

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 361  
3136501

BETWEEN            STACEY KEREAMA  
                                 Applicant

AND                    HARBAR LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Applicant in person  
                                 Rick Velenski for the Respondent

Investigation Meeting:    10 June 2022

Submissions Received:    10 June 2022 from the Applicant  
                                 10 June 2022 from the Respondent

Date of Determination:    3 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Stacey Kereama worked for Harbar Limited as a Front of House Manager at the Harbar - described as a Beachbar and Kitchen – in Akaroa.

[2]     Ms Kereama had only worked for a short period of time when the parties discussed Ms Kereama becoming the Assistant Manager on a permanent full-time basis.

[3] Harbar then provided a draft employment agreement for the new role to Ms Kereama. Ms Kereama reviewed the employment agreement and raised various points with Harbar.

[4] Harbar sought legal advice on these points as some of them were technical and related to employment law requirements.

[5] Unfortunately, in the period between Harbar seeking advice on the points raised by Ms Kereama and Harbar's adviser responding, communication between Ms Kereama and Harbar broke down. The end result was the employment agreement was never finalised and/or signed by Ms Kereama and she never returned to work at Harbar.

[6] Ms Kereama says she was unjustifiably dismissed by Harbar and Harbar denies this.

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

[7] Ms Kereama lodged a statement of problem in Authority claiming unjustifiable dismissal. I investigated this claim by receiving written evidence and documents, holding an investigation meeting on 10 June 2022 and assessing the submissions of the parties.

[8] I received witness statements from Ms Kereama and Rick Velenski, a director and shareholder of Harbar. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **What happened?**

[10] On 28 December 2021 Ms Kereama responded to a Facebook advertisement by Harbar seeking employees. Ms Kereama was interviewed the next day and then started work shortly after the interview.

[11] Ms Kereama says she was offered and accepted a full-time role as Front of House Manager working 5 to 6 days per week. She says there was no discussion in the interview about the role being casual but accepts she was not offered fixed hours nor was she guaranteed a minimum number of hours per week; she simply understood that there was enough work for her to work on a full-time basis, albeit on varying shifts.

[12] Ms Kereama worked from 29 December 2021 through the new year period. This was a busy time at Harbar and it appears the bar was short staffed. Ms Kereama had to “hit the ground running” and there were plenty of hours for her to work. The way in which Ms Kereama was assigned work was that she would confirm the start time for each upcoming day of work the day before with the General Manager and then would finish each day depending on need.

[13] On 31 December 2021 the General Manager of Harbar gave Ms Kereama an employment agreement for her to sign. In the agreement Ms Kereama’s employment was described as casual with no agreed or guaranteed hours of work. The agreement also had other hallmarks of a casual employment relationship, for example, holiday pay was rolled up into the hourly rate (at 8%) and paid weekly rather than accruing.

[14] Ms Kereama was surprised to receive a casual employment agreement; she believed she had been offered permanent full-time employment. She wanted the security of permanent full-time work as she lived in Christchurch and was planning on moving to Akaroa.

[15] Ms Kereama asked the General Manager about the employment agreement, questioning why it was not a permanent employment agreement as this was what she believed was offered to her. She was told that all Harbar employees were on casual agreements as the bar operated largely in response to customer demand and there was no guarantee of opening hours or operation. The General Manager did however offer to talk to Mr Velenski about a permanent employment agreement for Ms Kereama.

[16] The next day on 1 January 2021 Ms Kereama and the General Manager spoke about the possibility of Ms Kereama becoming an Assistant Manager. This role included her getting a bar manager's licence so she could be the Duty Manager for opening hours and then Harbar would remain open year-round and have more regular opening hours; this would mean Ms Kereama would then be employed on a permanent full-time basis with a guarantee of 35 hours work per week.

[17] Ms Kereama described her conversation with the General Manager as amounting to her being offered the Assistant Manager role. Ms Kereama said she was delighted by the opportunity but told the General Manager it was dependant on her finding a house in Akaroa.

[18] Whilst I did not hear evidence from the General Manager, Mr Velenski said the General Manager could not offer a permanent role to Ms Kereama at that time. Mr Velenski was open to the proposal of Ms Kereama being employed as an Assistant Manager of a permanent full-time basis. However, Harbar needed to sort out the current Duty Manager's intentions - discussions were being conducted with him about his plans - and then consider the implications of employing Ms Kereama on a permanent full-time basis, including the terms of employment, as Ms Kereama would be Harbar's first permanent full-time employee.

[19] In any event, the conversation on 1 January 2021 was left with Ms Kereama proceeding to look for a house in Akaroa and the General Manager speaking to Mr Velenski about the Assistant Manager role.

[20] On 3 January 2021 the General Manager advised Ms Kereama that Mr Velenski was open to the idea of her being employed in the Assistant Manager role. Then on 6 January 2021 he advised, by text, that it was short notice from Mr Velenski to go ahead with the permanent full-time role so he would need a bit more time to finalise things.

[21] Unfortunately, the General Manager was not able to progress matters regarding the Assistant Manager Role promptly and on 16 January 2021 he advised Ms Kereama, by text, that he was still waiting on Mr Valenski's approval of the full-time employment agreement.

[22] On 22 January 2021 a draft employment agreement for the Assistant Manager role was provided to Ms Kereama.

[23] On 25 January 2021 Ms Kereama reviewed the draft employment agreement for the Assistant Manager role. On 26 January 2021 Ms Kereama sent an email to Harbar with a number of comments and questions about the role and the employment agreement – this included five key issues:

- (a) Removing a few inadvertent references to casual employee as the role was permanent full-time.
- (b) Removing the trial period provision as that was no longer applicable.
- (c) Recording the days of work to exclude Sundays as this was Ms Kereama's preferred day off.
- (d) Requesting a higher starting wage rate.
- (e) Modifying the wording on various clauses relating to conditions of employment in order to clarify matters such as notice period, holiday entitlement, and consent to deductions.

[24] On 26 January 2021 Mr Velenski sent Ms Kereama's email to his employment advisor and asked for his views on her comments and questions.

[25] Ms Kereama and Mr Velenski then met on 27 January 2021. Ms Kereama had requested the meeting as she was anxious about resolving the points she had raised before she moved to Akaroa – she had recently secured accommodation and was committed to moving within the next few days.

[26] Whilst Ms Kereama and Mr Velenski had differing views on the meeting, it is clear that the role was discussed and Ms Kereama asked about her email and when the matters would be answered. Mr Velenski made it clear the role was permanent full-time (minimum of

35 hours per week) but he could not confirm what changes would be made to the employment agreement until he heard back from his employment advisor.

[27] The following morning Ms Kereama sent a text to Mr Velenski asking if the offer of permanent work had now changed. Mr Velenski responded later that day saying amongst other things, saying the contract is as is.

[28] Whilst Mr Velenski's text is not entirely clear, both Ms Kereama and Mr Velenski agreed that Assistant Manager role was a permanent full-time role and apart from some anomalies in the drafting the employment agreement provided for this and all discussion were based on this being the case, including the discussion on 27 January 2021. The outstanding matters related to days of work, the trial period provision and the requested increase to the starting wage. So, Mr Velenski's text message was confirmation that the offer was for permanent full-time work.

[29] Despite receiving this text, Ms Kereama remained anxious about the role being permanent full-time, so she sent a further text to Mr Velenski at 6:06 pm on 27 January 2021. In that text she stated:

I was always promised a guarantee of 35 hours pw and this was written on the contract offered to me already, so I assumed this morning you were willing to honor (sic) that promise still? Seems you have changed your mind now we are through the busy time and I am just above to move here! Need this sort

[30] Mr Velenski had not responded to that text by 6:43 pm and Ms Kereama sent a further text stating:

No worries [Mr Velenski], im (sic) off now. You'll be hearing from my lawyer and im (sic) sorry things didn't work out as planned. ....

[31] When Mr Velenski saw the text messages about an hour later, he called Ms Kereama, but she did not answer the call, rather she sent a text to Mr Velenski stating "please delete my number".

[32] Mr Velenski said in evidence that he had no idea what had caused Ms Kereama to act the way she did. He had not altered the terms of employment that had been offered including the agreement to permanent full-time work with a minimum of 35 hours per week. All that needed to occur was the points Ms Kereama had raised had to be resolved and before he could do that he wanted to receive advice – which he had not received on 27 January 2021.

[33] In response to my questions in the investigation meeting, Ms Kereama accepted that Mr Velenski had not withdrawn the offer of permanent full-time work and he had told her he was waiting on advice regarding the points she had raised. She went on to say it was the indirect answer to her text on 27 January 2021 that created uncertainty for her at a time when she needed things to be finalised as she was moving to Akaroa.

[34] Ms Kereama did not work any more shifts for Harbar following the 27 January 2021 text messages and then raised a personal grievance for unjustifiable dismissal.

#### **Assessing Ms Kereama's claim**

[35] Ms Kereama's claim for unjustifiable dismissal is based on two arguments:

- (a) She had accepted the offer of the Assistant Manager role and Harbar then withdrew the offer, which meant it dismissed her.
- (b) Alternatively, if she had not been dismissed, then Ms Kereama resigned in response to Harbar withdrawing the offer of permanent full-time work, i.e., she was constructively dismissed.

[36] Harbar says the events between it and Ms Kereama cannot amount to an unjustified dismissal:

- (a) Ms Kereama never accepted the offer for the Assistant Manager role as she had raised several points, including a request to be paid more and these had not been resolved. So, the offer was never withdrawn by it, rather its offer had

been rejected by Ms Kereama's response and the counteroffer by her was still being considered by Harbar when she walked away.

- (b) Ms Kereama was employed in the Front of House Manger role on a casual basis so regardless of what caused Ms Kereama to walk away from that role, this cannot be an unjustified dismissal as she was not an employee between work shifts.

[37] So, in order to determine Ms Kereama's claim firstly I need to decide if Ms Kereama had accepted the Assistant Manager role.

[38] If Ms Kereama accepted the Assistant Manager role, I then need to decide if Harbar withdrew the offer after acceptance, effectively dismissing her.

[39] If Ms Kereama did not accept the Assistant Manager role, then I must decide, what Ms Kereama's employment status was as Front of House Manager, which would have been the role she was in on 27 January 2021. There are then two possible questions:

- (a) If Ms Kereama was a permanent employee, was she dismissed by the events that occurred or did she resign in circumstances that amount to a constructive dismissal?
- (b) If Ms Kereama was a casual employee, can she have a valid claim for unjustified dismissal?

*Did Ms Kereama accept the Assistant Manager role?*

[40] There are two possible bases for Ms Kereama accepting the Assistant Manager role. First, offer and acceptance occurred with the General Manager in the initial discussions about the Assistant Manager role. Or, second, offer and acceptance occurred when Harbar provided Ms Kereama with the employment agreement for the Assistant Manager role.

[41] I am satisfied that the General Manager did not make an offer to Ms Kereama for the Assistant Manager role, nor was he authorised to do so. The discussions at the time and the subsequent exchanges between him and Ms Kereama show that the Assistant Manger role was a proposal being considered by Harbar and no clear offer had been made.

[42] An offer for the Assistant Manger role was made by Harbar when it provided Ms Kereama with the employment agreement on 22 January 2021. This offer was not accepted by Ms Kereama as she raised issues with it and requested different terms and conditions of employment, including an increased wage rate.

[43] There was no offer and acceptance of the Assistant Manger role and Ms Kereama was not employed in this role. It follows that Ms Kereama was not dismissed from this role either directly or constructively.

*What was Ms Kereama's employment status as the Front of House Manager?*

[44] So, the question then becomes, was Ms Kereama a casual employee or a permanent employee in the Front of House Manager role?

[45] In order to answer this question I must assess the real nature of the relationship.<sup>1</sup> The courts have identified a number of characteristics that assist this assessment but the key factor is whether there was an obligation on the employer to provide work to the employee and an obligation on the employee to accept it.<sup>2</sup>

[46] My view on this, which I have expressed before, is that the characteristics of the relationship referred to are merely elements that inform the key factor of whether there was an obligation to provide work and an obligation to accept work. For example, if the employer requires notice before an employee takes leave, that is a factor that indicates the employee has

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<sup>1</sup> *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

<sup>2</sup> *Baker v St John Central Regional Trust Board*, above n 1 at [23]; and *Jinkinson v Oceana Gold (NZ) Ltd*, above n 1 at [41].

an obligation to accept work or if the employee works a regular shift pattern, then that is a factor that indicates the employer has an obligation to offer work, because there is an expectation created by the regularity of the work.

[47] What I must do is assess how the relationship operated, identifying characteristics that inform whether there was an obligation on the employer to offer work and an obligation on the employee to accept work.

[48] Harbar's evidence is that all employees at the time were employed on casual employment agreements. This reflected the uncertain nature of the industry, particularly in Akaroa, a tourist town, where Harbar would often close during quieter periods. Harbar did not employ people on permanent employment arrangements because it did not know if it would remain open all of the time.

[49] Ms Kereama's employment agreement reflected this stance. It identified her employment as being casual with no set or guaranteed hours rather work to be offered and accepted by rostered shifts. Other aspects of a casual employment relationship were evident – for example, the agreement provided for holiday pay to be paid weekly at 8% rather than accruing.

[50] Ms Kereama's employment then operated in line with the terms of the employment agreement:

- (a) Ms Kereama had no set hours of work nor did she do a minimum number of hours.
- (b) There was no set pattern to the days and hours worked by Ms Kereama, rather the shifts she was offered reflected the business need. As a result, Ms Kereama worked a lot initially, as it was the holiday period, but she had no regular start and finish time and her hours varied each week – the Wages and Time records show different hours worked each week.

(c) Ms Kereama's holiday pay was paid weekly at the rate of 8% on her hourly wage rate.

(d) Harbar said Ms Kereama could refuse shifts or simply not work if that is what she wanted.

[51] Reflecting on these various factors, I conclude there was no obligation on Harbar to offer work to Ms Kereama and there was no requirement imposed on Ms Kereama to accept work that Harbar did offer to her. Therefore, I conclude that the employment relationship was a casual one.

*As a casual employee can Ms Kereama have a claim for unjustifiable dismissal?*

[52] As Ms Kereama's employment with Harbar was casual the circumstances of her employment coming to an end cannot give rise to an unjustified dismissal claim. The basis of a casual employment relationship is that the employee is only employed for the shifts offered and accepted. In between, where there is no ongoing work obligation, the employee is not employed. It follows then that Ms Kereama was not dismissed from this role either directly or constructively.

[53] This means on 27 January 2021 when Ms Kereama sent the three text messages to Mr Velenski she was not an employee, and the effect of her statements was to advise:

(a) That she was no longer accepting further casual work shifts with Harbar.

(b) She was no longer interested in the offer of permanent employment.

[54] Neither of these can give rise to an unjustified dismissal grievance.

## **Summary**

[55] Ms Kereama was not dismissed by Harbar and her claim for unjustified dismissal does not succeed.

## **Costs**

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Harbar may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms Kereama would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>3</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>3</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).

