

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 196
3287659

BETWEEN RYDER McCUTCHAN
Applicant

AND R L FOODY LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Carren McDonald, advocate for the Applicant
Elisabeth Giles, counsel for the Respondent,

Investigation Meeting: 28 February 2025 in Christchurch

Submissions Received: 14 March 2025 from the Applicant
14 March 2025 from the Respondent

Date of Determination: 7 April 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ryder McCutchan was employed by R L Foody Limited T/A as a Hells Pizza franchise as a ‘Kitchen Staff’ member from 17 April 2023 until his employment ended in disputed circumstances on 25 January 2024.

[2] Mr McCutchan is claiming he was constructively dismissed and the subject of actions and omissions of his former employer in the period leading up to the relationship ending, that he says caused him to be unjustifiably disadvantaged. In addition, Mr McCutchan asserts that his former employer did not act in accord with statutory good faith obligations by allegedly misleading him about the availability of ongoing working hours.

[3] R L Foody (“RLF”) contend that Mr McCutchan resigned to obtain alternative employment with better hours and that the management he complained of was not oppressive but designed to better coach and provide training opportunities when it became evident Mr McCutchan was struggling with some tasks. The good faith breaches are denied.

The Authority’s investigation

[4] At the investigation meeting, Mr McCutchan attended with his father Brendan McCutchan. RLF’s shareholder Qingxian Ru (aka Isabella) attended alongside: Qingwei Ru (aka Wayne), the duty manager, Pardeep Kaur, the store manager and two ex-employees of RLF, one an ex-duty manager and the other a kitchen hand. All provided written evidence and made themselves available for questioning.

[5] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

Issues

[6] The broad issues to be decided are:

- (a) In all of the circumstances, was Mr McCutchan the subject of unjustified actions and/or was he unjustifiably dismissed and did his employer breach any statutory good faith obligations?
- (b) If an unjustified dismissal or unjustified actions or breaches are found to have occurred what, if any, remedies should Mr McCutchan be awarded.
- (c) If Mr McCutchan is successful in all or any elements of his personal grievance claims should the Authority reduce any remedies granted as a result of any contributory conduct?
- (d) How costs are to be resolved.

What caused the employment relationship problem?

[7] The employment relationship, that Mr McCutchan commenced with RLF upon turning sixteen years of age, was permanent part-time with a minimum of six hours work per week. Mr McCutchan was at the time an early school leaver enrolled in a tertiary study course (level 3 Food and Beverage). Mr McCutchan had some experience working at another fast-food outlet. Mr McCutchan says he was looking for work to fit around his studies. He recalled being interviewed by Isabella Ru and mentioning at the interview he would be applying for a restricted driver's licence in six months' time to enable pizza delivery work.

[8] The individual employment agreement provided after the interview was signed and returned by Mr McCutchan before he commenced working on 17 April 2023. It contained the relevant following hours of work provisions:

- 12.1 The Employee's usual hours of work shall be 6 hours, over Monday to Sunday. Hours will be specified by the Employer in a roster and where possible the roster will be communicated to the Employee 7 days in advance of work.
- 12.2 The Employee accepts that, due to the operational needs of the Employer, they may be required to fulfil hours with less than 7 days' notice and the Employee undertakes to ensure they are available to meet all hours specified by the Employer.
- 12.3 The Employee must be available to work the number of hours specified in this agreement.
- 12.4 From time to time, the Employer may also offer additional hours, over the hours specified in this agreement, and the Employee can decide whether to accept the offer of additional hours.
- 12.8 Following consultation, to suit the operational needs of the Employer, the Employee's hours of work may be altered.

[9] I note that the above provisions may not comply with s 67D of the Act or are at least ambiguous. Clause 12.2 permissively requires the worker to be available for "all hours specified by the Employer". However, cl 12.4 appears to also provide that the worker can refuse to accept additional hours – the two clauses sit uneasily together. Further, the use of the term "usual hours of work" is imprecise or unclear in its intent and would be better specified as either "minimum" hours of work or the term "guaranteed hours of work" used in s 67D(2)(B) of the Act.

[10] In addition, cl 12.8 which is effectively a variation provision, should provide that any change in hours of work is by agreement and not just by consultation. I also observe that c 7 of the agreement says company policies and procedures are deemed to apply as long as they are not inconsistent with the employment agreement and there is a policy that confusingly indicates if a worker is unable to make a rostered shift they bear the responsibility for finding a suitable replacement to cover the shift and if they do not find a replacement and do not give a minimum of two hours' notice of that failure, then "you will be expected to work".

[11] Mr McCutchan says he had no fixed days of work and would usually work evenings during the week between Wednesday and Friday. Wage and time records disclosed for the entire period of employment show Mr McCutchan's hours fluctuated and averaged 8.99 per week.

[12] The evidence of Isabella Ru, who is the nominee manager and handles day to day operational and employment matters (and is the primary contact with the franchisor head office), was that RLF generally preferred to engage students on a part time basis. It is RLF's practice to offer a low minimum number of hours that would then increase on a discretionary basis when the worker gained more skills and experience in pizza making or became qualified to undertake delivery work. Three broad tasks were described for kitchen staff, they could be working on the pizza making bench; taking orders/frying sides/serving customers/cleaning; or delivery work.

[13] Mr McCutchan says that after two to three months in employment, he started having disagreements with two of RLF's managers while he was learning pizza making and says one manager frequently yelled at him and treated him in a humiliating manner that eroded his self-confidence and enjoyment of his work. Generally, Mr McCutchan conceded he sometimes struggled making pizzas with multiple ingredients but he was assisted by co-workers.

[14] Mr McCutchan says he finished his tertiary study course on 25 July and indicated he was available to work more hours as he was aware the store was coming up to a busy period but this was declined with management saying the extra hours would have to come off other workers and Mr McCutchan was too young and not yet 'up to speed' on pizza making. Upon

obtaining his restricted driver's licence, Mr McCutchan picked up some additional pizza delivery work from the end of October 2023.

[15] Mr McCutchan related an incident from Friday 3 November, where he was admonished the following day; by two duty managers for exceeding his portion of a free staff meal. Mr McCutchan arrived at work on the day in question and says he was confronted by the store manager and the duty manager, who suggested he pay for the additional food portion (\$5) and when he responded he had no cash he was told it would be deducted from his next pay. Mr McCutchan questioned the legality of the deduction and was advised in response that it was illegal to steal food. Mr McCutchan got upset and it was established that the store manager suggested he go home for the day, which he did. During this interchange, the store manager suggested if he wanted to quit, he must advise Isabella Ru.

[16] On 7 November, Mr McCutchan texted Isabella Ru indicating:

I've heard that deep told you that i quit when I didn't actually say i was quitting, i said i was done for the day because deep was pushing my buttons and I didn't want to get snarky to all the other co-workers that don't need to be included. I had a terrible day that day and she just happened to set it off more. I'm working on keeping my outside of work issues away from work environment so it doesn't interfere.

[17] Isabella Ru responded indicating Deep had not told her Mr McCutchan had quit and "it doesn't work that way. I can talk to you when next time see if you want to". Mr McCutchan acknowledged the text and indicated a 'face to face' discussion would be a good idea but did not immediately take this option up.

21 November Meeting

[18] Mr McCutchan says he sought advice from his father and asked for a formal meeting with Isabella Ru that took place on 21 November. Mr McCutchan says he intended to discuss concerns including what he saw as rude and hostile treatment from his duty managers; specifically, being accused of theft of the staff meal; and not being allocated extra working hours.

[19] In attendance at the meeting were Isabella Ru and an ex-duty manager together with Mr McCutchan and his father, Brendan McCutchan. While no notes of the meeting were

produced, the evidence of all parties in attendance, broadly agreed that there was a constructive discussion led by Brendan McCutchan. This identified that his son was struggling with his duty managers' approach to him and the reasons why this was so. Brendan McCutchan described a mix of some inherent features of how Mr McCutchan learned on the job and how to motivate him. Isabella Ru raised concerns of how quickly Mr McCutchan was picking up instructions and that he was not fully up to speed in pizza making which was why he was not being allocated additional hours and how he negatively handled critical feedback.

[20] The discussion then focussed on a way forward and it was accepted that Brendan McCutchan suggested three alternatives. However, there was a variance in the evidence of what those options were presented as. Mr McCutchan says his father first posed an exit package and the ending of the relationship, second: some intensive training on pizza making so he could get extra hours and third: that nothing changes and Mr McCutchan would look for alternative work. Isabella Ru and the ex-duty manager did not recollect the exit option being discussed but did recall the other options being raised.

[21] Isabella Ru says she agreed to the 'no change' option as she thought additional training would require expenditure on more hours and she felt there had been enough training and was not confident that Mr McCutchan would respond positively. Brendan McCutchan recalled Isabella Ru did not want to give more training or extra hours but was willing to carry on as is.

[22] In addition, Isabella Ru says that the discussion was useful to alert her to how Mr McCutchan responded to instructions and she resolved to tell the managers to use a kinder approach when interacting with him.

[23] It was also apparent from Isabella Ru's evidence that she was aware that the managers were both blunt communicators. In particular, she was acutely aware of Wayne Ru's shortcomings but largely put this down to English not being his first language which made him communicate by giving short instructions. Contextually addressing this was complicated by the fact that Wayne is her cousin and is part of Isabella's household.

[24] The ex-duty manager noted observing both other managers' addressing Mr McCutchan "quite harshly" when training him on pizza making tasks. However, this witness stressed that Mr McCutchan was sometimes reactive as in her opinion he was very young and needed time to develop a more mature attitude and approach to the job.

End of the employment relationship

[25] Mr McCutchan says his hours did marginally increase after the November meeting as the business experienced a busy period. Mr McCutchan also got allocated some delivery work but this was limited by his restricted licence not allowing him to work beyond 10pm. However, when his hours reverted to 6-9 per week, Mr McCutchan says he started looking for another job. Mr McCutchan says he asked for additional hours but was told this would be at the expense of co-workers having their hours reduced. Isabella Ru says the reality was Mr McCutchan's inexperience on the pizza making side of the business prevented him from being offered extra hours and delivery work was constrained by him having a restricted licence. RLF noted they had provided delivery work to Mr McCutchan as his preferred option, in limited circumstances. Records produced showed Mr McCutchan earned \$632.50 from this work that paid an additional \$2:50 - \$5:00 per delivery (depending on distance).

[26] While looking for alternative work, Mr McCutchan says he saw job adverts placed by RLF in a student job search online forum (in mid-November and early January) and was confused why this was so when he was being turned down for extra hours' he had indicated he was available to work. Mr McCutchan says he applied for a vacancy online but his application was rejected. RLF also cited a subsequently disclosed social media chat group that demonstrated Mr McCutchan was aware that his lack of additional hours was due to his restricted driver's licence status. Despite this, Mr McCutchan emailed on 16 January, after viewing an advert for a job that offered hours of 10-20 per week, asking Isabella Ru: "Just wondering if there are any available hours so i could get a few more ? I am 100% available to work."

[27] RLF in response has pointed to the adverts being clear that a full driver's licence was a requirement as during Fridays and Saturdays the store closed at around 11pm. RLF also suggested that after Christmas and into January/February, the demand for their product is

significantly lower and then in late February students return and they generally have more available workers. Isabella Ru also indicated that she had informed Mr McCutchan at the November meeting that RLF intended to advertise as two workers with full licences had resigned.

[28] Mr McCutchan resigned on 18 January 2024 by emailing Isabella Ru and providing a notice period of one week noting his last day would be 25 January. No reason was stated for the resignation. The resignation was acknowledged the same day by Isabella Ru confirming acceptance of 25 January as the last working day and she noted: “Thank you for your service with us”.

[29] During the notice period, Mr McCutchan raised an issue of his last roster allocation being less than 6 hours per week and receiving a response that his resignation date meant he was only available for half the final week. Mr McCutchan responded when he was told the roster would not change: “OK that’s good then :)”.

[30] Mr McCutchan says he decided to resign when it was all getting too much for him and that his employment wasn’t going anywhere. Mr McCutchan’s view was he had been misled about hours available to him and RLF had not been committed to training him and his managers’ treatment of him led to a decision he had to leave if he wanted to make more money.

[31] While not specifically alluding to it in his written evidence, Mr McCutchan immediately obtained on or around 25 January, alternative full-time work (40 hours per week) as a car groomer. Mr McCutchan advised his co-workers of this on their social media forum and was also disparaging about RLF and their employees including encouraging others to resign. When pressed during the investigation about reasons for leaving RLF, Mr McCutchan recounted his concerns about how his manager had treated him and how he felt he had been lied to about allocated hours but then stated he was “going to leave anyway” and he had no discussion with Isabella Ru on the reasons for him leaving.

Personal grievance

[32] By way of a letter from his advocate of 23 February 2024, a personal grievance was raised suggesting the lack of additional hours was due to RLF forming an opinion of Mr McCutchan's performance without putting this to him, and that this constituted a disadvantage grievance and lack of good faith (for which a penalty was sought) . An unjustified constructive dismissal claim was also advanced.

Was Mr McCutchen constructively dismissed?

[33] A 'constructive dismissal' can be established if an employer's conduct compels a worker to resign in circumstances where although the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as alleged here) is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated. The Court of Appeal has stated the broad legal approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. ¹

[34] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith' ² is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. ³

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

² Section 4 (1A)(a) and s 4(1A)(b).

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

Summary of submissions

[35] Mr McCutchan's advocate suggested he resigned in response to being unable to cope with RLF's refusal to take meaningful action to address and resolve issues of concern he raised at the 21 November meeting. It was suggested it had been established that RLF were aware of the "blunt and abrupt" communication approach taken by one of Mr McCutchan's managers but did nothing to mitigate this and that the focus was on Mr McCutchan's reactions to this style of management. Further, when at the 21 November meeting it was highlighted that the approach being taken to instructing Mr McCutchan was not working and why this was so, RLF chose to not proactively address the situation with additional training but instead signalled they were largely indifferent to dealing with Mr McCutchan in a different way. An additional factor cited was RLF not allocating Mr McCutchan additional hours of work.

[36] In contrast, RLF's counsel noted RLF is a small family run franchisee business. They noted that Mr McCutchan was initially employed as kitchen staff (making pizzas) on a minimum six hours per week to suit his then status as a student. They note he struggled with taking instructions and was sometimes overreactive when criticised but despite this was offered additional hours. It was posited that Mr McCutchan did not raise specific complaints about his manager and that while RLF's Isabella Ru was aware of the manager's blunt communication style this was contextually explained that English was not the manager's first language and he preferred short instructions often given in a loud and busy workplace. In terms of allocation of additional hours, RLF maintained that the lack of a full licence was a constraint that could not be avoided and Mr McCutchan's preference for delivery work could not be accommodated. RLF, say they took on board that Mr McCutchan needed to be approached in a different gentler manner after the 21 November meeting but decided that it was impractical to provide additional training over what had been given and they concluded pizza making was not his strength or work preference. Regardless, RLF says Mr McCutchan's average working hours demonstrate he was provided more than the employment agreement obligation provided of six minimum hours per week.

[37] RLF suggest that Mr McCutchan resigned of his own volition as he had found another job with additional hours that RLF could not match and that he wanted more delivery work

that was at the time impractical due to his licence status. RLF noted they did not discipline Mr McCutchan for the staff snack issue and they accommodated his difficulty in accepting criticism.

Assessment

[38] In reviewing all the contextual circumstances leading up to the resignation, I do not conclude Mr McCutchan was the subject of ongoing breaches of a serious enough nature, objectively causative of his resignation.

[39] It was evident that Mr McCutchan in or around late November 2023, resolved to leave RLF due to his dissatisfaction with the working environment and a desire to obtain a position with a more favourable allocation of guaranteed working hours. Apart from his dissatisfaction, the evidence suggested Mr McCutchan wanted to transit from a largely casual job with minimum hours suited for someone studying, to a job where he could obtain more hours and look to live independently. This objectively was a natural transition.

[40] The timing of the resignation and a failure to identify at that point in time, any compelling factors that needed RLF's intervention, leads to a finding that Mr McCutchan was not constructively dismissed.

[41] I do acknowledge that the issues Mr McCutchan raised during his employment were reasonably significant from his perspective but I am satisfied that they were adequately addressed at the 21 November meeting and Isabella Ru had earlier, made herself available to consider ongoing concerns.

Unjustified disadvantage

[42] In the alternative, Mr McCutchan has largely suggested the same events that gave rise to his need to resign, amount to an unjustified disadvantage. RLF addressed this claim by suggesting no disadvantage claim was raised within 90 days of a specific event occurring.

[43] As I have found RLF did adequately address Mr McCutchan's concerns as they arose by engaging in constructive dialogue with him and did so in an appropriate fashion, albeit not

to Mr McCutchan's satisfaction, I find there is no compelling basis for the disadvantage claim regardless of its timeliness.

Good faith

[44] Given my findings above, Mr McCutchan has not established that RLF breached good faith obligations owed. In particular, I find that Mr McCutchan was not misled about his hours of work as apart from the restrictive provisions of his employment agreement, there were explained and legitimate reasons why he was not allocated additional hours of work.

[45] For completeness, I have not found Mr McCutchan conclusively identified or established, that a "toxic" work environment existed but I do understand he was uncomfortable at times with the way he was trained and supervised. Likewise, if Mr McCutchan had been clearer of his preferred learning style at the outset of his employment and why this was the case, a different outcome may have been achieved.

[46] I note that evidence suggests that Mr McCutchan struggled with taking criticism. I can only put this down to Mr McCutchan's age and relative inexperience. I was however, impressed by Mr McCutchan in giving evidence, that he has an insight on this and is working on how he can in future, best cope in demanding working environments.

Outcome

[47] Having not obtained a finding of an unjustified dismissal and/or unjustified disadvantage Ryder McCutchan is unsuccessful in his personal grievances and is not entitled to consideration of any specific remedies.

A recommendation

[48] This investigation has identified and counsel for R L Foody Limited accepted, that the individual employment agreement pertaining to Mr McCutchan (and others) does not comply with s 67D Employment Relations Act as cl 12.2 permissively requires the worker to be available for "all hours specified by the Employer". While cl 12.4 appears to also provide that the worker can refuse to accept additional hours – the two clauses are not complimentary.

[49] Further, the term “usual hours of work” is imprecise or unclear in its intent and I recommend it should be changed to “minimum” or “guaranteed hours of work”.

[50] As a result, pursuant to s 123(1)(ca) of the Employment Relations Act 2000 the Authority issues a recommendation that the individual employment agreements used by R L Foody Limited be amended to remove reference to “usual hours of work” as an imprecise term and replace with a suitably precise term and that any reference to a worker making themselves available for all hours of work be confined to agreed or guaranteed hour of work.

Costs

[51] Costs are reserved.

[52] If the parties are unable to resolve costs, and an Authority determination on costs is needed, R L Foody Limited may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Ryder McCutchan will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[53] The parties can expect the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁴

David G Beck
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1