

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 326
3024909

BETWEEN TIMOTHY JAMES CHAPMAN
 Applicant

AND THE WHINGING POM LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Stephanie Hill, advocate for Respondent

Investigation Meeting: 5 March 2019

Submissions received: Received on the day

Further information
received: 18 March 2019
Determination: 31 May 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Timothy James Chapman was unjustifiably dismissed from his employment.**
- B He is also owed outstanding wages from the first two weeks and last week of his employment.**
- C The Whinging Pom Limited is ordered to pay to Timothy Chapman the following:**
- (i) Taking contribution into account the sum of \$5464.93 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
 - (ii) Payment for unpaid wages for 28 hours for the first two weeks of employment in the sum of \$616 gross.**

- (iii) **Payment for one day's pay for the final week in the sum of \$146.66 gross.**
- (iv) **Reimbursement of the filing fee in the sum of \$71.56.**

Employment Relationship Problem

[1] Timothy Chapman says that he has five employment relationship problems arising from his employment as a Senior Barista with The Whinging Pom Limited from 6 November 2017 until he was dismissed on 12 February 2018.

[2] The employment relationship problems are as follows:

- (a) That he was forced to work 40 hours over six days without agreement.
- (b) That he was forced to attend meetings on 18 and 26 January 2018.
- (c) That he was unjustifiably dismissed.
- (d) That he is owed wages from the start and the end of his employment.
- (e) That there was damage to his private vehicle for which he should be reimbursed.

[3] At the heart of most of the employment relationship problems is the requirement that Mr Chapman work over six days when he was employed by The Whinging Pom Limited.

[4] Mr Chapman says that he would like his problems to be resolved by reimbursement of any lost wages, payment of the repairs required to his motor vehicle and payment of any unpaid wages.

The reply from The Whinging Pom Limited

[5] The Whinging Pom Limited (The Whinging Pom) is a duly incorporated company having its registered office in Christchurch and carrying on the business of a café.

[6] It says that Mr Chapman entered into an employment agreement providing for 40 hours of work to be set out in a roster which was normally 7am to 2pm Monday to Friday and 9am to 2pm on Saturdays.

[7] The Whinging Pom says that it has paid Mr Chapman correctly for his wages and that Mr Chapman offered to work reduced hours from the start of his employment until the café opened.

[8] It says that Mr Chapman offered to attach a sign to his personal vehicle to advertise the café which he attached and removed himself and that it was unaware of any damage to the vehicle until this was raised during a disciplinary meeting on 2 February 2018. Further, that the Authority does not have jurisdiction to deal with this matter.

[9] The Whinging Pom says that Mr Chapman was invited to informal meetings to discuss his indication that he needed to reduce his contractual hours but that he was aggressive and verbally abusive. A disciplinary process then followed and Mr Chapman was dismissed.

[10] It says that the dismissal was procedurally and substantively justified.

The Issues

[11] The Authority needs to determine the following issues in this matter:

- (a) What did the employment agreement provide for hours and days of work?
- (b) What was the expectation for Mr Chapman's hours and days of work?
- (c) When did Mr Kennedy and Ms Hill become aware that Mr Chapman did not agree to Saturday work and did not believe he had to undertake the work or could not undertake work on a Saturday?
- (d) What allegations were put to Mr Chapman and what was his explanation?
- (e) What were the reasons for dismissal?
- (f) Could a fair and reasonable employer conclude serious misconduct during the meetings on 18 and 26 January 2018 in the circumstances?
- (g) Was the process to investigate the misconduct that of a fair and reasonable employer?
- (h) Could a fair and reasonable employer have dismissed Mr Chapman in all the circumstances?

- (i) Are there outstanding wages due to Mr Chapman at the start and end of his employment?
- (j) Does the Authority have jurisdiction to deal with the claim for repayment for any damage to Mr Chapman's vehicle?
- (k) If the Authority finds that there is money owing to Mr Chapman and/or that the dismissal was unjustified then what remedies should follow and are there issues of mitigation or contribution?

What did the employment agreement provide for hours and days of work?

[12] Mr Chapman and The Whinging Pom entered into an employment agreement on 25 October 2017. The employment agreement provided amongst other matters that employment would commence on Monday 6 November 2017 and that Mr Chapman would be employed on a full-time basis of 40 hours plus per week.

[13] Clause 1.6 of the employment agreement provided as follows:

Your hours of work shall be set by the employer in advance in accordance with a roster. Hours of work may be varied by mutual agreement to suit the particular needs or circumstances at the time.

[14] The employment agreement was not clear about the days Mr Chapman could be expected to work his 40 hours over. Mr Chapman was not assigned work by way of a roster and simply worked when the café was open.

[15] The employment agreement provided in a first page introductory statement that it "prescribes the entire understanding of the terms and conditions of employment... unless otherwise mutually agreed in writing." Notwithstanding that I have also investigated the understanding at the outset of hours and days of work of both parties.

What did Mr Chapman understand about working on Saturday?

[16] The Authority heard from both of the directors of The Whinging Pom, Simon Kennedy and Stephanie Hill. Mr Kennedy said in his oral evidence that Mr Chapman knew that the café would open on a Saturday and as he was the only one who could make a coffee he would have known that he would work on Saturdays. Ms Hill said that the café was

always going to open on a Saturday from 9am to 2pm. There was some change in the opening hours during the week from 8am to 3pm initially to 7am to 2pm as they better understood the customer base and needs.

[17] Mr Chapman was adamant that there was no discussion about the requirement for him to work on a Saturday. He said that he would not have accepted the role if it required him to undertake weekend work. His evidence was that Mr Kennedy told him that the job offer was Monday to Friday and that appealed to Mr Chapman. In his oral evidence Mr Chapman said that he left his previous Monday to Friday job to commence work with The Whinging Pom.

[18] Mr Chapman knew that Mr Kennedy wanted to extend the hours of operation but the café was not opened at the time of the job offer. Mr Chapman said it was not until the end of his first week of employment that Mr Kennedy advised they were going to open Saturdays. He said that he was shocked but agreed he would do it for a few weeks on the understanding that Mr Kennedy would sort it in due course. Mr Chapman was additionally concerned that he was not reaching 40 hours over the five days Monday to Friday.

[19] There could have been some miscommunication/misunderstanding about the requirement that Mr Chapman work on a Saturday and that 40 hours per week would be worked over six days.

[20] Mr Kennedy and Ms Hill believed the requirement for Mr Chapman to work on a Saturday to have been clear but having heard the evidence I could not be satisfied that Mr Chapman was aware when he was offered the job that the 40 hours of work would include work on a Saturday. Mr Chapman's partner Maryann Rigor said in her evidence to the Authority that Mr Chapman believed the role when he accepted it was work from Monday to Friday. The employment agreement does not clearly specify that the hours of work were to be worked across six days of the week.

[21] My impression from the evidence was that it became apparent to Mr Chapman quite early on that the role in terms of working hours and days was not what he expected. Concerns were alleviated however because another employee, Anthony, was employed on a casual basis for a time and I will turn to how that worked now.

Employment of Anthony on a casual basis

[22] On Wednesday 29 November 2017 Mr Chapman had a family situation and could not attend work. He sent a text message to Mr Kennedy and asked if he could send Anthony, a Barista that he knew, to fill in for him. Mr Kennedy agreed and then Anthony was subsequently employed on a casual basis.

[23] Mr Chapman said that he asked Anthony to cover his Saturday shifts and in that way the concern about working Saturdays from his perspective was resolved. Mr Kennedy provided a copy of the casual employment agreement that was entered into between The Whinging Pom and Anthony as part of his documents to the Authority. Mr Kennedy said that Mr Chapman offered Anthony some shifts that were not authorised by him or Ms Hill.

[24] For reasons that I do not need to expand on Anthony was not offered further work after the end of December 2017. Mr Chapman said that he was asked by Mr Kennedy to advise Anthony about this and found it very stressful to do so. Mr Kennedy also provided some text messages between him and Anthony at that time when there was no further work provided to Anthony.

Hours worked when Anthony working

[25] Between 29 November and the end of December 2017 Mr Chapman worked fewer hours than 40 per week because of the shifts taken up by Anthony.

[26] For the week ending 3 December 2017 he worked 22.5 hours and Anthony worked 20.25 hours. For the week ending 10 December 2017 Mr Chapman worked 27.5 hours and Anthony 14.75 hours. For the week ending 17 December 2017 Mr Chapman worked 19.75 hours and Anthony 19.50 hours. For the week ending 24 December 2017 Mr Chapman worked 32.75 hours and Anthony 8 hours. For the week ending 31 December 2017 Mr Chapman worked 24.50 hours and Anthony 10.50 hours.

What happened after Anthony was no longer offered work?

[27] Mr Kennedy and Ms Hill said in their evidence that they advised Mr Chapman that the arrangement for Anthony to cover his shifts was not acceptable and that he was required to work for a minimum of 40 hours per week. Mr Kennedy said that the response to that from Mr Chapman was positive as he was at that stage applying for a home loan. However, before

18 January 2018, Mr Chapman advised both of the directors of The Whinging Pom that they could not make him work six days a week and that he could not work on Saturdays.

[28] Mr Chapman's hours worked each week then increased. For the week ending 7 January 2018 he worked 40 hours and for the week ending 14 January 40.50 hours. He worked 40 hours for the week ending 21 January 2018 and 34.25 hours for the week ending 28 January 2018. Thereafter the disciplinary process started which included a period of special leave before termination of employment.

[29] Mr Chapman said that he continued to feel aggrieved about working on Saturdays. Having heard the evidence I find it more likely than not that the depth of his feelings about this did not become apparent to Mr Kennedy and Ms Hill until a few days before a meeting took place on 18 January 2016. By that stage his partner had also obtained employment that made childcare more difficult if he worked on a Saturday.

[30] A disciplinary process then took place and I shall proceed to set out the allegations put and the explanations provided.

[31] The Authority in assessing the justification of the dismissal that took place needs to apply the test of justification in s103A of the Employment Relations Act 2000 (the Act) and objectively assess whether dismissal was what a fair and reasonable employment could have done in all the circumstances at the time. It needs to consider whether there was adherence to the requirements in the test for procedural fairness.

Allegations and explanations received

The allegations

[32] The allegations for Mr Chapman to answer at a proposed disciplinary meeting on 2 February at 10am are set out in a letter from The Whinging Pom's then lawyers dated 31 January 2018. I will set them out below and then Mr Chapman's explanation to them.

18 January 2018

[33] It was alleged that on 18 January 2018 at 2pm Mr Kennedy and Ms Hill had an informal meeting with Mr Chapman to discuss his indication that he no longer wanted to work on Saturdays and that Mr Chapman became very aggressive and began to yell. It was

stated in the letter setting out the allegation that he referred to a need for days and times in the [employment agreement] and said that Mr Kennedy and Ms Hill “could not run a business if they tried.” It was alleged that Mr Chapman threatened to take the company to Court if they insisted that he work on Saturdays and that he shouted that he was not working on the next Saturday and to find someone else. He then got up and “further verbally abused” Mr Kennedy and Ms Hill.

26 January 2018

[34] On 26 January 2018 there was a further meeting called at 1:45pm by Mr Kennedy and Ms Hill with Mr Chapman. It was stated in the letter that Mr Kennedy began the meeting by advising that the employment agreement provides for Mr Chapman to work 40 hours plus per week and be available to work on any day of the week and that they did not agree to vary the terms [of the employment agreement].

[35] It was alleged that Mr Chapman immediately started shouting at them and advised that it was up to him to agree to work on any day of the week and that he could refuse to work if he chose. It was set out that Ms Hill asked him to stop shouting as there were customers who could hear and Mr Kennedy said that the needs of the business are such that when the other shops open around them then the roster may be changing to accommodate Sundays and/or later shifts in line with opening hours. It was alleged that Mr Chapman continued to shout and refused any roster and advised he would only work Monday to Friday from now on and did not stop when Ms Hill asked him to and to treat them with respect.

[36] It was stated in the letter that when Ms Hill advised the Company had obtained legal advice Mr Chapman continued to shout and said that “your lawyer is shit and don’t know what they are talking about”. It was alleged that Mr Chapman continued to shout that he had sought advice from the Department of Labour and that it is illegal for an agreement to have 40 plus hours per week and a requirement to work on any day of the week. Further that he would be taking them to mediation. It was alleged that Mr Chapman was red and shaking and that he again shouted he would not be in on Saturday and stormed off and that Mr Kennedy and Ms Hill felt very threatened and intimidated by his behaviour.

[37] It was stated in the letter that customers who were in the café got up and left and a painter who had overheard the exchange provided a statement as did a builder working next door which were attached to the letter to Mr Chapman.

[38] Also attached were messages from Mr Chapman to Mr Kennedy sent after this meeting including information from the Ministry of Business Innovation and Employment (MBIE) site about employment agreements and fixing the number of hours at not more than 40 hours per week unless agreed otherwise and some related messages about that from Mr Chapman.

Mr Chapman's explanation in an email dated 1 February 2018 and at the disciplinary meeting

[39] The disciplinary meeting was attended by Mr Chapman and his stepfather David and Mr Kennedy and Ms Hill and The Whinging Pom solicitor Deborah Hendry. The meeting was recorded and the Authority was provided with a copy of the recording and has listened carefully to it. There was an offer to Mr Chapman to view the security footage but he declined to do so.

[40] Mr Chapman said by way of explanation he did not want to attend the meeting on 18 January as he had another commitment after he finished work at 2pm and had made his views clear earlier about the Saturday work. He did not accept that he yelled or was abusive. He said that he was "quite stern" during the meeting because it was about getting "people to listen" about his issues with the days he could be required to work. He said that he was told that he could be dismissed without reason under the probation clause in the employment agreement by Ms Hill and he responded that he could not and that conversation went back and forth. He said that he suggested bringing in more staff to cover the weekend but Mr Kennedy said the business could not afford it. He denied that he said Mr Kennedy and Ms Hill couldn't run a business if they tried but agreed he said "it's not my fault you guys can't operate your own business." Mr Chapman said that he stated at the first meeting that the matter needed to go to mediation and that had that occurred he thought the matter may have been resolved amicably.

[41] Although he refused to view the security camera and that footage was not available to the Authority he was told that the footage showed him standing up and waving his arms in

both meetings. He did not deny that. He said that he felt anxious and it was about his legal rights.

[42] Mr Chapman further said that he was reluctant to attend the second meeting. He denied that he shouted at that meeting. He did not think he said the word “shit” but agreed that he did say “your lawyer doesn’t know what they are talking about”. He agreed that he was red and shaking but said that was because he was upset and anxious. He did not agree that he continued shouting. His explanation was that he was told at that meeting that the café was going to open on Sundays and he was told that he would work Wednesday to Mondays with Tuesday being his day off. He felt that this advice was given to “rub him up.” Mr Chapman said that he offered to reduce his hours to 35 per week so that other staff could be employed without extra costs for Saturday work. He said that the painter and builder were friends of Mr Kennedy which affected the reliability of their statements and they were not true.

[43] Mr Chapman’s step-father David at some stage on behalf of Mr Chapman said that Mr Kennedy and Ms Hill “lined Tim up” and asked him to do something against the law and that it was an ongoing issue. He referred to the issue having been ongoing for some time. There was also reference to Anthony and his working being a solution to the Saturday work.

Reasons for dismissal

[44] The reasons for dismissal were set out in the preliminary findings letter from The Whinging Pom’s then lawyers to Mr Chapman dated 2 February 2018. These preliminary findings were found to be established in the letter of 12 February 2018 sent to Mr Chapman advising of his termination.

[45] The reasons were that at a meeting on 18 January 2018 Mr Chapman shouted at Mr Kennedy and Ms Hill and acted aggressively towards them.

[46] Further that at a meeting on 26 January 2018 Mr Chapman shouted at Mr Kennedy and Ms Hill even after being asked several times to stop shouting and that he acted aggressively towards Mr Kennedy and Ms Hill and said “your lawyer is shit and don’t know what they are talking about.”

[47] It was stated that the conduct amounted to harassment of a work colleague which is serious misconduct as defined at clause 13.2.1 of the employment agreement, results in a

finding of incompatibility and destroys trust and confidence of The Whinging Pom in Mr Chapman's ability to continue working for it.

Could a fair and reasonable employer conclude that there was conduct on the part of Mr Chapman that amounted to serious misconduct in all the circumstances?

[48] Mr Chapman disputed that he could be required to work on a Saturday. Mr Kennedy and Ms Hill in the knowledge of that dispute wanted to meet with Mr Chapman to discuss it. It was not unreasonable for them to do so. Indeed the employment agreement provided the first step in a dispute was to raise the issue with a manager. What would have been helpful would have been some notice of the meeting and ability for Mr Chapman to bring a support person as he did to the disciplinary meeting.

[49] Mr Chapman was reluctant to attend both meetings. The first meeting quickly became heated and unpleasant in different ways for those who attended. It did not resolve the issue and was not constructive. Objectively assessed when discussions become heated recollections of what was said exactly can become less reliable. It is often a case of what was heard rather than was intended by a statement.

[50] Mr Chapman for example heard that he could be dismissed under the probation period in his employment agreement. What he took from that may not have been what Ms Hill intended but Mr Chapman reacted to that. Mr Chapman made a statement that could be seen as disparaging about Mr Kenendy and Ms Hill's ability to run their business however he explained that was put in the context of whether there was a requirement to work over six days.

[51] Mr Chapman said that he referred to mediation at that first meeting however Ms Hill and Mr Kennedy recalled mediation being referred to at the second meeting.

[52] There was then a second meeting notwithstanding the unsuccessful nature of the first meeting. Objectively assessed a second meeting of the same nature was less likely to resolve matters and more likely to have a negative impact on the maintenance of trust and confidence that both parties needed in the relationship. Concerns about Mr Chapman's behaviour at the first meeting were not raised with him before the second meeting. He was not asked to bring a support person with him and he was not given any real advance notice of the meeting.

[53] Mr Kennedy and Ms Hill were more certain or articulated more clearly at the second meeting that Mr Chapman could be required to work Saturday's under his employment agreement. There was some discussion that the needs of the business could mean changes to opening a further day on a Sunday. They had obtained legal advice. Mr Chapman took from that, although it may not have been intended, that he was going to be required to work six days with two of the work days over the weekend. He offered, I find, to reduce his hours to 35 per week to support employment of him and another staff member without increasing costs. There was concern again about Mr Chapman's shouting and that he was acting aggressively primarily shouting and finger pointing and/or arm waving. He made a derogatory remark about their legal advice.

[54] Whilst shouting and aggressive responses could amount in some circumstances to serious misconduct one of the main circumstances in this matter was that there was a dispute between the parties about which days the 40 hours in the employment agreement could be worked over. It remained unresolved and Mr Chapman was dismissed for his conduct during two discussions he had about this with Mr Kennedy and Ms Hill.

[55] The employment agreement was at best unclear about the days over which 40 hours could be worked. Mr Chapman considered that he could not be required to work on a Saturday and furthermore could not work on a Saturday. He had received some information about that from MBIE or as he referred to it the Labour Department that he felt supported that position. Clause 12 of the employment agreement provided that in the first instance a dispute should be resolved between an employee and their Manager and failing that reference to mediation.

[56] I shall go onto consider the process and the substantive fairness.

Procedural and substantive fairness

[57] Mr Chapman was given an opportunity to explain the allegations and I accept that his explanations about whether he shouted or was otherwise aggressive were considered.

[58] The recording of the disciplinary process supports that Mr Chapman explains he was in dispute with The Whinging Pom and his behaviour was in the context of his view that he was not required to work Saturdays. During the meeting of 2 February 2018 the company solicitor on occasion directs Mr Chapman away from his broader explanations to answer the

allegations about his conduct. There is a suggestion from time to time by the company solicitor during the meeting on 2 February 2018 that those issues not about his conduct would be dealt with at another time and/or that it was not the time to discuss those issues. That was the response for example when the issue of Anthony covering for Mr Chapman was raised.

[59] The explanations set out in the preliminary findings letter are limited to those made to the alleged behaviour. There is nothing about the context of the dispute.

[60] I do not find that the context of Mr Chapman's behaviour as explained by him at the disciplinary meeting on 2 February 2019 was properly weighed and considered. His behaviour I find on an objectively assessed basis was considered in isolation of the dispute. That was significantly unfair and not simply in a technical way.

[61] The procedural unfairness I find overlaps with any finding of substantive justification. Whilst open to a fair and reasonable employer to conclude that Mr Chapman's behaviour during the two meetings was inappropriate and not conducive to resolving the issues it needed to be assessed in the context of an unresolved dispute about days of work. The employment agreement was ambiguous and it was not clear that the working of the 40 hours was to be over a seven day period including Saturdays and Sundays. Mr Chapman was sincere in his views that he was right. Rather than weighing the conduct with the dispute the focus was only on Mr Chapman's reaction and behaviour at two meetings called at short notice about the dispute and he was summarily dismissed.

Could a fair and reasonable employer have dismissed Mr Chapman?

[62] I have found that there was procedural unfairness in this matter that overlapped in with substantive justification. I do not find that a fair and reasonable employer could have dismissed Mr Chapman in all the circumstances at the time.

[63] Mr Chapman has a personal grievance that he was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies for unjustified dismissal

Lost wages

[64] Mr Chapman seeks reimbursement of lost wages. Section 128 of the Employment Relations Act 2000 provides that the Authority must whether or not it provides for any other remedies order the employer to pay to the employee the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration.

[65] Mr Chapman provided earnings information from the Inland Revenue Department. After his dismissal he obtained temporary work in March 2018 and then a full time role in June 2018. In that full time role it is apparent that he received at least as much as he was receiving at The Whinging Pom. It is appropriate therefore to assess actual loss for the period between 12 February 2018 and 1 June 2018. That is a period of 15 weeks and 4 days. I am satisfied that Mr Chapman took steps to mitigate his loss.

[66] Although there was a suggestion that lost wages should be calculated on the basis of a 42 hour week I find it appropriate to assess on the basis of a 40 hour week which is the minimum hours prescribed in the employment agreement.

[67] Mr Chapman would have received if he had worked 40 hours at The Whinging Pom the sum of \$880 gross per week. \$880 multiplied by 15 weeks is \$13,200 gross. There then arises the issue as to how to determine days of work against the dispute about their number. I consider that I should divide the weekly sum of \$880 gross by six because when Mr Chapman worked for 40 hours he did so rightly or wrongly across six days. \$880 divided by six is a daily rate of \$146.66 which multiplied by four days is \$586.67. Adding together the amounts of \$13,200 gross and \$586.67 gross the figure of \$13,786.67 is arrived at. From that figure the amounts Mr Chapman received by way of mitigation must be deducted.

[68] In March 2018 Mr Chapman received the sum of \$315 gross and in April \$1,685 gross. In May he received the sum of \$4,600 gross. His earnings after dismissal total \$5,784 gross until 1 June 2018.

[69] Mr Chapman's actual loss until June 2018 is \$13,786.67 less \$5,784 which is \$8002.67 gross.

[70] Three months lost ordinary time remuneration is \$880 multiplied by 13 weeks which is the sum of wages is \$11,440 gross.

[71] The lesser of lost remuneration or 3 months ordinary time remuneration is the actual loss which is \$8002.67 gross.

[72] I have then considered whether Mr Chapman would have remained at The Whinging Pom for a further period until June 2018 even if he had not been dismissed. I find that he could have remained there but realistically only on the basis that his hours were cut and he worked Monday to Friday with other staff employed on the weekend. At 35 hours per week as proposed by Mr Chapman he would then have received \$770 gross per week. That is a difference of \$100 per week over the 15 weeks or \$1500 in total and over the four days a difference of \$73.34.

[73] It would be fair I find to reduce the actual loss to reflect that almost inevitable reduction in income if Mr Chapman had continued at The Whinging Pom. That is \$8002.67 less \$1573.34 which is \$6,429.33 gross.

[74] Subject to any findings about contribution Mr Chapman is entitled to reimbursement of \$6,429.33 gross being lost wages.

Contribution

[75] The Authority must under s 124 of the Act if it finds a personal grievance as it has in this case in deciding the remedies consider the extent of any contribution because of the actions of Mr Chapman to the situation that gave rise to the personal grievance and if required reduce the remedies.

[76] This is the only point at which the Authority needs to reach finding on the balance of probabilities whether Mr Chapman behaved in the manner alleged at the two meetings.

[77] I find on the balance of probabilities that Mr Chapman did shout and make comments about The Whinging Pom's lawyer and Mr Kennedy and Ms Hill's business abilities at the meetings. I find it likely that his voice was raised to the extent at the second meeting customers and the painter and builder could hear and that he made gestures with his arms because he was worked up and that Mr Kennedy and Ms Hill felt intimidated as a result.

[78] Against that I weigh that he was in dispute with the company and that I accept he was anxious. His anxiety in all likelihood presented itself in angry, loud and defensive statements. I weigh that his partner had obtained employment at that time that meant he could not have worked Saturday without significant cost for childcare. There was a mechanism within the employment agreement to resolve disputes that should have been considered and there was an unwise second meeting with issues about conduct at the first meeting raised before that meeting with Mr Chapman. The Act itself provides that an employee has a statutory right to make a request for a variation of their working arrangements under Part 6AA and potentially the matter could have been resolved in that way.

[79] There were however also obligations on Mr Chapman to act reasonably as well in attempting to resolve the Saturday working issue. The lost wages sum is to be reduced by 15% for contribution.

Was Mr Chapman paid properly at the start and end of his employment?

[80] The café was unable to open until in or about 20 November 2017 because it did not have a public service certificate. Mr Kennedy relies on a series of text messages as support that Mr Chapman agreed to work reduced hours until the café opened. For the first week commencing 6 November the pay records reflect that Mr Chapman was paid for 12 hours at \$22 per hour. For the second week Mr Chapman was paid from 13 November to 19 November for 20 hours of work. Mr Chapman seeks payment for that period in the terms of his employment agreement together with payment for the period at the end of his employment.

[81] The text messages that I have read that were sent between Mr Chapman and Mr Kennedy at that time show a discussion about when the café would open. There was at that stage a degree of goodwill between the parties which sadly did not exist at the end of the relationship. There is a text message from Mr Kennedy to Mr Chapman which was sent on Monday, 13 November 2017 asking about the hours for payment. Mr Chapman is responding that he hadn't worked many hours. Mr Kennedy suggested 12 hours and stated that he was just waiting for the engineer to send the report through. He also recorded that they would pay Mr Chapman for eight hours for the public holiday as goodwill for that week.

[82] Mr Chapman had left his previous employment by that stage to commence employment at the new café. 6 November 2017 was the date for commencement, or earlier by

mutual agreement. Whilst the hours of work could be varied by mutual agreement to suit particular needs or circumstances, I am not satisfied that there was mutual agreement to vary them in the circumstances of this matter; rather a situation which meant that it was inevitable Mr Chapman would only be paid for a nominal amount of hours. Mr Kennedy and Ms Hill said they thought Mr Chapman was happy with existing on his holiday pay from his previous employment but I am not satisfied of that. There was also no clear indication about when the café would open that would support a mutual agreement to lower wages with understanding of all the circumstances.

[83] Mr Chapman is entitled to be reimbursed for payments for those two weeks less than what he would have received for 40 hours work. That is payment for an additional 28 hours over the first two weeks which at \$22 per hour is the sum of \$616 gross.

[84] Mr Chapman for his final pay up to his dismissal for the period from 5 February 2018 to 11 February 2018 was paid ordinary pay for 28 hours or four days and there was one day's annual leave. The evidence supports that Mr Chapman was on special leave from 5 February subsequently extended to 8 February 2018 but he was not dismissed until Monday 12 February. I am unclear why one day's annual leave has been deducted although it could have been for the Saturday work. In any event I find that one day's pay is owed of \$146.66 for that period between Monday to Friday. I have simply adopted the daily rate I assessed earlier for lost wages.

The damage to the car

[85] I do not find that the Authority has jurisdiction to consider this claim as placing a sign on his car is not a problem that directly concerns the employment relationship. I suggest to Mr Chapman that he makes an insurance claim.

Orders made

[86] I order The Whinging Pom Limited to pay to Timothy James Chapman:

- (a) Taking contribution into account the sum of \$5464.93 gross being reimbursement of lost wages under s 123 (b) of the Act.
- (b) The sum of \$616 gross being wages owing for the first two weeks of employment.

(c) The sum of \$146.66 being wages owing for the last week of employment.

Costs

[87] Mr Chapman was not represented but is entitled to reimbursement of the filing fee of \$71.56 and I so order.

Helen Doyle
Member of the Employment Relations Authority