

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 70
3057273

BETWEEN MINSOOK LEE
 Applicant

AND JNJ MANAGEMENT
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Adam Mapu, advocate for Applicant
 Julia Leenoh, counsel for Respondent

Investigation Meeting: 29 and 30 October 2020

Submissions Received: 13 and 30 November 2020 from Applicant
 20 November 2020 from Respondent

Determination: 24 February 2021

DETERMINATION OF THE AUTHORITY

- A. Ms Lee was subject to unfair bargaining. JNJ Management Limited is ordered to pay to Ms Lee the sum of \$4,000 as compensation under s 69(1)(a) of the Act within 28 days of the date of this determination.**
- B. One or more conditions of Ms Lee’s employment were affected to her disadvantage by the unjustified actions of JNJ Management Limited. In resolution of her grievance JNJ Management Limited is ordered to pay to Ms Lee the sum of**

\$7,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

C. Ms Lee was not unjustifiably constructively dismissed.

D. Costs are reserved.

Employment relationship problem

[1] Ms Lee is a Korean national. She was employed by JNJ Management Limited (JNJ) as Secretary to Mr Kwak, the Chairman of JNJ, from 4 September 2017 until 22 March 2019. JNJ operates a business in real estate planning and development, and building lease management.

[2] Ms Lee was dependent on JNJ to support her work visa and for whom English is a second language. Ms Lee's circumstances put her in a category of employee whom the Employment Court has characterised as inherently vulnerable.

[3] During her employment Ms Lee raised concerns about her workload and her manager's conduct towards her. Ms Lee resigned from her employment on 18 February 2019. While working out her notice Ms Lee was issued with a warning.

[4] Ms Lee challenges the ending of her employment claiming it was in fact a dismissal. Ms Lee also claims one or more conditions of her employment have been affected to her disadvantage by the unjustified actions of JNJ, that she was illegally employed between September 2017 and 28 March 2018 because she did not have a valid work visa, JNJ breached its statutory obligations of good faith and she was subject to unfair bargaining.

[5] JNJ denies the claims.

Issues

[6] In order to resolve Ms Lee's employment relationship problems I must determine the following issues:

a) Was Ms Lee working illegally?

- b) Were one or more conditions of Ms Lee's employment affected to her disadvantage by the unjustified actions of JNJ?
- a) Was Ms Lee subject to unfair bargaining and if so, what if any remedies should be awarded?
- b) Was Ms Lee unjustifiably constructively dismissed?
- c) If Ms Lee has suffered a disadvantage and/or was unjustifiably dismissed, what if any remedies should be awarded?
- d) Did JNJ breach its statutory duty of good faith and if so, should penalties be imposed on JNJ for its breaches?

[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 as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[8] Ms Lee was living and working in Korea when she was alerted to an employment opportunity in New Zealand. On 27 March 2017 Ms Lee was contacted by a recruitment company in Korea which was assisting JNJ in the search for a secretary for Mr Kwak. In an email to Ms Lee the recruiter noted that no support would be provided for residence, although the company would support Ms Lee in an application for a work visa and residency visa.

[9] Ms Lee was interested in the position, applied and was the successful candidate.

[10] Following negotiations between the parties Ms Lee was provided with a copy of a proposed employment agreement.

[11] On 10 August 2017 before signing the employment agreement, Ms Lee accepted JNJ's offer to provide support by way of a vehicle and accommodation for four weeks on her arrival in New Zealand. The email does not attribute a value to either the accommodation or the vehicle and does not stipulate any intention that Ms Lee would be required to reimburse JNJ for the cost of the support.

[12] After receiving this further offer Ms Lee signed the employment agreement.

[13] Ms Lee moved, with her husband, to New Zealand to take up her employment on 2 September 2017. The couple left their children in Korea and planned to fly them out to New Zealand once Ms Lee's work visa had been granted.

[14] In accordance with the promise of accommodation and the use of vehicle, the couple were accommodated at Mr Kwak's residence and were provided with a vehicle owned by Ms Sasha Lee, who was at that time, Mr Kwak's life partner and personal assistant.

[15] Ms Lee and her husband became uncomfortable with the arrangement of living with Mr Kwak and Sasha Lee and made arrangements to move into an Air BNB on 9 September 2017. The accommodation at the Air BNB was substandard and they contacted Mr Kwak and asked if they could return to his home. Mr Kwak agreed and they moved back that same day.

[16] At the end of the four weeks Ms Lee and her husband left Mr Kwak's home on 30 September 2017. They moved into an Air BNB before moving into their own rental accommodation on 7 October 2017.

[17] Despite not being granted a work visa Ms Lee started working for JNJ on or about 4 September 2017. She was paid an annual salary of \$35,000. This was increased to \$60,000 on 1 December 2017.

[18] By agreement, JNJ assisted Ms Lee with payment of her initial application for a work visa totaling \$3,450 after she arrived in New Zealand. Ms Lee repaid this money through deductions from her weekly wages. The visa application was lodged with Immigration New Zealand on 24 October 2017.

[19] On 19 October 2017 Ms Lee was asked to sign a document in which she agreed to repay the costs paid by JNJ to support her relocation should she resign within two years of receiving her work visa. The document stated the following amounts would be payable:

- a) Accommodation support \$300 per week for four weeks totaling \$1,200;

b) Vehicle support \$200 per week for four weeks totaling \$800.

[20] Ms Lee signed the document because she felt she had no option but to do so. At that time she was relying on JNJ to support her application for a work visa.

[21] On 28 November 2017 Ms Lee was notified that her application for a work visa had been declined. This came as a surprise to Ms Lee because during her discussions with the recruiter and before arriving in New Zealand Ms Lee had been forwarded information from JNJ which included the statement that:

Our company ... has a good relationship with immigration which makes work visas to be issued with ease.

[22] Ms Lee was advised that her application had been declined because JNJ had failed to secure a building warrant of fitness for the building in which Ms Lee was to work.

[23] The declination of the work visa meant Ms Lee was required to make a second application. JNJ agreed to pay the fees associated with the second application after Ms Lee agreed the money for the application would be considered a loan.

[24] Ms Lee was asked to sign and did sign a second document on 15 March 2018 which states that she and Mr Kwak agreed that Ms Lee will repay the costs of the second visa application amounting to \$3,414.35 if she resigned within two years of her visa being granted.

[25] The documents signed by Ms Lee on 19 October 2017 and 15 March 2018 form part of proceedings lodged in the District Court. In its submissions JNJ advises it has agreed to withdraw its claims in the District Court.

Was Ms Lee working illegally?

[26] When she arrived in New Zealand Ms Lee entered under the conditions of a visitor visa. The conditions attached to this visa meant that Ms Lee was not legally entitled to work in New Zealand.

[27] Ms Lee started working for JNJ on or about 4 September 2017. She was not granted a valid work visa until 28 March 2018. In the absence of a valid work visa it is apparent Ms Lee was working illegally from 4 September 2017 to 28 March 2018.

[28] Ms Lee was aware that she could not legally work in New Zealand until she had a valid work visa. The employment agreement signed by Ms Lee on 10 August 2017 correctly states that the start date of her employment was dependent on her visa.

[29] Ms Lee says she felt she had no option but to work for JNJ despite not having a valid work visa because of the accommodation situation and the bonding to her employment as a result of the two documents she signed on 19 October 2017 and 15 March 2018 respectively.

[30] While the accommodation situation may have left Ms Lee feeling uncomfortable, the documents she signed on 19 October 2017 and 15 March 2018 were not signed until after she had started working illegally for JNJ so they could not have influenced her breach of her visitor visa.

[31] Mr Martin Symes, Ms Lee's husband, told me he was also working for JNJ illegally and that he was aware of the requirement to hold a valid work visa before he was entitled to work in New Zealand legally.

[32] JNJ condoned and encouraged the conduct of both Ms Lee and Mr Symes undertaking work in breach of their legal obligations to have a valid work visa and Mr Kwak was aware they were working illegally. Mr Kwak covered Ms Lee's actions by directing the company accountant to calculate and pay Ms Lee from his personal account and to pay her in cash until she received her work visa. While PAYE was deducted from Ms Lee's gross earnings each week the money was never remitted to the Inland Revenue. It appears Mr Kwak has retained the PAYE deductions.

[33] For the sake of completeness I record my finding that it appears Ms Lee worked illegally for JNJ and that work was encouraged by JNJ through Mr Kwak's actions. Appropriately, no remedies have been sought in relation to this allegation. The Authority has no jurisdiction in relation to immigration breaches.

Unjustified disadvantage

[34] Ms Lee claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of JNJ when it:

- a) Expected Ms Lee to work an unreasonable workload;

- b) Conducted an unfair disciplinary process which resulted in a warning; and
- c) Breached its statutory obligations of good faith.

[35] Under s 103(1)(b) of the Act an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[36] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Unreasonable workload

[37] Ms Lee took instructions for her work from Sasha Lee. This included Sasha Lee delegating various tasks given to her by Mr Kwak. Mr Raghu Koneru was the Assistant Manager with responsibilities for Human Resources (HR). Mr Koneru told me Ms Lee's workload was complex. He confirmed that she would often be asked by Sasha Lee to undertake tasks that Ms Lee did not have the appropriate experience to take on.

[38] In November 2018 Ms Lee was assigned the task of implementing a property management system and was instructed to co-ordinate the project to facilitate a transfer of systems by 1 March 2019 (the PMS Project).

[39] The project was subject to a number of delays during November 2018 and February 2019. During a meeting on 11 February 2019 to discuss the project, Ms Lee advised that she was having difficulty handling too many matters and managing her time. The concerns were acknowledged and it was agreed existing staff would be utilised to assist Ms Lee. Sasha Lee acknowledged that the plan had been to recruit a support person to upload data into the PMS system but that this had not happened as it had been too difficult to find someone.

[40] In the early hours of Friday, 14 February 2019 Ms Lee wrote a detailed email to Sasha Lee setting out concerns she held about her workload. In particular Ms Lee was concerned that the assignment of the PMS project would take her away from her usual day to day tasks for at least two whole days. Ms Lee sought assurances that she would not be held accountable for any inevitable backlog or delays experienced on other tasks and asked for a constructive solution to resolving her workload issues.

[41] During a subsequent meeting later that day, Ms Lee asked if Mr Koneru could assist her with the PMS Project. Sasha Lee told Ms Lee that Mr Koneru was too busy with other tasks and would be unable to assist for at least a month. Another employee was offered to assist. Ms Lee told me the employee suggested by Sasha Lee did not have the competencies to properly carry out the required tasks and would need to be trained. She told me this would only prolong the time required to complete the project and was not a suitable option.

[42] During the meeting on 14 February 2019 Ms Lee enquired about the additional resource that had been discussed on 11 February 2019. Sasha Lee advised her that she had tried her networks but had not been able to find anyone. Sasha Lee told Ms Lee she had instructed HR to look for someone. In answer to questions at the investigation meeting Mr Koneru told me he had received no instructions from Sasha Lee to recruit anyone until after Ms Lee had resigned her employment.

[43] During the meeting on 14 February 2019 offers of assistance were made to Ms Lee from other employees including Sasha Lee. Ms Lee told me she did not take them up on their offers because she did not consider them genuine.

[44] Ms Lee held genuine concerns about her workload and these concerns were shared by Sasha Lee. Mr Kwak says he first became aware of Ms Lee's concerns about her workload when he read the minutes of the meeting between Sasha Lee and Ms Lee on 11 February 2019. He told me as soon as he became aware he made the decision for resources to be diverted and to recruit someone to assist her.

[45] Mr Kwak's evidence is not consistent with the contemporaneous notes of the 11 February 2019 meeting where it is recorded that Sasha Lee acknowledged a previous decision had already been made to recruit support to upload data to the PMS system.

[46] At the 14 February 2019 meeting Sasha Lee informed Ms Lee that her attempts to find an additional resource had been unsuccessful and was too difficult. Instead a decision was made to divert one resource from within the existing staff to assist Ms Lee.

[47] The employee suggested by Sasha Lee was not agreeable to Ms Lee because, in her view, the person did not have the training necessary to enable him to assist immediately. Ms Lee told me the person would require many hours of training to ensure he could undertake the required tasks competently.

[48] Ms Lee has established one or more conditions of her employment were affected to her disadvantage as a result of her workload. It was common ground that Ms Lee was struggling with her workload. This was acknowledged by the witnesses for both parties. After the meeting on 14 February 2019, Ms Lee commenced a period of sick leave which she has attributed as being necessary due to the stress of trying to cope with her workload. She resigned three days later.

[49] Having found Ms Lee's employment was affected to her disadvantage I must also consider whether the actions taken by JNJ were actions an employer acting fairly and reasonably could take.

[50] In the circumstances of this case I am satisfied JNJ has acted fairly and reasonably. It followed up on its promise to recruit a support person to assist Ms Lee but was struggling to find someone and it offered options of support from within the business which were rejected by Ms Lee.

[51] Ms Lee resigned three days after being offered additional support including a promise that a new person would be recruited to assist her. JNJ was not provided with a reasonable opportunity to properly address her workload concerns.

18 February 2019 Warning

[52] The employment agreement sets out the obligations and expectations of the parties. Appendix 3 contains a code of conduct which sets out examples of behaviour that will constitute misconduct and serious misconduct. The code sets out the steps required to be taken where breaches of the code are alleged. The steps require, among other things, for JNJ to invite Ms Lee to have a representative of her choice present at all meetings relating to disciplinary procedures.

[53] On 27 February 2019 Ms Lee received a written warning dated 18 February 2019. The letter is headed up “Second Warning Letter” and came out of the discussion held on 14 February 2019.

[54] The 18 February 2019 letter followed a number of other meetings in May and June 2018 at which time Ms Lee’s performance and compliance with employment obligations had been discussed with her.

May 2018

[55] On 27 April 2018 Ms Lee was assigned the task of responding to questions raised by a local law firm. Sasha Lee says Ms Lee was given reminders to action the task throughout May 2018.

[56] On 24 May 2018 Ms Lee met with Sasha Lee to discuss progress on the task. During the meeting Ms Lee admitted she had forgotten the task and had not taken any steps to progress it. Ms Lee apologised for her oversight and accepted the delay was her fault. Later that day Ms Lee was issued with a “...first warning notice...”. This first warning has not been challenged and I have referred to it simply to provide context for what followed.

June 2018

[57] In June 2018 Ms Lee was assigned the task of engaging a new insurance company to insure JNJ’s building and progressing the sale of its bowling alley. JNJ was unable to secure insurance at a better rate and was unable to sell the bowling alley despite having several interested purchasers.

[58] In a meeting to discuss the next steps, Ms Lee advised Mr Kwak that she had mistakenly shared confidential information with the insurance broker and a potential purchaser of the bowling alley. No disciplinary action was taken at this time and Ms Lee was encouraged to learn from her mistake.

Conclusion

[59] For the following reasons I have concluded the issuing of the second warning dated 18 February 2019 led to one or more conditions of Ms Lee’s employment being affected to her disadvantage and was not an action an employer acting fairly and reasonably could take:

- a) Ms Lee was not advised prior to the 14 February 2019 meeting, of the issues to be discussed and was not told a possible consequence of the meeting could be a warning;
- b) Ms Lee was not provided with the opportunity to have a representative with her at the meeting and was not told of her right to seek advice;
- c) The warning was issued without any opportunity for Ms Lee to comment upon it prior to it being issued.

[60] It seems unlikely to be coincidental that the letter of warning was written on the same day Ms Lee resigned from her employment.

[61] The defects in the process used by JNJ leading up to the issue of the warning were not minor and led to Ms Lee being treated unfairly. Ms Lee has established a personal grievance in relation to the issue of the second written warning and is entitled to a consideration of remedies which have been addressed later in this determination.

Breach of good faith

[62] I am satisfied the allegations of breach of good faith relate to the processes used by JNJ when issuing the warning to Ms Lee and the breaches have been established.

[63] I consider the good faith issues raised by Ms Lee have been captured by the personal grievance claim and wish to avoid the prospect of Ms Lee double dipping for grievance remedies and penalties.

[64] Because Ms Lee has been awarded compensation for the breaches by JNJ as a result of establishing a personal grievance no penalties will be imposed.

Unfair bargaining

[65] This claim relates to the two documents signed on 19 October 2017 and 15 March 2018. There is a dispute about whether these documents form part of Ms Lee's employment agreement and if so, whether the bargaining over the agreement was unfair.

[66] Mr Kwak says both agreements were personal agreements between Ms Lee and himself and did not form part of the terms of employment. For the following reasons

I find both documents were written variations to and form part of Ms Lee's employment agreement:

- a) The parties in both documents are Ms Lee and Mr Kwak "...as the director of JNJ Management Limited". When Mr Kwak signed the agreement he did so in his capacity as a director of JNJ;
- b) The body of both documents refer to funds having been paid by the company and not Mr Kwak personally;
- c) The address is the business address for JNJ and not Mr Kwak's personal address; and
- d) The offer of accommodation and the vehicle were made to Ms Lee as part of the offer of employment before she signed the employment agreement.

[67] Ms Lee claims the bargaining for the variations to the employment agreement was unfair under s 68 of the Act and seeks remedies under s 69 of the Act.

Section 68 of the Act

[68] Section 68 of the Act deals with unfair bargaining as follows:

68 Unfair bargaining for individual employment agreements

(1) Bargaining for an individual employment agreement is unfair if—

- (a) 1 or more of paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (person A); and
- (b) the other party to the agreement (person B) or another person who is acting on person B's behalf—
 - (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or
 - (ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.

(2) The circumstances are that person A, at the time of bargaining for or entering into the agreement,—

- (a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—
 - (i) age; or
 - (ii) sickness; or
 - (iii) mental or educational disability; or
 - (iv) a disability relating to communication; or emotional distress; or
 - (b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf; or
 - (c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or
 - (d) where section [63A] applied, did not have the information or the opportunity to seek advice as required by that section.
- (3) In this section, individual employment agreement includes a term or condition of an individual employment agreement.
- (1) Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.

[69] Ms Lee relies on s 68(2)(d) of the Act in her claim of unfair bargaining. Section 63A of the Act applies to s 68(2)(d) of the Act and to variations to an employment agreement.¹ Section 63A of the Act required JNJ to provide to Ms Lee a copy of the intended agreement and advise her of her right to seek independent advice and give her an opportunity to seek that advice. JNJ did not comply with its statutory duty in respect of either of the two variations it entered into with Ms Lee.

[70] JNJ knew or ought to have known Ms Lee did not have the opportunity to seek advice as required by section 63A. Pursuant to s 68(2)(d) I find the bargaining over the two variations to Ms Lee's employment agreement dated 19 October 2017 and 15 March 2018 was unfair.

Remedies for unfair bargaining

[71] Section 69 of the Act confers a wide discretion on the Authority to grant remedies if a party is found to have bargained unfairly. Remedies include payment of

¹ Employment Relations Act 2000, s 63A(1)(e).

compensation, an order cancelling or varying the agreement or any order the Authority thinks fit.

[72] In her statement of problem Ms Lee sought compensation for the stress she has endured in relation to the District Court proceedings taken by JNJ in relation to the two agreements and reimbursement of the costs associated with defending that matter.

[73] In his submissions Mr Mapu submitted a penalty for a breach of s 63A of the Act is appropriate. I have declined this late request for a penalty to be imposed. This was not specified as a remedy in the statement of problem and so JNJ was not on notice that a penalty for this action was being sought. Submissions is not the appropriate place to raise new claims.

[74] I have concluded a payment of compensation under s 69(1)(a) of the Act is appropriate in this case.

[75] JNJ Management Limited is ordered to pay to Ms Lee the sum of \$4,000 as compensation under s 69(1)(a) of the Act within 28 days of the date of this determination.

Unjustified constructive dismissal

[76] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:²

- a) An employer gives the employee the choice of resignation or dismissal;
- b) An employer follows a course of conduct with the ‘deliberate and dominant purpose’ of coercing an employee to resign;
- c) A breach of duty by the employer leads an employee to resign.

[77] The present case concerns the third of these categories.

[78] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.*, stated:³

² *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

³ [1994] 1 ERNZ 168 (CA).

In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[79] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, JNJ must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

Ms Lee's resignation

[80] After the meeting on 11 February 2019 failed to address Ms Lee's concerns about her workload, she wrote a comprehensive email in the early hours of the morning on 14 February 2019 setting out her concerns and seeking assistance.

[81] The email resulted in the 14 February 2019 meeting. The meeting on 14 February 2019 covered not only the issues raised by Ms Lee in her email earlier that morning, but also a number of other tasks and performance issues identified by Sasha Lee.

[82] On 15 February 2019 Ms Lee emailed Sasha Lee setting out her concerns about the conduct of the meeting held the previous day including the length of the meeting, which had taken approximately 75 minutes. Ms Lee noted in her email that she had broken down after arriving at home the previous day and that she could not continue to work in the current circumstances.

[83] Ms Lee commenced a period of sick leave on 15 February 2019. On 18 February 2019 while she was on sick leave Ms Lee emailed Mr Kwak advising him of her resignation. Later that same day Ms Lee confirmed her last day of work would be 15 March 2019 and requested that two of her sick leave days be treated as annual leave. She advised Mr Kwak of her intention to return to work on 25 February 2019.

[84] On 19 February 2019 Ms Lee asked to meet with Mr Kwak the following Monday to discuss her exit from JNJ. Ms Lee advised Mr Kwak that she would be

accompanied by a support person at that meeting as she had by now, sought the assistance of an advocate. While there was an agreement to meet, Ms Lee was told a support person would not be welcome.

[85] On 4 March 2019 Ms Lee met with Mr Kwak where they discussed Ms Lee's resignation and other concerns Ms Lee had raised. At this meeting Ms Lee confirmed her decision to resign.

[86] On 15 March 2019 Ms Lee requested and was granted an extension to her notice period. The extension was to accommodate a handover to the employee who had been engaged to take over Ms Lee's role. The request was granted and Ms Lee's final day of employment was confirmed as 22 March 2019.

[87] Later that same day Ms Lee requested a further four week extension to her notice period. This request was not responded to by JNJ. Mr Kwak told me he was still considering it when Ms Lee left the office on 18 March 2019 and never returned.

Conclusion

[88] Assessing the overall evidence I am not satisfied Ms Lee has established a breach of duty on the part of JNJ. The catalyst for Ms Lee's resignation was the 14 February 2019 meeting following which, she took a period of sick leave.

[89] Ms Lee was offered assistance and support with the PMS system which she rejected. At the investigation meeting she conceded that her perception that the offers were not genuine may have been misplaced.

[90] Ms Lee is not able to rely on the second warning to support her decision to resign because that letter, while dated 18 February 2019, was not given to her until 27 February 2019.

[91] Ms Lee's email resigning from her employment is cordial and did not contain any suggestion that she considered JNJ had repudiated the employment agreement. At the investigation meeting Ms Lee confirmed that the decision to resign was made on her own accord and she reiterated a number of times during her notice period that she wished to resign.

[92] In her email on 15 March 2019 requesting a further extension to her notice period Ms Lee states:

I am now grateful that you have given me the opportunity to be positive and focus on getting through the works that matter to the Company. I am happy that I have been able to contribute and continue working with you and the colleagues who have been supportive and helpful. Although I have told you more than once that I decided to leave JNJ, I am now more than happy to work for another four weeks to contribute even further and to help the new starters to settle into their work more smoothly.

[93] Mr Kwak did not approve or decline Ms Lee's application for a further extension beyond 22 March 2019, although he did advise her it was under consideration.

[94] On 18 March 2019 Ms Lee attended work but says her work station had been moved. She raised concerns about this and has indicated this was a further step taken by JNJ to secure her resignation. That this was a step taken to secure her resignation cannot be correct because Ms Lee had resigned a month earlier, on 18 February 2019.

[95] Ms Lee had work stations on two levels within the building in which she worked. On 18 March 2019 Ms Lee was asked to work only on level two so that she could assist a new employee and conduct a handover of work. Ms Lee was upset about this and when she could not locate Mr Kwak to confirm the extension to her notice period she offered up her key and access card and left the office.

[96] Ms Lee did not return to the office. Instead she conducted further dialogue with Mr Kwak and Sasha Lee via email. It was made clear to Ms Lee that her request for an extension to her notice period was still in contemplation and she was welcome to return to work. JNJ offered to make temporary access cards available to her to accommodate her return to complete her notice period.

[97] Ms Lee also points to actions taken by JNJ to enforce the two variations to her employment agreement through the District Court as contributing factors in her decision to resign. The difficulty with this is that Ms Lee had resigned before these actions were contemplated or taken by JNJ so could not have influenced her decision to resign.

[98] Ms Lee has failed to establish to my satisfaction a breach of duty on the part of JNJ. Even if I am wrong about that conclusion Ms Lee would need to establish that there was a causative link between her resignation and a breach of sufficient seriousness

to make her resignation reasonably foreseeable.⁴ That threshold has not been met. None of the pleaded breaches, either by itself or in combination with any other breach, would have made the resignation foreseeable. Ms Lee's application for remedies for constructive dismissal is declined.

Remedies

[99] Having established a personal grievance for unjustified disadvantage I may award any of the remedies provided for under s 123 of the Act. In this regard Ms Lee seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[100] Ms Lee did not suffer from any lost wages as a result of the unjustified warning dated 18 February 2019. For that reason no order for reimbursement of lost wages will be made.

[101] Ms Lee's evidence regarding compensation focusses on her claim for unjustified constructive dismissal and does not address in any real way, the impact on her of receiving the second warning letter dated 18 February 2019.

[102] There will be some inherent hurt and humiliation where, as here, no process led up to the issue of the warning and the meeting leading up to the warning had been initiated by Ms Lee as a result of the issues raised by her in her 14 February 2019 email.

[103] I consider in all the circumstances of this case that Ms Lee should receive \$7,000 as being a fair and just award.

[104] JNJ Management Limited is ordered to pay to Ms Lee the sum of \$7,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[105] Having found Ms Lee is entitled remedies for her personal grievance for unjustified disadvantage, I am required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance. I am satisfied Ms Lee did not contribute in any blameworthy way to her unjustified disadvantage grievance and there will be no reduction to the remedies awarded.

⁴ Above n 2.

Costs

[106] Costs are reserved. The parties are invited to resolve the matter. Both parties have had a modicum of success. If they are unable to resolve the matter of costs the parties shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. The parties shall have a further seven 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.

[107] 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