IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 12
3031080

	BETWEEN	SHEENA HARRISON Applicant
	AND	TRIBECA LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Geoff Martin, Advocate for the Applicant Emma Butcher, Counsel for the Respondent
Investigation Meeting:	25 September and 11 October 2018
Submissions received:	At the investigation meeting
Date of determination:	11 January 2019

DETERMINATION OF THE AUTHORITY

A. Sheena Harrison was unjustifiably dismissed by Tribeca Limited trading as Hotties.

B. Tribeca Limited is ordered, within 28 days of the date of this determination, to pay Ms Harrison the sums of $3,800.00 gross as lost wages, $304.00 gross holiday pay on that sum and $10,000.00 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Tribeca Limited is ordered to pay a penalty of $2,000.00 for failure to provide an employment agreement. The penalty is to be paid within 28 days of the date of this determination, to the Employment Relations Authority for transfer into the Crown

account.

D. Costs are reserved. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Sheena Harrison worked briefly at Hotties, a restaurant at Hot Water Beach. Hotties is owned by Tribeca Limited (Tribeca or the company).

[2] Ms Harrison claims that she was unjustifiably dismissed and that Tribeca did not comply with its obligations and should be penalised. Tribeca disputes her claims.

[3] An investigation meeting was held on 25 September and 11 October 2018 in Auckland. I heard evidence from Ms Harrison, Ms Harrison's employment coach and Ms Harrison's friend. I also heard from Mark Walynetz (director and shareholder of Tribeca), his wife Pauline Walynetz and a hospitality consultant/chef who consulted for Tribeca.

[4] 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 on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issues for determination are:

(a) What was the status of Ms Harrison's employment with Tribeca?

(b) Was Ms Harrison subject to an unjustified disadvantage by Tribeca's actions or was she unjustifiably dismissed by Tribeca?

(c) If so what remedies, if any, should Ms Harrison receive?

(d) Did Tribeca breach its duty of good faith to Ms Harrison, or its other obligations under the Act, by failing to provide her with a written employment agreement?

(e) Did Tribeca breach any obligation to Ms Harrison regarding failure to keep time and wages records and/or provide her with payslips?

(f) If Tribeca breached its obligations in any of those regards, should it have to pay a penalty?

The parties

[6] Ms Harrison's work history was mainly in sales but from 2006 to 2014 she ran her own restaurant in Te Aroha. She had been the front of house manager, bar manager, and had also waitressed, designed menus and employed and trained staff. She closed the restaurant and was not employed for a few years. She was keen to start a new life away from Te Aroha and was interested in going to the Coromandel.

[7] Mr Walynetz is a restauranteur who had owned and operated restaurants in New Zealand and overseas for many years. Ms Walynetz also has an extensive history of front of house and restaurant management roles.

[8] Tribeca bought an existing restaurant called Hotties and was planning substantial renovations. The Walynetzes moved to the Coromandel. The restaurant had a kiosk and shop attached. Hotties traditionally closed over winter due to the reduction of holiday makers and the Walynetzes arranged to renovate during the 2017 closure.

[9] In about late March 2017 Mr Walynetz began thinking about what additional resources would be needed once they reopened. He was also wanting to withdraw from having as much direct involvement in the business. Mr Walynetz advertised on Seek, looking for a front of house manager. He says that he wanted to test the market, given their location. The advertisement was for a full time senior hospitality staff member.

Initial interactions

[10] On 5 April 2017 Ms Harrison emailed Mr Walynetz, attaching her CV and a covering letter. The letter was headed with her Te Aroha address but she also said "I am relocating to the Coromandel". Mr Walynetz called Ms Harrison the next day and they discussed the renovations and the job envisaged to start after those were complete. Mr Walynetz identified that it was a senior front of house role, running the dining room. Ms Harrison offered to come up to visit.

[11] On 12 April 2017 Ms Harrison offered to come up after Easter and asked if they would interview her. Mr Walynetz says he wanted to meet her but was not intending an interview. He did not want to be discouraging so he just responded by email "Yes".

[12] Mr Walynetz says that he was intending to undertake a trial process as is common in hospitality for the parties to see if the applicant liked the job, fitted in well and had the right skills before a formal contract is negotiated and signed. However, I am not satisfied that that was clearly identified to Ms Harrison, who did not have that experience from her own restaurant. She had used a 90 day trial period for staff.

April meetings

[13] Later in April Ms Harrison came to visit Hotties. She says that she went in twice, once on the 20th and again on the 21st. Mr Walynetz initially considered she had only come in once, but during the investigation meeting accepted it could have been twice. Ms Harrison was briefly introduced to Ms Walynetz.

[14] On the second visit Ms Harrison says that she did some work to help out. Ms Harrison considers that she was offered the job on 21 April. Mr Walynetz says that he liked her having met her and was willing to continue the discussion, with her returning to see how she went when the restaurant opened. Ms Harrison was given the opportunity to undertake some work at Hotties although there was no formal discussion about starting date, hours of work or pay at that point.

Continuing discussions

[15] Ms Harrison emailed on 22 April 2017 talking about being part of his team and him taking her on board "so to speak". Mr Walynetz considered that the "so to speak" reference reflected the fact that neither had committed but did not contradict her comments.

[16] Ms Harrison emailed again saying that for her manager's certificate form she needed to say where she would be serving liquor. Also to get WINZ payment for the application fee she needed an employment agreement. Mr Walynetz offered to pick up a form or download one for her and fill out his part. He did not reply regarding the employment agreement. There was no further mention by Ms Harrison of the agreement.

[17] In May 2017 Ms Harrison emailed to say she had passed what she needed to in order to get her manager's certificate and asked about the renovations. Mr Walynetz replied with an update. Later in May she emailed again asking how things were going and offering to help. Mr Walynetz replied that it was quiet but some work was

underway. He explained his responses as politeness, but they certainly create an impression of a degree of involvement and commitment between Hotties and Ms Harrison.

[18] In June 2017 Ms Harrison emailed again saying she was ready for her "big move". Mr Walynetz had understood from the discussion that she had been planning to move to Coromandel anyway, so that it was not just about Hotties. Mr Walynetz replied that it looked like mid-September 2017 for the reopening so she could plan to be available then if she wanted to. He asked her to meet up again and for her to stay in touch. He also mentioned, he says as an afterthought, the possibility of them having a place she could stay to see how that worked out. The Walynetzes owned a house which was rented to the public at times and sometimes accommodated staff.

[19] Mr Walynetz emailed saying they were looking at opening about 20 September and she should come and have a look. Ms Harrison said she would be up on the 15th of September and could help with the set-up. Mr Walynetz responded okay.

[20] The two had a phone call during which Ms Harrison mentioned using her son's caravan when she arrived. Mr Walynetz repeated his offer for her to stay in the house paying $25 a night on a casual basis, as a caravan would be cold. She agreed.

[21] Ms Harrison contacted Mr Walynetz and he agreed that her first day would be 16 September 2017, starting at 9am and staying until the work was done for the day.

[22] Ms Walynetz's understanding from discussions with her husband was that Ms Harrison was going to be trialling. Ms Walynetz was sceptical about Ms Harrison's suitability, given that she appeared to have had only one previous position in hospitality and that was running her own place. Ms Walynetz corroborated her husband's understanding that Ms Harrison was moving to the Coromandel anyway, and there was no harm in trying her if she was still available once the restaurant reopened for the summer.

Ms Harrison's work at Hotties

[23] On 16 September 2017 Ms Harrison began working at Hotties. The restaurant was not yet open and she initially assisted with cleaning and setting up the merchandising shop. Once the restaurant opened, Ms Harrison worked in front of

house. Her impression was that things were going well. The hospitality consultant was operating as head chef during this period and Mr and Ms Walynetz were also working at Hotties.

[24] After completing her work on Friday 22 September 2017, Mr Walynetz called Ms Harrison into a meeting. He asked her how she thought she had got on. She responded positively. Mr Walynetz said that he was disappointed with Ms Harrison's work and did not consider that she was suitable for the job in his restaurant. He said she did not have a job at Hotties, adding that she was best suited for café work and provided the names of several local cafes which he knew were keen for staff. Ms Harrison asked if she could be a waitress at Hotties but Mr Walynetz said no. It was agreed that Ms Harrison would continue working until the following week to sort herself out.

[25] Later, whilst still working at Hotties, Ms Harrison received news that her mother, who lived overseas, had died. Ms Harrison continued to work as she felt it was the best thing to do.

[26] On Monday 25 September 2017 the restaurant was quiet. Ms Walynetz suggested that Ms Harrison go home, saying she was sure Ms Harrison had plenty to do there. Ms Harrison was to move out of the house provided by the Walynetzes shortly. Ms Harrison decided to make 25 September 2017 her last day of work, so told Mr Walynetz to make sure her pay was in her bank account.

[27] Ms Harrison left the Coromandel to stay with friends on the way to flying out to her mother's funeral.

Status of Ms Harrison's employment

[28] Tribeca says that Ms Harrison was on a casual trial arrangement. Mr Walynetz saw it as standard practice in the restaurant business to have a one or two week paid trial. Mr Walynetz did not see that trial as an employment as an employment situation, although on Tribeca's behalf it was accepted that it was.

[29] Ms Harrison understood that she had agreed to full time employment. She was however used to employing staff on a 90 day trial period and anticipated having such a clause in her agreement with Tribeca. I find that Mr Walynetz made reference to seeing how things went and the like but had not explicitly referred to a one or two

week trial period. He appears to have relied on his experience of the commonness of such trials without being explicit to Ms Harrison.

[30] I deal firstly with the issue of whether the arrangement was a casual one. The advertisement which Ms Harrison responded to was for a full time hospitality employee. There was no indication that this was a casual role.

[31] Ms Harrison did not understand from her numerous interactions with Mr Walynetz prior to starting work in September 2017, that the role was casual. Mr Walynetz described Hotties' hours as being 9am to 4pm. Ms Harrison understood she'd work those hours with an occasional day off.

[32] Although the Walynetzes were able to handle managing the restaurant themselves, they did want a front of house manager and that was a full time role. Although the substantial email chains do tend to indicate a higher level of enthusiasm on Ms Harrison's part than from Mr Walynetz, the tone and content do not indicate that this was a casual arrangement.

[33] When Ms Harrison actually worked her start time was usually 9am and she mostly worked 7 hours a day. I accept that there was some variation in the hours actually worked, depending on when the work was completed in the afternoons. However, that is not sufficient to make the role casual. On 20 September 2017 Ms Harrison was told that she was not required to work on 21 September 2017. However, at that point she had already worked five days in a row so having a day off would not be unusual.

[34] I accept that Mr Walynetz indicated that they would see how things went, but not in such a way as to suggest that casual employment was what was being envisaged. Rather this was a trial to see how things went with a view to Ms Harrison getting on-going employment. She had to be present with a sufficient degree of regularity for her work to be assessed. I do not accept that the real nature of the relationship was a casual one.

[35] In light of *Salad Bowl Ltd v Howe-Thornley* [1] an employment situation existed as there was an expectation of reward by Ms Harrison and an economic benefit to Tribeca from her work.

[36] For Tribeca it was submitted that short trial arrangements in hospitality, on a paid basis if there was economic benefit/profit to the employer, were not unlawful. However, the question is, what is the consequence when employment exists and the employer decides to stop the work?

[37] Whilst it could be argued that this was a fixed term arrangement for a couple of weeks, that approach faces a barrier in s 66(2) of the Act. In fixed term situations the employer must have genuine reasons based on reasonable grounds for the arrangement, and establishing suitability of the employee for permanent employment is not a genuine reason.[2]

[38] In the absence of any written employment agreement setting out a probationary period, any term agreed to that effect may not be relied on under s 67(3) of the Act. Similarly under s 67A(2) of the Act trial periods which prevent employees from bringing an unjustified dismissal claim must be in writing to be effective.

[39] Having established no basis for Ms Harrison's employment to be subject to a valid fixed term, probation period or trial period, she was therefore an employee who is entitled to pursue an unjustified dismissal claim when her employment was terminated.

Unjustified dismissal

[40] I now look at whether Ms Harrison's dismissal was justified. I accept that Tribeca had concerns about Ms Harrison's performance. Although a few of the issues were mentioned to Ms Harrison in the course of her work, this was done in an informal manner with no written notification to her of the issues or chance to respond about them.

[41] At the meeting on 22 September 2017 Mr Walynetz summarised some of the concerns but had already made up his mind at this point and so Ms Harrison did not get a proper chance to respond to the issues. The matter was dealt with on the basis

[1] *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152
[2] S 66(3) of the Act

that Mr Walynetz did not regard Ms Harrison as an employee at that point, merely someone trialling.

[42] Tribeca did not act as a fair and reasonable employer would have done. It did not clearly identify concerns to Ms Harrison, give her a chance to comment, and then if not satisfied with the response, give her an opportunity to improve. Rather it aggregated its concerns, made a decision to dismiss and then told Ms Harrison of that decision.

[43] Ms Harrison was unjustifiably dismissed by Tribeca.

Lost wages

[44] Ms Harrison seeks lost remuneration, based on $19 per hour and a 40 hour week, totalling $5776.00, plus holiday pay on that sum of 8% and interest. She was able to obtain employment on 21 November 2017. I calculate that this was eight weeks after she finished at Hotties.

[45] There was some uncertainty about the hours of work which Ms Harrison could be expected to have worked. The role was advertised as full time, which in the absence of any other indicators I take to mean 40 hours per week. Ms Harrison worked varying hours during her time at Hotties, with the most common being 9am to 4.30pm. I calculate lost wages on 40 hours at $19 per hour, being $760 gross per week.

[46] I do not consider that Ms Harrison can claim wage loss for the period when she was overseas for three weeks for her mother's funeral and to catch up with family. While it is entirely understandable for her to attend, due to her not having been in Tribeca's employment for six months, she would not have been entitled to any paid bereavement leave. Ms Harrison's wage loss for the three weeks trip was not caused by her dismissal.

[47] I have considered whether, having undertaken a fair performance process, Ms Harrison's employment could have been properly terminated earlier than the point when she obtained other employment, but there seems unlikely to have been sufficient time. An award of a period of five weeks' lost wages, being $3,800, would be appropriate subject to the consideration of contribution below.

Compensation

[48] Ms Harrison seeks $15,000 compensation under s 123(1)(c)(i) of the Act.

[49] Ms Harrison and her friend provided detailed evidence regarding the effects of the dismissal on her. Her immediate reaction to be told she no longer had a job at Hotties was to feel shocked and sick. On reaching her car she cried and screamed. She was however, able to continue working at Hotties for another few days.

[50] Ms Harrison describes herself as being broken hearted, having thought that she had done a good job. She felt humiliated at having to tell her family what had happened, and felt useless to society. At times she wished to disappear from the earth. She took some anti-depressant medication offered by a friend although she was not assessed by a doctor. Ms Harrison's friend described her as becoming very depressed, dejected and not being herself in the months after the dismissal.

[51] There are some matters temper what might otherwise have been a higher level of compensation. I do not consider that the extent of Ms Harrison's reliance on the opportunity of work for the first time in a few years, as well as to move to the Coromandel, was entirely apparent to Tribeca. Her application letter indicated that she was moving to the Coromandel, leading Mr Walynetz to believe that she was coming anyway.

[52] Although Ms Harrison did not accept that her mother's death contributed to her level of distress at this time, I find that unlikely. Also, some of the harm to Ms Harrison was caused by her receipt of negative feedback regarding her skills, rather than by her dismissal.

[53] I consider that compensation of $10,000 would be appropriate before a consideration of contribution.

Contribution

[54] I must consider whether Ms Harrison's actions can be said to have contributed to the situation which led to her dismissal. If I am to make a reduction to the remedies

outlined above I need to be satisfied that her actions can be said to be causative of the outcome and blameworthy.[3]

[55] I do consider that Ms Harrison's work performance contributed to the situation which gave rise to her dismissal. Mr Walynetz, his wife and the consultant believed that Ms Harrison's skills were not at a level or of a type which Hotties needed. They all expressed appreciation of Ms Harrison on a personal level but gave credible evidence that they did not consider her sufficiently expert for the role.

[56] The more difficult question is whether Ms Harrison's actions can be said to be blameworthy. Ms Harrison did try hard and came across as willing to learn. However, she brought limited relevant experience. I do not consider that Ms Harrison's actions can be seen as blameworthy in the context of a short period of employment without sufficient opportunity to improve with assistance.

[57] I therefore order Tribeca Limited, within 28 days of the date of this determination, to pay Ms Harrison the sums of $3,800.00 gross as lost wages and $10,000.00 as compensation under s 123(1)(c)(i) of the Act. I accept that Ms Harrison is entitled to holiday pay on the lost wages sum, amounting to $304.00 gross and order that to be paid by Tribeca within 28 days, but do not consider that interest should be awarded.

Lack of employment agreement

[58] Tribeca did not provide Ms Harrison with an employment agreement. It says that it was not aware that it needed to do so for a trial period. Its practice was to provide a written agreement after a successful trial.

[59] Tribeca breached s 63(2)(a) of the Act which requires employers to provide a copy of the intended agreement to the employee. Under s 63(3) of the Act a penalty may be imposed for a failure to comply.

[60] Tribeca submits that this is a situation where a penalty is not appropriate as it involved casual employment in the situation of Ms Harrison not losing anything by waiting for the restaurant to re-open and trial for the role. However, I do not agree

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

that Tribeca should not be penalised. The company did little to clarify its expectation or understanding regarding Ms Harrison's situation. An employment agreement could well have avoided arguments regarding whether the arrangement was casual or subject to a trial period. A penalty is appropriate.

[61] In light of the Employment Court's decision in *Borsboom (Labour Inspector) v Preet Pvt Ltd* [4] (*Preet*) I now proceed through the four step test to determine the appropriate penalty, also considering the matters set out in s 133A of the Act.

[62] Under step one of the *Preet* test, the penalty here concerns one breach, with a maximum penalty for a company of $20,000.

[63] Under step two I assess the severity of the breach, considering aggravating and mitigating factors.

[64] Written employment agreements have an important role in evidencing the agreement between the parties and helping establish what rights each party has as regards the employment relationship.

[65] Tribeca had some awareness of its obligations to provide staff with written employment agreements, although that was done for staff once any trial period was satisfactorily completed.

[66] For Ms Harrison it was argued that she pursued getting an agreement but Tribeca refused to give her one. However, there was no explicit refusal. Despite repeated prompting from her employment coach, Ms Harrison did not pursue the matter further.

[67] Although Ms Harrison was not vulnerable in the sense of being new to the employment market or to New Zealand, she had been without work for some time and was clearly enthusiastic about the opportunity which she thought was being provided by Tribeca.

[68] There was no indication of any previous proceedings against the company.

[69] I consider that a provisional penalty of $2,000, being 10% of the maximum, is appropriate.

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[4] *Borsboom (Labour Inspector) v Preet Pvt Ltd* [2016] NZEmpC 143

[70] Under step three of the *Preet* analysis, I am able to consider the company's financial position, but received no evidence in this regard.

[71] I now look at the proportionality of the provisional $2,000 figure under step four. I accept that that amount is appropriate given all of the circumstances of the case. I order Tribeca Limited to pay a penalty of $2,000.00 within 28 days of the date of this determination. The penalty is to be paid to the Employment Relations Authority for transfer into the Crown account.

Payslips

[72] For Ms Harrison it was argued that there was an obligation on Tribeca to provide her with payslips. This was said to be under s 130 of the Act. Whilst payslips can help prevent disputes regarding the calculation of pay and other entitlements, there is no statutory obligation to provide payslips. Section 130 requires the employer to keep a record of time and wages. The keeping of payslips may potentially be sufficient compliance with s 130, but other than that, it does not require the provision of payslips to employees.

[73] Employment agreements can impose such an obligation on employers but in this case there was no written agreement. Tribeca did not have any obligation to provide payslips.

Time and wages records

[74] Ms Harrison claims that Tribeca did not keep or produce to her, or her representative, time and wages records.

[75] In terms of the keeping of records, Tribeca filed time cards and a pay record.

[76] The printed time cards provide for the recording of hours of work, as well as payments made. There is room for the employee's signature certifying that the particulars are correct, although Ms Harrison's cards are not signed. Ms Harrison clocked in and out but the printer was not working well, making the dates and times barely visible. The time cards were partially filled out by Mr Walynetz by hand, providing an indication of the number of hours worked on various days, although largely without reference to the days or dates concerned. Mr Walynetz has noted on the cards how Ms Harrison's pay has been calculated.

[77] The pay record was kept by the company's book keeper. It sets out Ms Harrison's name and tax details, and details of the gross payments, the rent deducted and the net pay.

[78] There is a lack of clarity in the time cards records about which days the hours were worked on, and the records do not state Ms Harrison's postal address or make reference to the type of employment agreement she is employed under. The records do not meet the requirements of s 130 of the Act. However, I am not satisfied that that any penalty should be imposed in the circumstances. Ms Harrison's employment was brief and at a time when the restaurant was just reopening. Tribeca appeared to have systems in place which would normally work satisfactorily for the recording of time worked and wages paid.

[79] In terms of the production issue, the question is whether a request was made for the employer to provide the records. Ms Harrison says that she asked for "wage slips" on her last day of work, when Mr Walynetz brought out the timecards.

[80] Ms Harrison's representative's letter of 25 September 2017 refers, in a section headed "The Law", to wage slips and the employer being required to maintain a wages and time record as per s 130 of the Act. Reference is also made to failure to keep records or provide them being in breach of s 132 of the Act. There is however, no request for a copy of Ms Harrison's records. References to failure to provide Ms Harrison with payslips being a breach of the duty of good faith, may not have assisted.

[81] Two further letters did not include a request for the time and wages records. I am not satisfied that there was a request for time and wages records.

Costs

[82] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Harrison shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Tribeca shall have a further 14 days in which to file and serve a memorandum in reply. All submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig
Member of the Employment Relations Authority