

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 159  
3230399

BETWEEN                      MUSTAFA HUSSAINI  
   Applicant  
  
AND                                REAL BREAD LIMITED  
   Respondent

Member of Authority:        David G Beck  
  
Representatives:              Dave Cain, advocate for the Applicant  
   Chris Cerecke for the Respondent  
  
Investigation Meeting:        9 February 2024 in Christchurch  
  
Submissions Received:        9 February 2024 from the Applicant  
   7 March 2024 from the Respondent and further information  
   provided on 13 March 2024  
  
Date of Determination:        19 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        Mustafa Hussaini was employed by Real Bread Limited (R B Ltd) as a delivery driver/merchandiser from 12 February 2023 until the engagement ended on 15 February 2023.

[2]        Mr Hussaini raised a personal grievance with R B Ltd on 21 February 2023, alleging he had been unjustifiably dismissed. Mr Hussaini claims compensatory remedies including a penalty due to a claim he was not provided with an employment agreement.

[3] R B Ltd says Mr Hussaini's employment was casual with no expectation of ongoing work and that they decided to not engage him further due to performance concerns they observed during a brief period of employment.

[4] The parties subsequently attended an unsuccessful mediation and the matter remains unresolved.

### **The Authority's investigation**

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I, likewise, have carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

[6] During the investigation meeting, Mr Hussaini and Mr Cerecke (founder and a director of R B Ltd) gave oral evidence to supplement written evidence previously provided.

### **Issues**

The issues to be decided are:

- (a) Was Mr Hussaini provided with an employment agreement and if not, is it appropriate to order a penalty against RB Ltd for non-compliance with s 63A of the Act.
- (b) Was Mr Hussaini a casual employee with no expectation of ongoing regular employment and did his employment end because of this categorisation; or:
- (c) was Mr Hussaini unjustifiably dismissed or unjustifiably disadvantaged and if so, did R B Ltd's actions meet the standard of a fair and reasonable employer in all the circumstances.
- (d) What if any remedies should be awarded considering Mr Hussaini's claims for:
  - i. lost wages; and:
  - ii. compensation under s 123(1)(c)(i) of the Act.

iii. A penalty for non-provision of an employment agreement.

(e) If Mr Hussaini is successful in all or any element of his personal grievance claims, should the Authority reduce any remedies granted because of any contributory conduct applying s 124 of the Act?

(f) How costs are to be dealt with.

### **What caused Mr Hussaini's employment relationship problem?**

[7] R B Ltd is a small Christchurch based bakery, specialising in producing sourdough loaves that it distributes to retail outlets in Christchurch. Mr Cerecke who manages the business, says he started the business in his garage in 2017 and now has a commercial building it operates out of and at various times R B Ltd employees up to ten people in full-time and part-time roles.

[8] It was common ground, Mr Hussaini approached Mr Cerecke by a phone call of 8 February 2023, inquiring about a delivery driver job that he (Mr Hussaini) had been informally told may be available. Mr Cerecke says at the time he had not advertised any job but thought there was some potential to engage a relieving driver to cover for a staff member about to take two weeks' annual leave. Mr Cerecke says he portrayed the job as: if Mr Hussaini was interested in casual work he should come in for a chat. The parties then met on Friday 10 February. There were no notes produced of the conversation that morphed into an informal interview.

[9] Mr Cerecke says despite having a concern about Mr Hussaini not being prepared and not offering an outline of his work history or any references, he took on trust when told he had just returned from Melbourne where he had a similar delivery job in a bakery. As a result, Mr Cerecke invited Mr Hussaini to accompany him on a delivery round to see how he went.

[10] Mr Hussaini says no discussion of the job being casual took place and he assumed it was part-time work as that was what he was interested in. However, Mr Cerecke says he did discuss the casual nature of the role and why this was so, and after the interview he showed

Mr Hussaini around the bakery and gave him a casual employment agreement, job description and some company policies including a privacy waiver to check the currency of his driving licence.

[11] Mr Hussaini denied receiving an employment agreement but conceded he was given a job description, an employee details form and tax and KiwiSaver forms. The job description defines the role as “Delivery and Merchandising” but had no mention of the casual or otherwise nature of the job. Notwithstanding, the initial engagement had some elements of informality and no employment agreement was signed.

[12] As Mr Hussaini indicated he was immediately available, a ‘try out’ was agreed to proceed on the Sunday morning after the interview and Mr Hussaini subsequently accompanied Mr Cerecke on a delivery round. This went sufficiently well enough for Mr Hussaini to be asked back to be placed alongside the existing delivery driver for a couple of days orientation on the following Monday and Tuesday. Unfortunately, this arrangement did not go well and Mr Cerecke says the delivery driver expressed some significant concerns about Mr Hussaini’s suitability.

[13] Mr Cerecke says by this point in time (15 February), he had not been provided any requested paperwork (including his driver’s licence) or references and he began to have reservations about employing Mr Hussaini on an ongoing basis, due to the other driver’s significantly negative feedback and after background checks he conducted and feedback he sought from a customer. Mr Cerecke concluded that he had been misled about Mr Hussaini’s background or that he was not open about such and, Mr Cerecke says he was not comfortable in continuing with the engagement.

[14] Mr Hussaini was not asked to work on 15 February and at around 5 pm, Mr Cerecke rang Mr Hussaini and after identifying himself, left the following message:

Hey, erm look we’ve had a bit of a good old think about it. We appreciate the trials you did over the last three days.

Erm, we have had quite a lot of other people interested and ultimately we’ve decided on somebody else, so I’m sorry about that.

Erm, we have got your hours there though, so quite happy to pay you for those, erm but I'll just need you to put through the paperwork and we can, erm put you into our payroll to pay you out for those hours that you did.

Erm, so flick us the paperwork. Er, you can email it or drop it off, whatever works. Erm, email is [redacted].

Erm, but yea, so appreciate your interest and sorry it didn't work out for us.

So, thanks a lot. Cheers. Bye.

[15] Mr Hussaini then called Mr Cerecke on the afternoon of 16 February – the call was four and a half minutes duration. Mr Cerecke recalled being pressed about the reasons for not continuing with his employment and says he “side stepped” the reasons by confining feedback to his “demeanour was not suitable for a customer facing role”. Mr Cerecke says the call stuck in his mind as Mr Hussaini was then abusive of the co-worker, he had accompanied on his trial runs. Mr Cerecke also recalled offering to pay Mr Hussaini for the three days and asking for his payment details. Within the next hour, Mr Hussaini texted his IRD number and bank account details to Mr Cerecke. Mr Hussaini during the investigation, denied making the call mentioned above but when pressed, suggested it may have occurred but he could not recall it. Further, in submissions Mr Hussaini's advocate noted “...he has no recollection of whatever conversation might have taken place”.

[16] I find satisfactory documentary evidence of the call being made was provided and on balance, that Mr Cerecke's version of what was said is more credible. Mr Cerecke stressed he was keen not to aggravate the situation given what he had discovered about Mr Hussaini's background (I need not go into this further other than to say I accept Mr Cerecke's concerns as valid). Mr Cerecke also conceded that he did not expand upon the reasons for not continuing with Mr Hussaini's employment in either call as he says he was trying to let Mr Hussaini down gently. Mr Hussaini was then paid for the three days he worked in the amount of \$540.50 (\$23 per hour).

### **Issue 1 – the provision of an employment agreement**

[17] In view of the conflicting evidence on the timing and the provision of an employment agreement and other evidence of documentation provided, I am unable to conclude that the

evidential threshold for consideration of a penalty for no provision of an employment agreement, has been met.

## **Issue 2 – was the employment casual?**

[18] There was conflicting evidence on how the first stage of the engagement was portrayed. Mr Cerecke says no ongoing job existed but when Mr Hussaini indicated he was interested, Mr Cerecke thought he may be useful as casual cover for an employee just about to go on annual leave. In contrast, Mr Hussaini was of the belief that he was being offered a permanent part-time job and said if he had appreciated it was casual, he would not have applied for it.

[19] After initially taking a position that no employment relationship was entered into Mr Cerecke conceded this was not the case, as he had agreed with Mr Hussaini on at least his remuneration and start date and he was remunerated for the days worked. Mr Cerecke acknowledged a failure to secure a signed employment agreement before Mr Hussaini commenced work.

[20] Because of the noticeably short duration of Mr Hussaini's employment, I have only a limited period to consider in terms of the nature of the relationship. I only have an ability to assess the intention of the respective parties and whether they were clearly expressed.

[21] Three broad scenarios are possible; these are that:

- a) There was no clear communication of the nature of the relationship during the informal interview and both parties assumed different things – Mr Hussaini believed it was a permanent arrangement but Mr Cerecke thought he had made it clear it was casual.
- b) Mr Cerecke was clear at the outset that the arrangement was both casual and temporary and this was reinforced by the presentation of an employment agreement making clear the nature of the arrangement (noting that Mr Hussaini denied receiving the employment agreement).

- c) Mr Cerecke did not explain the nature of the employment and was waiting to discuss such after the informal trial period was completed.

[22] Assessing the evidence and all the circumstances, I find that it was more likely than not, that b) occurred, in that: Mr Cerecke made it clear the basis of the employment being short term and perhaps thereafter some limited cover work but he may not have presented the written employment agreement to Mr Hussaini on the day of the informal interview. I consider it more likely than not, Mr Cerecke inappropriately held back on signing an employment agreement on the basis he wanted to assess Mr Hussaini first by using a 'mini trial'. Such informality may have been because the job was envisaged to be of a short duration and Mr Hussaini, in being keen to get started, pushed Mr Cerecke to try out for the role in the brief period between him being interviewed and starting the work familiarisation exercise. The latter premise is reinforced by my acceptance that no job was 'on offer' until Mr Hussaini approached Mr Cerecke and the work envisaged was genuinely of a temporary nature to provide cover for an employee about to go on leave.

### **Finding**

[23] Assessing the totality of the circumstances and communication I find the position on offer was described as and was, casual to cover an employee leave situation for a short duration. In these circumstances, a preferable option may have been to categorise the employment as fixed term but evidence given including the size of the employer's operation, suggested that Real Bread Ltd may have wanted to use Mr Hussaini further in a casual capacity.

### **Issue 3 – was Mr Hussaini unjustifiably dismissed and/or disadvantaged by RB Ltd's actions in all the circumstances?**

[24] Given my finding above this situation could be categorised as a refusal to offer a further casual engagement which amounted to a legitimate ending of the employment relationship. As such no consideration of an unjustified dismissal arises.

[25] However, the way the employment ended leads to a view that I can consider whether Ms Hussaini was unjustifiably disadvantaged in his employment. This includes applying the s 103A test of justification to the employer's actions and considering good faith factors.

[26] Objectively viewed, the reasons given for ending Mr Hussaini's employment on the face of it, could not establish serious misconduct was at issue. It was apparent from the evidence that Ms Hussaini was judged on his co-worker's assessment of suitability for the job during a two-day period. In addition, Mr Cerecke sought comment from customers and harboured concerns about Ms Hussaini's past. None of these matters were put to Ms Hussaini for comment. Nor was the true reasoning communicated to Mr Hussaini for his dismissal – he was effectively misled to believe another person would be appointed instead.

[27] The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In addition, even though I have concluded Mr Hussaini was a casual employee there was still an obligation to deal with him in good faith including treating him fairly and being responsive and communicative (that impliedly includes placing a person on notice that performance issues may impact ongoing employment).

### **Finding**

[28] In the circumstances described, due to a failure of RB Ltd to adhere to good faith and fair dealing during the brief period of employment, I find Mr Hussaini was unjustifiably disadvantaged and entitled to a consideration of remedies.

### **Issue 4 – consideration of remedies**

#### *Lost wages*

[29] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Hussaini should I find that he has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[30] Here I find Mr Hussaini's lost remuneration was attributed to the personal grievance. Mr Hussaini says he found short duration alternative employment at the end of May 2023 before being placed on a job seekers benefit. Mr Hussaini claimed 13 weeks lost wages in the amount of \$7,06.50.

### **Finding**

[31] In all the circumstances of the limited engagement to cover an employee taking two weeks annual leave I consider it fair to award Mr Hussaini the amount of expected wages (ten days at eight hours per day at a rate of \$23 per hour) in the sum of \$1,840.

### *Compensation for hurt and humiliation.*

[32] Mr Hussaini gave evidence of the impact of the abrupt dismissal and the uncertainty it created at a tough time to find immediate alternative employment and pay living costs.

[33] While Mr Hussaini was entitled to feel he had been used and humiliated by the nature of the dismissal I was not convinced it had as significant an impact on his confidence and mental well-being as described. Mr Hussaini described a difficult employment history and other extraneous factors that unfortunately impact on him that cannot be exclusively attributed to the loss of his job with R B Ltd.

[34] I am however, convinced that at the time, Mr Hussaini suffered humiliation, loss of dignity and injury to feelings but has now moved on. Considering the circumstances and awards made by the Authority in similar situations and how R B Ltd effected this dismissal, I consider Mr Hussaini's evidence warrants compensation of \$2,000 under s 123(1)(c)(i) of the Act.

### **Issue 5 - Contribution**

[35] Section 124 of the Act states that I must consider the extent to what, if any, Mr Hussaini's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy

should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>1</sup>.

[36] I do find that Mr Hussaini, was unnecessarily reactive and abusive in his call to Mr Cerecke after his dismissal and that this was ill-considered. I also leave room for a consideration that the dismissal may not have occurred had Mr Hussaini been more forthcoming with documentation around his past employment and other issues.

[37] Overall, I find Mr Hussaini potentially did contribute to the situation giving rise to the personal grievance by hardening his employer's negative attitude toward him but I must balance that up with my finding that R B Ltd should have given Mr Hussaini an opportunity to address their concerns. Mr Hussaini cannot be blamed for the deficiencies in process and an outcome that significantly worked against him. This was a hasty decision.

[38] I cannot objectively deem Mr Hussaini's conduct to have been 'culpable' – he responded to what I have found to be actions that caused an unjustified disadvantage and that response in context, although not condoned, was understandable so the extent of his contribution could not be deemed blameworthy.

[39] On balance, considering the actions of both parties I find that Mr Hussaini's contribution to the situation does not warrant any reduction in the remedies I have awarded.

### **Summary and Orders**

[40] I have found that:

- a. For the whole period of his engagement with Real Bread Limited Mustafa Hussaini was a casual employee.
- b. Mustafa Hussaini was unjustifiably disadvantaged in his employment with Real Bread Limited.
- c. Real Bread Limited is ordered to pay Mustafa Hussaini the amounts below within 28 days of this determination being issued:
  - (i) \$1,840 gross lost wages.

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<sup>1</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

(ii) \$2,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

## **Costs**

[41] Costs are reserved.

[42] The parties are invited to resolve the matter of costs. If they are unable to do so, the party that considers they are entitled to a consideration of a cost contribution has 28 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Upon request by either party, an extension of time to explore settlement of costs may be granted.

[43] The parties can expect the Authority to determine costs, if asked to do so, on its usual notional daily rate basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>2</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>2</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)