

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 298
3125454

BETWEEN JUYEON OH
 Applicant

AND SSEONZ LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Daniel Kim for the Applicant
 Stella Seo for the Respondent

Investigation Meeting: 18 May 2022 at Auckland

Further Information: 22 May 2022 from the Respondent
 3 June 2022 from the Applicant

Date of Determination: 7 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Oh was employed by Sseonz Limited (the Respondent) to work in its new Japanese restaurant, Ichigo Ichie Japanese Kitchen and Sake Bar in Rothesay Bay Auckland (“*the restaurant*”). The restaurant had only recently opened in March 2020.

[2] Ms Oh did an unpaid two hour work trial on 25 July 2020. She was successful so started work as a casual part-time employee for the Respondent on 29 July 2020. Ms Oh worked for seven days in total from 29 July to 8 August 2020 before she was dismissed without notice.

[3] Ms Oh claimed she had been unjustifiably dismissed. She sought an award of distress compensation and lost wages to compensate her for not being paid the wage subsidy during the COVID-19 lockdown.

[4] Ms Oh sought payment for the two hour work trial she did for the Respondent, along with four weeks' wages for the lack of notice of her dismissal.

[5] The Respondent told the Authority it was in serious financial difficulties so it had no choice but to end Ms Oh's employment because it could not afford to pay her due to Covid-19 related issues.

Authority's investigation

[6] The Authority conducted an in-person investigation meeting in Auckland. The Authority was assisted by an interpreter.

[7] Ms Oh attended the investigation meeting by Zoom because she was back living in Korea. Ms Oh's representative was a friend who attended the investigation meeting in person on her behalf.

[8] The Authority heard evidence from the parties and their witnesses. The parties were also given an opportunity after the investigation meeting to provide the Authority with specific information about Ms Oh's actual days and hours of work, and earnings, while employed by the Respondent.

[9] That additional information established that Ms Oh had worked a total of 35.75 hours across the following seven days; 29 and 31 July and 1, 5, 6, 7 and 8 August 2020.

Issues

[10] The following issues had to be determined by the Authority:

- (a) Was Ms Oh owed wage arrears for her two hour work trial?
- (b) Was Ms Oh's dismissal justified?
- (c) If not, what remedies should she be awarded?

Background

[11] Ms Oh initially started off working for the Respondent as a casual employee at the end of July 2020. At the same time Ms Oh began working for the Respondent she was also working part time at a local café and she was continuing to seek full time work.

[12] On 31 July 2020, after a couple of days working for the Respondent, Ms Oh resigned because she had been offered full time work by the café she was doing part time work for. Ms Oh preferred to have one full time job instead of doing casual/part time work for two different employers.

[13] Ms Oh gave Ms Seo, the sole director and shareholder of the Respondent, two weeks' notice of her resignation and explained that she had been offered full time work. Ms Seo asked Ms Oh to reconsider her decision but Ms Oh confirmed that she still wanted to resign because she wanted full time work.

[14] On 3 August 2020 Ms Oh received a phone call from a friend of Ms Seo's who asked her if the Respondent gave her full time work, then would she then agree to withdraw her resignation? Ms Oh agreed to that so entered into a text message exchange with Ms Seo to confirm that she accepted the offer of full time work for the Respondent, so would withdraw her resignation.

[15] Ms Oh's acceptance of the offer of full time work from the Respondent meant she advised her other café employer that she would not be taking up its offer of full time work. She also resigned from continuing to work casually or on a part time basis for that café.

[16] When Auckland went into a level 3 COVID lockdown on 12 August 2020 Ms Oh was not able to attend work, so the Respondent did not pay her anything. She did not receive the Government wage subsidy. Ms Oh's income was just stopped without discussion or consultation. When Ms Oh raised her concerns about that with the Respondent she was dismissed without notice.

[17] Ms Oh told the Authority that when she spoke to Ms Seo about being paid she (Ms Oh) was told that because the Respondent was operating a new restaurant business it had to wait to see if it was eligible for the wage subsidy, because it needed to prove a 40 percent reduction in revenue. It therefore was unable to pay Ms Oh anything.

[18] Ms Oh said she explained to Ms Seo that she did not have any money so was not able to support herself. Ms Seo told Ms Oh to obtain a wage subsidy via the café she had been working at.

[19] There is a dispute between the parties about what if any days the restaurant was open during the level 2 and level 3 COVID lockdowns and about whether or not it operated a takeaway menu during COVID restrictions.

[20] The Authority accepted Ms Seo's evidence that because it was a very new and high end Japanese restaurant, it was not suitable for takeaways, and clients were put off dining in due to COVID restrictions. The lockdown and COVID restrictions therefore had a devastating impact on the Respondent's business.

Is Ms Oh owed wage arrears for her two hour work trial?

[21] Ms Seo in the Statement in Reply agreed that there had been a two hour work trial before Ms Oh started her casual employment on 29 July 2020. There is no evidence that Ms Oh was paid for that work. Nor was there evidence Ms Oh had agreed to work for the Respondent for free.

[22] The Respondent is ordered to pay Ms Oh \$37.80 (being two hours x \$18.90 per hour) plus \$3.02 (being 8% annual holiday pay on that wage arrears) for the hours she worked during her work trial, which she has not been paid for.

Was Ms Oh's dismissal justified?

Justification test

[23] Justification of Ms Oh's dismissal is to be assessed in light of the justification test in s 103A(2) of the Employment Relations Act 2000 (the Act). Section 103A(3) of the Act required the Authority to objectively assess whether the Respondent's actions, and how it acted, were what a fair and reasonable employer could have done at the time it dismissed Ms Oh.

[24] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. Failure to do so may fundamentally undermine an employer's ability to establish justification of a dismissal or action.

Substantive justification

[25] Ms Seo said she did not apply for a wage subsidy for Ms Oh because they knew the Respondent could not afford to continue employing Ms Oh. Ms Seo said she was informed by the Ministry of Social Development that the wage subsidy was only for staff who would continue to be employed, so the Respondent did not think Ms Oh was eligible for it.

[26] Ms Seo said since the Auckland lockdown the restaurant's sales were down by 85 percent. Six days of that involved sales of less than \$200 total and on four of those days the Respondent had no sales. Ms Seo said that Ms Oh's role became redundant as a result of this because there was no work for her to do.

[27] The Respondent did not have enough business to be able to continue to employ Ms Oh. It could not afford to pay her during lockdown when she was not working. There were no other employees who could have been made redundant because it was a family business. The workers consisted of Ms Seo and her mother plus two chefs, one of whom unexpectedly left their employment during the Auckland Level 3 COVID lockdown.

[28] The Authority was satisfied that the Respondent had a good reason for disestablishing Ms Oh's position, so her dismissal was substantively justified.

Good faith

[29] The way the Respondent ended Ms Oh's employment was a breach of its good faith obligations in s 4(1A) of the Act. It failed to provide her with relevant information or an opportunity to comment on it before she was dismissed, in breach of s 4(1A)(c)(i) and (ii) of the Act.

Procedural fairness

[30] Ms Oh's redundancy dismissal was undertaken in a procedurally unfair manner. The Respondent failed to comply with any of the four minimum procedural fairness tests in s 103A(3) of the Act.

[31] However, this is one of those cases in which a fair and proper process would not have made any difference. The newness of the restaurant, the Auckland lockdowns and other COVID related restrictions, the resignation of a chef who was needed to run the restaurant and the fact she was the only non-family member working (apart from one chef) all created a perfect storm that meant Ms Oh's redundancy dismissal was inevitable.

Finding

[32] The Authority finds that the Respondent's dismissal of Ms Oh was substantively justified but procedurally unjustified. That means it had good reason for ending her employment but it did so in a way that was unfair to her.

What remedies should Ms Oh be awarded?*Notice pay*

[33] In the absence of a notice clause in an employment agreement, Ms Oh was entitled to 'reasonable notice'. Because Ms Oh had only worked for the Respondent for seven days, the Authority considered one week's notice was reasonable in the circumstances.

Lost remuneration

[34] Because her dismissal was substantively justified Ms Oh was not entitled to an award of lost remuneration. Even if the Respondent had followed a fair and proper process it was inevitable that Ms Oh would be dismissed because her position was clearly redundant. There was no work for her to do and no funds to pay her wages.

Distress compensation

[35] Ms Oh was upset about her redundancy. It put her under considerable stress and uncertainty because she struggled to support herself without any income.

[36] The Respondent is ordered to pay Ms Oh \$5,000 distress compensation under s 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her procedurally unjustified dismissal.

Contribution

[37] Ms Oh's dismissal arose as a result of the COVID related issues. She did not contribute to the situation that resulted in her dismissal, so her remedies are not to be reduced under s 124 of the Act.

What if any costs should be awarded?

[38] Because Ms Oh was represented by a friend she did not incur legal costs. However, as the successful party, Ms Oh is entitled to be reimbursed \$71.56 for her filing fee.

Outcome

[39] Within 28 days of the date of this determination, the Respondent is ordered to pay Ms Oh \$5,773.88 consisting of:

- (a) \$37.80 wages for the two hours work trial she did;

- (b) \$3.02 holiday pay on the wage arrears she is owed for the work trial;
- (c) \$661.50 pay in lieu of notice;
- (d) \$5,000 distress compensation;
- (e) \$71.56 filing fee.

Rachel Larmer
Member of the Employment Relations Authority