

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 23
3044073

BETWEEN MIKYUNG KIM
 Applicant

AND DOLLAR KING LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Michael Kim for Applicant
 Jessie Laphorne for Respondent

Investigation Meeting: 9 October 2019

Submissions Received: 18 and 31 October 2019 from Applicant
 25 October 2019 from Respondent

Determination: 22 January 2020

DETERMINATION OF THE AUTHORITY

- A. Ms Kim was not constructively dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] Ms Mikyung Kim and her husband, Mr Jun, started working for Dollar King Limited in 2015 at its Tokoroa store. Mr Jun was the store manager and Ms Kim was employed to assist him.

[2] Both Ms Kim and Mr Jun worked six days each week. Ms Kim took Sunday's as her day off work while Mr Jun took Monday's off. When one of the two was on their day off the other worked as the sole worker in the store.

[3] In April 2018 both Mr Jun and Ms Kim were offered new employment agreements (including the offer of a salary increase), together with new Workplace Policy rules. From 30 April to 3 May Mr Jun raised questions about aspects of the new employment agreement and the Workplace rules on behalf of himself and Ms Kim.

[4] In particular the new employment agreement required Ms Kim to work on Sundays. Since 2015 Ms Kim had taken Sundays off for religious reasons. In his correspondence to Dollar King Mr Jun asked that their days of work remain the same. In response Dollar King withdrew the offer of the new employment agreement and the associated offer of salary increases.

[5] Mr Jun asked Dollar King to reconsider the withdrawal of the offer of salary increases citing an increase in sales for 2017, the profits made for the company and exceeding the goals set by the company as reasons to increase his and Ms Kim's salary level to those promised in the new employment agreements.

[6] In relation to the Workplace rules document Mr Jun requested information about his and Ms Kim's alternative holidays. This is because the Workplace rules document set out a requirement that any alternative holidays (for working a public holiday) be taken within 14 days of the public holiday. Neither Mr Jun nor Ms Kim had taken alternative holidays during their employment so they wished to understand how many alternative holiday days they were entitled to.

[7] In response Dollar King told Mr Jun to check the payslips because it recorded the number of alternative holidays available. After checking their payslips Mr Jun disputed the number alternative holidays recorded on them and asked Dollar King to recalculate his and Ms Kim's entitlements.

[8] On 7 May 2018 Mr Jun made a further request for the information pertaining to alternative holidays. Mr Jun and Ms Kim were again referred to their payslips and were asked to revert to the HR Manager if their records were different to those held by the company. In his correspondence Mr Jun also reiterated his request that the withdrawal of the salary increases be reconsidered. His request was declined.

[9] On 24 May 2018 Ms Kim and Mr Jun joined the Unite Union. This came to the attention of Dollar King when it received a form giving authority to deduct union membership fees from their wages.

[10] On 26 May Mr Jun wrote on his and Ms Kim's behalf advising Mr Changhyun Kim, HR Manager, they had both worked on Waitangi Day but their bank records did not record payment at time and a half. Mr Kim responded noting that processing of public holidays had been done in a casual manner and questioned why Mr Jun and Ms Kim were seeking such entitlements when Dollar King did not take any issue him and Ms Kim occasionally not fulfilling their contracted hours of work. Mr Jun was shocked at the reference that he and Ms Kim were not fulfilling their contracted hours and requested further information.

[11] Without responding to Mr Jun's request for information, on 1 June 2018 Ms Kim was issued with a "letter of concern" in which Dollar King raised allegations about her conduct and punctuality. The letter stated that it was not a warning but would remain on Ms Kim's file. This was followed by the initiation of formal disciplinary processes relating to allegations of theft and poor timekeeping.

[12] On 5 July 2018 Ms Kim suffered an accident and was unable to work. Her injury was covered by the Accident Compensation Corporation (ACC).

[13] During July and concurrently with the disciplinary processes initiated against Ms Kim, Mr Jun was also subjected to separate disciplinary processes. He was given notice of his dismissal on 21 August with a last day of work of 3 September 2018.

[14] Ms Kim resigned from her employment on 7 September 2018 and raised a personal grievance for unjustified constructive dismissal. Dollar King denies Ms Kim was constructively dismissed.

Issues

[15] In order to resolve Ms Kim's application I must determine whether her resignation amounted to a constructive dismissal and if so, what if any remedies should be awarded.

[16] 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 as a result. It has not recorded all evidence and submissions received although all evidence and submissions have been carefully considered.

[17] All witnesses at the investigation meeting have English as a second language. For that reason I was assisted by the services of an interpreter in the Korean language during the investigation meeting and all documents produced in the Korean language were translated into English.

[18] In a related but separate matter Mr Jun challenged the conduct of Dollar King towards him. He lodged an application in the Authority claiming that he had been unjustifiably disadvantaged and unjustifiably dismissed. In an earlier determination I found one or more conditions of Mr Jun's employment had been affected to his disadvantage by the unjustified actions of Dollar King but found his dismissal to be justified.¹

Constructive dismissal

[19] On 7 September 2018 Ms Kim resigned from her employment. In her letter of resignation Ms Kim raised a personal grievance claiming her resignation was in law a constructive dismissal. Ms Kim alleged that she had no option but to resign from her employment because it was apparent to her that she would be subjected to a similar pattern of harassment as was used against her husband until her employment was terminated on vexatious grounds.

[20] A constructive dismissal is an apparent resignation which is, in reality an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of employment and entitles an employee to accept that repudiation by resigning the employment.

[21] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer or a course of conduct with a deliberate and dominant purpose of causing an employee to resign.²

[22] The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on

¹ *Jun v Dollar King* [2019] NZERA 722.

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.³

[23] If the motivation arises from a breach or breaches of the employers duty or other actions by the employer the Authority must determine whether the breach or other actions were sufficiently serious to make it reasonably foreseeable to Dollar King that Ms Kim would not be prepared to continue to work for it under those circumstances (making her resignation, in law, a constructive dismissal).⁴

[24] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.⁵ Constructive dismissal can consist of creating an atmosphere in which employment is unlikely to be able to continue or continue for very long.⁶

[25] Ms Kim claims her resignation arose from breaches of duty of good faith by Dollar King. She points to a number of issues that arose during the employment relationship each of which she says constitutes a breach which cumulatively entitled her to treat Dollar King's conduct as a repudiation of the employment relationship.

[26] In submissions Ms Kim set out a summary of the following key issues:

- a) Dollar King's refusal of Ms Kim's request for a pay review;
- b) Ms Kim was subjected to duress in relation to her union membership;
- c) The continuous raising of allegations of misconduct and serious misconduct against Ms Kim;
- d) Dollar King falsely reported to ACC that Ms Kim's claim was fraudulent;

³ *Commissioner of Police v Hawkins* [2009] NZCA 209.

⁴ Above n 1 at p 172.

⁵ *Wellington etc Clerical Workers Union IUOW v Greenwich*

⁶ *Harrod v DMG World Media* [2002] 2 ERNZ 410 at [41].

- e) Dollar King made it difficult for Ms Kim to use her annual leave when she needed to urgently return to Korea.

Pay review and terms of employment

[27] Ms Kim says Dollar King's rejection of her request for a pay review was without justification and that her terms of employment were unilaterally changed when Dollar King attempted to change her days of work. Ms Kim says these actions constituted a breach of good faith.

[28] As set out earlier, Ms Kim was offered a new employment agreement in April 2018 together with an associated pay increase. The new employment agreement also required Ms Kim to change her days of work to work on Sundays and taking another day as her day off.

[29] On 2 May 2018 Mr Jun was told Dollar King wished to have all of its store managers (including Mr Jun) working on the week days Monday to Friday inclusive. The reason for the change was so that store managers would be working at times when suppliers would be making enquiries and deliveries were being made. To give effect to the change Dollar King wanted Mr Jun and Ms Kim to change their days off.

[30] In support of her claim that it was a breach of good faith that her salary was not reviewed Ms Kim told me she had not received a pay increase since she had started with Dollar King in 2015. I have preferred the evidence from Dollar King that Ms Kim received salary increases between 2017 and 2018 taking her salary from \$37,000 in 2017 to \$38,000 then \$40,195.74 in 2018. I have also accepted Dollar King's evidence that Ms Kim received a bonus at the end of 2017 to recognise her efforts in achieving budgeted sales.

[31] The acceptance of a further increase to \$41,000 in April 2018 was subject to Ms Kim accepting the new employment agreement which also required a change in her days of work so that she would work on Sundays.

[32] Ms Kim rejected the new employment agreement. In doing so she rejected the offer of an increased salary and the proposed change in her days of work. There was no evidence to suggest Ms Kim was forced to change her days of work after she rejected the new employment agreement.

[33] The employment agreement signed by Ms Kim on 1 May 2017 provided for salary reviews to be conducted annually and stated that Dollar King had no obligation give Ms Kim an increase in her salary. The evidence shows Ms Kim's salary was reviewed on a regular basis.

[34] There has been no breach of duty on the part of Dollar King in respect of the offer of a new employment agreement in April 2018 and there has been no unilateral variation to Ms Kim's hours of work.

Duress with respect to union membership

[35] Ms Kim says Dollar King was not happy about her joining the union. Ms Kim and Mr Jun were invited to attend an informal meeting on 20 June 2018 to discuss the issues raised in the 1 June letter of concern.

[36] The meeting was attended by Ms Kim, Mr Jun and three managers from Dollar King: Mr Kim, Mr Hee Keon Lee, Chief Executive Officer, and Mr Andy Yoo, Chief Financial Officer.

[37] Ms Kim says the meeting was supposed to be a discussion about the alleged punctuality issues but instead it focussed on the fact that Mr Jun and Ms Kim had recently joined First Union.

[38] There is considerable dispute between the parties about the union membership discussion. I have carefully considered the evidence I heard from all witnesses about the discussion and after reviewing emails written shortly after the meeting I have concluded that Ms Kim and Mr Jun were asked about the benefits of union membership and on his and Ms Kim's behalf Mr Jun told the managers of the benefits he perceived in being members.

[39] Mr Lee told me he enquired about the union membership out of curiosity. I find it is likely that union membership was not contemplated by Mr Lee as being a positive move for the business. Mr Kim in his email to Mr Jun on 22 June refers to Mr Jun being asked if he was unwilling to discuss matters openly with management. Mr Kim alludes to this question being asked because of Mr Jun's repeated requests for evidence of the allegations made about him and Ms Kim and Mr Jun's actions in joining the union.

[40] Mr Jun says Mr Yoo told him and Ms Kim that the good faith relationship between them was soon to be over. This was denied by Dollar King.

[41] I have concluded on the balance of probabilities that Mr Yoo told Mr Jun and Ms Kim during the meeting that because of their actions in joining the union he [Mr Yoo] questioned whether the good faith relationship could be maintained.

[42] Mr Jun emailed Dollar King and expressed his and Ms Kim's concerns about the questions regarding their Union membership. Mr Jun asked Dollar King to refrain from questioning them about the matter in the future.

[43] In response Mr Yoo told Mr Jun and Ms Kim that the questions were asked out of curiosity. Their concern was that Dollar King thought Ms Kim, through her husband, was initiating a formal process by requesting specific evidence regarding the allegations about punctuality. Mr Yoo told Mr Jun and Ms Kim that if that was the case then the good relationship they had with Dollar King might be coming to an end.

[44] Ms Kim says that during the meeting she became extremely anxious about the possibility of losing her job due to her Union membership. She found it difficult to breathe, excused herself and left the meeting room. She says she then began vomiting. The meeting was adjourned and Mr Jun took Ms Kim to the hospital.

[45] Ms Kim commenced a period of sick leave and was due to return to work on 28 June 2018. Despite Ms Kim being on sick leave Dollar King requested a second meeting on 26 or 27 June 2018. Ms Kim asked for the meeting to be adjourned until she had been cleared to return to work.

[46] Ms Kim returned to work on 28 June but no steps were taken by Dollar King to reconvene the meeting.

[47] I have been provided with Ms Kim's medical records from 1 June to 9 October 2018. Those records confirm Ms Kim became unwell on 20 June 2018. The notes record that she first suffered from a headache, this was followed by stomach upset and she vomited in the car.

[48] The medical notes record that Ms Kim has experienced similar attacks 3-4 times a year and that it has been happening for a prolonged period of about 10 years.

[49] I have no doubt the questions about the union membership may have caused Ms Kim to become anxious. However, it is difficult to attribute her medical event as being caused by Dollar King when it was something she was experiencing on a regular basis and over a prolonged period of time. This was not a one-off event.

[50] Ms Kim has failed to establish the questions raised by Dollar King about her union membership was a breach of Dollar Kings duty of good faith.

Allegations of misconduct and serious misconduct

[51] Ms Kim says Dollar King breached its obligations of good faith when it issued her with the “letter of concern” dated 1 June and that a disciplinary process initiated on 13 July was put in place for dishonest reasons and in circumstances where the issues could have been resolved through honest and open communication. She says Dollar King insinuated in a letter dated 28 July 2018 that she had been stealing throughout her three years of employment which left her feeling ashamed and humiliated.

Letter of concern

[52] On 1 June 2018 Ms Kim received a “letter of concern” regarding her punctuality. Dollar King alleged Ms Kim was starting her shifts late and finishing early. While Dollar King made it clear the letter did not constitute a warning, Ms Kim was advised the letter would be retained on her personal file indefinitely.

[53] On receipt of the letter Ms Kim asked Mr Jun to represent her. Acting on her instructions Mr Jun contacted Mr Kim by email. While reiterating his request for a copy of the records setting out his and Ms Kim’s alternative holidays for working on public holidays, Mr Jun advised Mr Kim that Ms Kim was feeling threatened by the letter of concern and asked for evidence to support the concerns raised in the letter.

[54] In response Mr Kim advised Mr Jun Dollar King had no obligation to show him the evidence. Mr Kim advised Mr Jun Dollar King was not intending to take disciplinary action against Ms Kim and assured Mr Jun the letter to Ms Kim was simply to set out Dollar King’s concerns.

[55] Despite indicating that the letter of concern was not disciplinary, while Ms Kim was absent on a period of sick leave Mr Kim wrote to Mr Jun requesting a

response from Ms Kim to the letter of concern. They were both invited to attend a meeting on 20 June 2018 to discuss how the issues could be resolved.

[56] The letter of concern makes reference to previous discussions Mr Kim apparently held with Ms Kim about the issues raised. Ms Kim disputed any discussions had taken place prior to her receiving the letter. At the investigation meeting Mr Kim was unable to tell me when the discussions had taken place and what had been discussed. I have concluded Mr Kim did not have any discussions with Ms Kim about the issues identified in the letter of concern prior to it being issued.

[57] In accordance with the invitation in the letter for Ms Kim to raise any enquiries about the letter with Mr Kim, Mr Jun (on Ms Kim's behalf) requested Mr Kim provide information supporting the allegations. Mr Kim refused to do so.

[58] Section 4 of the Act requires an employer to be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative. The failure to address any concerns with Ms Kim before sending her the letter and referring to discussions that did not take place was a breach of this obligation. This was exacerbated by Mr Kim's refusal to provide the information on which Dollar King relied when setting out the allegations against Ms Kim.

[59] The letter also purported to remove day to day management of Ms Kim's hours of work from her manager, Mr Jun, to Mr Kim. This action was taken without any prior discussion or consultation with Ms Kim or Mr Jun.

[60] Given my findings I am satisfied Ms Kim has established that the issuing of the letter of concern dated 1 June 2018 was an action taken in breach of Dollar King's statutory obligations of good faith.

13 July disciplinary process

[61] A review of CCTV footage from the Tokoroa store showed Ms Kim taking a pair of socks from the display shelf and putting them on her feet on 28 June 2018. On 13 July Ms Kim was formally invited to attend a disciplinary meeting to answer allegations that she had stolen product from the store. Ms Kim was advised that if proven, the matter could be viewed as serious misconduct the consequences of which could be a warning or dismissal.

[62] At the time she received the 13 July letter Ms Kim was absent on ACC after suffering an injury. Despite her absence Ms Kim attended a meeting on 24 July 2018. She was represented at the meeting by her Union Organiser.

[63] At the meeting Ms Kim was shown the CCTV footage and acknowledged that on the morning of 28 June she had taken a pair of socks from the shop display and had put them on her feet. She explained to Mr Lee that she had permission from her manager (Mr Jun) to pay for the socks later as she did not have her eftpos card at the store that day. Ms Kim says she paid for the socks on 2 July during a telephone call with Mr Lee.

[64] After the meeting Mr Lee wrote to Ms Kim on 28 July confirming the allegations discussed with her on 24 July and setting out his understanding of her explanations. Mr Lee also set out the reasons why he did not accept Ms Kim's explanations. He then raised a further four allegations for which he wanted explanations.

[65] Mr Lee told me that Dollar King did not follow up on any of these allegations or take any disciplinary action against Ms Kim in relation to the issues raised with her on 13 and 28 July 2018.

[66] I find it is more likely than not that the issues raised by Dollar King in its letters of 14 and 28 July were not taken further because Ms Kim did not return to work. There is no evidence that Ms Kim was advised that Dollar King did not intend to pursue the disciplinary processes once she returned to work and therefore when she resigned these matters were, in her view, still current and would be concluded on her return to work.

[67] No disciplinary or other action was taken against Ms Kim in relation to the allegations. Ms Kim has not established a breach of good faith on the part of Dollar King in raising its concerns with her. Employers are expected to raise concerns as they arise which is what has happened in this case.

Implied allegations of ongoing theft

[68] Ms Kim says the following paragraph in Mr Lee's 28 July letter left her feeling ashamed and humiliated. Mr Lee states [verbatim]:

We suspect and worry that, this occurrence of taking things without payment wouldn't be the first time in the period of 3.2 years from your start date. This looked so casual in the CCTV footage as if you were the owner and you could take anything you need or like from the store without paying for them.

[69] I have no doubt that the suspicion that Ms Kim had been helping herself to product from the shelves without paying for it over a period of 3.2 years would have come as a shock to her.

[70] Because she resigned before the matter could be properly explored by either herself or Dollar King, it is difficult to find that in making the statement Dollar King has breached any duty owed to Ms Kim.

ACC dispute

[71] On 5 July 2018 Ms Kim slipped and injured her back and left leg while at the store. Ms Kim says she was stepping out of the store to take a call and while she was talking on the phone she slipped while also trying to pick up some rubbish. Her injury was covered by ACC.

[72] Ms Kim claims Dollar King made allegations about her to ACC stating that her ACC claim for the injury was fraudulent. Ms Kim says Dollar King did this without discussing its concerns with her first.

[73] Ms Kim says the subsequent investigation undertaken by ACC meant she had to return to New Zealand before her ill mother passed away and that this caused her to miss her mother's final moments. Ms Kim says the allegations made by Dollar King were a breach of its obligations to act in good faith.

[74] Ms Kim attended Tokoroa Hospital in the afternoon of 5 July and again on the morning of 6 July. The medical practitioner who treated Ms Kim at the hospital completed an ACC report form on which it was recorded that Ms Kim's accident was non-work related.

[75] Despite being seen by Hospital staff on 6 July Ms Kim wanted to visit her own general practitioner who is based in Auckland. Mr Jun agreed to drive Ms Kim to attend her own doctor and they left Tokoroa about 2 pm. Both Ms Kim and Mr Jun had taken a days' sick leave.

[76] At about 2.45 pm Mr Jun received a call from Mr Lee who advised Mr Jun he was in Tokoroa and he wished to meet with him at the Tokoroa McDonald's Restaurant. Mr Jun returned to Tokoroa and met with Mr Lee. During this time Ms Kim stayed in the car.

[77] There is a dispute about the length of the meeting. Ms Kim says the meeting lasted about 2 hours. Mr Lee says it was about 30 minutes. At the investigation meeting Ms Kim acknowledged that she did not check the time and was not able to confirm with any certainty how long the meeting lasted. I find it is more likely than not that the meeting took about 30 minutes. Mr Lee told me he could see Ms Kim in the car and could see that she was in pain.

[78] Ms Kim was issued with a medical certificate from Tokoroa Hospital putting her off work for a week. Ms Kim requested to take a week's sick leave to cover her first week of injury as that week was not covered by any ACC payments.

[79] Dollar King wished to ensure it was meeting its obligations under the ACC legislation so Mr Lee contacted ACC to check as to whether the injury was recorded as a work or non-work related claim. He was told by Ms Kim's case manager the injury was recorded as a non-work related injury. Dollar King paid Ms Kim for the first week of absence through the use of 3 days sick leave and 3 days alternative holidays.

[80] Ms Kim was interviewed about the injury by ACC on or about 20 July and on hearing that she suffered an accident while at work ACC amended its records to record the injury as a work related injury. Because of the change of status Dollar King was advised that the injury was being treated as work related and was sent a form to complete if it wished to dispute the nature of the claim.

[81] On 31 July 2018 a representative of Dollar King emailed ACC alleging that Ms Kim's claim was fraudulent. The email included links to videos to support Dollar King's assertions. This was followed by an email on 2 August advising ACC that Ms Kim had requested 15 days leave to go to Korea to see her sick mother and questioning whether Ms Kim could tolerate a 12 hour flight. Dollar King urged ACC to look into Ms Kim's claim as possible fraud.

[82] Ms Kim was not aware of the allegations being made about her claim. None of the managers from Dollar King spoke to her about the allegations before or after they were made.

[83] ACC contacted Ms Kim by telephone after receiving the email and a subsequent telephone call from Dollar King. During the call Ms Kim advised ACC that her mother was very sick in Korea, she was on oxygen and she [Ms Kim] had been advised to prepare for her mother's funeral. Ms Kim advised ACC that she may be going to Korea soon. ACC confirmed to Ms Kim that she would be covered until 9 September in line with her medical certificate. ACC did not raise any concerns about with Ms Kim about her travel plans.

[84] Ms Kim was advised Dollar King was disputing that her injury was a work related injury and that a form would be sent to her by email for completion. ACC did not advise Ms Kim that Dollar King had alleged her claim was fraudulent.

[85] Due to the dispute over whether Ms Kim's injury was work related or not, Ms Kim was required to complete a work injury questionnaire form and return it to ACC by 16 August. This date was later extended to 22 August. Ms Kim was in contact with ACC via email while she was in Korea. Ms Kim claims that having to complete the form meant she had to return to New Zealand earlier than anticipated and so was not in Korea when her mother passed away.

[86] I am satisfied Ms Kim was not required to return to New Zealand earlier than she had anticipated. In her email correspondence with ACC on 14 August Ms Kim requested the extension to completing and returning the questionnaire form from 16 August. Her request was granted and the date was amended to 22 August. ACC does not state that Ms Kim is required to return the form in person. It seems to me on reading the email from ACC Ms Kim could have returned the form by email.

[87] Further, in her email on 14 August Ms Kim advised ACC that she was "...going back to NZ 20th August." Ms Kim arrived back in New Zealand on 21 August 2018.

[88] I find it is more likely than not that Ms Kim had always intended to return to New Zealand on or about 21 August. This finding is supported by the original application for leave made by Ms Kim in which she requested leave until 18 August 2018.

[89] I am satisfied an employer being active and constructive in maintaining a productive employment relationship and being responsive and communicative would have discussed its concerns about Ms Kim's ACC claim with her before making serious allegations of fraud against her. The failure to do so was a breach of Dollar King's statutory obligations of good faith.

[90] However, at the time Ms Kim resigned from her employment, she was not aware of the allegations that had been made. Ms Kim only became aware of the allegations after the employment relationship ended so could not have influenced her decision to resign from her employment.

Annual leave request

[91] Ms Kim claims she was treated harshly and insensitively while she was on sick leave in June and again when she requested annual leave to be with her terminally ill mother in Korea.

June absence

[92] Ms Kim was absent on sick leave for a week following the 20 June meeting. While she was absent Dollar King attempted to set up a second meeting despite being aware that she was not due to return to work until 28 June.

[93] I am not satisfied there was any breach of good faith on the part of Dollar King when it attempted to reconvene the 20 June meeting. It accepted Ms Kim's response to its request for a meeting and did not pursue the matter.

August absence

[94] When Ms Kim learned on 2 August that her mother in Korea was seriously ill both her and Mr Jun applied to take paid leave to be with Ms Kim's mother. Mr Jun completed both leave request forms on his own and Ms Kim's behalf.

[95] On receipt of the forms Dollar King required Ms Kim to complete her own leave form. When she did, Mr Kim wrote to Ms Kim advising her that due to operational requirements her leave would not be approved. Mr Kim explained that Ms Kim had failed to provide sufficient notice of her request and Dollar King was unable to organise suitable cover to assist with running the store in her absence.

[96] Ms Kim was advised that any absence without authorisation may be viewed as serious misconduct resulting in termination without notice.

[97] Mr Jun's leave was approved.

[98] Ms Kim asked the Union to intervene on her behalf because she felt the rejection of her application for leave was unreasonable. Ms Kim was at that time off work and in receipt of ACC payments. On her behalf the Union sent an updated medical certificate confirming Ms Kim would not return to work until 9 September 2018. In its covering email the Union advised Dollar King Ms Kim would be travelling to Korea to visit her ill mother and that she would be accompanied by her son who would be looking after Ms Kim during their journey. Mr Jun withdrew his application for leave and remained in New Zealand to run the store.

[99] No further issues were raised with Ms Kim in respect of her travel to Korea.

[100] Dollar King's response to Ms Kim regarding her request for leave to visit her terminally ill mother is surprising. Ms Kim was already absent on ACC so any operational needs as a result of her absence must already have been addressed. It would have been more logical to reject Mr Jun's application given that he was the Manager of the store and his absence would have had a bigger impact on its operations than Ms Kim travelling out of New Zealand while on ACC.

[101] While surprising, I am not satisfied Dollar King's treatment of Ms Kim over her application for leave was a breach of good faith.

Conclusion

[102] Ms Kim says Dollar King's conduct toward her from June to August 2018 amounted to dismissive and repudiatory conduct causing her to resign. Ms Kim says her husband was dismissed for dishonest and invalid reasons which meant her dismissal was inevitable.

[103] Dollar King denies it acted in a dismissive way. It says it raised genuine concerns on a number of occasions and provided Ms Kim with reasonable opportunities to respond. Dollar King says the disciplinary processes had concluded two months before Ms Kim's resignation so could not have been the cause of her resigning from her employment.

[104] Further Dollar King says its actions were not calculated to destroy the employment relationship nor intended to induce Ms Kim's resignation. It says its actions in conducting a genuine disciplinary process did not undermine the trust and confidence in the employment relationship such that Ms Kim had no option but to resign.

[105] Finally, Dollar King says Ms Kim did not raise any concerns with it before offering her resignation so the respondent was provided with no opportunity to remedy Ms Kim's concerns.

[106] In an earlier determination I found Mr Jun had been justifiably dismissed after he had posted disparaging remarks about his employer on a Korean community social media page.

[107] While Dollar King was entitled to raise concerns about Ms Kim's conduct I find the way it approached its concerns in its letter dated 1 June was a breach of its statutory duty of good faith. At the time Ms Kim resigned from her employment the issues raised in the letters of 14 and 28 July had not been concluded and as far as Ms Kim was aware still needed to be addressed.

[108] In her resignation letter Ms Kim refers to the treatment suffered by Mr Jun and sets out her view that Dollar King was following a similar pattern of harassment with the clear intention of terminating her employment. Under those circumstances Ms Kim felt she was left with no option but to resign.

[109] Ms Kim raised a personal grievance by letter dated 1 October 2018. In her letter Ms Kim says Mr Jun's dismissal was the final straw for her.

[110] It will be an unusual case where the "final straw" consists of conduct which viewed objectively as reasonable and justifiable, satisfies the final straw test.⁷ Mr Jun's dismissal was found to be justified and he has not challenged that finding. Ms Kim viewed Mr Jun's dismissal as being destructive of the necessary trust and confidence. However, her interpretation of his dismissal has been shown to be mistaken.

⁷ *Pivot v Southern Adult Literacy Inc* [2013] NZEmpC 236 at [72].

[111] I find on balance the motivation for Ms Kim's resignation had more to do with the fact that she and Mr Jun had a permanent residence in Auckland and it was likely, following the ending of his employment relationship that Mr Jun would return there meaning Ms Kim would want to be there also.

[112] While there is evidence of breaches of good faith on the part of Dollar King I find they were not so serious as to entitle Ms Kim to say she could not be expected to go on working for Dollar King.

[113] In all the circumstances of this case I find Ms Kim has not established to my satisfaction that Dollar King's conduct was repudiatory or dismissive sufficient to justify the termination of the employment relationship.

[114] Ms Kim's application is declined.

Costs

[115] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Dollar King shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Kim shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[116] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority