

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 593
3211899

BETWEEN JAIHEE CHOI
 Applicant

AND HSK LIMITED trading as
 FIVE STAR RESTAURANT
 Respondent

Member of Authority: Peter Fuiava

Representatives: Applicant in person
 Chang Hwan Ryoo and Young Woo Ryoo for the
 Respondent

Investigation Meeting: 29 May and 10 July 2023 in Auckland

Last information received: 12 July 2023 from the applicant and the respondent

Determination: 12 October 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] From 10 September to 25 October 2022, Jaihee Choi worked full-time as a kitchen hand for HSK Limited, a small family-owned Vietnamese restaurant in Albany (HSK or the company). The company is operated by Chang Hwan Ryoo, his wife, and their son Young Woo Ryoo also known as Ben.

[2] Ms Choi has asked the Authority to investigate her claim that she was not provided with a written employment agreement by her employer, that it failed to set up a payment plan into her KiwiSaver, and that she was forced to resign because of the company's actions in reducing her employment from five to two days of work per week.

[3] While HSK accepts that it failed to provide Ms Choi with a written employment agreement, it says that she failed to provide it with her passport so that the agreement

could be prepared, Ms Choi had failed to return her KiwiSaver form so that payment into her KiwiSaver could be arranged, and that her claim of constructive unjustified dismissal was not lodged with the Authority in time and that in any case she had resigned and was not dismissed.

How has the Authority investigated?

[4] For the Authority's investigation written witness statements were lodged from Ms Choi. For HSK, a joint written statement from Mr Ryoo and Ben was provided. At the investigation meeting, Ms Choi, Mr Ryoo and Ben answered questions under oath or affirmation from me and from each other. On 12 July 2023, I attempted to resolve matters between the parties but they could not agree on a settlement so I must now make a determination having regard to the established facts and the substantial merits of the case.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the issues?

[6] The issues requiring investigation and determination are:

- (a) HSK admits that it did not provide Ms Choi with a written employment agreement. Was Ms Choi unjustifiably disadvantaged by not having a written employment agreement and what should be awarded against HSK by way of a penalty under the Act?
- (b) Was Ms Choi unjustifiably disadvantaged by HSK when it reduced her employment from five to two days per week?
- (c) Was Ms Choi constructively and unjustifiably dismissed because HSK had significantly changed the terms of her employment?
- (d) Was there a dismissal? Did Mrs Choi voluntarily resign from her employment?
- (e) If HSK's actions were not justified (in respect of disadvantage and/or dismissal) what remedies should be awarded considering:
 - Lost wages (subject to evidence of reasonable endeavours by Ms Choi to mitigate her loss); and

- Compensation under s123(1)(c)(i) of the Act.
- (f) If any remedies are awarded, should these be reduced under s 124 of the Act for blameworthy conduct by Ms Choi that contributed to her own grievance?

What happened?

[7] On 23 August 2022, Mr Ryoo and his family purchased the restaurant business as a going concern. It employs Mr Ryoo, his wife, the couple's son Ben and three other employees. At some point, Ms Choi had cold called the restaurant and spoke to Ben looking for work. She had no prior experience working in a restaurant and it was Ben who interviewed her and who ultimately employed her. No written employment agreement was provided but the oral terms and conditions of Ms Choi's employment are not disputed namely that she was employed as a kitchenhand, was required to work full time for approximately 32 to 33 hours per week over five days from Tuesday to Sunday, and that she was to be paid \$22 per hour.

[8] After completing a one-week trial, Ms Choi formally commenced working for HSK on 10 September 2022. However, her employment ended some six weeks later on 25 October. The parties disagree as to how the employment relationship ended. It was Ms Choi's evidence that HSK had arbitrarily decided to reduce her workdays from five to two days per week. She attributes this to the company's decision to employ an additional staff member, a Vietnamese cook, which it did as a way to boost sales but that this came at Ms Choi's expense as she was now being asked to work only two days per week rather than the agreed five.

[9] On 18 October 2022, Ms Choi met with Mr Ryoo and Ben to discuss the proposal to reduce her workdays. She was asked two things by her employer. First, she was asked if she could work part-time for only two days per week but Ms Choi could not agree stating that she could not afford to do so as she was financially supporting her younger brother in South Korea who was the caregiver for both their elderly mother and a second brother who has cerebral palsy. Both he and the mother wore adult nappies which needed to be changed every three hours. Ms Choi further explained that she could not rely on her husband for financial support because he had already paid for her mother's high hospital fees which had strained the couple's marital relationship as a result.

[10] The second thing that the employer asked of Ms Choi was whether she could work during the evening. The rationale for this was the change in season and the anticipated drop off in demand for HSK's noodle soup during summer. Ms Choi explained that she could not do so because of her husband's diabetes which required her to be home in time to cook his dinner.

[11] The meeting ended with no agreement being reached between the parties but they continued to text each other later that evening. In one text sent at 8.44 pm that night, Ms Choi reiterated to her employer that she could not agree to her workdays being cut from five to two days per week. She further stated that she had been told not to come into work the next day (Wednesday 19 October) by her employer. At 10.26 pm, Ms Choi received a text from her employer that she had been asked to work part-time and that she had not been dismissed.

[12] On 24 October 2022 at 11.13 am, Ms Choi received a text from her employer stating that what she was asking from the business was difficult and consequently she was asked to work the same hours (during the day) but for two days per week only. Ms Choi reiterated that she needed to work her five days but indicated she was willing to work in the evening. However, the employer had not agreed to her working in the evening five days per week.

[13] At 1.42 pm later that same day, Ms Choi requested that she be given three weeks' notice (working five days per week) because she did not feel comfortable "fighting over this". At the investigation meeting, Ms Choi clarified that she sought three weeks because this would have given her time to find alternative employment. The employer's response was that if Ms Choi wished to quit, she could work two days per week for the next three weeks. This was not accepted by Ms Choi who advised that she did not wish to quit but that her hours had been significantly reduced without agreement and that none of her other colleagues had their hours reduced. Ms Choi stated this was not fair and that she had trusted her employer but now felt "betrayed." She had tried (unsuccessfully) to resolve the problem and for these reasons had requested three weeks' notice.

[14] Ms Choi returned to work on 25 October 2022 which was her last day of employment at HSK. By letter or email of 26 October, she raised a personal grievance

with her employer for failing to provide her with a written employment agreement and for changing her work hours.

[15] HSK says that it did not wish to reduce the number of Ms Choi's workdays but rather wanted her to work in the evening because business was "calmer" over the summer. Because she rejected evening work on account of cooking her husband's dinner, HSK had alternatively proposed that she work her usual hours but for two days per week only. HSK further stated Ms Choi had indicated that she needed time to think matters through but had then resigned.

Was the personal grievance raised in time?

[16] Section 114 of the Act sets out what is required of an employee to raise a personal grievance within the applicable employee notification period which in this case is 90 days. Time starts to run from the date on which the action alleged to amount to a personal grievance has occurred or has come to the notice of the employee, whichever is later.¹

[17] This meant that Ms Choi had 90 days to raise her personal grievance with her employer as opposed to 90 days to file her grievance with the Authority as contended (incorrectly) by Mr Ryoo. It is noted that Ms Choi raised her grievance with HSK in writing on 26 October 2022 and on 28 October had sought the assistance of early dispute resolution to resolve her grievance. When that failed, the parties attended mediation on 12 December but matters did not resolve there. On 1 February 2023, Ms Choi lodged her Statement of Problem with the Authority. Given the chronology described above, I am satisfied that Ms Choi has raised her claim with her employer well within the employee notification period of s 114.

Was Ms Choi unjustifiably disadvantaged?

[18] The question of whether a dismissal or other action by an employer is justified is determined on an objective basis by applying the test at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.

¹ The Act, s 114(1) and (7)(b).

[19] Section 63A(2) of the Act states that an employer who is bargaining with an employee for an individual employment agreement or individual terms and conditions in an employment agreement must, among other requirements, provide the employee with a copy of the intended agreement under discussion. While HSK concedes that it failed to provide Ms Choi with a written employment agreement, it says that Ms Choi's failure to provide it with her passport meant that it could not prepare a written employment agreement for her.

[20] Section 65 of the Act sets out the minimum requirements for form and content of an employment agreement which includes the name of the employee and the employer; a description of the work to be performed by the employee; an indication where the employee is to perform the work; any agreed hours of work; the wages or salary of the employee; and a plain language explanation of services available for the resolution of employment relationship problems.²

[21] HSK had all this information already and did not require Ms Choi's passport to complete her employment agreement as required by law. If the passport was required to check her immigration status for example, that purpose was never conveyed. A written employment agreement could have contained a provision that the employee needed to be lawfully entitled to work in New Zealand such as being a citizen, resident or the holder of a valid work visa. HSK's explanation is unsatisfactory and does not absolve it from failing to comply with a minimum employment standard.³

[22] It follows that HSK has breached its statutory obligation under s 63A(2) of the Act to provide Ms Choi with a written employment agreement and I consider it appropriate to consider the imposition of a penalty. In considering whether a penalty is warranted and, if so, at what level, I have taken into consideration the mandatory factors set out in s 133A of the Act and the Employment Court's decisions in *Nicholson v Ford*⁴, *A Labour Inspector v Daleson Investment Ltd*⁵ and *Borsboom v Preet Pvt Ltd*.⁶

² The Act, s 65(2)(a)(i)-(vi).

³ The Act, ss 64 and 5 (definition of employment standards).

⁴ *Nicholson v Ford* [2018] NZEmpC 132.

⁵ *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

⁶ *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

[23] In *Borsboom*, the full bench of the Employment Court stated that the objective behind the award of penalties were to:⁷

- (a) punish those who breach statutory obligations;
- (b) deter deliberate breaches;
- (c) compensate the victim of the breach;
- (d) eliminate unfair competition and business.

The court also applied a four-step process to the assessment of penalties which I have adopted and applied below.

Step one – nature and number of breaches

[24] The maximum penalty for a company or corporation is a penalty not exceeding \$20,000.⁸ There is only one breach of the Act which relates to HSK's failure to provide an intended written employment agreement to Ms Choi. The maximum penalty the company faces is \$20,000.

Step 2 – assessment of the severity of the breach in each case to establish provisional penalties starting point and consider both aggravating and mitigating factors

[25] The company's failure to provide a written employment agreement did have a real and appreciable impact on Ms Choi because she stated at the investigation meeting that if she had a written employment agreement, HSK may not have changed her workdays from five to two days per week. A written employment agreement may have contained a provision that before any subsequent variation or change could be made, the agreement of both parties evidenced in writing was required. Had Ms Choi been provided with an employment agreement, such a provision would have made it that much more difficult for her employer to change the terms and conditions of her employment without her express consent.

[26] However, I take into consideration as a mitigating factor that Mr Ryoo had purchased the business shortly before Ms Choi had commenced her employment and that the company may not have all of its systems in place at that time to provide her with an employment agreement. Its failure to comply with s 63A(2) was not intentional but negligent. I consider a reduction of 70 per cent to be appropriate. The adjusted total for the penalty so far amounts to \$6,000.

⁷ Above at [61] to [63].

⁸ The Act, s 135(2)(b).

Step three – means and ability to pay the provisional penalty

[27] There was evidence that trade levels for HSK are lower during summer compared to the colder months when customers prefer hot meals such as noodle soup. HSK is a small family-owned business which has operated for approximately two years. It will still be building up its client base while meeting rising operating costs and inflation.

[28] I am prepared to make a modest discount of a further 10 percent from the provisional penalty of \$6,000 in light of the respondent's ability to pay. The adjusted total for the penalty is now \$5,400.

Step four – proportionality of outcome

[29] The penalty imposed should be in proportion to previous cases with a similar factual scenario. The court in *Preet* observed that the final penalties which are set should not be at such a level that the liable employer has an incentive to avoid paying them or, alternatively, simply cannot pay them.⁹ While there is no evidence of impecuniosity, the penalty should be in all proportion to the breach committed and its effects.

[30] Standing back and looking at all matters in the round, I find a fair penalty is \$1,500 which HSK Ltd is ordered to pay. Pursuant to s 136(1) of the Act, the entire amount is to be paid to Jaihee Choi within 28 days from the date of this determination.

Remedies

[31] I find that HSK's action in failing to provide Ms Choi with a written employment agreement is not what a fair and reasonable employer could have done in all the circumstances. Put differently, HSK's actions fail the test of justification at s 103A of the Act for which Ms Choi is entitled to remedies which is considered further below.

Was Ms Choi constructively dismissed?

[32] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the

⁹ n 14 at [191].

resignation? Second, if there was such as breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, was there a substantial risk of resignation?¹⁰

[33] In the Court of Appeal decision of *Auckland Shop Employees Union v Woolworths (NZ) Limited*, constructive dismissal cases included situations where:¹¹

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

[34] In this case, I understand Ms Choi to be relying on the third category namely that HSK breached its duty to provide her with a written employment agreement and significantly reduced her work hours without her consent.

[35] In HSK's defence, Mr Ryoo stated that it was not the company's intention to reduce the number of Ms Choi's workdays and that he would have allowed her to work five days per week provided that she was able to do so in the evening rather than during the day. As noted above, the rationale for the change with Ms Choi's work hours was to assist the business because customers were less likely to order its main dish of noodle soup during the summer months. Mr Ryoo further stated that Ms Choi had failed to advise her employer during her job interview that she could not work during the evenings.

[36] However, Mr Ryoo did not interview Ms Choi who was interviewed by his adult son Ben. I asked him whether he had explained to Ms Choi during her job interview that she could be needed to work during the evening. Ben stated that they did not talk about it then. I accept that when evening work became an issue for HSK on 18 October 2022 that it did have a conversation with Ms Choi at that time. While both Mr Ryoo and Ben take issue with Ms Choi saying that she was prepared to work in the evening, a text message from her to her employer has been translated into English by an Authority-appointed Korean interpreter who is independent of the parties. The

¹⁰ *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 at 172.

¹¹ *Auckland, etc, Shop Employee, etc, IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

translated message from Ms Choi dated 24 October shows that while initially refusing evening work, after further serious thinking, Ms Choi had said to her employer to give her those hours but that the employer had said “no”.

[37] The evidence establishes that in the end Ms Choi had agreed to work in the evening (although she was not happy about it) but that HSK had changed its mind and declined to give her evening work at five days per week. While the threshold for constructive dismissal cases is high because it is the applicant’s responsibility to establish the fact of their dismissal, I find HSK’s failure to provide Ms Choi with a written employment agreement, its ultimate decision not to allow her to work five days per week in the evening, and the apparent disparity in treatment in how Ms Choi was being treated in relation to her other work colleagues has resulted in Ms Choi feeling that she had no other choice but to resign. I find further that Ms Choi had explained to her employer why she needed to work which was to support her immediate family members in South Korea. Considered cumulatively, I find that HSK’s breaches were sufficiently serious so as to make it reasonably foreseeable that Ms Choi would be unable to continue working in that situation. I find that she was constructively and unjustifiably dismissed.

Lost wages

[38] Under s 123(1)(b) of the Act, where it has been found that an employee has a personal grievance, employment institutions may, among other things, reimburse the employee a sum equal to the whole or any part of wages or money lost by the employee as a result of the grievance. During the investigation meeting Ms Choi stated that it took her longer than two months to find alternative employment. When her employment ended, she returned to selling vegetables at a local market once a month. She worked for one other employer as a kitchenhand but left that employment after one day, dissatisfied with the employer.

[39] By Ms Choi’s own admission, her search for work was limited to her ethnic community. She did not seek work outside of that circle which I attribute to her limited English and her preference to work during the day because she was needed at home to cook the evening meal for her husband who has diabetes. I do not consider it fair that HSK has to pay significantly in lost wages when it has not been shown that Ms Choi

has sufficiently mitigated her losses. I accept Mr Ryoo's statement that there would be a demand for kitchenhands in hospitality.

[40] However, in the absence of a written employment agreement, it is more probable than not that it would have contained a two-week notice period and the evidence shows that Ms Choi was only provided with one weeks' notice for the week of 25 September 2022 which HSK paid in compensation for holiday pay and for KiwiSaver. Taking into account that payment, the Authority orders HSK Ltd to pay Jaihee Choi one weeks' wages of \$715 (gross) in lost remuneration.

Compensation for humiliation, loss of dignity and injury to feelings

[41] Compensation is for the effects on the employee of the grievance. It is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct. Ms Choi felt betrayed by her employer who employed her to work five days per week for 32-33 hours per week. In the absence of a written employment agreement, Ms Choi trusted her employer to do right by her but felt that she had been unfairly treated when none of her other co-workers had their work hours reduced. The sudden end to her employment resulted in Ms Choi feeling stressed for herself and for her financially-dependent family members in South Korea.

[42] I am satisfied that Ms Choi has experienced loss of dignity and injury to feelings. The evidence establishes that HSK's failures towards Ms Choi have directly contributed to the circumstances which resulted in her dismissal. On the spectrum of harm and quantum awarded and noting also that Ms Choi was unjustifiably disadvantaged and unjustifiably dismissed, an award of \$10,000 under s 123(1)(c) of the Act is appropriate.

[43] Ms Choi has not contributed to her own grievance so no reduction in compensation or in lost wages is warranted under s 124.

Reasonable expenses

[44] Given the outcome, it is reasonable for HSK to reimburse Ms Choi the filing fee of \$71.55 to lodge her application in the Authority and the hearing fee of \$153.33 that she paid for the second day of the investigation meeting.

Summary of Orders

[45] The Authority orders that within 28 days of the date of this determination, HSK Limited is ordered to pay Jaihee Choi the following sums:

- (i) reasonable expenses in the total amount of \$224.88 (\$71.55+153.33);
- (ii) a penalty of \$1,500 under s 63A;
- (iii) \$715 (gross) in lost wages under s 123(1)(b); and
- (iv) compensation of \$10,000 under s 123(1)(c)(i) of the Act.

Costs

[46] As the parties are self-represented, each party shall carry their own costs.

Peter Fuiava
Member of the Employment Relations Authority