

**Attention is drawn to the order prohibiting publication of certain information in this Determination in paragraph [140].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 715  
3231819

BETWEEN	SEOJEONG JOO Applicant
AND	HOSPITALITY SERVICES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Seungmin Kang, counsel for the Applicant Takeshi Ito, counsel for the Respondent
Investigation meeting:	26 and 27 September, 31 October and 2 November 2023, at Auckland
Submissions received:	31 October and 10 November 2023
Determination:	29 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Seojeong Joo was employed as a Food and Beverage Attendant at the Grand Millennium Auckland hotel from 16 September 2022 until 8 February 2023. Hospitality Services Ltd (HSL) was her employer.

[2] While employed, Ms Joo raised a personal grievance in which she complained of bullying by co-workers. Upon termination of the employment she raised a further

grievance, claiming she had been constructively dismissed by unjustified actions of HSL.

[3] Mediation did not resolve the employment relationship problems and an application was made to the Authority on 24 May 2023. As well as seeking an investigation and determination of her disadvantage and dismissal personal grievance claims, Ms Joo sought a penalty from HSL for breaching its good faith obligations imposed by s 4(1) of the Employment Relations Act 2000 (the ER Act).

[4] In response to the application, HSL's stated its view of Ms Joo's claims. Her employer said it had not taken any unjustified action to Ms Joo's disadvantage and she had not been dismissed but had notified her resignation on 8 February 2023. HSL alleged the party in breach of the duty of good faith was Ms Joo.

[5] As remedies for her contended grievance and penalty claims, Ms Joo seeks payment of \$30,000 compensation for humiliation, loss of dignity and injury to feelings, \$16,500 in reimbursement of lost wages, and a penalty in such sum as the Authority thinks fit up to the maximum of \$20,000.

[6] At an investigation meeting the Authority took evidence from Ms Joo and five other witnesses. They had been employed by HSL at material times and were closely involved with Ms Joo during her employment. Submissions were received from counsel, Mr Kang for Ms Joo, and Mr Ito for HSL.

[7] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

### **Personal grievance claims – statutory test of justification**

[8] Ms Joo has a grievance if she is found to have been dismissed or disadvantaged, and if HSL's actions in the circumstances do not satisfy the test of justification at s 103A of the ER Act.

[9] The test, at s 103A(2), 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.

[10] Justification is to be determined on an objective basis.

### **Penalty claims for breach of good faith**

[11] Section s 4A of the ER Act sets the standard required to be met before a penalty can be imposed for any breach of s 4(1). Ms Joo may have consideration given to an order for a penalty if the Authority finds that HSL failed to discharge its duty of good faith and if, in the circumstances, the failure was deliberate, serious, and sustained, or was intended to undermine her employment relationship with HSL.

[12] Ms Joo claims the breach occurred through a failure of HSL to be active and constructive, and responsive and communicative, as required of parties to an employment relationship by s 4(1A)(b) of the ER Act. She claims HSL also failed to provide access to information and allow an opportunity for her to comment on that information, as required by s 4(1A)(c).

### **Constructive dismissal – the principles**

[13] In *Ngawaka v Global Security Solutions Ltd*<sup>1</sup>, the situations where a constructive dismissal might occur were considered by the Employment Court to include:

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

[14] In principle, the conduct complained of by the employee as giving rise to a constructive dismissal must be serious enough to amount to a repudiation of the

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<sup>1</sup> [2022] NZEmpC 40 at paragraphs [7] to [10]

employment contract. As the Court observed, conduct that was just unreasonable is insufficient<sup>2</sup>.

[15] The Court also restated a principle settled in earlier cases, that constructive dismissal may occur even if the employer was not seeking the resignation of the employee and had wanted to retain that person in employment<sup>3</sup>.

[16] Ms Joo's statement of problem identified situation (c) as applicable to the circumstances; i.e., a breach of duty by HSL serious enough to make her resignation reasonably foreseeable.

[17] In oral and written submissions Mr Kang assessed situation (b) in addition to (c) as applicable; i.e., a course of conduct was followed by HSL with the deliberate and dominant purpose of forcing Ms Joo to leave her job.

[18] The Authority finds no evidence, and it has not been contended, that situation (a) was present in the circumstances. Before Ms Joo advised she was leaving, HSL had not sought her resignation nor shown any intention to dismiss her, although it had notified her that it was going to commence a disciplinary investigation of complaints received about her.

[19] Viewed broadly, from October 2022 the employer had seen and reacted to friction in the workplace between Ms Joo and co-workers. Events occurred suddenly and spontaneously rather than in any planned or connected way, as might become apparent when an employer is following a course of conduct. While the events were not initiated by HSL, inevitably it became drawn into trying to resolve the interpersonal problems as they developed in the workplace. The issue then arose as to whether HSL, in addressing the problems, breached any duty owed to Ms Joo to detect and address problems sooner, and to be active, constructive, responsive, and communicative, to provide access to information, to consult and to provide a safe workplace for Ms Joo.

[20] HSL contends that the employer did not breach any duty it owed to Ms Joo but that if it did, the breach did not present a risk of resignation.

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<sup>2</sup> Above at para [8]

<sup>3</sup> Above at [10]

[21] In principle, an employer found to have constructively dismissed an employee is not disqualified from attempting to justify the dismissal, or from claiming that there was contributory fault on the part of the employee.

### **Commencement of employment**

[22] Ms Joo started at the Grand Millennium hotel on Saturday 17 September 2022 with an eight-hour shift. She worked the same shift next day.

[23] In October she worked 10 shifts over five weekends, and in November she worked eight shifts. In December she worked nine shifts, including the public holidays of 26 and 27 December.

[24] In January 2023, Ms Joo worked only on the 6 January. She was off work for the rest of the month and until early February when she gave notice of resignation.

### **Ms Joo's resignation**

[25] On 8 February 2023, through Mr Kang her legal representative, Ms Joo gave written notice of resignation. Her reasons for that were advised to be;

- Failure of HSL to prevent bullying or intervene when bullying occurred, between October 2022 and 7 January 2023.
- Failure of HSL to keep Ms Joo protected and informed after the coffee bin (or coffee lid) incident.
- Notification by HSL to Ms Joo that disciplinary action was to be commenced against her.

### **Coffee lid incident**

[26] What was referred to by the parties as the coffee bin or coffee lid incident, was plainly a low point for Ms Joo in her employment. She was harmed physically as well as mentally by the actions of a co-worker, Kim, on 6 January 2023 when the incident occurred.

[27] Ms Joo did not return to work after it. She was on special leave in the period before she gave notice of resignation on 8 February. She also caught Covid and had to isolate for the required time. For much of the time up until resignation she was paid by HSL.

[28] The coffee lid incident occurred when the metal lid of a coffee bean rubbish bin was thrown by Kim in the direction of Ms Joo, who had been cleaning the rubbish bin in the barrista area after the breakfast service. While doing this she had her cell phone camera turned on to make a video of anything that happened to her. To keep her hands free, the camera had been positioned in her clothing, pointed to the front.

[29] The video she made of the incident shows the lid flying from the left of Ms Joo before striking her on the wrist with some force. She is heard to cry out loudly when it does. Two or three other staff can be seen working nearby at the time. The incident was also recorded by the hotel's CCTV.

[30] Ms Joo reported the incident to the Police and later attended her doctor, who reported swelling and bruising on her wrist.

### **HSL's investigation of coffee lid incident**

[31] On 7 January 2023, Ms Joo sent a copy of her video clip to Jonathan Fernandes, Human Resources Advisor of HSL, to whom she had spoken on the day of the incident. Although she said the video did not need any explanation, Mr Fernandes asked for a statement containing her exact version of events.

[32] On 10 January, Ms Joo sent a statement and advised she would 'try to send as many dates back as possible for all the bullying and violence they have done to me'. She asked for Kim to be held responsible for what she had done, and said she hoped the hotel could become a healthier working environment.

[33] On 16 January, Mr Fernandes asked to meet Ms Joo once she had recovered from Covid, to discuss new information she had provided.

[34] Ms Joo sent more documentation the same day 16 January, explaining that she had tried to give enough detail and that, 'as you know, they did not just torment me

with one event, and they continuously subjected me to verbal abuse every day that I went to work, so it is impossible to remember everything they did'. She referred to the 'prolonged bullying' and the coffee lid assault incident, and to medical records of the affects that incident had on her.

[35] In the account Ms Joo gave of the coffee lid incident, she said;

I expect a prompt and thorough investigation into this matter, as well as appropriate action to be taken against the individual responsible for this assault.

[36] Ms Joo also referred to one of her supervisors, Alex D'Mello. She said his behaviour was unbelievable in that he had failed to 'stop the bullying in order to maintain a healthy work environment'. She said it was clear even without looking into the work environment around Mr D'Mello, that 'it must have been a difficult and hostile environment'.

[37] To Mr Fernandes in her email of 16 January 2023, Ms Joo wrote;

I want to reiterate that I will not let this incident pass without taking any action.

As I am sending this document, I would like to receive updates on how Grand Millennium Hotel HR department is handling the situation.

I want to know how they plan to hold those responsible accountable for their actions.

.....

..... as it is a necessary step, I will do my best to help you make it a formal case.

I hope that our workplace can be a safe and respectful environment for all employees.

[38] Ms Joo concluded her message by expressing the hope that she would be able to meet Mr Fernandes in the following week, to further discuss the coffee lid incident.

[39] On 17 January 2023, Mr Fernandes acknowledged to Ms Joo that he had received her statement. Over some seven pages this gave to him an account of her experiences of bullying and abusive behaviour in the workplace, from the beginning of her employment.

[40] As well as the coffee lid incident of 6 January 2023, her account referred to other physical and non-physical abusive conduct alleged of Kim in October 2022, on dates Ms Joo could not remember. It also referred to similar conduct alleged of Kim in November 2022, also on unspecified dates.

[41] Ms Joo's account detailed the circumstances of what the parties have referred to as the hot water incident.

### **The hot water incident**

[42] This occurred on 4 December 2022.

[43] On that day in the morning, Ms Joo came into contact with water which had been provided for breakfasting guests to make their tea and coffee. After breakfast when the water was no longer required, staff were pouring it out of containers into a kitchen sink. Ms Joo complained that a co-worker, Kristy, poured it onto her deliberately, burning her skin. She claimed Kristy treated the incident lightly and laughed about it.

[44] HSL responded immediately to the incident and Ms Joo was offered first aid for any injury she might have suffered. When HSL investigated it received different accounts from Ms Joo and Kristy as to what happened. Ms Joo maintained that Kristy had approached when she was already at the sink and had intentionally poured hot water on her, laughing about it at the time. Kristy on the other hand maintained that Ms Joo had approached the sink while Kristy was already there emptying the water, which was only warm and not hot. She said Ms Joo had reached in and accidentally come into contact with the water. Kristy denied acting intentionally or laughing.

[45] No injuries could be seen on Ms Joo when she was examined straight after the incident happened. No disciplinary action resulted, and no instructions were issued about the use of the sink area by more than one person at a time.

[46] Ms Joo remained dissatisfied with HSL's handling of the hot water incident and raised her concerns with Ruben O'Connell, the hotel's Food and Beverage Manager, by email on 9 December. She was critical of his investigation of the matter, his favouritism shown towards Kristy as a long-time work associate, and his conclusions about what had happened. She asked for a copy of any CCTV footage.

[47] The Authority has assessed the reasonableness of Mr O'Connell's conclusions and the claim of favouritism towards against Kristy's account of what happened, and Kristy's standing as a hotel worker and co-worker of others.

[48] She is an experienced hotel worker of some 20 years and has attained the position of Head Waiter. She has worked with and alongside many others during her career. It is unlikely that she set out to cause distress or annoyance to Ms Joo by splashing her, or that she would have laughed after accidentally splashing her. Kristy said she was aware of the relative temperature of the water while she was pouring it out and it was not hot. She considered a person would have to be psychotic to deliberately pour hot water on someone else and laugh about it.

[49] Mr O'Connell who investigated did not see what happened and there was no CCTV coverage in that part of the hotel. He could only rely on what he was told in contradictory accounts, and he had to choose one over the other or dismiss both accounts as unreliable. There were no other witnesses.

[50] He was also aware of issues with Ms Joo her supervisors had reported to him since October. There was some indication of friction, which was attributed to unwillingness on Ms Joo's part to work co-operatively and flexibly with her colleagues, in performing her duties as a Food and Beverage Attendant. On one occasion she had insisted on working solely as a barrista, when she had been employed to perform wider duties. Nothing had been formally brought to Mr O'Connell's attention for action to be taken and the supervisors had simply been left to keep an eye out and give Ms Joo guidance and encouragement.

[51] It is understandable that Mr O'Connell preferred Kristy's account of the hot water incident, and it is not reasonable to simply claim that he was swayed by his friendship and work association with Kristy.

[52] In the view of the Authority, the handling of this incident by HSL was fair and reasonable in the circumstances.

[53] The Authority finds it was a reasonable conclusion of Mr O'Connell that Ms Joo moved too close to where Kristy was emptying containers into the sink and was accidentally splashed with warm water. When this happened, a supervisor quickly became involved to check that Ms Joo had not been injured.

[54] What happened because two people at the same time were at a sink where there was likely to be hot water, was something that could happen in anyone's home just as easily. HSL could expect common-sense would be exercised and it did not need to put out a guide for health and safety purposes to working at a sink. Equally, a warning to staff against clowning or foolish behaviour around a sink area could be seen as unnecessary for kitchen and restaurant workers, who could be expected to see for themselves the potential danger of coming into contact with hot food or beverage.

[55] In her 16 January account, Ms Joo wrote that Kristy had been bothering her 'for weeks while I was working'.

[56] The Authority finds that the hot water incident on its own could not have given Ms Joo reasonable cause for concern that HSL by its actions was trying to get her to resign.

[57] The Authority finds the conclusion of HSL from its investigation that there was no bullying or other misconduct by Kristy was a reasonable one.

## **26 and 27 December 2022**

[58] Detailed accounts were given by Ms Joo about events on 26 and 27 December involving Kristy and Kim, and her supervisor Mr D'Mello. They included touching amounting to physical assault and harassment while cleaning cutlery.

[59] On 26 December at the hotel a meeting was arranged by Mr O'Connell between Ms Joo and Kim, to try and get them to work better with each other. Friction returned, especially when Ms Joo referred to Kim as 'crazy criminal', bringing up the hot water incident again. The meeting was unsuccessful. Blame for that was directed by Ms Joo onto Mr O'Connell, as he had 'failed to handle matters appropriately'.

[60] The Authority has difficulty seeing what he could have done better in a difficult situation where two workers were not getting on. He at least made an attempt and spent some time, on his day off apparently, trying to settle things down.

[61] Also on 26 December in Ms Joo's account, she had worked with Mr D'Mello for the first time and said she overheard him telling Kristy he would make sure Ms Joo would not work at the hotel if she continued to be useless. She said in her account, 'And so, I spent the entire day being bullied by Alex and Kristy'. She said she was excluded and laughed at, as well as being discussed behind her back, and Mr D'Mello had made fun of her ethnicity by bowing in a mocking way.

[62] In his evidence Mr D'Mello, who is an experienced and long serving supervisor in hospitality, denied he had engaged in any of the conduct alleged of him. He found it surprising that Ms Joo could make these claims after only one shift of working together.

[63] Mr D'Mello featured in her account of events on the following day 27 December 2022. Ms Joo said she was excluded from a gathering of staff he called, and he engaged in 'repeatedly mocking and gossiping about me'. She said others 'repeatedly treated me unfairly and told me to go home because I was useless'.

[64] Ms Joo said that Kristy, Kim, Mr D'Mello and another co-worker together had mentally harassed her all day on 27 December. The behaviour was so concerning she said, that;

I also had to make sure that my recorder and camera were turned on all the time, as I was afraid of verbal and physical abuse and was unable to focus on work.

[65] Ms Joo in her detailed account sent to Mr Fernandes on 16 January, complained that Kristy had prevented her from drinking water and had required her to sign out

before going to get a drink of water, as she was not being paid to do that at the hotel. She said;

2-3 ..... Moreover, when I brought water to drink, she took it way from me and discarded it dozens of times in a day. I counted more than 25 times in a day. It looked like a terrible mental disorder and I couldn't help but wonder how she could do her job properly while worrying about taking my water away.

[66] She also complained that Mr D'Mello had tried to control the visits she needed to make to the women's bathroom and had followed her, to make sure she used only a designated bathroom. Over the four days of 24 to 27 December, she said;

..... I received group bullying, and was unable to properly use the restroom or drink water and my health issues became serious. Eventually, on Wednesday, I had to go to the emergency room by ambulance.

[67] Ms Joo did not produce any recording she had made that day, 27 December, showing the conduct alleged, such as Mr D'Mello trying to restrict or limit her water drinking or bathroom use.

[68] She gave an account of being examined and given a medical certificate by Emergency Medicine of Te Whatu Ora, putting her off work for three days from 28 December. Ms Joo said in her account that a doctor told her she had been under severe stress, which if left untreated was likely to develop into stomach cancer.

### **HSL's response to the complaints**

[69] Mr Fernandes emailed Ms Joo on 17 January;

I would like to inform you that your complaint is being taken seriously and we are investigating the matter further.

[70] He asked Ms Joo to be patient while the issues she had set out in her written account were explored and said he would be in touch again in the following week.

[71] After being instructed by Ms Joo, her solicitor Mr Kang wrote to Mr Fernandes on 23 January. He advised that although at the time the conduct occurred Ms Joo had reported the bullying complained of in her 17 January statement, no meaningful steps had been taken by HSL managers. He further advised that she had not been updated as to any progress or timeframe 'of the investigation/disciplinary actions against the bullies'.

[72] Mr Kang wrote that Ms Joo would find difficulty returning to work without being updated on the action being taken against the bullies, whom she was likely to be rostered to work with. HSL was criticised for not having appropriate policies and providing training, and for not intervening at the beginning of the employment when bullying would have been apparent to a supervisor.

[73] Mr Kang requested an urgent update on progress, and he asked for the timeframe of the investigation/disciplinary action against those who had bullied Ms Joo. He requested HSL take a robust approach and make a prompt and right decision to provide a safe work environment for her.

[74] Mr Kang also requested \$10,000 compensation as payment to Ms Joo for hurt and humiliation suffered by her, through HSL's failure to take appropriate prevention and intervention steps. He requested that she be allowed to resume work in a safe work environment and on shorter shifts, with her hours gradually increasing over time.

### **HSL's action to address the coffee lid incident**

[75] Mr Fernandes replied to Mr Kang on 24 January 2023. He said action had been taken as soon as possible to address the issues and ensure that what had taken place would not reoccur in the future. He attached a copy of advice of the same date sent directly to Ms Joo. In it, with reference to the 6 January incident, he said;

We have concluded that there have been breaches of the Code of Conduct and as a result our disciplinary processes were actioned. For reasons of privacy, we are unable to provide you with additional information on the actions that have been taken but we can advise that we are confident that the matters you have raised have been addressed.

[76] On 25 January, Mr Kang wrote and disputed HSL's decision not to provide detailed information about the action taken against Kim, which he said might have served to give Ms Joo reassurance that no further bullying would occur and allow her to safely return to work. Mr Kang requested 'all detailed information' including the actions taken against all named bullies, to enable Ms Joo to assess whether it was safe to return.

[77] Mr Kang also advised that Ms Joo had reported bullying and the conduct had been witnessed by her supervisor, and she had reported the hot water incident to Mr O'Connell, but no steps were taken by him.

[78] Mr Kang continued to seek a payment of \$10,000 for unjustified disadvantage. He also advised that given the seriousness of the bullying, Ms Joo was considering resigning and bringing a constructive dismissal claim.

**HSL's response to request for information**

[79] Mr Fernandes replied to Mr Kang on 3 February, attributing the delay partly to the disruptions caused by adverse weather events in Auckland on and after 27 January 2023. His reply began;

3) We reject your assertion that we have not responded to your client's concerns and reiterate that we take allegations of bullying seriously. We have taken all reasonable steps to roster your client at the hotel in areas where contact with the persons she has made allegations about in her complaint to us will not occur or be as limited as possible. There will be a manager on duty to monitor staff interactions. We believe that your client will be able to work safely at the hotel.

.....

4) ..... We believe that the steps we have taken to roster your client in an area that will not have the persons she has identified as bullies will be working (sic) and we have endeavoured to ensure that where reasonably possible there is no opportunity for any interaction.

## **Allegations against Ms Joo**

[80] In the lengthy reply he made to Mr Kang by email of 3 February 2023, Mr Fernandes referred to several new issues which were being investigated and which needed to be raised with Ms Joo, so that she could obtain legal advice. The issues were described as follows;

### Disciplinary issue (December 2022) – potential breaches of the code of conduct – personal behaviour:

In the course of enquiries into your client's allegations, a number of different allegations have been made by multiple employees which include your client verbally alleging that another employee was a "crazy criminal". The employee was deeply upset by this allegation as it was an unfounded allegation to make and has complained to her direct manager and this has been reported to us.

A different employee has raised allegations that your client was, in her words, "terrorising" her and telling lies which caused this employee great mental stress. We therefore took action to ensure that your client did not work with this employee to prevent a recurrence of this incident.

We will be commencing a disciplinary investigation of this incident and this will be raised in a letter to your client inviting her to an investigation meeting. Please advise if the letter should be sent to you and your client.

### Privacy issue – unauthorised recording of images at the hotel – potential breach of privacy / Privacy Act 2020:

We have now received multiple complaints from multiple employees relating to your client's unauthorised recording and/or audio while she has been at the hotel. The hotel is not a public place. We understand that your client has been doing so both while she has been working and during her break periods. This is also a breach of the code of conduct in relation to personal behaviour and will need to be investigated.

Given that your client's recordings are unauthorised and in breach of the Privacy Act 2020 (and possibly the Crimes Act 1961), we now request an immediate undertaking in writing from your client that she will not use any phone or other audio or video recording device of any kind while she is at the hotel whether she is working or not. We also request an immediate undertaking that your client will delete all footage that she has taken without permission or authorisation from us or any other employee at the hotel. We suggest that you advise your client as to what is permissible and what is not.

Please respond to this request within the next business day. We have advised the relevant employees that they may raise the issue with the Privacy Commissioner (and possibly the Police) if they wish.

We propose to deal with this matter in the same letter referred to above and at the same investigation meeting. Further information on the matters detailed above will be provided in advance of the investigation meeting to allow your client to obtain legal advice from you. We assume you will want to attend as her legal representative.

### **Referral to mediation**

[81] After addressing Ms Joo's allegations of bullying, and then raising the matter of complaints against Ms Joo made by co-workers and the commencement of a disciplinary investigation into those complaints, Mr Fernandes concluded his response by suggesting that matters between the parties be referred to mediation;

In view of the fact that there now appear to be a myriad of allegations from both sides and multiple new issues which require investigation, our suggestion is that the matter should be referred to mediation in good faith to see whether any of them can be resolved. We are willing to attend and are happy to contact Mediation Services if you wish.

## **HSL's investigation**

[82] Mr Fernandes told the Authority he spoke to Ms Joo on 6 January after the coffee lid incident and she had told him then about earlier incidents. He investigated the coffee lid incident separately and urgently but could not start a new investigation into the earlier incidents until Ms Joo had recovered from Covid and was able to return to meet him at the hotel.

[83] Mr Fernandes received on 16 January the detailed account from Ms Joo, which plainly he read. As with any reader, he formed an impression from the way that account had been written. He said he found some of her allegations 'strange'.

[84] Mr Fernandes told the Authority he had no reason to disbelieve Mr O'Connell's account of his investigation of the hot water incident. Similarly, he said he had no reason to disbelieve Mr D'Mello's report about the events of 26 and 27 December 2022.

[85] Mr Fernandes accepted the findings of Mr O'Connell about the hot water incident of 4 December 2022. He accepted Mr D'Mello's account of what had happened on 26 and 27 December. The Authority considers that in both cases it was open to Mr Fernandes to do so.

[86] The disciplinary investigation of the coffee lid incident was regarded by HSL as a private matter between HSL and Kim. For that reason the decision was made to advise Ms Joo only that disciplinary action had been taken against Kim. It was seen as being in the interests of Ms Joo and Kim to limit future work contact between them.

[87] HSL had an obligation to investigate, and it did that. It determined the action it should take and the response it should properly give to Ms Joo.

[88] The Authority is satisfied that its response was one that of a fair and reasonable employer could give in the circumstances at the time it investigated. HSL provided to Ms Joo copies of its policies about bullying as requested, and it pointed out the induction training that is usually planned to be given to new employees. HSL did not agree there was a basis for it having to compensate Ms Joo for the coffee lid incident, an event it had little control over but had addressed by taking disciplinary action.

[89] The area where HSL could have fallen short of a reasonable response was in the measures to ensure that Ms Joo and Kim did not work together in future. That may have required more detail to be given to Mr Kang and Ms Joo and some fine tuning of rosters. This could easily have been done if HSL had been given an opportunity to review the arrangements in conjunction with Ms Joo and Mr Kang.

[90] The Authority does not consider that under the ER Act the principles of constructive dismissal should be applied in an artificial or rigid way that ignores HSL's apparently sincere and reasonable suggestion that the parties undertake mediation.

[91] It is a stated object of the ER Act at s 3(a)(v), to promote mediation as the primary problem solving mechanism for building productive employment relationships.

[92] The situation that had developed between Ms Joo and HSL by 3 February 2023 should not have been viewed narrowly just to tick-off whether HSL had breached a duty owed to Ms Joo. It may have been a reasonable conclusion that HSL was in breach to some extent but, before any breach was viewed as serious enough to amount to a constructive dismissal, HSL's offer to undertake mediation should have been weighed up as well. If that offer had not been genuine and reasonable, then it could have been rejected and a claim of constructive dismissal put forward.

[93] Ms Joo appeared to have no reservations about the sincerity of the mediation offer, for she accepted that offer at the same time she resigned.

[94] It was submitted for Ms Joo that the proposed mediation, if she had attended while remaining employed, would have been in the nature of a disciplinary action against her brought with an ulterior motive. The Authority considers this to be a speculative submission prejudging the process and taking no account of an important feature of mediation. It is a process conducted by a mediator, who is a neutral and independent third party. There is no basis for believing that the mediator would simply become the tool of one party for delivering whatever agenda they might have.

[95] Resignation was a needless reaction in the circumstances where Ms Joo's immediate return to work had not been demanded by HSL and discussions through mediation had been proposed by HSL. The Authority finds that resignation not

dismissal brought the employment relationship to an end, prematurely and unnecessarily.

### **Unjustified disadvantage in employment or terms and conditions of employment**

[96] The unjustified disadvantage grievance was raised as an alternative to unjustified constructive dismissal. The same circumstances are relied upon in support of the disadvantage claim.

[97] In principle, a breach of the ER Act or other applicable statute, or a breach of terms and conditions of employment or other duty owed to an employee, need not be so serious as to make it foreseeable that an employee will be disadvantaged before a grievance can be established.

[98] The Authority finds that the hot water and coffee lid incidents, and other events Ms Joo complained of in her 16 January account written to Ms Fernandes, do not support unjustifiable disadvantage claims. They were matters that were investigated and addressed reasonably by HSL.

[99] Three specific matters of conduct by HSL must also be considered in this regard;

- Not disclosing the disciplinary action taken against Kim
  - Failing to provide Ms Joo with a copy of her intended employment agreement
  - Notifying Ms Joo of the commencement of disciplinary action against her.
- 
- **Not disclosing disciplinary action taken against co-worker Kim**

[100] The Authority considers Ms Joo had no entitlement to be informed of the exact disciplinary measures taken by HSL, after a disciplinary process carried out regarding another employee. Kim's employment relationship was not Ms Joo's to control or have oversight of. Ms Joo's interest was to see that she was not at risk of being harmed in any way again by Kim. In the Authority's view, HSL took reasonable steps to ensure

that was unlikely to happen, because Ms Joo and Kim were not going to be rostered to work together.

[101] Ms Joo's request to HSL for this information was supported by a reference to a 1998 decision of the Employment Court; *Spotless Services (NZ) Ltd v Parker*<sup>4</sup>. In the view of the Authority that decision turns on the circumstances of the case, which were different from those of Ms Joo's. An employee facing a disciplinary process following complaints made about him, was declined information about the identity of the complainants. The Court upheld a Tribunal order made for disclosure, finding that the information was relevant in the circumstances and, when proceedings had been commenced, there were rules of procedure applying to disclosure for the purposes of conducting a hearing.

[102] The information requested of the employer in the *Spotless* case was about the employee requesting it, i.e., the names of those who had complained of misconduct committed by him. The information Ms Joo requested was not about her, it was about Kim and the breach by Kim of her employment relationship with HSL. It had not been in dispute that Kim's actions amounted to serious misconduct towards Ms Joo.

[103] A right to be told what disciplinary action was proposed to be taken against Kim, implies that Ms Joo would be consulted about the form of action and give feedback, if not her consent to that action. A right of review would also allow personal circumstances to do with an employee's private life, to be disclosed in cases where there may be matters of mitigation to be considered in deciding upon the appropriate disciplinary action take. That would amount to an unreasonable intrusion into Kim's privacy.

[104] Just as Ms Joo could not decide to dismiss Kim, unless invited she was not entitled to be a regulator of Kim's employment relationship with HSL.

[105] Ms Joo was entitled to receive an assurance from HSL that disciplinary action was under consideration and that she would be kept safe from any threat of repeat misconduct. In the Authority's view, she did receive adequate assurance based on actual measures and sanctions HSL had decided to apply against Kim. Some adjustment or refinement to the rostering arrangements may have been necessary but there was no

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<sup>4</sup> [1998] NZEmpC 20

reluctance shown by HSL to communicating further or reviewing its proposals. Mediation as proposed by HSL would have provided a good opportunity for that to be done.

[106] Mr Kang also submitted that HSL's refusal to disclose the disciplinary action taken against Kim, was a breach of the duty of good faith at s 4(1A) of the ER Act, subclause (c) in particular. If so, that breach could support an unjustified disadvantage grievance claim.

[107] Mr Kang submitted that HSL's disciplinary action, was likely to have an adverse effect on the continuation of Ms Joo's employment and therefore, in accordance with subclause (c), HSL had a duty to give her access to information about disciplinary action taken against Kim and give her an opportunity to comment on that information.

[108] The Authority disagrees that s 4(1A)(c) is capable of being applied in that way. It is addressed to the situation where an employer knows or can foresee the consequences a decision will have for a party directly affected by the employer's decision, such as where a decision is made to make a position held by that party redundant. It is not addressed to the situation where a decision causes a third party, who is not the subject of the decision, to react in a certain way, for example by resigning.

[109] The Authority finds that HSL did not breach s 4(1A) of the ER Act by disclosing to Ms Joo only in general terms, that action of a disciplinary nature had been taken against Kim.

[110] At the request of the Authority made at the investigation meeting, HSL produced a record showing that disciplinary action was in fact promptly taken against Kim as the outcome of the disciplinary investigation commenced on 9 January 2023. Although this evidence was after the event, it laid to rest any suggestion that HSL had taken no action against Kim.

- **Failure to provide a copy of intended employment agreement.**

[111] Ms Joo claimed in her statement of problem that she did not get an employment agreement, or a Code of Conduct, although HSL had advised those documents were attachments to an email containing the letter of offer she received and signed.

[112] HSL has not been able to show that the IEA and the Code referred to in it, were provided to her when the employment was entered into. Any neglect by HSL in this regard may have amounted to a breach of provisions of the ER Act but claims for penalties have not been made for breach of any applicable provisions such as ss 63A, 64 or 65.

[113] Similarly, a disadvantage grievance has not been raised about a failure to provide the agreement.

[114] Without the IEA the terms of Ms Joo's agreement may have been oral and not written as required by the ER Act, but the validity of the employment agreement was not affected by any breach.

[115] After HSL had notified Ms Joo on 3 February 2023 of its intention to commence a 'disciplinary investigation' regarding her conduct, she raised an objection at the same time she gave notice of resignation. Her objection was based on a contended lack of substantive grounds for disciplinary action, rather than on any procedural difficulty arising from the failure to provide a written employment agreement and Code of Conduct containing the Investigation and Disciplinary Procedure.

[116] Ultimately, the commencement of the proposed disciplinary investigation was forestalled by the resignation Ms Joo gave on 8 February 2023.

[117] HSL may have forgotten (as can occur with email messaging) to attach a document it referred to as 'attached' to an email. Lack of justification might have arisen if Ms Joo had raised that omission during the employment and HSL had failed to provide the document. Viewed against the substance of Ms Joo's complaints, the Authority finds she was not disadvantaged by any inability to read the printed words of the employment agreement.

- **Notifying Ms Joo of the commencement of disciplinary action against her**

[118] With or without a written IEA for the employment relationship, the employer retained the ability to conduct a disciplinary investigation and to impose sanctions including dismissal, where trust and confidence had been seriously impaired or destroyed by the actions of an employee.

[119] Independently of the existence of any written or oral contractual obligations, the employer had a statutory obligation arising from the ER Act at s 103A and ss (3) in particular, to investigate allegations against an employee before dismissing or taking action.

[120] For Ms Joo to claim the proposed disciplinary investigation against her was ‘unmeritorious’, was to prejudge the outcome of an investigation HSL was entitled to carry out and was obliged to carry out. The conduct alleged of Ms Joo, the comments she had allegedly made to Kristy and Kim, gave the outward appearance of being conduct capable of being misconduct at some level. Making a video of other staff working was also capable of being misconduct. HSL’s proposal to investigate could not readily be said to have been frivolous or vexatious, or motivated by an intention to force Ms Joo to resign.

[121] By resigning Ms Joo denied herself the opportunity to explain that she believed a supervisor, Amit Jalal, had suggested or approved of the videoing in the workplace. Mr Jalal in his evidence confirmed they had had some discussion about this. What exactly was said would have been a matter for HSL to enquire into if Ms Joo had attended the disciplinary meeting and raised it as an explanation for her conduct.

[122] By not attending Ms Joo also denied herself the opportunity to refute if she wished, complaints about the way she had behaved towards staff who had made complaints about her.

[123] Management had received complaints and had some obligation to respond to those appropriately. HSL had obligations not just to Ms Joo but to others who may have been adversely affected by Ms Joo’s conduct.

**Resignation was not induced by conduct of HSL**

[124] An employee cannot be forced to take part in a disciplinary investigation of the employer and cannot be forced against their will to continue in employment if they wish to leave. Freely, although unhappily, Ms Joo exercised her choice to leave HSL.

[125] The Authority finds that looked at overall, in the particular circumstances Ms Joo could not reasonably have concluded that HSL was rejecting her employment relationship and demonstrating that it would no longer be bound by its contractual and statutory obligations, including the duty of good faith.

[126] The Authority finds that HSL had a proper and reasonable basis for invoking disciplinary action. The potential disadvantage to Ms Joo lay in HSL not fairly or reasonably investigating all her concerns and all the incidents she had made Mr Fernandes aware of 17 January 2023. In the Authority's view, HSL did seriously consider whether a basis of fact existed to support Ms Joo's account or her perception of the conduct of co-workers including supervisors. Plausibility was plainly a factor, given Ms Joo's descriptions of some of the complained of conduct.

[127] The Authority finds there was no breach of such seriousness as to make it foreseeable that Ms Joo would resign. Foresight does not arise solely from an expressed intention or threat to resign of an employee, but from the nature and seriousness of the employer's own conduct which it has control of.

[128] The Authority finds there was no attempt by HSL to induce the resignation of Ms Joo.

[129] In deciding whether the actions of HSL constituted a dismissal of Ms Joo, an objective test is to be applied<sup>5</sup>. Applying that test the Authority concludes it was not reasonable for a person in the shoes of Ms Joo with all that she had experienced, to consider their employment had been terminated.

[130] Ms Joo was not in any sense 'sent away' by HSL. To the contrary, her employer was active and constructive in trying to repair disrupted relationships and enable performance of the employment to resume safely and productively.

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<sup>5</sup> *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 6, at [45]

[131] The Authority finds that category (c) of constructive dismissal situations referred to by the Court in its *Ngawaka* judgment<sup>6</sup>, is not applicable to Ms Joo's employment relationship problems.

### **No coercive course of conduct**

[132] The Authority is satisfied that HSL had no intention, overt or hidden, of forcing Ms Joo's departure. Its actions showed the contrary, that it hoped she could safely resume work under arrangements that would see her kept apart from Kim in the workplace. Extending those arrangements to apply to Kristy could also have been discussed, if Ms Joo had remained for any fine-tuning needed to be carried out to the rosters.

[133] HSL's conduct in relation to the hot water incident, the coffee lid incident, and events on 26 and 27 December was largely reactive. HSL did not in any way instigate or provoke the events, which give no appearance of being part of a scheme of conduct embarked upon by the employer.

[134] The Authority finds that category (b) of constructive dismissal situations in *Ngawaka*<sup>7</sup>, has no application to the facts of Ms Joo's case.

### **Conclusion**

[135] The Authority concludes that Ms Joo does not have a personal grievance, whether of unjustified disadvantage or unjustified dismissal.

[136] The Authority also determines HSL did not breach s 4(1) of the ER Act to the standard required to support a claim for a penalty brought under s 4A of the Act.

[137] No orders are made against HSL in resolving this employment relationship problem.

### **Costs**

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<sup>6</sup> Above at para [13]

<sup>7</sup> Above at para [13]

[138] Ms Joo notified HSL and the Authority that she was receiving legal aid for the investigation. The Legal Services Act 2011 makes provision for the liability of a legally aided person for costs.

[139] Any application for costs by HSL is to be made within 14 days of the date of this determination, and any reply by Ms Joo within a further 14 days.

**Non-publication order**

[140] Further to the interim order given by the Authority on 26 September 2023, a permanent order is now made under clause 10 of Schedule 2 of the ER Act, prohibiting publication of the Disciplinary Action Form in the name of Minjung Kim and dated 18 January 2023, which was produced by HSL at the requirement of the Authority.

Alastair Dumbleton  
Member of the Employment Relations Authority