



ISSUE

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a regular newsletter for clients of
mcpaill gibson & zwart ltd

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
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Liability of Company Directors for Employment Cases

A recent Employment Relations Authority case, *Gang v KNCC Limited and Ors* [2023] NZERA 182, serves as a reminder that Company Directors cannot always hide behind the Corporate Veil.

Ms Gang brought claims for unjustified disadvantage and unjustified constructive dismissal against KNCC Limited ("KNCC"). Ms Gang sought penalties against KNCC for failing to provide her with a healthy and safe workplace, as required under her employment agreement. She also claimed that the Director of the Respondent, Mr Jaeho Huh, and KNCC's Technical Director, Mr Jae Jeong Jang, aided and abetted the breach of her employment agreement.

Ms Gang commenced work with KNCC in 2020 as an Assistant to the Sales Manager and Office Manager. Throughout Ms Gang's employment, Mr Jang acted inappropriately towards her, noting that:

- 1 When they were alone in a lift together "he commented that she would be more sexually appealing if she wore more sexy outfits", she could then be in the showroom "attracting customers and being: 'a honeytrap.'";
- 2 He would stand very close to her when she sat at her desk, deliberately banging her chair;
- 3 He told her it looked like she had a cold body and would be unable to have children;
- 4 On another occasion when they were alone in a lift he asked if she were not afraid that he would rape her;

- 5 Ms Gang stated Mr Jang punched her on the shoulder when she was seated on one occasion, and on another, touched her elbow outside company premises. She stated those actions made her feel very intimidated.

Ms Gang raised her concerns about Mr Jang's conduct with a number of people within the business, including other directors and the President/Chairperson of KNCC. When Ms Gang raised her concerns, no positive action was taken by KNCC in response to them. In response to Ms Gang's concerns:

- She was told that she should be more careful around Mr Jang because he "had a reputation for these sorts of actions".
- Mr Huh, the President/Chairperson of KNCC, was informed of her concerns.
- Mr Huh told Ms Gang she should sue Mr Jang personally but still forgive him and give him some latitude.
- Ms Gang raised concerns with one of the directors that there was not a process to deal with her complaint. She was told the only person who could deal with it was Mr Huh, but that wouldn't work with Mr Jang.
- Ms Gang told another director, Mr Kim, of the conversation with Mr Huh. He told her that he would support her to sue Mr Jang and sent Ms Gang a copy of a complaint email and letters from a former employee of KNCC who had resigned the previous year.

Due to a lack of response from KNCC, ultimately Ms Gang resigned from her position, citing "personal reasons".

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

Contact Details:

Level 2
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

Jane Taylor
E: jane@mgz.co.nz
M: 021 1539 147

Deborah Hendry
E: deborah@mgz.co.nz
M: 027 247 4274

Jane Jarman
E: jane.jarman@mgz.co.nz
M: 027 279 4936

Ms Gang provided a detailed “*Resignation Report*” to KNCC, specifically requesting that KNCC take steps to prevent Mr Jang continuing his behaviour against other employees. Ms Gang met with Mr Huh and his wife to discuss the report and was told that Mr Huh would speak with Mr Jang and if anything occurred again, to tell him. However, no action was taken, nor was she provided any update. To the contrary, she was assigned to do more work which required her to work directly under Mr Jang’s supervision.

Mr Jang was not informed of the allegations against him until after Ms Gang had ended employment with KNCC. It is noted in the Authority’s investigation, he denied the allegations against him.

The Authority considered Ms Gang’s resignation and agreed that due to KNCC’s actions (or lack thereof) she had no other option but to resign, and that she was constructively dismissed from her employment by KNCC. The Authority considered KNCC’s response to Ms Gang’s concerns and found “*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.”*

Ms Gang sought penalties against KNCC in respect of the failure to provide a healthy and safe working environment, provided under clause 17.1 of her employment agreement. The Authority determined the company had breached clause 17.1 of Ms Gang’s employment agreement, and that a penalty of \$14,000 should be imposed against KNCC.

The Authority then had to consider whether Mr Huh and/or Mr Jang aided and abetted KNCC to breach its duty to provide a healthy and safe working environment and, if so, whether penalties should be awarded against them.

Under section 134(2) of the Employment Relations Act 2000, “*every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority*”. For liability to arise under section 134(2), there must be a breach of an employment agreement by a “*primary breacher*”. The maximum penalty that may be imposed is \$10,000 for an individual. The Authority noted “*a person deemed to be the ‘mind’ of the company may be found guilty of aiding and abetting the company to commit a breach*”.

The Authority considered that Mr Huh had ostensible authority in the business, including the authority to make executive decisions, being referred to as ‘Mr President’, and senior management deferring to him. Mr Huh was aware of the concerns raised by Ms Gang, and took no steps to address them. This should have included issuing instructions to management to ensure Ms Gang was provided with a safe working environment. Instead, knowing of Ms Gang’s concerns, Mr Huh instructed her to complete more work which required that she had direct contact with Mr Jang.

The Authority determined Mr Huh did aid and abet the breach of duty to provide Ms Gang with a healthy and safe working environment as required under her employment agreement and imposed a penalty of \$4,000 against him.

The Authority determined that Mr Jang did not aid and abet the breach of Ms Gang’s employment agreement, as he was not informed of the concerns until after her employment ended. There was no investigation undertaken, and he was not provided with an opportunity to answer the allegations against him.

Bills & Laws Update

Employment Relations (Restraint of Trade) Amendment Bill: Submissions are open, closing on 18 September 2023

The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act has passed. You should be aware of the following:

- New employment agreements must now include reference to the extended timeframe for raising personal grievances in respect of sexual harassment.
- Existing employment agreements do not need to be amended; however, you should consider sending a notice to all employees in respect of the extended timeframe. Alternatively, if you vary any existing employment agreements for other reasons, the new clause should be added into the variation.

This may be an opportunity to review your current template employment agreements and assess if further updates are needed. If you have any questions about this change, or if there is anything else we can assist with in regard to your template employment agreements, please contact our offices to discuss further.