

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 535  
3271100

BETWEEN                      GUIO ROSANTINA  
   Applicant  
  
AND                                HOSPITALITY PARTNERS  
   LIMITED  
   Respondent

Member of Authority:        David G Beck  
  
Representatives:              Kirk Edgeler, advocate for the Applicant  
   No appearance for the Respondent,  
  
Investigation Meeting:        18 July 2024 in Timaru  
  
Submissions Received:        18 July 2024 from the Applicant and further information on  
   31 July 2024  
   None from the Respondent  
  
Date of Determination:        6 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Guio Rosantina was employed by Hospitality Partners Limited T/A Subway Temuka, as a ‘sandwich artist’ from 23 March 2023 until his employment ended in disputed circumstances on 13 July 2023.

[2]     After the alleged dismissal Mr Rosantina who at the time was a school student, sought help from Mr Edgeler a family friend, who contacted the employer party through an early resolution facilitator of the mediation service.

[3] The mediation service alerted Hospitality Partner's Limited to Mr Rosantina's concerns on 17 July 2023 and the parties attended a mediation on 2 November 2023. This did not resolve matters and an application was filed in the Authority by Mr Rosantina on 22 December 2023 alleging the employment had ended in an unfair manner and during the employment Mr Rosantina had been unfairly treated in relation to the handling of a request for leave and pressure to make himself available for work while he was unwell.

[4] Contact with the respondent party's sole director and shareholder, Sukhveer Kour, has been sporadic. Ms Kour initially acknowledged the need to file a statement in reply, was then provided with an extension due to health issues but did not provide such. By mid-March 2024, Ms Kour said she was still indisposed but agreed that a directions conference could proceed without her. This led to an Authority notice of direction being issued on 22 March 2024 timetabling exchanges of an amended statement of problem and statement in reply evidence with an investigation meeting being set down for 18 July 2024.

[5] Mr Rosantina duly filed an amended statement of problem on 3 April 2024 with additional information but nothing further was provided by Ms Kour on behalf of Hospitality Partners Limited. I am satisfied however, that Hospitality Partners Limited have been served both the amended and original statement of problem and communication evidences they were aware of the investigation meeting timing and venue.

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

[6] Mr Rosantina attended the investigation meeting, supported by Mr Edgeler. Unfortunately, Ms Kour did not attend so I am not able to hear her perspective of the dispute and must decide this employment relationship problem based on available documentation that was largely copies of text exchanges and oral evidence given by Mr Rosantina.

[7] 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

[8] The broad issues to be decided are:

- (a) In all of the circumstances, was Mr Rosantina the subject of unjustified actions and/or was he unjustifiably dismissed?
- (b) If an unjustified dismissal or unjustified actions are found to have occurred what, if any, remedies should Mr Rosantina be awarded.
- (c) If Mr Rosantina is successful in all or any elements of his personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?
- (d) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[9] At the outset of the employment relationship, Mr Rosantina understood the basis of his employment was casual. He recalled being interviewed by Ms Kour and being told they were short staffed and needed people to work evenings. Mr Rosantina was still at school so being potentially allocated weekday shifts between 4:30 pm to 8:30 pm suited him. The individual employment agreement I was provided (unsigned) belonging to Mr Rosantina had the following hours of work provision:

- 5.1 The parties agree that because the Employee is being employed on as required basis, the Employee has no fixed hours of work, nor any minimum number of hours of work.
- 5.2 The hour of work and days to be worked will be as agreed between the Employer and Employee from time to time.
- 5.3 The Employee shall take all reasonable steps to advise the Employer of their availability when required, however, the Employee is able to decline work offered by the Employer.

[10] Mr Rosantina says he had no fixed days of work and would plug gaps in the roster when he was available (which was evenings during the week) and his weekly hours

fluctuated between 3 – 21.75 hours. No wage and time records were provided but Mr Rosantina's wage slips showed between 22 March 2023 and 11 July 2023 he worked a total of 129.65 hours over 16 weeks (an average of 8.10 hours per week) with only one week where no hours were allocated. Mr Rosantina says he was not required to fill out a time sheet but would get paid for fixed hours despite sometimes when busy the shop and clean up duties going till around 9 pm.

[11] Mr Rosantina described this engagement as his first real job and that he received training in Subway operating practices; he was responsible for cash handling and at times, solely responsible for closing the shop at the end of the day. While working at the Temuka Subway, Mr Rosantina reported to Ms Kour's store manager (Sylvia) who worked mornings. Mr Rosantina had little contact with Ms Kour who he says did not work in the business.

[12] Despite the employment being casual and the employment agreement provision cited above (cl 5.3), allowing an employee to decline work offered, a problem arose when Mr Rosantina requested time off the roster to attend a forthcoming school camp from 5-10 July. Mr Rosantina had indicated he would not be available for four days and says he was told this was not possible.

[13] As a result of concerns about being pushed to work when needed, Mr Rosantina signalled he wanted to resign on 15 June, in a text to Ms Kour saying he would work out a notice period up to 29 June. However, Mr Rosantina changed his mind and messaged Ms Kour on 26 June asking if he could keep his job and Ms Kour responded, "That's ok No Worries" and "yes" to a request whether he could stay.

[14] However, Ms Kour then apparently discovered that Sylvia had that day, interviewed another worker, and offered them a job. To further confuse matters on 26 June, Mr Rosantina felt unwell at school and in a text exchange with Ms Kour at around 4:15 pm he indicated his sister had suggested he not go to work unwell. Ms Kour responded with "M sorry You don't work for your sister" and then questioned whether Mr Rosantina was sick enough to be in bed all day and then said, "You know the process of asking for cover in the group chat." When she had ascertained Mr Rosantina was not going to work that day, Ms

Kour then later on 26 June, texted: “Regarding your resignation I am sorry Sylvia has already interviewed another girl. So unfortunately, we can not keep you. Sorry.”

[15] Mr Rosantina then asked by response text if Ms Kour was sacking him and Ms Kour denied this referring to his earlier resignation. Mr Rosantina then reminded Ms Kour that she had accepted it was ok for him to come back to work and Ms Kour referred to not being aware that “Sylvia had called other person” and then she directed Mr Rosantina: “If you any questions please contact her” and “Also if you want to stay you can let her know”. Mr Rosantina duly texted Sylvia indicating he was now confused but available for work. Sylvia responded with she would try to fit him in but “can’t guarantee anything sorry” and then confirmed she was “not sure” if he had lost his job.

[16] After 26 June Mr Rosantina was not offered further work. On 4 July two developments occurred. First, Ms Kour texted him asking if he was not continuing work would he return his uniform. Mr Rosantina responded asking if she was confirming his termination. Then in an email of 4 July Ms Kour invited him to a meeting on 13 July, following his school trip that she acknowledged he had requested time off work for. The purpose of the meeting as described by Ms Kour, was ostensibly to “discuss any concerns” Mr Rosantina may have but it also discursively recounted what had led up to Sylvia offering work to another employee and Ms Kour expressed concerns that despite being absent unwell Mr Rosantina had attended his school ball on 30 June that Ms Kour cryptically indicated “which will be referred to as a different issue altogether”. Ms Kour then suggested Sylvia had said despite hiring another worker, he could be kept on as a casual but they had not heard from him.

[17] Ms Kour ended her email referencing her proposed meeting as “to discuss your concerns regarding your employment and what options the company can offer you.” Ms Kour confirmed Sylvia would attend and Mr Rosantina was welcome to bring a support person.

[18] I was provided rosters for the weeks beginning 4 July and then 11 July. Mr Rosantina was not provided any hours of work. The 11 July roster had a new worker added to it.

[19] Mr Rosantina did not respond to Ms Kour's 4 July email as he considered his job had ended and he claims he was dismissed and replaced by another worker.

### **Assessment**

[20] The Act provides no definition of 'casual employment' but useful guidance on determining what is a genuine casual relationship is found in the Court decision *Jinkinson v Oceania Gold (NZ) Ltd*<sup>1</sup> that identified the following relevant factors:

- (i) The number of hours worked each week.
- (ii) Whether work is allocated in advance by a roster.
- (iii) Whether there is a regular pattern of work.
- (iv) Whether there is a mutual expectation of continuity of employment.
- (v) Whether the employer requires notice before an employee is absent or on leave.
- (vi) Whether the employee works to consistent starting and finish times.

[21] Looking at it broadly, it would appear that Hospitality Partners Limited, in operating a fast-food franchise, had set hours of opening but fluctuating demand (busy periods). In setting staffing levels, they could have simply allocated rostered part-time hours but chose to use casuals to give them flexibility to reduce staffing costs during less busy periods. I am however restricted in gaining any perspective of their staffing situation as Ms Kour did not participate in proceedings and all I have are the employment agreement and a selection of rosters as well as the ability to assess Mr Rosantina's hours worked albeit during a brief period of employment.

[22] In applying the factors identified above in *Jinkinson* leads by a close margin, to an assessment that the work was not necessarily casual and had more features of part-time work. Hours did fluctuate but tended to be for set regular afternoon/evenings; work was set by an advance roster rather than Mr Rosantina occasionally being brought in to replace an

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<sup>1</sup> *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

absent worker; there was a requirement to give advance notice if not available and some evidence to show that the employer had control over the timing of leave taking. Also, while the employment agreement was explicit that Mr Rosantina could turn work down, the responses over his leave request and raising issues of what he was doing outside of work, point to a different expectation more akin to a part-time position with fluctuating hours. The only major factor that pointed to casual was the employer being unable to guarantee a fixed number of hours each week. In a sense this was a ‘zero hours’ guaranteed agreement and the way it operated was one way – Mr Rosantina was expected to make himself available when needed.

[23] I find overall that the engagement of Mr Rosantina as casual did not accurately describe the real nature of the employment relationship under s6 of the Act.<sup>2</sup> The relationship was better described as permanent part-time and the employment agreement in the way it was operated should have had an agreed set floor of guaranteed hours or an availability provision.

### **Was Mr Rosantina dismissed?**

[24] The leading definition of “dismissal” is “termination of employment at the initiative of the employer,”<sup>3</sup> whilst such must flow from an unequivocal act, this can include a “sending away” that is also considered an element of a constructive dismissal.<sup>4</sup>

[25] In assessing the situation and perception of Mr Rosantina that he was dismissed, a useful approach described in *Cornish Trucks & Van Ltd v Gildenhuis*, that is:

The test is an objective one; was it reasonable for somebody in Mr Gildenhuis’ position to have considered that his or her employment had been terminated?<sup>5</sup>

[26] The question that follows in these narrow circumstances is - was the decision of Hospitality Partners Limited to engage a new casual employee after they had affirmed Mr

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<sup>2</sup> An approach taken in *Jinkinson* above note 1, with Couch J indicating that an assessment of employment status (whether ‘casual’ or not) needs to examine the real nature of the relationship under s 6 Employment Relations Act 2000 with the parties’ description of the relationship in an employment agreement not being determinative.

<sup>3</sup> *Wellington Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Assocs Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 (AC) at 103.

<sup>4</sup> *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZILR 154, (1989) ERNZ Sel Cas 247 (CA).

<sup>5</sup> *Cornish Trucks & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45].

Rosantina's employment as ongoing, an unequivocal act bringing the employment to an end?

[27] From the evidence I have heard, I am satisfied that despite engaging an additional employee, Hospitality Partners Limited did not terminate Mr Rosantina's employment and Ms Kour was willing to engage with Mr Rosantina to discuss his concerns and presumptively explore what hours could be made available on an ongoing basis. Up to this point in time (4 July) Mr Rosantina was still notionally employed and Hospitality Partners Limited and Ms Kour were willing to engage. In contrast, Mr Rosantina treated his employment as at an end.

[28] In all the circumstances, I do not find Mr Rosantina was unjustifiably dismissed he resigned too early without giving Hospitality Partners sufficient time to rectify his concerns.

### **Unjustified disadvantage?**

[29] While I have not found that Mr Rosantina was dismissed, I do need to consider whether Hospitality Partners Limited's actions were ones a fair and reasonable employer could have engaged in, in all the circumstances. In this respect they were not. Ms Kour failed to communicate with Mr Rosantina in a timely and reasonable manner; the provision of his employment agreement allowing him to turn down work was ignored and undue pressure was placed upon Mr Rosantina to perform the employment agreement in a manner not envisaged by its terms or casual 'label.' Ms Kour failing to intervene in a decision to employ an additional casual employee and its obvious impact upon Mr Rosantina's job security and ability to earn was negligent of his interests. This is also set against the background of Mr Rosantina being young and avowedly vulnerable. The nature of the 'work bargain' changed unilaterally over time and not in Mr Rosantina's favour.

### **Finding**

[30] In all the circumstances I find Mr Rosantina has made out a disadvantage claim in that his former employer's actions caused him detriment when he was employed and he is entitled to consideration of compensatory remedies.

## **Remedies**

*Compensation for distress, hurt and humiliation.*

[31] Mr Rosantina impressed with evidence that this situation significantly dented his confidence and trust in employers that was made worse by it being a formative experience. He described a lack of agency in being able to resolve matters with Ms Kour and felt her communication was intimidating and not constructive.

## **Finding**

[32] Considering the evidence proffered and awards made by the Authority and Court in similar circumstances and surveying cases I consider Mr Rosantina's evidence warrants modest compensation of \$3,000 under s 123(1)(c)(i) of the Act.<sup>6</sup>

## **Contribution**

[33] Section 124 of the Act states that I must consider the extent to what, if any, Mr Rosantina's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised in *Maddigan v Director General of Conservation*<sup>7</sup>.

[34] I find that Mr Rosantina in the circumstances, given his youth and inexperience, adopted an objectively reasonable position in thinking he had been dismissed even though I have not found that to be the case. However, apart from a failure to engage at the ending of the employment relationship I have not found any factors that could lead to a conclusion he contributed to the way in which his employment was established.

## **Finding**

[35] This warrants no reduction in Mr Rosantina's compensatory remedy.

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<sup>6</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

<sup>7</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## **Costs**

[36] As Mr Rosantina was supported by a family friend no costs issues arise but I am prepared to award Mr Rosantina reimbursement of his Authority filing fee.

## **Orders**

[37] I have found that Guio Rosantina was unjustifiably disadvantaged by the actions of Hospitality Partners Limited. As a result, Hospitality Partners Limited must pay Guio Rosantina the sums below:

- i. \$3,000 compensation pursuant to s 123(1)(c)(i) of the Act; and
- ii. A sum of \$71.55 as reimbursement of the Employment Relations Authority application filing fee.

David G Beck  
Member of the Employment Relations Authority