

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 7
3261859

BETWEEN PAIGE JURY
 Applicant

AND BUCI LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Hayley Johnson and Alex Kersjes, advocates for the
 applicant
 Garry Pollak, counsel for the respondent

Investigation Meeting: 7 and 8 August 2024 in Auckland

Submissions [and further 23 August, 6, 12 and 27 September and 9 October 2024 from
Information] Received: the applicant
 9 and 23 August, 12 September and 2 and 3 October 2024
 from the respondent

Date of Determination: 10 January 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A school student, Paige Jury, obtained her first job as a kitchenhand with a local restaurant known as Amore Italiano Ristorante (Amore). It did not end smoothly with impact rippling through Ms Jury's world.

[2] Amore is operated by Buci Limited (Buci or the company). Buci's co-directors and shareholders are a married couple, Svetlana and Marjanco (usually known as Mario) Kotevski.

[3] Ms Jury argues she was a permanent part time employee who was not initially given an employment agreement and later was unjustifiably dismissed for not agreeing to sign a

casual agreement. Buci's position is that Ms Jury was a casual employee, who it attempted initially to offer a written agreement to, even though the company does not have a copy. Later, on being offered agreements she refused to sign and Buci did not think it could compromise its position by offering her further work until she signed an agreement. It denies dismissing her.

The Authority's investigation

[4] An investigation meeting was held on 7 and 8 August 2024. Written witness statements were received from Ms Jury, her mother Stephanie Jury and stepfather Thomas O'Donoghue, Mr Kotevski and Mrs Kotevski. All also gave oral evidence under oath or affirmation. Mention was made of two other possible witnesses being brought by Buci, but they had availability difficulties and ultimately the company did not pursue their evidence.

[5] By the end of the meeting, it was agreed further evidence was needed about Ms Jury's working hours and pay. In addition, there had been some confusion over different versions of employment agreements as well as questions about employment agreements of other staff Buci provided by way of example.

[6] A memorandum dated 21 August 2024 was filed on Buci's behalf. A case management conference was held on 23 August 2024 where pay and a new issue was discussed. The new issue was responded to in a further witness statement from Ms Jury and associated material.

[7] A further case management conference was held on 12 September 2024 with the parties agreeing that it was time to provide closing submissions. This was done.

[8] All material from the parties has been fully considered. However, 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. In this case consideration has been given to Ms Jury's young age, with some details limited.

The issues

[9] The issues to be investigated are:

- (a) Was Ms Jury a permanent or a casual employee of Buci and related, was she initially provided with an employment agreement?

- (b) Was Ms Jury disadvantaged by an unjustified action of Buci in unilaterally reducing her hours of work for several weeks?
- (c) Was Ms Jury dismissed and if so, was that unjustified?
- (d) If a grievance is established, what remedies (if any) should Ms Jury receive?
- (e) Did Buci breach s 130 of the Act by failing to keep or provide wages and time records and if so, should it be penalised?
- (f) (As arising during the investigation meeting) does Buci owe Ms Jury wages or other money?

[10] A question about sick leave arose during the investigation meeting but is covered by lost wages and arrears issues.

[11] In closing submissions for Ms Jury penalties were sought for breach of s 65 of the Act for failure to provide an employment agreement and breach of the Holidays Act 2003. Penalties are a quasi-criminal matter and in the absence of earlier notification, are not further considered for these breaches. In any event there would also be a question about whether these penalty claims were raised within the limitation period.¹ The penalty sought for failure to keep or provide wages and time records is able to be pursued.

Amore

[12] Amore is a family business with Mrs Kotevski cooking, alongside her husband and nephew. She generally looks after the front of house staff and Mr Kotevski the kitchen hands. He takes care of employment documentation.

[13] Staff were generally in school or tertiary education. The only full timers were the Kotevskis and nephew. Buci saw there being a distinction based on job classification with bar and waiting staff being seen as permanent part time and kitchen staff as casual.

[14] The Kotevskis report that in the few years their restaurant has been open they have never had any sort of employment issue before.

[15] Many customers come from the local area, to eat at the restaurant or get takeaways.

¹ The Act, s 135(5).

Ms Jury's start with Buci

[16] In late November 2022, after a short trial, Ms Jury commenced work at Amore as a kitchen hand. She had been referred by the girlfriend of a family member, who was working at Amore.

[17] Ms Jury was one of at times two or three kitchen hands, who between them generally covered the six days a week the restaurant was open. The Kotevskis occasionally covered the kitchen hand's work if necessary.

[18] Mr Kotevski says he discussed the role with Ms Jury and told her she was casual. Ms Jury denies that, saying she was told she would get at least two shifts a week, although not initially specifying which ones.

No employment agreement signed on commencement

[19] As mentioned, there was uncertainty at the investigation meeting about various employment agreement documents. A lack of clarity between Mr Kotevski and the relatively recently appointed representative, likely contributed to by language differences and the absence of agreements being sent by letter or email with a paper trail, resulted in Mr Kotevski's written witness statement not fitting well with other evidence. Buci's representative appropriately stepped in and clarified the position and documents as best could be.

[20] Mr Kotevski's evidence finally was that he had left a casual agreement he had signed, on the bar for Ms Jury to sign, knowing agreements had to be provided. He says he did not check for the agreement until mid-2023. Ms Jury says she never saw an agreement on appointment. Submissions for Buci, in congruence with Mr Kotevski's evidence, accept this may be the case.

[21] A permanent part time agreement was given to Ms Jury on 26 July 2023 then a casual agreement on 3 August 2023. More on these below.

[22] A generic unsigned agreement was not given to Ms Jury and Buci accepts it is irrelevant.

[23] Evidence was provided, sometimes hearsay, on whether other staff were provided with employment agreements from the start of their employment or only later in 2023, when the absence of one became an issue with Ms Jury. Employment agreements provided by Buci as examples from other staff were questioned by Stephanie Jury and her daughter, as regards timing of offers, dates and details such as employee address.

[24] Ultimately it is sufficient to conclude that even if there was an attempt to provide Ms Jury with an employment agreement at the start of her employment, she did not see the agreement and did not sign it. There was, at least, a lack of care in ensuring Ms Jury received and signed an agreement on appointment and it was properly stored.

New Employee Form

[25] Ms Jury was given a New Employee Form. Mr Kotevski recalls it being presented and signed in front of him, suggesting this was before she started work. However, I accept Ms Jury took that form home to look at and sign. A text to her mother asking for help to get the “form” to the restaurant, supports it being at home. She handed in the completed form a few days after she started.

[26] The New Employee Form has employment status boxes - Full Time (permanent/temporary), Part Time (ditto), Casual and Contractor.

[27] The form supplied by Buci to the Authority had the casual box ticked with Mr Kotevski saying it was ticked at the start. Ms Jury strongly denies that the casual box was ticked when she signed the form. She points out some appearance of a different pen being used to tick the box from that used elsewhere on the form.

[28] Given that the form was taken home by Ms Jury and the care taken by her later, with her mother’s involvement, over employment terms, I consider it more likely than not that the casual box was not ticked at the time she signed the form. This is reinforced by what appears to be a lack of care with documentation by Buci.

Ms Jury’s work in operation

[29] A helpful analysis of Ms Jury’s hours, based on handwritten Amore timesheets, was provided by Buci’s accountant after the investigation meeting. The timesheets had earlier been used by the accountant to make up the pay. There was no written roster for kitchenhands.

[30] Ms Jury initially works at least three evenings a week at Amore, including almost always Saturday and mostly Friday. Then, when she finds working that many shifts exhausting and impactful on her schooling, she asks to work less days. She texts about three days with two being agreeable that week. Without any objection from Ms Jury, from early March she drops to two nights a week, almost without exception Friday and Saturday. When she did not, it was because someone was sick, or she had to be away so worked on different days. She did not work three shifts a week after that. The days would be notified to her, sometimes in a “same days next week” type manner.

[31] Buci accepts that Ms Jury worked with a degree of regularity on Friday and Saturday, which were Amore’s busiest days.

[32] Those work periods were generally in the range of four to five plus hours. For Friday to Sunday work the start time was 5pm. As is common in hospitality, when Ms Jury finished work depended on how busy the restaurant was and how late customers stayed.

Conclusion on employment status

[33] There was no employment agreement identifying Ms Jury’s status received by her on appointment. I am not satisfied that the New Employee Form had the casual box ticked when Ms Jury signed it.

[34] There was no readily understandable explanation provided for the distinction the Kotevskis attempt to draw between the kitchen hands all being casual and the waiting staff all being permanent part time. Both groups were drawn from students, whether school or tertiary.

[35] Regardless, Ms Jury worked regularly at least four shifts a week for the first almost three months of employment, albeit with some variation in days, particularly for weekdays. Then, by agreement, Ms Jury worked fairly consistent Friday and Saturday nights for the following three months. The only time the hours became an issue was when the Kotevskis were away in June 2023.

[36] Buci did not pay Ms Jury ‘pay as you go’ holiday pay as many casuals receive in other organisations. Ms Jury received paid annual leave in January 2023 and later paid sick leave on occasions. Mr Kotevski’s position was that he wanted to pay sick leave and annual leave to the kitchen hands, in the same way he did with other staff.

[37] Was there a consistent and predictable pattern of work with an obligation on the employer to offer and employee to accept work?² Yes there was – Ms Jury worked every week (except when she took paid annual leave), initially of at least four shifts a week and then reduced by agreement to two shifts a week. Submissions for Buci accept that from early March 2023 regular hours on Friday and Saturday were worked, although any additional hours were seen as casual.

[38] I conclude Ms Jury had a permanent role with Buci for at least two days a week and was not casual.

The Kotevskis go away

[39] The disagreement between Ms Jury and Mr Kotevski started over wages. The Kotevskis decide to return to Macedonia, the first holiday they had had in many years. The Amore restaurant would close for patrons, but the takeaway service would still be run by their nephew with limited staff assistance.

[40] On 23 May 2023 the Kotevskis meet with the staff. Mr Kotevski advised them to expect their hours to be reduced because of the Kotevskis' overseas trip from 13 June to 27 July 2023.

[41] The parties agree that mention was made of, during the period, wages being calculated using an average of hours worked over the previous month. They differ over who that averaging was said to apply to.

[42] Mr Kotevski's witness statement referred to all staff getting paid an average wage and to him assuring Ms Jury she would be paid an average figure. But in oral evidence he said he told staff that it applied to the bar and waiting staff (thus not to kitchen hands). He did however accept Ms Jury may have misunderstood. Ms Jury says there was no such distinction made and thus she understood all staff would get wages paid on that averaging basis.

[43] Mrs Kotevski's witness statement referred to all staff being paid an average figure and in oral evidence her not knowing if it was clear to staff that the averaging arrangement was

² *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102.

only to apply to front of house staff. She later attempted to retreat from that and say staff knew.

[44] There was limited work available, but everyone did some work on the takeaway operation.

[45] I conclude that it was not made clear at the meeting that the averaging arrangement only applied to front of house staff, not kitchen staff. Ms Jury expected to get an average amount of pay in the Kotevskis' absence. This is reinforced by Mr Kotevski's comments mentioned below, when Ms Jury raised pay concerns.

[46] Pay records from 12 June to 23 July 2023 show Buci paying Ms Jury "Basic job" of five hours a week. This appears to be her actual work during the takeaways' operation. Three weeks have her also receiving annual leave payments, one with a sick leave payment of five hours in addition and another with an additional payment for work on the Matariki public holiday.

[47] Around 14 June Ms Jury raised a concern about reduced hours. Mr Kotevski messaged that he would sort out payment the following week based on how many hours done in the past couple of weeks. She felt reassured she would be paid an average hours' figure. However, after receiving two pays which seemed to be averaged, on 4 July she received a payment that was about half her usual amount. This payment was for hours actually worked. `

[48] Ms Jury messages Mr Kotevski saying about the pay drop when he said he was going to give her extra like the waitresses were getting. He replied that they would talk.

Disadvantage grievance established

[49] The evidence for Buci about its communications was mixed, with some of the meeting and subsequent communications supporting averaging applying to kitchen hands or Ms Jury in particular. Good faith obligations require communications which are not misleading.³ Mr Kotevski did not make it clear that a different arrangement applied to kitchen hands than other staff.

³ The Act, s 4.

[50] Even if he had, there was no basis a part time staff member could have her hours reduced below the minimum two days without either her agreement or payment in lieu. There was no consultation here, with the decision being announced.

[51] This cannot be seen as a closedown under the Holidays Act as it was not a closure that was customarily taken.⁴

[52] Ms Jury was a part time employee entitled to at least two days' work a week. Buci decided it was not going to offer her that. It breached its obligations to her, and this was to her disadvantage.

[53] It was not entirely apparent at the time the extent to which Ms Jury was financially impacted. Information obtained after the investigation meeting clarified that in some weeks the Kotevskis were away, annual leave was paid to Ms Jury.

[54] Mr Kotevski says that she agreed to cash out her annual leave to cover the hours she was not working. Ms Jury denies this and there is little basis to support her doing so.

[55] Even if Ms Jury had agreed, Buci has difficulties if it is suggesting a payout under s 28A of the Holidays Act. The employee must request the payment and it was not her request, even on his evidence.⁵ The request has to be in writing and there was no such written request here.⁶ The week has to come from the employee's "entitlement" which may suggest the employee has been employed for a year or more.⁷ That interpretation is reinforced by the limitation of paying out one week' holidays in each entitlement year with entitlement years defined as 12 months continuous employment beginning on the anniversary of employment.⁸

[56] I conclude Buci was not able to pay out for annual leave and thus still owes Ms Jury for her holiday hours.⁹

[57] Remedies are dealt with below.

⁴ Holidays Act, s 29.

⁵ Holidays Act, s 28A(1).

⁶ Holidays Act, s 28A(2)(a).

⁷ Holidays Act, s 28A(1).

⁸ Holidays Act, ss 28A(2)(b) and 28A(5)(a).

⁹ Holidays Act, s 28B(2).

Amore reopens

[58] The Kotevskis return to New Zealand on 26 July 2023, proceeding that day to getting staffing and food organised to reopen the restaurant.

[59] In the evening Ms Jury and her stepfather visit Amore to request money seen as owing for the time to Kotevskis were away. Mr Donoghue's impression was that Mr Kotevski is keen to try to resolve any concerns and offers to provide payslips to her. There is likely mention of checking with the accountant.

[60] It appears that as a result of Ms Jury raising the issue about payment, Mr Kotevski discovered or focused on there not being a signed employment agreement for her.

[61] Mr Kotevski says he told Ms Jury and her stepfather that she could be a part time employee or a casual employee - it did not matter to him. In terms of how the arrangement had been working in practice (other than when the Kotevskis were overseas) that view seems understandable.

[62] Mr Kotevski offers Ms Jury an employment agreement. There was some lack of clarity during the investigation meeting about whether this was a casual or permanent part time agreement, but I conclude it was the latter.

[63] Despite being provided in July 2023 the document says Ms Jury will start working on 28 November 2022, doing 5 to 12 hours a week. The two employee signature provisions have the date of 28 November 2022 entered and asterisks to indicate where to sign, entered likely by Mr Kotevski. He is unable to clearly explain to the Authority how or why that had happened, acknowledging it may have been a mistake.

[64] Ms Jury and her stepfather want to take the agreement home to review it. His recall was that Mr Kotevski seemed to expect it to be signed on the spot but ultimately did not object to it being taken home.

[65] This meeting is civil. But events begin spiralling thereafter.

[66] Ms Jury's mother becomes quite intensely involved. She has a human resources background. And messages Mr Kotevski at length about an employment lawyer they know, some points about the agreement provided and attaches an extract from an employment

website. She offers to meet him to explain, as this is what she does for a job and would hate for this to escalate.

[67] Mr Kotevski says he will check with his lawyer and believes some changes are needed as the agreement (he provided) is not updated. He expresses wanting everything to be clear by New Zealand law. Ms Jury's mother responds again offering help as "I don't want you to end up in endless personal grievances because of unlawful contracts". Mr Kotevski reiterates his intention have everything "clear by NZ law". Ms Jury's mother sends a standard employment agreement through to him. Further messages follow. Ms Jury's mother mentions domestic violence leave and Christmas closedown not being covered in the Buci agreement.

[68] Ms Jury told the Authority she did not sign the permanent part time agreement because it looked like it was being backdated and there were out of date clauses (such as an old minimum wage rate and sick leave entitlement as well as a trial period). She says she would have signed if those things were amended.

[69] In late July and on 1 August it seems from pay records that Ms Jury worked at Amore.

3 August confrontation

[70] On Thursday 3 August 2023 Ms Jury messages Mr Kotevski asking if her pay slips are there. He replies yes and, somewhat confusingly, asks her if she can bring in the agreement signed but also says the agreement has to be amended with some clauses completed. English is not Mr Kotevski's first language.

[71] Ms Jury responds that she would not be signing the agreement but would be happy to take a different agreement to let her lawyer look at.

[72] Mr Kotevski replies that that agreement "anyway is not for you, for you need a casual agreement". He told the Authority both that she was casual so she should have a casual agreement and that he thought she might sign a different kind of agreement to the one already offered.

[73] Ms Jury replies that she is not a casual employee, and he cannot give her a permanent part time agreement then a casual one without her agreement. Having worked consistently she expresses her view that she is no longer a casual. Mr Kotevski says she can come in (to collect payslips).

[74] After 8pm that night Ms Jury and her stepfather arrive at the restaurant, as agreed by Mr Kotevski. As it turned out this was probably unfortunate as the restaurant was busy with customers. The Kotevskis were still cooking, and Ms Jury and her stepfather were asked to wait outside.

[75] When they meet Mr Kotevski describes feeling very hot, coming straight from cooking in the kitchen. Mr Kotevski presents a casual agreement to Ms Jury but would not let her take it away. He tells her she cannot work until she has signed the casual agreement.

[76] Mr Kotevski's recall is that Ms Jury said yes with them then agreeing to her working the next day. It is not at all likely that Ms Jury agreed to sign a casual agreement at this point. She may have said she would sign a permanent agreement with changes or updating. No such agreement seemingly was available or offered.

[77] At some point Mr O'Donoghue asks Mr Kotevski if Ms Jury is being terminated. This is discussed more below.

[78] Around this point the parties go outside, possibly ushered out by Mrs Kotevski as customers were still present in the restaurant.

[79] An elevated and tense situation ensues, likely with raised voices. Mr Kotevski told the Authority that Macedonians articulate themselves loudly.

[80] Ms Jury and her stepfather describe Mr Kotevski waving his arms, moving around back and forward, side to side. Mr O'Donoghue refers to this as being like a boxer. The arm waving is confirmed by a property manager, later requested by Stephanie Jury to check security footage of the scene.

[81] Mr Kotevski's behaviour is focused on Mr O'Donoghue rather than Ms Jury. Mr Kotevski likely stands inches from the other man's face. Mr O'Donoghue had work experience of dealing with such challenging situations, but Ms Jury did not. She and her stepfather describe Mr Kotevski spitting at Mr O'Donoghue's face. Mr Kotevski denies this.

[82] They also recall Mr Kotevski threatening that he would make Ms Jury bankrupt, destroy her and make her pay, with reference to another employment dispute. Mr Kotevski largely denies this, accepting mentioning a friend who had been involved in an employment case with one of his staff.

[83] At this point Mr Kotevski again tells Ms Jury to sign the (casual) employment agreement in order to return to work. This does not fit readily with his evidence that he was happy to change the agreement. She refuses to sign, because it was casual.

[84] Mr Kotevski describes feeling upset straight after the meeting. Ms Jury describes feeling terrified about what had happened - scared and distraught at Mr Kotevski's behaviour.

The following days

[85] On 4 August 2023 Ms Jury contacts Mr Kotevski saying she is unwell so will not be in and asks for sick pay. Mr Kotevski does not object.

[86] On 7 August Ms Jury messages Mr Kotevski:

Hi Mario, it's not like you to not respond to me to let me know what shifts I'm doing so I can only assume that you have actually fired me like you said when I came in to pick up my payslips last week. Can you at least let me know when my final pay will be?

[87] Mr Kotevski replies, including attaching her New Employee Form, which has the casual box ticked and says:

You have to sign the contract, without signed you can't work

You see on employee form you signed

You are casual

[88] Ms Jury replies that she has been working for eight months without a contract:

... Do I have a job or not?

[89] Mr Kotevski replies over several messages:

Paige why you have not signed? You work only 2 night and you tell me when you want to work not I

You have pay everything regularly

Come tomorrow sign casual contract then you can work ok

Confirm please

[90] She responds:

I've not been a casual for the last 8 months and I do not agree to become one just because you are telling me to sign a casual contract, when is my last day?

[91] Mr Kotevski proceeds with these messages:

Are you come to sign casual agreement? All other kitchen hand do
You understand you don't have roster, you always change days
That is casual job I didn't offer any other unfortunately
Part time is 20h
Full time is 40hr
You work 5-10 h only per week without roster this is casual
All benefits I have pay to you
*Wages
*Holiday pay
*Sick day (you use sick day very often in very short period) all is evidenced in payroll system
I gave you a verbal warning several times to not stay on the mobile phone when you work you
do not listen and continue to the same, is unfair

[92] A photo is attached of Ms Jury in the kitchen on her phone and what appears to be a message from the Kotevski's nephew who cooks at Amore. Ms Jury has not seen the nephew's message before. Mr Kotevski may have mentioned phone use previously but not in a way that would be sufficient to amount to a verbal warning. Also, during his evidence to the Authority he said she was a good worker, and he did not complain regards anything about her.

[93] A few hours later on 7 August, around 6pm, Mr Kotevski continues:

You do all this and we are still not fired you, not sure what you want, I believe your parents teaching you wrong things.....

Come sign and you can work, remember this is your final warning !

Just do everything proper like I do

[94] Followed by:

Means final warning no
More use phone when you work ...
I pay per hour work per hour That's all

[95] Ms Jury does not reply.

[96] I note Mr Kotevski told the Authority that at some point he was waiting for Ms Jury (or potentially her mother) to come back with a different agreement. That also does not fit particularly easily with other evidence.

[97] In an 8 August 2023 letter from Ms Jury's advocate, a personal grievance is raised on her behalf, on the basis that Buci has dismissed her by sending her away. This is referred to in more detail below. A request that time and wages records be sent is also included.

[98] It became apparent at the investigation meeting that Ms Jury's employment had not been recorded as terminated in the payroll system run through Buci's accountant. This was done, meaning her final pay was calculated and Buci paid her \$283.02 gross, incorporating annual leave, holiday pay and public holiday pay.

Was Ms Jury was dismissed?

Actual dismissal?

[99] It was difficult to get a clear picture from witnesses about when they thought Ms Jury's employment finished although the extensive texts cover the communications after the 3 August interaction.

[100] The personal grievance letter states that on 3 August Mr Kotevski "verbally dismissed Paige if she does not sign" the agreement. Further, it describes his message of 7 August that "you have to sign the contract, without signed you can't work" as an "unequivocal sending away by the employer, which is a clear dismissal".

[101] There was some suggestion in the evidence of Mr Kotevski saying Ms Jury was dismissed. Mr O'Donoghue asked during the 3 August interaction whether Ms Jury was being fired. At the investigation meeting during the Authority's questions, Ms Jury said Mr Kotevski had said something along the lines of her being fired, at the 3 August meeting. However, it became apparent on further questioning that she did not hear him say that, rather thought that was the case from her stepfather's question. Mr O'Donoghue later confirmed in his evidence that he had asked that question in response to Mr Kotevski saying if Ms Jury did not sign the agreement she could not work. Mr Kotevski did not provide an answer to Mr O'Donoghue.

[102] When asked whether applying for sick leave the next day suggested she did not think she was fired on 3 August, Ms Jury replied that she thought they were going to try to work it out. Despite the tense 3 August interaction, on the face of it Ms Jury still considered she was employed, as she messaged attempting to confirm her hours the next weekend.

[103] Ms Jury saw matters spiralling from when she was not paid for that sick leave. On the information available, the grievance letter was sent on the day she should have been paid but the letter does not refer to that non-payment.

[104] Mr Kotevski gave Ms Jury the choice of signing an agreement or not working. This was a conditional sending away in the sense that work was not to be offered until she signed the agreement. Ms Jury had a choice, albeit an unpalatable one. There was a stalemate but there was no unequivocal sending away by Buci.

[105] There was no actual dismissal.

Constructive dismissal?

[106] 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 set out 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.¹⁰

[107] In this category it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.¹¹ What is required is dismissive or repudiatory conduct - a breach of the employer's duty to the employee. If that is established, I then examine whether:

- (a) the conduct caused the resignation; and
- (b) 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?¹²

[108] Was there a breach of duty by Buci? The company understandably wanted Ms Jury to have a written employment agreement. However, it firstly offered her the permanent part time one which indicated that she was being asked to sign in a backdated manner which she

¹⁰ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375.

¹¹ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

¹² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

considered improper. It also contained provisions which were out of date, including an earlier minimum wage, five days of sick leave and a trial period.

[109] Mr Kotevski then indicated the part time agreement was not the one Ms Jury should be on anyway. He showed her a casual agreement, seeking to have her sign it then and declining to let her take it away. She understandably refused to sign it. These two agreements have somewhat different content and formatting in several regards.

[110] By 7 August with repeated statements that she could not work unless she signed, and a “final warning”, Ms Jury was feeling shocked and threatened. She decided not to keep working for Buci. Through the letter from her representative, she indicated she would not be returning to work, even if not done in the express form of a resignation. There was a clear indication she was departing from employment.

[111] Buci breached its obligations to Ms Jury by refusing to offer her work unless she signed a casual agreement which it did not provide her a copy of and then purporting to give her a final warning to sign. This was repudiatory conduct. The grievance letter amounted to an acceptance of repudiation by Buci. It was foreseeable to a reasonable observer that this serious conduct would cause Ms Jury to depart.

[112] Ms Jury was constructively dismissed by Buci. The impetus for her departure was that of Buci – it chose to give her a choice of signing the casual agreement or not working and she reacted by leaving.

Dismissal was unjustified

[113] Under s 103A of the Act the test is whether objectively Buci had done what a fair and reasonable employer could have done when dismissing Ms Jury.

[114] In addition, the requirement on the employer under s 4 of the Act to act in good faith should be considered. This includes being active and constructive in maintaining a productive employment relationship by being responsive and communicative.¹³

¹³ The Act, s 4(1A)(b).

[115] On it becoming apparent to Buci that it did not have a written signed agreement with Ms Jury, understandably the company wished to have one in place. It had legal obligations. The approach it took to rectifying the situation, however, was not reasonable.

[116] Despite Buci getting advice from its accountant on pay matters and seemingly receiving a standard industry employment agreement or two from a friend, it is unfortunate it did not seek advice when there was a disagreement with Ms Jury about the first proposed (permanent part time) agreement, as it said it would.

[117] Mr Kotevski said on 26 July that he would check the difficulties Mr Jury's mother identified with his lawyer. There was some belated evidence of attempting unsuccessfully to ring a lawyer but without answer. Ms Jury was not informed about this at the time.

[118] Mr Kotevski allowed Ms Jury to work on days in late July and on 1 August without a signed agreement but for some reason then felt he could not allow her to continue to work without one.

[119] He did not ask on 3 August whether she would sign an updated permanent part time agreement. She indicated that day that she would consider a different agreement. Instead, Mr Kotevski lost patience, insisting she sign the (casual) agreement which she had not been given a copy of or not work, then issued a "final warning".

[120] I understand the suggestion for Buci that the outdated clauses would not have made any difference to Ms Jury's (statutory) entitlements, but Mr Kotevski had said he would take legal advice and update the agreement, but the next agreement provided was fundamentally different being a casual agreement.

[121] Buci did not act as a fair and reasonable employer could have done.

Remedies awarded

[122] For Ms Jury the following lost wages are sought:

- (a) \$742.00 gross as wages which she should have been paid when disadvantaged during the Kotevskis' absence; and
- (b) \$636.00 gross after her dismissal.

[123] Also, Ms Jury seeks \$25,000 compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act to cover both grievances.

Lost wages during restaurant closedown

[124] Ms Jury seeks \$742.00. The basis for calculation is not explicit. The sum equates to 35 hours of work at the \$21.20 rate, although by this time Ms Jury was on \$22.70 gross an hour, after the minimum wage increased in April 2023. Both parties appear comfortable proceeding on a 5 hour day, two days a week basis.

[125] There may have been some uncertainty about whether to seek wages or annual leave. Given I have found Buci was not entitled to cash up Ms Jury's annual leave and thus still owes her holiday pay, the money it paid in June/July 2023 remains with her. Effectively in some weeks she was paid on the basis of two days a week. There are only two weeks when she did not receive payment for 10 hours – the 2 and 9 July 2023 pays.

[126] In the 2 July pay she received 5 hours and is thus entitled to another 5 hours. In the 9 July pay she received 2.5 hours, so is entitled to a further 7.5 hours, making a total of 12.5 hours lost wages during this period.

[127] At the applicable \$22.70 rate, 12.5 hours equals \$283.75 gross.

Lost wages after dismissal

[128] The sum of \$636.00 gross is sought based on 10 hours a week at \$21.20 an hour, for the three weeks. Ms Jury mitigated her loss, successfully obtaining other work within three weeks of her dismissal.

[129] As Ms Jury was on \$22.70 at the time of her dismissal that rate should be used to assess lost wages post-dismissal. Lost wages are thus calculated on 30 hours work at \$22.70, totalling \$681.00 gross.

Compensation

[130] Compensation is sought on both grievances together.

[131] It was an unfortunate end to Ms Jury's first job. The breakdown of her employment relationship and pursuit of a claim against Buci has made Ms Jury feel like an outlier. In her

oral evidence Ms Jury spoke of some family and friends who either worked at Amore or were connected with those who did, choosing to support others rather than her. Strains on relations left Ms Jury feeling very hurt.

[132] I recognise Buci's point that there was a lack of detailed evidence about why these things occurred. In any event, there was no evidence that Mr Kotevski or his wife were involved in invoking these reactions or saying anything to other staff about Ms Jury's departure.

[133] Ms Jury's self-confidence has been seriously impacted as has her trust in employers, particularly in the hospitality sector. Fortunately, she was quickly able to find other work.

[134] Ms Jury has had periods of feeling miserable and withdrawn. She felt betrayed and mistreated by Mr Kotevski. Ms Jury sought medical assistance related to the impact of her dismissal and received treatment over an extended period.

[135] I note also Ms Jury had an unrelated medical issue which she discovered in the months immediately following her finish at Amore. There is some weight behind submissions for Buci that Ms Jury was not very forthcoming about that situation and possible impact on her wellbeing, rather being quite dismissive of it. It is hard to see how her own situation and one a close family member was going through around the same time had no impact on her, with all her difficulties caused by the situation with Buci. Compensation for her grievance does not cover those other events.

[136] Carefully balancing all of the above, I conclude the appropriate amount of compensation is \$17,000.

Contribution

[137] Were Ms Jury's actions blameworthy in a way that contributed to the situation giving rise to her grievances? She stood up for herself to an extent that might be seen as unusual for a 16-year-old. But she should not be criticised for that.

[138] Buci is critical of the behaviour of Ms Jury's mother both during and after the employment and suggests a deduction for contribution should be made on that basis, as it has been impacted. She played a part in the events, becoming caught up and active to an unexpected extent. But there are difficulties with Buci's submissions. Section 124(a) of the

Act requires examination of “whether the actions of the employee contributed towards the situation giving rise to the dismissal” (emphasis added).

[139] I conclude no deduction for contribution should be made.

Wages and time records

[140] A penalty is sought for Buci’s failure to keep or provide wages and time records for Ms Jury under s 130 of the Act.

[141] A request for wages and time records was made in the grievance letter of 8 August 2023. A response to the grievance letter was provided by Buci’s former representative on 15 August 2023. It is not explicit that this attached records. But by the time the statement of problem was lodged on 9 November 2023, Ms Jury or her representatives had received payroll information which was filed. This included information regarding each pay period – units (hours), pay rate, gross and net pay. Some annual leave information was also provided. It thus appears some of the elements required in wages and time records under s 130 of the Act were kept and provided as required.

[142] The wage records from the payroll system do not cover all the necessary elements. However:

- (a) some of the information required under s 130 is in the New Employee Form - Ms Jury’s date of birth (which would satisfy the age requirement in s 130(1)(b)) and her postal address (s 130(1)(c)); and
- (b) the timesheets provided during the Authority’s investigation process cover the kind of work she was usually employed on – s 130(1)(d).

[143] Standing back and considering all the information the Authority has I am not satisfied that this is a situation where a penalty should be awarded. In future Buci would be wise to focus on the s 130 requirements and those relating to holiday and leave records under s 81 of the Holidays Act, ensuring that information is adequately kept and provided on request.

Wages unpaid

[144] Questions about whether Ms Jury had been properly paid for all her entitlements came up at the investigation meeting. After the meeting the following confirmation was received on Buci’s behalf:

- (a) Final pay was calculated in the payroll system resulting in a payment covering annual leave balance, holiday pay and public holiday pay of \$283.02 gross (\$248.77 net), this included time for working Good Friday and Matariki; and
- (b) If the Authority determines Ms Jury did not consent to “cashing up” of her holiday pay while the restaurant was closed for customers dining in, Buci needs to reimburse her \$113.50, \$113.50 and \$136.20, totalling \$363.20 gross.

[145] As discussed above, Buci was not entitled to cash up holiday pay and still owes Ms Jury \$363.20 gross as holiday pay.

Orders

[146] Buci is ordered to pay Ms Jury within 28 days of the date of this determination:

- (a) \$283.75 gross and \$681.00 gross for lost wages on the grievances, totalling \$964.75 gross;
- (b) \$17,000 without deduction as compensation under s 103(1)(c)(i) of the Act; and
- (c) \$363.20 gross holiday pay.

Costs

[147] Costs are reserved.

[148] The parties are encouraged to resolve any issue of costs between themselves.

[149] If Ms Jury seeks costs she should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Buci would then have 14 days to lodge any reply memorandum. If the parties seek further time to try to resolve costs, they should seek an extension from the Authority.

[150] The Authority’s usual notional daily tariff and any factors requiring an upward or downward adjustment would also be considered.¹⁴

Nicola Craig
Member of the Employment Relations Authority

¹⁴ See www.era.govt.nz/determinations/awarding-costs-remedies.