

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

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

**[2023] NZEmpC 217
EMPC 306/2022**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MGK HOMES LIMITED Plaintiff
AND	BOMI YOON Defendant

Hearing: 29–30 August 2023
(Heard at Tauranga)

Appearances: Mingon (David) Kang and A Kim, agents for plaintiff
Seungmin Kang, counsel for defendant

Judgment: 1 December 2023

JUDGMENT OF JUDGE KATHRYN BECK

[1] This proceeding involves a non-de novo challenge to the determination of the Employment Relations Authority, finding that the defendant, Bomi Yoon, was unjustifiably dismissed.¹ The Authority awarded Ms Yoon lost wages, compensation and reimbursement of the cost of her immigration lawyer. She was also awarded costs in a subsequent costs determination.²

¹ *Yoon v MGK Homes Ltd* [2022] NZERA 377 (Member Blick).

² *Yoon v MGK Homes Ltd* [2022] NZERA 515 (Member Blick).

[2] The plaintiff, MGK Homes Ltd (MGK), challenges particular aspects of the decision and says that:

- (a) it did not dismiss Ms Yoon but that the employment was terminated by mutual agreement;
- (b) the employment relationship came to an end on 12 May 2020; therefore, when Ms Yoon raised her grievance on 1 October 2020, she was outside the 90-day period; and
- (c) if there was a dismissal (which is denied), Ms Yoon failed to mitigate her loss and contributed to the situation.

[3] A key point of dispute between the parties is what took place in a meeting on 12 May 2020. Most, if not all, matters flow from that point.

Issues

[4] The issues for determination are:

- (a) Did the defendant raise her personal grievance within 90 days?
- (b) Was the defendant unjustifiably dismissed?
- (c) If so, what remedies are available to her?

The facts

[5] Ms Yoon is a single mother with one daughter, originally from South Korea. In about July 2019, she came to New Zealand with her daughter, who was 10 years old at the time. She initially lived in Auckland on a visitor's visa and searched for employment from there.

[6] An agency introduced her to MGK. On about 4 October 2019, Ms Yoon signed an employment agreement. A work visa was applied for and granted on 16 October 2019 on condition that she work for MGK as an office manager.

[7] Ms Yoon then relocated to Tauranga where MGK was based and started working for the company in early November 2019. Her salary was \$45,000 per annum. MGK is a residential construction company. It is run on a day-to-day basis by Mingon Kang, the sole director and shareholder.

[8] Ms Yoon undertook general office and administration duties for the company. She says she also undertook work for a related company which was based in the same offices, Astoria Development Ltd (Astoria).

[9] A position description for Ms Yoon's role, which she says she cannot recall ever receiving, was provided to the Court. However, she agrees that, with the exception of health and safety compliance, it is a good representation of her duties. It states:

Responsibilities include, but are not limited to:

- Undertaking general office support tasks including purchase of office supplies and staff amenities.
- Managing records and accounts of the company
- Ensuring health and safety compliance
- Answering the phone enquiries
- Liaising with service providers, e.g. internet and telephone
- Supporting directors and other senior staff with their daily tasks when needed
- Assisting construction manager with staff allocating and performance review
- Other ad-hoc tasks

[10] The duties included preparation of the documentation for the payment of creditors, who were paid on the 20th of each month. In April 2020, when Ms Yoon was working from home, she began to prepare an Excel spreadsheet for the payments for that month. However, she did not update the bank account details. She says she had not finalised the document but payments were made based on it and so were wrong. This was able to be remedied but was time consuming and difficult.

[11] On 20 April 2020, Astoria posted an advertisement in the New Zealand Korean Post for three positions: a construction-related graduate, a quantity surveyor and an administrator. Applicants were invited to apply to an MGK and Astoria email address.

[12] On 22 April 2020, in email correspondence between Shawn Lee, a manager working within both MGK and Astoria, and Ms Yoon, Shawn Lee raised the issue of the incorrect bank details. Ms Yoon explained what had happened and apologised. Shawn Lee responded, noting the amount of time it had taken to correct the issue and that he needed to be able to trust the work and information provided by Ms Yoon. In particular, he said: "... Accounting and Banking which are your roles, are important. I hope you organise this and make no mistake in the future."

[13] Other than this email correspondence, no issues were raised with Ms Yoon about the error. There was no evidence of any other concerns being raised with her about her performance.

[14] On 8 May 2020, Ms Yoon was asked to post an advertisement on Trade Me Jobs for a full-time office manager position with Astoria. Other than noting that a Bachelor's degree in the field of accounting would be a strong advantage, and including the preparation of financial statements for management and shareholders as one of the areas of responsibility, the position description for the advertised role was identical to that which the company says applied to Ms Yoon's role.³

[15] The email to Ms Yoon requesting that she post the job advertisement forwarded an email from Kevin Kim, Mr Kang's brother-in-law and an immigration adviser. The subject line of Mr Kim's email, which contained the proposed advertisement and the email to Ms Yoon, was: "(Keetae/John Park – Job Advertisement)".

[16] On Tuesday 12 May 2020, Mr Kang rang Ms Yoon and asked her to attend a meeting at his office.

[17] Both Ms Yoon and Mr Kang agree that the meeting lasted just over 10 minutes. That is where their agreement ends.

[18] Either during or just after this meeting, it was decided that Ms Yoon's employment with MGK would come to an end.

³ See above at [9].

[19] I will come back to this.

[20] Ms Yoon continued to work for the company and was paid up until the end of June 2020. Despite applying for a number of jobs, she was unable to find a new position and was concerned about the status of her visa. Accordingly, on 29 June 2020, she emailed Shawn Lee asking to remain on leave from July 2020. He responded by granting her unpaid leave from 1 July to 31 August 2020. Mr Kang confirms that he agreed to approve this leave.

[21] Ms Yoon was paid her final holiday pay at her request on 9 July 2020 as she was in need of funds. She says she finally found a new employer who agreed to support her work visa in late August 2020. This required her making an application for a new work visa which was submitted to Immigration New Zealand on 16 September 2020 and granted on about 3 November 2020. She began working immediately afterwards.

[22] Her lawyer formally raised a personal grievance for unjustified dismissal on 1 October 2020.

Analysis

Did the defendant raise her personal grievance within 90 days?

[23] It is common ground that, while Ms Yoon ceased being paid on 30 June 2020, she remained employed by the company on unpaid leave until 31 August 2020.

[24] MGK says that the 90 days should run from 12 May 2020 when it says Ms Yoon resigned, and even if she did not resign, that is when it was determined that her employment would end.

[25] This submission cannot succeed. While the event that resulted in the termination of her employment occurred on 12 May 2020, such employment did not end until 31 August 2020.

[26] In relation to an unjustified dismissal, the 90-day period does not run until the employment is terminated.⁴

[27] Ms Yoon raised her grievance on 1 October 2020. This is within the 90-day period.

[28] Accordingly, the Authority did not err in either fact or law when it found that Ms Yoon raised her grievance within the 90-day period.

Was Ms Yoon dismissed?

[29] The plaintiff says the Authority erred when it found that Ms Yoon had been dismissed. It says the employment ended by either resignation or mutual agreement – either way, it was not a dismissal.

[30] The question here is who initiated the termination of the employment relationship.⁵ To answer that question, it is necessary to determine what occurred at the meeting on 12 May 2020.

[31] The parties have quite different accounts of that meeting.

[32] Mr Kang says that Ms Yoon offered her resignation to Shawn Lee after the meeting and that they then agreed the terms of her leaving.⁶

[33] Ms Yoon says she was told she was no longer needed because a person had been employed to replace her and she should discuss the timing of her leaving with Shawn Lee.

[34] I prefer Ms Yoon's account of events for a number of reasons.

⁴ *New Zealand Automobile Assoc Inc v McKay* [1996] 2 ERNZ 622 (EmpC) at 633.

⁵ *Wellington etc 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 This was Mr Kang's final position in terms of his evidence. His evidence changed during the hearing, a matter which is dealt with below.

[35] Mr Kang's evidence, in relation to the meeting, has varied from the Authority investigation meeting to the court hearing, and even during the court hearing itself, whereas Ms Yoon's evidence has been consistent throughout.

[36] Mr Kang's account of the initial meeting, as recorded in the Authority's determination at [28], was that he had requested both Ms Yoon and Brian Lee to come to his office to discuss the payment error and how they could ensure it did not occur again, and that Ms Yoon had resigned during the meeting. However, that was later changed during the investigation meeting to say that her resignation had not been given to him but to Shawn Lee soon after the meeting.

[37] Likewise, during the hearing in this Court, Mr Kang's version of both the reason for the meeting and what happened at the meeting, in particular in relation to whether Ms Yoon resigned or not, also changed.

[38] In his brief of evidence, Mr Kang said he called the meeting to discuss the spreadsheet error, but it was not disciplinary. However, when questioned by counsel for Ms Yoon, he said the reason for the meeting was to address the relationship issues between Brian Lee and Ms Yoon (not the payments issue); it then took an unexpected turn with Ms Yoon blaming Brian Lee for the payment errors.

[39] As to how the termination of Ms Yoon's employment came about, Mr Kang's initial evidence was that Ms Yoon resigned during the meeting. In his witness statement, Mr Kang said he did not dismiss her but that her employment was terminated by mutual agreement during the meeting, after which she left the office immediately. He said they parted on amicable terms.

[40] In his closing submissions, Mr Kang asked to correct his evidence which, as he was still under oath, I allowed. He stated that on 12 May 2020, he did not hear anything like a resignation from Ms Yoon. He heard it from Shawn Lee later that day.

[41] Mr Kang's final evidence was that, on 12 May 2020, he instructed Shawn Lee to "listen to her regarding what she wants and then report to me". Shawn Lee

then told him they had agreed that Ms Yoon would be on garden leave until 30 June 2020.⁷

[42] Even with the correction to his evidence, however, he remained adamant that he did not dismiss Ms Yoon.

[43] Ms Yoon's evidence has been consistent, from the investigation meeting in the Authority to finally the proceedings in the Court. She says she was not given any information as to what the meeting would be about. When she attended Mr Kang's office, she found Brian Lee, a co-worker, was also present. She says that during that meeting, Mr Kang advised her and Brian Lee that he had employed other "experienced employees" and that they were therefore no longer required. Ms Yoon says that, on being told this, Brian Lee immediately left. She was shocked they were being treated in this way, but particularly Brian Lee, as he had worked for the company for some time.

[44] She says Mr Kang said the best he could do for her would be to let her have a longer notice period and work from home during that time (which she was already doing due to lockdowns). He told her to discuss this further with Shawn Lee. Ms Yoon says she did not see much point in saying anything further to Mr Kang as the decision had already been made.

[45] It is now common ground that Ms Yoon met with Shawn Lee after the meeting and it was agreed that she would work from home until the end of June 2020. They agreed she could take time to look for another job because she was on a work visa that named MGK as her employer.

[46] Immediately after the meeting with Mr Kang, Ms Yoon made a written record of what had been discussed by way of sending an email to herself. That email was provided to the Court. It further supports Ms Yoon's account. She says she made

⁷ Mr Kang refers to "garden leave" but when it was explored further, it was apparent that Ms Yoon still undertook work for MGK (although possibly on a reduced basis) and that the period was more in the nature of an extended notice period. The fact that her work was performed from home was not of any note due to working from home arrangements at the time due to the COVID-19 pandemic.

notes because she was concerned about what had happened. Notes such as these can sometimes be self-serving. However, the notes prepared by Ms Yoon credibly read as a series of points remembered from the meeting. It is also consistent with Mr Kang's final evidence as to how the meeting ended. In her email she stated: "He asked me to let him know after thinking about it and talking with the manager [Shawn Lee]."

[47] A further factor that supports Ms Yoon's evidence that Mr Kang said he had found a replacement for her, is the advertisement she was asked to place on 8 May 2020 (just four days before the meeting). Mr Park, whose name appears in the subject line of the instruction to Ms Yoon to post the advertisement,⁸ was ultimately employed by Astoria into the role of office manager after Ms Yoon left. Mr Kang says this did not occur until 3 August 2020 and so is unrelated. However, it is not an unreasonable inference that the advertisement was placed for the purpose of attracting Mr Park on the advice of Mr Kim, and that he was one of the "experienced employees" Mr Kang was referring to in the meeting.

[48] Consistent with that inference, the role itself was almost identical to that undertaken by Ms Yoon.

[49] MGK submitted that Mr Park worked for a separate company, Astoria. However, Astoria and MGK are closely intertwined with Mr Kang being the sole director for both companies. While Brian Lee was employed by Astoria, and Shawn Lee and Ms Yoon were employed by MGK, they shared the same office and the communal MGK email address. Their personal email addresses contained Astoria's name. Ms Yoon says she did work for both Astoria and MGK; for example, the error she made in April 2020 was in relation to Astoria's payments. The fact that Mr Park worked for Astoria, not MGK, does not undermine the inference that he was employed to replace Ms Yoon.

[50] Neither Brian Lee nor Shawn Lee gave evidence for MGK in the Authority or these proceedings. Given the changing nature of Mr Kang's evidence versus the consistency of Ms Yoon's, the contemporaneous record prepared by Ms Yoon and the

⁸ See above at [14]–[15].

corroboratory evidence of the job description advertisements, I prefer Ms Yoon's account of the meeting.

[51] Accordingly, I find that Mr Kang advised Ms Yoon that he had employed other experienced employees, that she was no longer required, and that she should talk to Shawn Lee about the timing of her leaving due to her visa issues. Ms Yoon is adamant she did not resign. I agree.

[52] I find that Mr Kang initiated the termination of Ms Yoon's employment. She left the meeting knowing that her employment was to come to an end, a position that had not been agreed to by her; the only outstanding issue was how much time she would be able to take to deal with her visa issue.

[53] Discussing and agreeing a period of paid notice with Shawn Lee does not render this an agreed termination. It certainly does not render it a resignation.

[54] Ms Yoon says, given the contents of the meeting, it was clear to her she had no option but to accept dismissal.

[55] I agree that the termination of Ms Yoon's employment was a dismissal.

Was the dismissal unjustified?

[56] Section 103A of the Act states:

103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
 - (a) minor; and
 - (b) did not result in the employee being treated unfairly.

[57] While Mr Kang says the purpose of the meeting on 12 May 2020 was not disciplinary, on Ms Yoon's evidence (which I prefer), the issues of the payments and her alleged lack of ability were raised after she was told about the employment of replacements.

[58] If Mr Kang had concerns about her performance, he was required to undertake a fair and reasonable process before taking any disciplinary action. I have already found that Mr Kang dismissed Ms Yoon. This is the ultimate disciplinary sanction. There was no process of any sort in this instance. While concerns may have been raised, there was no opportunity for Ms Yoon to respond. With no opportunity to respond, there can be no consideration of such a response. Ms Yoon was simply told that she was being replaced.

[59] Accordingly, her dismissal is both procedurally and substantively unjustified.

[60] The Authority did not err in its findings.

Remedies

Lost earnings: did the defendant take adequate steps to mitigate her loss?

[61] Ms Yoon's evidence is that (other than holiday pay) she did not have any income between 1 July and 3 November 2020 when she started her new role (18

weeks). She says she would have earned \$15,576.84 over that period if she had not been dismissed.

[62] The Authority found that she did what she could to mitigate her losses and was entitled to an award of the full amount of lost remuneration for a period of 18 weeks.⁹

[63] There is no dispute about the calculations of the amount of the loss. MGK takes issue with whether Ms Yoon did enough to mitigate her loss.

[64] The loss was more than three months' wages and therefore required the Authority to consider the exercise of its discretion under s 128(3) of the Act. The Authority made its finding after reviewing the evidence of loss and what it referred to as Ms Yoon's significant number of attempts to secure alternative employment after her dismissal.

[65] Ms Yoon's evidence in the Court was consistent with the Authority's findings. She produced evidence of a number of applications for employment commencing on 20 May 2020. She applied for a range of roles, including payroll co-ordinator, administrator and shop supervisor/sales assistant. It is apparent that she worked very hard to try and find new employment. She was motivated to do so, being a single mother with a dependent daughter. She was also keen to remain in New Zealand and find a role that could support her visa. She was able to do so in mid-August 2020.

[66] She says this was more difficult because she needed to find an employer who could support her visa, but the evidence illustrates her perseverance. Her actions were reasonable in the circumstances and she is therefore entitled to recover her losses for the full period of 18 weeks.¹⁰

[67] The Authority did not err in either fact or law in its findings in relation to lost remuneration.

⁹ *Yoon v MGK Homes Ltd*, above n 1, at [80].

¹⁰ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 at [58]-[64].

Section 123(1)(c)(i)

[68] The Authority awarded Ms Yoon \$20,000 under s 123(1)(c)(i) of the Act.¹¹ It accepted that she suffered a high degree of mental and financial distress as a result of MGK's actions. It took into account the manner in which she was advised of her dismissal which it considered to have been insensitive, and the fact that she had been asked to post a job advertisement for a role that was intended to replace her. It also noted the humiliation she felt as a result of having to ask to borrow money, and the stress that came from being in the position she was in as a single parent, having to 'couch-surf' at her friends' houses.

[69] Ms Yoon's evidence in the Court was consistent with that given in the Authority. It was apparent that she suffered significant stress and distress as a result of both the way in which her employment ended, and the fact of it ending, when she relied on the work visa with MGK for both her own and her daughter's security and ability to remain and work in New Zealand. Her evidence is that, once she stopped being paid, things became very difficult for her financially and she was required to 'couch-surf' at friends' places with her daughter and borrow money from family, which she found humiliating.

[70] The Court has adopted an approach to the quantification of an award under s 123(1)(c) of the Act.¹² The three bands were recently updated in *GF v Comptroller of the New Zealand Customs Service*:¹³

- band 1 – low-range loss: \$0–\$12,000
- band 2 – mid-range loss: \$12,000–\$50,000
- band 3 – high-range loss: \$50,000 or more

[71] \$20,000 is at the lower end of band 2. If anything, the claim by Ms Yoon may well have supported a higher claim had she not pleaded in her statement of defence that she was seeking a judgment upholding the Authority's determination in respect of

¹¹ *Yoon v MGK Homes Ltd*, above n 1, at [84].

¹² *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; and *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

¹³ *GF v Comptroller of NZ Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [162].

the \$20,000 compensation. As this is a non-de novo hearing, I do not consider I am able to increase the amounts awarded.¹⁴

[72] In any case, the Authority did not err in either fact or law in awarding the amount of \$20,000.

Reimbursement of other money

[73] Ms Yoon required the assistance of an immigration lawyer to apply for and obtain a new work visa for herself and a new student visa for her daughter, which cost her \$4,544.25.

[74] The Authority held that it was appropriate to exercise its discretion under s 123(1)(b) of the Act to order reimbursement of the sum of \$4,544.25 that Ms Yoon had to pay. It found that sum was lost as a result of the grievance.

[75] Ms Yoon was holding an essential skills work visa supported by the plaintiff. Her daughter was also holding a dependent child student visa which relied upon the defendant's work visa. I agree that, had the plaintiff not dismissed the defendant, their visas would have been valid until 2022, and they would not have needed to apply for new ones. It was a direct result of the dismissal that their visas were no longer valid after 1 September 2020 and they needed to apply for new ones. While it was suggested that Ms Yoon could have made the application herself, given the complication of her daughter and the fact that she had already lost her employment, I accept that she considered she needed to instruct an immigration lawyer to make the application.

[76] The cost of that immigration lawyer was a direct and foreseeable consequence of Ms Yoon's unjustifiable dismissal given the timing and circumstances in which it took place. I therefore consider that it is recoverable as reimbursement as "other money lost by the employee as a result of the grievance".¹⁵

¹⁴ *Cheng*, above n 8 at [72]; *McCulloch & Partners v Smith* CA133/03, 3 December 2003 at [3].

¹⁵ See *McKendry v Jansen* [2010] NZEmpC 128, [2010] ERNZ 453 at [76]-[77].

[77] The Authority did not err in fact or law in granting the defendant reimbursement of \$4,544.25, being other money lost as a result of the unjustifiable dismissal.

Outcome

[78] The plaintiff is unsuccessful in its challenge. The Authority's substantive determination is upheld in full. It follows that the costs determination is also upheld.

[79] The amount of \$46,997.40 currently held by the Court in accordance with the judgment of Judge Holden dated 23 February 2023,¹⁶ can now be released to Ms Yoon, together with any interest.

Costs

[80] Costs are reserved. In the event the parties are unable to agree on costs, the defendant will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 3.40 pm on 1 December 2023

¹⁶ *MGK Homes Ltd v Yoon* [2023] NZEmpC 22.