

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 623
3096473 and 3096412

BETWEEN	ELLIOT PARK Applicant
	MYUNGHEE JEON Applicant
AND	THE KOREAN SOCIETY OF AUCKLAND INC. First Respondent
AND	KYUNG SOOK WILSON Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Brenda McDonald, advocate for the Applicant
Jong Sun Lim, counsel for the First Respondent
James June-Young Song, counsel for the Second Respondent

Investigation Meeting: 22 and 23 July 2021

Submissions [and further Information] Received: Up to and including 26 August 2022

Date of Determination: 25 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Park and Ms Jeon were employees of The Korean Society of Auckland Incorporated (KSA). They were work colleagues and both resigned their employment on 5 December 2019 citing the same background in support of their contention that their resignations were forced and accordingly constituted dismissals which were unjustified.

[2] KSA wished the matters to be heard separately and indeed they were. There was a high degree of artificiality in this namely because in respect of Mr Park's claims, apart from himself his prime witness, was Ms Jeon. And in Ms Jeon's claims, apart from herself, the prime witness was Mr Park.

[3] For that reason, and the fact that the background to both claims are identical, this determination deals with both Mr Park's personal grievances and Ms Jeon's personal grievances.

[4] Mr Park was employed by KSA from 5 June 2018 to 5 December 2019. He said he was forced to take annual leave, was accused of wrongdoing, went through a period where he was not paid, and ultimately left his employment on 5 December 2019 in circumstances which constituted a constructive dismissal. He says that dismissal was unjustified. He says that at all material times the President of KSA, Ms Wilson caused KSA to act the way it did as it acted under her direction. It is for that reason he has joined her to the proceedings. He seeks lost wages and compensation for hurt and humiliation in terms of s 123(1)(c)(i) of the Employment Relations Act. Mr Park also seeks penalties in respect of the lack of provision of wage and time records and for breaches of good faith.

[5] KSA denies any wrongdoing saying that Mr Park resigned on his own initiative. The Second Respondent, Ms Wilson, denies any personal responsibility and says that at all times she simply acted as the President of KSA and not in any personal capacity.

[6] Ms Jeon was employed by KSA and was employed by KSA's previous president in 2018. She received a full time work visa on 29 January 2019 and commenced permanent full time employment with KSA on 1 February 2019 until she says she was forced to take annual leave, was not paid for that leave until after her employment ended, was unilaterally suspended from her employment and ultimately resigned on 5 December 2019 in circumstances which constituted a constructive dismissal. Like Mr Park, she says that dismissal was unjustified and believes that Ms Wilson as President of KSA caused KSA to act in the way it did as it acted under her direction and for that reason also joined her to her proceedings.

[7] Ms Jeon also seeks lost wages and compensation for hurt and humiliation under s 123(1)(c)(i) of the Act. Like Mr Park she also seeks penalties in respect of the lack of provision of wage and time records and for breaches of good faith.

The Authority's Investigation

[8] The Authority heard from Mr Park, his co-worker My Yung Hee Jeon (Ms Jeon) and from Ms Wilson both on behalf of KSA and herself. The issues the Authority needed to determine for both applicants were:

- (a) What did the wage and time records disclose?
- (b) How and when were Mr Park and Ms Jeon required to take holidays?
- (c) Were Mr Park and/or Ms Jeon constructively dismissed?
- (d) If so, what would be the appropriate remedies?

Background

[9] Mr Park worked for KSA for an agreed 20 hours per week. He acted as an Assistant Manager until he resigned on 5 December 2019. He says that that resignation was forced on him and accordingly amounted to a dismissal.

[10] At times between July 2019 and September 2019, Mr Park became aware that an issue was arising with Ms Wilson and the Directors of KSA on one hand, and Ms Jeon on the other. He worked closely with Ms Jeon and accordingly the beginnings of a breakdown in that relationship were also impacting on him. He says on 10 October 2019 he was asked to learn Ms Jeon's role in case she left KSA. The tension was such that he became concerned not only about Ms Jeon's role but also his own.

[11] At the end of September 2019 Ms Wilson went to South Korea and did not return to New Zealand until mid-October 2019. During this period some KSA financial documents, including employment agreements etc, had gone missing. Ms Wilson had been made aware of this issue prior to her leaving the country. Ms Wilson returned on 23 October 2019.

[12] Immediately prior to her return Mr Park and Ms Jeon had become aware that KSA had posted comments online that seemed to describe them as a burden. Later that month they noticed KSA had put an advertisement online seeking a volunteer worker. They wondered at this time whether KSA were trying to replace their duties and their jobs.

[13] On 17 October both he and Ms Jeon were told by a KSA director to take all their cards and keys and leave the office. They were ordered to take three weeks' leave. They were not consulted about this and indeed had no input to the decision. They were just told to get out.

Their pay was stopped. Both Mr Park and Ms Jeon considered they had been suspended without pay.

[14] On 13 November 2019 Mr Park's and Ms Jeon's representative forwarded a personal grievance letter to KSA explaining that this action had disadvantaged her clients. Mr Park considered he was due to start work again after the three week period so he returned to the workplace. When he arrived, he noticed that Ms Wilson's car was parked there but the doors were all locked and no-one answered when he knocked. Approximately 15 minutes later he saw a Mr Lee, a KSA director, coming out of the office so approached him. The director told him that Ms Wilson was inside with a further director, Mr Kong, having a meeting. Mr Lee then knocked on the office door and was admitted, however Mr Park was not.

[15] Approximately an hour or two later, Ms Wilson did answer the door, telling Mr Park that she was having discussions with a lawyer and when the discussions finished she would let him know about work but not to worry, that his pay would be sorted out. Mr Park asked her did that mean he had to wait for her to contact him and she replied yes.

[16] Ms Jeon arrived at the office on 21 November 2019 after taking three days' bereavement leave. She says that when she arrived, the doors were all locked with notices displayed. She was worried and confused as she expected to start her work in the normal way.

[17] On 22 November 2019 Mr Park and Ms Jeon received a message from Ms Wilson notifying them that they could return to work but they had to work upstairs and not in their normal work space. When they returned, they found they also were expected to use their own computers when previously they had been supplied with computers. Neither had received wages for October or November and both said that their ability to carry out their respective roles had been severely compromised with this lack of equipment. On 5 December 2019 both Mr Park and Ms Jeon resigned.

[18] Mr Park gave strong evidence regarding the effect KSA's actions had had on him. He was worried about money and also the timing. He sought the assistance of a counsellor/psychologist because of the stress and anxiety that it had created for him. He said he felt a sense of shame and felt that the Korean community were talking about him and Ms Jeon. He said he could not sleep and was always tired.

[19] Ms Jeon also gave evidence. As one would expect, in respect of the forced taking of annual leave it mirrored Mr Park's. She worked in a full time role as a database/systems administrator and her employment agreement provided for her to have no less than 30 hours per week for which she received a gross monthly salary of \$3,640. She was ordered to leave the workplace on 25 October 2019 in the same circumstances as Mr Park. Without any discussion, Ms Jeon received a notice of suspension alleging she had committed misconduct by assaulting a volunteer worker. No process was followed involving Ms Jeon, and her first opportunity to deny the allegation was during the investigation meeting.

[20] Ms Jeon states she had no access to her workplace systems and files. She simply could not carry out her work. She says that KSA's actions, culminating in the issuing of the suspension notice, caused her to resign on 5 December 2019. Sometime after that date, she received a copy of the complaint from the volunteer worker. Rather bizarrely and some considerable time after she resigned, Ms Jeon received a further letter advising her she had been dismissed.

[21] It later transpired that KSA was facing increasing difficulties because an accounts folder containing vital information was missing. The file contained various financial documentation such as monthly accounts, PAYE records and suchlike. It also contained bank passwords together with computer passwords. Ms Wilson believed that the documents had been deliberately taken with the intention of causing disharmony within KSA. She said this was why she had asked for the doors to be locked and an investigation started. It was also the reason behind the direction given to Mr Park and Ms Jeon to take leave.

[22] Ms Wilson's evidence made it clear that KSA considered that Ms Jeon had deliberately taken the financial data with the intention of causing disharmony. It did not share that view with Ms Jeon until well after the termination of her employment.

[23] No proper investigation had been carried out or any disciplinary process undertaken. The fact that KSA thought Ms Jeon was guilty of any wrongdoing was arrived at without ever properly putting any allegations to her and/or properly considering any responses.

[24] The response given through Ms Wilson does not in any material regard contradict the evidence given by Mr Park and Ms Jeon. She justified the Society's position by saying that when they discovered the missing documentation they perceived it to be a deliberate action to create disharmony within KSA and acted accordingly. She confirmed however there was no

consultation regarding the forced leave and that at the date both Mr Park and Ms Jeon resigned, neither had been paid for the time taken off because of the forced annual leave. Ms Wilson reiterated she was the person ultimately responsible for the management of all assets and confidential information. She felt as President she needed to deal with that matter and as Mr Park and Ms Jeon were ultimately paid for the leave, she felt she had done the best she could.

[25] In respect of her personal involvement Ms Wilson gave evidence that at all times she acted simply as President of KSA and accordingly she should not have been made a party to the proceedings in her personal capacity. Ms Wilson was forthright in the evidence she gave and there was no reason to do anything other than take her at her word. There was no evidence that Ms Wilson acted in any personal capacity. It seemed clear that at all times, decisions were made in her capacity as President of KSA and not in any other.

[26] Although an attempt was made to link Ms Wilson personally to any breaches of KSA's constitution and/or rules, it remained abundantly clear that Ms Wilson at all times only acted in her capacity as President.

Discussion and conclusions

[27] The legal principles relating to claims of constructive dismissal are well settled. In *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign.¹ There must be a causal link between the employer's conduct and the tendering of the resignation and the possibility of resignation in response to that conduct should be foreseeable.

Elliot Park

[28] At the time of his resignation on 5 December, Mr Park had still not been paid. A fundamental obligation on an employer is to pay its employees. Accordingly, it should have come as no surprise that Mr Park tendered his resignation as he did. Under such circumstances I would consider that resignation came about purely because of KSA's breach of employment standards. That conclusion is reinforced by KSA's decision to force leave on Mr Park when it had an ulterior motive unknown to him. The motive of course was that as President, Ms Wilson

¹ *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA)

was concerned about the taking of financial information and intended to carry out an investigation and then ascribe blame. If that were the reason, then she needed to explain that to Mr Park. In any event, there was no discussion, consultation or negotiation with Mr Park about the taking of leave. He was made to take it immediately and wasn't paid for it until after the termination of his employment.

[29] It follows, that Mr Park was unjustifiably dismissed and is entitled to remedies.

[30] Mr Park's employment ended on 5 December 2019 and he enrolled in a course at the Auckland University of Technology which was confirmed on 8 January 2020. Accordingly, he is not entitled to any wage loss after that point.

[31] Mr Park gave evidence regarding the effect the termination of his employment had on him. I referred to this earlier in paragraph [18] above. I consider an appropriate award in that regard to be \$10,000.

Myunghee Jeon (Ms Jeon)

[32] In respect of the suspension, no process was attached to the decision to suspend her. Whilst ultimately it is within an employer's power to suspend, there is a duty to at least give an employee the option to at least discuss a proposal to suspend before it is implemented. No opportunity was given to Ms Jeon. She said that the suspension depressed and worried her. She was confused as to why following the suspension no-one called her to a meeting to discuss what was happening. Again, on 5 December 2019, Ms Jeon said she was feeling so distressed with what had transpired with the suspension and with the fact she could not do her work because she had effectively been locked out, not paid for October or November, she had no choice but to resign.

[33] At no time prior to her resignation, had KSA made Ms Jeon aware that they had been investigating her, and virtually concluded that she had deliberately withheld confidential KSA records, including financial records and passwords, which were preventing them operating as they should.

[34] As in the case of Mr Park, there is no doubt it was entirely foreseeable that Ms Jeon would resign. She had been forced to take leave without notice and was not paid during that period. She was suspended with no consultation and prior to the termination of her employment was not given material the employer was relying on for the suspension, namely the volunteer's

complaint. Finally, she was never informed that the employer believed she had deliberately kept information from it and had taken KSA information for the purpose of causing KSA harm.

[35] No investigation to test such thinking was carried out. Accordingly there was no basis for KSA to conclude Ms Jeon was guilty of serious misconduct. Instead of being open and transparent, KSA did not inform Ms Jeon of its views, but reacted by sending her and Mr Park on leave. Neither was paid until after they had resigned. In the interim, KSA had limited Ms Jeon's working environment, caused her to use her own computer on the basis they believed Ms Jeon was guilty of serious misconduct. Again, it was entirely foreseeable that under these circumstances Ms Jeon would leave her employment. Accordingly, as in the case of Mr Park, I find that Ms Jeon was unjustifiably dismissed from her employment.

[36] The effect on Ms Jeon was significant. She said she was stressed, depressed and anxious and felt betrayed. She was suffering from insomnia and shame. She said in evidence she had to take medication and needed weekly counselling sessions for at least a six month period. I consider an award of \$15,000 appropriate.

[37] The unjustness of KSA's actions is highlighted by the fact that on 10 February 2020 the Society wrote, summarily dismissing Ms Jeon. Other than noting, it underlines the unfairness Ms Jeon was subjected to prior to her resignation, the 10 February 2020 dismissal was of no effect because of course dismissal occurred prior to that on 5 December 2019 when Ms Jeon was constructively dismissed.

[38] Ms Jeon could not immediately find alternative employment and claims two months' salary. I accept that claim.

[39] Ms Wilson was joined to these proceedings as a second respondent on the basis she was somehow acting in a personal capacity. As I have said in paragraph [26] above, there is simply no evidence that Ms Wilson acted in any capacity other than that as President of KSA. She had no personal role to play in respect of the claims.

Orders

Mr Park

[40] The Korean Society of Auckland is ordered to pay Mr Park the following:

- (a) One month's salary as lost wages covering the period from the date of his resignation until he enrolled at Auckland University of Technology;
- (b) The sum of \$10,000 as compensation under s 123(1)(c)(i) of the Act.

Myunghee Jeon

[41] The Korean Society of Auckland is ordered to pay Myunghee Jeon the following:

- (a) Two months salary as lost wages;
- (b) The sum of \$15,000 as compensation under s 123(1)(c)(i) of the Act.

Costs

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

[43] If the parties are not able to do agree on costs, and an Authority determination on costs is needed, Mr Park and Ms Jeon may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum KSA 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.

[44] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.