

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 15
3138601

BETWEEN PUYOUNG KWON
Applicant

AND TRANQUILITY HEALTH
AND SPA LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Seungmin Kang, counsel for the Applicant
Priyanka Sharma, advocate for the Respondent

Investigation Meeting: 29 April and 3 August 2022

Submissions received: 17 August and 5 September 2022

Determination: 13 January 2023

DETERMINATION OF THE AUTHORITY

- A. The applicant Puyoung Kwon was unjustifiably dismissed and is to be reimbursed lost wages and paid compensation by the respondent Tranquility Health and Spa Ltd.**
- B. The applicant is to be paid wages for sick leave and rest and meal breaks.**
- C. The respondent is ordered to pay a penalty to the Crown and to the applicant for failing to provide a written employment agreement.**

Employment Relationship Problem

[1] Ms Puyoung Kwon was employed as a junior in the Maelstrom hair salon of Tranquility Health and Spa Ltd (THS). She commenced in December 2019 and from January 2020 worked three days each week until August 2020, when her employment ended.

[2] Ms Kwon raised a personal grievance with THS, claiming she had been disadvantaged in her employment and dismissed from it. She alleged the actions of her employer THS were not justified.

[3] Ms Kwon also claimed that THS had acted in breach of several statutory employment law requirements.

[4] The claimed breaches include a failure by THS, throughout more than seven months of employment, to put into writing the terms and conditions of the employment agreement THS had entered into with Ms Kwon orally.

[5] She seeks remedies of compensation and reimbursement of lost wages for her dismissal and disadvantage grievances, and penalties for the breaches of statute.

[6] The parties undertook mediation but were unable to resolve the employment relationship problems.

[7] At an investigation meeting the Authority heard and examined evidence from Ms Kwon and her partner, and from Ms Priyanka Sharma, a director and owner of THS, and Ms Miyoun Lee a senior stylist employed in the Maelstrom salon.

[8] This determination is issued outside the three-month time frame of s 174C of the Employment Relations Act 2000 (the ER Act). An extension of time has been given by the Chief of the Authority.

[9] The determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received from counsel Mr Kang and advocate Mr Sharma.

The claims

[10] The claims to be determined by the Authority are

Personal grievance

- unjustified dismissal – ending of employment by THS, acting in reliance upon a resignation Ms Kwon claims she did not give
- unjustified disadvantage – failure to provide Ms Kwon with a written employment agreement and rest and meal breaks

Penalties

- breach of good faith – s 4 of ER Act
- failure to provide written employment agreement – ss 63A(2), 64 and 65 of ER Act
- failure to keep and produce a wages and time record – s 130 of ER Act
- failure to pay minimum wage or above during untaken rest and meal breaks – ss 6 and 10 of Minimum Wage Act 1983
- failure to pay sick leave – ss 65, 71, and 75(2)(d) of Holidays Act 2003
- failure to keep holiday and leave records – ss 75(e) and 81 of Holidays Act 2003.

Unjustified dismissal grievance

[11] Ms Kwon's employment ended in August 2020 following a disagreement with THS about whether she had resigned. THS maintained she had given notice of resignation and the employment was ending at her requirement or initiative, not by dismissal. Ms Kwon insisted she had not resigned but was being 'fired'.

[12] The Authority finds from the evidence that in late June or early July 2020, Ms Kwon raised with Ms Miyou Lee her manager or supervisor, a potential difficulty

because of an impending change to her partner's days of work. The change would mean he was unable to look after their child on Saturdays, one of Ms Kwon's days of work in the salon.

[13] Ms Kwon made Ms Lee – who is known as Elly - aware that her partner was probably going to have to start working on Saturdays, leaving her unable to work that day. Ms Lee suggested she try and find a child minder for Saturdays. Nothing was decided in the initial discussions, and it was left for Ms Kwon to talk with her family and keep THS informed of what was happening.

[14] Ms Sharma, who rarely attended the salon where Ms Kwon worked, was informed of the situation by Ms Lee. On 14 July, Ms Lee sent a text to Ms Sharma simply advising that Ms Kwon's last day would be on 13 August. Ms Sharma wanted Ms Kwon to finish earlier, on 8 August, and she asked Ms Lee to request that finish date of Ms Kwon.

[15] Ms Sharma spoke to Ms Kwon on the phone on 4 August, making it plain that she considered Ms Kwon had resigned and there would be no turning back from that. Ms Kwon took the view that she had not resigned and Ms Sharma was in effect 'firing' her by requiring her to leave.

[16] The phone discussion was followed up next day with an email sent by Ms Sharma. She repeated that Ms Kwon had not been fired or made redundant, and she explained

You decided to resign you advised Elly that 13th of August would be your last day of work. This was communicated to me in a timely manner by Elly and I accepted this as your last day of work.

I did not take your resignation in writing, as I was acting in good faith.

[17] The hollow attempt by Ms Sharma to pass off her acceptance of an oral resignation as being an act of good faith, does the employer no credit when for over seven months THS arguably had acted in bad faith by failing to provide a written employment agreement. Without one, there was no express requirement for Ms Kwon to give written notice of resignation and no particular period of notice.

[18] Ms Sharma would have been well aware that other employees, such as Ms Lee, had in their written agreements an express term requiring two weeks written notice of termination. It is likely that Ms Kwon's written agreement, if one had been provided, would have had the same provision.

[19] The line in Ms Sharma's email about a resignation in writing, is read by the Authority as an acknowledgement by Ms Sharma of a likely truth that in the absence of writing there was uncertainty surrounding the question of whether Ms Kwon had resigned or not.

[20] Ms Sharma again in her email of 5 August attempted to portray herself as a good employer when she offered Ms Kwon two weeks' notice, until 19 August, 'as a goodwill gesture and in good faith'. This was not benevolence on her part, as undoubtedly an implied term as to reasonable notice would have required at least 2 weeks to be the period.

[21] The Authority finds from the evidence of the discussions and communications between Ms Kwon, Ms Lee and Ms Sharma, that there was ample room for misunderstanding as to Ms Kwon's intentions towards continuing her employment.

[22] English is not the first language of Ms Kwon although she is reasonably fluent. The initial discussions about the Saturday problem were with Ms Lee, who is also Korean. She sent on the advice to Ms Sharma that 13 August was to be the last day for Ms Kwon.

[23] Ms Sharma is not a Korean speaker. She did not become directly involved in discussions with Ms Kwon until 4 August when she spoke to her on the phone.

[24] The language situation does not appear to have been a major contributor to the misunderstanding. What really was lacking was a reasonably clear and unequivocal expression from Ms Kwon of her intentions. There was an opportunity for misunderstanding to arise when Ms Kwon first raised the Saturday problem with Ms Lee, and then when Ms Lee in turn informed Ms Sharma of the situation.

[25] Ms Kwon had drawn her employer's attention to a prospective difficulty with her days of work and enquired about the availability of another day of work instead of Saturday. The Authority finds that is all she did. She did not clearly advise of a present

need to terminate her employment, although she recognised in discussion with Ms Lee that could happen.

[26] From time-to-time employees do mention or discuss the possibility that they will have to finish their employment because of some event or situation they expect may arise. Such discussion is not a resignation but is an aspect of being active and communicative in an employment relationship, by keeping the employer reasonably informed of developments that may impact performance of the employment.

[27] Ms Kwon produced to the Authority an email of 6 August she had drafted to send to Ms Sharma but sent to her lawyer Mr Kang first. Although in the end it was not sent to Ms Sharma, it does give an indication of what Ms Kwon was thinking on 6 August after she had spoken to Ms Sharma on 4 August and received her email of 5 August. She said

When I first talked about my work with Elly, I didn't even want to quit my job and I was discussing the change in my situation.

[28] In her draft Ms Kwon did concede that she had not explained the situation properly in the phone discussion with Ms Sharma on 4 August, although she said she could not understand what Ms Sharma had said.

[29] Ms Sharma was relying on what she had heard from Ms Lee about Ms Kwon's advice given in June or July. Ms Kwon could not be held responsible for any miscommunication between Ms Lee and Ms Sharma.

[30] THS created a difficulty for itself by not putting the employment agreement in writing. Ms Kwon, as a young employee wanting to advance in her employment, is likely to have paid attention to the written terms and, if resigning, done so in accordance with them. But she was given no written terms as to the notice period or the form of resignation.

[31] The absence of a written term did not prevent Ms Kwon from giving an effective notice of resignation, in writing or orally, provided it was a clear and unambiguous statement of intention to resign. The Authority is satisfied that was not the situation and that THS, as the employer, did not discharge a responsibility it had to make sure there was no misapprehension about Ms Kwon's intentions.

[32] The aspect of the law has been explained by the Employment Court in *Montieth v Hakansson*¹

In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where an employee makes it clear that resignation was not intended.

[33] If THS had genuinely wanted to keep Ms Kwon as suggested by Ms Sharma, Ms Lee or Ms Sharma could have checked with Ms Kwon to make sure there had been no misunderstanding about her intentions. Instead, it seems THS wanted her to leave and transformed Ms Kwon's discussions about a problem with working Saturdays, into a resignation.

[34] Given the investment in training Ms Kwon the employer says it put in, and given that she was well regarded as an employee, it seems to the Authority more likely that THS found it convenient let Ms Kwon go.

[35] The Authority does not accept the portrayal of THS as an employer that had no reason at all to seize an opportunity to have Ms Kwon leave, especially once Ms Kwon told Ms Lee she had arranged for another person to look after her child on Saturday.

[36] Ms Sharma told the Authority that all that had been required was for Ms Kwon to say she did not want to resign but would like to continue, and 'none of this would have happened'. Equally on the other hand, all that would have been required was for Ms Sharma to ask Ms Kwon if she wanted to resign. Ms Sharma seems from all the evidence to have stood back from taking that simple and practical step.

[37] Ms Sharma's evidence that she did not want to put pressure on Ms Kwon by asking her to continue working, is not credible. The Authority finds that THS for its own reasons was content to believe Ms Kwon wanted to go and did not want that belief disturbed through making further enquiry.

[38] The evidence from Ms Sharma and Ms Lee also leaves it unclear exactly when Ms Kwon was believed to have given notice, whether in June or July. What is clear is

¹ [2008]NZEmpC 9

that there was considerable uncertainty about MS Kwon's intentions, placing some responsibility on THS to seek clarification.

[39] The Authority does not accept that the misunderstanding was about the length of notice rather than whether notice was given at all. The heart of the dispute was whether Ms Kwon wanted to leave at all, rather than the date she wanted to leave.

[40] Neither does the Authority accept the veiled suggestions that THS was scammed by Ms Kwon. Any scam based on a faux resignation would fall apart the moment the employer asked the employee to confirm they were resigning, which is what should have happened in this case. Ms Kwon did not strike the Authority as the perpetrator of an elaborate plan based around the employer wanting to shorten a period of notice by five days, as suggested by Ms Sharma.

[41] The Authority finds that Ms Kwon did not resign on any period of notice. Nor did she give THS any firm or reliable basis for believing she had resigned. Ms Kwon was dismissed by THS insisting she leave and giving her two weeks' notice.

[42] THS has not sought to justify the dismissal if the employment is held to have ended in that way. Accordingly, the Authority determines that the dismissal was unjustified and Ms Kwon has a personal grievance of that kind.

Remedies for unjustified dismissal

[43] The Authority accepts the evidence and submissions for Ms Kwon in support of her claim for reimbursement of lost wages of \$3,872.61, an amount which takes into account considerable mitigation of her loss by Ms Kwon, by finding other employment for some of the three-month period of claim. THS is to pay that sum to Ms Kwon under s 123(1)(b) of the ER Act.

[44] Interest is to be paid on \$3,872.61 from 29 April 2022, the date the investigation meeting began, until the lost wages are paid in full. The rate and calculation are available on-line at www.justice.govt.nz/fines/civil-debt-interest-calculator.

[45] As compensation for distress and anxiety Ms Kwon has claimed \$20,000 under s 123(1)(c)(i) of the ER Act.

[46] The Authority accepts the evidence given by Ms Kwon and her partner as to the distress, anxiety and worry she suffered as a result of losing her job by dismissal. The evidence for THS was that Ms Kwon had performed well and was liked by other employees. Until the issue over Saturday work arose, there had been no problems in her employment or with her employer. She strongly felt the loss of the job she had had part-time for over seven months, the loss of income and the rejection of her employer.

[47] The Authority takes into account that THS was a small business with limited resources, which like most others suffered through the Covid pandemic, but it was an experienced employer which had been in business for about eight years at the time of Ms Kwon's dismissal.

[48] An award in the middle part of the range, towards the lower end of that, is appropriate. The amount THS is ordered to pay Ms Kwon is \$15,000, under s 123(1)(c)(i) of the ER Act.

[49] The Authority is satisfied there was no blameworthy conduct on the part of Ms Kwon that caused the unjustified dismissal. No reduction in the remedies of lost wages or compensation is required to be made for contribution.

Unjustified disadvantage grievance – absence of written employment agreement

[50] The Authority finds that without excuse THS acted in breach of the ER Act when it failed to provide Ms Kwon with a written employment agreement. The employer acted without justification. THS has accepted responsibility for the breach but maintains Ms Kwon did not suffer disadvantage from it.

[51] Ms Sharma was well aware of the legal requirements, as THS had employed several other people in its salon including Ms Lee. They had been given a written employment agreement.

[52] Ms Kwon asked repeatedly for her written agreement from 4 December 2019 but was not given one. On that date she sent a message to Ms Lee, asking when the agreement would be put in writing, and she asked for it to be sent to her.

[53] The Authority disagrees there was no disadvantage to Ms Kwon. She was disadvantaged in her employment and conditions of employment on several levels. She did not receive the benefit of the statutory requirement to have an individual employment agreement in writing. Both she and THS together would have been advantaged by the acquisition of knowledge and certainty if this requirement had been met.

[54] To suggest there was no disadvantage is to question the purpose and objective of the statutory provisions at s ss 63, 64 and 65 of the ER Act which provide a fundamental benefit for employees in an employment relationship. Bound into that trio of provisions, at s 64, is an employment standard, one of several measures in a special class which are intended for the advancement of productive employment relationships.

[55] A person who has not been afforded their full legal rights, particularly when those have been enshrined in statute as an adjunct to a minimum legal standard, could rarely if ever be said not to have been disadvantaged in their employment or conditions of employment.

[56] The disadvantage to Ms Kwon was not theoretical only. She suffered significant disadvantage for a long period by not having certainty and clarity over things such as whether a 90-day trial period was a term or condition of the employment, when and how rest and meal breaks were to be taken, the period and form of notice of termination, and her entitlement to sick leave. Her oral terms of employment were insufficiently clear or certain as to the existence and scope of these and other entitlements, rights, or obligations, putting her at a disadvantage.

[57] Leaving it to an employee to consult Google or an 0800 Labour helpline, will not usually be enough to provide the knowledge and certainty intended to be available from having a personal copy of a written agreement.

[58] The Authority considers there was a real prospect that if there had been a written agreement with a two-week written notice provision, Ms Kwon may not have been dismissed at all, because if she had intended to resign it is likely she would have complied with her agreement and given clear written notice. Room for misunderstanding is likely to have been eliminated or at least reduced by having the requirements for giving notice set out in writing.

[59] Ms Kwon was unjustifiably disadvantaged but did not lose wages from that. Her hurt feelings and humiliation flow largely from being unjustifiably dismissed rather than the failure of her employer to provide a written agreement. The failure does require a penalty to be imposed.

[60] The Authority accepts that Ms Sharma was overseas during much of the employment and that she was preoccupied with personal matters, but the Authority does not accept that the breach of the requirements in ss 63A, 64 or 65 occurred through oversight. It is not difficult to produce an employment agreement template. THS already had some examples provided to other employees. It needed printing out and signing, something Ms Lee could easily have assisted with.

[61] It seems to the Authority the breach was deliberate, in circumstances where Ms Kwon had asked for a written agreement as soon as she started work but for the seven months of the employment THS did not provide one. Ms Sharma was aware of the requirements and the Authority concludes she was not careless but avoided giving one to Ms Kwon.

[62] The Authority finds that multiple remedies are available to address the failure. First, Ms Kwon has an unjustified disadvantage personal grievance. Leaving her without a written employment agreement for over seven months, is not what a fair and reasonable employer could have done in the circumstances.

[63] Second, it was a breach of good faith to withhold a written agreement, as the statutory requirements are an aspect of being responsive and communicative in sharing critical information. The breach was serious, deliberate and sustained, and is therefore punishable with a penalty under s 4A of the ER Act.

[64] Third, the provisions of ss 63, 64 and 65 each provide penalties for breach.

[65] A single penalty for breach of s 64 or 65 will best address the wrong and avoid duplication of remedies.

Breach of good faith

[66] A penalty can be imposed where the Authority finds there has been a breach of good faith that is serious, deliberate and sustained, or was intended to undermine an employment agreement.

[67] As well as the failure to provide a written employment agreement, there were other features of the behaviour of THS towards Ms Kwon that raise doubts whether good faith was complied with. The Authority is satisfied that the grievance and other penalty claims provide better redress for conduct which might have supported a penalty under s 4A of the ER Act.

Paid sick leave

[68] Ms Kwon took paid sick leave on four days after she had been employed for more than six months. By then she had an entitlement to that leave, under s 63 of the Holidays Act 2003.

[69] The Authority is satisfied from the pay records produced for the dates in question that Ms Kwon was not paid for the four days and is therefore entitled to recover \$689.85, as claimed for a total of 36.5 hours.

[70] The amount is to be paid with interest from 29 April 2022, calculated using the on-line calculator at the site given earlier in this determination.

[71] THS is liable to a penalty for failing to comply with s 63 of the Holidays Act.

Breaks

[72] The Authority is satisfied that Ms Kwon was not given all the breaks, paid and unpaid, she was entitled to under s 69ZD of the ER Act.

[73] The nature of the business and services THS provided, were such that flexibility was needed as to timing and even on occasions whether a break could be taken at all. The provision in Ms Lee's written agreement, assuming it would have been the same for Ms Kwon if she had been given one, provided no detail about the taking of breaks. The flexibility required of salon work makes it likely that breaks were not always taken.

[74] The claim for arrears is best answered with an order made in equity and good conscience under s 157(3) of the ER Act, recognising the difficulties in precisely establishing what happened on each day of work for nearly eight months.

[75] The penalty claim is best dealt with together with the failure to provide a written agreement, which could have specified how and when breaks were to be taken while still allowing flexibility in the salon.

[76] In equity and good conscience THS is ordered to pay Ms Kwon for 1.25 hours per week or 50% of the amount claimed, being a payment of \$402.00. Interest is to be paid on that sum from 29 April 2022.

Wage and time records – holiday and leave records

[77] The Authority directed production of these records to Ms Kwon through counsel Ms Kang. They had to be produced by THS in February 2022 and be available for the April start date of the investigation meeting.

[78] It appears THS failed to comply with the Authority's direction and the records were not produced.

[79] In final submissions from Ms Sharma, copies of a Crystal Payroll programme were provided although they were for Ms Lee not Ms Kwon.

[80] The Crystal records in form and content would seem to satisfy the statutory requirements for records. They detail dates of annual leave, sick leave and public holidays. They give the hours Ms Lee worked each day and in each week, and amounts paid. They begin in January 2020 when Ms Kwon started work for THS.

[81] The Authority accepts that the same records were kept for Ms Kwon. Although they were not produced as directed, that failure has not delayed or obstructed the Authority which has largely accepted the evidence given for Ms Kwon about her entitlements.

[82] The relatively small business of THS has been ordered to pay significant amounts in compensation, lost wages, and penalties. In the circumstances further penalties are not required to do justice to the claims and achieve the objects of the ER Act and Holidays Act.

Penalties

[83] The Authority is satisfied penalties against THS should be contemplated for its failure to provide an employment agreement in writing, to pay the minimum wage for untaken breaks, and for unpaid sick leave.

[84] A breach need not necessarily result in a penalty. The amounts of wages ordered to be paid by THS for sick leave and breaks are \$689.85 and \$402.00. The Authority considers penalties are not necessary as a further remedy. In its discretion the Authority makes no orders for penalties in relation to sick leave and breaks.

Failure to provide a written employment agreement

[85] An individual employment agreement must be in writing. The requirements are in ss 63, 64 and 65 of the ER Act. Section 65 seems to best fit the situation where THS failed for over seven months to provide a written agreement to Ms Kwon.

[86] The maximum penalty where the employer is a company is \$20,000.

[87] The principles and methodology for reaching the appropriate level of penalty are set out in *Shah Enterprise NZ Ltd and another v A Labour Inspector*². The Authority applies them as follows.

[88] The conduct of THS was contrary to the objects of the ER Act. The lack of certainty as to the terms and conditions of employment impeded the building of trust and confidence and nurturing of good faith.

[89] The need for judicial intervention was probably increased by the absence of a written agreement providing certainty as to how notice of resignation was to be given, whether orally or in writing, and how much notice was to be given. Employment relationship problems are more likely to arise when there is no written agreement to check entitlements, rights and obligation against.

² [2022] NZEmpC 177

[90] The breach is a single one although it continued throughout the seven months of employment. The period of continuing failure should be reflected in the amount of the penalty.

[91] The breach was deliberate or intentional. From the beginning of the employment Ms Kwon repeatedly asked for her written agreement. The employer did not simply forget what it had to do.

[92] Provision of a written agreement may have avoided the time and expense of an Authority investigation including the fees of Mr Kang, Ms Kwon's retained legal counsel. Taxpayer funded institutions have also incurred cost and had extra burdens put on their resources by this investigation.

[93] The lack of a written agreement has probably contributed to the underpayment of Ms Kwon for sick leave and breaks.

[94] No compensation or reparation for the breach and harm has been paid to Ms Kwon.

[95] Ms Kwon was a vulnerable worker, relatively new to employment in New Zealand and working at the minimum wage, the lowest lawful pay rate.

[96] Nothing is known about any previous history or form THS may have in relation to breaches of employment law.

[97] There is a strong need for general deterrence to make employers aware that they must not fail or delay for any reason in complying with ss 64 and 65 of the ER Act.

[98] The level of culpability is medium in the circumstances.

[99] The Authority accepts the likelihood that THS will have limited ability to pay a penalty as well as meet the other orders made by the Authority.

[100] The breach was serious in relation to the obligation cast on THS by the ER Act, and the conduct of THS in allowing a situation to exist and continue where a new employee was left without key knowledge and certainty at the critical introductory phase of her employment.

[101] The starting point should be 35% of the maximum, or \$7,000, with a reduction to achieve consistency with other awards to \$3,500.

[102] It is also just that Ms Kwon should be paid \$2,000 of that penalty, to recognise that her right was infringed, a right she knew to be important as she asked for the written agreement repeatedly.

Summary of orders of the Authority

- (i) As remedies for her unjustified dismissal, Ms Kwon is to be paid by THS compensation of \$15,000 under s 123(1)(c)(i) of the ER Act and lost wages of \$3,872.61 under s 123(1)(b).
- (ii) Ms Kwon is to be paid \$689.85 by THS for sick leave, as required under s 63 of the Holidays Act 2003.
- (iii) Ms Kwon is to be paid \$402 wages by THS for rest and meal breaks, as required under s 69ZD of the ER Act.
- (iv) Interest is to be paid on the amounts awarded above for lost wages, sick leave and breaks, from 29 April 2022 (\$4,964.46 total) until paid, as calculated using the www.justice.govt.nz/fines/civil-debt-interest-calculator.
- (v) THS is to pay a penalty of \$3,500 under s 135 of the ER Act for breach of ss 64 and 65 of the ER Act. Ms Kwon is to receive \$2,000 of that sum under s 136(2) of the Act, and the balance of \$1,500 is to be paid to the Authority for payment into a Crown Bank Account.

Costs

[103] Costs are reserved

[104] Any application for costs and expenses by Ms Kwon is to be made within 14 days of the date of this determination. Any reply by THS is to be made within 14 days of Ms Kwon's application.

Alastair Dumbleton
Member of the Employment Relations Authority