

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 93
3223879

BETWEEN

RAJESH VERMA
Applicant

AND

MJ EMPIRES LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Kylie Hudson, counsel for the applicant
No appearance for the respondent

Investigation Meeting: 20 November 2023 in Auckland

Submissions and information received: At the investigation meeting from the applicant
None for the respondent

Determination: 20 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rajesh Verma commenced employment with MJ Empires Limited (MJ Empires) in August 2022, which traded as Tarka restaurant in Mission Bay, Auckland. He held the position of Head Chef. He says his employment came to an abrupt end in October 2022 when MJ Empires told him not to come back to work the next day. His employment agreement contained a provision for a trial period, although MJ Empires did not purport to rely on it in terminating the employment. Mr Verma says he was unjustifiably dismissed and seeks personal grievance remedies. He also seeks payment in lieu of notice, arrears of wages and holiday pay.

The Authority's process

[2] The statement of problem was served at MJ Empires' registered office in April 2023. No statement in reply was lodged.

[3] A copy of the Authority's written directions and the notice of investigation meeting were served at MJ Empires' registered office in June 2023.

[4] The Authority sent a reminder email message to the parties on 17 November 2023 (shortly prior to the investigation meeting), including to MJ Empires' director and shareholder Jagjit Singh's email address, along with a further copy of the notice of investigation meeting. No response was received.

[5] MJ Empires did not attend the investigation meeting, and on being satisfied MJ Empires was aware of the date and time of the meeting, and with no good cause shown for its non-attendance, the Authority proceeded in MJ Empires' absence.

[6] Mr Verma answered questions under affirmation at the investigation meeting and his counsel gave submissions. I have carefully considered the available documents and assessed Mr Verma's evidence given during the investigation meeting.

[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 issues and make orders but I do not record all evidence or submissions.

The issues

[8] The issues requiring investigation and determination are whether Mr Verma is entitled to bring a personal grievance for unjustified dismissal and if he can, whether it is established and if he is entitled to remedies. There are further issues of whether he is owed payment in lieu of notice, arrears of wages, holiday pay and interest.

Background

Employment agreement and start of employment

[9] Mr Verma has provided a copy of a signed employment agreement between the parties. It is signed by Mr Singh dated 16 August 2022. Mr Verma signed the agreement on 17 August 2022. It records Mr Verma was to be employed as head chef, his hours were a minimum of 48 hours per week, and he would be paid an annual salary including free staff accommodation. Employment was to commence on 22 August 2022.

[10] The agreement included a 90-day trial period provision which reads as follows:¹

Trial period

The first 90 days of employment will be a trial period, starting from the first day of work.

During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.

During the trial period, the employer's normal notice period doesn't apply. Instead, the employee may end this agreement by giving two weeks' notice before the trial period ends. **The Employer may end this agreement by giving one week notice before the trial period ends. The employer might decide to pay the employee not to work.** For serious misconduct, the employee may be dismissed without notice...If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, e.g., discrimination, harassment or unjustified disadvantage. During the trial period, the employer and employee must treat each other in good faith.

[11] The agreement also had a provision entitled "Taking money from pay" which said the employer may take an agreed amount from an employee's pay if the employee requested it or agreed to it in writing.

[12] Mr Verma moved into the staff accommodation (the flat) and started work at the restaurant on 22 August 2022 as agreed.

[13] Mr Verma says he was not paid wages for the week 10-16 October 2022 and is owed \$2,022.25 in gross wages. He says while the restaurant was closed that week, it was open for workers and he performed work that week.

Termination of employment

[14] On 30 October 2022, Mr Singh called Mr Verma into the restaurant kitchen and advised he was not to return to work the next day. He says the only reason Mr Singh gave for this was that the restaurant was not doing well. Nothing was said about his performance or abilities. He was told he had to empty the flat by the next day.

[15] Mr Verma says Mr Singh advised he would be paid two weeks of outstanding wages owed, a further two weeks wages in lieu of notice and his holiday pay. Mr Verma says he was shocked and upset and after that day tried to call and text Mr Singh but

¹ Emphasis added.

received no response. His evidence was that he was never given any opportunity to discuss Mr Singh's concerns and instead was dismissed with no reason.

Subsequent email correspondence

[16] On 4 November 2022 Mr Verma emailed Mr Singh stating he was very shocked that he was given no notice regarding the termination of his employment, and that he was extremely disappointed with the way he had been treated. Mr Verma said Mr Singh had informed him he would be paid for another two weeks from 31 October to 13 November 2022. Mr Verma also referred to Mr Singh having promised to pay him "missed wages" for the weeks 10-16 October 2022 and 24-30 October 2022. He said he had not received any wages as promised.

[17] Mr Singh replied on 5 November 2022 referring to the 30 October 2022 meeting and the two men having discussed that the restaurant was running at a loss. The email stated the reason for Mr Verma's termination was "job performance (not knowing or no knowledge of all type of middle eastern food) under the new concept of the restaurant". The email stated termination was with "proper 2 weeks notice which started from 31st October and ends on 13th November for which you will be paid for not to work on your usual pay day." The email also referred to being "disappointed" in how Mr Verma had treated the company, mentioning other issues it had regarding his performance and conduct.

[18] Mr Singh's email claimed MJ Empires had bought Mr Verma a bed and mattress and apparently attached invoices for their purchase to the email, stating that amount would be deducted from Mr Verma's final wages, along with the cost of cleaning and fixing a broken key lock at the flat.

[19] On or about 8 November 2022, Mr Verma received one weeks' payment (for 48 hours work) and a payslip from MJ Empires for the period of 24 October 2022 to 30 October 2022.

[20] Mr Verma says he has still not been paid the promised two weeks' pay in lieu of notice, nor for the week 10-16 October 2022 or annual holiday pay.

[21] The parties attended mediation in February 2023 however the matter was not resolved.

Whether Mr Verma is prevented from bringing grievance in respect of dismissal

[22] Although MJ Empires did not purport to rely on the trial provision in the parties' employment agreement in dismissing Mr Verma, in my view the effect of the provision does need to be considered.

The law

[23] At the time Mr Verma and MJ Empires entered their employment agreement relevant provisions in the Act regarding trial periods were:

67A When employment agreement may contain provision for trial period for 90 days or less

- (1) An employment agreement containing a trial provision may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by the small-to-medium-sized employer.
- (2) For the purposes of this section and section 67B,—
small-to-medium-sized employer means an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into
trial provision means a written provision in an employment agreement that states, or is to the effect, that—
 - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
 - (b) during that period, the small-to-medium-sized employer may dismiss the employee; and
 - (c) if the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

67B Effect of trial provision under section 67A

- (1) This section applies if a small-to-medium-sized employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
- (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal...

[24] As trial periods restrict what would otherwise be an employee's right to challenge their dismissal as unjustifiable, the requirements must be strictly met.² In saying that, if contractual terms about trial periods were within specified parameters, the relevant sections "did not purport to override the parties' entitlement otherwise in law to conclude the terms of their own bargain".³

² *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

³ *Smith*, above n 1, at [106] and [107].

Finding

[25] Mr Verma does not suggest that the trial provision was not validly entered into, nor is there evidence suggesting that is the case. As such s 67B of the Act sets the statutory bar to bringing a personal grievance for unjustified dismissal, where an effective trial period is in place. However, the section does not apply unless the employer gives “notice” of the termination. The statutory reference to notice is to be interpreted as referring to the notice provisions set by the employment agreement in any particular case. Failure to comply with the contractual terms for notice is deficient notice, and deficient notice does not satisfy the s 67B requirement for notice.

[26] The trial provision in the parties’ employment agreement provided that MJ Empires could give one week’s notice of termination during the trial period or that it “may pay the employee not to work”. Mr Verma did not receive one week’s notice nor did MJ Empires provide payment of wages in lieu of his being required to work out the period of notice and earn wages. As a result of MJ Empires’ failure to give the notice required by the employment agreement, it lost any immunity to a personal grievance proceeding that s 67B could otherwise have given it. The Authority has jurisdiction to investigate and determine his personal grievance claim.

Whether Mr Verma’s dismissal was unjustified

[27] Given my finding I now consider whether Mr Verma’s dismissal was unjustified.

[28] The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A (3), requires that the Authority consider a number of factors, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal.

[29] The Authority accepts Mr Verma’s unchallenged evidence in relation to the circumstances of the dismissal. I find MJ Empires failed to comply with any of the minimum procedural fairness tests in the Act. The manner of the dismissal was abrupt with no practical opportunity for Mr Verma to obtain representation or have any input into the decision. There is no evidence MJ Empires sufficiently investigated its

concerns, in breach of s 103A(3)(a) of the Act. MJ Empires failed to raise its concerns with Mr Verma, in breach of s 103A(3)(b) of the Act. He was not the subject of a performance management process to address any “poor performance” issues. MJ Empires failed to give Mr Verma any opportunity, much less a reasonable opportunity, to respond to its concerns in breach of s 103A(3)(c) of the Act, because the dismissal was unilaterally imposed on him. MJ Empires failed to genuinely consider Mr Verma’s responses to its concerns because he was deprived of any opportunity to respond to them in breach of s 103A(3)(d) of the Act, because they were not put to him to respond to. MJ Empires’ failure to meet any of the minimum procedural fairness tests in s 103A(3) of the Act fundamentally undermined its ability to justify Mr Verma’s dismissal.

[30] I have considered that MJ Empires appears to be a small company with likely little or no human resource support but I find nevertheless that no fair and reasonable employer could have concluded that dismissal was warranted in the circumstances. Good faith considerations were entirely absent in the decision to dismiss.

Finding

[31] A fair and reasonable employer could not have terminated Mr Verma’s employment for poor performance without following a fair and reasonable performance management process. I find Mr Verma was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost wages

[32] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Verma as a result of the grievance. Mr Verma provided evidence that he secured alternative fixed term employment as a chef at another restaurant for the period 21 November 2022 to 5 January 2023. He is seeking three months lost remuneration from 31 October 2022 to 31 January 2023 which I accept on the basis:

- (a) If he had stayed employed by MJ Empires he would have earned \$26,289.24 gross wages for three months work;
- (b) While working for the other restaurant he earned \$7,590 gross;

(c) His lost earnings were \$18,699.24 gross;

(d) Holiday pay lost on \$18,699.24 gross was \$1,495.94 gross.

[33] Subject to any consideration of contribution, MJ Empires is ordered to pay Mr Verma lost wages of \$18,699.24 gross plus holiday pay of \$1,495.94 gross.

Compensation for hurt and humiliation

[34] Mr Verma found the way MJ Empires treated him very unfair and disrespectful. Rather than be given any opportunity to discuss Mr Singh's concerns, he was dismissed with no reason then criticized harshly afterwards by Mr Singh. He says suddenly losing his employment put him under a lot of financial strain and he was very stressed about meeting his daily living costs. In particular, his employment with MJ Empires included accommodation and staff meals, and he had to very quickly find somewhere else to live.

[35] I find Mr Verma was afforded no dignity and he suffered humiliation and injury to feelings as a result of how he was dismissed. Considering the circumstances and awards made by the Authority and Court in similar situations and how MJ Empires effected this dismissal, I consider the evidence warrants compensation of \$15,000 under s 123(1)(c)(i) of the Act.

Contribution

[36] Under the Act I am required to consider whether to reduce remedies where the actions of the employee contributed toward the situation that gave rise to the grievance. None of MJ Empire's allegations about Mr Verma's performance or conduct at the relevant times have been backed up by sworn or affirmed evidence or the documentary evidence. In those circumstances I do not consider Mr Verma's conduct warrants any reduction for contribution under s 124 of the Act.

Other remedies

Unpaid notice in lieu

[37] In his statement of problem Mr Verma sought payment of two weeks' wages as the outstanding amount of his notice period in lieu, but at the investigation meeting he appeared to orally amend that claim to four weeks' wages in lieu of notice under the standard termination notice provision in the employment agreement. I have already found MJ Empires is not entitled to rely on the trial provision for the purposes of the

dismissal grievance, but I am not satisfied by necessary implication the standard notice requirement of four weeks' notice applies.

[38] The Authority is, however, satisfied the two weeks wages Mr Singh agreed to pay Mr Verma on termination is payable. An award of payment for this entitlement is in addition to reimbursement for lost wages awarded pursuant to s123(1)(b) of the Act. The obligation to the notice in lieu payment crystallised "at the time of notice of dismissal in circumstances where the company elected, for its own reasons...to summarily terminate employment".⁴ Mr Verma is entitled to \$4,044.50 gross being two weeks wages. MJ Empires could not lawfully deduct that amount under the employment agreement in an attempt to recover amounts from Mr Verma.

Unpaid wages

[39] The Authority is satisfied Mr Verma is owed arrears of wages for the week 10-16 October 2022, totalling \$2,022.25 gross. His evidence was that he performed work for MJ Empires while the restaurant was closed that week. Even if he had not worked, MJ Empires was still obliged to pay him his contractual hours as he was ready, willing and able to work. MJ Empires also could not lawfully deduct that amount in an attempt to recover amounts from Mr Verma.

Annual holiday pay

[40] Mr Verma's total gross earnings during his employment were \$20,222.50, 8% of which is \$1,617.80. The Authority is satisfied Mr Verma is also owed that 8% as annual holiday pay which was due to be paid on termination, but was not. MJ Empires could not lawfully deduct this holiday pay to recover amounts from Mr Verma.

Interest

[41] Mr Verma is entitled to an award of interest which must be calculated using the civil debt interest calculator.⁵ Interest should be calculated for the period from 5 November 2022 (being on or about the date Mr Verma's final pay became overdue) until the date MJ Empires makes full payment.

⁴ *Atwill v Tanners Timberworld Ltd* [1994]1 ERNZ 321 at 324-325.

⁵ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Outcome

[42] The Authority orders as follows:

Within 21 days of the date of this determination MJ Empires Limited is to pay Rajesh Verma the following:

- (a) \$15,000 under s 123(1)(c)(i) of the Act;
- (b) \$18,699.24 gross lost wages under s 123(1)(b) of the Act;
- (c) \$1,495.94 gross annual holiday pay under s 123(1)(b) of the Act;
- (d) \$4,044.50 (two weeks contractual notice);
- (e) \$2,022.25 wage arrears (one week's wages for 10-16 October 2022) plus interest;
- (f) \$1,617.80 annual holiday pay plus interest.

Costs

[43] Costs are at the discretion of the Authority and here Mr Verma was successful in his claims. The investigation meeting took half a day at which he was represented. In the circumstances, I award Mr Verma a contribution to costs in the amount of \$2,250. He is also entitled to recover the Authority application fee.

[44] Accordingly, within 21 days of the date of this determination MJ Empires Limited must also pay Rajesh Verma \$2,250 in costs, and \$71.55 being the application fee.

Sarah Blick
Member of the Employment Relations Authority