IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 344
3038171

	BETWEEN	HAYDEN CASEY Applicant
	AND	BETTER BURGER LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Robert Morgan, advocate for the Applicant Rod Ballenden, director of the Respondent
Investigation Meeting:	10 June 2019
Oral determination:	10 June 2019
Written record issued:	10 June 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hayden Casey began work as a team member in Better Burger Limited's Mount Eden store on 7 May 2018. His employment agreement described his position as full-time with guaranteed minimum hours of 30 a week. In a letter to Mr Casey dated 6 August 2018 BBL's operations manager Josh Harre said he presumed Mr Casey had abandoned his employment because Mr Casey had not attended or communicated with Mr Harre about a meeting scheduled for 27 July 2018. Mr Harre asked Mr Casey to contact him within 24 hours if there were any circumstances about his absence of which BBL should be made aware. Mr Harre said unless he heard from Mr Casey his last day of employment would be treated as 29 July and his final pay, including holiday pay, would be credited to his bank account.

[2] Through his advocate Mr Casey raised a personal grievance by letter on 8 August although Mr Harre said BBL did not know about the grievance until

November 2018 when the company was sent a copy of Mr Casey's application to the Authority.

Issues and investigation

[3] From Mr Casey's application to the Authority and BBL's reply the following issues arose for investigation and determination:

(i) Did BBL act justifiably in treating Mr Casey's employment as having ended on grounds of abandonment (considering why and how BBL decided it was)?

(ii) If BBL's actions were not justified, what remedies should be awarded to Mr Casey, considering:

(a) Lost wages (subject to evidence of reasonable endeavours by him to mitigate his loss); and

(b) Compensation under s123(1)(c)(i) of the Act?

(iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Casey that contributed to the situation giving rise to his grievance?

(iv) Was Mr Casey owed any arrears of wages for the difference between his contracted or otherwise agreed hours and the hours for which he was rostered for and worked?

(v) If Mr Casey was owed arrears, what holiday pay was also due on those arrears?

(vi) Was BBL liable to a penalty for failure to pay any amount found to be due as wages (Wages Protection Act 1983 s 4 and s 13)?

(vii) Should either party contribute to the costs of representation of the other party?

[4] For the purpose of investigating those issues Mr Casey, Mr Harre and the former store leader of BBL's Mount Eden store Matt Brant each provided a written witness statement. Mr Casey and Mr Harre, under affirmation, confirmed the content of their written statements and answered questions. Mr Brant, who is now resident in Australia, could not be contacted during the investigation meeting. In light of Mr Harre's evidence on various points Mr Brant's evidence would not have materially changed the outcome for the company.

[5] As permitted by s 174A and 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.

Abandonment of employment – a justified decision?

[6] The general principle in employment law about abandonment is that where an employer believes a worker has walked away from the job but the worker has not clearly indicated an intention to finally end the employment, the employer should be cautious in that inference and make further inquiries of the worker.[1] The statutory duty of good faith requires the employer to be active in finding out the true situation and to take reasonable steps to communicate with the worker about it. The worker has a corresponding obligation to be active and communicative in responding to the employer's query.[2]

[7] Those principles are considered in relation to any provision in the employment agreement and the particular circumstances of what happened in each case.

[8] BBL's employment agreement with Mr Casey included this provision about abandonment of employment:

> You will be deemed to have terminated employment without notice if you are absent from work for three consecutive working days without notifying the Employer and without good cause.

[9] His terms of employment also included a 90-day trial period (which ran from 7 May to 5 August 2018). From early in his employment Mr Harre and Mr Brant had concerns about Mr Casey's attendance and being late for work. This was partly due to transport difficulties he experienced. Mr Casey lived in West Auckland and travelled by train and bus to work at BBL's Mount Eden store. Although he initially said travel arrangements would not be an issue he soon asked for adjustments to shift times in order to catch last buses or trains home.

[10] In mid-June he also had an accident that aggravated an earlier hip injury that resulted in him taking a number of days off work.

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[1] *E M Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 (CA) at [26].
[2] Employment Relations Act 2000 s 4(1A).

[11] Text messages exchanged between Mr Casey and Mr Brant throughout the employment indicated Mr Brant was not satisfied with some reasons Mr Casey gave for not attending work on some days. On one occasion this was because Mr Casey was taking a cat to the vet. On another occasion he missed his train because he did not have enough credit on his travel card. On the latter occasion, in early July, Mr Brant sent a text reading:

> That is a terrible reason not to turn up to a shift for the second time in one week, not impressed. Letting the entire team down on a Friday night because of public transport is not a valid reason. It is your responsibility to find the means necessary to attend your shifts.

[12] On 20 June Mr Harre and Mr Brant had held a "feedback" meeting with Mr Casey. This included discussion about some adjustment to Mr Casey's hours of work, to accommodate his hip injury and travel needs, but no written variation to the provision for a guaranteed minimum of 30 hours' work each week was made. By 1 July Mr Casey was seeking restoration of his usual rostered hours. Mr Brant told Mr Casey by text that he was happy to discuss his hours but his rostered hours in the following weeks were for less than 14 hours each week.

[13] In the week ending 22 July Mr Casey did not attend work on the two days he was rostered to work. On Friday 20 July he advised Mr Brant by text that this was because he had caught a cold but in his written witness statement Mr Casey disclosed that the real reason, which he did not tell Mr Brant, was that he had decided his travel costs meant it was not worth turning up. A reply text from Mr Brant said he would get Mr Harre to "organise another meeting to chat about your attendance". Mr Casey responded that he wanted a meeting with Mr Harre to talk about his rostered hours because he had seen his roster for the following week that provided only ten hours. On Sunday 22 July Mr Casey sent a further text saying he was still unwell and would not be at work that day.

[14] Mr Harre sent Mr Casey a letter by email on 24 July calling him to a meeting at 9am on 27 July. The letter said the meeting was "to discuss the possibility of your employment ending under the terms of the 90 day trial period outlined in your employment agreement". Mr Casey was encouraged to bring a support person with him and to confirm his attendance by 25 July.

[15] Mr Casey did not respond directly to Mr Harre's letter about arrangements for the 27 July meeting. Instead he sent Mr Brant a text at 8.08pm on 26 July asking if the 9am time for the meeting the next day could be moved closer to the 5pm starting time that he was rostered to work that day. His message continued: "Or am I being terminated and wasting my time and money coming in to be told to go home again?"

[16] Mr Casey got no reply to his 26 July text and did not attend the workplace at 9am on 27 July. In the early afternoon of 27 July he asked Mr Brant by text "what's going on". Mr Brant responded that he had passed Mr Casey's message on to Mr Harre and "he'll get in contact with you". Mr Harre did not contact Mr Casey at any time that day but at 3.31pm, 90 minutes before Mr Casey was due to start work that day, Mr Brant sent him a text cancelling his shift for the evening saying: "Regardless it's quiet today so won't be needing you tonight".

[17] As well as not attending work for the four-hour shift he had been rostered to work on 27 July, Mr Casey did not attend work on 28 July (three hours rostered) or 29 July (three hours rostered). Mr Casey sent further texts to Mr Brant on 28 July, 31 July, 1 August, 2 August and 4 August, each asking what was happening and if he would receive a new roster. On 31 July Mr Brant replied that he did not realise Mr Harre had not contacted Mr Casey and said: "he will now".

[18] Mr Harre, in his oral evidence, could not recall conversations with Mr Brant about the situation or having told him that he would contact Mr Casey. On the balance of probabilities, given what Mr Brant told Mr Casey by text on 27 and 31 July, Mr Brant at least understood that Mr Harre would respond to Mr Casey's queries.

[19] However the next and only subsequent contact Mr Casey then had from Mr Harre was six days later when he received, by email, the 6 August letter. Mr Harre's letter said he had "unsuccessfully tried to contact" Mr Casey and had been "left to presume" Mr Casey had abandoned his employment.

[20] Mr Casey made no attempt to telephone or email Mr Harre in response to the 6 August letter.

[21] His action in not attending work for his rostered hours on 27, 28 and 29 July meant Mr Casey had been absent for the "three consecutive working days" referred to

in the employment agreement provision on abandonment. However, given his text messages to Mr Brant on 26, 27 and 28 July, he had not failed to contact his employer. He had asked the question of "what was going on", had been told by his direct manager Mr Brant that Mr Harre would be in touch and, reasonably, expected an answer.

[22] The immediate question for determination was whether BBL, through the actions of Mr Brant and Mr Harre, had acted justifiably in its dealings with Mr Casey over his absence from work on those three days and then making the decision that he had abandoned his employment? The answer to that question is no. A fair and reasonable employer could not have made that decision without responding to Mr Casey's request regarding the time of the meeting and his queries in the following few days. At the very least it could not be said that Mr Casey's actions fell within the reference in the abandonment clause to being absent without notifying the employer – he had been in touch with Mr Brant and was awaiting a response.

[23] Mr Casey may have gained some advantage from the delay in the response. He was clearly aware from the 24 July letter that the future of his employment was being considered under the 90-day trial period. The trial period ended on 5 August and BBL could have acted before then to declare his employment at an end, with the consequence that he could not have pursued a grievance for unjustified dismissal. However, having not acted on that option sooner, BBL was obliged to act as a fair and reasonable employer could have done in making its decision that he had abandoned his employment. That obligation included being active and communicative in responding to Mr Casey's queries. In failing to do so, BBL also failed to consider sufficiently whether Mr Casey's contention about his rostered hours remaining below the 30-hour guaranteed minimum was a "good cause" for his absence. BBL may have had a valid argument that his absences, lateness and health issues warranted on-going reduced hours but it failed to act reasonably and fairly in making sufficient arrangements to hear from him before presuming and then deciding the employment relationship was at an end for reasons of abandonment.

[24] As a result of those unjustified actions Mr Casey had established a personal grievance for which an assessment of remedies had to be made.

Remedies

Lost wages

[25] Mr Casey found a new job from 16 August. He later left that job because he found it too physically demanding but BBL was not liable to pay him lost wages after 16 August.

[26] An award of lost wages in the particular circumstances in this case is also limited by two contingencies that, if BBL had acted fairly, would likely have ended his employment quite shortly anyway. Firstly, as already noted, it could have terminated his employment (with or without a meeting) before 5 August under the 90-day trial because of concerns about Mr Casey's attendance record. Secondly, even if the employment had continued after that date, the difficulties with travel and attendance made it unlikely Mr Casey would have been employed there much longer, either by his own decision or by termination for performance reasons.

[27] Accordingly, the award of lost wages is limited to the two-week period between his last pay and beginning a new job on 16 August. At his hourly rate of $16.50 an hour for 30 hours a week, the award of lost wages for two weeks totals $990. Including the holiday pay of $79.20 due on those lost wages, the sum due is $1,069.20.

Compensation for humiliation, loss of dignity and injury to feelings

[28] Mr Casey said getting the 6 August letter about abandonment of employment "felt like a kick in the guts". He said this also affected his confidence in seeking other work. Those effects, which were limited rather than long term, warranted an award of compensation under s 123(1)(c)(i) of the Act of $7,000.

A reduction of remedies for conduct contributing to the grievance

[29] Where a worker is found to have a personal grievance and is awarded remedies, s 124 of the Act requires the Authority to consider the extent that actions of the employee contributed to the situation that gave rise to the grievance. Then, if those actions are sufficiently blameworthy, the Authority must reduce the remedies that would otherwise have been awarded.

[30] Mr Casey contributed to the situation giving rise to his grievance in the following ways.

[31] He stayed away from work in the week of 16-22 July rather than work his rostered hours. This was a form of protest over what he considered to be the unreasonably low number of hours he was rostered for that and the following week but said, looking back, that it was "really stupid". While he had made some efforts to talk with Mr Brant about restoring his rostered hours to at least 30 hours a week, Mr Casey's unilateral action made the situation worse.

[32] He had also contributed to that situation by his attendance record during his employment. While some absences and lateness were for accepted reasons of ill health, others were due to his own lack of care, such as by not making adequate travel arrangements.

[33] Reducing the compensation remedy awarded by 15 per cent, that is to $5,950, was sufficient to mark how Mr Casey had contributed to the situation giving rise to his grievance. The reduction is not applied to his lost wages remedy.

Wages arrears

[34] Mr Casey sought an order for wage arrears for payment of hours he said he was entitled to receive as part of his weekly "guaranteed minimum" of 30 hours. For the six weeks from 25 June to 5 August 2018 he claimed he was denied around 131 hours for which he should have received pay of about $2,160.

[35] During the investigation meeting Mr Casey's calculation of the shortfall in hours was corrected. Over a six-week period from the week ending 1 July the difference between his rostered hours and the guaranteed minimum totalled 120 hours. The value of his wage arrears claim was therefore $1,980.

[36] BBL's employment agreement with Mr Casey included a provision that its terms and conditions could not be varied unless this was recorded in a written variation signed by both parties.

[37] In his written witness statement Mr Harre noted that whatever changes to hours were agreed with Mr Casey in late June were not documented and he understood there could have been "a more procedurally sound process" to do so.

[38] As a result Mr Casey was entitled to an award of wage arrears for the shortfall in hours, after the week ending 24 June, between the 30-hour minimum and what he was actually rostered. He has, properly, not included in his wages arrears claim any payments for hours that he was rostered in the weeks ending 22 July and 29 July (12.30 and 10 respectively) but did not attend work.

[39] If BBL had rostered Mr Casey for those minimum hours, as required by its own employment agreement with him, and he had not attended work, it would not have had to pay any wage arrears to him. Having failed to do so, it must pay the difference.

[40] BBL must pay Mr Casey $1,980 as wage arrears. He is also entitled to the sum of $158.40 as holiday pay on that amount.

Liability to a penalty?

[41] Mr Casey also sought a penalty be imposed on BBL under the Wages Protection Act 1983 in relation to failure to pay him the amount found to have been due to him as wage arrears. In the circumstances of this case the remedies awarded had adequately addressed that failure without any need to impose a further penalty on BBL. No penalty is awarded.

Costs

[42] Costs for this investigation meeting, which required just over a half a day, is dealt with on the basis of the Authority's usual tariff. BBL must pay Mr Casey the sum of $2,250 as a contribution to his costs of representation.

Orders

[43] For the reasons given, and in summary, BBL must pay Mr Casey the following sums within 28 days of the date of this determination:

(i) $1,069.20 as reimbursement of lost wages (including holiday pay) under s 123(1)(b) of the Act; and

(ii) $5,950 as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act (being the amount after a reduction of 15 per cent was applied for contributory conduct by Mr Casey); and

(iii) $2,138.40 as arrears of wages (including holiday pay); and

(iv) $2,250 as a contribution to his costs of representation in bringing his application to the Authority.

Robin Arthur
Member of the Employment Relations Authority