

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 182
3158981

BETWEEN	SEULBI GANG Applicant
AND	KNCC LIMITED First Respondent
AND	JAEHO HUH Second Respondent
AND	JAE JEONG JANG Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Seungmin Kang, counsel for the Applicant Hiruni Wijewardhana/Melissa Johnston, counsel for the Respondent
Investigation Meeting:	8 to 10 March 2023
Submissions and/or further evidence	15 March 2023 from the Applicant and from the Respondent
Determination:	14 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Seulbi Gang, claims that she was unjustifiably disadvantaged and constructively dismissed by the First Respondent, KNCC Limited.

[2] Ms Gang also claims that the Second Respondent, Jaeho Huh, and Third Respondent, Jae Jeong Jang, aided and abetted the personal grievances.

[3] The First Respondent denies that Ms Gang was constructively dismissed and unjustifiably disadvantaged and claims that she voluntarily resigned from her employment.

The Authority's investigation

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant Ms Gang.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Mr Jang, Technical Director, and Mr Eugene McLaren, Associate Director.

[6] The Authority was assisted by the services of an interpreter in the Korean language when taking and receiving evidence from the witnesses.

[7] I also received submissions from the representative for the Applicant and counsel for the Respondent. Note counsel for the Respondent did not attend the investigation meeting.

[8] 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.

Issues

[9] The issues requiring investigation are whether or not:

- Ms Gang was constructively dismissed by KNCC?
- Ms Gang was unjustifiably disadvantaged by bullying and harassment?
- Penalties should be ordered against KNCC for failing to provide Ms Gang with a healthy and safe workplace and if so, in what quantum?
- Mr Huh and/or Mr Jang aided and abetted KNCC to breach its duty to provide Ms Seulbi with a safe working environment?
- Penalties should be awarded against Mr Huh and/or Mr Jang for aiding and abetting and if so, in what quantum?
- A penalty should be awarded against KNCC for failing to provide compliant wages and time records for Ms Gang, and if so, in what quantum?

Background

[10] KNCC is a construction company based in Auckland. Mr Jaeho Huh is the sole director, Mr Jun Woo Heo is the sole shareholder. Mr Huh was appointed as the director on 1 December 2022, until that date Mr Heo was the sole director and shareholder.

[11] Ms Gang applied for employment at KNCC and was interviewed by Mr Huh and Mr Incheol Kim, an executive manager in KNCC. She was subsequently offered a job and employed as an Assistant to the Sales Manager and Office Manager, signing an independent employment agreement on 21 October 2020. It was counter signed by Mr Incheol Kim, (the Employment Agreement). The Employment Agreement contained the following clauses:

16. GRIEVANCE/DISPUTES PROCEDURE

16.1 If any employment dispute issues arise, those should be raised with the Employer as soon as possible so that they can be resolved. If the matter is not resolved either party can seek assistance from the Department of Labour's Mediation Service. If the issues are not resolved at mediation, they may be referred to the Employment Relations Authority.

16.2 If the issue is a personal grievance, the Employee must present that grievance within 90 days of the event giving rise to the grievance.

17. HEALTH AND SAFETY

17.1 General Health and Safety Obligations

Both the Employer and the Employee shall comply with their obligations under the Health and Safety in Employment Act 1992. This includes the Employer taking all practical steps to provide the Employee with a healthy and safe working environment.

[12] Ms Gang said she worked under the supervision of, and reported to, Mr Huh, and also to Mr Jae Jeong Jang, the Technical Director. Her duties included the following:

- a) Selection of flooring materials for apartments;
- b) Purchase of sanitary fittings; and
- c) Installation of construction site fence barriers.

[13] From the commencement of her employment, Ms Gang said Mr Jang acted inappropriately towards her. The first such incident occurred on or about 18 November 2020 when she was alone in a lift with Mr Jang and he commented that she would be more sexually appealing if she wore more sexy outfits. She could then be in the KNCC showroom attracting customers and being: "a honeytrap".

[14] Further incidents followed in which Ms Gang said Mr Jang would stand very close to her when she was seated at her desk; banging her chair deliberately when she was seated and, on one occasion, telling her it looked like she had a cold body and would be unable to have children.

[15] Mr Jang denied harassing Ms Gang. He said he had occasionally stood close to her desk in order to see her computer screen because his eyesight was poor, but he did not touch her.

[16] On another occasion when they were alone in a lift, she said he asked if she were not afraid that he would rape her. Mr Jang denied the allegation and said that they had moving offices to another floor in the building, this had involved trying to manoeuvre a filing cabinet

into the lift. His only comment to Ms Gang had been to ask her to press the lift button. When they arrived at the next floor another employee had been waiting to help them with the filing cabinet.

[17] Ms Gang said she raised her concerns with Mr Kim on or about 2 February 2021. On 3 February 2021 she raised them with another director and the Finance Manager when other employees were present. She said their response was to tell her to be more careful around Mr Jang because he had a reputation for these sorts of actions.

[18] Ms Gang said KNCC took no steps to address her concerns and Mr Jang continued to act inappropriately towards her. In March 2021 he started to call her by offensive names and accused her of swearing.

[19] In April 2021 Ms Gang said Mr Jang punched her on her shoulder when she was seated and approached her outside the company premises, touching her elbow. This made her feel very intimidated.

Thursday 15 April 2021: the First Resignation

[20] On Thursday 15 April 2021 Ms Gang submitted a resignation providing four weeks' notice to Mr Eugene McLaren (the First Resignation). Her last day of work was stated as 13 May 2021.

[21] The resignation was submitted using a KNCC template form and stated that the reasons for the resignation were "Personal reasons". Ms Gang said that 'Personal reasons' was set as the default category and she did not change it as it was regarded as taboo in Korean culture for employees to raise issues with the employer. Having already raised issues verbally which were not addressed, she did not want to raise the issues again in a resignation letter which might adversely affect the chances of her getting another job with a Korean company.

[22] That same day, she was invited to a meeting with Mr Kim during which she reiterated her concerns about Mr Jang's behaviour towards her. Mr Kim told her he would report the issues to Mr Huh.

[23] Ms Gang said that although Mr Heo was the company director, in fact he was seldom in New Zealand. Mr Huh, his father, was the actual decision-maker: he had his own office at KNCC and held the Korean title of 'Hoe-Jang' meaning 'President/Chairperson. Any transaction over \$500 required Mr Huh's authorisation.

[24] The following day, 16 April 2021, Ms Gang said she saw Mr Huh who was waiting for the lift. She said he told her she should sue Mr Jang personally but still forgive him and give him some latitude. Ms Gang said she found this to be an unacceptable response.

[25] Ms Gang said she informed Mr Kim of her meeting with Mr Huh and they exchanged text messages on 16 April 2021:

SG: I saw Mr President (Mr Huh) while waiting for the lift earlier in the morning. He told me to postpone my resignation until the lots sell. And to sue Mr Jang.

IK: Yes. Sue him. I will help you.

SG: Are you saying sue him but continue working with him in this office?

IK: Surely he will quit. I will gather all previous documents for you.

SG: He said I should sue him yet cut him some slack. What does that even mean.

IK: What? I have a statement from (CNM), and voice-recording from (EGH)

SG: And there is no internal process to deal with this issue within the company?

IK; Mr President (Mr Huh) is the only person who could deal with that but even his words don't work for Mr Jang.

SG: What on earth does it even mean, sue him but cut him some slack and still work together ...

IK: Let's think of some solutions.

SG: He is right that I should complete the sales so I will finish off that task ...

IK: Okay

[26] Ms Gang said that following the text message conversation, Mr Kim sent her copies of a complaint email and letters from a former female employee of KNCC who had resigned on or about May 2020. Ms Gang said she was extremely disappointed with KNCC's response, especially when she realised that another employee had raised similar issues but following them, KNCC had taken no action to address Mr Jang's behaviour.

The Resignation Report 19 April 2021

[27] Ms Gang said that due to the lack of response from KNCC, she decided to write a statement setting out in detail her experiences and concerns, formally raising the bullying behaviour she had experienced by Mr Jang, and asking KNCC to address the issues (the Resignation Report).

[28] The Resignation Report was six pages long and addressed to "The Board of Directors, KNCC", itemised the interactions Ms Gang had experienced with Mr Jang and the steps she had taken to address the issue with various KNCC management members. In paragraph 11 of the Resignation Report Ms Gang states:

... I had an interview with Director Incheol KIM and had a conversation with him after I submitted a letter of resignation. As I mentioned at the time of joining the company, I thought I could learn from the Health and Safety Manager when the site was

prepared. So I have been holding on until now. But sexual molestation of Director Jae-Jeong (Jay) JANG was getting worse and worse.... So I decided to leave. Director Incheol KIM said, "*There will be more sexual harassment at the field*". But I don't think that is appropriate. Regarding sexual harassment which the board of directors is already aware of, there is no effort to improve, such as internal report, process of solution or education. And they said, 'Watch out for this man. Be careful of this work.' This response is clearly wrong. It is a clear role of the company to make measures to prevent sexual harassment in the office and field. ...

[29] Ms Gang concluded the Resignation Report by asking KNCC to take steps to prevent Mr Jang continuing his harassing behaviour in order to prevent similar outcomes in the future and other employees leaving KNCC as a result.

[30] Ms Gang printed the Resignation Report on Monday 19 April 2021 and submitted it to Mr Kim, who later confirmed to her that he had given it to Mr Huh's wife.

[31] Ms Gang said she had a brief meeting with Mr Huh and his wife later that day during which she read her statement out aloud. Ms Gang said Mr Huh said she should not feel resentment towards the company, that he would speak to Mr Jang and, if it happened again, she should tell him. She said Mr Huh added that Mr Jang probably acted as he did because she was pretty and he liked her, whereupon his wife stopped him from making any further comment.

[32] Ms Gang said as a result of the meeting, she hoped KNCC would take formal action regarding Mr Jang's behaviour. However, there were no steps taken by KNCC and she was not updated about the situation. On the contrary Mr Huh told her to do more procurement work which entailed her working directly under Mr Jang's supervision.

[33] On 13 May 2021 which Ms Gang had intended to be her final day working for KNCC, nothing had been discussed with her in regard to her resignation. As a result, she had been visibly upset and Mr McLaren spoke to her. He told her he had not received any confirmation of her resignation from Mr Huh, which was a necessary step, so she would have to submit a further resignation if she wished to leave KNCC.

[34] Ms Gang said due to her resignation not having been processed in accordance with KNCC procedures, her employment did not cease on 13 May 2021.

[35] Mr McLaren said that he had not seen Ms Gang's first resignation, but that had she completed it and brought it to him, he would have passed it to Mr Kim.

[36] He confirmed that Ms Gang had shared her personal concerns with him. He said he expected that senior management were aware of them, and he was not encouraged to offer her additional support. He also said that Ms Gang had expressed her desire to be a specialist in

health and safety, and had hoped KNCC would provide this experience, but he explained that KNCC required employees to do multiple roles.

[37] Mr McLaren said he did not recall suggesting to Mr Gang that she needed to submit another resignation form.

24 May 2021: the Second Resignation

[38] Ms Gang said she decided to finish the project she was responsible for and to submit a second resignation which she did on 24 May 2021 (the Second Resignation). The reason for leaving was again stated to be “Personal Reasons”.

[39] Ms Gang said her second resignation was accepted immediately but no one from the management team, including Mr McLaren the HR Manager, discussed it with her.

[40] Mr McLaren said there had been no formal exit interview with Ms Gang. When cross-examined at the Investigation Meeting, he said this was because he had fully understood her frustration.

[41] Ms Gang’s last day of work with KNCC was 21 June 2021.

[42] Mr Jang said that after Ms Gang had left KNCC, Mr Huh informed him about the complaints made by Ms Gang. He had not previously been aware that she had complained because not only Mr Huh, but no other member of the management team mentioned it to him.

Was Ms Gang constructively dismissed by KNCC?

[43] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Ms Gang claims that she was constructively dismissed as a result of KNCC failing to address her concerns about Mr Jang’s inappropriate behaviour towards her.

[44] She regards this as an unjustifiable action by KNCC and a breach of duty which was sufficiently serious to give her no option but to resign.

[45] In examining whether a constructive dismissal has occurred two questions arise:

- [1] First has there been a breach of duty on the part of the employer which caused the resignation; and
- [2] Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation

Was there a breach of duty?

[46] The Employment Agreement set out at clause 17.1 that KNCC would provide Ms Gang with a healthy and safe working environment. It also stated at clause 16 that the employee should raise any employment issues with the employer as soon as possible so that they could be resolved.

[47] I accept that the first resignation form dated 15 April 2021 set out only that Ms Gang's resignation was due to 'personal reasons'. However, prior to that Ms Gang had raised her concerns with Mr Kim on or about 2 February 2021, and with two other members of the management team on 3 February 2021. On that basis, I find that the management team in KNCC were aware that Ms Gang had concerns about Mr Jang's behaviour towards her, and that these should be addressed.

[48] Mr McLaren's evidence was that he did not recall receiving the First Resignation form but Mr Kim (to whom McLaren reported) did ask to meet with Ms Gang. At that meeting with Mr Kim she explained her concerns about Mr Jang.

[49] Mr Kim's response was not to initiate an investigation into Ms Gang's concerns which was the action the fair and reasonable employer could have taken, but instead he told her to "forgive" Mr Jang, but to sue him personally. Not surprisingly, Ms Gang decided this was not a course of action she wished to pursue.

[50] At the meeting with Mr Huh and his wife on 19 April 2021, the Resignation Report was read, and as a result I find that the senior management in KNCC was aware of Ms Gang's concerns about Mr Jang.

[51] Following the interactions with Mr Kim and with Mr Huh, no action was taken by KNCC to address Ms Gang's concerns, specifically:

- i. there was no investigation;
- ii. there was no opportunity provided to Mr Jang, who was unaware of Ms Gang's concerns, to offer an explanation; and importantly,
- iii. no practical steps taken in order to provide Ms Gang with a healthy and safe working environment.

[52] It has been submitted on behalf of KNCC, that Mr Huh was an independent contractor with no decision-making authority in KNCC. I note that Mr Huh is currently the sole director of KNCC and prior to that his son, Mr Heo, was the sole director.

[53] I find that it is clear from the evidence that Mr Huh did have decision-making authority in KNCC: (i) Ms Gang said Mr Huh had interviewed her and she reported to him; (ii) Ms Gang said Mr Huh authorised all KNCC expenditure over \$500; (iii) Mr McLaren's evidence was that it was Mr Huh who signed and authorised employee resignation forms, and (iii) Mr Kim confirmed in his text message exchange with Ms Gang in relation to her comment about an internal process to address employee complaints that Mr Huh (known within KNCC as 'Mr President') was the only person in KNCC who could initiate an internal process to deal with harassment complaints.

[54] I find the KNCC had been aware of Ms Gang's concerns about Mr Jang from her comments to the management team, and the Resignation Report which set out her concerns in detail. It took no action to address them, and I find that in those circumstances her resignation was a foreseeable consequence of its total failure to act.

[55] I find that there was a breach of duty on the part of KNCC which failed to provide Ms Gang with a healthy and safe working environment as it was contractually required to do, and therefore it failed to act as a fair and reasonable employer could act in the circumstances. As stated, I find that Ms Gang's resignation was a foreseeable consequence.

[56] I determine that the Ms Gang was constructively dismissed by KNCC.

Was Ms Gang unjustifiably disadvantaged by bullying and harassment?

[57] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[58] The elements of s103(1)(b) are twofold:

- a. An unjustifiable action by the employer,
which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[59] The failure by KNCC to act in accordance with the provisions of the Employment Agreement and to provide Ms Gang with a healthy and safe workplace resulted in her terms and conditions of employment being affected to her disadvantage.

[60] I find that Ms Gang was unjustifiably disadvantaged in her employment.

Remedies

[61] I have found that Ms Gang was unjustifiably dismissed and unjustifiably disadvantaged in her employment with KNCC and she is entitled to remedies.

Unjustifiable Dismissal Claim

Lost wages

[62] Ms Gang said that she applied for approximately 40 jobs after her employment at KNCC ended and provided supporting evidence, including from the Trade-me and Seek websites.

[63] Ms Gang obtained part-time employment from which she earned the sum of \$1,404.00 each month during August, September and October 2021, she obtained and commenced full-time employment in early November 2021.

[64] Had she remained employed at KNCC during that period she would have earned \$19,365.00.

[65] I therefore consider that Ms Gang is entitled to lost wages for the period between leaving her employment at KNCC and commencing her new full-time employment, minus the payments earned from her part-time employment in that period.

[66] **KNCC is to pay Ms Gang the sum of \$15,153.00 (calculated as \$19,365.00 - \$4,212.00)** pursuant to s28(3) of the Act.

Compensation

[67] Ms Gang gave evidence of the effect her experiences had on her. These included a strong alcohol dependency, depression, stress, and financial pressure.

[68] I accept that Ms Gang suffered humiliation, loss of dignity and injury to feelings as the result of the breach in failing to provide her with a healthy and safe working environment at KNCC. Ms Gang also required professional counselling to help her address the ongoing adverse effects.

[69] **I order KNCC to pay Ms Gang the sum of \$28,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s123(1)(c)(i) of the Act.**

Contribution

[70] I am required under s124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[71] Ms Gang alerted KNCC to the concerns she was experiencing in her employment at an early stage, thereby giving it an opportunity to rectify the situation at an early stage, however it conspicuously failed to do so giving rise to ongoing breach and to her continuing to suffer harm.

[72] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Gang did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

Unjustifiable disadvantage Claim

[73] Ms Gang was also successful in her claim of unjustifiable disadvantage.

[74] This claim is based upon the same facts as formed the basis of her successful unjustifiable dismissal claim for which she has been awarded remedies. There is no separate remedy award under this head.

Penalties

Should penalties be ordered against KNCC for failing to provide Ms Gang with a healthy and safe workplace and if so, in what quantum?

[75] The Applicant is seeking penalties in respect of the failure by KNCC to provide Ms Gang with a healthy and safe working environment in breach of the Employment Agreement clause 17.1.

[76] A breach of the Employment Agreement renders KNCC liable to a maximum penalty of \$20,000.00 pursuant to s134 and s135 of the Act.

[77] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[78] KNCC had a duty, in accordance with the provisions of the Employment Agreement, to provide Ms Gang with a healthy and safe working environment and it failed to do so.

[79] In the circumstances of this case, I note that the breach was ongoing, even after Ms Gang brought it to the attention of various members of the KNCC management team who took no steps to address such behaviour. To that extent I find the breach was intentional, it caused

Ms Gang ongoing stress and lead to her physical, emotional and financial suffering because KNCC failed to take any steps to address or remedy it.

[80] In deciding whether to impose a penalty, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹ These principles have been followed since.²

[81] The law in respect to quantification is well established given the content of s133A of the Act and requires that regard is given to the object of the Act, namely the nature and extent of any breach, whether it was intentional or not, the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, any vulnerability, and previous conduct.

[82] In that context I note that the nature and extent of the breach were severe and ongoing, causing distress to Ms Gang; the breach was intentional in that Ms Gang made KNCC fully aware of her concerns and it failed to act thereby allowing the breach to continue; no steps were taken to mitigate it and Ms Gang was a junior member of staff. I have no evidence of previous conduct, although this is suggested in the text message comments of Mr Kim.

[83] **In all the circumstances and considering proportionality, I consider that a penalty of \$14,000.00 to be appropriate.**

Did Mr Huh and/or Mr Jang aided and abetted KNCC to breach its duty to provide Ms Seulbi with a safe working environment, and if so, should penalties be awarded against them?

Mr Huh

[84] Section 134(2) of the Act is relevant to the issue of inciting, instigating, aiding and abetting:

Section 134 Penalties for breach of employment agreement

(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

¹ *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC 143

² See also *A Labour Inspector v Prabh Limited* [2018] NZEmpC ; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12]

[85] In *Musa v Whanganui District Health Board*³ the Employment Court observed that for a party to be liable under s134(2), there must be a breach of an employment agreement by a primary breacher.

[86] In this case, I have found a breach of the duty by KNCC to provide Ms Gang with a healthy and safe working environment which was a breach of clause 17.1 of the Employment Agreement.

[87] If it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, a penalty may be awarded pursuant to s135 of the Act.

[88] The maximum amount of such a penalty is \$10,000.00 in the case of an individual.

[89] A person deemed to be the 'mind' of the company may be found guilty of aiding and abetting the company to commit a breach.⁴

[90] Mr Huh was not noted as a Director on the Companies Office Website during the time of Ms Gang's employment at KNCC. However, it is possible that he was in fact the guiding 'mind of the company' during that period.

[91] In *Nelson v Porirua Community Law Resource Centre Incorporated*⁵ the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:⁶

Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit."

[92] I have found that Mr Huh acted as a senior management position in KNCC. It is clear from the evidence presented that the other members of the senior management team that they deferred to him, referring to him as 'Mr President' and that he possessed the authority to make executive decisions.

[93] I am satisfied from the evidence provided to the Authority that Mr Huh was the 'mind of the company' during the period of Ms Gang's employment with KNCC.

³ *Musa v Whanganui District Health Board* [2010] NZEmpC 120, (2010) 7 NZELR 710 at [66]

⁴ *Jury v Fonseca* AEC 36/98

⁵ *Nelson v Porirua Community Law Resource Centre Incorporated* [1993] 2 ERNZ 1109 (WEC39/93)

⁶ *Ibid* at page 17

[94] I note that the Resignation Report written by Ms Gang and addressed to the KNCC directors had been given by Mr Kim to Mr Huh, who then held a meeting with Ms Gang. During the meeting Ms Gang had read the Resignation Report aloud.

[95] As a result I find Mr Huh was fully aware of the concerns being raised by Mr Gang. Significantly, he took no steps, and issued no instructions to the rest of the KNCC management team, to ensure that Mr Gang was provided with a healthy and safe working environment as required under the provisions of the Employment Agreement.

[96] On the contrary, knowing of her concern in respect of Mr Jang, Mr Huh instructed her to do more procurement work which would bring her into direct contact with Mr Jang. That had the effect of exacerbating the contractual breach of KNCC's duty to provide Ms Gang with a safe and healthy working environment.

[97] I determine that Mr Huh aided and abetted the breach of duty to Ms Gang to provide her with a safe working environment.

Mr Jang

[98] Mr Jang was the reason for Ms Gang raising concerns. His behaviour was ongoing and resulted in both her first and subsequent resignations. To that extent his behaviour can be held to be the main reason for her resignation.

[99] Mr Jang was not informed by KNCC of Ms Gang's concerns about his behaviour towards her until after her employment ended. There was no investigation and he was therefore not provided with an opportunity to answer the allegations she had made about him.

[100] Significantly, KNCC failed to inform Mr Jang of Ms Gang's complaints about him at the earliest opportunity and therefore he had no opportunity to either deny his contribution to the situation, or alternatively to apologise and correct his behaviour.

[101] As a result, whilst the failure of KNCC to raise Ms Gang's concerns about Mr Jang's behaviour towards her resulted in her feeling that she had no option but to resign, I find that Mr Jang cannot be held to have intentionally aided and abetted the breach by KNCC.

[102] I determine that Mr Jang did not aid and abet the contractual breach of duty by KNCC to Ms Gang to provide her with a safe working environment.

Should penalties be ordered against Mr Huh for aiding and abetting KNCC in its failure to provide Ms Gang with a healthy and safe workplace and if so, in what quantum?

[103] I have found Mr Huh aided and abetted KNCC in its breach of the Employment Agreement.

[104] Mr Huh is liable to a penalty pursuant to s134(2) of the Act.

[105] **Having considered all the factors, I consider a penalty of \$4,000.00 to be appropriate.**

Should a penalty be awarded against KNCC for failing to provide complaint wages and time records?

[106] One of the objects of the ERA is to promote the effective enforcement of employment standards. There is a duty to maintain wages and time records compliant with the requirements of the legislation.

[107] Those provided by KNCC are not compliant with the requirements of s81 of the Holidays Act 2003 in a number of respects, these include the number of hours worked each day in a pay period; the dates of and payments for public holidays; the dates the employee became entitled to annual holidays; the employee's current entitlement to sick leave.

[108] I find that KNCC is liable to a penalty for the failure to provide compliant wages and time records.

[109] **In all the circumstances and considering proportionality, I consider that a penalty of \$2,000.00 to be appropriate.**

Should any part of the penalties ordered to be paid to Ms Gang?

[110] Ms Gang has been compensated for all her losses. As observed, the purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to KNCC and to Mr Huh the importance of adhering to contractual commitments, and to maintain the employment standards in New Zealand which should be well known to all employers given the length of time they have been in place.

[111] **I order KNCC to pay the full penalties amount totalling \$16,000.00 to a Crown Bank Account.**

[112] **I order Mr Huh to pay the penalty amount of \$4,000.00 to a Crown bank account.**

Costs

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

[114] If they are not able to do so and an Authority determination on costs is needed the applicant 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 the Respondent 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.

[115] 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 notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Eleanor Robinson
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].