

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 622  
3147464

BETWEEN                      LOURDES LAISON  
Applicant

AND                              RAPP HOSPITALITY GROUP  
LIMITED  
First Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Dave Cain, advocate for the Applicant  
Pawan Malik, representing the Respondent

Investigation Meeting:       3 November 2022 in Tauranga

Submissions and/or further   3 November 2022 from the Applicant  
evidence                         7 November 2022 from the Respondent

Determination:                25 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Lourdes Laison, claims that she was constructively dismissed by the Respondent, Rapp Hospitality Group Limited (RHGL) after it failed to provide her with work after 1 February 2022.

[2]     Ms Laison also claims that she is owed wages and annual leave entitlement by RHGL.

[3]     RHGL denies that it constructively dismissed Ms Laison and claims that she was a casual employee to whom ongoing shifts were not offered after 1 February 2022.

**The Authority's investigation**

[4]     I received written statements of evidence from Ms Laison and her mother, Ms Caroline Howie, and heard their oral evidence given under oath or affirmation.

[5] I received written evidence from Mr Pawan Malik and Mrs Reema Malik on behalf of the Respondents, and oral evidence given under oath or affirmation by Mr Malik. All were questioned and cross examined.

[6] I received closing submissions from the representatives.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[8] The issues requiring investigation are whether or not Ms Laison:

- was as a casual or a permanent employee with RHGL?
- was constructively dismissed by RHGL?
- is owed any monies by RHGL?

### **Background**

[9] RHGL operates a number of businesses. Mr Malik is the sole director and he and Mrs Malik are joint shareholders. RHGL purchased a restaurant in Tauranga in or about 14 December 2020. Mr Malik said he was at the restaurant in Tauranga dealing with the administration required in regard to its opening, whilst Mrs Malik was in Auckland.

[10] During December 2020 Mr Malik said a number of casual employees were engaged for the restaurant by the Manager. Ms Laison responded to an advertisement RHGL had placed on Facebook and on 5 January 2021 was contacted by text message to attend for an interview. The advertisement read:

Experienced gaming and duty managers. Indian and European cuisine, chef is required to join an amazing team at our multicuisine restaurant at ... interested and dates?

Ideal candidate should be experienced in her field. Salary won't be an issue for the right candidate. Immediate openings. Must apply with detailed CV and have a valid visa to start work.

[11] Ms Laison said she was unemployed when she saw a job posted by RHGL for kitchenhand/waitress in December 2020. She had understood the job to be of a permanent nature. She applied to the Manager by text message in the name of Mea Mason, provided her CV which was in the name of Lourdes Laison and was invited for an interview on or about 5 January 2021.

[12] Ms Laison said the Manager offered her the position of kitchenhand/waitress and assured her she would have at least 25 hours of work each week.

[13] Mr Malik said that the Manager had conducted the interview and engaged Ms Laison as a casual employee to work as kitchenhand/waitress. Mr Malik said all the kitchen hand and waiting staff/bartenders were casual, and this included Ms Laison. He said Ms Laison had been advised that the position was of a casual nature.

[14] Ms Laison said she was not provided with a written employment agreement despite frequently requesting one.

[15] Mr Malik said he provided Ms Laison with a written casual employment agreement which she had taken home and returned after several days with a lot of amendments. He explained that the changes were not acceptable and provided her with a new contract which he had signed, however Ms Laison did not return it.

[16] The first draft written employment agreement was provided to the Authority. It had been signed by Mr Malik and dated 24 January 2021 but not by Ms Laison, who denied that she had seen it.

[17] Mr Malik messaged Ms Laison on 27 January 2021 stating: "Hi Mea, Have you provided us with a filled in employee details form?". Ms Laison had responded: "I only done contract but waiting on copy"

[18] Ms Laison denied having seen an employment agreement. In regard to the text message Ms Laison said that she had been referring to the employee details form, not to a written employment agreement.

[19] The draft employment agreement was a template document in which Mr Laison's name had been hand written. In the section entitled "2.1 Position", it stated in type print 'Full Time/Part Time'. The words Full Time had been crossed out and the hand written word 'casual' inserted next to the typed work Part Time.

[20] In the section entitled: "6.1 Full Time/Part Time with an obligation to not perform overtime as necessary with an entitlement to extra pay" it stated in type face: 'The employee's normal hours of work shall be (the word 'casual' was inserted in hand writing) hours per week ...'. No hours are specified.

[21] There is no sections on the employment agreement which have handwritten annotations other than those outlined, and I am not therefore persuaded that Mc Laison had seen and amended it as claimed.

[22] Ms Laison said she knew which hours she was to work each week because a weekly roster was kept in the bar area of the restaurant. She would sign in each day she worked. Ms Laison said she had kept her own record of the hours she worked, but was unable to provide these.

[23] Ms Laison said that although she understood from her interview that she would be provided with 25 hours a week, she was not provided with that number of hours after she commenced working at the restaurant.

[24] During the Investigation Meeting Ms Laison said she had been paid for the hours she had worked, but the payments she received were delayed. She had emailed Mr Malik about the delayed payments, and the fact that the hours she was working were less than the 25 hours she had been promised, but said she received no response. She had also tried telephoning him, but her calls were not answered.

[25] Mr Malik said that sometimes Ms Laison did not attend work on the days when she had been allocated shifts because of personal or health issues. There had been no disciplinary steps taken in regard to that issue.

[26] Mr Malik said that after the week ending 7 February 2021 a call was received from the Inland Revenue Department (IRD) informing him that the name and date of birth provided on the employee details form for Ms Laison which had been submitted, was not a match to the IRD number provided. Mr Malik said the IRD instructed him not to pay Ms Laison any more wages until the issue was resolved.

[27] On 15 February 2021 Ms Laison text messaged Mr Malik:

Hi Pawan I would like to know what is going on I thought having a job I should be working I had.... No work last week and want to Im expecting my money today or I'm going to see my lawyer about my rights.

[28] Mr Malik replied on 4 March 2021:

Hi Mea,

As explained to you multiple times since last week and most recently yesterday that wage payment of the 12.5 hours worked by you is held up by you having supplied someone else's IRD number as informed to us by IRD. And also that if you insist on getting paid without getting it clarified from IRD, then we are required to deduct 45%

tax as instructed by IRD. and till yesterday in the meantime ... so it's entirely upto you, how you wanna resolve this situation!

Either by asking us to deduct 45% tax as instructed by IRD or getting IRD to confirm your correct tax details or going to your lawyer! Coz as far as we are concerned that we are not denying that we owe you wages for those 12.5 hours, it's rather your issue with IRD!

[29] Ms Laison replied:

I have no contract and still I wait its not fair Pawan I was told I was going to be working for 25 hours a week?? I have no money and will have to wait for winz

[30] Ms Laison said she had given the incorrect details on the employee form she had completed in error, this had resulted in the confusion with the IRD. She had telephoned IRD to explain what had happened and was told it would contact Mr Malik.

[31] After that date Ms Laison said she visited the restaurant a few times. There was another employee in the kitchen area where she had worked, and no one had spoken to her.

[32] Although she text messaged Mr Malik, and asked for more work, she was not provided with any hours. Nor had she received a response when she asked if her employment had been terminated.

[33] On 25 February 2021 Ms Laison emailed Mr Malik stating :

Hi pawan, it has been three weeks I have not heard from you. I am very concerned by this. I was meant to be getting 25 hours per week that is what we agreed on the signed in employment agreement my hours kept being decreased and no contact from you, I believe you have ended my employment agreement with no hours and no contract but I just need to hear from you.

[34] Ms Laison said she received payment of \$255.15 from RHGL, although she was unsure why this had been paid since she had not worked for some weeks by that date.

### **Was Ms Lourdes a casual or a permanent employee?**

[35] Casual employment is not defined in the Act, and therefore the factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature.

[36] A strong indication that the relationship is that of casual employment is the lack of an obligation on the employer to offer ongoing work, or for the employee to accept it when offered.

[37] The Employment Court judgment in *Jinkinson v Oceania Gold (NZ) Ltd* which is the leading case in this area set out guidelines in paragraph [47] for determining whether or not the nature of the employment was casual or permanent, these are:

- a) The number of hours worked each week.
- b) Whether work is allocated in advance by a roster.
- c) Whether there is a regular pattern of work.
- d) Whether there is a mutual expectation of continuity of employment.
- e) Whether the employer requires notice before an employee is absent or on leave.
- f) Whether the employee works to consistent starting and finishing times.<sup>1</sup>

[38] The advertisement placed by RHGL did not mention whether the employment was permanent or casual. Ms Laison said her understanding was that it was permanent. I consider this was a reasonable understanding since the advertisement is ambiguous regarding the nature of the employment.

[39] Considering the nature of the employment at the start of the relationship, I observe that it was the manager who interviewed Ms Laison, not Mr Malik, and Ms Laison's evidence is that she was not told during the interview that the position was casual, however she was told that it was for 25 hours a week.

[40] The written employment agreement provided is not signed by Ms Laison who denies having seen it. Moreover I find it does not provide a clear indication of casual employment in that although the word 'casual' has been inserted in writing in some places, the overall application of the clauses is in respect of permanent employment, and this is confusing. I consider it certainly could not be considered as indicating the true nature of the employment as casual. Moreover Ms Laison's evidence is that she had not seen it, and it is not signed by her.

[41] Ms Laison was advised of the hours she would be working each week by a roster which was kept in the bar area of the restaurant.

[42] RHGL provided timesheets for the employees, which included Ms Laison, however these are not signed by the individual employees.

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<sup>1</sup> *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225

[43] Although Mr Malik said that Ms Laison would not turn up for her shifts on occasion, there is no evidence supporting this.

[44] I find that Ms Laison had an ongoing expectation of work, this is indicated by the text messages, in particular the text messages sent to Mr Malik on 15 February and by the text from Mr Malik sent on 4 March 2021.

[45] I determine that Ms Laison was a permanent employee when working for RHGL.

### **Was Ms Laison constructively dismissed by RHGL?**

[46] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Ms Laison claims that she was constructively dismissed as a result of RHGL failing to provide her with ongoing work on or about 4 February 2021. In that situation she regarded herself as having no option but to conclude that her employment with RHGL was at an end.

[47] In examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation

#### *Was there a breach of duty?*

[48] An employer is expected to behave in good faith towards an employee. The provision of ongoing employment provided by the employer to the employee is fundamental to the employment relationship, provided the employee is ready and willing to work .

[49] Ms Laison was ready and willing to work. I find that RHGL did not engage with her in any meaningful way and failed to provide her with ongoing employment with no valid reason why it failed to do so.

[50] In those circumstances I find that the failure to provide work on the part of RHGL was a breach of the duty of good faith.

#### *Reasonably foreseeable?*

[51] In these circumstances I consider it was reasonably foreseeable that Ms Laison would be left with no option but to conclude that her employment had been terminated.

[52] Ms Laison's actions in accepting that her employment had been terminated must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where she had no other option.

[53] I find that Ms Laison tried to engage with her employer by text message, and by going to the restaurant on more than one occasion, but without any engagement on the part of RHGL.

[54] In that situation I find Ms Laison acted reasonably in her conclusion that her employment had been terminated.

[55] I determine that Ms Laison was constructively dismissed by RHGL.

**Is Ms Laison owed any monies by RHGL?**

[56] Ms Laison worked for RHGL from 18 January 2021 for four weeks after which RHGL failed to provide her with any further work.

[57] Payslips provided by RHGL recorded that Ms Laison worked the following hours:

- Pay period 18/01/2021 – 24/01/2021: 22.25 hour: net pay \$373.61
- Pay period 25/01/2021 to 31/01/2021: 12.25 hours: net pay\$212.83
- Pay period 01/02/2021 to 07/02/2021: 17.50 hours: net pay \$297.88
- Pay period 01/03/2021 to 07/03/2021 12.50 hours: net pay \$217.17

[58] Ms Laison understood that she was to be provided with 25 hours a week. During the period of her employment, according to the hours specified on the time sheets provided by the Respondent, Ms Laison worked 64.5 hours., resulting in a shortfall of 35.5 hours.

[59] I find RHGL owes Ms Laison payment for 35.5 hours in respect of unpaid wages.

[60] Ms Laison was paid holiday pay on a pay-as-you-go basis during her employment on the hours worked, however I find she is owed holiday pay on the outstanding proportion of unpaid wages.

[61] Had the employment been terminated on valid grounds, Ms Laison would have been entitled to a notice period.

[62] Ms Laison was not provided with a notice period by RGHL. Ms Laison was paid on a weekly basis, and I therefore find she is entitled to one week's payment in lieu of notice.

## **Remedies**

[63] Ms Laison was unjustifiably dismissed and she is entitled to remedies.

### *Reimbursement of Lost Wages*

[64] Ms Laison obtained alternative employment from October 2021.

[65] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Ms Laison said she had started to look for other employment, although she provided no evidence of that and her evidence was that she did so “after a few months”

[66] I am not satisfied that Ms Laison made a reasonable effort to find alternative employment in order to mitigate her loss, and make no award for lost wages.

### *Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[67] Ms Laison gave evidence as to the financial and emotional impact the loss of her employment with RHGL had on her. I understand that given her recent return to the workforce, the loss of her job with RHGL had a significant impact on her self-confidence.

[68] Ms Laison, who has a young family was also unable to claim support from WINZ for some weeks due to a stand-down period. This was also stressful for her.

[69] I order RHGL to pay Ms Laison the sum of \$6,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

### *Unpaid Monies*

[70] I order RHGL to pay Ms Laison \$472.50 gross (calculated as \$18.90 x 25 hours) in respect of a one week unpaid notice period.

[71] I order RHGL to pay Ms Laison the sum of \$670.95 gross (calculated as 35.5 hours at \$18.90 per hour) unpaid wages pursuant to s 131 of the Act.

[72] I order RHGL to pay Ms Laison \$53.68 gross as unpaid holiday pay pursuant to s 24 of the Holidays Act 2003

### *Contribution*

[73] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Laison did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

### **Penalty**

[74] The Applicant is seeking penalties in respect of the failure to provide Ms Laison with a written employment agreement and to retain a copy of it pursuant to s 64 of the Act, and to the withholding of payment of wages owing to Ms Laison in full and on time pursuant to s 4 Wages Protection Act 1983.

[75] Penalties for breaches of various sections of the Act render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[76] In deciding whether to impose a penalty, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.<sup>2</sup>

[77] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[78] One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to provide a written employment agreement and to pay wages as they fall due.

### *Identify the nature and number of statutory breaches*

[79] There is two statutory breach identified, meriting a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$40,000.00.

[80] However I consider in light of the fact that there are the two statutory breaches, it will be appropriate to globalise the penalties.<sup>3</sup>

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<sup>2</sup> *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC 143

<sup>3</sup> *Xu v McIntosh* [2004]2 ERNZ 448 at [43] – [45]

*Step Two - assess the severity of the breaches*

[81] The aggravating factors include the fact that the delayed payments of her wages caused Ms Laison some financial inconvenience, and the lack of a written employment agreement caused her uncertainty about the terms and conditions of her employment.

[82] Ameliorating factors on the part of RHGL is that it is a small employer lacking the HR assistance of a larger organisation.

[83] I consider that the penalty amount should be reduced to 15%.

*The Respondent's financial circumstances*

[84] I have no information that would support the view that the Respondent's financial position is precarious.

[85] In the circumstances, no reduction is made to the penalty on this basis.

*Proportionality*

[86] In considering the level of penalties awarded in similar cases decided since *Preet* and considering the impact on the Applicant in this case, I consider the appropriate level of the penalties in this matter to be \$2,000.

*Should any part of the penalty be paid to Ms Laison?*

[87] The purpose of penalties is to deter, not to compensate. However I accept that the failure to pay her wages on time, and to provide a written employment agreement was a matter of concern to Ms Laison.

[88] **I order RHGL to pay Ms Laison \$500.00, with the balance of \$1,500.00 to be paid to the Authority for payment into a Crown Bank Account, pursuant to s136 of the Act**  
**Costs**

[89] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[90] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent 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.

[91] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[92] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>4</sup>

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].