

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 142  
3103832

BETWEEN                      HWAN HEE KIM  
Applicant

AND                              JSY TRADING LIMITED  
Respondent

Member of Authority:        Trish MacKinnon

Representatives:              Seungmin Kang, counsel for the Applicant  
Cristina Nitu, counsel for the Respondent

Investigation Meeting:        23 June 2021 at Auckland and 7 October 2021 by Zoom

Submissions [and further    21 October 2021 from the Applicant  
Information] Received:        4 November 2021 from the Respondent

Date of Determination:        13 April 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Hwan Hee Kim claims to have been unjustifiably dismissed by JSY Trading Limited on 28 September 2019. Mr Kim seeks compensation for humiliation and injury to feelings that he suffered. He also seeks the imposition of penalties on the respondent for various breaches of its statutory obligations.

[2] Mr Kim initially also claimed to have been unjustifiably disadvantaged in his employment by actions of his employer. That claim was withdrawn after it became evident during the Authority's investigation that Mr Kim had not raised that personal grievance within the statutory 90 day period specified in s 114 of the Employment Relations Act 2000 (the Act).

[3] JSY Trading Limited (JSY) denies that it unjustifiably dismissed Mr Kim. It says Mr Kim was undergoing a trial period for a position in its business, Delight Sushi (the Sushi

shop), and his work during the trial period and, particularly his conduct on the last day of it, was such that JSY's sole director and shareholder, Sun Yun Jeon, also known as Sarah Park, decided not to continue his employment.

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

[4] In accordance with s 174E of the Act I have set out the material facts and made findings on issues relevant to the determination of Mr Kim's claims. I have not, however, set out a record of all the evidence received and nor have I recorded all submissions made by the parties, although I have read and considered all such information.

[5] I undertook the investigation of Mr Kim's claims, initially at an in-person hearing on 23 June 2021 in Auckland. Following the imposition of Alert Level 3 COVID-19 restrictions in Auckland, the investigation meeting was reconvened by Zoom on 7 October 2021. In both investigation meetings the Authority was ably assisted by a Korean interpreter, Ms Jennifer Shin.

[6] The Chief of the Authority has decided, in accordance with s 174C(4) of the Act, that exceptional circumstances exist for providing this determination outside the statutory time frame specified in s 174C (3).

### **Issues**

[7] The issues for the Authority to determine are:

- (a) whether Mr Kim's employment was subject to a trial period; and, if not
- (b) whether he was unjustifiably dismissed;
- (c) whether remedies are appropriate;
- (d) whether JSY breached good faith in its treatment of Mr Kim; and, if so
- (e) whether a penalty should be imposed on JSY;
- (f) whether a penalty should be imposed on JSY for:
  - (i) failure to provide a written employment agreement;
  - (ii) failure to keep wage and time records for Mr Kim;
  - (iii) failure to keep holiday and leave records for Mr Kim.

### **Trial periods**

[8] Sections 67A and 67B are the relevant provisions of the Act. Section 67A provides that a qualifying employer may enter into an employment agreement containing a trial period

provision with an employee whom it has not previously employed.<sup>1</sup> A trial provision is defined in s 67A(2) as:

a written provision in an employment agreement that states, or is to the effect, that—

- (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- (b) during that period, the small-to-medium-sized employer may dismiss the employee; and
- (c) if the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[9] The effect of s 67B is that, where the employer terminates an employment agreement containing a trial provision under s 67A, by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period, the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

#### **Was a valid trial provision in place?**

[10] Mr Kim said he was interviewed by Ms Jeon for a position at the Sushi shop on 4 September 2019. During the interview, Ms Jeon offered him full-time work at the Sushi shop, at the minimum wage, with two initial training days. Those days were on consecutive Saturdays, 7 and 14 September 2019.

[11] There had been no discussion about a trial period at the interview, by Mr Kim's account, and he handed in his notice to his (then) current employer following Ms Jeon's offer of employment to him. Mr Kim said he would not have done that if his employment with the Sushi shop had been subject to a trial provision.

[12] Mr Kim said he was given training on two Saturdays, 7 and 14 September 2019, in line with his discussion with Ms Jeon during his interview. He said he worked for two hours and three hours respectively on those days. Mr Kim noted that he was paid \$60 in cash for the two Saturdays, which approximated to the minimum wage for the hours he had worked.

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<sup>1</sup> A qualifying employer under s 67A is a small to medium sized employer, defined as one who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into.

[13] JSY asserted that Mr Kim worked at the Sushi shop to gain chef experience from 16 September 2019, when his trial period began. Before that, he had visited the Sushi Shop on 2 occasions and had observed for two hours on each of those days. The purpose was so that Mr Kim would know what he would be required to do before he formally started a trial period.

[14] Ms Jeon said Mr Kim was not working on the two “observer” days, and did not receive wages. She said the \$60 she paid him was a contribution to his travel expenses. Ms Jeon’s evidence was that, due to her disappointment with Mr Kim’s behaviour on the final day of his trial period, on 27 September 2019, she decided not to employ him. She texted him the following day, 28 September 2019, to inform him of her decision.

#### *Discussion*

[15] If Mr Kim’s employment was subject to a trial period provision under s 67A of the Act, he would be barred under s 67B from bringing a personal grievance in respect of his dismissal. An examination of Mr Kim’s situation in relation to those statutory provisions, however, makes it clear the conditions for a trial period were not met.

[16] For there to have been a valid trial period, Mr Kim would necessarily have had an employment agreement with a written trial provision that contained the information specified in s 67A(2) (a) to (c) inclusive. In its absence there was no valid trial period in place.

[17] Ms Jeon acknowledged that JSY did not offer Mr Kim an employment agreement. She said she had intended to offer Mr Kim an employment agreement after he had completed the trial period.

[18] Ms Jeon also said the final day of the trial period was 27 September 2019, which was Mr Kim’s last day at the Sushi shop. By her evidence, Ms Jeon informed Mr Kim of her decision not to employ him the day after the purported trial had ended. The Act requires that notice of termination is given during a trial period.

[19] Even if there had been a trial provision in place, which I have found there was not, it would not have prevented Mr Kim from bringing a personal grievance for unjustifiable dismissal as he did not receive notice of the termination of his employment during the trial period.

**Was Mr Kim unjustifiably dismissed?**

[20] JSY's defence that Mr Kim was on a trial while training for a position with the Sushi shop has failed. Therefore, it must justify terminating his employment by showing that its actions were those open to a fair and reasonable employer in all the circumstances at the time in accordance with the test of justification at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[21] In applying the test, a number of specified factors must be considered which may broadly be described as coming under the umbrella of natural justice. Other factors the Authority considers appropriate may also be taken into account. However, s. 103A(3)(5) provides that a dismissal or action is not to be found unjustifiable solely because of defects in the employer's process if those defects were minor and did not result in the employee being treated unfairly.

[22] In its statement in reply JSY stated that, despite Mr Kim not demonstrating enough effort and hard work during his trial, it would have allowed him more time to improve his performance. It was Mr Kim's "misbehaviour" on 27 September 2019 that led to the decision not to employ him.

[23] Ms Jeon said, in written evidence, that Mr Kim was scheduled to work four hours on that day, from 11.30 a.m. to 3.30 p.m. She said Mr Kim claimed to be hungry when he arrived at work that day so she provided lunch for him. He then worked for one and a half hours before saying he needed to move his car as he was parked in a limited time zone. Mr Kim told Ms Jeon it would take him 25 to 30 minutes to move his car, which was parked some distance from the Sushi shop.

[24] According to Ms Jeon, another employee overheard Mr Kim say that he wanted to go home early rather than moving his car then returning to work. Ms Jeon said she was very disappointed with his behaviour and decided not to employ him as a result of the incident. That employee, Sojin Lee, gave evidence in the form of a short written statement to the Authority. She also attended the Authority's 7 October 2021 investigation meeting by Zoom.

[25] In her written statement, Ms Lee said she was at the Sushi shop on the last day of Mr Kim's trial, when his parking time had almost finished and he had to renew the time to stay longer. She said that instead of doing that, "he said that he might as well just leave now".

[26] Under questioning Ms Lee said that Mr Kim and Ms Jeon had a conversation between themselves, which she did not overhear, and she did not know whether Ms Jeon had, or had not, agreed to Mr Kim leaving for the day when he left the Sushi shop at approximately 2.30 p.m.

[27] Mr Kim said Ms Jeon always made lunch for the employees and she did so on that day as usual. He said that, because Ms Jeon had asked him to start work at 11.30 a.m. that day instead of the 7.30 a.m. starts he had in the previous days, he was unable to find parking close to work. He had found a car park some distance away but he had to move his vehicle after three hours or pay \$4.00 per hour to continue parking there, which was unaffordable on the minimum wage he was receiving.

[28] Mr Kim said he had asked Ms Jeon if he could move his car at about 2.30 p.m. and she had told him that he could go if he had finished his work in time. If he had not, Mr Kim said Ms Jeon told him he would have to stay until he had completed it. He said he completed his work early and asked Ms Jeon if there was any further work he needed to do. There was no further work and he left with, he believed, his employer's permission.

[29] Ms Jeon's view is that she was emotionally forced to allow Mr Kim to leave the Sushi shop to move his car but she expected him to return to work. She denied telling Mr Kim he could finish for the day at that time.

[30] Ms Jeon messaged Mr Kim by Mobile Messenger message (text) on Saturday 28 September 2019, advising him of the wages she had paid into his account, and informing him of her decision about the continuation of his working for JSY. An English version of the text, originally sent in Korean, was provided in the parties' Common Bundle and was certified as having been translated by a translator from Gilbrid Limited, a Korean Language Interpreting and Translation Service. The translated text reads:

I would like to wrap up the matters between you and the store like this. Though it's hard for me to look for and train another employee, I can't wait for you Hwan Hee. It's beyond my ability. In former days the business was run by a chef and I without a cashier. Today, there were three employees. But I had to run around. I don't feel right about this. How long do I have to wait? The

generating cost is also too high. To be honest, I'm not sure I should bear it continuously. It's been so hard to say things I hate. Hwan Hee! **I think you'd better find the right job for you again. So I make a decision like this. I am sorry that a good relationship couldn't be continued.** But, I'll cheer for you.  
(bolding added)

[31] When asked what she meant by not being able to wait for Mr Hee, Ms Jeon answered that she had written out the steps he needed to take in relation to his role. Despite that, Mr Kim had not committed those steps to memory within two weeks and she could not wait any longer for him to do so.

### *Discussion*

[32] According to Ms Jeon, she decided not to employ Mr Kim because he did not put enough effort into his work, and he "misbehaved" on what turned out to be his final day at the Sushi shop, on 27 September 2019. These concerns were not put to Mr Kim at the time, nor were they referred to in Ms Jeon's text message. The text referred to matters relating to Mr Kim's performance on the job and to Ms Jeon's unwillingness to wait for him which, as she explained, related to what she perceived as Mr Kim's slowness in memorising some components of his role.

[33] In the course of the Authority's investigation Ms Jeon stated that Mr Kim had left his employment on 27 September 2019 and had not returned. Her evidence was that she concluded Mr Kim had decided he did not want to work for Sushi Delight and had quit his employment. Ms Jeon conceded under questioning there may have been a misunderstanding between Mr Kim and herself over whether he was to return to work after moving his car or whether he was going to finish work for the day at that time.

[34] In submissions made by counsel for JSY, Ms Nitu denied that Mr Kim was unjustifiably dismissed and referred to his misbehaviour having led to his "self-dismissal". She submitted JSY believed Mr Kim had deliberately and wilfully abandoned his employment.

[35] Ms Jeon texted Mr Kim the following day informing him that she wanted to wrap up the matters between him and the Sushi shop. Ms Jeon's text did not refer to her belief that Mr Kim had decided he did not wish to work for JSY. It referred to her decision to discontinue the relationship.

[36] When she was referred to the bolded words in her text message above, Ms Jeon said she had no other choice but to say those things because Mr Kim had left his employment. She also said she had not referred to the events of 27 September and what she described as his misbehaviour because she did not want conflict.

[37] Ms Jeon made no attempt to contact Mr Kim on 27 September 2019 when he did not return after moving his vehicle. If she was concerned about his failure to do so, it would be reasonable to expect her to have done so. When Ms Jeon texted Mr Kim on 28 September 2019, she made no reference to his having abandoned his employment.

[38] I do not accept Ms Jeon's explanation that she had no choice but to say what she did because she thought he had quit his employment. Her claim that he had abandoned his employment is implausible. I find Ms Jeon clearly conveyed to Mr Kim in her text that she had decided not to continue employing him, in other words, she dismissed him.

[39] In the circumstances, before carrying out a dismissal Ms Jeon was required at a minimum to raise her concerns over Mr Kim's behaviour with him and give him a reasonable opportunity to respond to her concerns. She was required genuinely to consider his explanation for the actions that gave rise to her concerns before deciding to dismiss him.

[40] JSY did not accord Mr Kim the treatment required by s 103A of the Act before dismissing him by text message, purportedly on performance grounds. I find that was not the action a fair and reasonable employer could take in all the circumstances at the time. I find Mr Kim's dismissal was unjustifiable.

### **Are remedies appropriate and was there contribution by Mr Kim?**

[41] I have found Mr Kim was unjustifiably dismissed. Subject to any contribution he may have made to the situation that led to his personal grievance<sup>2</sup> he may be entitled to compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. Mr Kim seeks \$10,000 as compensation for his unjustifiable dismissal. He was able to secure alternative employment within a short period and does not seek the reimbursement of lost wages.

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<sup>2</sup> In accordance with s 124 of the Act.

[42] Counsel for Mr Kim acknowledged the period of employment was short, comprising shortly more than two weeks in total. Mr Kang cited *Richora Group Ltd v Cheng* as authority for the proposition that the degree of harm to an employee is not capable of being measured by reference to timeframe alone.<sup>3</sup> In that case Chief Judge Inglis awarded an employee \$20,000 compensation where she had worked for less than three months.

[43] In Mr Kang's submission, the effect of Mr Kim's dismissal by text caused him mental and financial distress. Particular factors he noted included that Mr Kim had never been dismissed before, particularly by text; the dismissal occurred after Mr Kim had resigned from his previous employment in the expectation of having secured employment with Sushi Delight; and his treatment by his employer had made him feel worthless, which led to his being depressed, suicidal, and reliant upon alcohol.

[44] Mr Kim gave evidence to the Authority of these effects on him and of the shock he experienced at his dismissal. He also said, however, that he managed to find alternative employment within two weeks of his dismissal and began work straight away.

[45] Ms Nitu's submissions did not address Mr Kim's evidence regarding the effect of his dismissal on him, other than in the context of it being justification for the employer's failure to contact Mr Kim on 27 September 2019 when it believed he had abandoned his employment. In JSY's submission there is no case for awarding compensation as there was no unjustifiable dismissal.

[46] I disagree. I accept there was harm caused to Mr Kim by his dismissal, and by the way he was dismissed. That was debilitating for Mr Kim and undoubtedly affected his health although his successful attempt to find alternative employment suggests the effect was relatively brief.

[47] Taking all factors into account, including the short duration of the employment, I find an award of compensation of \$8,000 is justified, subject to any contribution that may be found.

[48] On the issue of contribution, where the Authority determines an employee has a personal grievance, it must consider, in the context of remedies for the personal grievance, the extent to which the actions of the employee contributed towards the situation that gave rise to

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<sup>3</sup> *Richora Group Limited v Cheng* [2018] NZEmpC 113 at [59]

that personal grievance. If the employee's actions so require, the remedies that would otherwise have been awarded are to be reduced accordingly.<sup>4</sup>

[49] In Mr Kang's submission, there is no justification for reducing any remedies to Mr Kim on the basis of contribution. He submits Mr Kim did not contribute to the situation that gave rise to his personal grievance. Mr Kang referred to a complaint made by Ms Jeon about the time Mr Kim took to return his uniform and key to the Sushi shop, submitting that, as these events took place after Mr Kim's dismissal, they could not be contributing conduct towards the dismissal.

[50] JSY made no specific submissions on contribution although it is clearly opposed to any remedies being awarded to Mr Kim.

[51] I accept Mr Kang's submission regarding the lack of relevance of events that took place after Mr Kim's dismissal and have only taken into consideration the events of 27 September 2019. As Ms Jeon made clear, that was the day on which Mr Kim's conduct, or misbehaviour as she viewed it, led to her dismissal of him by text message.

[52] I am not persuaded that Mr Kim's actions on that day contributed to the situation that led to his personal grievance for unjustifiable dismissal. If he had left work early that day without his employer's permission, I would have no hesitation in finding that he had contributed to his dismissal.

[53] That is not what occurred in my view. Ms Jeon's concession that there may have been a misunderstanding between herself and Mr Kim over whether he would return to work or not after moving his vehicle persuades me that is the more likely scenario. In circumstances where Mr Kim left the workplace believing it was with his employer's permission not to return that day, I find he did not contribute to the situation that led to his dismissal.

**Did JSY breach its good faith obligation to Mr Kim and is a penalty warranted?**

[54] Mr Kim claims JSY breached its good faith obligations to him by failing to act in good faith when dismissing him.

[55] Parties to an employment relationship are required by s 4 (1A) of the Act to deal with each other in good faith. The duty of good faith requires them to be active and constructive in

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<sup>4</sup> N2 refers.

establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative. Where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, the employer is required to provide access to relevant information and provide the employee the opportunity to comment on it before the decision is made.

[56] Mr Kim has successfully brought a claim for unjustifiable dismissal and the fact scenario for his claim that the employer failed to act in good faith towards him is the same as for his personal grievance. JSY did not follow a fair procedure before dismissing Mr Kim. It did not advise him of its concerns and give him the opportunity to comment on those concerns before making the decision to dismiss him.

[57] Mr Kim is to receive compensation for his unjustifiable dismissal. In the circumstances, I do not consider it necessary or appropriate to consider the imposition of a penalty on JSY for its shortfalls in its dismissal of Mr Kim.

**Is a penalty warranted for JSY's failure to provide a written employment agreement?**

[58] Part 6 of the Act imposes a number of requirements on employers regarding employment agreements for its employees. Some relate to the bargaining for an employment agreement and others to their form and content. In this instance Mr Kim was not offered an employment agreement because, as Ms Jeon explained, she did not think Mr Kim's employment would commence until his two week trial was over.

[59] Ms Jeon was mistaken in this. Mr Kim was an employee during that time and an employment agreement should have been discussed and agreed between the parties before Mr Kim commenced employment. Where a trial provision is sought by the employer, it must be included in the employment agreement and conform with the requirements of s 67A of the Act.

[60] The failure of JSY to comply with the statutory requirements renders it liable to a penalty under s 65(4) of the Act. Not all breaches of the Act will result in the imposition of a penalty and in this instance I decline to impose one.

[61] In reaching that decision I take into account the relative newness of Ms Jeon's business and that JSY has not previously had claims against it in the Authority to the best of my knowledge. Ms Jeon's evidence, which I accept, is that her other employees have had

employment agreements from the outset of their employment and have not been subject to trial period provisions. While ignorance of the law is not an excuse for failing to comply with statutory requirements, I regard JSY's error in this instance as being inadvertent rather than deliberate.

**Are penalties warranted for failing to keep wage and time and holiday and leave records?**

[62] Employers are required under s 130 of the Act to keep a wage and time record for each employee. They are also obliged under s 81 of the Holidays Act 2003 to keep a holiday and leave record for each employee. Failure to do so may result in the imposition of a penalty.

[63] Mr Kim claims JSY failed to keep either of those records and asks the Authority to impose a penalty or penalties accordingly.

[64] Ms Jeon told the Authority she did keep both wage and time records. She said Mr Kim had never asked for either of them and nor had anyone else asked for them on his behalf.

[65] At the conclusion of my investigation meeting on 7 October 2021, Mr Kang asked me to order JSY to produce wage and time and holiday and leave records in respect of Mr Kim. I declined to do so and note that Mr Kim or his representative could have requested those records at any time during, or following the termination of, Mr Kim's employment but had not done so. As no wages, wage arrears or holiday claims formed part of Mr Kim's application to the Authority, the records were not relevant to my investigation.

**Orders**

[66] JSY Trading Ltd is ordered to pay Mr Kim, without deduction, the sum of \$8,000 under s 123(1)(c)(i) of the Act.

**Costs**

[67] Mr Kim has been successful in his personal grievance claim. 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 is needed, Mr Kim 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 JSY Trading Ltd 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.

[68] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

**Trish MacKinnon**  
**Member of the Employment Relations Authority**

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].