

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 187
3171393

BETWEEN YOUN SUNG KANG
Applicant

AND NELLIE TIER NZ LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Jaime Rose-Peacock, advocate for the Applicant
Ruthi Bommoju counsel for the Respondent

Investigation Meeting: 15 and 16 August and 13 November 2023

Submissions Received: 29 November 2023 from the Applicant
8 January 2024 from the Respondent

Determination: 2 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Youn Sung Kang is a fashion designer with her own business Cecilia Kang Couture and she was employed at Nellie Tier NZ Limited (Nellie Tier) from September 2020 to December 2021. Ms Kang says she was hired to provide creative direction, not as an administrator and was taken advantage of in several ways including being underpaid for the work she did and made to do administrative tasks.

[2] By the time Ms Kang resigned, she says she was also owed wage and holiday arrears and commission for masks she made. Ms Kang also says she was left with no option but to resign because she was underpaid for the creative work she did for Nellie Tier and treated unfairly. She claims constructive dismissal and seeks wage and holiday arrears, lost wages and compensation.

[3] Wendy Kim, one of the Directors of Nellie Tier, also sponsored Ms Kang's entry to New Zealand Fashion Week in 2021, in the name of Cecilia Kang Couture, and

provided support to Ms Kang including introductions to potential sponsors. During the employment relationship they interacted and spent time on arrangements for Cecilia Kang Couture's entry to NZFW in 2021 as well as matters to do with Ms Kang's employment at Nellie Tier.

[4] Nellie Tier denies Ms Kang was paid incorrectly and says the personal grievance claims were raised outside the prescribed time period of 90 days and therefore cannot proceed. It denies Nellie Tier treated Ms Kang unfairly or disadvantaged her during her employment.

The Authority's investigation

[5] For the Authority's investigation, written witness statements were lodged from Youn Sung Kang (Cecilia Kang), Fiona and Courtney Amour, Jinny Moon, Allan Myers, Jono Ong, Me la Jang and Kerry Jeon. For the respondent witness statements were lodged from Wendy Kim, Su Kyung Lee (Chloe), John Nash, Sara Sadd, Nica Decenda, Jasmine Peterson, Bongil-Kim, Kyuho Lee and Ye Jun Shim. Two witnesses (Kyuho Lee and Su Kyung Lee) had written questions put to them and provided written answers by agreement. All other witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives provided written and oral closing submissions by AVL.

[6] A Korean language interpreter assisted the Authority and the witnesses during the investigation meeting.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (a) Did Ms Kang raise a personal grievance within the prescribed period of 90 days?
- (b) If Ms Kang did raise a grievance, but it was raised outside the 90-day period, should she be granted leave to bring her grievance out of time?

- (c) Whether Ms Kang was unjustifiably disadvantaged in her employment by unjustifiable actions of her employer, in particular:
- Was she was underpaid?
 - Was there unfair bargaining of the employment agreement?
 - Did Ms Kang work overtime?
 - Were her hours unilaterally reduced during Lockdown?
 - Should she have been reimbursed for materials for face masks?
 - Was there a privacy breach?
 - Did Ms Kim yell at Ms Kang and were disparaging comments made by Sara Sadd about Ms Kang?
 - Did Ms Kim cause a deal with a fashion magazine for Cecilia Kang Couture fall through?
 - Was duress applied to Ms Kang to enter fashion week and to have Nellie Tier act as a billing partner?
 - Was there a failure to provide a safe workplace by failing to provide training and exposing Ms Kang to ongoing psychological and emotional hazards and/or was Ms Kang expected to work during Covid-19 Lockdown when she was unwell.
- (d) Whether Ms Kang unjustifiably constructively dismissed because her resignation was caused by Nellie Tier breaching its duty of fair treatment to her through the disadvantages set out above.
- (e) Is Ms Kang owed wage and holiday arrears due to the way her employer:
- paid her during Lockdown
 - made unlawful deductions of her annual leave
 - made unlawful deductions to her sick leave entitlement
 - failed to pay her for overtime hours worked including attendance at events, dinners and making samples.
- (f) Is Ms Kang due commission for making face masks?
- (g) Has the employer breached its duty of good faith towards Ms Kang.

Ms Kang's employment at Nellie Tier

[9] Nellie Tier manufactures and sells skincare products. Wendy Kim and Sara Sadd are the directors of Nellie Tier. Ms Kim is also the majority shareholder and Ms Sadd and Margaret Porter hold the remaining shares. Ms Sadd and Ms Porter started the business with Ms Kim joining in 2019.

[10] Ms Kang resigned because she says Ms Kim's actions made her feel she needed to leave her role:

I had to resign because the working conditions and environment became so intolerable that I could no longer stand to work for Wendy Kim. Therefore I was put in a position where I had no choice but to resign.

[11] In general terms the working conditions Ms Kang refers to included four main things. Firstly, being given factory tasks that she says were not part of her role, secondly attendance at a series of additional meetings and work that she was not paid for, thirdly, Ms Kim's influence over Ms Kang causing her to comply with Ms Kim's will, in relation to a variety of things (including Cecilia Kang Couture's entry to NZFW) and lastly not being paid correctly, in several ways, including allocation of sick leave and use of annual leave.

[12] An important part of the evidence in this case for both parties was the context provided by Korean culture. Both parties referred to it regularly in evidence to explain an additional aspect for me to consider in relation to their own actions and the way they perceived the actions of others.

[13] The other context was Covid-19 Lockdown because the employment relationship spanned periods of Lockdown. That is particularly relevant because Ms Kang under her own brand Cecilia Kang Couture, and with Ms Kim's support, entered New Zealand Fashion Week (NZFW) in 2021, however, the 2021 show was cancelled due to Covid-19.

Creative director or administrator

[14] The parties signed an individual employment agreement that described Ms Kang's role as "creative director" but listed the tasks of an administrator. The way this came about was not in dispute but what it meant is a point of difference between them. Ms Kang says she was employed as a creative director at Nellie Tier to provide creative services. Ms Kim says the title was in name only and while she intended to support Ms

Kang with her creative work, and her entry to NZFW in 2021, the role at Nellie Tier was that of an administrator. This role was designed to support the work at the factory. The tasks at the factory were set out as follows:

- Developing and managing the company's website, communications, social media, promotional and other marketing materials
- Maintaining computer and online systems
- Processing orders and payments
- General office administration duties
- Liaising with customers and suppliers
- Assisting with other employees duties from time to time by agreement with the employer

[15] Nellie Tier is a small business with two to three staff and two working directors. Processing orders and payment included putting orders together, packaging them and arranging for those to be sent from the factory to customers and sometimes involved lifting heavy boxes.

[16] Ms Kim first met Ms Kang on 14 July 2020 when they were introduced by a third party. Ms Kim said the connection was with another designer who had supported Ms Kang at NZFW during the 2019 show. They had lunch together which from Ms Kim's perspective was to explore whether there was "some mutual advantage resulting." Two days later Ms Kang emailed asking Ms Kim if she would sponsor her. Ms Kim replied saying she could support her with products but no commitments or agreements were made other than to meet again.

[17] On 19 July Ms Kang sent Ms Kim a partnership sponsorship request. The terms proposed were partnership with Cecilia Kang Couture for one year in return for \$20,000 and supply of products from Nellie Tier. Ms Kim declined but was positive about working together in the future. They met the next day for lunch and again no commitments were made but Ms Kim says she would have conveyed support and positivity. Supporting a young up and coming Korean designer was consistent with her desire to support Koreans to succeed in New Zealand and helping others also aligns with her core values.

[18] Ms Kang also asked Ms Kim to attend a workshop as Ms Kang's support person because Ms Kang was speaking. Then Ms Kim contacted Ms Kang on 4 September because the administrator role had suddenly become vacant, and she needed someone urgently.

[19] Ms Kim's evidence was that she offered Ms Kang the job verbally over the phone on 4 September but also told Ms Kang the company was going through a tough time so could not pay her well, and that Nellie Tier was a good place to work and had potential to grow in the future.

[20] The draft individual employment agreement they discussed described the role as administrator. They discussed the role, terms and pay from 7 September 2020 to 14 September 2020 when Ms Kang returned the signed agreement. As a result of discussions, the job title was changed to Creative Director.

[21] Their evidence is at odds in that Ms Kim says Ms Kang asked for the job description to be changed to Creative Director in order for her to save face in the Korean community because she felt embarrassed doing a lower paid administrative job. Ms Kang maintains that she was employed as a Creative Director for Nellie Tier. In particular, she points to a clause in the employment agreement where she was to receive commission for designing and making face masks for Nellie Tier and says that the role that she took on was more than an administrator for Nellie Tier, demonstrated by the work she did, including meetings and events where she pitched and marketed Nellie Tier products.

[22] Ms Kim thought Ms Kang was a talented, young Korean designer and wanted to help her. Ms Kim was aware Ms Kang wanted to enter NZFW in 2021 and this was her dream. She says she set about supporting Ms Kang in every way that she could. This included what appears to be a sponsorship arrangement evidenced by payment as a billing partner, for half of the entry fee to NZFW and Ms Kim facilitating meetings with potential sponsors. Ms Kang on the other hand says that Ms Kim was motivated by a desire to control and manipulate Ms Kang and take advantage of her and therefore everything that Ms Kim did was to benefit Ms Kim and Nellie Tier Skincare.

[23] Having heard the evidence regarding the role being one of "creative director", I prefer Ms Kim's evidence. This was supported by Mr Nash's evidence and his surprise that Ms Kim had agreed to change the title. It is also supported by the description of tasks. It was an administration role and while Ms Kim may have wanted to highlight the social media aspect, this was likely to be to play to Ms Kang's strengths rather than an indication of her intent to appoint a creative director. The evidence about Nellie Tier, the size of the company, the nature of the business it was in also supports Ms Kim's evidence that there was no need for a creative director.

[24] The evidence from both parties described a number of events and meetings both in and out of work time. Ms Kim and Ms Kang were in constant contact both at work and outside of work which became focussed on supporting and encouraging Ms Kang's entry to NZFW. The lines appeared blurred between what was work at Nellie Tier and what was sponsorship of Cecilia Kang Couture. Ms Kang quickly used up all her sick leave, there was evidence of Ms Kang crimping time from her role at Nellie Tier to spend on NZFW and her hours at Nellie Tier were reduced so she could focus on her creative work for NZFW. There was evidence this was viewed negatively by others at times, but on the whole, they carried on until Lockdown in August 2021.

Ms Kang's resignation

[25] Ms Kang's hours were reduced from 40 hours to 30 hours and then to 15 hours several weeks before the NZFW show. New Zealand went into Lockdown and NZFW was cancelled at the last minute. Ms Kang also found herself receiving reduced wages during this period because her hours had been reduced. When NZFW was cancelled the reason for the reduced hours was removed and it was her view she should go back up to 40 hours. From this Ms Kang appeared to form the view she was paid incorrectly during Lockdown.

[26] They corresponded over this point. Ms Kim was overseas and offered some solutions to Ms Kang but did not agree to put her hours back up initially however, they negotiated over her pay, work and the wage subsidy and Ms Kim took steps to remedy Ms Kang's concerns. Ms Kang remained unhappy.

[27] In November 2021, there was an exchange of emails about an allegation of discrimination between Ms Kang and Sara Sadd, one of the directors. Ms Sadd made a comment that Ms Kang felt needed to be addressed. The email exchange also shows Ms Sadd had been concerned about tasks in the factory that Ms Kang was not keen to do.

[28] By this stage, Ms Kang had become very disillusioned with her role at Nellie Tier and felt exhausted. She was focussed on marketing and promoting Nellie Tier products. In the end she felt the significant benefits Nellie Tier gained from having Ms Kang as their creative director, and using her appearance and brand, had overstepped the mark. She felt taken advantage of. Nellie Tier gained in terms of profit through that association and her being involved in NZFW 2021 and this was never quantified.

As a result of this and her low wages, she was significantly underpaid for the work she did.

[29] Ms Kim became aware of Ms Kang's unhappiness. Reducing Ms Kang's hours to allow her to focus on NZFW was a step Ms Kim said was to support Ms Kang. She also met and communicated with Ms Kang's mother to discuss Ms Kang's welfare. After Ms Kang raised issues about being underpaid during Lockdown and became concerned about how the wage subsidy was paid, and feeling exhausted, she resigned in December 2021.

[30] Having had time to reflect she realised she had been in a situation with an extreme power imbalance. Ms Kang also says Ms Kim manipulated her and took advantage of her good will and creative skills. Ms Kang lodged a statement of problem in the Authority on 4 May 2022 raising workplace discrimination, employee exploitation, wage subsidy fraud, holiday/annual leave payment and abuse of power as employment relationship problems. Attached was a document titled "Nellie Tier wage subsidy fraud workplace dispute" recording further information under the five headings in the statement of problem.

[31] After seeking leave of the Authority and after Ms Kang sought advice, Ms Kang's representative lodged an amended statement of problem on 10 November 2022 restating the problem into four claims: wage arrears breaches, unjustified disadvantage, unjustified (constructive dismissal) and good faith breaches.

Did Ms Kang raise a personal grievance?

[32] Section 114 of the Act requires grievances to be raised with employers within the prescribed period. The raising of a grievance marks the first step in resolving it. If a grievance is raised out of time, it can only proceed if the Authority grants leave or the employer consents. Nellie Tier says the initial statement of problem was the first time the personal grievances had been raised with Nellie Tier and it did not consent to the grievances being raised out of time. In addition, Nellie Tier says what was raised in the initial statement of problem lacked detail such that a grievance could not have been raised. The employer could not understand what it was responding to.

[33] There are two issues to be resolved before Ms Kang's personal grievance claims proceed. Firstly, whether Ms Kang raised a personal grievance and if she did, was it raised within the 90-day period.

Raising a personal grievance

[34] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹ An employee must take reasonable steps to make the employer aware that the employee claims to have a personal grievance they want addressed and it must be raised within the applicable notification period which in this case was 90-days.

[35] Where an employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the grievance out of time. The Authority may grant leave if it is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and it considers it just to do so.²

[36] The first question is whether Ms Kangs communications with Nellie Tier were sufficient to make Nellie Tier aware a personal grievance was being raised. For an employer to be able to address a grievance the employer must know what it is it is addressing³ and it is important that the employer is made aware sufficiently of the grievance to be able to respond.⁴

[37] In considering this, I note the Court recognises that the totality of the communications between the employee and employer might constitute the raising of a grievance.⁵ While the lodging of a statement of problem is not always enough on its own to have raised a grievance with the employer, the serving of that statement of problem on the employer can satisfy the requirement of s 114(2) for making the employer aware of the grievance.⁶

The parties' submissions

[38] Ms Kang says it was only after the employment relationship had ended that she was able to clearly see the manipulation of her by her employer and she took action. She did this by lodging her initial statement of problem in the Authority on 4 May 2022.

¹ Section 114(2).

² Section 114(4).

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

⁴ Above at [36].

⁵ *Chief Executive of Manuka Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36].

⁶ *Morgan v Quality Environmental Consulting Ltd* ERA Auckland AA404/08, 25 November 2008.

She made claims for wage and holiday arrears and also an all-encompassing statement of an “abuse of power” and discrimination. Taking into account the cultural context, the power imbalance that was said to exist in the employment relationship, and the fact Ms Kang was self-represented at that time, it was submitted this was sufficient to have raised her grievance with her employer.

[39] Nellie Tier accepts three problems were raised with it in time. Two weeks of back pay of the wage subsidy and the use of one week of annual leave during the Lockdown period were raised on 15 September and addressed during the employment relationship. They were raised as a wage related claim and not a personal grievance, so Nellie Tier does not accept a grievance was raised on that date.

[40] Nellie Tier accepts a third problem, that Ms Kang alleged she had been discriminated against by Ms Sadd, was raised on the same date and was within the 90-day period. Evidence of this is in the emails between Ms Kang to Ms Sadd but Nellie Tier says the matter was addressed and closed.

[41] It is further submitted the initial statement of problem lodged on 4 May 2022, could not have raised discrimination or any grievance with the employer because it did not set out all alleged grievances captured by the use of the term “abuse of power” and it was out of time.

Were the communications sufficient to have raised a grievance?

[42] Ms Kang raised discrimination as an employment problem on 15 September and again in the initial statement of problem.

[43] In the case of *Coy v Commissioner of Police*, it was considered sufficient albeit by a narrow margin for Ms Coy to have specified the general grounds of her problem and saying that her personal grievance submission was being prepared and would be forwarded to the Commissioner later.⁷

[44] While noting that the disputed claims were not particularised in the original statement of problem, they were expanded on in the document attached:

Workplace discrimination when I am perfectly doing the job

⁷ *Coy v Commissioner of Police* EmpC Christchurch CC 23/07, 19 November 2007.

I also raised issue in regards to workplace discrimination with one of the director Sara Sadd when I was highly achieving the job with administration work. Her attitude did not improve until my resignation day and led me to great levels of mental and physical stress till now.

[45] The email Ms Kang sent Ms Sadd raised racial discrimination related to comments made about an aspect of Ms Kang's physical appearance. This was set out in the document, as was Ms Sadd's response. Work pressure was also mentioned in both emails and it was evident Ms Kang believed she was undertaking tasks not required of her.

[46] Under "workplace exploitation" a message from Ms Kim to Ms Kang was translated reminding Ms Kang she was responsible for packing and shipping orders received, pouring bottles and attaching labels, among other things.

[47] There was a further email from Ms Kang to Ms Sadd (after Ms Sadd apologised for making the comment Ms Kang considered discriminatory), that was not copied in the statement of problem. Nellie Tier has that email and it was dated 13 November 2021, prior to Ms Kang's resignation. While it did not set out distinct problems Ms Kang wanted her employer to address in clear concise terms, it indicated unhappiness on a number of fronts:

I personally felt most of the tasks that I fulfil at work such as boxing taping, using corn starch, wrapping glass jars, xero etc.... I appreciate you pointing out these points occasionally for things I do in the factory but I feel there are negative emotions mixed towards my performance and I feel that you are discriminating but correct me if I am wrong. I am trying absolute my best to protect jars, boxes breaking apart. So if we can be a bit more supportive and look out for each other during this time at work that would be amazing and my wish.

[48] Ms Kang also messaged Ms Kim alerting her to the fact she had emailed Ms Sadd alleging discrimination.

[49] Noting Ms Kang was self-represented at that time, I consider the combined effect of what was recorded in the statement of problem including the attachment, together with the earlier email exchange with Ms Sadd went beyond wage and holiday pay arrears. Regardless of whether Nellie Tier considered the matters raised had merit, this was sufficient for Nellie Tier to be on notice Ms Kang believed she was being asked to do tasks that were not in her job description and that she was being discriminated against. When read together they amount to significant concerns in the employment

relationship and the serving of the statement of problem on the employer put the employer on notice of those concerns.

[50] The next question is whether the delay in raising these concerns was occasioned by exceptional circumstances. The initial statement of problem was lodged in the Authority on 4 May 2022 which is some five months after Ms Kang resigned. Ms Kang applies for leave from the Authority based on exceptional circumstances, namely circumstances where the employee was so affected or traumatised by the matter giving rise to the grievance they were unable to properly consider raising the grievance within 90-days.

Was the delay occasioned by exceptional circumstances?

[51] If the Authority is satisfied, after giving the employer an opportunity to be heard, the delay in raising the grievance was occasioned by exceptional circumstances and considers it just to do so, it may grant leave for the raising of a personal grievance after the expiration of 90 days.

[52] Ms Kang says she was vulnerable by virtue of being a transgender woman in the workplace and as a member of the Korean community she was deferential to those senior to her in the workplace. Blackmail and manipulation was occurring and Ms Kang says she was being used by Ms Kim for Nellie Tier's benefit. It was submitted on Ms Kang's behalf this ground is made out for the following reasons:

- Ms Kang was in a position of vulnerability in her employment and therefore unable to raise the ongoing concerns at the time.
- Because this was a controlling relationship Ms Kang was not able to see the blackmail and manipulation that was occurring when she was in the employment relationship and that she was being used by Nellie Tier for its purposeful gain, said to be financial gain and enhanced public image by association with Cecilia Kang Couture.
- When the relationship ended Ms Kang was able to see this manipulation and took action and she did so by emailing the directors about her concerns and then raising her own self-represented claim with the Authority on 4 May 2022 which made an application for wage and holiday claims and also an all encompassing statement about abusive power.

- Cultural hierarchy and the employer/employee power imbalance within this relationship meant that it was challenging for Ms Kang to articulate her concerns clearly and she feared retribution from her employer and from within the Korean community.
- Ms Kang was self-represented when she first lodged her statement of problem in the Authority.

[53] Nellie Tier submits there is evidence Ms Kang demonstrated during the employment relationship she was far from being in a position of vulnerability and points to the robust way she raised the issue with Ms Sadd, the wage subsidy issue and the forthright way she raised issues during the period when she was preparing for her upcoming fashion show for NZFW. It is noted she told Ms Decena, who (replaced Ms Kang), that working for Nellie Tier is good and to voice any suggestions as the people at Nellie Tier are kind and approachable.

[54] In addition, Nellie Tier points to evidence that demonstrated Ms Kim went above and beyond in her efforts to support Ms Kang including covering Ms Kang's work while Ms Kang was preparing for NZFW in 2021 and support in the form of many calls, messages, meals and coffees provided by Ms Kim. It also notes communications when Ms Kang said Ms Kim "was hers", spoke about "smashing people" and was vocal in raising concerns in the media when NZFW made a genuine mistake in relation to her name. This, it is submitted, is not a person that is in a position of vulnerability during her employment or too scared to raise concerns.

[55] Ms Kim consistently used the honorific term "sunsengim" meaning teacher during the employment relationship to address Ms Kang which was submitted also demonstrated there was no power imbalance in their relationship such that it would make it difficult to articulate her claim.

"So affected or traumatised"

[56] The threshold is high for finding that an employee has exceptional circumstances because they were so affected or traumatised by the matter giving rise to the grievance, which in this case, is Ms Kang's alleged treatment during the employment relationship. The leading case on this aspect of the test is *Telecom New*

Zealand v Morgan. The Court in *Morgan* set out that a high standard of proof was required.⁸

[25] So interpreted, the statutory test for this exceptional circumstance requires a high standard of proof to be met by an applicant. Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than three months, most cases are unlikely to meet that test.

[57] *Morgan* was a case where the applicant obtained alternative employment within the 90-days and although the Court did not doubt the psychological effects of the dismissal on the employee, he was not found to be “so affected or traumatised” by his dismissal that he was unable to properly consider raising the grievance for much, let alone all of the 90-day period.

[58] In *Messick v The Vice Chancellor of the University of Waikato* the Authority commented that a diagnosis of depression is insufficient to meet the test: “Parties may be depressed but be able to raise a grievance and have done so in many cases before the Authority.”⁹

[59] The submission on Ms Kang’s behalf was the effect of being in a position of vulnerability in her employment, meant she was significantly impacted by Ms Kim’s actions. Compounding the power imbalance was a cultural hierarchy which made it challenging for her to articulate her concerns clearly. She feared retribution from her employer from within the Korean community and felt powerless to raise her personal grievance claims within the statutory time period. This concern about her reputation, it was submitted, is evidenced by the fact Ms Kim disclosed Ms Kang’s employment matters and grievances to influential people and organisations in the Korean community.

[60] Ms Kang’s evidence was of her unhappiness due to Ms Kim’s actions making her feel she needed to resign. This included being affected mentally from not being able to rest properly, not being able to speak freely or properly express her opinions which resulted in a trauma for Ms Kang. Her confidence was significantly affected, and she was unable to work creatively or take on more creative events. Ms Kang said she has had physical and mental health issues and has felt depressed and anxious which

⁸ *Telecom New Zealand v Morgan* [2004] 2 ERNZ 9 at [25].

⁹ *Messick v The Vice Chancellor of the University of Waikato* [2017] NZERA Auckland 6 at [38].

had affected her family. Her reputation she said had been affected and she had socially isolated herself.

[61] I do not doubt there was an impact on Ms Kang however, in *Morgan* it was held that “so affected or traumatised” in s 115(a) connotes substantial injury. Furthermore, an inability to “properly consider” raising the grievance means the employee must suffer the inability for the entire 90-day period.

[62] Having heard all the evidence, it was clear there was another relationship that also broke down and was in my view most likely the catalyst for the breakdown in the employment relationship. This was not in writing so difficult to define, however, it nonetheless existed. Ms Kim provided “sponsorship” and support in various ways including the introductions to sponsors and half the NZFW entry fee. Many of the meetings and events outside of work hours were about raising Ms Kang’s profile as a fashion designer with Nellie Tier products provided as giveaways. Ms Kim was steadfast in her support of Ms Kang because she was a young Korean designer making this arrangement one that benefitted them both. However, at the point in time NZFW was cancelled, these arrangements became strained with flow on effects on the employment relationship.

[63] Both parties had issues with each other’s conduct, some of Ms Kim’s actions that were alleged to be unfair towards Ms Kang, were not supported by the evidence and vice versa. I consider the true picture to have been that there was a symbiotic relationship from which they both benefitted in various ways, often intangible, connected with reputation, exposure in the fashion and beauty industry but connected with Ms Kang’s entry to NZFW in 2021. Most of this was outside the employment relationship but the lines became blurred.

[64] I accept Ms Kang was affected by what happened, however, the test is necessarily high and the evidence did not reach the threshold of a substantial injury caused by the actions of her employer such that Ms Kang was unable to properly consider raising her grievances within the specified period. It was also not clear that Ms Kang was affected or traumatised as a result of the employer’s actions (within the parameters of the employment relationship).

[65] Ms Kang’s personal grievance claims were raised out of time and leave is not granted for the claims to proceed based on exceptional circumstances.

Wage and holiday arrears

Underpayments during lockdown

[66] Ms Kang says she was not paid correctly for the weeks ending 27 August, 3, 10 and 24 September 2021. This was during a nationwide Lockdown for three days from 17 August that was extended in Auckland to 20 September 2021, following which Auckland moved to Alert Level 3.

[67] The individual employment agreement between the parties provided for 40 hours per week. Ms Kim says there were two agreed variations to the agreement reducing Ms Kang's hours of work, to accommodate Ms Kang's preparation for NZFW.

[68] The second reduction in hours took Ms Kang down from 30 hours to 15 hours per week with effect from 12 July 2021, which was also several weeks before the Covid-19 Lockdown. Ms Kim says Ms Kang asked because she was finding even 30 hours a week challenging as NZFW work was ramping up. Ms Kim says the request and agreement were both verbal. Ms Kim says she neglected to send written confirmation of the change but there was no question in her mind Ms Kang requested it and was happy with it.

[69] The text message on 15 July shows Ms Kang agreeing that she should be paid for 15 hours which Ms Kim says is consistent with her agreement. I prefer Ms Kim's evidence on this matter because the emails and messages indicate agreement between them. There was also no reason given as to why Nellie Tier needed to reduce the hours of the administrator role and until Lockdown and NZFW was cancelled and the issue of the wage subsidy was raised by Ms Kang, there is no record of any communications from Ms Kang indicating she had not agreed to that reduction in hours.

[70] This was a minor breach of the requirement in the employment agreement that all variations be in writing. The first variation reducing work hours from 40 to 30 hours was recorded in an email appropriately:

As verbally agreed last week, your hours of work will reduce form 40 hours per week to 30 hours per week with you no longer working on a Friday. This change takes effect from 11 June 2021 and will continue until otherwise agreed. We can review again once the NZFW finishes at the end of August.

[71] Ms Kang emailed confirming she agreed to this change in writing. Ms Kim explained failing to put this second variation in writing was an oversight on her behalf

as they were all busy at that time. I am satisfied Ms Kang agreed to this variation because it was to her advantage until events overtook both parties.

[72] I am also satisfied that during Lockdown there was discussion between them that resulted in a reasonable arrangement whereby Ms Kang was to be paid for specific tasks she could do from home over and above her 15 hours of work. Her hours were increased again after further discussion between them.

[73] Ms Kang suggested in her evidence that Ms Kim's husband by virtue of his work would have had advance notice of the Lockdown, meaning Ms Kim took advantage of Ms Kang by reducing her hours at that time (to avoid having to pay her the full wage subsidy). This is denied by Mr Nash and I consider it unlikely that to have been the case.

[74] Nellie Tier's accountant confirmed Ms Kang was paid \$300.00 per week until her wages were increased to \$600.00 per week from 24 September until 3 December 2021. This means Ms Kang either had the entire wage subsidy passed on to her or was paid her normal wage. I consider the reduction in hours to have been an agreed variation to the contract and on that basis the payments Ms Kang received during Lockdown were correct.

Annual leave deductions

[75] There are three periods of annual leave deductions that Ms Kang takes issue with. Ms Kang says from the period ending 19 March 2021 to 25 March 2021 annual leave was used without notice, warning or authorisation. The pay slip shows half a day annual leave on 15 March and a full day on 19 March.

[76] Ms Kim says the staff register recorded the time staff arrived and left and if they were on leave or sick. That record is consistent with the pay slip with a note from Ms Kim on 19 March saying that was annual leave for Rina Chae's K Pop dance party. Given this appears to be outside of the list of tasks in the job description, and more likely to be in the ambit of sponsorship of Cecilia Kang Couture, I am satisfied on the information provided this was appropriate use of annual leave from Nellie Tier.

[77] For the period ending 17 September 2021 to 23 September 2021 Ms Kang was forced to use annual leave and worked that week as well (this was during Lockdown). That came about after several communications between them and a WeChat voice call

to discuss the Lockdown period in general. Ms Kang complained about not receiving the full-time wage subsidy. Ms Kim was in Korea. Ms Kang also resigned during this period but withdrew her resignation. The end result of their communications was a message showing Ms Kang stating she should be paid for “\$500 + holiday pay”. I am satisfied there was agreement based on the communications provided that Ms Kang was to take annual leave that week.

[78] During the period 25 June 2021 it was claimed Ms Kang was incorrectly on annual leave for one day. Again, given the concurrent sponsorship arrangement, I am satisfied this was appropriate use of annual leave.

Sick leave deductions

[79] Ms Kang claims deductions were made to her sick leave balance that were not days when she was sick. These deductions show in the pay slips for two periods being 26 February 2021 to 4 March 2021 and 30 April 2021 to 6 May 2021.

[80] The staff record shows no sick leave taken in the first period but there was some annual leave and a statutory holiday. In the second period no sick leave is showing. The pay slips do show sick leave was taken on 24 February and it is recorded in the pay slip dated 26 February to 4 March. The staff register is consistent with that.

[81] The pay slip for 30 April to 6 May 2021 shows a half day sick leave on 27 April, and a full day on 28 April. The staff register shows the same.

[82] Ms Kim says either Ms Kang filled in the staff register or Ms Kim did on her behalf. On all those occasions sick leave was paid and there is no evidence of sick leave being used when Ms Kang was not sick.

Overtime

[83] Ms Kang claims overtime for work completed for Nellie Tier when she worked at the request of Ms Kim and this involved frequent overtime on a weekly basis. It includes dinners with Ms Kim and several events and dates were set out in submissions.

[84] Based on my conclusions about the existence of the sponsorship and billing partner arrangement between Nellie Tier and Cecilia Kang Couture, these events were outside of the employment relationship and no overtime for work done is owed.

Other claims

Commission for face masks

[85] The employment agreement contained a clause providing for commission for face masks that Ms Kang was to make:

The employee will design a face mask which will be manufactured and sold by the employer, with 30% of the sale price going to the employee as commission.

[86] However, Nellie Tier provided evidence none were manufactured or sold because they never got past the initial stages. Therefore, there is no money due under the agreement.

Breach of good faith

[87] It is alleged Nellie Tier breached its good faith obligations towards Ms Kang by failing to uphold implicit and explicit terms the employment agreement in several ways. Given the conclusions above, I have found no breaches of the good faith obligation.

Outcome

[88] Ms Kang has been unsuccessful in raising her personal grievance because it was raised out of time. There was also insufficient evidence of the wage and holiday pay claims. There was a minor breach of the employment agreement for failing to record agreement to the variation in hours in writing but no remedies are awarded. There was no breach of good faith.

Costs

[89] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[90] If they are not able to do so and an Authority determination on costs is needed Nellie Tier may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Kang would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[91] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹⁰ [Practice Direction of the Employment Relations Authority
https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf
\(era.govt.nz\)](https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf)