaptioned text with a photo of him wearing an eye patch at around 4.46pm on 21 September 2019. When they spoke, the applicant told Mrs Lee he had gone to the hospital with a sore eye. He did not tell her it was a workplace injury.

[45] The applicant did not respond to Mrs Lee querying whether it was a workplace accident by telling her that he had already told Mr Lee about the eye injury when it happened at work. That omission was curious given it would have been the natural time and opportunity for the applicant to have told Mrs Lee that he had reported the eye injury to Mr Lee but he had done nothing to help the applicant.

[46] The applicant did not record in either his resignation letter or personal grievance letter that he had Mr Lee reported the eye injury to Mr Lee while they were working together on 21 September 2020 but that Mr Lee had not helped him.

The truck work

[47] Contrary to the applicant's claims, the first respondent did not service heavy trucks. It did minor maintenance work on small to medium size trucks. This basic maintenance work did not require specialist licenses.

[48] The first respondent had about six or seven trucks that came in every six months for regular checks and basic maintenance, such as changing lightbulbs and replacing oil. Any issues that required a heavy vehicle technician were sent out to a specialist mechanical centre.

[49] The applicant said that around 14 May 2020 he was told to work on a truck without any support or training. However, he contradicted that claim by saying that Mr Lee had told him what to do, and had demonstrated on a few occasions what was required.

[50] The Authority noted that Mr Ng was also available to help the applicant if he felt he needed more guidance or assistance with basic truck maintenance. However, that should not have been necessary because the applicant had been doing basic maintenance work on trucks since he had started his employment.

[51] The applicant had never raised concerns that he did not know what to do or that he felt unsafe working on trucks or lacked experience to do so. The applicant had also told Mrs Lee during his job interview that he was able to work on trucks due to his army experience when she had told him that would be required as part of his role.

[52] The Authority did not accept the applicant's claim that he had been required to do truck work without proper ongoing training or supervision. Exactly the same principles applied to changing oil and light bulbs in trucks as they did for cars. As a mechanic with ten years' experience, including in working on trucks in the Korean army, the work was well within the applicant's capabilities.

[53] The applicant also told the Authority that Mr Lee had told him (the applicant) not to work on trucks if he did not want to. Mr Lee subsequently reported to Mrs Lee that the applicant had refused to work on any trucks.

[54] At that time Mrs Lee was on maternity leave. However, she returned to work to meet with the applicant on 22 May 2020 to discuss his concerns. When she asked what the issue was, the applicant said he had asked Mr Lee about his (the applicant's) pay but had not received a satisfactory response.

[55] The applicant explained that he had asked Mr Lee why his hourly rate did not match that of a heavy vehicle automotive technician, as shown on a webpage the applicant had found. Mr Lee had told that applicant it was because he did not have the necessary qualifications for a heavy vehicle technician.

[56] The applicant then queried whether he could do any truck work and Mr Lee had told him he could, because the truck work he did was minor maintenance that did not require any special licenses or qualifications. The applicant did not raise any safety issues or concerns about the truck work in the face of that advice. The applicant's concern was that he was not being paid enough to work on trucks.

[57] The applicant had also asked Mr Lee whether panel beating work was required in his role. He mentioned this in passing, not as an example of a safety concern. Mr Lee told the applicant he was not doing a panel beater's or heavy vehicle technician's job.

[58] Mr Lee explained to the applicant the difference between what he was doing and what a panel beater or heavy vehicle technician did. The applicant just had to sand the surface area to scrape off minor rust (less than size of 50 cent coin) and then spray undercoat paint on it. That was different from the work panel beaters did because they repaired corrosion, and the first respondent did not do that type of work.

[59] The applicant's actions showed he was concerned about being paid more, and not safety matters regarding the issues he raised.

[60] On 11 May 2020, the applicant emailed the first respondent "*pay related information*". He attached a link to a web page that showed that in New Zealand heavy vehicle automated technicians earned \$26 to \$39 an hour on average. The applicant told Mrs Lee he wanted to know if he was being paid enough for the jobs he did because truck mechanics were paid more in South Korea.

[61] The applicant told Mrs Lee that he had asked her husband for a pay rise a couple of times before 14 May 2020. Mrs Lee took from their discussion on 22 May 2020 that the applicant wanted a pay rise, not that he had unresolved safety concerns.

[62] In addition to raising concerns about his rate of pay, the applicant also took issue with the equipment that was used at Motor King. The applicant said his job was less efficient and more labour intensive because Motor King did not have the tools the applicant had used in South Korea. He said working under the truck was physically hard and his clothes often became dirty. However, he did not raise this as a safety concern because the equipment he had met New Zealand safety standards.

[63] Mrs Lee told the applicant the first respondent's focus at that point was keeping the business afloat in the face of the Covid-related and lockdown uncertainties. However, she said it would look at increasing the applicant's pay once it had got past Covid.

[64] Mrs Lee reminded the applicant that she had mentioned Motor King's truck maintenance during the job interview and that the applicant had agreed he was able to do that type of work. Mrs Lee said that she would look into purchasing the equipment that the applicant wanted. The first respondent subsequently purchased some of the equipment the applicant wanted and it also gave him a pay rise from \$23 to \$25 per hour.

[65] During the 22 May 2020 meeting the applicant also told Mrs Lee that he did not feel confident enough driving in New Zealand to be able to drive and deliver serviced trucks to clients. Mrs Lee told him he would not have to do deliveries as part of his employment, and she arranged for other employees to do that. This was an example of the first respondent addressing the applicant's safety concern.

[66] Following the 22 May 2020 meeting the applicant did not raise any other concerns or issues before he resigned.

[67] The applicant failed to identify to the Authority any health and safety issues that were associated with his working on trucks that he had raised while employed.

[68] When questioned by the Authority about what additional guidance, training or support he wanted, the applicant was unclear. He could not specify what training or supervision he was looking for, and instead answered by saying he needed "*a drop in pit, proper tools and equipment, impact wrench (aired or electric), and a heavy-duty creeper.*"

[69] His concern therefore appeared to be that he was unhappy with the more basic tools that the first respondent provided, and would have preferred more up to date tools to use. These items he identified were not required for him to do his job safely. They were 'nice to haves', as it would have made his job easier, but these items were not necessary or essential from a safety point of view.

The panel beating allegations

[70] The applicant raised a new concern during the Authority's investigation that had not been raised while employed. He claimed that he had been required to do panel beating and he pointed to the videos he had taken while employed to support that claim. The applicant had not

raised this as a concern while employed, other than asking if it was in his job description. Nor was it mentioned in his resignation letter.

[71] It was raised by his lawyer for the first time in the applicant's personal grievance letter, which claimed in addition to the three concerns identified in the applicant's resignation letter that he "*had to work on the panel beating tasks, which is outside his job description.*"

[72] Mr Lee told the Authority he had not asked the applicant to work on the cars in the videos and the applicant did not claim he had been instructed to do so. There was no evidence to establish that Mr Lee knew the extent of the rust on the vehicles or that, instead of sending them out to a panel beater as was usual practice, he had told the applicant to do the rust repairs himself.

[73] Minor body maintenance and repairs were within the applicant's job description. Anything where the rust was bigger than a coin or had broken thorough or was structural was sent out to a panel beater. The Authority considered it significant that the applicant had not objected to, or raised any concerns about, doing the work at the time. The applicant's claim that he was required to do panel beating work did not succeed.

The shoulder injury

[74] On 8 July 2020 the applicant injured his shoulder while replacing engine oil from truck, by hitting his shoulder against the body of the truck. The applicant said it happened because he had to do the work in a small space where the front of the truck was slightly lifted up and he had to go underneath, without using a drop-in pit.

[75] The applicant's subjective view that he was in a dangerous environment where the truck could have fallen on him was not objectively correct. The truck could not have fallen on the applicant because the equipment used could support the weight of the trucks that the first respondent worked on.

[76] The truck had been properly lifted, using an appropriate jack and axel, so it could not have fell on the applicant. Mr Lee completed the job after the applicant hurt his shoulder and there were no inherent safety problems with the work that had to be done. The truck work was undertaken in accordance with normal industry health and safety standards.

[77] The Authority finds that the applicant's shoulder injury was likely caused by his own 'human error' due to him not moving carefully enough in a confined space and not because of any health and safety breach by the first respondent.

[78] Mr Lee heard the applicant scream, so he ran over to the applicant, who said he had hurt his shoulder while removing the truck's oil filter. Mr Lee sat the applicant down on a chair in the kitchen area to check his injury. Mr Lee did not see any external injury such as blood or bruising. The injury was recorded in the first respondent's accident register.

[79] Mr Lee and Mr Ng both offered to take the applicant to hospital but he declined these offers. When Mrs Lee found out about the injury she sent the applicant a message asking if he was okay and offering to go to the hospital to act as a translator for him. The applicant said he did not need that, but he asked what he should say to the doctor. Mrs Lee said he should tell the doctor what happened, that he hurt himself at work.

[80] Mrs Lee texted the applicant again just after 4 pm to ask him to contact her if he needed any assistance. The applicant emailed Mrs Lee some documents he had received from the doctor. Mrs Lee replied to the applicant that he should rest until 22 July 2020, and they could discuss the next steps around 20 July 2020. The applicant received ACC payments for four weeks, until he was able to return to work.

[81] On 1 August 2020 the applicant emailed Mrs Lee and said he felt he could return to work the following Monday. Mrs Lee was concerned the applicant could be pushing himself to return to work after four weeks off work, so she asked him to send a medical certificate that confirmed he was fit to return to work.

[82] The applicant did that on 3 August 2020 and on 4 August 2020 he returned to work. Mrs Lee said that after a few days she asked the applicant how he was feeling and he replied fine. The applicant never reported that he felt unsafe at work either before or after his shoulder injury.

Did the Authority have jurisdiction over the applicant's unjustified disadvantage claims?

[83] Section 114(1) of the Act provides that an employee who wants to raise a personal grievance must do so within 90 days, beginning with the date on which the alleged action occurred or came to the employee's notice (whichever is the later) unless the employer consented to it being raised out of time.

[84] The first respondent objected to the applicant raising personal grievance claims out of time. It also pointed out that the applicant had not sought leave under s 114(4) of the Act from the Authority to raise a personal grievance claim for unjustified disadvantage outside of the 90 day time limit required by s 114(1) of the Act.

[85] Because the applicant withdrew his unjustified disadvantage grievance relating to the eye injury, the two unjustified disadvantage claims he wanted to pursue involved claims:

- (a) The first respondent had required him to carry out tasks outside of his job description (the work on heavy trucks and panel beating) when he had no experience or training to do them, and had raised concerns on 14 May 2020 that such work was unsafe, but was told by the first respondent he had to perform those tasks; and
- (b) The first respondent failed to provide him with a safe workplace, causing him to suffer a workplace accident and shoulder injury on 8 July 2020.

[86] The applicant's resignation letter did not raise any personal grievance claims. His personal grievance letter dated 20 October 2020 raised a constructive dismissal claim but no disadvantage grievance claims. Disadvantage grievances were not raised the applicant lodged his Statement of Problem with the Authority on 30 April 2021.

[87] The disadvantage grievance relating to events that occurred on 14 May 2020 had to be raised on or before 12 August 2020 and relating to the shoulder injury on 8 July 2020 had to be raised by 6 October 2020. That did not occur, so both disadvantage grievances were raised outside of the 90 day time limit required by s 114(1) of the Act.

[88] Because the first respondent did not consent to it being raised out of time, and the applicant has not sought or been granted leave from the Authority to do so, the Authority did not have jurisdiction over the stand-alone unjustified disadvantage grievances.

[89] The Authority had the ability to look at events, acts or omissions that occurred during the applicant's employment to determine whether they were part of a continuum of conduct or whether cumulatively they had got to the point where the applicant's resignation was reasonably foreseeable. The Authority therefore still considered whether these issues had caused or contributed to the applicant's resignation.

Did the first respondent breach the applicant's employment agreement?*Alleged breaches of the employment agreement*

[90] The applicant claimed the first respondent breached the health and safety obligations in his employment agreement by:

- (a) Requiring him to work on panel beating and heavy motor vehicles and/or by failing to take proper steps in good faith when he raised issues about that (referred to as "*concerns about the nature of the work*"); and
- (b) Failing to comply with express duties resulting in workplace injuries and failing to take proper steps after he had been injured (referred to as "*health and safety concerns*").

Factual findings on the alleged breaches

[91] The Authority was satisfied that the applicant was not required to do panel beating or mechanical work on heavy motor vehicles (trucks), so the first respondent did not breach his employment agreement in that regard. The first respondent also responded appropriately to the various issues the applicant had raised during his employment and to the injuries he said had occurred at work.

[92] The evidence did not establish the applicant had raised health and safety concerns about the truck or panel beating work, or about an unsafe workplace, while employed.

[93] The 22 May 2020 meeting was the perfect time for the applicant to have raised any safety concerns. Mrs Lee prioritised meeting with the applicant over her maternity leave, indicating employment issues were taken seriously and would be promptly addressed. This was a good faith attempt to address the applicant's concerns.

[94] During their meeting the applicant told Mrs Lee he did not feel safe to drive in New Zealand doing vehicle deliveries. As a result of that concern, the respondents removed that requirement from the applicant's job description.

[95] There was no good reason for the applicant to have raised one safety concern on 22 May 2020 while remaining silent about other supposed safety concerns, especially when the concern he did raise resulted in immediate action in his favour.

[96] The Authority considered the applicant's failure to raise other safety concerns with Mrs Lee on 22 May 2020 strongly suggested he did not have unresolved health or safety concerns at that time. It was also significant that the applicant did not show Mrs Lee the videos he gave the Authority, and that he did not say anything about the videos while he was employed – if he believed they were evidence of breaches of his employment agreement.

[97] The applicant raised concern about whether he had to do truck work, and if so, whether he should be paid more to do it. His focus was therefore on wanting to be paid more, not on raising safety issues. The applicant had asked if he had to do panel beating work. He was told “no”, because the first respondent did not do panel beating work. Panel beating work was sent out to a panel beater to do.

[98] The applicant was told his job description included “*repairing body work.*” It was explained to him that involved minor repairs to small rust patches that were less than the size of a 50 cent coin. The applicant did not raise safety concerns about this advice to him. Nor did he inform the respondents after the 22 May 2020 meeting that he had unresolved safety concerns.

[99] Mr and Mrs Lee each individually spoke to the applicant about the nature of the truck work and minor body work being within his experience, expertise and job description. The applicant did not dispute that advice. Nor did he explain what he thought was unsafe about the work he was required to do. Had he done so, then the first respondent would likely have addressed it, as it had done with the delivery driving safety concern.

[100] The applicant's failure to raise safety concerns while employed meant the respondents were not alerted to the fact he believed the workplace was unsafe. They were therefore not on notice that the applicant considered his employer had breached/or was breaching his employment agreement by failing to provide him with a safe workplace.

[101] The first respondent demonstrated it had taken the applicant's concerns seriously. It had explained the truck work was required by his employment agreement, was within his experience/capabilities and Mrs Lee pointed out that it had been specifically discussed with him at the job interview. Mr Lee had also told the applicant not to work on trucks if he did not want to.

[102] The applicant's concerns about delivering vehicles resulted in that task being removed from him, showing the first respondent was responsive to addressing the applicant's safety

concerns. It also later purchased equipment he wanted (not safety equipment but tools that made his job easier) and gave him a pay rise in response to issues he had raised.

[103] In terms of the videos the applicant produced to the Authority, Mr Lee agreed that the rust on the green car was more extensive than what Motor King should have been working on, so it should have been sent to a panel beater.

[104] However, there was no evidence from the applicant that Mr Lee knew about this amount of rust but had instructed the applicant to work on the green car anyway. The evidence established that if Mr Lee had seen the rust on the green car then he would have referred it to a panel beater.

[105] Mr Lee also questioned why the applicant worked on the green vehicle instead of sending it to a panel beater. Mr Lee pointed out that he did not know the applicant had chosen to do the rust work himself and he (Mr Lee) had not instructed the applicant to do that rust work. The Authority accepted that evidence.

[106] The evidence established that the applicant must have decided to do that work himself, without telling anyone, either before or after he had done the work. The applicant also chose to video the work he did. However, he did not provide the video to Mr or Mrs Lee while employed, as an example of a safety concern he had. Nor did he tell them that he believed the work he had done on the green car was an example of an unresolved safety concern.

[107] The applicant said nothing about it at all. It was not mentioned as a safety concern in his resignation letter. The applicant's personal grievance letter did not say anything about the green car, instead making a brief reference (without any detail being provided) about doing "*panel beating tasks*".

[108] Mr Lee expressed concern that the applicant may have videoed a vehicle with a large amount of rust to make the first respondent look bad, instead of bringing the extensive rust to Mr Lee's attention, so the vehicle could be referred elsewhere, as was the usual practice. The Authority agreed that it seemed odd that the applicant videoed the vehicle as an example of a safety concern, but failed to raise that as a concern at the time.

[109] The job description set out the work that was to be performed by a mechanic. This had been approved by Immigration New Zealand as the basis for the applicant's work visa.

[110] The duties the applicant was employed to do were not inconsistent with his work as a mechanic. They included “troubleshooting and repair of cars and trucks”, “replacing parts and components”, “repairing body damage”, “completing preventative maintenance such as engine work, oil changes, tyre rotation ... wheel balancing, replacing filters”.

[111] The applicant’s general skills and experience were sufficient to enable him to do the work required of him. If he had needed to ask questions or to seek a second opinion or obtain additional support or guidance, then Mr Lee and Mr Ng were both available to him in the workplace. He was never working alone.

[112] The Authority was satisfied that the tasks the applicant was required to undertake (repairing minor body damage to vehicles and maintenance work on light trucks) were within the scope of his job description. As a mechanic with ten years’ experience he was qualified and experienced enough to be able to do this type of work safely.

[113] The second alleged fundamental breach of the applicant’s employment agreement involved allegations that the first respondent had not provided him with a safe work environment, which had resulted in the applicant injuring himself twice. The applicant also alleged the first respondent had not treated him properly (i.e. taken proper steps) after his eye and shoulder injuries.

[114] The Authority was satisfied from the evidence it heard that appropriate equipment and safety requirements were in place regarding this type of work. The workplace was not inherently unsafe and the applicant was not asked to work in an unsafe manner.

[115] In terms of the eye injury, the applicant was an experienced mechanic, so he should not have needed to be told that he should choose to wear safety goggles with side shields if he was doing work where debris could fly around. That was self-evident.

[116] The Authority considered that if the eye injury had happened at work the applicant must have failed to select the appropriate safety goggles for the task he was doing. This is an example of employee error, so did not involve a breach by the first respondent of its health and safety obligations to the applicant.

[117] The evidence did not establish the required causal link between a breach of duty or health and safety breaches by the first respondent and the applicant’s eye injury. Appropriate safety equipment was available and the applicant was experienced enough to have done the

work he had to do safely. If the eye injury had occurred at work then it likely occurred because the applicant selected the wrong type of safety goggles.

[118] The shoulder injury on 8 July 2020 was also likely caused by the applicant's own lack of care or human error. The applicant appeared to have misjudged the space he had available to move around in, and as a result he hurt his shoulder. It was not caused by the respondent's health and safety failure or by a breach of his employment agreement.

[119] The applicant had the training and tools to be able to do the job safely. The vehicle had been hoisted up correctly. Mr Lee completed the work safely after the applicant was injured. No safety issues were identified by Mr Lee and the applicant did not report any. The first respondent's response to the injury was appropriate for the size and resources of the business, so it was not a breach the applicant's employment agreement.

[120] The Authority did not consider that the first respondent breached the applicant's employment agreement regarding the shoulder injury.

Outcome

[121] The applicant's breach of employment agreement claims and associated penalty claims did not succeed.

Was the applicant dismissed?

Reasons for the resignation

[122] The respondents pointed out the applicant's concerns had changed from what was written in his resignation letter, to the personal grievance letter, to what appeared in his Statements of Problem, to his evidence and then his submissions. The Authority considered the resignation letter was the most accurate reflection of the why the applicant resigned, because that was prepared at the time.

[123] The applicant claimed he resigned because the first respondent breached its duty to provide him with a safe workplace, he had injured himself twice so felt unsafe at work, and he was required to do work he was not trained or experienced enough to do.

[124] The respondents said the applicant resigned because he did not like the type of work he had been employed to do, he wanted to be paid more and he had decided to move his family to Australia.

[125] The Authority accepted the respondents' evidence that the workplace was not unsafe, the applicant was only required to do work that was within the scope of his employment agreement and job description, and he was experienced and qualified enough to do the work he had been employed to do.

[126] The Authority was satisfied that the applicant was not required to do unsafe work or to work in an unsafe manner. Appropriate tools and safety equipment were made available to him. The first respondent had not caused or contributed to his eye and/or shoulder injuries as these appeared to be due to (his own) human error.

[127] The injuries had not occurred because of health and safety breaches by the first respondent. The applicant was a competent and experienced motor mechanic. The Authority was satisfied he had the necessary experience, qualifications and training to be able to safely do the work he had been employed to do.

[128] The applicant's belief that the nature of his employment had changed substantially from what he had expected, and agreed to, was not objectively correct. The need to do truck work had been discussed with him at the job interview and he had agreed he was able to do it. Did not do heavy vehicle work or panel beating work. He had also not raised that as a safety concern while employed.

[129] The eye injury was too remote to be an operating cause for a resignation that occurred more than 12 months later. The applicant had never raised any concern about the eye injury during his employment, and he had not reported it as a workplace accident. It was not reasonably foreseeable he would resign over it more than twelve months later. The eye injury was also outside the 12 month time limit for a penalty claim.

[130] The Authority was not satisfied that it was a breach of duty by the first respondent that had caused the applicant to resign. He had applied for an Australia work visa on 10 August 2020 which suggested he had already made a decision to move his family to Australia well ahead of his resignation.

[131] Although that visa application was later withdrawn, because it had been significantly delayed due to Covid and during the delay period the applicant's family had become settled in New Zealand, the fact the applicant devoted his time and money to an Australian visa application suggested he had already made the decision to leave New Zealand before his 5 October 2020 resignation.

[132] The Authority concluded the applicants' resignation was more likely than not a free and voluntary resignation and not a constructive dismissal. Accordingly, the applicant's constructive dismissal claim did not succeed.

What, if any, costs and disbursements should be awarded?

[133] The respondents are the successful parties, so they are entitled to a contribution towards their actual legal costs. The parties are encouraged to resolve costs by agreement. If that does not occur then the respondents have 14 days within which to file a costs application and the applicant has 14 days within which to respond.

[134] Costs will not be dealt with outside of this timetable, without the prior leave of the Authority.

[135] The Authority is likely to adopt its usual notional tariff based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day. Because this matter involved two days of investigation meeting time, the notional starting point for assessing costs in this matter is therefore \$8,000. This may then be adjusted to reflect the particular circumstances of the case.

[136] The parties are therefore invited to identify any factors they say should result in the notional starting tariff being adjusted. The applicant may also file an affidavit that sets out his financial position if he believes his ability to pay an award of costs is a factor the Authority should take into account when assessing costs.

Rachel Larmer
Member of the Employment Relations Authority