

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 151
EMPC 199/2021**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations authority

BETWEEN HUNMO KANG
 Plaintiff

AND SAENA COMPANY LIMITED
 Defendant

Hearing: 11–13 April 2022 and submissions filed up to 27 May 2022

Appearances: S Kang, counsel for plaintiff
 M Y Kim, counsel for defendant

Judgment: 23 August 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Hunmo Kang worked for Saena Company Limited (SCL) at a sushi restaurant in Whangarei. It was operated by Gyu-ill Hwang and his wife, Oksil Weon. Mr Kang’s wife, Yoojin Chung, also worked for the business.

[2] Mr Kang and Ms Chung are originally from South Korea. So too are Mr Hwang and Ms Weon.

[3] On 21 October 2019, an incident occurred where Ms Weon and Mr Hwang became angry – initially with Ms Chung but then with Mr Kang as well. The incident concluded with Mr Kang and his wife believing that they had been dismissed. Mr Hwang and his wife, however, considered the two had decided to quit.

[4] There was subsequently a text message exchange with Mr Kang in Korean. It stated it would be best if the parties went their own way. At the time, Mr Kang thought the exchange was with Mr Hwang, the sole director of SCL, but it transpired his wife, Ms Weon, had sent the relevant texts.

[5] Detailed letters then passed between Mr Kang and Mr Hwang. Most of that correspondence was in Korean. Each of them set out their position as to what had occurred. Numerous texts were also exchanged.

[6] Mr Hwang suggested that Mr Kang return to work. Mr Kang's position was that both he and his wife might do so; there was also discussion as to the extent they would work in the restaurant at the same time as Ms Weon, who Mr Kang believed had precipitated the recent incident.

[7] It transpired that Mr Hwang and Ms Weon held strong views against the possibility of Ms Chung returning. The parties could not reach an agreement as to the possibility of only Mr Kang returning.

[8] Accordingly, Mr Kang pursued disadvantage and dismissal grievances against SCL, as well as other breach claims. Ms Chung elected not to do so as she did not want the associated stress which she thought such a process would involve.

[9] Mr Kang's claims came before the Employment Relations Authority. His personal grievances were dismissed, principally because the Authority accepted he and his wife had not been dismissed.¹ The Authority declined to impose a penalty on SCL for failure to provide Mr Kang with an individual employment agreement (IEA) at the outset of his employment because Mr Kang did not wish to sign an IEA at that stage.² However, the Authority did determine that adequate wage, holiday and leave records had not been maintained, and it ordered payment of a penalty of \$2,000 to the Authority within 28 days of the date of the determination.³

¹ *Kang v Saena Company Limited* [2021] NZERA 196 at [26] and [32] (Member Campbell).

² At [36].

³ At [69].

[10] SCL also brought a claim against Mr Kang to the effect that he should be fined for breaching visa conditions and penalised for forging translations and other alleged inappropriate actions. Compensation and an apology were sought. Since such remedies were unavailable, SCL's claim was declined.⁴

[11] Mr Kang has brought a de novo challenge to the findings made about his grievances. The challenge focuses on his assertion that he was dismissed by SCL on 21 October 2019, and that the dismissal was unjustified. He also claims a disadvantage grievance because he had not been provided with an IEA when he commenced working for SCL. He says he should be awarded remedies for these grievances. He also seeks a penalty for the failure to provide an IEA.

[12] Mr Kang and Ms Chung gave evidence, as did Mr Hwang and Ms Weon for SCL. In addition, SCL called two further witnesses: Ms Bomi Kim, a work colleague who was present when the heated discussion took place between the parties, and Pastor Dongkeun Hong, who was appraised of the circumstances soon after they occurred and then worked for SCL afterwards because it was short-staffed.

[13] In addition to their evidence, the Court was also assisted by text messages and detailed correspondence which followed the incident of 21 October 2019.

[14] All witnesses gave their evidence in Korean, which was translated for the Court by a translator. The case was conducted by Virtual Meeting Room. Submissions were timetabled to follow the hearing of evidence, which have been of assistance to the Court.

Legal framework

[15] The primary issue on which extensive evidence was called related to the question of whether the actions of SCL, via Mr Hwang and Ms Chung, constituted a dismissal. The classic definition of dismissal is found in *Wellington, Taranaki and Marlborough Clerical v Greenwich*. That case makes it clear that the termination of

⁴ At [73].

employment must be at the initiative of the employer.⁵ This approach has been followed in many cases since.⁶

[16] It is also well established that the test is an objective one. The issue is whether it was reasonable for somebody in the employee's position to have considered that his or her employment has been terminated.⁷

[17] The lens must therefore be trained on the employee's understanding of the events which it is alleged the employer has initiated.

[18] Credibility issues obviously arises in this case. Recently, the Supreme Court commented on the usual methods of assessing credibility in a situation where there may be cultural implications. The Court said that most of the usual ways that Judges use to assess credibility remain available: "consistency of a narrative over time and with other evidence (particularly contemporaneous documents) and general plausibility".⁸

[19] The Supreme Court went on to observe that it was critical that Judges and counsel maintain a sense of proportionality and recognise that many, perhaps most, cases in which the parties operate within a social and cultural framework that differs from that of the Judge, can be dealt with in the manner outlined.⁹

[20] Then the Court referred to a statement made by Emilios Kyrou,¹⁰ writing extrajudicially in which he said:¹¹

⁵ *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 103.

⁶ *EN Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 (CA) at [19]–[20]; *Ngawharau v Porirua Whanau Centre Trust* [2015] NZEmpC 89, [2015] ERNZ 748 at [67]–[69]; and *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [28].

⁷ *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 6, (2019) 16 NZELR 426 at [45]; and *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219, [2020] ERNZ 495 at [28]–[29].

⁸ *Deng v Zheng* [2022] NZSC 76 at [48]; see also *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [45], a criminal case which was applied to the assessment of credibility in two civil cases, *Burden v Debonaire Furniture Ltd* [2017] NZHC 1553 at [48]–[49]; and *Smith v Attorney-General* [2020] NZHC 1157 at [15]–[19]. In this Court, see *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [303]–[304].

⁹ *Deng v Zheng*, above n 8, at [78].

¹⁰ A Judge of the Court of Appeal, Supreme Court of Victoria, Australia.

¹¹ Emilios Kyrou "Judging in a Multicultural Society" (2015) 24 JJA 223 at 226.

In many cases, managing a cultural dimension in evidence may require no more than the most basic of all tools in a judge's toolkit, namely context and common sense.

[21] In this case, no evidence of the parties' social or cultural framework was called, notwithstanding the Korean cultural context in which the subject events occurred and the fact that most of the parties' communications were in Korean rather than in English.

[22] Nonetheless, the Court has been able to resolve the credibility issues which have arisen by applying the conventional methods of credibility assessment, as outlined.

History of events

The lead up to 21 October 2019

[23] On 25 July 2019, Ms Weon, who was head chef and wife of Mr Hwang, SCL's sole director, posted a job vacancy for the company's sushi restaurant. The advertisement provided a cell phone number, which was used by both Ms Weon and Mr Hwang. Associated with the number was an email address, bearing the name of the company.

[24] Mr Kang used the cell phone number to arrange an appointment to discuss the vacancy. He was interviewed by Mr Hwang and Ms Weon. He was not offered a job at that stage because he was holding an interim visa only. However, he was invited to make contact again once he obtained a work visa. He obtained such a visa on 27 August 2019 and contacted SCL via the same cell phone number. This resulted in another shorter interview with both Mr Hwang and Ms Weon. Then he was offered a job at the restaurant.

[25] From 16 September 2019, Mr Kang commenced working six days a week. His main job was making donburi dishes and deep frying.

[26] On 7 October 2019, Ms Chung also commenced working at the restaurant. According to later correspondence, this was to be a two-week work trial before she decided whether to leave other employment.

[27] Ms Weon said that soon after Ms Chung was employed by SCL, concerns arose that she was not following instructions for food safety and hygiene. Ms Weon said that despite repeated warnings not to wear bracelets and rings when making food, for hygiene reasons, Ms Chung would give her a dark look and ignore the instruction.

[28] On 20 October 2019, Ms Weon told Ms Chung not to wear her watch in the workplace. Although she felt she needed her watch so she would know her finishing time, she placed it in her bag straight away.

Events of 21 October 2019

[29] At about 11.00 am, on 21 October 2019, Ms Weon and Ms Chung were in the restaurant kitchen making sushi rolls. Ms Chung said she placed her watch in a container and put that container on a shelf.

[30] I refer to the two accounts provided by each of the couples involved as to what then occurred.

[31] Ms Chung, whose evidence was very similar to that of Mr Kang, said that Ms Weon told her when she placed the watch on the shelf, that she did not like “having that kind of thing in my restaurant”.

[32] Initially, Ms Chung said she did not understand what Ms Weon was talking about but then realised she was looking at her watch. She tried to explain why she had placed it there and that having it nearby did not affect her work.

[33] Then, she said, Ms Weon suddenly raised her voice, thumped a table, and said something like “how dare you keep talking back to me ... do you want to have a fight with me?”

[34] Mr Kang’s recollection as to what Ms Weon said was “want to fight with me now as a husband and wife in pairs?”.

[35] Ms Chung said Mr Hwang, who was nearby, became involved. He walked towards her, pointing his finger. He yelled at Ms Chung “get out of my restaurant right

now.” She was shocked but tried to be calm and explain the situation. Mr Hwang said, “stop talking and leave.”

[36] She felt she had no other choice but to leave the premises, saying “please stop yelling, I will leave.” She acknowledged she may have used the word “quit” rather than “leave”.

[37] Mr Kang told her he would see her at home. He said he always said this when she was leaving the workplace ahead of him.

[38] By this time, Ms Chung was in tears. She left the workplace very distressed; she said she was trying to understand what had occurred.

[39] Mr Kang also said that as Ms Chung was leaving, he tried to continue his work. It was at that point that Mr Hwang told him angrily “you get out as well.” He understood that both he and his wife had been fired.

[40] Turning to Ms Weon’s account, she said that what occurred on 21 October 2019 emanated from her earlier concerns. She said she saw Ms Chung still wearing a ring and a bracelet while working with food; she considered the placing of a watch on a food shelf to be unacceptable.

[41] Ms Weon said she told Ms Chung to remove these items, who frowned and stared at her without saying anything. She found this behaviour “highly disrespectful”.

[42] She acknowledged she was upset and angry. She hit the table and referred to the couple pairing up against her.

[43] Ms Weon said Ms Chung then said that she would “quit and leave”, taking off her cap and apron and throwing it over some sushi rice. She responded by saying “do as you want then”.

[44] Mr Hwang joined the argument by asking Ms Chung to leave because she was clearly irritated.

[45] After Mr Kang said he would follow his wife soon, Ms Chung heard Mr Hwang telling Mr Kang to get out as well. She said initially Mr Kang hesitated. She acknowledged Mr Hwang was upset or angry. Mr Hwang confirmed this evidence.

[46] Ms Kim, who was nearby and observed the incident, gave evidence which was similar to that of Ms Weon and Mr Hwang.

[47] Pastor Hong happened to visit the restaurant soon after this incident and was told by Ms Weon and Mr Hwang what they believed had occurred, as per their evidence.

[48] In short, both Mr Hwang and Ms Weon said they thought Ms Chung and Mr Kang had said they were quitting.

The text exchange later that day

[49] Mr Kang said he thought he had been dismissed when he was asked to leave. However, the situation seemed to him to be so unbelievable that he sent a text message to confirm this was what had in fact happened.

[50] At about 4.19 pm, on the afternoon of 21 October 2019, he sent a message to the number which he had earlier used when seeking employment, believing it was SCL's cell phone number. His message was as follows:

Hello. I am writing this via text messages because it is during work hour now. Today I left as I was told to leave now immediately. However, what would you want me to do from tomorrow?

[51] Ms Weon responded to the text, which she said made her "angry and very frustrated". The reply, sent at 4.21 pm, stated:

Let's go our separate ways. I appreciate for what you have done so far.

[52] Ms Weon sent him another text at 4.24 pm:

I think it is an expression of intention to quit here that you said to your wife she leave first and that you would follow her soon when your wife said she would quit.

[53] Mr Kang replied at 5.02 pm saying:

Every day I say to my wife I will join her soon when she leaves work. It appears that you misheard me. Thank you.

[54] Mr Kang said that he did not know what to do after receiving these texts, which confirmed that SCL did not want the two to return to work at the restaurant. He could not believe that dismissal had occurred with no notice being given. He and his wife began searching online as to what to do when an employee is dismissed.

[55] Mr Hwang did not communicate with either Mr Kang or Ms Chung later that day.

The job advertisement

[56] That evening, Mr Kang noticed two job advertisements which had been posted for the restaurant.

[57] The first, posted at 7.03 pm, was for a “Sushi and Donburi” job. It stated that the role was full-time and that no experience was needed.

[58] The second, posted at 10.08 pm, stated that two kitchen staff were being sought, the job being described as “Kitchen and Roll-Maker”.

[59] Mr Hwang said these advertisements had been posted jointly by himself and Ms Weon.

22 October 2019

[60] On 22 October 2019, at about 8.00 am, Pastor Hong came to the restaurant. Neither Mr Kang nor Ms Chung were at work. He commenced the role which Mr Kang had been performing. He finished at about 3.00 pm that day. He continued to undertake this work for some months.

[61] At about lunchtime, Mr Hwang said he commented to his wife that Mr Kang had not attended work, without warning. At that point, his wife showed him the text

exchange that had occurred the previous day where she had suggested that the parties should go their separate ways. Mr Hwang did not take any step for several hours.

[62] At approximately 4.00 pm that day, Mr Kang applied for mediation with the Ministry of Business, Innovation and Employment (MBIE), after receiving advice to do so from a Citizens Advice Bureau with whom he had been in touch.

[63] At about 6.00 pm, Mr Hwang called Mr Kang stating that he would like him to attend work the next day. Mr Kang's response was that he needed some time to think about the circumstances because the dismissal had been a shock to him, and he had panicked.

[64] That evening, Mr Hwang sent a text to Mr Kang confirming he had spoken to his wife and that Mr Kang should "make a decision by next Monday", that is, 28 October 2019.

23–29 October 2019

[65] The next day, on 23 October 2019, Mr Kang sent a text to Mr Hwang suggesting they meet at the restaurant that afternoon. This was agreed.

[66] At about 2.00 pm, Mr Kang and Ms Chung visited the restaurant. Pastor Hong was also present.

[67] Mr Kang handed over a letter. It was the first of several which the parties exchanged.

[68] In his letter, Mr Kang referred to the text exchange in which he had been told they should go their separate ways. He also raised an issue concerning the statement made by Ms Weon about "the husband and wife ... in pairs". He commented he did not want to work with her were he to return. He said he had applied to MBIE for mediation. He asked for a formal IEA and made suggestions as to how that might be framed. The intention of the letter was that both he and Ms Chung would return to work at the restaurant. The other alternative was that they be paid for a notice period and holiday leave.

[69] He later said that the step of providing a letter was on the recommendation of an MBIE Dispute Resolution Coordinator.

[70] Two days later, Mr Kang and Ms Chung were asked to visit the restaurant again. Mr Hwang provided them with a written response when they visited.

[71] Mr Hwang gave his account as to what had happened. In doing so, he acknowledged that his wife had, at the time, said, “Want a fight with me now as husband and wife in pairs.” This meant, he said, that “the husband and wife are together”.

[72] A draft IEA was provided, but it was for Mr Kang only.

[73] Later that day, after reading Mr Hwang’s letter and the draft IEA, Mr Kang responded. He emphasised that any further employment would need to be for both himself and his wife. Other issues as to the content of the proposed IEA were also raised.

[74] In a letter dated 25 October 2019, but provided to Mr Kang on 26 October 2019, Mr Hwang gave a long response. Again, the events of 21 October 2019 were traversed. He said Ms Chung had been offended by a lawful and reasonable instruction which had been given by the head chef, Ms Weon. Ms Chung’s poor attitude had been an ongoing problem; she had often refused to undertake tasks, giving excuses. Her behaviour was disrespectful to Ms Weon, who had become furious.

[75] Thus, Ms Chung had irreparably destroyed the trust and confidence expected of an employee. He said that Ms Chung had said she would “quit the job”. When Mr Kang had asked her when she would leave, she had said “now”. Mr Hwang said it was his understanding that Ms Chung had “quit”. Therefore, employment would be offered only to Mr Kang and not to Ms Chung.

[76] Later in the letter, Mr Hwang reiterated that he and Ms Weon had understood Mr Kang and Ms Chung had both indicated they were quitting; the text messages Ms Weon had subsequently sent reflected their understanding that both had quit.

[77] With regard to the suggestion that Mr Kang would not work at the same time as Ms Weon, Mr Hwang said that, as an employee, Mr Kang would have no right to pick and choose the tasks he would like to undertake. The suggestion that had been made, which amounted to the imposition of a roster and a job description for Mr Hwang and Ms Weon was “appalling” and “highly unacceptable”. He said Mr Kang was a cook, “placed under the head chef and owner.”

[78] Mr Kang and Ms Chung visited the restaurant again on 29 October 2019, providing a response to Mr Hwang’s letter of 25 October 2019. Although it was raining, Mr Hwang asked Ms Chung to stay outside.

[79] Ms Weon came outside and spoke to Ms Chung; she did this at her husband’s insistence; in fact she did not want to talk to Ms Chung alone as she did not “think she was a trustworthy person”. There was a discussion as to whether the intended mediation had to go ahead.

[80] In another conversation during the visit, Mr Kang raised a question with Ms Weon as to why she had said “the husband and wife fight in pairs”. She told him he “did not have good sense at work”.

[81] After these exchanges occurred, Mr Kang said he became concerned as to whether Mr Hwang and Ms Weon really wanted him to be re-employed, never mind his wife.

[82] In his evidence, Mr Hwang said that Mr Kang refused to work again at the restaurant because Ms Chung was not being offered employment.

[83] Mr Kang confirmed in an email later that day he would not work again at the restaurant, stating that mediation would now have to proceed for two reasons. The first reason was that the employment relationship of trust and confidence had been seriously broken and could not be restored. The second reason was that the terms and conditions of employment which were now being offered were not acceptable.

[84] Mediation did not resolve the parties' differences. Mr Kang's relationship problem then came before the Authority.

Submissions

[85] Counsel for the plaintiff, Mr S Kang, accepted that there was an initial onus on an employee to first establish that there has been a "dismissal". He submitted that once it has been proven that there was a dismissal, the onus then shifts to the employer to prove that the dismissal was justified.

[86] He submitted that it was reasonable for Mr Kang to believe he was dismissed on 21 October 2019 for three reasons: first, because of the events that occurred at the time of the heated argument; secondly, as a result of the texts which were exchanged; and thirdly, because of the content of the advertisements for staff which were posted late that day.

[87] The exchanges that occurred between Mr Kang and Mr Hwang between 22 and 29 October 2019 were, in effect, a post-dismissal negotiation for a new IEA, rather than an acknowledgment the employment relationship remained on foot.

[88] Turning to justification, a fair and reasonable employer should not have dealt with the situation that arose angrily; there should have been constructive communication to deal with any misconceptions that may have arisen, including from the job advertisements that were published.

[89] With regard to the asserted grievance that Mr Kang was disadvantaged by not being provided with a written IEA, counsel submitted the Authority was not correct to conclude that Mr Kang wanted to put off the signing of an IEA before deciding his job title. The evidence was that Mr Kang requested an IEA in his letter of 23 October 2019 when he commenced his written exchanges with Mr Hwang. Mr Kang made it clear he did not want the document to record a start date of 16 September 2019, the day he commenced work at the restaurant. In any event, the obligation to provide an IEA under s 65 of the Employment Relations Act 2000 (the Act) was not one which could be waived, given the provisions of s 238 of the Act.

[90] Counsel also submitted that Mr Kang had said that if he had been given an IEA, he would have known what the agreed provisions were for the termination of employment, and he would have known how to deal with any problems that may have arisen. It was not accepted, as the Authority had found, that the disadvantage to which he referred occurred after he had been dismissed.

[91] Submissions as to penalty were then made.

[92] Counsel for the defendant, Mr Kim, submitted that there was a heated exchange between the respective family members, but it was not accepted that there had been an unequivocal sending away of Mr Kang. Ms Chung had demonstrated a strong resentment towards Mr Hwang and Ms Weon in the presence of customers dining in the restaurant, shouting and throwing her apron on the top of food to be served to customers. She acted in a disorderly way.

[93] Counsel submitted that Mr Hwang had told Ms Chung to leave the premises, but she continued speaking with Mr Kang in a loud voice, which created a nuisance.

[94] It was submitted that Mr Hwang's action of telling Ms Chung and Mr Kang to leave were steps which a fair and reasonable employer could have taken to settle an "obnoxious situation" and avoid an escalation of it. Mr Hwang genuinely believed Mr Kang should escort Ms Chung away and comfort her before returning to work later.

[95] Subsequently, Mr Kang sent text messages to check the reality of the situation and clarify whether in fact he had been dismissed.

[96] The evidence showed that Ms Weon sent the texts. Counsel submitted Mr Kang's case was that she held ostensible authority to do so, and that the texts in and of themselves constituted termination of employment. However, it had not been established that Ms Weon was apparently authorised by SCL to terminate Ms Chung's employment.

[97] Mr Kim submitted that the written exchanges between the parties showed Mr Kang instituted the mediation process and the negotiation for an IEA so as to better

the terms of his employment, and to obtain full autonomy of the kitchen operation. It was contended this would enable him to obtain a resident's visa. When Mr Kang then chose to not return to work and to commence proceedings against SCL, he was attempting to capitalise on the confrontation.

[98] Turning to the question of whether Mr Kang had been unjustifiably disadvantaged if the employment had been terminated, there would be no actionable disadvantage because the terms and conditions as to the process of dispute resolution would not have survived the point of termination. Moreover, Mr Kang was able to make enquiries and then contact MBIE, so it could not be said Mr Kang had been disadvantaged.

[99] Alternatively, if the Court were to conclude, as SCL asserted, that Mr Kang resigned voluntarily on 29 October 2019, he had in fact been provided with a draft IEA well before then.

[100] In summary, it was submitted that Mr Hwang's request for Mr Kang and Ms Chung to leave the workplace in the context of a heated argument were steps which a fair and reasonable employer could have taken. Thereafter, Mr Hwang took reasonable actions to mitigate the problems of the workplace dispute.

[101] It was submitted the Court should also find that Mr Kang had acted in bad faith in the course of these proceedings, for example, by stating in his brief of evidence that it had come to his attention during the mediation process that the cell phone number from which the texts came was that of Ms Weon, a fact which he previously acknowledged much earlier in his letter of 25 October 2020.

First issue: unjustified dismissal?

The confrontation

[102] There is a degree of common ground between the parties as to the way in which the confrontation unfolded.

[103] The background was that Ms Weon, as head chef, considered there were issues with both Ms Chung and Mr Kang.

[104] She believed Ms Chung had not been following hygiene instructions and had not demonstrated a willingness to comply with her reasonable instructions.

[105] She also felt Mr Kang had not always done what was asked of him, such as when he had been asked to prepare a written order for certain products which were needed by the restaurant, a step he had not taken.

[106] Turning to the incident which arose after Ms Chung placed her watch on a shelf in the kitchen and was seen wearing jewellery, it is clear that Ms Weon felt there were again hygiene implications. She commented on Ms Chung's watch being on the shelf. Ms Chung responded by saying she needed to see the watch so she would know when her finishing time was reached.

[107] Ms Weon very quickly became frustrated and upset. She felt Ms Chung was answering her back in a disrespectful way. She challenged Ms Chung and used language which I find was clearly confrontational.

[108] It was in that context that she then thumped a table with a kitchen implement, followed by an angry comment about the couple, Ms Chung and Mr Kang, pairing up against her.

[109] Ms Chung said she was scared and that she felt a "deep fear". She said that she felt as if she "would be collapsing". She was crying. She removed her apron – and I infer her cap – saying she would "quit" or "leave" the premises, so as to remove herself from the situation.

[110] As she was leaving, Mr Kang said he would follow her soon. As far as Mr Kang was concerned, Mr Hwang had told Ms Chung to leave the restaurant.

[111] Mr Hwang also told Mr Kang to leave. Mr Kang hesitated, so Mr Hwang repeated the statement that he should leave. He, and Ms Weon, accepted he was angry.

[112] I find the instructions given to both Ms Chung and Mr Kang were given forcefully. Mr Hwang said his direct instruction to both of them was necessary because there was an argument that customers could hear.

[113] There is no reliable evidence that this was in fact the case – such as by the provision of bank statements that might have confirmed customers had been present in the restaurant at the time. I do not overlook Ms Kim’s evidence which suggested this was the case; the Court was left with the impression that she wished to reinforce her employer’s case.

[114] On the face of it, the situation quickly escalated, becoming a confrontation between those who operated the restaurant on the one hand, and two recently employed staff members on the other.

[115] Not only was there a power imbalance which is inherent in any employer/employee relationship, but there was a cultural element where more senior members of this community considered that they were not being respected by more junior members of that community.

[116] It is also appropriate to focus on the language used by the two sides at this stage, since that is where the dispute lies.

[117] As noted earlier, Ms Chung acknowledged that she may well have used the word “quit” or the word “leave”. However, she also said, in effect, the words she used should be interpreted within the context of what occurred so she would be understood as quitting the situation rather than the employment.

[118] This is a fair point. I find that the context within which she said she would “quit” or “leave” was one in which she was frightened and shocked because the confrontation had developed so quickly.

[119] She also was worried about both the financial circumstances and immigration status of herself and her husband. She explained that she was not in a position to quit the job because that might have resulted in her and her husband having to leave New

Zealand or find another job. So, she simply wanted to defuse the situation by leaving it. All of this was foreseeable by Ms Weon and Mr Hwang.

[120] I find that Ms Chung's account is plausible. It is inherently unlikely, in the heat of the moment, that she was quitting, as in terminating her employment with SCL, even if she was frightened.

[121] Similarly, the words used by Mr Kang do not suggest that he was quitting his employment. He simply said that he would follow Ms Chung. He did not use language which could reasonably have been understood as an intention to end his employment with SCL. It is inherently unlikely, given his particular immigration and economic circumstances, that he would have said he was quitting his employment, even in the heat of the moment.

[122] The heated language used by Mr Hwang was unequivocal and forceful. In the context of a dispute where both he, and his wife, quickly became very angry, I am satisfied there was a very clear instruction given by him to both Ms Chung and Mr Kang to leave the workplace.

[123] On the balance of probabilities, I find that they reasonably understood they were being dismissed.

The texts

[124] The text exchange which occurred late on 21 October 2019 requires consideration in the context of the confrontation which had occurred a short time earlier.

[125] The message – which suggested that the parties go their separate ways – could only have served as a re-enforcement of a belief that both Ms Chung and Mr Kang's employment was terminated, and that they should not return.

[126] In cross-examination it was put to Mr Kang that he raised the question of whether he and his wife should return the next day because he was unsure as to what had occurred. His response was that the situation was “so unbelievable I just sent a

message to be confirmed that it was real for sure”. He said he wanted to be 100 per cent sure that he had been dismissed. After the heated confrontation, it is understandable from Mr Kang’s perspective that he would seek that confirmation.

[127] An issue arose from the fact that it transpired Mr Kang had raised his text query using Ms Weon’s cell phone number and not Mr Hwang’s. It was Ms Weon, who was not a director of SCL, that sent the texts.

[128] In my view, it was reasonable for Mr Kang to believe that the texts were sent with the authority of SCL. They were sent from a phone number used in the job advertisement for the role he had applied for at the outset, which unquestionably was associated with SCL. Alongside the cell phone number was SCL’s email address. Mr Kang had used that number twice for the two applications which he made.

[129] In fact, Ms Weon exercised significant authority in the restaurant. Her role was described as “Head Chef”. Both she and her husband attended the two interviews when Mr Kang was hired. Mr Hwang accepted that Ms Weon had the authority to employ staff, although he said she would have to recommend dismissal of a staff member to him. That caveat, however, was a statement of convenience. The reality is that by virtue of her position, and the way she conducted herself in her various dealings with Ms Chung and Mr Kang, to the knowledge of Mr Hwang, she held the authority not only to hire but to fire.

[130] Ms Weon herself appeared to have believed she could dismiss staff. The content of the text exchange which she authored was to that effect. They impliedly confirmed she was authorised to confirm a termination of employment.

[131] Ostensible authority is created when an employer makes representations which are intended to convey to an employee that an individual/agent has authority to act for the employer and where the employee acts on those representations. This is to be assessed from the viewpoint of a reasonable person dealing with the agent.¹² I find that Ms Weon held the ostensible or apparent authority to send the texts.¹³

¹² Stephen Todd “Privity and Agency” in Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington 2022) at [14.4.1].

¹³ Section 142ZA.

[132] The context was the sending away by Mr Hwang earlier that day when supporting his wife, the absence of any attempt to state later that this was temporary only, and the delay the next day in making any attempt to clear the air after Mr Hwang was told about Ms Weon's texts.

[133] I find that Mr Kang could reasonably believe that Ms Weon's two texts were a confirmation of the sending away of both himself and his wife.

Job notices

[134] Later that day, Ms Chung and Mr Kang became aware that two job notices had been posted by SCL. The content of the advertisements were not altogether clear. The first was for a single staff member under the job title "Sushi and Donburi". The advertisement went on to state that a "Kitchen Roll Maker" staff member was being sought.

[135] The second was for two kitchen staff members under a job title of "Kitchen and Roll Maker". No reference was made to "Donburi" as had appeared in the earlier advertisement.

[136] In his evidence, Mr Hwang stated that the donburi role was not to fill Mr Kang's position. He said that because his wife found her role as head chef too hard, she wanted someone to assist her. He also said the second role was to replace Ms Chung who had quit. As noted earlier, Mr Hwang said that he and his wife had prepared the two advertisements together.

[137] Mr Hwang's account is not consistent with contemporaneous evidence, that is, the texts which had been sent earlier.

[138] In summary, Ms Weon, the author of the texts, had said the reason she suggested the parties go their separate ways, was because both Ms Chung and Mr Kang had quit. This understanding, on the part of both Ms Weon and Mr Hwang, was also reflected in Mr Hwang's letter to Mr Kang of 25 October 2019, and when Mr Hwang gave evidence to the Court.

[139] As it was believed that both Ms Chung and Mr Kang had quit, it is more likely than not that the two advertisements were to replace the two of them.

[140] Viewed from their perspective, it is unsurprising that they concluded the two notices related to their roles and served to reinforce their understanding they had been dismissed.

Subsequent events

[141] The next day, neither Ms Chung nor Mr Kang attended the restaurant for work purposes. Pastor Hong undertook Mr Kang's previous responsibilities.

[142] Mr Hwang said he did not comment about this to Ms Weon until lunchtime, when he referred to the fact Mr Kang had not attended work without any warning. This comment led Ms Weon to show him the text exchange of the previous day.

[143] In his brief of evidence he said that he rang Mr Kang "immediately" upon learning about the texts. However, according to his oral evidence, he did nothing initially, and it was not until near 6.00 pm that he telephoned Mr Kang.

[144] This chronology tends to suggest that initially he did not necessarily disagree with Ms Weon's suggestion that the parties should go their separate ways. There is no evidence to suggest he disagreed with Ms Weon, and that she should not have suggested the parties go their separate ways. He did not at any time that day contact Mr Kang to tell him the texts represented a misunderstanding.

[145] Further, in the letters and numerous text messages which Mr Hwang subsequently sent to Mr Kang, Mr Hwang did not attempt to rescind the impression created by Ms Weon's texts, that a discontinuance of the employment relationships was preferable.

[146] Rather, the issue was avoided. Mr Hwang said he wished Mr Kang to be re-employed; the focus turned to the terms of a potential IEA. At one stage, he attempted to suggest that this be backdated to 16 September 2019, the date when Mr Kang commenced working at the restaurant.

[147] I find this was to overcome the difficulties created by the texts Ms Weon had sent, which had confirmed a sending away of Ms Chung and Mr Kang from the workplace.

[148] However, two other problems emerged. First, Mr Kang's correspondence proceeded on the basis that both he and Ms Chung would be re-employed. It emerged that Ms Weon was strongly opposed to Ms Chung returning, although this fact was not expressly referred to until Mr Hwang's letter dated 25 October 2019 when Mr Hwang said Ms Weon regarded Ms Chung as having been disrespectful to the point that the relationship of trust and confidence had been "irreparably destroyed". Understandably, this statement did not enhance the possibility of Mr Kang agreeing to return to the workplace.

[149] Second, Mr Kang, in his letter of 23 October 2019, made it clear that because of the apparently critical remark Ms Weon had made at the time of the incident on 21 October 2019 ("want to fight with me now as husband and wife in pairs"), any terms and conditions of employment would have to be on the basis that Ms Weon not be present. Mr Kang said that because he and his wife would not be brow-beaten when Ms Weon arrived at work, Mr Kang and Ms Chung would not work with her.

[150] It is evident, from the text exchanges that took place between Mr Hwang and Mr Kang, that Mr Hwang was keen to try and smooth over the problems by having Mr Kang sign an IEA "as if nothing had happened". I have no doubt he was concerned that both Ms Chung and Mr Kang believed they had been dismissed and that he was attempting to avoid the implications of the sending away, the texts, and the job advertisements.

[151] In any event, Mr Kang did not consider that it would be appropriate for him to be re-employed, but not his wife.

[152] A final comment should be made regarding the assertions made for SCL as to Mr Kang's bona fides when corresponding with Mr Hwang. It was inferred that Mr Kang was attempting to take advantage of the situation when negotiating for an IEA, whilst leaving open the possibility of taking formal steps.

[153] I do not accept that Mr Kang was acting in bad faith in undertaking the correspondence he did.

[154] It was his position that if the parties could sort out their differences without having to undertake any formal processes, such as attending a mediator, then it was preferable to do so.

[155] It appears he was encouraged to adopt such a stance by Mr Hwang, as is evident both from the correspondence and the texts which the two exchanged. I find Mr Hwang did not want matters to go further.

[156] It was alleged Mr Kang had inappropriately adopted a strategy designed to improve his immigration status and to extract a substantial penalty or compensation payment from SCL.

[157] I do not think that this evidence establishes this was the case. Mr Hwang was not in any way prejudiced by the stance Mr Kang took in the discussions that were raised. These clearly proceeded at arms' length and in a fairly structured fashion, where each participant was able to express themselves clearly, without any suggestion of undue influence.

[158] In the result, I am satisfied that Mr Kang's dismissal grievance is established.

Second issue: disadvantage grievance

[159] There is no doubt that Mr Kang should have been provided with an IEA when he commenced employment with SCL, having regard to the obligations in s 65 of the Act.

[160] The company acknowledges this.

[161] The real issue is whether that failure should lead the Court to conclude Mr Kang has established a disadvantage grievance because he did not know the terms and conditions under which he was employed, and he did not know what procedure to follow after the termination.

[162] Two relevant points need to be made. First, I accept the submission made for SCL that any contractual obligation as to dispute resolution that may have been included in an IEA did not survive the termination of Mr Kang's employment, which was of immediate effect.

[163] Second, and alternatively, even if the contractual provisions were to be regarded as having survived, there is no apparent disadvantage. Mr Kang was able to source advice from a Citizens' Advice Bureau almost immediately following the incident of 21 October 2019. As a result of that, he contacted MBIE and arranged for the commencement of a mediation process. Then he entered into a dialogue with Mr Hwang. All of this is consistent with what might have occurred had a written IEA been operative.

[164] The stress he may well have suffered through that process was not exacerbated by SCL's original failure to have provided him with an IEA. It was stress he would likely have suffered in any event, due to the circumstances of his dismissal.

[165] The disadvantage grievance is not established.

Issue three: remedies

[166] Mr Kang told the Court that if he had not been dismissed, he would have earned \$9,664.20 gross, for the three-month period following the termination.

[167] He was able to mitigate that loss by obtaining new employment and earning \$6,313.14. His claim for that period is accordingly \$3,351.06.

[168] None of this was disputed by SCL.

[169] It was argued for Mr Kang that he could not have mitigated his loss by accepting fresh employment with SCL. Having regard to the difficult circumstances which I have reviewed in some detail already, I do not think it was unreasonable for Mr Kang to have decided not to return to work for SCL.

[170] Turning to compensation for humiliation, loss of dignity and injury to feelings, a number of points are raised by Mr Kang.

[171] First, Mr Kang says that he had never been dismissed, and had worked hard at the restaurant until the date of the dismissal. An attempt was made to establish in cross-examination of Mr Kang that in fact he had suffered previous employment relationship problems, but these were not accepted, nor did SCL provide evidence of this. I proceed on the basis that his assertion of there being no previous relevant history is correct.

[172] Mr Kang says the dismissal made him doubt himself and diminished his self-worth. He could not sleep at night and became depressed. This evidence was not challenged, and I accept it.

[173] He also said he had to obtain a job immediately to support himself, his wife and his three children. He was unable to obtain another Korean role in Whangarei because the local Korean community knew about the dismissal, and the fact he had raised a personal grievance. He said he felt isolated and suffered financially. He was lucky enough to locate a job in late November 2019. This was for temporary and seasonal work, and he felt lucky to obtain it because otherwise he and his wife may have been forced to return to South Korea. Then he found a new role in the Bay of Plenty region, but he incurred expenditure in having to relocate there.

[174] He said that whilst working for new employers afterwards, he felt that he could be at risk of dismissal at any time.

[175] Again, none of this was challenged. I accept these consequences, and that they would have contributed to the stress he suffered following his dismissal by SCL.

[176] I am satisfied that an award for humiliation, loss of dignity and injury to feelings should be made.

[177] Inevitably, assessments of this kind are case specific, but consistency may be applied by reference to the bands from which the Court has derived assistance.¹⁴ The relevant band in this case is Band 2, which relates to mid-level loss/harm.

[178] Quantum for this band is appropriately placed at being \$10,000 to \$40,000.¹⁵

[179] Standing back, I consider the appropriate award is a moderate one towards the mid-point of Band B, that is, \$20,000.

[180] A penalty is sought for the failure to provide an IEA at the outset of Mr Kang's employment.

[181] SCL accepts that it erred by not providing an IEA at the outset, but it says this is because Mr Kang requested this. However, this assertion was not accepted by Mr Kang. Although it breached the provisions of the Act by this failure, I am not persuaded that there should be a penalty for a breach. There is no evidence that the failure to provide an IEA was relevant until after Mr Kang's termination. I am not persuaded that a penalty is appropriate in this case for the purposes of general or specific deterrence, or for any other reason.

[182] Finally, I consider contribution. Where there is a determination that an employee has a personal grievance, the Authority or Court must, in deciding both the nature and extent of remedies, consider the extent to which the action of the employee contributed towards the personal grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded.¹⁶

[183] There is no evidence to suggest that Mr Kang contributed to the dismissal grievance that he has established. The sending away arose entirely from the situation created by Ms Weon and Mr Hwang. I consider that no reduction of remedies for contribution should be made.

¹⁴ *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 918 at [62].

¹⁵ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].

¹⁶ Employment Relations Act 2000, s 124.

Result

[184] The challenge in respect of Mr Kang's dismissal grievance is allowed; his challenge in respect of his disadvantage grievance is not.

[185] SCL is to pay Mr Kang remedies as follows:

- (a) \$3,351.06 gross, under s 128 of the Act; and
- (b) \$20,000 as compensation, under s 123(1)(c)(i) of the Act.

[186] Finally, I turn to consider costs. On the face of it, Mr Kang is entitled to costs on a 2B basis, unless there are any particular factors of which the Court is unaware. Counsel should agree this issue. If that does not prove possible, I will receive memoranda.

B A Corkill
Judge

Judgment signed at 2.15 pm on 23 August 2022