

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 37/07
ARC 76/06**

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

BETWEEN ANDREW YONG TRADING AS YONG
& CO CHARTERED ACCOUNTANTS
Plaintiff

AND YUNPEI (SOPHIA) CHIN
Defendant

Hearing: 18 and 20 April 2007 and 7 May 2007
(Heard at Auckland)

Appearances: Evgeny Orlov, Counsel for Plaintiff
Mark Nutsford, Advocate for Defendant

Judgment: 20 June 2007

JUDGMENT OF JUDGE ME PERKINS

Introduction

[1] Mr Yong has filed a challenge against the determination of the Employment Relations Authority at Auckland dated 4 October 2006. Under the determination Mr Yong was ordered to pay his former employee, Ms Chin, the following:

- a. Reimbursement of the gross sum of \$3,653.85;
- b. compensation of \$5,000;
- c. outstanding holiday pay of \$2,192.31 gross as arrears of wages;

- d. interest on the judgment sum of \$2,192.31 for arrears of wages at the rate of 9 percent per annum from 25 November 2005 until the date of payment.

[2] While the plaintiff's pleadings were somewhat deficient I allowed the matter to be set down at the callover so that there were no further delays in bringing this challenge to a conclusion. A detailed statement of defence has been filed to the rather poorly pleaded statement of claim. No cross challenge has been filed. However, as the challenge seeks a hearing de novo against the whole of the determination, it is open to the Court to increase the awards if the plaintiff is unsuccessful. I also mention that while the determination of the Employment Relations Authority correctly named Mr Andrew Yong trading as Yong & Co Chartered Accountants as employer party to the determination, the documents subsequently filed by the parties simply named the plaintiff as Yong & Company, which is not a legal entity. At the callover hearing, which I conducted on 16 February 2007, I made an order directing that the correct plaintiff in the challenge is Andrew Yong trading as Yong & Co Chartered Accountants.

[3] The original estimate given for the trial was one day. It soon became apparent that this would be inadequate. The trial in fact lasted three days. While the Court made every effort to ensure the trial was completed as quickly as possible there was an unacceptable delay between the second and third days.

The employment history

[4] Ms Chin first commenced employment with Mr Yong's accountancy practice in July 2002. She resigned on 28 October 2003 but resumed employment with him again on 3 May 2004.

[5] During the first period of employment Mr Yong entered into a financial transaction with Ms Chin's husband, Mr Julian Chan. Under this transaction, taking place in February 2003, Mr Yong lent Mr Chan \$50,000, ostensibly to help finance a deal involving export of dairy cattle to Asia. The agreement was that Mr Yong would receive back \$75,000 at the expiry of three months. Mr Chan never repaid Mr Yong. It was agreed between Mr Yong and Mr Chan that Ms Chin would not be informed of the transaction. I am satisfied that Ms Chin did not know of this

transaction until alerted to it confidentially by Mr Yong's wife in mid 2005 when Ms Chin was back in his employment for the second time.

[6] While employed during the first period, Ms Chin had assisted the Lee family, clients of Mr Yong's practice, with an Inland Revenue Department investigation into their family business, Lywist Tobacco Ltd. Through her skill and expertise, Ms Chin procured a successful outcome for the Lee family and Mr Yong received a substantial fee for her work. During his evidence, Mr Yong described Ms Chin as his most valuable employee. Clearly that was the case.

[7] The Lee family was very grateful for the outcome Ms Chin had procured and persistently offered to have her to their home for dinner. Ms Chin resisted the invitation as she felt uncomfortable going to the home of a client of her employer. Eventually, she succumbed to the invitation and she, her husband and children visited the Lees' home for dinner. As part of the cultural requirements, it was necessary for the invitation to be reciprocated and on a later occasion the Lees were invited back to Ms Chin's home in Bucklands Beach for dinner. Mr Yong was not informed of these events. It was put to Ms Chin in cross-examination that these social events amounted to a breach of Ms Chin's obligations of trust and confidence towards her employer.

[8] Following the final dinner meeting, Mr Lee and Mr Chan entered into a financial transaction. This was coincidentally similar to the earlier transaction between Mr Chan and Mr Yong. Mr Lee agreed to lend Mr Chan \$60,000 to finance the trade of white veal from New Zealand to Asian countries. The return to Mr Lee was to be 10 percent per annum and a share of the expected profit. At the end of November 2003, at a time incidentally when Ms Chin was no longer in Mr Yong's employ, Mr Lee advanced the \$60,000 to Mr Chan who, in return, gave him four post-dated cheques totalling \$66,000. The cheques were due for presentation in December 2004 but Mr Lee, apparently concerned about Mr Chan's bona fides, attempted to unsuccessfully cash the cheques in February 2004. Mr Chan informed me during the course of his evidence that through a change in export/import requirements of meat into Asia, the transaction failed. Like Mr Yong, Mr Lee was never repaid. Mr Chan asserted that the transactions, for which he borrowed from

both Mr Yong and Mr Lee, were bona fides. I have considerable doubt about that and was never provided with documentation to verify his assertions.

[9] However, I am satisfied that Ms Chin knew nothing of the transactions when they were first entered into. She became aware of the Lee transaction when she came across a notice of dishonoured cheque and confronted her husband. There was considerable disagreement between them about it. At that time, of course, Ms Chin was not aware of the similar dealings between her husband and Mr Yong. She did not become aware of those transactions until much later.

[10] Ms Chin gave evidence that she was concerned about her husband's financial affairs. She owned the house in Bucklands Beach and other properties as her separate property. Some years earlier she had ensured that her position with respect to her separate property was protected by entering into a matrimonial property agreement with her husband. She had become concerned about his gambling habits. She wished to protect her separate property against any attack from potential creditors of her husband. The matrimonial property agreement was entered into in May 2002, before Ms Chin even commenced employment with Mr Yong. As it transpired, the protection Ms Chin had gained held her in good stead as the Lees obtained a judgment against Mr Chan for the borrowed money. Mr Chan was adjudicated bankrupt on 17 August 2005. This then left the Lees and Mr Yong without further recourse against Mr Chan personally for the debts. The solicitors for the Lees attempted to seek payment for the debt from both Mr Yong and Ms Chin on the basis of alleged breach of fiduciary duty arising out of the Lees' dealings with the accountancy firm. These allegations were rejected and nothing further transpired.

[11] Mr Orlov, in his submissions, insinuated that Ms Chin was a party to the failed transaction which, in turn, gave rise to grounds for Mr Yong to make further inquiries of her. Mr Yong had previously become aware of the Lee transaction by virtue of the actions of the solicitors for the Lees against him and of course had suffered loss himself. However, when discussing these matters with her later, he accepted Ms Chin's assurance that she did not know of the transactions and was not involved. Mr Yong was not aware at that time of the social dinners, which had taken place. Mr Orlov also insinuated during his cross-examination of Ms Chin that the

matrimonial property agreement and the social dinners were part of an alleged conspiracy between Ms Chin and her husband to defraud the Lees and Mr Yong. Such allegations were simply not established during the course of evidence and were completely without factual foundation.

[12] Clearly the loss of money was a source of irritation for Mr Yong. However, with the adjudication of Mr Chan as a bankrupt, the debt was extinguished. Any recourse would need to be directed to the Official Assignee. Ms Chin stated that within days of her husband's bankruptcy, Mr Yong and his wife began hinting that Ms Chin personally had a responsibility to them. Ms Chin was in a difficult position, having resumed employment with Mr Yong. She diplomatically rejected their suggestions. Mr Yong clearly relied upon Ms Chin as one of his most valued and able employees and did not wish to lose her. There was no suggestion from him that she would be dismissed or that she should resign at that time.

[13] It was around this time that Mr Yong appears to have converted to Scientology and unwisely fell under the spell of a Mr Andrew Wenborn. Mr Wenborn held himself out as a business consultant. He was attached to an organisation called WISE (World Institute of Scientology Enterprises), which adhered to principles enunciated by L Ron Hubbard, the founder of Scientology. Mr Wenborn did not give evidence although there was clearly an intention earlier that he would. I was informed by Mr Orlov that Mr Wenborn now resides in Australia and was unavailable. Mr Yong under cross-examination seemed reluctant at one point to concede the connection between WISE and Scientology but Mr Nutsford was able to point to documentary evidence that the enterprises were linked.

[14] Ms Chin described her dealings with Mr Wenborn after he was employed as the business consultant for Mr Yong's practice. Mr Wenborn introduced time recording systems for the firm, which would be consistent with his advising Mr Yong on business matters. However, it appears that as part of the philosophy attached to WISE, Mr Wenborn wished to ascertain the integrity of all the staff then working for Mr Yong and undertook a series of individual interviews with the staff at which Mr Yong was present.

[15] Mr Yong in his brief of evidence stated that Mr Wenborn had identified one of the “*issues*” as the debt Ms Chin’s husband owed and that “... *all these events had virtually undermined the relationship of trust between employer and employee*”. Of course by this stage there was no longer any debt as Mr Chan was bankrupt. It seemed rather late in the stage to be claiming the employment relationship had been undermined given Mr Yong’s earlier discussions with Ms Chin at the time of the adjudication in which he reinforced her position in his employ. He had previously become aware of the Lee debt as I mentioned when the Lees’ solicitors wrote to him in September 2004, nearly a year previously. He had on that earlier occasion also reaffirmed Ms Chin’s employment with him. At that stage in September 2004, he also knew that Ms Chin’s husband was indebted to him but did not reveal that to Ms Chin and knew that she was not aware of this position.

[16] Ms Chin stated that the interview with Mr Wenborn and Mr Yong took place on 29 September 2005. She was informed at the outset that the purpose of the interview was to settle her role and to help Mr Yong reorganise the practice. She stated that during the interview Mr Wenborn spent most of the time delving into her personal affairs rather than her professional skills and any practice issues. Mr Wenborn’s notes of the meeting confirm that. Indeed, it is plain from the notes that Mr Wenborn was more interested in the debt owing to Mr Yong. Drawing reasonable inferences from the notes and subsequent correspondence, it is clear that Mr Wenborn was keenly interested in how Mr Chan or Ms Chin was to repay the debt.

[17] Ms Chin stated that she protested to no avail at the meeting as to the tone of the questioning. She remonstrated further with Mr Wenborn in a letter she wrote to him dated 14 October 2005. In that letter she tried to ascertain what role in the practice she was to play. She ended the letter by stating that she was the longest serving staff member of the practice and remained loyal and hard working.

[18] Mr Wenborn replied to Ms Chin on 19 October 2005. He used Mr Yong’s practice letterhead to do that. He set out a series of business issues, which one would have thought would have provided a better agenda for the previous interview. Clearly, however, they did not. Mr Wenborn then disingenuously disclosed what I think was his real purpose for interviewing Ms Chin when he wrote:

Being a loyal, and the longest serving staff member, please send by return a written solution to the following situation which came up in the meeting: That your lawful husband owes a sizable debt to Mr Yong, is declared bankrupt, is now being supported by you on a salary you are receiving from Mr Yong.

I look forward to a prompt reply to assist with establishing the role you will play, in the expansion of Yong & Co.

[19] Further correspondence followed in which Ms Chin reiterated that she was not liable for her husband's debts and felt stunned that she had been asked to provide a "written solution" to the financial problem between her husband and her employer, Mr Yong. Mr Wenborn's response on 9 November 2005 to Ms Chin's first letter is concerning. It raises the suggestion that Ms Chin may wish to resign. It implies that Mr Yong may merely be providing Ms Chin with employment from some altruistic motive. The letter concludes:

Please explain in writing your exact position at Yong & Co. and your future intention. This is needed within 7 days for decisions to be taken to allow for the expansion of the company.

[20] On 14 November 2005 Ms Chin wrote to both Mr Wenborn and Mr Yong. She considered Mr Wenborn was misinterpreting her earlier letter. She reiterated she had no intention of resigning nor had she given any indication of that. She emphasised that she was not liable for her husband's debts and objected to Mr Wenborn's intrusion into her personal affairs. The letter, which she wrote to Mr Yong on the same day, was a plea to him to tell Mr Wenborn to stop harassing her.

[21] Mr Yong responded twice to this letter. He maintained, in the first letter dated 16 November 2005, that Ms Chin was over-reacting to Mr Wenborn's "project". He then dealt at some length with the debt owing to him by Ms Chin's husband. The matter took a somewhat sinister turn in the following paragraphs:

From what I understand, in order to do well in a professional firm like ours, integrity plays an important role in our work place and is critical and vital to our survival. You are identified as one of the potential candidates to help in this respect but however, your husband's financial affair has been viewed as an irregularity of our practice. Therefore, an investigation of this case is unavoidable. This is to ensure that you are not conspiring with your

husband. As a loyal employee of our firm we now require you to cooperate and assist in this matter. As you are aware of [sic], I am now a member of WISE (World Institute of Scientology Enterprises), which require [sic] that there are no unethical and unscrupulous staff in our firm. Unfortunately, you are the first one that has to go through this process due to your position in the firm and also your relation [sic] with Mr. Julian Chen [sic] who is now bankrupt.

...

I hope this letter will make you understand that Mr. Andrew Wenborn is here merely to carry out his duty as our firm's consultant. Investigating your husband's financial affair is unavoidable in order to restructure our firm. Hence, in order to move forward together I need all of my employees to cooperate with Mr. Andrew Wenborn at his/her uttermost sincerity and from the bottom of their heart.

If you wish to continue your stay with us, your cooperation to work towards the best for all of us is needed. If you need a formal written employment contract to replace our verbal contract, please do not hesitate to let me know. As I said earlier it can be printed out for you straight away.

[22] From my observations of Mr Yong's standard of English, I suspect that this first letter had considerable input from Mr Wenborn. The second letter, dated 17 November 2005, which had been typed in a totally different font, deals with Ms Chin signing the written employment contract enclosed with the letter. The letter re-confirmed Ms Chin's duties. Again, for the same reason, I have some suspicion that the second letter may have been drafted by someone other than Mr Yong.

[23] Mr Wenborn also responded to the letter he received from Ms Chin dated 14 November 2005. His letter, dated 18 November 2005, again written on the firm's letterhead, notes the absence of a written employment contract. The letter fails to deal with the concerns raised by Ms Chin. However, it concludes with the following, also somewhat sinister paragraph:

Please ensure that the employment contract is finalized, as there can be no real position for you until it is signed.

[24] It is clear from the correspondence in reply from both Mr Yong and Mr Wenborn that they had been, up to that stage, unfamiliar with the requirements imposed on employers in New Zealand under the Employment Relations Act 2000. It was very late in the piece to be requiring Ms Chin to sign the individual employment agreement. It was facetious of Mr Wenborn

to suggest that Ms Chin's continued employment might be in doubt if the contract was not finalised.

[25] Ms Chin then replied to Mr Wenborn advising that she would sign and return the agreement after discussing it with her legal adviser. On the same day, being 21 November 2005, she wrote to Mr Yong rejecting his assertions that she had been over-reacting to Mr Wenborn's "*project*". She responded to the matters concerning the debt, confirming that it was not her concern. She expressed some amazement at the belated request to sign a written employment agreement. She required time to consider the agreement. She confirmed that her intention was to remain a co-operative employee and reminded Mr Yong of the long hours that she had previously worked on his behalf.

[26] Mr Orlov submitted that the final letter from Ms Chin affirmed her contract. He raised this in the context of Ms Chin's allegation that she was constructively dismissed. I have considerable doubt about Mr Orlov's proposition. He submitted that Ms Chin had agreed to sign the agreement but that is clearly not so. By that stage the relationship had been seriously undermined by the allegations directed at Ms Chin that she may have conspired with her husband in perpetuating a fraud on Mr Yong, that she was personally responsible for the debt, and that her continued employment was in doubt if she did not sign a written agreement.

[27] While Mr Yong denied in evidence that he required Ms Chin to discharge her husband's debt, the whole tenor of his and Mr Wenborn's actions and correspondence was clearly aimed at that objective. Mr Yong frankly conceded in evidence that he believed Ms Chin had acted conspiratorially with her husband in defrauding him and that attitude is clear from his correspondence.

[28] There was of course no basis upon which Mr Yong and Mr Wenborn could come to that view of Ms Chin. Mr Orlov submitted that there was sufficient evidence for Mr Yong to form suspicions on that score and therefore entitle him to interrogate her. I do not accept that submission. Mr

Wenborn's arrival on the scene, and the upset he created, occurred over 12 months after Mr Yong had confirmed to Ms Chin his acceptance that she was not involved in either the husband's alleged fraud on him or Mr Lee. No grounds existed for this to be reopened in the way Mr Wenborn did. It is significant that shortly before this, Mr Chan had been made bankrupt and the debt extinguished. At that point it would have dawned on Mr Yong that he could not be paid and it seems to me that he, at the suggestion of Mr Wenborn, turned his attention to obtaining payment from Ms Chin. I do not accept Mr Yong's assertions in evidence that he lent the money to Mr Chan from some altruistic motive. I believe he was motivated by greed. His subsequent actions and correspondence are all consistent with his desire to have Ms Chin repay her husband's debt. His behaviour seriously undermined the employment relationship.

[29] The matter came to a head on 21 November 2005. Mr Yong and Mr Wenborn arrived on that date at Ms Chin's home in the early evening. Ms Chin had been home on sick leave. Mr Yong stated that the reason for going there was to speak to Mr Chan about repayment of the debt. Mr Yong spoke of his dealings with the Official Assignee so I infer he had proved his debt in Mr Chan's bankruptcy. It is hard to know therefore, on what basis he was wishing to speak further to Mr Chan about repayment of the loan. Any communications on the matter should have been with the Official Assignee pending any discharge from the bankruptcy. It was inevitable that Ms Chin would become involved in the presence of Mr Yong and Mr Wenborn at her home at that time of day. Initially Mr Chan answered the door. He stepped outside but realising the presence of Mr Wenborn who appeared in charge of proceedings, Mr Chan asked them both to leave. They refused to do so. Ms Chin came to the door. She first spoke to her lawyer by telephone for advice. The direction to them to leave was then repeated. When they refused to do so the Police were called. Mr Wenborn and Mr Yong waited at the front of the garage for the Police to arrive apparently suspicious as to whether the Police had indeed been summoned. When the Police arrived they were directed to leave and did so.

[30] This appalling turn of events was the last straw for Ms Chin. She wrote to Mr Yong advising she was resigning her position and intended to pursue a personal grievance. Her letter of resignation reads as follows:

Dear Mr. Yong,

I am writing to tender my resignation as the situation at your office is untenable for me to continue working there any longer. And I am giving you one week notice in this regard.

The reasons of my resignation are as follows:

- 1. I was badly treated by Mr. Andrew Wenborn at the interview held on September 29, 2005, and both you and he have also written me letters making unreasonable demands.*
- 2. You have made so many disparaging comments about me to some of my colleagues behind my back, specifically on the financial deal between you and my husband.*

The above has caused stress on me and I am suffering a health problem because of those unpleasant events.

You must be aware that I am entitled to my sick leave till Tuesday next week, and hopefully I shall be able to come back to office that day.

The opportunity is also taken to tell you that I am going to take a personal grievance against you.

...

Legal principles - constructive dismissal

[31] Regardless of the allegations Mr Yong has raised against Ms Chin, this case turns upon whether, following the events immediately leading up to her resignation, she was constructively dismissed.

[32] The concept of constructive dismissal was considered at length in *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ACJ 965; ERNZ Sel Cas 95. Williamson J and the members of the Court considered the cause at length. The ratio of the decision is summarised from the following brief statements at 975; 104:

A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.

...

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.

[33] Issues of causation and foreseeability are part of the consideration as to whether the employee can rely upon a constructive dismissal:

(a) In *Greenwich* at 976; 104 the Court stated:

In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is a useful insight to be gained from a consideration of the real or true source of the initiative for termination. If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal. We appreciate that the concept of causation has caused difficulties in some branches of the law. However, we think it has some utility here, particularly since for years the Court has been applying principles of apportionment of loss having regard to the employee's share in the responsibility for the loss. In that respect the Court's policy is broadly similar to that contained in the Contributory Negligence Act 1947 applying to certain liability for tortious damage.

(b) In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, 172 the Court of Appeal outlined the correct approach to constructive dismissals as follows:

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 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.

[34] In the first Court of Appeal decision considering constructive dismissal, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, the Court enunciated three situations where a constructive dismissal may occur at 374, 375:

- where the employee is given a choice of resignation or dismissal;
- where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- where a breach of duty by the employer leads a worker to resign.

[35] It is the last of these three situations that applies in the present case.

[36] In respect of that last factor, the *Auckland Electric Power Board* decision elaborated upon it as a breach of contract relied on by the employee that the employer had breached the implied duty not to act in a manner calculated to destroy or seriously damage the employment relationship. In other words, to destroy the trust and confidence between employer and employee, which must exist in every employment relationship.

[37] Mr Orlov submitted on the basis of *Auckland Shop Employees v Woolworths* (supra) that the employer has a right to investigate and discuss alleged or suspected breaches of the employment contract and relationship. That was a case involving a shop employee suspected of stealing money from her employer. She was comprehensively interrogated by a security officer who was a former police officer. Following this she resigned. The Arbitration Court held that the employee's resignation in such circumstances was not a constructive dismissal. The case went on appeal to the Court of Appeal by way of case stated. The matter was then referred back to the lower Court for reconsideration. However, the decision of the Arbitration Court has some pertinence to the present. While the employer clearly had a right to carry out an inquiry in the circumstances of that case the Court stated that such inquiry must not only be carried out in a fair and reasonable manner, but more importantly that the employer must be initially justified in setting up the inquiry. In that case suspicions were strong and the employer embarking on an inquiry was reasonable, whereas in the present case that is not so. In addition the inquiry was conducted without delay whereas in the present case that is not the position.

[38] *Woolworths* is important in the context of constructive dismissal for other reasons. The Court of Appeal's decision dealt at considerable length with the

obligations of trust and confidence implied in the employment relationship. There had been some dissension on the point in the United Kingdom now resolved in *Woods v W-M Car Services (Peterborough)* [1981] ICR 666, [1982] ICR 693 (on appeal). In the Employment Appeal Tribunal, Browne-Wilkinson J (as he then was) indicated that constructive dismissal may not fall to be determined just in the context of common law repudiation of contract with an election to cancel. Rather the conduct of the parties and its cumulative impact on the employment relationship is to be considered. This approach appeared preferable to the New Zealand Court of Appeal in *Woolworths* rather than the common law test of repudiation applied in *Western Excavating (EEC) Ltd v Sharp* [1978] QB761, which was also discussed in *Woods*. That approach was then endorsed in the *Auckland Electric Power Board* case (*supra*).

[39] In New Zealand these issues may now be academic with the statutory overlay of the Employment Relations Act 2000. Section 4(1)(a) of the Act requires the parties to an employment relationship to deal with each other in good faith. Section 4(1A)(a) states that such duty “*is wider in scope than the implied mutual obligations of trust and confidence*”.

[40] Applying those principles, whether it be as a breach of the implied mutual obligations of trust and confidence or the overall obligation of good faith, it is then necessary to look at whether in this case the employer’s conduct as a whole, judged reasonably and sensibly to use the words of Browne-Wilkinson J, was such that Ms Chin should not have been expected to have put up with it.

Conclusions

[41] Mr Orlov spent a considerable period of time in his cross-examination of Ms Chin with the issues of the matrimonial property agreement and the social contact between Ms Chin and her husband with the Lee family. I raised the relevance of these issues at the time and Mr Orlov assured me he would deal with the relevance of such matters in his submissions. The question of the Lee dinners was mentioned but not developed in his final submissions. The two matters appear to be thrown into the pot as part of the allegation of conspiracy between Ms Chin and her husband, which I reject as being unsubstantiated. It is clear that both issues are red herrings. Any

allegations of impropriety in Ms Chin's social contact with the Lees without her employer knowing might have some marginal relevance to a dismissal for misconduct but no dismissal for such grounds was contemplated in this case. In any event I do not consider there was any impropriety in Ms Chin accepting the invitations to dinner or reciprocating. There is no principle of employment law forbidding such contact between an employee and employer's client, which I venture to suggest is a regular occurrence. More pertinent, however, is that Mr Orlov submitted that these were among the matters, which provided the basis for Mr Yong and Mr Wenborn to question Ms Chin on her integrity and loyalty. That submission cannot be correct. It is debatable whether Mr Yong or Mr Wenborn knew about either matter at the time of the questioning of Ms Chin. If they did, certainly neither matter was recorded in Mr Wenborn's notes as the basis for the interview. It therefore could not have provided the basis for the interview. The statement of claim clearly pleads the social contact with the Lees as new evidence so that matter cannot have been known to Mr Yong until after the Authority's investigation. Both matters appear to have been belatedly raised at the time of or after these proceedings were commenced. Neither are mentioned in the determination of the Member of the Employment Relations Authority and I presume were not raised there.

[42] There were two other matters raised, which I consider have no relevance to the issues to be decided in this case. The first was that Mr Yong in his evidence refers to his heart attack and hospitalisation. Mr Orlov in his submissions, perhaps for dramatic effect, effectively stated that Mr Yong was so clearly stressed and worried by the whole matter that he suffered a heart attack. It was submitted that he wanted a solution and that it was natural that Ms Chin should be requested to provide one. The reality of course was that so far as their employment relationship was concerned, Mr Yong had, over a year earlier, accepted that Ms Chin was not a party to the loan transaction. He did not need any further assurance from Ms Chin on that score in any event because he had agreed with her husband at the time that he made the loan to him that she should not be informed. As to his heart attack, this took place several weeks after Ms Chin had left his employment and there could be no link between the events leading up to Ms Chin's resignation and that unfortunate hospitalisation. The second matter was the allegation that Ms Chin set about taking clients from Mr Yong after she terminated employment. While such allegations are contained in Mr

Yong's evidence, it is notable that this point was not mentioned at all in Mr Orlov's closing submissions. It was not raised in cross-examination of Ms Chin. In any event the evidence of Mr Darren Liu would appear to dispose of that matter. Following her resignation Ms Chin did not immediately undertake other employment. In mid December 2005 she met Mr Liu by chance. He offered her a position. She commenced employment with him in January 2006. Mr Liu and his company were clients of Mr Yong but had independently decided for business reasons to use another accountant. Ms Chin's skills were naturally used by Mr Liu to perform accounting duties formerly carried out by Mr Yong's practice. She did this as an employee. She was under no restraint of trade and there could be no impropriety in her working as an employee for Mr Liu in this way.

[43] Mr Orlov submitted that, Ms Chin having affirmed the contract, nothing transpired between 21 November 2005 and her resignation to negate that. That argument, however, is only relevant in the context of constructive dismissal arising from repudiatory conduct followed by the election to cancel the contract. The decisions earlier discussed show that the inquiry must be wider than that. Nevertheless, Mr Orlov's submissions in this respect could not be further from the truth. First, Ms Chin did not affirm the contract of employment or, more correctly, waive previous conduct towards her by her employer. She specifically stated she wanted to take legal advice before signing the written contract belatedly provided. Even if she had signed the agreement, so that there was retrospective technical compliance with the law, that would not amount to waiver or affirmation. Secondly, however, the act of going to Ms Chin's home to either remonstrate with her husband or more likely enter into discussion with both of them about the debt must have been likely to have created an altercation as it did. A foreseeable outcome of that action, against the previous background and correspondence, must have been Ms Chin's resignation from employment. Ms Chin was on leave when these events took place. It is clear that whatever her attitude or decision was on the conduct towards her by that point, the events of the evening of 21 November 2005 were the last straw.

[44] A lot of matters have been thrown into the "*whole factual matrix*" as Mr Orlov calls it. But that does not make all such matters relevant. Ms Chin's decision to resign is to be assessed against the circumstances occurring between 29 September

2005, when without notice she was summoned to a meeting with Mr Wenborn, and 21 November 2005 when Mr Wenborn and Mr Yong arrived at her home unannounced. The events previous to and after that period, consisting of the loans to her husband by Mr Yong and Mr Lee, the social dinners with the Lees, the matrimonial property agreement between Ms Chin and her husband, and the employment with Mr Liu, cannot be relevant. The fact that Ms Chin was not involved in the loans was accepted by Mr Yong. The social dinners with the Lees could not possibly provide grounds for the subsequent attack on her integrity. Even if they could, neither Mr Wenborn nor Mr Yong knew about them at the time of the meeting on 29 September 2005 and therefore they could not have provided justification for the inquiry they made. The matrimonial property agreement is totally irrelevant. It was raised in evidence as some fortification for an allegation that Ms Chin conspired with her husband to defraud Mr Yong and Mr Lee. That allegation was simply never substantiated by the evidence. Nor was the allegation that Ms Chin's subsequent employment with Mr Liu was in some way a breach of her contractual duties. The allegation Mr Yong made that Ms Chin had also encouraged clients to leave him, both during her employment and after, was not corroborated by any evidence.

[45] This case is determined by whether or not the actions of Mr Wenborn and Mr Yong justified Ms Chin's resignation and thereby amounted to a constructive dismissal. It is clear that they did. There was no reasonable justification for Mr Wenborn and Mr Yong to convene a meeting with Ms Chin without notice and then proceed to delve into the personal matters they did. If that meeting had been simply to discuss management issues affecting the practice (as it appears to have been with other employees) then no criticism could be levied. However, Mr Wenborn proceeded to delve into issues of a quite personal nature with Ms Chin. He undermined her position. He attacked her integrity. In later correspondence he made statements tantamount to threatening her continued employment. Mr Yong stood by and encouraged these actions by Mr Wenborn. When Ms Chin made a plea to Mr Yong to relieve her of her continued attendance at the meeting he refused to do so. Similarly when she pleaded with him to stop Mr Wenborn's written demands he stood by and did nothing. Mr Orlov submitted that the employer was justified in delving into such matters as part of his inquiry. He used the analogy of the

disciplinary inquiry into an employee's alleged misconduct. But in this case there was no reasonable basis for such an inquiry to take place in the first instance. The events, subsequently raised in an attempt to provide such justification, were either not within Mr Yong's knowledge then or had occurred and been known by him a year previously, been inquired into then and resolved.

[46] The effect on Ms Chin was considerable. She suffered headaches, difficulty in sleeping and other symptoms of stress. When she took leave Mr Yong and Mr Wenborn inappropriately came to her home in the evening and continued their pressure on her and her husband there. It does not matter what one can say about the actions of Mr Chan, there was no justification for the visit as Mr Chan was by that stage bankrupt. Looked at cynically, the visit can only have been intended to increase pressure on Ms Chin.

[47] Whether or not those actions are couched in terms of conduct repudiatory of the contract, breach of implied terms to maintain trust and confidence, or breach of the obligation of good faith the effect is the same. All of these events were causative of Ms Chin's resignation. Her resignation must have been a reasonably foreseeable outcome of their behaviour, which was unjustified. She should not have been expected to put up with it. Her resignation amounted to a constructive dismissal.

[48] In a case involving facts such as this, it is clear that the finding that there has been a constructive dismissal resulting from the behaviour and breach of duty or obligation of the employer means that there does not really need to be a further consideration of the threshold prescribed by s103A of the Act. Nevertheless, the behaviour of the employer in this case was clearly not what a fair and reasonable employer would, or for that matter could, have done in all the circumstances.

Remedies

[49] The Authority awarded Ms Chin the sum of \$3,653.85 as lost remuneration. I do not understand Ms Chin to be claiming that sum is inadequate. She took proper steps to mitigate her loss by obtaining alternative employment. Accordingly, as part of this judgment there is an award of \$3,653.85 for lost remuneration.

[50] So far as compensation is concerned, it is open to me on a de novo challenge to review the sum awarded. As I have indicated, the evidence in this matter was presented in a reasonably lengthy hearing. It is probable that I have heard evidence, which was not before the Authority. Having regard to the serious undermining of Ms Chin's integrity and the quite despicable way Mr Yong and Mr Wenborn behaved towards her or corresponded with her, the level of compensation awarded by the Authority appears to me to be inadequate. Comparing the level of behaviour of the employer in this case with other cases, which have come before the Court, I consider a more appropriate level of compensation would be \$8,000. I award that sum.

[51] The Authority also awarded outstanding holiday pay of \$2,192.31 plus interest of 9 percent per annum from 25 November 2005 until payment. No evidence was led by Mr Yong to suggest that such sum was not owing by him. If the holiday pay and interest have not already been paid then Mr Yong is ordered to do so.

[52] The Court is required by s124 of the Act to consider contribution. There is no allegation in this case that if a constructive dismissal was upheld, Ms Chin did contribute towards the situation that gave rise to her personal grievance. There can be no such contributory conduct in this case and therefore no reason to reduce any remedies.

Costs

[53] I did not receive submissions on costs and they are reserved. Mr Nutsford has 14 days to file a memorandum as to any costs sought in respect of the court proceedings. If no award has been made in respect of the inquiry by the Authority, then such memorandum will need to cover the costs of such inquiry, which the Court is now authorised to award. Mr Orlov has 7 days thereafter to file any memorandum in response.

ME Perkins
Judge

Judgment signed at 12.45pm on Wednesday 20 June 2007