

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 572
3159345

BETWEEN SUHEE LEE
Applicant
AND YAMAYA NZ LIMITED
Respondent

Member of Authority: Marija Urlich
Representatives: Seungmin Kang, counsel for the Applicant
Jong Sun Lim, counsel for Respondent
Investigation Meeting: 19, 20 September 2022, 20 and 21 June 2023 in
Tauranga
Submissions and further information received: At the investigation meeting
26 June 2023 from the Respondent
30 June 2023 from the Applicant
Determination: 2 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Suhee Lee was employed by Yamaya NZ Limited (Yamaya) to work in its sushi shop from 19 June until her employment ended on 11 September 2021. Ms Lee says she was unjustifiably disadvantaged in her employment and unjustifiably dismissed during the course of a telephone conversation with one of the owners of the business. She seeks orders to reimburse wages lost consequent to her dismissal and compensation for humiliation, loss of dignity and injury to feelings. Ms Lee also seeks arrears of wages relating to a COVID-19 lockdown in August 2021 and unpaid termination holiday pay. An award of penalties is also sought for a range of statutory breaches - breach of the duty of good faith and failure to provide a written employment agreement,

rest and meal breaks and wage and time records on request. Ms Lee asks that any penalty awarded is paid to her in whole or in part.

[2] Yamaya denies the claims Ms Lee brings before the Authority. It says Ms Lee's failure to provide her tax code meant it was unable to provide her a written employment agreement and that she resigned from her employment.

The Authority's investigation

[3] During the investigation meeting the Authority received evidence from Ms Lee, her husband Namuk Kim, and Kyung Kim and Jung Im Kang, who are the owners of Yamaya and worked there day-to-day with Ms Lee. The Authority also received evidence from Euna Seo, Kyong Yoon Lee and Okim Kang.

[4] 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.

[5] During the investigation meeting the Authority was assisted by an interpreter of the Korean language.

Issues

[6] The issues identified for investigation and determination are:

- a) Was Ms Lee unjustifiably disadvantaged in her employment by way of Yamaya's actions by:
 - i. failing to provide a written employment agreement?
 - ii. requiring her to perform duties outside the agreed job description?
 - iii. failing to provide statutory rest and meal breaks?
 - iv. requiring her to perform duties she believed were unlawful?
 - v. failing to provide a safe and healthy work environment?
 - vi. unilaterally changing her working hours?
- b) Was Ms Lee unjustifiably dismissed?

- c) If so, is Ms Lee entitled to a consideration of remedies sought including:
 - i. reimbursement of lost remuneration under s123(1)(b) and 128 of the Act; and
 - ii. compensation under s123(1)(c)(i) of the Act.
- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Lee which contributed to the circumstances which gave rise to his grievance?
- e) Has Yamaya breached an implied obligation owed to Ms Lee to apply for and pay her the wage subsidy or pay her normal wages during August 2021 lockdown? If so, are arrears owing?
- f) Does Yamaya owe Ms Lee arrears of holiday pay?
- g) If statutory breaches are established is Yamaya liable for a penalty/ies for breaches of sections 4, 63A, 64, 69ZD, 69ZF, 130 of the Employment Relations Act 2000 and section 28 and 75 of the Holidays Act 2003?
- h) Is either party entitled to an award of costs?

Relevant law

The test for justification

[7] When the Authority considers justification for the actions of Yamaya it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or any found dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of Yamaya and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the events at issue.

[8] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against were sufficiently investigated; concerns were then raised with him, he had a reasonable opportunity to respond to them and his explanations were considered genuinely by TCA before dismissal. The Authority may take into account other factors as appropriate and

must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Lee being treated unfairly.

[9] Yamaya could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Discussion

Was Ms Lee unjustifiably disadvantaged in her employment?

[10] Ms Lee raises a range of matters which she says occasioned unjustifiable disadvantage to her in her employment:

- i. not having a written employment agreement;
- ii. being required to perform duties which had not been agreed when the parties entered an employment relationship;
- iii. having her hours of work changed without agreement;
- iv. not being provided rest and meal breaks;
- v. food and money handling; and
- vi. dealings with and about customers.

[11] She says these unjustifiable actions arose from Yamaya's actions which were in breach of the parties' employment agreement.

(i) No written employment agreement

[12] There is no dispute Yamaya did not provide Ms Lee with a written employment agreement. It says it was waiting for Ms Lee to provide her tax code before providing the written employment agreement and she did not before the employment relationship ended. Yamaya submits Ms Lee's obligation under s 24C of the Tax Administration Act 1994 to notify her employer of her tax code is a condition precedent to its obligation to provide a written employment agreement.

[13] This argument does not succeed. Section 63A of the Act provides an employer bargaining with an employee for an individual employment agreement must, among other requirements, provide the employee with a copy of the intended employment agreement. Section 65 sets out the minimum requirements of form and content of such

an agreement. An employee's tax code is not one of the minimum requirements. There is no scope to read down this clear statutory requirement against the obligation to provide a tax code.

[14] Yamaya has breached the statutory obligation to provide Ms Lee with a written employment agreement. In so doing it is liable to a penalty under s 63A of the Act which is considered further below.

(ii) Duties changed without agreement?

[15] Ms Lee told the Authority that at the meeting with Ms Kang on 14 June 2021 to discuss working for Yamaya she made it clear she was unable to lift heavy objects and understood the parties agreed her duties would be making nigiri and cashier duties. Ms Lee said despite the agreement as to duties, she was required to stock the drinks fridge, refill sauce bottles and clean the sushi-making machine. Yamaya says Ms Lee was its only part-time staff member and that all the tasks it asked her to perform could reasonably be anticipated for her job.

[16] It is accepted Ms Lee was concerned about these issues because she had thought she had made these matters clear in the initial meeting with Ms Kang and that they had reached agreement. However, she has performed the duties as required and none of the tasks fall outside the reasonable ambit of the role Ms Lee was employed to perform or were tasks which were so onerous as to make the requirement to perform them unreasonable. Further, the evidence does not establish the agreed duties were as narrow in scope as claimed. While Yamaya's failure to provide a written employment agreement has likely contributed to the situation because a description of the work to be performed was not recorded in writing the disadvantage under this head of claim is not established.

(iii) Where Ms Lee's hours of work unilaterally changed?

[17] Ms Lee says Yamaya changed her day off from Thursday to Tuesday, then required her to work Tuesdays, that she was told to work an extra half hour at last-minute notice on 2, and 10 July and 11 September and on 26 and 27 July she received an hour's notice her work was cancelled for the day for which she was not paid.

[18] The submission is accepted that had a written employment agreement been provided Ms Lee's days and hours of work would have been specified as would a mechanism to change those hours and days of work. Having failed to meet this fundamental requirement Yamaya has left itself vulnerable to a claim that it has changed hours and days of work without agreement or, without sufficient consultation with Ms Lee before the change was made. The claim of unjustified disadvantage under this head is established.

(iv) *Failure to proactively provide rest and meal breaks?*

[19] With respect to the rest and meal break issue, Mr Kim and Ms Kang said breaks were taken, when possible, given the requirements of sushi making and customers. They said, and the Authority accepts, they work long hours six days a week, starting very early in the morning, to make the food sold to their customers during the course of the shop opening hours and given this the practise around rest and meal breaks is to take them when time allows. They accepted this practise extended to Ms Lee who was expected to take a break when she was able.

[20] Yamaya has failed to discharge its duty with respect to facilitating Ms Lee's rest and meal breaks. There is no compelling evidence Yamaya discussed with Ms Lee how rest and meal breaks would be taken, there is no record of such breaks taken by Ms Lee and given the statutory requirement was Yamaya's to provide rest and meal breaks, it is unable to satisfy the Authority that it has discharged its obligation. Again, the failure to provide a written employment agreement has no doubt contributed to the situation because there was no record of what the parties had agreed with respect to rest and meal breaks. For these reasons the Authority is satisfied Ms Lee was unjustifiably disadvantaged in her employment because Yamaya failed to provide rest and meal breaks as it was required to do under s 69ZD of the Act and to which Ms Lee was entitled.

(v) *Issues with food and money handling?*

[21] Ms Lee has raised matters concerning food and money handling. The Authority accepts the matters are genuinely raised. However, given these matters are serious they would need to be supported by evidence of equally probative value. Yamaya strongly denies the claims and has produced evidence of the quality of the food made and its

compliance with food hygiene standards and other regulatory requirements. Mr Kim and Ms Kang gave sincere evidence of the gratitude they feel towards their customers for supporting their business. The claim of disadvantage under this head is not established.

(vi) Issues with and about customers?

[22] An employee is entitled to a workplace that is free from psychological harm. Ms Lee says attitudes exhibited to and about customers made her feel uncomfortable and made the workplace unsafe for her. Mr Kim and Ms Kang reject the claim and gave sincere evidence as to the gratitude they feel towards their customers for supporting their business. Again, given the seriousness of the claim, without compelling evidence such a claim is difficult to establish. While it is accepted Ms Lee has experienced some discomfort at work there is insufficient evidence the conduct described, if it was accepted as described is such as to put it in a category where it could be reasonably foreseeable it would cause harm. The claim of disadvantage under this head is not established.

Was Ms Lee unjustifiably dismissed?

[23] By early September the matters outlined above were weighing heavily on Ms Lee and she sought to meet with Ms Kang to discuss them. I am satisfied Ms Kang knew Ms Lee wished to speak with her about her concerns about the workplace. Setting up a meeting proved difficult. It appears Ms Kang was reluctant to meet during the working day because it is busy and the weekends and evenings were occupied with family and other commitments. A fair and reasonable employer, consistent with the statutory obligation of good faith, would have actively and constructively engaged in the discussion Ms Lee sought including facilitating it occurring during working hours. In failing to do so Yamaya has breached the statutory duty of good faith.

[24] Matters came to a head on 12 September when Ms Lee insisted Ms Kang make time to speak with her. The telephone conversation which occurred at 3.30pm and lasted for 12 minutes and 34 seconds, on either party's account ended in Ms Lee's employment ending. Ms Lee says Ms Kang dismissed her. Ms Kang says Ms Lee made it clear she was not coming back to work.

[25] Given these conflicting accounts the contemporaneous record of the parties' actions soon after the 3.30pm telephone call assists in resolving this factual dispute namely:

- (i) at 4.15pm Ms Lee sent Ms Kang a KakaoTalk message "as you told me I shouldn't come to work from tomorrow, I will do so. Stay well";¹ and
- (ii) Yamaya posted a job advertisement at 4.57pm for the role Ms Lee performed.

[26] The first question is – did Ms Lee's employment end during the telephone conversation? The answer is yes. Ms Lee's KakaoTalk message confirms her understanding that she had been dismissed. Yamaya's actions in advertising Ms Lee's position the same day is consistent with the parties' joint understanding that Ms Lee's employment had ended with immediate effect – Yamaya took swift action to find Ms Lee's replacement and there is no suggestion in the evidence Yamaya was seeking to employ a part time employee in addition to Ms Lee.

[27] The second question is - did Ms Lee's employment end because she resigned or was she dismissed? For the following reasons I find Ms Lee's employment ended at the initiative of Yamaya on 12 September 2021 and was an unjustified dismissal. On both accounts of the telephone conversation, it was heated and Ms Lee was upset. It is more likely than not that Ms Kang told Ms Lee if she was not happy in her employment she should leave. In the circumstances of a heated discussion and with emotions running high this was a sending away at the initiative of Yamaya. Yamaya's immediate subsequent actions in not responding to Ms Lee's message confirming her employment had ended at its initiative and posting an advertisement for her job are consistent with a sending away. Yamaya is unable to demonstrate its actions were those a fair and reasonable employer could have taken in all the circumstances. The dismissal was unjustified.

¹ In translation.

Remedies

[28] Ms Lee has established a personal grievance for unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement

[29] Ms Lee seeks reimbursement of wages lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. The claimed amount is \$7,130 (gross) for the period of 15.5 weeks which runs from 13 September 2021 until 30 December 2021 following which she started a new job.

[30] After reviewing the evidence of loss and Ms Lee's attempts to secure employment, the Authority is satisfied she is entitled to an award \$5,520.00 (gross) being 12 weeks ordinary wages calculated at \$20 gross per hour for 23 hours per week being the usual hours of work. The shareholder dividend Mr Lee received is not a relevant factor in lost wages mitigation.

Compensation for humiliation, loss of dignity and injury to feelings

[31] Ms Lee seeks a global award of compensation of \$20,000 for both any established unjustified disadvantages and the unjustified dismissal. The evidence establishes Yamaya's failures towards Ms Lee have directly contributed to the circumstances which resulted in her dismissal.

[32] The Authority is satisfied Ms Lee has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$18,000 under section 123(1)(c)(i) is appropriate.

Contribution

[33] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[34] Ms Lee did not contribute in a blameworthy way to the circumstances which led to her employment ending. It is not unreasonable for an employee to seek to meet with their employer to discuss matters of concern in the workplace.

[35] There are no deductions from the monetary remedies for reasons of contribution.

Arrears

Are arrears of wages due and owing?

[36] Ms Lee is entitled to be paid by Yamaya for hours she would have worked but for the three-week period from 17 August to 7 September 2021 when the business was locked down as a consequence of the COVID-19 pandemic response. She was not paid during this period and Yamaya did not discuss with her the impact of the lockdown in her employment or usual pay.

[37] Yamaya Limited is ordered to pay Ms Lee wage arrears totalling \$1380 (gross) because but for the lockdown she would have worked those hours and there is insufficient evidence the employment agreement was not enforceable during this period.² The payment is to be made within 21 days of the date of this determination.

Are holiday pay arrears due and owing?

[38] The claim that termination holiday pay remains outstanding is not disputed. Any claim the withholding of the holiday pay was justified cannot succeed. Yamaya Limited is ordered to pay Ms Lee \$368 (net) in holiday pay entitlements within 21 days of the date of this determination.

Should interest be ordered on the arrears?

[39] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[40] It is appropriate where a person has been deprived of the use of money to make an award for interest. Ms Lee is entitled to an award of interest on the wage and holiday

² Being three weeks' pay calculated at \$20 per hour gross at average hours of 23 per week.

pay arrears awarded to be calculated from her last day of employment being 12 September 2021 until paid in full.

[41] Yamaya Limited is ordered to pay interest, using the civil debt interest calculator, on all arrears awarded within 21 days of this determination.³

[42] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Penalties

[43] Yamaya has been found to have breached statutory obligations in the following respects - by failing to provide an intended written employment agreement, failing to provide rest and meal breaks, failing to pay termination holiday pay and not acting in accordance with the duty of good faith. Ms Lee seeks an award of penalties, all or a portion of any paid to her.

[44] Also sought is a penalty for failure to provide wage and time records on request. Ms Lee first requested the wage and time records from Yamaya on 8 December 2021. The record was produced on 31 August 2022. Such a delay is not compliant with the statutory obligation to provide immediate access to such documents on request.⁴

[45] The maximum penalty against a company is \$20,000 per breach.⁵ There are five breaches of statutory obligations. It is appropriate to globalise the breaches given their interrelated nature. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁶

[46] Where a breach is not a minor or technical breach, the question of whether a penalty is warranted turns to whether the conduct was deliberate or negligent,

³ www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁴ Employment Relations Act 2000, s 130((2)).

⁵ Employment Relations Act 2000, s 135.

⁶ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

warranting the imposition of a penalty.⁷ The level of harm occasioned by the breach is also relevant.⁸

[47] Yamaya's actions must be seen as intentional and its culpability high. As the employer it was responsible for providing a written employment agreement, ensuring rest and meal breaks were provided, producing wage and time records immediately on request, paying termination holiday pay and acting in accordance with the statutory duty of good faith. The failure to do so is, in all the circumstances of this employment relationship problem is a serious breach.

[48] There is compelling evidence of direct loss suffered by Ms Lee as a result of Yamaya's breaches, including the consequences of not having a written employment agreement and she has spent time and resources seeking to enforce those statutory obligations.

[49] There is no specific evidence before the Authority of any financial difficulty Yamaya may have in paying any penalty.

[50] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$6,000. Yamaya is ordered to pay half the penalty to Mrs Lee to compensate her for the inconvenience and resources expended in pursuing these statutory entitlements. The penalty is to be paid within 21 days of the date of this determination.

Summary of Orders

[51] The Authority orders as follows:

Within 21 days of the date of determination Yamaya Limited is ordered to pay Suhee Lee the following sums:

- (i) \$18,000 under s 123(1)(c)(i);
- (ii) \$5,520.00 (gross) under s 123(1)(b);

⁷ See *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 at [169]; *Xu v McIntosh* [2004] 2 ERNZ 448.

⁸ *Xu*, *ibid*.

- (iii) \$1,380.00 (gross) in wage arrears;
- (iv) \$368.00 (net) in holiday pay arrears;
- (v) Yamaya Limited is to calculate and pay interest on total arrears; and
- (vi) \$6,000 penalty half of which is to be paid to Suhee Lee and half to the Crown.

Costs

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

[53] If parties are unable to resolve costs between them and an Authority determination on costs is needed Ms Lee may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Yamaya 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.

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

[54] 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.⁹

Marija Urlich
Member of the Employment Relations Authority

⁹ See www.era.govt.nz/determinations/awarding-costs-remedies.