

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 674
3210459

	BETWEEN	TAIKA BLUEGUM Applicant
	AND	MODERNZ LIMITED t/a KEBUP Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Dave Cain, advocate for the Applicant No appearance by the Respondent	
Investigation Meeting:	29 October 2024 in Auckland	
Submissions and/or further evidence	29 October 2024 from the Applicant None from the Respondent	
Determination:	13 November 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Taika Bluegum, claims that she was unjustifiably dismissed by the Respondent, Modernz Limited t/a Kebut (Modernz).

[2] Ms Bluegum also claims that she was unjustifiably disadvantaged by not being paid sick leave or bereavement leave.

The Authority's investigation

[3] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Ms Bluegum and her mother, Che Solomon.

[4] No Statement in Reply was received from the Respondent.

[5] I am satisfied that service had been effected on the Respondent on the basis as follows:

- Service of the Statement of Problem was effected at the registered address of the Respondent by personal service on 12 March 2023.

- a) Service of all subsequent documents was effected at the registered address of the Respondent by courier service on 22 February 2024.
- b) Service to the home address of the sole director, Mahdi Samani, was effected by courier delivery on 21 February 2024

[6] Regulation 17(1)(b) of the Regulations to the Employment Relations Act 2000 (the ERA) states that service of a notice, order, or other document required to be served by the Act or these regulations may be effected on a corporation incorporated in New Zealand by leaving the notice, order, or document at the corporation's registered office. I am satisfied that service on the Respondent Modernz Limited was made in accordance with regulation 17(1)(b) when the parcel of document was served on the registered address of the company on two separate occasions.

[7] The Respondent was not present at the start of the investigation. The Investigation Meeting was delayed while the Authority Officer attempted to make contact with Modernz, but this was without success, and Modernz did not attend the Investigation Meeting.

[8] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Modernz's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

[9] Oral and written submissions were received from Mr Cain for the Applicant.

[10] 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

- [11] The issues requiring investigation are whether or not Ms Bluegum:
- was unjustifiably dismissed by Modernz.
 - was unjustifiably disadvantaged by Modernz.
 - is owed any monies by Modernz.

Background

[12] Modernz operates a number of Turkish food takeaway outlets trading as Kebub. The sole director and shareholder is Mahdi Samani.

[13] Ms Bluegum said she saw a position working at Kebup advertised on Facebook and applied for it. She was 14 years old at the time and wanted a part-time job to have some spending money.

[14] Ms Bluegum was interviewed by the Manager, a person she knew as Shahin. She told Shahin she was 14 years old and had no previous job experience, and he warned her that the job could be demanding. She was told she would be working 5.30 p.m. until 8.30 p.m. on three nights a week: Wednesday or Thursday, Friday and Sunday.

[15] Ms Bluegum said her hours increased on occasion to between 16 – 20 per week with a finish time of 9.30 or 10.00 p.m. especially after the cleaner left, but subsequently reduced from four hours a shift back to three hours.

[16] Ms Bluegum was provided with an individual employment agreement which included the following terms and conditions:

Hours of Work

The employer will roster the employee on for 12 hours each week. The timeframe for these work sessions will be Tuesday to Sunday. The timing of working hours will be set out in a roster.

The employer may offer more hours, and the employee can decide whether to accept the offer of extra hour.

Annual Leave

The employee will get annual leave of **4 weeks** each year once they have worked for the employer for **12 months**.

The employee can take annual leave in advance with the employer's agreement.

Sick Leave

The employee can take up to 5 paid days off a year due to illness or injury, or to care for their partner or another dependent person who is sick or injured. This leave will be available when they have worked for 6 months.

They must tell their manager if they are going to be on sick leave as soon as they can (before their usual start time, if possible).

...

Sick Leave: medical Certificate

The employer may require proof of sickness or injury at any time if the employee takes, or has asked for sick leave. The employer will tell the employee as soon as possible that proof is required.

If the employee has been sick or injured for three or more calendar days in a row – or is taking sick leave that is more than the legal minimum – the employee must get a medical certificate at their own cost.

If the employee has been sick or injured for less than three full days in a row, the employer pays for the employee to get a medical certificate.

Unpaid Leave

The employee may ask for time off without pay for any reason, and the employer will consider the request.

Ending employment

The employee might end their job by resigning.

The employer might end the employee's job if there's a good reason (also caused reasonable cause) and they follow a fair process in deciding to end employment. The employee or the employer will give **three weeks notice in writing** unless otherwise set out in this agreement ...

[17] Ms Bluegum commenced work on 24 November 2021, her duties included preparing food, cooking, cleaning, loading and unloading the food and drinks, and serving customers. There were three other employees with whom she worked at Kebup, one was the manager Shahin's mother and the other was his girlfriend, and a third employee worked as a cleaner.

[18] After the cleaner left shortly Ms Bluegum took on responsibility for closing the takeaway in the evenings, working sometimes worked after 10.00 p.m., particularly on a Friday or Saturday. On those occasions she often worked alone which she found intimidating since Kebup was situated next to a busy bar.

[19] Despite this, Ms Bluegum said she enjoyed the job and having some money of her own.

Absences

[20] During the Easter period in 2022 Ms Bluegum's father died. She said that she and her mother went to Hamilton to be with her grandmother, but Ms Bluegum said this did not involve her taking any time off work.

May 2022

[21] On 25 May 2022 Ms Bluegum said she tested positive for Covid-19. She sent a text message to Shahin advising him that her Covid-19 test was positive, but offered to come into work because she did not want to be dismissed. In a text message exchange Shahin instructed her to attend work that day:

Hi Taika, Today you come to the work and use two masks and gloves at shop,
From tomorrow, I will manage the employees so that you can rest for a few days
so that your test is back to negative.

[22] Ms Bluegum said she worked on 25 May, but not on 26 or 27 May 2022 because she was too sick to do so. Ms Bluegum was not paid sick leave on these two days.

July 2022

[23] In July 2022 Ms Bluegum's stepfather died and the family travelled to the Chatham Islands to attend the funeral. Their return flight was delayed and Ms Bluegum had to take an additional day off work. In total she had two days absence on 29 and 31 July 2022.

[24] Ms Solomon text messaged Shahin to explain that Ms Bluegum had been absent because of a bereavement, not for annual leave, and in response he messaged:

In the Taika agreement, inform the employer two weeks in advance to request leave,
But I told Taika that it would be enough if she let me know a week earlier ,,,

[25] The two days absence were not paid.

26 August 2022

[26] On 26 August 2022 Ms Bluegum messaged Shahin to explain that she was sick. In response Shahin replied that if she did not attend for work that day, he would have to give her two weeks 'notice:

Today if Friday and I don't have anyone, I can't help you, Because you have not come for many days without prior notice, if you don't come to work today, I will have to give you two weeks' notice. Sorrt about this.

...

I have worked with many employees for 11 years. Yu do not prioritise your job. You have already used your sick leave, holidays, and for your grandma and ...
You must inform me at least one week in advance of the reason for your absence.

...

When you don't show up for work without prior notice, the accountant declares a sick day to the IRD, You are in a lot of trouble ,,,

[27] Ms Bluegum said the text message which inferred she was in trouble with the IRD frightened her.

September 2022

[28] On 5 September 2022 Ms Bluegum informed Shahin by text message that she was sick and unable to attend for work that day. He responded by confirming the two weeks' notice of termination:

Today is Friday and I don't have anyone, I can't help you. Because you have not come for many days without prior notice, if you don't come to work today, I will have to give you two weeks' notice, sorry about this, Shahin.

[29] Ms Bluegum attended the doctor and was provided with a medical certificate dated 5 September 2022, certifying that she would be absent for two days due to sickness.

[30] Ms Bluegum worked the two weeks' notice she had been given and her employment ended on 18 September 2022.

Was Ms Bluegum unjustifiably dismissed by Modernz?

[31] A fair and reasonable employer will have substantive justification for a dismissal decision and will follow a fair and reasonable process.¹

¹ Employment Relations Act 2000 s 103A

[32] Ms Bluegum had six months service by the date of her first absence on 26 May 2022. She was entitled in accordance with s 63(1) of the Holidays Act 2003 (the HA) to 10 days sickness or bereavement leave in the 12 month period after the six month stage in her employment.

[33] I note that the Employment Agreement referred to 5 days sick leave, but that is incorrect and statute prevails.

[34] In accordance with s 64 of the HA the employee must notify the employer of their absence:

64 Employee must notify employer of intention to take leave

An employee who intends to take sick leave or bereavement leave must notify the employer of that intention—

- (a) as early as possible before the employee is due to start work on the day that is intended to be taken as sick leave or bereavement leave; or
- (b) if that is not practicable, as early as possible after that time.

[35] In the text messages the employer is informing Ms Bluegum that she must give at least one weeks' notice. Apart from the fact that it is unreasonable to expect an employee to advise in a one week advance period that they will be ill or suffer a bereavement at a future date, that is not required by statute and the Employment Agreement states that Ms Bluegum must provide notice: "as soon as they can (before their usual start time, if possible), not at least one week in advance.

[36] Ms Bluegum was notified by text message that her employment was being terminated because she had been absent on sick leave. At the date she took sick leave on 5 September 2022 Ms Bluegum had not exhausted her entitlement to statutory sick leave entitlement.

[37] Although Shahin had warned Ms Bluegum by text message on 26 August 2022 that if she did not attend for work that day, he would have to provide her with two weeks' notice, there were no formal disciplinary steps taken during Ms Bluegum's employment.

[38] In addition, Modernz did not adhere to the requirements of procedural fairness as set out under the test of justification set out in s 103A of the Act. In particular:

- Ms Bluegum was not provided in advance with specific details of any issues with her performance at Kebup, or alerted to the fact that her absences might result in her dismissal prior to a text message on 26 August 2022 which did not constitute a step in formal performance management;

- Ms Bluegum was not provided with a reasonable opportunity to respond to the concerns about her, and
- There is no evidence that the employer gave any consideration to any explanation Ms Bluegum might provide since she was denied such an opportunity prior to being given notice of termination.

[39] I accept that Modernz was a smaller employer, however whilst minor flaws which did not result in an employee being treated unfairly would not render a dismissal unjustifiable, in this case I find the flaws in the procedure adopted by Modernz were more than minor.

[40] In all the circumstances at the relevant time I find that dismissing Ms Bluegum was not a decision a fair and reasonable employer could have taken.

[41] I determine that Ms Bluegum was unjustifiably dismissed by Modernz.

Was Ms Bluegum unjustifiably disadvantaged by Modernz?

[42] Ms Bluegum was entitled to receive paid sick leave and bereavement leave after six months' employment in accordance with the Employment Agreement (noting the error in the entitlement) and s 63(1) of the HA; however the leave she took was not paid by Modernz.

[43] Ms Bluegum had some difficulty recalling dates of absence, and there appeared to be some confusion between her evidence and the text messages as to the bereavements she suffered. I observe that in her oral evidence Ms Bluegum stated that it was only the bereavement of her stepfather that necessitated her taking time off work, but in a text message to Shahin she refers having taken time off for her grandmother:

My first sick leave I had covid yet I still had to work which was totally against the law, and I definitely could not give a week notice from when my grandma and my stepfather passed away

[44] Nonetheless despite the discrepancies in the evidence provided, I was able to establish that Ms Bluegum had the following periods of absence in 2022:

2 days 26 and 27 May	sick leave
29 and 31 July	bereavement leave
26 August	sick leave
5 and 6 September	sick leave

[45] I appreciate that Kebup was a small business and therefore Ms Bluegum's absence had a greater impact on the operation of the business than it would have done in a larger company, however Ms Bluegum was statutorily entitled to sick and bereavement leave.

[46] I find that the failure to pay Ms Bluegum sick and bereavement leave constituted a disadvantage in her employment.

Is Ms Bluegum owed any monies by Modernz?

[47] Ms Bluegum was not paid her correct contractual notice: she was provided with two weeks' notice by Modernz which she worked, but she was entitled to three weeks' contractual notice.

[48] Ms Bluegum was not paid for seven days of sick and bereavement leave on 26 and 27 May, 29 and 31 July, 26 August and 5 and 6 September 2022. Ms Bluegum had completed six months service by the date of the first day of absence. She was entitled to be paid in accordance with her contract and statute.

[49] Ms Bluegum was not paid her final week of notice, and she did not receive payment in respect of her accrued holiday entitlement of 38.77 hours.²

Remedies

[50] I have found that Ms Bluegum was unjustifiably dismissed and unjustifiably disadvantaged in her employment with Modernz and she is entitled to remedies.

Unpaid wages

[51] Ms Bluegum was not paid for the second week of her notice period which she worked, and the final week of her notice period which was not worked. I find that Ms Bluegum is entitled to two weeks as unpaid wages.

[52] I order Modernz to pay to Ms Bluegum the sum of \$528.00 gross (calculated as 24 hours at \$22.00 per hour) in respect of the week of unpaid wages and the unpaid week of her notice period.

² As set out as "Estimated annual leave accrued since anniversary on Ms Bluegum's last pay slip covering the pay period 5 to 11 September 2022.

Sick leave entitlement

[53] Ms Bluegum was not paid for seven days of sick and bereavement leave to which she was entitled in accordance with s 63(1) of the HA. It is submitted for Ms Bluegum that the unpaid hours totalled 20 in respect of the six days.

[54] I order Modernz to pay to Ms Bluegum the sum of \$440.00 gross (calculated as 20 hrs x \$22.00 per hour).

Holiday pay entitlement

[55] Ms Bluegum was not paid accrued annual leave when her employment ended.

[56] I order Modernz to pay to Ms Bluegum the sum of \$852.94 as holiday pay entitlement pursuant to s 23 and s 24 of the HA (calculated as 38.77 hrs x \$22.00 per hr).

Lost wages

[57] Ms Bluegum said that she did look for other part-time employment after her employment with Modernz ended although she was deterred in a search for new employment as a result of her experience with Modernz which had affected her confidence. Ms Bluegum obtained alternative employment in January 2023.

[58] I therefore consider that Ms Bluegum is entitled to lost wages.

[59] **I order Modernz to pay Ms Bluegum the sum of \$3,432.00 gross (calculated as 13 weeks at 12 hours per week x \$22.00 per hour) pursuant to s 28(3) of the Act.**

Compensation

[60] Ms Bluegum's evidence was that the termination of her employment had affected her self-confidence. Ms Bluegum was young and it was unfortunate that her first work experience ended as it did, although I note her evidence that she had enjoyed the work.

[61] The reason for her dismissal arose from circumstances beyond her control, being sickness and bereavement. Her distress at the dismissal I find to have been compounded by the Respondent's denial of sick pay.

[62] Accordingly taking into consideration all the circumstances of this case, I order Modernz to pay Ms Bluegum the sum of \$12,000.00 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

Unjustifiable disadvantage Claim

[63] Ms Bluegum was also successful in her claim of unjustifiable disadvantage.

[64] 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.

Contribution

[65] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[66] I find that Ms Bluegum did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

Orders

[67] I have made the following orders:

- **Modernz is ordered to pay Ms Bluegum the sum of \$528.00 gross in respect of unpaid wages and notice pay.**
- **Modernz is ordered to pay Ms Bluegum the sum of \$440.00 gross in respect of unpaid sick and bereavement leave pursuant to s 63(1) of the HA.**
- **Modernz is ordered to pay Ms Bluegum the sum of \$852.94 in respect of unpaid holiday pay pursuant to s 23 and s 24 of the HA.**
- **Modernz is ordered to pay Ms Bluegum the sum of \$3,432.00 gross (calculated as 13 weeks at 12 hours per week x 13 weeks) in respect of lost wages pursuant to s 28(3) of the Act.**
- **Modernz is ordered to pay Ms Bluegum the sum of \$12,000.00 in respect of compensation pursuant to s 123(1)(c) of the Act.**
- **All payments are to be made within 28 days of the date of this determination.**

Costs

[68] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[69] I see no reason for not applying these principles in this case. Ms Bluegum was the successful party in the matter.

[70] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[71] The investigation meeting was of a short duration since the Respondent did not attend, and the facts of the situation which had resulted in the termination of Ms Bluegum's employment were succinct and not complex.

[72] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a quarter investigation meeting as the appropriate measure.

[73] **Accordingly, Modernz is ordered to pay Ms Bluegum the sum of \$1,125.00 towards her legal costs, pursuant to clause 15 of Schedule 2 of the Act.**

[74] **Modernz is also ordered to pay Ms Bluegum \$71.56 in respect of the Authority filing fee.**

Eleanor Robinson
Member of the Employment Relations Authority

³ [2005] 1 ERNZ 808