

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 696
3247239

BETWEEN KANG HYUK LEE
 First Applicant

AND YOUNG JOO LEE
 Second Applicant

AND SAKE BROTHERS LIMITED
 First Respondent

AND JUNG SUB KIM
 Second Respondent

Member of Authority: David G Beck

Representatives: Henry Holderness, counsel for the Applicants
 Nicholas Farrands, counsel for the Respondents

Investigation Meetings: 2 and 3 May 2024, 26 July 2024, and 12 September 2024 in
 Christchurch

Submissions Received: 25 July 2024 and 12 September 2024 from the applicants
 25 July 2024 and 12 September 2024 from the respondents

Date of Determination: 22 November 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kang Hyuk Lee (aka Jack) and Young Joo Lee (aka Alice) worked for Sake Brothers Limited (Sake Bros) as respectively a chef and an administrator of a Christchurch based Korean restaurant (ZZAN). Jack and Alice are married. Jung Sub Kim (aka Jimmy) is the sole director of Sake Bros that owns the restaurant that Jack and Alice Lee worked at.

[2] Jack and Alice Lee have suggested they were both unjustifiably dismissed arising from broadly the same contextual background. As remedies they are seeking compensation; lost

wages; penalties; lost benefits and unpaid minimum entitlements. Jack Lee is also seeking additional monies he considers are owed to him arising out of a profit share agreement he entered with Jimmy and that is the sole claim being pursued against Jimmy Kim as second respondent.

[3] Sake Bros deny acting unjustifiably towards the Lees' and say they made significant efforts to accommodate them throughout the employment relationship and that they both voluntarily resigned and were not dismissed. Regarding the profit-sharing claim, Jimmy Kim says he entered the agreement as a director of Sake Bros and has no personal liability and is not a party to the employment relationship.

[4] The Lees' raised personal grievances for unjustified actions causing disadvantage, wage arrears and unjustified dismissal claims on 29 August 2022. The matters remained unresolved despite mediation and extensive correspondence during 2023 and the employment relationship issues have been brought before the Authority for resolution.

The Authority's investigation

[5] The Lees' claims have been the subject of three days of investigation meetings. The issues I must determine are broadly:

- (a) Whether Jack and Alice Lee were unjustifiably dismissed by Sake Brothers Limited?
- (b) Whether during their employment period, the Lees were paid appropriately for all the hours they say they worked?
- (c) Whether penalties should be levied against Sake Bros for failing to provide Jack Lee with a copy of his proposed employment agreement during bargaining at the time of his transition from his previous employer to ZZAN restaurant and for Sake Bros failing to provide Alice Lee with an employment agreement.
- (d) Whether any outstanding monies are owing from the profit share agreement that Jack Lee and Jimmy Kim executed and if so, what entity or person is liable for any amount that may be outstanding.

(e) What if any, remedies are appropriate and whether if granted, should they be reduced for any contributory conduct.

[6] Jack and Alice Lee provided written statements and gave evidence at the investigation meeting, as did two former co-workers and Jimmy Kim gave evidence for Sake Bros. I was ably assisted by an interpreter, Soo min Shin. The parties' representatives subsequently provided written submissions.

[7] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the evidence and submissions received from both parties and refer to them where appropriate and relevant, to the issues I have identified as being in dispute.

What caused the employment relationship problem?

[8] Jack Lee initially worked from 2018, as a chef for a Christchurch restaurant trading as Mum's Kitchen owned by a company that Jimmy Kim was a director of (Koji Christchurch Limited (Koji)). This employment was the subject of an individual employment agreement that cited Koji as the employer.

[9] In January 2020, the restaurant was rebranded and renovated to trade as ZZAN and came under the ownership of Sake Bros (a company that owns several restaurants). Jimmy Kim says he was keen to continue engaging Jack Lee and prior to entering a new employment agreement resolved to offer him a more beneficial interest in the running of ZZAN. At the time Jack and Alice Lee who are Korean nationals, possessed work visas up to 16 July 2023 that specified in Jack Lee's case that he could only be employed by Sake Bros as a head chef in their ZZAN restaurant in Christchurch. Alice Lee's working visa status was as a partner of Jack Lee.

[10] Without either party obtaining legal advice and against a backdrop that neither used English as their first language, Jimmy Kim and Jack Lee signed an agreement headed "Sales Agreement" as follows:

THIS SALES AGREEMENT (the ‘Agreement’) dated this 4th February 2020

BETWEEN

Jung Sub Kim of Sake Bothers (the ‘seller’)

AND

Kanghyuk Lee (the ‘buyer’)

IN CONSIDERATION OF THE COENNANTS [sic] and agreements contained in the Sales Agreement the parties to this Agreement agreed as follows:

1. The buyer is purchasing 40% share of ZZAN restaurant (the ‘Restaurant’) at 62 Manchester Street, Christchurch owned by Sake Brothers at NZD \$80,000 (Eighty Thousand dollar)
2. The share cannot be transferred to other party and only be owned by the Buyer while the Buyer works for the Restaurant
3. If the Buyer cannot continue to work for the Restaurant, the Seller would purchase share back at cost (NZD \$80,000)
4. If the Restaurant is sold to third party, the Buyer will be entitle to 40% of the net sales price
5. Agreed Net profit before tax amount would be distributed fortnightly. Final payout would be agreed between the parties once the tax return is finalized in following year

Kanghyuk Lee (the ‘Buyer’)

Jung Sub Kim of Sake Brothers (the ‘Seller’)

[11] On 4 February 2020, after spending \$6,276.80 on various items for ZZAN, Jack Lee says he deposited the balance of the purchase price of \$73,723.20, into Jimmy Kim’s personal bank account (evidence provided showed this sum was then transferred to a Sake Bros account).

[12] Subsequently, an individual employment agreement was signed by Jonathan Kwon, General Manager (Authorised Officer and shareholder of Sake Bros) and Jack Lee, dated 10 February 2022. The employer party in the agreement is described as “Sake Brothers Limited

t/a Zzan 62 Manchester St, Centra, Christchurch” and designates Jack Lee as “Head Chef”. There is no reference to the sales agreement in the employment agreement that had a provision for an annual salary of \$54,600 (later increased from 20 July 2022 to \$70,000 p.a.).

[13] The employment agreement noted the restaurant’s “span of hours of operation” were: “Monday to Sunday, 9am to 2 am”. An hours of work clause indicated Mr Lee was required to work 35 Hours per week “in accordance with a mutually agreed roster” and that he was responsible to complete “regular time recordings as directed by management”.

[14] Counsel for Jack Lee conceded that the sales agreement did not constitute a shareholding for his client but rather a right to an ongoing share of the restaurant’s net operating profit. However, there is a dispute between the parties as to the liability of claims arising from the sales agreement, with Jack Lee suggesting that Jimmy Kim entered the agreement in a personal capacity and Jimmy Kim suggesting that he did so on behalf of the company (Sake Bros) and has no personal liability. Jimmy Kim argued he also acted at all times in the employment relationship, in his capacity as a director but not sole shareholder of Sake Bros who own ZZAN and he should not be joined to these proceedings.

[15] From early March 2022, Alice Lee says without an employment agreement, she commenced working part-time for Sake Brothers in an administration support role in their Christchurch office and also worked ‘front of house’ when ZZAN was short staffed.

[16] Trading conditions for the restaurant from April 2020 were negatively impacted by the Covid 19 pandemic and opening restrictions. This led to a deferring of fortnightly profit payments until an agreement was struck that they be paid in a series of instalments when trading improved around August 2020. However, these payments became the subject of ongoing disputation and delay over the methodology of their calculation.

[17] A further complication was Sake Bros established a ZZAN branded restaurant in Wellington in mid to late 2021. Jack Lee travelled to and from Wellington to assist with its set up. The additional Wellington operation was interrupted in late August 2021 by further Covid-19 restrictions. This necessitated Jack Lee and his family temporarily relocating to Wellington on two occasions to assist, until mid-October when they returned to Christchurch. The remuneration paid for these periods spent in Wellington is a matter of dispute. Jimmy Kim says

in compensation for assisting with the Wellington operation he increased Jack Lee's profitability stake to 45% (Jack Lee did not contest this but it was not documented).

Ending of the employment relationship

[18] Jack Lee says in May 2022, Jimmy Kim approached him wanting to settle their dispute over profit business payments and he promised to pay a set amount in cash. However, he says soon afterwards, Jimmy Kim asked him to invest the set amount he had offered as owing and more, into a new restaurant venture in Christchurch and that it was best to do it that way as Jack was still holding a working visa. Jack Lee says he declined this 'opportunity' that led to Jimmy Kim saying he would not pay the amount he suggested was owing in profits.

[19] Jimmy Kim says in July 2022, he resolved to get the Sake Bros accounts manager to do a breakdown calculation of disputed payments up to 31 March 2022. It was then brought to his attention that the Lees had been making various and significant, personal purchases utilising Sake Bros business credit card. Jimmy Kim says he resolved to meet with the Lees to discuss his concerns.

[20] The sequence, context, and outline, of what happened next is disputed. I was not provided with any documentation or notes of meetings but it emerged in evidence, that all agreed the first meetings happened on Tuesday, 19 July and that Jimmy Kim did not indicate prior to meeting Alice and Jack, what his concerns were. Jimmy Kim admitted he just asked to meet them (purpose not disclosed) and that he did not obtain any legal advice on how he should handle his concerns and he did not document his concerns. He conceded he did not advise the Lees of their option of being represented before meeting him. Jimmy Kim maintained he met Alice Lee first because it was her job to retain business related purchase invoices.

[21] Jack and Alice Lee say they had just returned from two weeks leave when Jimmy asked to meet them both. Alice Lee says she thought it was going to be a discussion about the disputed bonus. Alice Lee recalled having her son with her and that Jimmy Kim met Jack Lee first then her straight afterwards, without giving her an opportunity to speak with him.

[22] Jack Lee's written statement made no mention of meeting Jimmy Kim on 19 July and suggested Alice Lee was dismissed on that day but it was the next day when they first met. However, during the investigation meeting Jack Lee conceded he met Jimmy Kim on 19 July

and again on 20 July. Jack Lee's written statement appears to conflate events; suggesting he had one meeting on the 20 July at which he was told to cease working.

[23] From assessing both accounts, I consider it was more likely than not that Jimmy Kim met Alice Lee first on 19 July then Jack Lee on the same day shortly thereafter but little turns on the sequence of meetings, other than the Lees had no opportunity to consult with each other after their meetings and were not beforehand, made aware of the purpose of the meetings.

The first meetings

[24] It was agreed that Alice Lee's meeting was brief (around 10 minutes) and that they discussed missing invoices. Jimmy Kim says Alice Lee conceded that they were using the business card to purchase personal items but claimed they were not significant. Jimmy Kim says at this admission, he advised as he did not have the 'full picture', he needed to do some further investigation and would meet Alice Lee again.

[25] However, Alice Lee's account of the meeting was that Jimmy Kim showed her two or three receipts that indicated small supermarket purchase items (cookies and toothpaste), that she accepted were personal purchases. Alice Lee says Jimmy Kim then got very angry, banged on his desk and was shouting at her saying this was embezzlement; a crime; and he did not trust her. Alice Lee recalled being shocked and scared about her work visa. When pressed whether she was told she had been specifically dismissed, Alice Lee says those words were not used but she was told to leave the meeting and accused of disposing of receipts (an allegation she says was denied at the time). After the meeting, Alice Lee says Jimmy Kim called her and asked that she return the restaurant's cash sales book and office keys.

[26] At his first meeting with Jimmy Kim on 19 July, Jack Lee says he was likewise angrily accused of embezzlement for using the business card for personal purchases. Jack Lee conceded he had used the business card for personal reasons during the meeting. Jack Lee says at this stage he was not dismissed but told to just go and that Jimmy Kim said he would have to look into matters further. Alice Lee confirmed this by recalling after the first meeting Jack was not told to stop working and that Jimmy Kim rang the next day seeking to meet Jack Lee again.

The second and third meeting

[27] Again, no documentation was provided but it was accepted by Jack Lee during the investigation meeting that he was asked to an initial further meeting with Jimmy Kim on the afternoon of 20 July.

[28] Jimmy Kim says that during the first 20 July meeting, Jack Lee attended alone even though Alice Lee had been invited and that he advised Jimmy Kim that he had used the business card for personal purchases and had disposed of some of this documentation but could see nothing wrong in his actions. Jimmy Kim says he signalled a further meeting was needed after he had investigated matters further. However, Jimmy Kim then said Jack Lee unexpectedly returned after about thirty minutes and communicated that he and Alice had both decided to step down and he asked for his 'buy in' money to be repaid and outstanding profits distributed. At this point, Jimmy Kim says he indicated he would do a final calculation but he did not accept their resignations.

[29] Afterwards, Jimmy Kim claimed he continued to try and engage with the Lees to complete his investigation but was hampered by a lack of engagement. One unanswered text of 27 July concerning discrepancies in a daily income summary from the restaurant, supports Jimmy Kim's view that he was still investigating matters but there was no formal correspondence.

[30] After 20 July, Jack and Alice Lee did not return to work. Records provided by Sake Bros show that on 18 August 2002, Jack Lee received his final pay that was described as for the period ending 14 August and Alice Lee was also provided with her final pay statement on 18 August for the same ending pay period which showed a zero balance. 24 hours annual leave appeared to have been deducted.

[31] Jimmy Kim says he completed a calculation of the final profit share amount he considered owed around 22 August but was unable to get the Lees to agree to meet.

[32] Jack Lee texted Jimmy Kim on 25 August indicated their lawyer would be in touch soon but did not elaborate any specific issue. In response, Jimmy Kim emailed the Lees letters of 25 August 2022, headed "Termination of Employment". He purported to accept Jack Lee's resignation of 18 July 2022 as effective on that date. The letter also suggested that during the 18 July meeting, Jack Lee had "admitted to the unlawful taking of company funds" and that: "Such conduct is serious misconduct and a criminal offence which is the basis for immediate

dismissal” but that: “For the purpose of record” the resignation had been accepted. The 25 August letter to Alice Lee mirrored the one to Jack Lee. Jimmy Kim’s explanation for the letters was he wrongly believed he needed to formally accept the resignations in writing for them to be effective. However, I observe the timing of the letters does not give much credence to that assertion.

[33] Jack Lee in contrast, says at the initial 20 July meeting Jimmy Kim insisted that he could not work with him anymore as the trust was gone and he had already installed another chef to run the restaurant. After initially not mentioning a further meeting and not referring to it in his written evidence, Jack Lee then conceded during the investigation meeting that on 20 July, he went back to meet Jimmy Kim and he agreed to resign after Jimmy Kim had suggested that was his best option.

[34] Jack Lee says by 20 July, it was his view Alice had already been dismissed as she had been asked to return property and that because another chef had been installed, he too had been dismissed. Alice Lee on being pressed what Jack said to her immediately after his last meeting, says she was told Jimmy Kim was still thinking about matters connected to the disputed business receipts but Jack thought he had been sacked.

[35] By way of separate letters of 29 August 2022 from a law firm they engaged, personal grievances for unjustified dismissal were raised with Sake Bros. Alice Lee’s letter also identified her lack of employment agreement and annual leave payment claims on the basis of an assertion that she was being treated as a casual and not a permanent, part-time employee.

[36] Sake Bros lawyers responded by letter of 2 February 2023 after the parties had made some informal effort to resolve outstanding differences, by noting that on 30 January 2023 Sake Bros had made a payment to Jack Lee of \$111,824.85. Sake Bros suggested this calculated amount was a combination of Jack Lee’s original stake and share of outstanding bonus payments. Sake Bros in acknowledging this was not a full and final agreement and without directly referring to the Lee’s unjustified dismissal claims, noted they reserved the right to pursue reimbursement of amounts they believed had been misappropriated by Jack Lee during his employment period as a defence to any claims brought by Jack Lee. In an open offer, Sake Bros suggested the appointment on an equal cost-sharing basis, of a forensic accountant to specifically resolve any outstanding claims Jack Lee may have relating to the profit share dispute. There was no agreement to this suggestion.

[37] The Lees then engaged new counsel and in an email of 8 March, counsel indicated he had instructions to pursue the employment relationship problem in the Authority for the Lees' personal grievances and for Jack Lee, recovery of an additional unspecified amount related to the profit share dispute arising from the original sales agreement. The Lees filed an application in the Authority on 23 August 2023. The parties then attended mediation but the matter remains unresolved.

Other witness accounts

[38] The chef who replaced Jack Lee (a co-worker) indicated during the investigation meeting that he had to step in to cover on 19 July and at the time, Jimmy Kim told him Jack Lee had left for personal misuse of the business debit card but did not elaborate further. He also indicated Jack Lee later told him that he and Alice Lee had been fired.

[39] Another ex-employee of Sake Brothers who administered the business accounts and did background work for Jimmy Kim's investigation of the Lees' use of the business account, says Jimmy Kim told him at or around the end of June 2022, to prepare a report on the Lees use of business funds and their apparent under recording of daily sales income. He also says Jimmy Kim told him upon discovering discrepancies in business card spending, that he intended to get rid of the Lees when they returned from holiday. The ex-employee was, however, vague when pressed on when this was and the content and context of the conversation.

Whether Jack and Alice Lee were unjustifiably dismissed by Sake Brothers Limited?

Dismissal or resignation ?

[40] The first issue I have to determine is how and at who's initiative did the employment relationship end and, at what point in time did the ending occur. That is initially a factual inquiry aided by evidence given during the investigation meetings.

[41] Stepping through this it is clear that Jimmy Kim on behalf of Sake Bros, on 19 July 2022, identified legitimate concerns to the Lees about their use of the company business card for personal expenditure and he was potentially seeking to end the employment relationship. It was also in context, during a period when there was emerging tension between the parties about the calculation of bonus payments although no formal personal grievance was raised by the Lees at the time. Aside from these matters, there was no suggestion of any performance issues

being extant in relation to the Lees' capabilities and commitment to running the restaurant. The act of asking Alice Lee to return her office keys was an indicator that she had been dismissed on 19 July but Jimmy Kim's evidence was that he then invited both the Lees to meet the next day as he had yet to form a clear picture of what was going on – this is a counter indicator of a dismissal of Alice Lee having already occurred.

[42] From the evidence, I prefer the explanation as being more likely than not, that at the second meeting between Jack Lee and Jimmy Kim on 20 July, Jack Lee offered that he and Alice Lee would summarily resign due to an awareness that their personal use of the company business card was inappropriate and had destroyed the relationship of trust between them but they were still seeking to have their bonus payment issue resolved. The subsequent actions of the parties are consistent with a resignation and not an actual dismissal.

[43] The Lees' promptly left the workplace and did not return. Jimmy Kim immediately arranged cover for Jack Lee as chef, in anticipation of the employment relationship ending. The Lees considered they had been dismissed but this was not formalised: there was no 'sending away' and they objectively were aware that Jimmy Kim thought they had resigned, yet they took no steps to correct this assumption within a reasonable timeframe. This latter failure is remarked upon as potentially being fatal to an unjustified dismissal claim by the then Chief Judge, in a leading Employment Court authority considering various unclear resignation scenarios, *Boobyer v Good Health Wanganui Ltd*.¹ In a further reassessment of resignation cases by the current Chief Judge, of the Employment Court in *Mikes Transport Warehouse Ltd v Vermuelen*, it is noted that:

... the Act does not legislate for how a resignation is to be communicated; it may be verbal, in writing, or in some circumstances, by conduct. A resignation will ideally comply with the contractual provisions regarding notice but may also be given on a "summary resignation" or "resignation without notice" basis, where an employee resigns on the spot and does not return to work. The employer may, in such circumstances, have a claim against the employee for breach of the notice period. The employer does not, however, have a claim that the employment remains on foot and the resignation is of no effect.²

[44] The Lees did not explore working out their notice period. Communication ceased until Jimmy Kim's unanswered text of 27 July, seeking a further explanation around a provided

¹ *Boobyer v Good Health Wanganui Ltd* EmpC WEC 3/94, 24 February 1994.

² *Mikes Transport Warehouse Ltd v Vermuelen* (2021) NZEmpC 197.

statement of daily cash takings. While this could be construed as a continuation of an employment investigation it was apparent Jimmy Kim did not seek to suspend the Lees as would be expected in a typical ongoing relationship and evidence suggests he told other workers that the Lees had already left because of inappropriate use of the business card.

[45] The next communication was the 25 August exchanges. These are best viewed as an attempt by Sake Bros to formalise acceptance of the resignations advanced on 20 July (although they mistakenly refer to 18 July) and a recording of the fact that the Lees had both admitted to the inappropriate use of company funds. A situation that Jimmy Kim retrospectively noted, constituted serious misconduct.

[46] During the investigation meeting the Lees gave evidence of their deliberate use of the business card for significant personal spending knowing this was conceptually wrong. They sought to justify or mitigate their actions by contrasting how they perceived Jimmy Kim was engaging in similar blameworthy conduct that they viewed as reducing their share of any profit from the restaurant. Part of the latter assertion was complicated by documentary evidence that showed both Jack Lee and Jimmy Kim had been dividing up daily cash takings from the restaurant instead of banking them and declaring them for PAYE and GST purposes.

[47] I observe that had the facts established there was an actual dismissal, I would have found it to be substantively justified. Objectively a belief that they were entitled to use the business card for personal use was for the Lees, not exculpatory. There were other legal options to resolve the bonus dispute and Jimmy Kim as a director and majority shareholder of Sake Bros was in a different accountability position to the Lees.

[48] Identified procedural errors (and they were manifest) were ameliorated by the Lees' admission of serious misconduct when confronted with evidence of the business card use. There was also some evidence to suggest they sought to conceal their expenditure. On the latter, the Employment Court and the Authority have depending on the circumstances and it is rare, held that where an employer's investigation is deficient, the honest belief that serious misconduct

has occurred justifying dismissal may be dubious but such a premise does not necessarily extend to situations of admitted serious misconduct.³

Constructive dismissal ?

[49] As an alternative claim, the Lees counsel in submissions suggested that if I find they have resigned and not been dismissed, then the Authority should categorise this employment relationship problem as ‘constructive dismissals’ of the Lees, because:

- Having raised allegations about improper use of company funds, the employer failed to carry out a proper investigation of those allegations and/or failed to follow a proper process (per s 103A).
- This failure was either deliberately calculated to coerce Jack into resigning; or it involved a breach of the employer’s duty (express or implied) to act in a procedurally fair manner and it was reasonably foreseeable that this breach would cause Jack to resign.
- In the circumstances thus created by the employer; Jack felt he had no choice to resign and did so.⁴

[50] The same analysis above was advanced to support a claim Alice Lee had been constructively dismissed.

[51] A ‘constructive dismissal’ can be found if an employer’s conduct compels a worker to resign in circumstances where although on the surface, the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as alleged here) is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated. The Court of Appeal has stated the broad approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the

³ See *Murphy and Routhan t/a Enzo’s Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC) and *Reynolds v Mount Cook Airline Ltd* NZERA Christchurch 155 where the Authority discusses the observations in *Enzo’s Pizza* as still being relevant when applying the factors contained in s 103A Employment Relations Act 2000.

⁴ Counsel for applicants’ submission of 24 July 2024.

employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.⁵

[52] The difficulty for the Lees is the answer to the first question – I find the resignation was not caused by a breach of a duty by the employer who at the time of the resignation had merely identified legitimate concerns and was seeking an initial explanation for why the Lees were making several and significant personal purchases on the Sake Bros business account. There was no reason for Sake Bros to carry out a proper investigation of improper use of company funds as the Lees admitted their transgressions. Thus, a failure to investigate in these limited circumstances, could not constitute coercion.

[53] For completeness I observe that the evidence showed once the Lees knew Sake Bros were going to proceed with a further investigation they pre-empted this by resigning. There was no submission that this fell into the category of a ‘resign or you will be dismissed’ situation.

Finding

[54] Overall, I find the Lees were not unjustifiably dismissed, constructively or otherwise, and are not entitled to remedies for their unjustified dismissal claims. I have found they both resigned on 20 July 2022 after conceding that they had inappropriately used the company’s business account in a manner that objectively amounted to serious misconduct, potentially warranting dismissal.

Were the Lees paid appropriately for all the hours they say they worked?

Alice Lee

[55] Alice Lee was not provided with an employment agreement or job description that Jimmy Kim during the investigation meeting, conceded was his oversight. There were no wage, time and holiday records pertaining to Alice Lee, just payslips. Jimmy Kim asserted that Alice Lee who reported to him never raised any issues of payment for additional hours. Alice Lee says it was part of her job to compile weekly sales data and she reconciled hours of work from restaurant staff time sheets but was not required to record her own hours of work.

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

[56] Alice Lee made a claim for 60 extra hours worked that she says were not paid in the period January to May 2020 (being “about 3 hours per week over 20 weeks”) and for four unpaid hours pertaining to 18 and 19 July 2022.

[57] Payslips provided by Sake Bros showed Alice Lee was consistently paid twelve hours per week at an hourly rate of \$19 during the former period of her claim. Alice Lee’s evidence to support these claims was sometimes inconsistent as she also acknowledged that Jimmy Kim had made a series of random additional payments to her in 2020 including tax free payments through the Lees joint bank account as part of the profit-sharing arrangement.

[58] On the available evidence since no wage, time and holidays records were kept, s 132(2) of the Act and s 83(4) Holidays Act 2003 apply so that the evidence given by Ms Lee may be accepted.⁶ The Authority is satisfied on the balance of probabilities that Alice Lee has discharged the onus of proving her claims she worked additional hours.

[59] Turning to the claims that Alice Lee worked on 19 July 2022, I likewise find this was more likely than not that there is an entitlement to paid on 19 July she attended work to meet with Jimmy Kim and was then sent home and deprived of pay for a day she would have expected to be at work and was available to be working. In submissions, Alice Lee only claimed for pay on the 18 July and appeared to abandon her claim for not being paid that day. I otherwise accept Jimmy Kim’s recollection that Alice Lee returned from leave on 19 July and did not work on the 18th.

[60] There was an additional claim for 4 hours sick leave supposedly deducted in the pay period inclusive of 16 June 2022 but the pay slips provided by Sake Bros show this was not deducted and that Alice Lee was paid 4 hours sick leave in the relevant period.

Finding

[61] I find Alice Lee is entitled to be paid for an additional 62 hours worked plus a holiday pay loading of 8%. The total being \$1,280.88.

Jack Lee

⁶ *Shah Enterprise NZ Limited and Sapan Jagdishbhai Shah v A Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177, EMPC 1/2021 at [26].

[62] In submissions for Jack Lee, the lost remuneration sought was alleged unpaid wages for the time he spent working in Wellington setting up a branch of ZZAN; two underpayments in July 2022 and the 4 February ‘Sales Agreement’ that is referred to as the profit share claim. Orders were sought in the amounts of:

- a) 96 hours of extra work during the Wellington ZZAN start up period in the amount of \$5,150.40.
- b) A claimed underpayment for the period 4-17 July 2022 in the amount of \$2,037.36.
- c) A recovery of unpaid salary for 18 and 19 July 2022 in the amount of \$858.46.
- d) \$95,000 of unpaid profits said to be concealed from Jack Lee.
- e) \$48,700 to account for improperly deducted ‘management fees’ that Jack Lee asserts related to the wider Sake Bros business and were payments he never consented to.
- f) A further \$8,799.29 to correct the total figure (\$31,426.03) used in a dividend payout summary document presented to Jack Lee.

[63] In evidence responding to the claimed underpayments for the Wellington work, Sake Bros says Jack Lee was paid his salary and accommodation expenses throughout this time and in recognition of the extra work and temporary upheaval to his family this was rewarded by Sake Bros increasing by 5%, the ‘share’ in ZZAN Christchurch. Correspondingly, this increased the profit share available to Jack Lee. Beyond this arrangement, Sake Bros assert there is no provision in Jack Lee’s employment agreement for the payment of overtime and clause “8 Remuneration” prevails as it records Jack Lee’s agreement that his salary “compensates you for all hours works [sic], including any hours that you are required to work outside your standard hours of employment”. Jimmy Kim says he was aware of Jack Lee not being paid on 18 – 19 July but was unsure if he was on leave while suggesting he took two weeks leave prior to 18 July. No leave records were produced and there was no payslip produced covering the period 4 July 2022 to 20 July 2022 but in evidence the Lees accepted they had just returned from leave on Monday 18 July.

[64] On the dispute about other payments allegedly owed, Sake Bros counsel submitted that they accepted “there was a profit share arrangement as set out in the Sales Agreement”.⁷ Further, in asserting that it was up to the Lees to make out their claim, Sake Bros says they stood by their calculations but had proposed an independent accountant be engaged to determine if any further amounts were owed.

Assessment

[65] I am persuaded that additional remuneration was provided for Jack Lee’s work in Wellington in the form of increasing his profit share by 5%. Overall, I was not provided with compelling evidence from Jack Lee on what hours he actually worked in Wellington; they were not recorded due to his salary status and I do not find this claim is made out.

[66] Turning to the period 4-17 July 2022 there was no evidence Jack Lee was paid in that period and Sake Bros bank statement showed he was paid on 7 July and then not until 18 August 2022. I accept that Jack Lee should have been paid \$2,037.36 for this period. While there is final accumulated holiday pay balance paid on the 18 August 2002 payslip (\$4,721.54) I had no breakdown on what period this related to.

[67] For the days 18 and 19 July 2022 I am persuaded Jack Lee made himself available for work and should be paid salary for those two days in the amount of \$858.46.

[68] Dealing with the more complex profit share dispute, evidence given at the investigation meeting, without going into specific detail, made it clear that some mutual practices of informally taking cash out of the business was occurring and allegations were levelled at Jimmy Kim that some other inappropriate practices lessened the amount of money available to distribute to the Lees. This was in addition to the Lees openly accepting that they used the business card as a partial redress mechanism.

[69] Against the above, it was also apparent that there was an imbalance of power and knowledge between the parties with Sake Bros being a fairly large hospitality business and Jimmy Kim being an experienced business operator with access to accountancy and other advice.

⁷ Counsel for Respondents submission of 25 July 2024.

[70] In the final analysis, the ‘sales agreement’ is a misnomer as its terms essentially arose out of and formed part of, Jack Lee’s employment agreement remuneration structure. It ideally should have been properly included in the employment agreement as a variation with a clear outline of how the restaurant profitability was to be assessed. This lack of clarity led to continued disputation and arguably Jimmy Kim was better placed to exploit definitional gaps in the agreement. The necessity to ‘buy in’ to the profit share is also a somewhat unique arrangement that provided Sake Bros the use of this interest free money albeit that it would be returned and was once the employment relationship ended.

Is Jimmy Kim personally liable for any disputed profit distributions?

[71] The Lees counsel invited the Authority to retrospectively hold that on a true construction and contextual analysis of the parties conduct in entering the sales agreement and fulfilling its initial terms, Jimmy Kim was entering into it, in a personal capacity.

[72] This issue is relatively easily dealt with. At the time of entering the sales agreement I find the Lees generally would have been aware of the existence of Sake Bros as their prospective employing company and that, that entity had purchased ZZAN. In fact, in Jack Lee’s case the payslips and bank account records show that his salary was paid by Sake Bros from 1 March 2019 and this pre-dated their purchase of ZZAN.

[73] While the wording of the agreement is not precise, the indicator that Sake Bros is the ‘seller’ are evident with the seller party being described as “Jung Sub Kim of Sake Brothers” and this is repeated underneath the seller’s signature. In addition, and decisively, the purchase clause of the sales agreement, refers to ZZAN being “owned by Sake brothers”.

[74] Other than the initial purchase price being paid into Jimmy Kim’s personal bank account (and then later transferred to Sake Bros), throughout the operation of the agreement, there was no evidence produced to show that Jimmy Kim was remunerating the Lees through a personal bank account. The Lees were paid by Sake Brothers Limited.

[75] I do accept that given the power and knowledge imbalance between the parties that the Lees may have wrongly considered they were purchasing a shareholding in the restaurant as the term ‘share’ is used three times in the agreement. However, if that was the Lees belief there was evidently no separate shareholders agreement and they must bear responsibility for not

seeking any legal or accounting advice when entering the arrangement. Nothing was evident given the purchase price, that such specialist advice was unaffordable.

Finding

[76] Jimmy Kim is not personally liable for a potential shortfall in remuneration paid by Sake Bros to Jack Lee arising from the sales agreement. The respondent party to this dispute is Sake Brothers Limited – Jimmy Kim merely signed the agreement on their behalf.

[77] Given the pressure of dealing with the unjustified dismissal claims of the Lees has now been resolved in Sake Bros favour and I have found that Jimmy Kim is not personally liable, this creates space for the disputed profit share issue to be resolved by agreement. To help achieve this goal I consider it appropriate, utilising s 159(1)(c) of the Act, to direct the parties to mediation on that specific issue.

Penalty claims

[78] There are two penalty claims. The first relates to Sake Bros failure to comply with s 63A of the Act. It is alleged that upon changing Jack Lee's employment from defining the employer as a company owned by Jimmy Kim (Koji Christchurch Ltd) to another company (Sake Bros) and appointing him Head Chef at ZZAN, there was a failure to provide an intended employment agreement in a timely manner and no evidence that Jack Lee was apprised of his right to seek legal advice prior to entering the employment agreement. As outlined above despite the legal change of employer defined in the employment agreement, Jack Lee had since 1 March 2019 been paid by Sake Bros. The penalty claim sought in relation to Alice Lee was a straightforward failure to provide a written employment agreement (a requirement under s 61A(2)(a) of the Act.

Assessment

[79] In the circumstances, the Authority pursuant to s 133 of the Act has jurisdiction to award penalties for the identified statutory breaches must consider matters outlined in s133A. In applying these factors including having regard to the Act's object of amongst other guidance, the need to address the inherent inequality of power in employment relationships⁸ that I find is

⁸ Employment Relations Act 2000, Section 3(a)(ii).

applicable here as the Lees were objectively vulnerable workers reliant on Sake Bros for their continued work visas, I find it is appropriate to award penalties for the breaches. In considering the quantum of the penalties however, I consider they should be moderate and serve to encourage future compliance.

Finding

[80] For both the uncontested breaches I award separate penalties of \$750 and find it appropriate that they be paid in full to Jack and Alice Lee.

Contribution

[81] Section 124 of the Act states that I must assess the extent to what, if any of the Lees' actions contributed to the situation that gave rise to their personal grievances and then assess whether any calculated remedies should be reduced.

[82] On balance, having found no grounds for the unjustified dismissal claims advanced by the Lees and therefore no remedies applicable for these claims, I consider no reduction in the remedies granted is warranted as they relate to unpaid wages and penalties.

Orders

[83] I order that:

- (a) Kang Hyuk Lee and Young Joo Lee were not unjustifiably dismissed by Sake Brothers Limited.
- (b) Sake Brothers pursuant to s 131 of the Employment Relations Act 2000, must pay the following amounts of unpaid wages to:
 - (i) Kang Hyuk Lee - \$2,895.82.
 - (ii) Young Jo Lee - \$1, 280.88.
- (c) Sake Brothers pursuant to s 133 of the Employment Relations Act 2000, must pay the following amounts in penalties to:
 - (i) Kang Hyuk Lee - \$750
 - (ii) Young Jo Lee - \$750
- (d) Sake Brothers Limited and Kang Hyuk Lee are directed to mediation pursuant to s 158 (1)(c) of the Employment Relations Act 2000 with the

purpose of attempting to resolve the parties dispute over profit sharing matters from the agreement the parties entered into on 4 February 2020. Should the parties be unable to conclude an agreement at mediation then either party has the right to make a further application to the Authority to resolve this distinct issue.

The Costs

[84] Costs are reserved.

[85] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Lees may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Sake Brothers Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[86] The parties can expect the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

David G Beck

Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1