

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 266
3173885

BETWEEN JACKSON GEORGE
Applicant
AND XENIA GROUP LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Nathan Santesso, advocate for the applicant
Rohini Jacob for the respondent
Investigation Meeting: 20 July and 9 August 2023 in Auckland
Submissions and further information received: 6 and 21 September, 26 October and 8 November 2023
and 9 February 2024 from the applicant
20 October, 7 and 8 November 2023 from the respondent
Date of determination: 6 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jackson George is a migrant, arriving in New Zealand hopeful of finding a good career. He had been working in Hamilton at a petrol station then was offered an opportunity by Rohini Jacob, director of Xenia Group Limited (Xenia or the company), to get into the hospitality industry through a move to Auckland. He took up employment with Xenia as a food and beverage attendant.

[2] Xenia operates restaurants, including the Oakroom at Victoria Park Market and Millwater Bistro & Bar in Silverdale. Ms Jacob has extensive experience in hospitality management both here and overseas.

[3] Mr George comes to the Authority dissatisfied about being required to regularly attend work premises during Level 4 of the long Auckland lockdown in the second half of 2021. Likewise with Xenia's rostering and payment arrangements, including the operation of a "timebank", referred to in an earlier Authority determination.¹ Ultimately Mr George resigned and now brings a constructive dismissal claim.

[4] Xenia says it was trying to help staff, providing a safe workplace, paying all the hours Mr George was eligible for and denies he was constructively dismissed.

The Authority's investigation

[5] Xenia began this proceeding legally represented but prior to the investigation meeting Ms Jacob took over.

[6] On 20 July and 9 August 2023 an investigation meeting was held in Auckland. Mr George, Xenia's Ms Jacob (director and shareholder) and Corey Stevens (Ms Jacob's husband and former Xenia shareholder) gave evidence. I also heard evidence from a number of witnesses Ms Jacob brought who were largely character witnesses for her - a sales and marketing manager and front of house staff members. They spoke of her commitment to helping staff, amongst other things. All witnesses gave evidence under oath or affirmation. Additionally, letters supporting Xenia or Ms Jacob were provided from a local doctor and a high profile Millwater client.

[7] The Authority rejected an unsigned joint witness statement provided by Xenia from three people who reportedly wished to remain anonymous. Ms Jacob also offered to provide another migrant employee whom she described as more of a character witness. He had not worked during the period Mr George was employed. We agreed his evidence was not necessary.

[8] I did not hear evidence from the operations manager in place when Mr George worked for Xenia, the manager Mr George reported to or the Xenia human resources assistant.

[9] During the course of the investigation meeting Xenia provided substantial additional documents, both on request of the Authority and of its own volition. Ms

¹ *Santra v Xenia Group Limited* [2023] NZERA 180.

Jacob confidently indicated during the meeting that various documents which seemed significant should be available but ultimately not all were provided.

[10] At the close of the investigation meeting additional documents were directed to be filed and it was agreed that submissions would be provided in writing. A timetable was set for the applicant's submissions followed by the respondent's submissions then a right of reply for the applicant. These were received.

[11] Ms Jacob sought to have an additional right of reply. However, I was satisfied that Mr George's final submissions of a little over a page were directed to Xenia's submissions and thus in reply and nothing further was required.

[12] An additional comment on bank statement entries was sought by the Authority and provided on behalf of Mr George.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Issues

[14] The issues for investigation are:

- (i) Did Xenia breach clause 12.2 of Mr George's employment agreement by failing to pay wages and if so, should it be penalised, noting that an arrears sum sought was paid prior to the investigation meeting?
- (ii) Did Xenia breach s 4 of the Wages Protection Act 1983 by failing to pay wages and if so, should it be penalised?
- (iii) Did Xenia pay Mr George his annual leave entitlement and if not, how much is owing?
- (iv) Did Xenia breach its obligation under an implied term of the employment agreement to provide safe working conditions and if so, should it be penalised?
- (v) Was Mr George constructively dismissed by Xenia and if so, was that unjustified?

- (vi) If a grievance is established, what remedies (if any) should Mr George receive?

[15] In addition to the issues identified at a case management conference, at the start of the investigation meeting a question about whether annual leave had been properly paid was raised for Mr George. The parties were informed the annual leave question was now included in the list of issues for investigation. Closing submissions for Mr George sought a penalty regarding annual leave. However, penalties are a quasi-criminal matter and given that Xenia was not on notice at the start of the meeting that this penalty was sought, no penalty regarding any Holidays Act 2003 breach will be considered.

[16] It also became apparent during the meeting that Mr George's grievance claim required an answer on whether he was a casual employee.

Mr George's initial contact with Xenia

[17] Mr George heard about the possibility of a Xenia job through a friend. He was on an open work visa which expired in July 2022. He had been working three shifts a week at the Hamilton petrol station. Mr George had no hospitality experience but hoped to move to a new line of work.

[18] Initially Ms Jacob and the HR assistant interviewed Mr George than Xenia offered a trial which Mr George completed.

[19] Around 30 April 2021 Ms Jacob met with Mr George when she visited Hamilton. They discussed the training which would be offered with Ms Jacob saying this was a pathway to New Zealand immigration residency.

[20] Mr George needed to work out his notice period at the petrol station and it was agreed he would work casually for Xenia during that period. He would then move to Auckland, work more hours for Xenia and start the training. Mr George explained he needed full time hours to be able to survive in Auckland. There was at least an agreement that once Mr George proceeded past the initial casual stage and another Xenia venue opened, he would have more hours.

[21] Xenia sent Mr George a "preliminary offer" as well as a commitment agreement "which is to be signed as part of the acceptance process".

[22] The commitment agreement is a bond agreement. Ms Jacob says that was due to previous staff being trained and then promptly leaving. Under that agreement Mr George was required to pay up to \$5,000 if he left Xenia within five years. There is no need to examine the legitimacy of that agreement here as Xenia did not attempt to enforce it with Mr George.

Work starts

[23] Mr George began work on 4 May 2021 at the Millwater Bistro & Bar. A couple of days later he signed an employment agreement with Xenia.

[24] Mr George mainly worked at Millwater but occasionally at the Oakroom. Millwater operated 3.30pm to 8.30 or 10pm. Generally things were good although Mr George was asked by Ms Jacob to take goods and staff from one Xenia site to another in his own car without payment. He mentioned this to the operations manager who indicated he was helpless and faced the same situation.

[25] From 16 May 2021 Mr George lived in Auckland. He continued to do a few shifts at the Hamilton petrol station. The parties were able to agree an arrangement which allowed him to work at both places, mostly without difficulty.

Mr George a permanent employee

[26] The employment agreement Xenia provided Mr George is a casual agreement. Although the parties signed that document, Xenia did not argue to the Authority that Mr George remained a casual. Ms Jacob's view is that a variation to hours form, referred to in more detail below, made him permanent. Mr George regarded himself as permanent, having seen the casual contract as only covering the initial fortnight when he was working out his notice at the petrol station and doing more limited hours for Xenia.

[27] Once that period was over and up until the August 2021 lockdown Mr George was regularly rostered to work at Xenia each week, averaging over 30 hours a week. Xenia's entry on an August 2021 wage subsidy form indicated Mr George worked 35 hours a week.

[28] Other documents Xenia and Mr George signed also indicate this was permanent employment – the five year commitment agreement based on the training to be provided and a Service IQ training enrolment form.

[29] Both parties had an expectation of an on-going employment relationship. I conclude that Mr George became a permanent employee.

COVID 19 Lockdown

[30] On 17 August 2021 New Zealand went into an Alert Level 4 lockdown. Auckland remained at Level 4 until 21 September 2021 when it moved into Alert Level 3. Those restrictions were eased from 5 October 2021 with Auckland remaining on steps of Alert Level 3 until the country moved from the Alert Level system to the COVID-19 Protection Framework, also known as the traffic light system, on 2 December 2021.

Xenia's operations

[31] On 17 August 2021 Xenia notified staff that the business would be closed. The following day the company wrote advising that there was no work available at that Alert Level (4) nor capacity for Mr George to work from home. As a result Xenia proposed a temporary variation that Mr George, presumably in the alternative:

- Take annual leave or leave without pay from 18/08/21 to 24/08/2021.
- Vary as follows for the same period:
 - Current Weekly Hours: will be calculated on an average hour worked over the past 52 weeks. ...
 - New Weekly Hours: 0hrs.

[32] The letter indicated Mr George was welcome to seek independent advice. It does not contain acknowledgment from Mr George that he would be paid the wage subsidy instead of his usual pay.

[33] Xenia also sent Mr George a consent form for it to apply to the Ministry of Social Development (MSD) on his behalf for the wage subsidy. As noted above Xenia recorded Mr George's average number of hours each week as 35.

[34] Mr George says he did not really understand what it meant to sign the variation, thinking he had to sign in order to get the wage subsidy. He did not have any annual

leave owing. Ms Jacob saw the variation as allowing Xenia time to assess its position. In any event, despite the zero hours reference, Mr George was ultimately paid for the week at the full-time wage subsidy rate.

[35] A few days later Xenia sent a list of tasks Mr George was to work on at home. Around that time Ms Jacob messaged Mr George as he had not been in contact. He apologised.

[36] Weekly temporary variation forms with leave or new hours options continued to be sent. On 25 August the variation form recorded the current weekly hours as 29.3 and new weekly hours as 27. Ms Jacob indicated this was the average number of hours Mr George worked in the few weeks before lockdown.

[37] Mr George's tasks to do at home included modules from the Service IQ industry training programme and checklists for Millwater such as daily/weekly cleaning schedules. There were already checklists in place but Xenia sought a review and possible refresh.

Level 4 gatherings at the Oakroom

[38] Ms Jacob describes herself going into the Oakroom daily from early in the Level 4 lockdown to have some freedom from home and check on the premises as the city was a ghost town. After a while some managers expressed interest in coming in for various reasons. Ms Jacob recalled asking them to get MSD approval but also said she had sought approval on 19 August 2021. She reports being told that 2 metre social distancing would be needed and people staying in their own bubbles.

[39] Towards the end of August 2021 Ms Jacob messaged Mr George to see how he was getting on. There is some dispute about whether Mr George was updating Xenia as often as expected. Ms Jacob wondered if he was doing tasks as required although this does not appear to have been addressed directly with Mr George at the time.

[40] On 30 August 2021 Ms Jacob started this message chain:

Ms Jacob: Ok come into the Oakroom tomorrow at 11am?
We work everyday here
Bring your work and Laptop

Mr George: Okay

[41] The following day Ms Jacob messaged Mr George asking him where he was, with him replying he was on his way.

[42] On 1 September 2021 Mr George messaged Ms Jacob asking if he should come in that day as well. She replied:

Ms Jacob: Yes please
It will be everyday as there is a lot of administration to do

[43] On 2 September Ms Jacob messaged asking why Mr George did not come in that day. He replied he was working at the petrol station. She asked him to text the HR assistant next time to let her know.

[44] On 5 September Ms Jacob messaged that they were heading in tomorrow and he was welcome to join “tomorrow is optional. Otherwise see you on Tuesday 11am”. Further messages refer to Mr Stevens running training that week with Mr George’s sheets being signed off and “please bring all your service iq modules”.

[45] Mr George recalls feeling concerned that attendance did not appear legal under the government protocols and he did not think it was safe. But he felt he had no choice if he wanted to be paid and not get on the wrong side of Xenia so he masked up and went in. I accept that Mr George was uncomfortable and would have preferred not to go in although he did not convey this to Ms Jacob.

[46] The Oakroom was not open to the public. On arrival Mr George found “all the migrant employees who were on temporary visas” working together with Ms Jacob plus the HR assistant and operations manager. There were up to 15 people present. Mr George recalls Ms Jacob explaining he was the only (migrant) staff member who had not been working and he should come in like everyone else. He was told to come in Tuesday to Friday 11am to 4pm. Exercise in nearby Victoria Park was incorporated.

[47] Mr George was largely doing the same work as he had been doing from home.

[48] Ms Jacob’s husband, Mr Stevens, attended on occasions. He remembers both front of house and kitchen staff being present, undertaking tasks such as training and administration - writing new menus, setting up a system for a hospitality outlet, writing up refreshed opening and closing processes, and accountancy.

[49] Mr Stevens describes Xenia as wanting to give staff something to do but accepts they could have done the work at home.

[50] Ms Jacob and Mr Stevens describe staff as happy to come in, as they were getting cabin fever. That may have been the case for some but the Authority was provided with a message chain between a manager/supervisor (on the left) and a staff member (right) including the following exchange:

Hey bud. The training is happening online?

No
Inside the OAKROOM

It's still level 4 next week bud. Can't do that.

No worries that's fine
All good

Are you insane?
This is 100% illegal
Have you inform Ro, Corey or *[the operations manager]*?

Yes

I strongly suggest against that. The risk is way too big.
This is shocking quite frankly

Okay I will ask Rohini
About this and I'll get back to you by tomorrow

[51] From Mr Stevens' evidence not all staff were present with part timers not coming in. Two examples of non-attenders were given – both front of house people who were not migrants.

[52] The sales and marketing manager did not go in to the Oakroom at Level 4, telling the Authority she chose to work from home. She was not aware of staff being forced to go in, seeing it as a place for those who felt isolated and secluded at home.

[53] Mr Stevens thought it was lawful to happen because processes were followed - masks, hand sanitiser and social distancing. He undertook in person bar training for staff in the first week of September (at Level 4).

[54] Mr George supplied photographs of staff together at the Oakroom during lockdown. Several of them were from October 2021, therefore at Level 3. About nine staff were sitting closely around the lunch table. November 2021 photos from a Diwali event show around 18 people standing shoulder to shoulder to be photographed.

[55] Mr Stevens accepts there did not seem to be two metres between the tables in a photograph. He maintains there was social distancing but some of the group lived in

the same apartments, so were in the same bubbles at work. Masks may have been available but the evidence was they were often not worn.

[56] Mr George denied there were bubbles, with staff sitting close together at tables. This evidence is supported by photographs. Although Mr Stevens thought Mr George was living with people from Xenia, I am satisfied that was not the case.

Xenia breached its obligations

[57] Under the Covid-19 Alert Level system at Alert Level 4:

- people must stay home in their bubble
- no travel is allowed except for necessities or to undertake safe recreational activities
- people must work and learn from home
- no gatherings are allowed
- businesses must close except for necessities.²

[58] The situation at Alert Level 3 was less restrictive but only people who could not work from home were to return to businesses which could safely open at Level 3. People were to stay home and keep their bubble small, working and learning from home if they could.³

[59] Clause 24 of the Covid-19 Public Health Response (Alert Level Requirements) Order (No 11) 2021 required a person in control of premises in Alert Level 4 to close those premises unless they were carrying on an Alert Level 4 business or service (often referred to as essential services). Other exceptions in subclause (2) are also not applicable here.

[60] While Ms Jacob and Mr Stevens saw that some staff preferred going in, that is not sufficient. In the interests of the country, many New Zealanders suffered negative effects from a lack of contact, or inadequate or undesirable living facilities, during lockdowns but followed the rules.

[61] Ms Jacob emphasised that some staff were suffering mental health problems at home, being isolated in small flats and the like. Irrespective of their situation, that was not Mr George's situation. He did not want to come in. Ms Jacob required him to.

² [Unite against COVID-19 \(covid19.govt.nz\)](https://www.covid19.govt.nz), History of the COVID-10 Alert System.

³ As above.

[62] Ms Jacob initially suggested that MSD had approved the arrangement although she did not provide written advice or information to that effect. It seems unlikely that MSD would have knowingly approved groups of people coming into work at Level 4 to a non-essential business which was not open to the public. MSD paid the wage subsidy but was not directly responsible for the Covid restrictions. In addition this was not the country's first lockdown so advice should have been well developed.

[63] On further questioning at the investigation meeting it became apparent that the MSD advisor, who dealt with wage subsidy questions, had not actually approved the practice with Ms Jacob focusing instead on it being ethically the right thing to do. Ms Jacob's position was further confused by her statement that she completely understood about the legislation (that businesses were supposed to be closed at Level 4 unless they were an essential service). Her submissions state she understood that gatherings were illegal.

[64] The evidence of solid implementation of two metre social distancing and people keeping within their own bubbles at the Oakroom was not compelling.

[65] Ms Jacob's evidence that Mr George came in as he wanted is also not compelling given her messages to him - "It will be everyday" and one day specified as optional but not the following one. She thought he needed to be supervised. I accept that Mr George felt he had little choice but to attend the Oakroom sessions.

[66] From the evidence before me it appears that, other than managers, those who came in were migrants who did not have residency rights in New Zealand.

[67] Given that this was not an office based business, it is questionable how much work was actually able to be achieved during a Level 4 lockdown. The training was in addition to the usual hospitality work. But to require Mr George to come into work at Level 4 to undertake cocktail and beverages training was surprising.

[68] Mr George saw Xenia as regarding Covid as a joke. He had a different view, having lost two family members due to the disease.

[69] Mr George did not articulate his concern regarding coming in at Level 4 as a personal grievance as such, but saw it as part of the reason he resigned in November 2021. It was submitted to be a breach of the implied term of the employment agreement to provide a safe working environment.

[70] In summary:

- Xenia was not operating as essential service
- Whilst there may have been some benefit to Xenia in Mr George coming into the office to discuss some of his work, that was not enough to justify requiring him to do so at Level 4
- Mr George did not want to come in but was told that he was to come in on working days
- Mr George was exposed to risk of infection from other staff in a way that would not have happened had he not been required to go into the Oakroom.

[71] I conclude that Xenia breached its implied obligation to provide Mr George with a safe working environment, requiring him to come into work premises at Covid-19 Alert Level 4 when the business was not operating an essential service. Penalties are discussed below.

Payment arrangements

[72] In lockdown Xenia's arrangements regarding work and payment were complicated.

[73] The company applied for the full-time wage subsidy for Mr George - \$600 gross a week. Xenia paid him the after tax amount - \$505.51 a week.

[74] Ms Jacob however considered that staff necessarily had to work all their agreed (including varied) hours in order to qualify for and receive the wage subsidy. That was not the correct position.

[75] Based on MSD's Work and Income Te Hiranga Tangata information the August 2021 subsidies:

- were to help businesses pay employees and protect jobs affected by the alert level changes
- were available to employers whose employees could not work during the level changes
- the full time subsidy was available to those who had worked 20 hours a week or more

- allowed employers use the subsidy to support paying the ordinary wages and salary of the named employees, in accordance with their employment agreements and statutory obligations
- came with a requirement to pay the full amount of the wage subsidy to the employee except where the employee's ordinary wages were less than the amount of the subsidy as at 16 August 2021.⁴

[76] Mr George was in the full time category, having worked over 20 hours a week before the lockdown. Xenia told MSD in its application he worked 35 hours a week. The variations Xenia set up did not affect that as they were implemented after 16 August 2021. It is presumably no coincidence that Mr George's hours were varied to 27, which at his ordinary hourly rate of \$20 (gross) amounts to \$540 being the net amount of wage subsidy he received.

[77] Ms Jacob, seemingly understanding or at least requiring that staff had to work all their varied hours, then utilised what was referred to a timebank system to take money off them if they worked less. This is set out in more detail below.

Non-payment in September

[78] During September 2021 Xenia was providing Mr George with payslips indicating it was paying him. In actuality it was not.

[79] Mr George checked with colleagues. They were getting paid. When Mr George inquired with management he was told that the wage subsidy application had not been approved yet so he was not being paid.

[80] Ms Jacob explains that Mr George was "registered as an employee" with another company solely owned by Xenia - Negroni Limited. This is consistent with Mr George's payslips showing money received from "Negroni". That company's wage subsidy application was delayed but not those of Xenia itself and another Xenia subsidiary.

[81] Ms Jacob suggested to the Authority that Xenia always offered an advance on wages in situations such as a staff member being away with no sick leave or waiting for ACC payments to start. It was put to Ms Jacob that it was unlikely a staff member

⁴ Work and Income Te Hiranga Tangata, Covid-19 Wage Subsidy August 2021 and Declarations for each two week period – <https://workandincome.govt.nz/covid-19/previous-payments/wage-subsidy-august-2021>.

would refuse the offer of money until the other payment came through. She suggested the HR assistant would have offered an advance on wages to Mr George on this occasion and there should be email evidence of that. No email to that effect was provided.

[82] Ms Jacob was asked why, if this was the practice, Xenia did not just pay Mr George the amount of the wage subsidy and await receipt of money from MSD. She suggested the company had to ask (the employee) and had done so but she ultimately accepted the company (at that point) did not have the money to pay with any payment coming out of her pocket.

[83] Once the wage subsidy was received at the start of October 2021, it was paid to Mr George.

Breach of employment agreement and Wages Protection Act

[84] Regardless of the situation with the wage subsidy, on the basis of the variations, Xenia had committed to providing Mr George with 27 hours of work a week in this period.

[85] Xenia breached its obligation to pay under clause 12.2 of the employment agreement which required wages to be paid weekly. Similarly it breached s 4 of the Wages Protection Act 1983 by not paying wages as they became payable. Possible penalties are dealt with below.

Level 3 work

[86] Auckland moved to Level 3 on 21 September 2021. From then on Mr George was rostered at Millwater from 3.30pm onwards, initially Thursday to Saturday. Millwater was open for takeaways at Level 3 for around 15 hours a week.

[87] There is text message evidence of Ms Jacob expecting Mr George to pick up staff members at Oakroom and drive them up to Millwater for their shifts. There was uncertainty about what was required with Mr George already being at Millwater on one occasion when Ms Jacob expected him at the Oakroom earlier, thinking the HR assistant had informed him.

[88] Mr George initially understood he was only expected to work those Millwater hours. They were all that was set out for him in the roster.

[89] Then at some point the operations manager instructed Mr George to come into the Oakroom, which was still not open to the public or doing takeaways. He was to do administrative work from 11am and then drive to Silverdale to do the short shift at Millwater until around 8pm.

Timebank

[90] I break from the narrative to focus on the timebank. Submissions for Mr George describe the timebank as a bizarre arrangement resembling debt bondage.

[91] Put relatively simply, the timebank scheme involved an expectation that a certain number of hours were worked and if the employee did not complete that many hours they owed Xenia for the hours not worked. Ms Jacob told the Authority that it was for staff on a salary.

[92] There is no sign of the scheme being applied to Mr George prior to the August 2021 lockdown. It was only at Level 3 when Mr George was being paid a regular sum, which was the wage subsidy amount, that the scheme was applied to him.

[93] Ms Jacob described the HR assistant sending out the first timebank emails to staff in September 2021, but in the absence of that documentation or the HR assistant's evidence, I accept Mr George's evidence that he did not see a timebank document until 2 November 2021.

[94] I am not satisfied that the arrangements which Ms Jacob describes actually resulted in Mr George being informed or in any way agreeing to the timebank scheme:

- Ms Jacob suggested the basis for the approach was the time in lieu policy in the Xenia Handbook but that does not describe such a scheme
- Ms Jacob recalls the timebank being discussed with Mr George right at the beginning but if it was mentioned that was not in such a way as was understandable
- The variation in hours forms did not cover this issue
- The timebank was not applied to Mr George prior to lockdown
- On the evidence before me, there was no basis for Ms Jacob's suggestion that weekly reconciled timebank entries were sent to the staff concerned and mutually consented. Emails which the HR assistant was said to have sent were not provided

- Most of the non-management staff who gave evidence to the Authority were not aware of the timebank scheme.

[95] In conclusion, without telling him, Xenia expected Mr George to work all the hours needed so that it got as many hours work as it could out of the wage subsidy. This is particularly troublesome when the Oakroom work likely included some 'make work' element. Ms Jacob acknowledged that administrative work was what they normally would not have time to train or do.

[96] In addition Xenia did not roster Mr George on sufficient hours once breaks were taken off. It was suggested he could make extra work time. He was not informed that if he did not hit the right number of hours he would end up owing Xenia even though he was only being paid the wage subsidy amount.

[97] Ms Jacob told the Authority that staff could work after the notional close time of premises if, for example, a customer came in just before closing. I accept that. It is difficult to jump from that to the conclusion that Mr George was aware that he could keep working at Millwater to meet the total hours requirement. On some instances that would require up to an additional 15 hours a week above what was rostered – five extra hours each shift. When asked who had told Mr George that he could work as long as he needed to get the total hours, Ms Jacob replied it was a discussion with the operations manager and HR assistant. When it was put to her that it seemed unlikely Mr George was told he could work as long as he needed to meet the total hours she accepted it was her assumption.

[98] I do not see a basis for the timebank to be in keeping with the contractual arrangements between the parties. This finding is consistent with that in the previous Authority determination.

Letter of concern

[99] Work hours in this period were not straightforward. At Level 4 there had been no roster. Then at the start of Level 3 Mr George was only rostered at Millwater with no reference to the Oakroom. As described above, he was then told to come to the Oakroom for a few hours before his Millwater shifts.

[100] Then from the week starting 18 October 2021 Mr George was also rostered to work 11am to 4pm at the Oakroom on days when he was not working at Millwater, despite the Oakroom not being open to the public or offering takeaways at Level 3.

[101] This caused some confusion with Mr George acknowledging he was late to the Oakroom the first couple of days.

[102] On 25 October the operations manager provided a letter of concern to Mr George, noting that he was hoping to catch up in person but was writing (instead). An expectation of accurate future timesheet recording is set but the letter is specifically said not to be a formal warning. The two situations identified related to times Mr George worked on administrative tasks at the Oakroom.

[103] These days were the first time at Level 3 that the Oakroom activity was recorded for Mr George or other staff on the roster, despite the rosters having been in operation for three previous weeks when only Mr George's Millwater time was recorded.

Disciplinary meeting

[104] On 27 October 2021 Xenia advised Mr George by letter of what was described as serious misconduct – being absent from a scheduled shift that day and not notifying of his absence.

[105] That description is harsh given the letter goes on to describe Mr George contacting Xenia about an hour after the 11am Oakroom start time to say he had been stuck at his other job but would attend at 2.30pm and take the remainder of his work home (presumably to catch up for his absence).

[106] Mr George attended a disciplinary meeting on 2 November 2021 with his reporting manager, the operations manager and the HR assistant. There was some discussion about the late start but talk turned to the time and money Mr George owed Xenia, despite this not being identified in the invitation letter.

[107] For the first time, Mr George became aware of the Xenia's timebank. The operations manager said Mr George had missed 50 hours of work and would need to pay back 50 hours of wages. The operations manager told Mr George he was expected to have "chased the company up" for work above his rostered hours to make up the required hours. Mr George had not previously been informed of that expectation. An

excerpt from an excel spreadsheet about hours of work and hours he owed was shown to him - Mr George's timebank. He was not given a copy.

[108] Mr George was asked to come up with a solution and come back to the operations manager the following day.

[109] In passing I note the figures appear disordered. Ms Jacob told the Authority that Mr George was on a full time average of 35 hours a week, which is what MSD was told. That does not seem to fit with the 29.3 hours in his variations forms or the 25.5 hours which the timebank document recorded he was required to work. Also Mr George says the Oakroom work was not taken into account on the timebank whereas he was actually working close 25.5 hours including at Millwater.

[110] Mr George was very upset by the sudden notification that Xenia saw him owing it \$1,000 – 50 hours at \$20 an hour. He messaged Ms Jacob asking to talk with her as he was having difficulties in the workplace. She agreed.

[111] Ms Jacob emphasises it was not money that staff owed back under the timebank but hours. When it was put to her that if staff worked to pay Xenia back they were working for no pay, she indicated that they were offered extra rostered time, like a couple of hours at a time, to pay back rather than say a week's working with no wages. There was no evidence of such additional hours being offered to Mr George.

[112] Ms Jacob accepts that the \$1,000 owing must have seemed like a lot of money to Mr George.

3 November

[113] The next day the operations manager approached Mr George about his solutions. Mr George replied he did not have any ideas. The operations manager suggested the company could take back five hours of pay for each of the next 10 weeks. I accept that Mr George did not accept this proposal during his talk with the operations manager.

[114] There were one or two occasions on 2 and/or 3 November when Mr George approached Ms Jacob and they talked about the timebank situation. He said he felt picked on by the operations manager. She said the wage subsidy is considered like a

salary whereas Mr George's understanding was that the subsidy was free money that was supposed to be handed over to staff.

[115] Ms Jacob's evidence was that around this time she told Mr George that he did not need to pay money for the timebank hours, he could work them off. Mr George does not remember her saying that. Ms Jacob recalls Mr George responding that he did not want to do that as he could work at the petrol station, and he would rather have deductions of \$50 a week. He did not remember that. She says he verbally agreed to deductions but given the most unusual nature of the arrangement it is more likely than not that there was a lack of clear agreement.

[116] Once at home Mr George looked at his hours, concluding he had not missed 50 hours of work.

Xenia makes unlawful deductions

[117] Mr George was sent an authority to deduct form on 3 November 2021 but did not sign it straight away. Despite Ms Jacob's statement that the hours could be worked off, Xenia had already started deducting from Mr George's pay – in the week ending 31 October (paid 2 November) and the week ending 7 November (paid 9 November).

[118] Payslips proved unreliable, showing the full amounts supposedly paid without deduction by Xenia. So, for example, the payslip for 2 November 2021 refers to payment being made of \$505.61 whereas Mr George's bank account shows him receiving only \$470.58. The payslip shows no reference to a deduction but there clearly was one. Ms Jacob could not explain why the deductions were not shown on the payslips.

[119] After initially asserting that there was a signed consent regarding payment, Ms Jacob then accepted that the form had not been signed until 10 November, after two deductions were made. She considered there was verbal agreement earlier. However, that is not enough - s 5(1) of the Wages Protection Act requires deductions to be with the worker's written consent or at their written request. Xenia breached this by making deductions before written consent or request was given.

[120] I also conclude that all deductions made under the timebank scheme were unreasonable deductions and so should not have been made under s 5A of the Wages Protection Act. Xenia was paying Mr George solely the wage subsidy it received from

the government rather than paying anything from its own money. It was then not rostering Mr George on enough hours to make up the hours set in the variation and requiring him to effectively pay money from his own earnings to cover the extra hours. All this without informing him until 2 November about the timebank scheme and that he should have been chasing up other work. It was not evident that there was other work given the very limited nature of Xenia's operations at Level 3.

[121] In his final weeks of work Xenia twice failed to pay his full pay breaching s 4 of the Wages Protection Act.

Mr George objects

[122] Mr George sought a copy of the timebank record. On 5 November he received one but it had been updated since the 2 November discussion and he was now said to owe 59.41 hours.

[123] On 5 November Mr George emailed the HR assistant noting that the purpose of the repayment is not mentioned anywhere and seeking a copy of the report the operations manager had shown him of clock in and out times at Levels 4 and 3. He also sought documentation that any money he refunded was being repaid to the government. This was not forthcoming in his time with Xenia.

[124] Mr George emailed Ms Jacob on 5 November saying he did not agree to pay back the 50 hours' wages. He objects to Xenia's demand to make deductions for time he did not work, given that Xenia did not roster him on sufficient shifts. Ms Jacob replied they had verbally agreed and it needed to be put in writing and signed by both parties for a deduction to be made. Mr George did accept that he owed around 16 hours for shifts he did not attend.

[125] Mr George calculated that, with the timebank scheme, he would be losing five hours' wages from each pay without his agreement and the company was also adding nine extra hours each week to the amount he owed. Mr George saw this as Xenia trying to claim back the wage subsidy which it had applied for in his name.

[126] On 9 November Mr George emailed, protesting the arrangement. He was becoming very stressed and aggitated.

[127] On 9 November the operations manager emailed Mr George saying that his point about not being rostered for the shift is irrelevant as it is Mr George's responsibility to be aware of shifts.

[128] Mr George responded that according to his employment agreement he only needed to show up when he was rostered. He also complained about the five hours being taken out of his pays without his consent. Other concerns were also raised.

Resignation

[129] At some point the operations manager talked about pursuing Mr George for the money he supposedly owed. Mr George was struggling with receiving frequent accusatory emails when he got home from work. He decided to resign.

[130] On 10 November 2021 Mr George went into the Oakroom. When he told Ms Jacob he had something to say, she directed him to the operations manager.

[131] Mr George talked to the operations manager and the HR assistant, saying he wanted to resign. The reasons he gave were making him work at the Oakroom in Level 4 and now accumulating almost 10 hours each week that he had to pay back to Xenia.

[132] The operations manager said that Mr George could leave on two conditions. He needed to sign some forms and send a letter. If he did that he could finish that day.

[133] Thus Mr George was required to authorise Xenia to apply for another two weeks of Covid subsidy under his name in order to get the funds that he "owed" Xenia and authorise Xenia to deduct the hours "owed" from his pay. In addition he had to sign more variation to hours forms.

[134] Later that day Mr George emailed Xenia a resignation letter, noting that he would sign the variations, with that day (10 November 2021) being his last day of work. He goes on:

Thank you for giving me the opportunity to work in this position for the last 6 months. I have thoroughly enjoyed working here until lockdown. Things changed upside down after that. I could summarise why I am leaving this workplace:

- I had to work in a lockdown situation which was against the rules and regulations at that time.

- The government subsidy has to be repaid to the company (the portion which the company claims I have not worked).
- My operations manager has been targeting me after the phone call situation was explained. He is behind me every time and is waiting for me to make a mistake.
- I have not seen a single person following the Covid-19 protocols.
- My performance is measured and based on the work (Tevalis) which I have *[been]* given limited training only.⁵

[135] The letter goes on to refer to Mr George having difficulty supporting himself during this pandemic situation and not being able to handle these pressures.

[136] Ms Jacob regards 10 November as Mr George's last official day with Xenia. Effectively the parties agreed to a two week notice period which would have been paid out in lieu except Xenia deducted all the money.

[137] Mr George was asked to come back for another meeting. On 12 November 2021 he went in and met with the operations manager and HR assistant. Mr George handed in his resignation letter. He repeated the same reasons he had given previously. There was no feedback from Xenia.

[138] The last pay Mr George received from Xenia was on 9 November, the day before his resignation. No payment or payslip was received for 16 November. He received a final payslip dated 23 November which indicated payment of a Covid payment and holiday pay of \$192 gross. In fact no payment was made as Xenia effectively deducted it all.

Constructive dismissal

[139] Constructive dismissal covers situations where although the employee resigns the impetus for the termination comes from the employer. Of the three categories of constructive dismissal described by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* the last one is potentially applicable here - a breach of duty by the employer leading the employee to resign.⁶

⁵ Tevalis is a online system which Mr George was supposed to be undertaking tasks on but he said had difficulty accessing.

⁶ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375.

[140] In this category it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.⁷ What is required is dismissive or repudiatory conduct - a breach of the employer's duty to the employee. If that is established, these factors need to be examined:

- whether the conduct caused the resignation; and
- the breach of duty was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Or, was there a substantial risk of resignation?⁸

[141] As outlined above, there were a number of breaches by Xenia of its obligations:

- Requiring him to work at the Oakroom at Level 4
- Non-payment of wages during September, with delay in the wage subsidy receipt by Xenia
- Failure to communicate the timebank scheme, a breach of good faith, with Xenia then regarding him as owing it money each week
- Deductions for the last two weeks of work without written consent or request to deduct
- Telling Mr George his consent was needed in writing for deductions when deductions had already started, a breach of good faith
- Unreasonable deductions of money supposedly owing under the timebank scheme.

[142] Mr George gave credible evidence that Xenia's actions led to his decision to resign. He described becoming very stressed and uncertain whether he would be properly paid. He saw himself owing the company more and more each week despite some deductions being made. Mr George felt he had no option - the more work he did for Xenia the more he would owe the company. This was in circumstances where the move to Auckland and start with Xenia was to set himself up with a good career in New Zealand. In conclusion Xenia's conduct caused Mr George to resign.

⁷ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

⁸ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

[143] Were the breaches sufficiently serious to make it reasonably foreseeable by Xenia that Mr George would not be prepared to work under those circumstances? The answer is yes. Mr George had sought and attended meetings with Ms Jacob as the owner to discuss his concerns as well as expressing them in emails.

[144] There was also the gap between when he said he wanted to resign, giving reasons and when Xenia required him to come in two days later to provide his written resignation, which covered the same territory. On the evidence before the Authority the operations manager, the HR assistant and Ms Jacob were all aware of Mr George's concern about the timebank system and its impact on him. No attempt was made to seek a retraction of his resignation.

[145] Mr George was constructively dismissed by Xenia.

[146] Was that dismissal justified? Xenia did not act as a fair and reasonable employer could have done, breaching its obligations, as outlined above.

[147] The company did have concerns about Mr George's actions. However, the first subject had been dealt with by a letter of concern and so finalised. The next issue was Mr George ringing shortly after his shift of administrative work at the Oakroom started, explaining he would be late but would take work home. That is not sufficient to justify dismissal. In any event it was largely Xenia's other actions which caused Mr George's resignation.

[148] Xenia unjustifiably dismissed Mr George.

Remedies

Lost wages

[149] Mr George sought \$2,400 gross as lost wages.

[150] Mr George's evidence in the Authority was that he lost wages for some months after his departure from Xenia. The figure of \$2,400 was calculated on the basis of his average earnings at Xenia less pay received for the shifts he undertook at the petrol station during that period. He was eventually able to obtain permanent full time employment.

[151] Subject to consideration of his contribution, Mr George is entitled to \$2,400 gross lost wages.

Compensation

[152] Mr George came to New Zealand then moved to Auckland hoping for a better future. He found himself in a situation with Xenia of not even being paid properly, effectively earning less than at the petrol station job. Mr George was upset at the prospect of owing Xenia more and more money each week.

[153] Mr George had felt vulnerable as a migrant and pressured into coming in to undertake tasks in a non-essential service during the Level 4 lockdown. He felt unsafe, being exposed to a number of other staff who were not in his bubble.

[154] The dismissal caused Mr George distress and sleepless nights. He had times of crying on the phone to his mother back in India. He found the Xenia experience had shattered his confidence applying for other jobs.

[155] Mr Jackson seeks \$15,000 compensation and that is a reasonable amount before assessing contribution.

Contribution

[156] Can Mr George be said to have contributed to the situation giving rise to his dismissal? In order to make a deduction for contribution the employee's conduct must have been both causative of the outcome and blameworthy.⁹

[157] The earlier issues resulted in a letter of concern so were not seen as sufficient by Xenia to result in disciplinary action. The disciplinary action it started was never finished, with the focus moving onto Mr George paying Xenia back (or working for nothing) for the hours the company said it owed him. It is important that this concerns the Oakroom administrative and training work which had previously been considered by Xenia to be suitable to undertake from home. Calling in a little late to advise that he would be in within a couple of hours and would also take work home, is not sufficient to warrant a deduction.

⁹ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178] and *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 (Full Court) at [175].

[158] I do not accept that Mr George can be said to have acted in a blameworthy manner by not chasing up on work as referred to by the operations manager. Mr George had taken a not unreasonable approach of expecting to do only the work he was rostered for and had not been informed of any obligation to chase the company for other work.

[159] In conclusion Mr George's conduct either did not contribute or was not blameworthy. No deduction for contribution is warranted.

Conclusion on remedies

[160] Xenia is to pay Mr George the following grievance remedies within 28 days of the date of this determination:

- \$2,400 gross as lost wages; and
- \$15,000 as compensation.

Arrears and holiday pay

[161] It was difficult for Mr George and his representative to accurately calculate what might be owing. Xenia accepts that hours were deducted from the last pays Mr George was otherwise owed.

[162] On the evidence before the Authority, it seems Xenia has now paid for the deductions it made. This includes the last pay which was made up of wage subsidy and \$192 for holiday pay.

[163] However, according to the pay history \$444.36 gross holiday pay was owing. How the \$192 was calculated is not clear but \$352.36 gross remains outstanding and is ordered to be paid by Xenia to Mr George within 28 days of the date of this determination.

Should a penalty be imposed?

[164] Mr George seeks a penalty be imposed on Xenia for breaches of the employment agreement and Wages Protection Act.¹⁰ These cover:

¹⁰ The Act, s 134 and Wages Protection Act, s 13.

- breach of an implied term of the employment agreement by failure to provide a safe working environment by requiring him come in, particularly at Level 4
- failure to pay wages when due under clause 12.2 of the employment agreement and s 4 of the Wages Protection Act in September 2021, when the wage subsidy was delayed
- November 2021 deductions from Mr George's pay before his written consent or request was provided, breaching payment obligations under s 4 of the Wages Protection Act
- Unreasonable deductions of November 2021, breaching payment obligations under s 4 of the Wages Protection Act.

[165] These are not minor matters. Mr George was unlawfully required to come into work, not paid for his work in a timely way and had deductions wrongfully made.

[166] The Wages Protection Act is aimed at ensuring employees are paid promptly for their work. This supports the imposition of a penalty on Xenia. This was not an accidental non-payment. There have been plenty of opportunities, including at times when the company was represented, to repay the money. No payment was forthcoming. Xenia was also aware of the Authority's earlier decision about the timebank. In these circumstances a penalty should be imposed.

What amount of penalty should be imposed?

[167] Firstly a look at the breaches.

[168] A worker's implied right to work in a safe working environment is an important one. The various instances of Xenia requiring Mr George to come in at Level 4 are globalised to one breach, with a maximum penalty for breach of his employment agreement at \$20,000.

[169] As outlined above, Xenia has breached its contractual and statutory obligations to pay wages during September 2021. There is a maximum penalty of \$20,000 against a company for each breach of the employment agreement and each breach of the Wages Protection Act. However, given that they cover the same facts I regard them as one breach for the purposes of a penalty.

[170] The two November 2021 deductions without written consent or request I regard as one breach, giving a maximum \$20,000 penalty. Those deductions were also unreasonable as was the failure to pay Mr George's final pay but as the first two deductions were covered above, this is regarded as one breach with Xenia potentially liable to another \$20,000 penalty.

[171] The provisional total is thus \$80,000.

[172] The failures to pay were deliberate although Ms Jacob regarded the company as entitled to deduct, at least for the final pay once Mr George had signed a consent to deduction. The provision of payslips in both September and November 2021 which purported to show Xenia paying Mr George when it did not is an aggravating factor.

[173] Mr George has been deprived of what is quite a sum for a man of his circumstances. Xenia has taken steps to mitigate the effects of the non-payment breaches on Mr George although this was paying him what he should have received earlier. He considers Xenia exploited him.

[174] I found Ms Jacob's suggestion that the HR assistant would have offered Mr George payment of the wage subsidy in advance, with the implication that he had turned it down given no payment was made, most unlikely when he was without payment for a month. Even if there was such an arrangement made in other circumstances, I am not satisfied that it was offered in this one.

[175] There is evidence of Xenia not paying others due to the timebank scheme.¹¹ There is no penalty here directly related for the operation of such a scheme but the November 2021 failures to pay were caused by Xenia's operation of that system.

[176] There is a need for deterrence for Xenia. Ms Jacob was aware of the financial pressure on Mr George but went ahead with the deductions from his wages, meaning he had no final pay to tide him over until he gained another job.

[177] There was little evidence about the company's current financial position so I make no deduction for that factor.

¹¹ Above at n 1.

[178] I have taken into account the level of penalty awarded in cases with some similarities and proportionality to the amounts not paid at the time.

[179] A penalty of \$15,000 is appropriate to reflect the seriousness of the situation. I consider it is right for a substantial proportion of that penalty to go to Mr George for having to pursue this matter under trying circumstances. I order Xenia to pay a penalty of \$15,000 into the Authority's account within 28 days of the date of this determination, with \$5,000 from that payment to be forwarded to the Crown account and \$10,000 to Mr George.

Summary of orders:

[180] Xenia is ordered to pay to Mr George within 28 days of the date of this determination:

- \$2,400.00 as lost wages and \$15,000 compensation for his personal grievance;
- \$352.36 gross for holiday pay; and
- Penalty of \$15,000, with \$5,000 to go to the Crown and \$10,000 to Mr George.

Costs

[181] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[182] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr George may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Xenia will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[183] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

Nicola Craig

Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1