**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2020] NZERA 75
3064832

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| | BETWEEN | JAMES BROBYN<br>Applicant |
| | AND | TSSR GROUP LIMITED<br>Respondent |

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| Member of Authority: | Philip Cheyne |
| Representatives: | Paul Mathews, for Applicant<br>No appearance for Respondent |
| Investigation Meeting: | 14 February 2020 |
| Determination: | 20 February 2020 |

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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**A. James Brobyn was unjustifiably disadvantaged and unjustifiably dismissed by TSSR Group Limited T/A Uncommon Café.**

**B. TSSR Group Limited T/A Uncommon Café must settle James Brobyn's personal grievances by paying him the following amounts within 28 days of this determination:**

**(i) $15,000.00 as compensation for hurt, humiliation and injury to feelings; and**

**(ii) $2,040.00 as reimbursement for lost wages.**

**C. TSSR Group Limited T/A Uncommon Café is to pay James Brobyn within 28 days of this determination arrears of $5,553.56.**

**D. TSSR Group Limited T/A Uncommon Café is to pay James Brobyn within 28 days of this determination costs of $2,321.56.**

**Employment relationship problem**

[1] TSSR Group Limited operated a café called Uncommon Café. James Brobyn worked as a kitchen-hand at Uncommon Café for the company from early 2017 until his employment ended in March 2019. Scott O'Driscoll and Natasha Rooney are the directors. Mr O'Driscoll was the chef but left the café in about November 2018. Ms Rooney continued the café, at least for the duration of Mr Brobyn's employment.

[2] Mr Brobyn received a written warning on 8 March 2019, he claims without justification, giving rise to a personal grievance. Later, Mr Brobyn resigned. He says he was constructively dismissed and has a second personal grievance. He seeks reimbursement of lost wages and compensation for distress as remedies for the personal grievance claims.

[3] Mr Brobyn also claims arrears of wages, sick pay and holiday pay. Costs are sought. Penalties were not claimed.

[4] TSSR did not lodge a statement in reply, did not participate in the case management conference and did not appear at the investigation meeting. Helpfully, former solicitors for the company did advise the Authority that the company's business had closed and that no-one would appear at the investigation meeting.

[5] The issues are:

(a) Was the warning justified?

(b) Was Mr Brobyn unjustifiably dismissed?

(c) How should any proven personal grievance be settled?

(d) Are there any arrears?

(e) Is Mr Brobyn entitled to costs?

**Was the warning justified?**

[6] There is an email dated 9 December 2018 from Ms Rooney to Mr Brobyn with the subject "Official Warning" which states that it is Mr Brobyn's first written warning. Mr Brobyn did not raise a personal grievance about this warning. I mention the email to give context to later events.

[7] In a later email dated 8 March 2019 with the subject "Running late", Ms Rooney stated she was issuing Mr Brobyn with his second written warning because he had been late for work for "at least the 10th time".

[8] I find that TSSR affected Mr Brobyn's employment to his disadvantage by sending him the 8 March 2019 email as a second written warning because it made his continued employment less secure. That is apparent from the progression from first warning in December 2018.

[9] TSSR did not raise its concern about Mr Brobyn's punctuality and did not give him any opportunity to respond to that concern before Ms Rooney took the action of warning him by sending him the email.

[10] These failings were not minor but comprised a complete absence of fairness for Mr Brobyn. It is apparent from the text of the warning email that TSSR had not required strict compliance with the rostered start times beforehand. If TSSR wanted to change its policy about punctuality, Mr Brobyn should have been told that and given the opportunity to comply. He should have had the opportunity to dispute the claimed frequency of being late and explain relevant circumstances. He should also have had the opportunity of giving an assurance about his future punctuality before TSSR decided to warn him. In the circumstances, a fair and reasonable employer could not have decided to warn Mr Brobyn without first taking such steps.

[11] It follows that TSSR has not established justification for the decision to give Mr Brobyn a second written warning. Mr Brobyn has a personal grievance.

**Was Mr Brobyn unjustifiably dismissed?**

[12] Mr Brobyn's evidence is that in 2018 he asked Mr O'Driscoll whether he could have leave in March 2019 to travel overseas to a family wedding. Mr Brobyn says that Mr O'Driscoll approved the leave, told him to write it in the calendar (which he did) and to remind him closer to the date. There is no reason to doubt Mr Brobyn's evidence, which I accept.

[13] Mr O'Driscoll left the café in about late November 2018.

[14] In February 2019, Mr Brobyn asked Ms Rooney if he could take a lieu day on a day coming up which would otherwise be a work day. Ms Rooney agreed and wrote it in the calendar. However, the pay for that pay period did not include payment for the day off. Mr Brobyn spoke to his parents and, as suggested, he asked Ms Rooney for a copy of his signed employment agreement while explaining that he thought he was entitled to a lieu day payment. Ms Rooney claimed that only salaried employees were entitled to a lieu day payment, but did not give Mr Brobyn a copy of his employment agreement.

[15] Around the same time in February 2019, Ms Rooney reduced Mr Brobyn's hours of work from 30 – 35 per week to 20 – 25 per week. Mr Brobyn thought that his employment agreement provided for a minimum of 30 hours per week. He again asked for a copy of the agreement. On 6 March Mr Brobyn received the unsigned employment agreement mentioned above, which includes reference to a minimum of 20 hours per week. Mrs Brobyn confirmed that the digital file information reports the document was created in March 2019. The March 2019 document records an hourly rate which was paid later in the employment, rather than the lower rate which applied at the start. I therefore find that the unsigned document was not the original employment agreement which Mr Brobyn agreed to when he started work. I accept Mr Brobyn's evidence that at the commencement of his employment, it was agreed that he would work a minimum of 30 hours per week.

[16] Shortly before the planned March overseas holiday, Mr Brobyn mentioned the planned leave to Ms Rooney. Ms Rooney told Mr Brobyn that he did not have any leave approved as he had not followed the correct process. Mr Brobyn and Ms Rooney had an email exchange on 11 March 2019 about this. Ms Rooney stated that in the employment agreement and at meetings they had conveyed the requirement for a formal procedure for leave to be approved. Ms Rooney instructed that Mr Brobyn could not go on leave.

[17] Mr Brobyn had started work in February 2017 and became entitled to annual holidays from February 2018. Mr Brobyn had not taken many holidays. The agreement between Mr Brobyn and Mr O'Driscoll about the March 2019 holiday was in the context of the Holidays Act 2003 requirement that an employer must not unreasonably withhold consent to an employee's request to take annual holidays and must allow an employee to take annual holidays within 12 months after the entitlement arises.

[18] The only employment agreement in evidence, an unsigned document, paraphrases the statutory leave entitlement without any mention of an application procedure. There is no evidence about any formal leave application procedure.

[19] As Mr O'Driscoll had approved Mr Brobyn's intended annual holiday, Ms Rooney was not entitled to refuse the leave.

[20] Mr Brobyn asked for a meeting with Ms Rooney to discuss these issues as they were causing him significant distress. Ms Rooney gave Mr Brobyn a typed summary of his hours of work over the last year, but it did not match the hours shown on payslips. He sometimes used Uber to get to work and the summary did not reconcile with times recorded on some receipts. It would have been apparent to Ms Rooney from her exchanges with Mr Brobyn that he was very distressed about the work issues.

[21] Mr Brobyn saw his doctor who certified him as unfit to work. Mrs Brobyn sent a copy of the medical certificate to Ms Rooney. Mr Brobyn then received a call from the doctor's office as Ms Rooney had called the doctor to query whether the medical certificate was genuine. There is no evidence to show a reasonable basis for that query. Ms Rooney had not raised the concern with Mr Brobyn.

[22] A meeting was eventually held on 17 March. Mr Brobyn was assisted by his parents. I accept Mrs Brobyn's evidence that TSSR agreed to pay him the unpaid lieu day, provide a copy of his signed contract, give a written explanation for a recent payslip recording no holiday pay outstanding and would withdraw in writing both warnings. I also accept Mrs Brobyn's evidence that the meeting was very hostile.

[23] Having received nothing in writing after the meeting and in light of the hostile attitude from TSSR, Mr Brobyn resigned. He sent written notice of his resignation on 20 March 2019 to Ms Rooney, together with a further medical certificate to cover the two week notice period.

[24] The concept of dismissal in employment law has long been recognised to include constructive dismissal. One category of constructive dismissal is where a breach of duty by an employer leads the worker to resign. The first question is whether the resignation was caused by the employer's breach of duty, taking account of all the circumstances. If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable that the employee would not be prepared to work under the prevailing conditions.

[25] I find that Mr Brobyn's resignation was caused by breaches of duty by TSSR. TSSR substantially reduced Mr Brobyn's hours of work, in breach of the minimum agreed hours. TSSR also purported to revoke the approved holidays. The exchanges with Ms Rooney significantly exacerbated Mr Brobyn's anxiety about the working relationship and reinforced his view that TSSR was trying to force him out of the workplace. This was in the context of him taking issue with the last warning, questioning non-payment of a lieu day and raising other matters. Mr Brobyn's deteriorating state of health caused by the employment issues was apparent to Ms Rooney.

[26] I find that TSSR's breaches were of sufficient seriousness to make it reasonably foreseeable that Mr Brobyn would not be prepared to continue working under those conditions. Mr Brobyn tried to sort out his concerns by talking with Ms Rooney with support. There was an opportunity from the 17 March meeting for TSSR to give written assurances about remedying various issues, but TSSR did not follow up on these arrangements. Particularly given Mr Brobyn's health circumstances, it was foreseeable that he would resign if TSSR did not resolve matters.

[27] For these reasons, I find that TSSR constructively dismissed Mr Brobyn and that he has a personal grievance of unjustified dismissal.

**How should the personal grievances be settled?**

[28] Mr Brobyn has unjustified dismissal and unjustified disadvantage grievances. I must consider the extent to which Mr Brobyn's actions contributed to the situation giving rise to these grievances and if required by those actions, reduce remedies that would otherwise have been awarded.

[29] Mr Brobyn's actions did not contribute to the situation giving rise to his unjustified dismissal. I therefore find that Mr Brobyn's actions do not require the Authority to reduce remedies for this grievance.

[30] Mr Brobyn arrived at work shortly after his rostered start time on 8 March 2019. The warning followed from this. There had been other occasions where Mr Brobyn arrived at work after his rostered start time, although the frequency is not shown by any evidence. However, Mr Brobyn's action did not contribute in a blameworthy way to the decision to give him a warning. Up until the warning issued, Mr Brobyn had not been required by Mr O'Driscoll or Ms Rooney to adhere to the rostered start time. He also worked past his rostered finish time and without strict adherence to breaks, without additional recognition from TSSR. While TSSR was entitled to insist on punctuality, it had not done so. Mr Brobyn's actions in commencing shortly after the rostered time cannot be described as blameworthy in that context. I therefore find that Mr Brobyn's actions do not require the Authority to reduce remedies for the unjustified disadvantage grievance.

[31] The claims under s 123(1)(c)(i) of the Act are for compensation of $18,000.00 for the dismissal grievance and $3,000.00 for the disadvantage grievance. I bear in mind the nature of the harm, the extent of proven loss and its causal connection to the damage.

[32] The case involves an unjustified warning and an unjustified dismissal. Being deprived of employment is much more likely to cause harm of a serious nature than an unjustified warning. The unjustified dismissal followed shortly after the unjustified warning so the loss caused by the warning endured only for a short time before much more serious harm arose. Given the limited time gap, it would be artificial to try and differentiate the harm caused by the unjustified warning and the harm caused by the unjustified dismissal. I will make a single award to cover humiliation, loss of dignity and injured feelings.

[33] Mr Brobyn had a passion for cooking and working in the hospitality industry which he has now lost, wholly because of the personal grievances. He gave evidence, which I accept, of feeling very frustrated, agitated and very uneasy about working in hospitality again. He feels that it is not worthwhile to try and spend the time and effort to become a chef. Mr Brobyn became reclusive and was angry and frustrated at not being able to afford to do things. He gave evidence in some detail about the health effects caused by the grievances, which I accept but I will refrain from detailing in this determination. He found some temporary work in May 2019 which became permanent in September 2019 so feels he is just

starting to get back on his "feet". However, I observed Mr Brobyn still to be significantly affected by the emotional harm caused by the grievances. Mrs Brobyn confirms that her son no longer has the confidence to work in hospitality, despite that being his intended career for a considerable time. I do not underestimate the continuing sense of loss for Mr Brobyn. Mrs Brobyn's evidence reinforces the serious consequences suffered by Mr Brobyn. I assess $15,000.00 as the level of compensation required under s 123(1)(c)(i) of the Act to make good the loss caused by the grievances.

[34] Mr Brobyn had no replacement income for a month following the termination of his employment with TSSR. He claims lost wages to cover the initial four weeks following the termination of the employment. Mr Brobyn was paid $17.00 per hour. He was entitled to a minimum of 30 hours per week. I calculate the lost wages at $2,040.00. There will be an order for compensation under s 123(1)(b) of the Act for that amount.

**Are there any arrears?**

[35] Where there has been default in payment to an employee of wages and other money payable under an employment agreement, s 131 of the Act entitles the employee to recover the arrears.

[36] Mr Brobyn gave two weeks' notice of his resignation but was certified as medically unfit for work for the full two weeks. The payslip for the period ending 3 March records a sick leave entitlement of 40 hours, so Mr Brobyn should have been paid sick leave to cover the notice period. I find that Mr Brobyn is entitled to arrears of sick leave of $1,020.00.

[37] TSSR did not pay Mr Brobyn any holiday pay when his employment ended. TSSR did not produce the time and wages records despite Mr Brobyn's several requests. There is no claim for a penalty, but I do not have records which would allow me to precisely calculate the holiday pay arrears. The payslip for the period ending 3 March 2019 records annual leave of 215 hours. Taking that as Mr Brobyn's entitlement to annual holidays at the end of his employment, there are arrears of $3,655.00. The payslip also records $113.56 owed as holiday pay. Adding that to the annual holidays payment, the holiday pay arrears totals $3,768.56.

[38] I accept Mr Brobyn's evidence that there were six public holidays during his employment on which he was required to work and which were otherwise his normal working days. Mr Brobyn was entitled to an alternative holiday for each of these days, in addition to

the higher rate of pay in accordance with the Holidays Act 2003. TSSR paid the higher rate when Mr Brobyn worked but never allowed him to take the alternative holidays. TSSR should have paid Mr Brobyn for six alternative days as part of his final pay. Several payslips show Mr Brobyn worked 7.5 hours on statutory holidays. The relevant daily pay for those days was $127.50, so Mr Brobyn should have been paid $765.00 for the alternative holidays.

[39] These arrears total $5,553.56.

**Is Mr Brobyn entitled to costs?**

[40] Mr Brobyn incurred costs to engage an advocate for this claim. The application of the daily tariff for one day is sought.

[41] I accept that Mr Brobyn is entitled to a contribution to his costs and that the tariff should apply. However, the claim was undefended and the investigation meeting took only part of the morning. I fix costs at the rate of a half day to recognise the time taken for preparation of the claim and statements of evidence.

[42] A further $71.56 is claimed to cover the fee paid to lodge the problem.

[43] There will be an order of $2,321.56 for costs.

Philip Cheyne
Member of the Employment Relations Authority