

**Attention is drawn to the order
prohibiting publication of
certain information in this
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 282
3175502

BETWEEN	CSJ Applicant
AND	JRL Respondent

Member of Authority: Andrew Gane

Representatives: Michael Smyth, counsel for the Applicant
Simon Buckingham, counsel for the Respondent

Investigation Meeting: 28 February 2023

Submissions and other: 17 March 2023
material received:

Determination: 31 May 2023

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] At the investigation meeting the parties asked that their identities and the nature of their involvement remain confidential. I am satisfied it is appropriate to make an order under clause 10(1) of the Second Schedule of the Employment Relations Act 2000 (the Act) that any information identifying the parties is prohibited from publication until this order is revoked or varied by further orders of the Authority. They will be identified only by randomised initials which have no correlation to their actual names any information referencing CSJ and JRL is prohibited from publication.

Employment relationship problem

[2] CSJ raises two personal grievances. First, whether CSJ was unjustifiably disadvantaged by JRL breaching minimum employment standards by not allowing its employees (including the CSJ) to take statutory rest breaks. Second, whether the CSJ was unjustifiably dismissed from his employment. He is also seeking compensation.

[3] CSJ is also seeks payment of outstanding wage arrears, a penalty and reimbursement of legal costs.

[4] JRL does not agree that CSJ suffered an unjustified disadvantage by not having meal breaks. JRL also says CSJ resigned from his role on 5 March 2020 and the parties mutually agreed he would work out his two months' notice period.

The Authority's Investigation

[5] I investigated CSJ's claims by receiving written statements of evidence and other documents from CSJ and his partner. For JRL I received evidence and supporting documents from its New Zealand based Manager (NZ manager), its United Kingdom based director (UK director) and its senior UK advisor. During the investigation meeting on 28 February 2023, I heard evidence from all witnesses who answered questions put by myself and the parties' representatives.

[6] As permitted by s 174E of 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. In determining this matter, the Authority has carefully considered all the material before it, including all the evidence by the parties and their submissions.

Issues

[7] The issues for determination and investigation were:

- (i) Whether CJS has a personal grievance for unjustifiable disadvantage because JRL breached minimum standards by not allowing its employees (including CSJ) to take statutory rest breaks?¹
- (ii) Was CSJ unjustifiably dismissed, or did he resign?

¹ Employment Relations Act 2000, s69ZD.

- (iii) If JRL's actions were found to be unjustified, what remedies should be awarded considering:
 - a. lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
 - b. interest awarded on any lost wages; and
 - c. compensation under s 123(1)(c)(i) of the Act, and
 - d. if any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by CSJ that contributed to the situation giving rise to her grievance.
- (iv) If a breach of minimum employment standards is established, to determine whether CJS should receive payment of rest and meal breaks?
- (v) If a breach of minimum employment standards is established, to determine whether a penalty should be imposed?
- (vi) Should either party contribute the cost of representation of the other party?

Background

[8] JRL is a charitable organisation that carries out a 24-hour health service in the UK. It employs 24 New Zealanders based in New Zealand who carry out the night shift in the UK.

[9] CSJ was employed by JRL from 4 May 2021 as a supervisor. He reported directly to the JRL NZ manager. His terms of employment were governed by an individual employment agreement (IEA) dated 12 April 2021. CSJ's primary role was to provide online supervision to workers whilst they undertook digital conversations with persons in the UK who access JRL's service. As part of his role, CSJ also engaged in those conversations himself.

[10] CSJ worked 20 hours per week in 4-hour shifts at his home and was paid a salary of \$44,000 per annum. CJS had primary employment with a NZ based provider and his employment with JRL was his secondary employment.

Employment standards

[11] Section 69ZD of the Act prescribes specific requirements for the duration of rest and meal breaks for different work periods. CJS's IEA was silent on the provision of rest

and meal breaks and there was no workplace policy on the implementation of rest and meal breaks.

[12] CSJ stated that he and his workplace colleagues were not permitted to take a paid 10-minute rest and meal break during their shifts. He stated the needs of the role required him to continue working on the platform whilst taking bio breaks.

[13] There was a dispute in evidence as to whether CSJ had raised the legal requirement to receive a 10-minute rest and meal break with JRL, however, it was accepted that the issue was raised by other employees in meetings with the executive team of JRL.

[14] JRL's witnesses gave evidence as to why taking rest and meal breaks in the middle of the work period would be impractical and unreasonable. Initially JRL assumed that the 'Admin' time stipulated in the IEA covered this, however, they now recognise that this assumption was incorrect.

[15] JRL employees did not come under any exceptions under the Act, and I find JRL breached the Act by not allowing NZ based employees to take paid meal breaks.²

Was the CJS unjustifiably disadvantaged by not being able to take meal breaks?

[16] The failure of JRL to provide the statutory requirements of s 69ZD of the Act, of paid rest and meal breaks, during CSJ's employment affected his working conditions to his disadvantage. This failure was not an action an employer acting fairly and reasonably could have taken, CSJ is entitled to a consideration of remedies to resolve his unjustified disadvantage personal grievance.

Was CSJ unjustifiably dismissed, or did he resign?

The law

[17] The principles of the law regarding resignations are summarised as follows:

- (a) resignation is a unilateral act. Once an employee has given notice of resignation, the employer cannot decide the resignation was not effective; and

² Employment Relations Act, s69ZEA.

- (b) The employee does not have to justify the resignation or demonstratively think it through; and
- (c) The key issue is, on an objective assessment whether the employee has resigned; and
- (d) Whether the employees resignation was due to an employer's breach or conduct will be addressed by the law relating to constructive dismissals.³

[18] The emphasis has moved away from consideration of whether an employer has given a cooling off period to an objective consideration of whether the employee has resigned. The employer can rely on that as a resignation rather than having to go back and ask if they are really sure. However, in some cases a cooling off period may still be required where words are spoken in anger or frustration. An employer is still subject to the duty of good faith which requires the employer to be active and constructive in maintaining the employment relationship.

[19] The main question is whether, on an objective assessment, CJS resigned. If it was a resignation, no "cooling off" period would be required.

The facts

[20] Prior to February 2022, the employment relationship was working well. Several JRL witnesses said that CSJ was well thought of. The UK director talked of him being valuable to the team and that he developed a strong relationship with his NZ manager.

[21] During February 2022 CJS felt stressed, which he claims was partly attributed to a previous work-related incident. On 22 February 2022 CSJ raised with his NZ manager a number of work-related issues, including his own objections to managerial decisions around hiring and promoting staff and the failure of management to address staff performance. As a result, CSJ said at the time he was considering resigning and said he would reflect on this over the next two weeks while he was on leave. He later stated it had been a "knee jerk" reaction.

[22] The NZ manager said that she discussed in a later video meeting with CSJ his frustrations and put in place some workplace changes to assist. She also thought that CSJ had worked through his issues and was in a good place mentally.

³ *Mikes Transport Warehouse v Vermuelen* [2021] NZEmpC 197.

[23] The NZ manager then spoke to CSJ on 14 March 2022 and CSJ advised her that his frustration was due to his being exhausted.

[24] On 3 April 2022 his NZ manager sent CSJ a series of meeting invitations for regular catch ups which CSJ declined. When questioned as to why he declined the invitation he stated the reason he declined the invitation was due to a timing conflict.

[25] On 4 April 2022 CSJ sent an email to his NZ manager stating

Hi there,

Emailing to advised that I am wanting to hand in my resignation.

Not happy with how the culture at JRL..... is at the moment. Feel this role is not what it used to be.

Not happy with [a manager]can we have a talk about this. Would not like to be on the same shift as her if possible.

[26] Initially the NZ manager interpreted the statement “*I am wanting to hand in my resignation*” as CSJ resigning from his position. I accept that the phrase itself is ambiguous as to CSJ’s intentions, however CSJ clarified his position further by a further email during the same work shift saying that he “*will have a think about it first, was another knee-jerk reaction*”.

[27] On 13 April 2022, CSJ and his NZ manager had a video meeting and the minutes of the meeting record that:

[NZ manager] informed CSJ that this has been discussed with [UK director] who has reviewed the emails and accepted CSJ’s resignation based on the rationale provided.

[NZ manager] advised that when a resignation is received this cannot be reversed unless the employer chooses to do this and as [UK director] is the director the decision sits with her.

[28] By email dated 22 April 2022, CSJ challenged the decision to end his employment:

Hi [NZ manager] and [UK director],

Want to follow up as to what has been decided. As I emailed straight after my email, I asked to retract my resignation. Have checked in with employment law specialists and they have advised I should of received communication back by now by my employer. Can you please advise on what has been decided. Feeling very uncertain and stressed that I haven't been advised yet. Cheers,

[29] Somewhat surprisingly to CSJ the UK director responded:

Having reviewed your resignation and having understood from my discussions with [NZ manager] that you have been expressing dissatisfaction with working arrangements and your role at JRL for some months, I have decided to accept your resignation.

[30] CSJ replied that he wanted to keep his job and that he had just bought a new property. He requested a conversation to discuss the issue.

[31] The UK director responded:

You state that you are happy with your role at JRL yet the submission of your resignation indicates otherwise. You have also talked to your NZ manager previously about feeling unhappy with how we manage things here at JRL. You state that things were stressful in your life when you tendered your resignation. You will know that our approach to working with people is always to acknowledge that our personal circumstances will have a bearing on our work. However, we do expect that our “*employees*” are able to reflect on how their life circumstances affect their attitude to work and the actions they undertake at work. For these reasons I am maintaining my original decision not to accept the retraction of your resignation.

[32] JRL submitted that time was allowed for CJS to rectify any misunderstanding, and whilst it may have been desirable for JRL to clarify his true intent, ultimately the onus is on the employee to clarify that they have not resigned if the employer has stated that they believe that such a communication is a resignation with good cause. To suggest otherwise would mean that every employer in New Zealand in the case of every resignation would be legally compelled to contact each resigning employee and ask if they meant it.

[33] I found CSJ’s NZ manager to be a credible witness. She believed CSJ’s statement that he was “wanting to resign”, and the fact he had earlier declined a series of meeting invitations, implied CJS’s resignation was genuine. She then communicated the alleged resignation to her UK director. For personal reasons unrelated to work there was a delay of some two weeks before the UK director was able to communicate with CSJ.

[34] However, from an objective viewpoint this was not an unequivocal resignation. The statement was at best ambiguous, and a good employer should have followed up with the employee after a cooling off period. The 4 April 2022 email stating CJS was “wanting to resign” on its plain and ordinary meaning is future focused. It is the same as someone saying, “I am going to...” (i.e. in the future). It is not the same as saying “I am resigning”, which is present tense. A reasonable person would understand CSJ’s words to mean that he was contemplating resignation but had not yet formed a firm intention to resign. The purpose of framing the words in that way is to highlight an issue which

CSJ wanted to discuss and hopefully resolve, thereby removing the need for resignation. The words used permitted the time for a discussion where CSJ may change his mind. A threat to resign is not a resignation.

[35] After CSJ had further clarified the situation, his dismissal could not be substantively justified. JRL could not reasonably conclude that his email amounted to a resignation. From that point onward when CSJ was asked to work out his notice period, which he did, CSJ was constructively dismissed by JRL, and his dismissal was unjustified.

Wage Arrears

[36] JRL failed to provide the statutory requirements of s 69ZD of the Act, of paid rest and meal breaks. CSJ is entitled to reimbursement of wages for unpaid rest breaks: \$1,833, equivalent to 43 hours.

Remedies

Reimbursement of wages

[37] Where the Authority finds that the employee has a personal grievance; and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration being \$11,000. Here the latter is the lesser amount. JRL is ordered to pay CSJ \$11,000 in reimbursement of lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[38] CSJ has succeeded in proving his two personal grievances claims that he was unjustifiably dismissed from his employment with JRL and was unjustifiably disadvantaged by not receiving a meal break during his four-hour shift is entitled to an award of compensation under s 123(1)(c)(i) of the Act,

[39] In regard to the unjustified dismissal CSJ said he felt the way he has been treated by JRL has had a significant, negative impact on him and has caused him financial hardship. Both CSJ and his partner gave evidence as to the impact the dismissal had on CSJ. His partner stated:

The anxiety caused CSJ to question his own confidence, questioning whether he was suitably qualified or suitably experienced. His mana has been severely impacted by the dismissal. He was humiliated by the

dismissal I could see his mental health suffering as the only thing left was him to question himself, when in my opinion the organisation has been the one that acted questionably. The anxiety has caused CSJ to lose focus on what he is doing, and during times of stress snap at others and become less tolerable.

[40] I am satisfied CSJ has experienced significant harm for humiliation, loss of dignity and injury to feelings. Further the failures by JRL to comply with basic fairness requirements that caused CSJ humiliation, loss of dignity and injury to feelings entitles him to compensation. I consider that an award of \$10,000 appropriate.

[41] In regards CSJ's claim for unjustified disadvantage, he said that in the circumstances the lack of meal breaks caused him additional stress in what was already a stressful job. It was extremely upsetting and humiliating for him. Having regard to the circumstances of this case and other awards of compensation I consider that an award of \$5,000 appropriate.

Contribution

[42] The Authority is required under s124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded. I do not consider CSJ's actions contributed to his situation.

Wage arrears

[43] CSJ is entitled to reimbursement of wages for unpaid rest breaks: \$1,833, equivalent to 43 hours.

Interest

[44] CSJ can recover interest on the arrears and JRL is liable for payment of that interest calculated from the date he started working at JRL until the arrears are paid in full. JRL is ordered to pay interest, using the civil debt interest calculator.⁴

⁴ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Penalties

Should a penalty be imposed for the breach of employment standard

[45] Having found that JRL has breached statutory duties owed to CSJ at paragraph [16] above, I must next consider whether an award of a penalty (or penalties) is warranted as sought.

[46] The failure by JRL to provide paid 10-minute meal break was a breach of section 69ZD of the Act. However, JRL advised they have retained a NZ employment advisor to advise them on compliancy with NZ employment law. JRL has agreed to follow any recommendations of the Authority, as this issue impacts on their NZ based employees. Also, the factual matrix of the statutory breach and breach of the employment agreement is the same as the personal grievance for unjustified disadvantage for which the remedies have been awarded in CJS's favour. In the circumstances I decline to exercise my discretion to award a penalty.

Result

[47] CJS has succeeded with both of his personal grievance claims. He was unjustifiably disadvantaged because his conditions of employment were affected to his disadvantage when JRL failed to comply with the requirements of s 69ZD of the Act. His dismissal was unjustified, because he had not resigned and therefore it had been carried out in a fundamentally unfair way, which failed to meet minimum employment law requirements.

Summary of orders

[48] CJS was both unjustifiably disadvantaged and unjustifiably dismissed for which remedies have been awarded. His claims for wage reimbursement have been upheld. The following orders are made:

- (a) Within 28 days of the date of determination JRL is ordered to pay Ms CJS the following sums:
 - (i) reimbursement of 3 months' salary being \$11,000; and
 - (ii) compensation for hurt humiliation and injury to feelings under s 123 of the Act being \$5000 for unjustified disadvantage; and

- (iii) compensation for hurt humiliation and injury to feelings under s 123 of the Act being \$10,000 for unjustified dismissal; and
 - (iv) wage arrears of \$1,833.
- (b) Within 28 days of the date of determination JRL is to calculate and pay Ms CJSinterest on the arrears as awarded in paragraph [433] above.

Costs

[49] Costs are reserved. If a determination of the Authority is required on costs, CJS may lodge a memorandum within 14 days of the date of this determination and JRL would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable unless prior leave has been sought.

Andrew Gane
Member of the Employment Relations Authority