**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

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

[2020] NZERA 152
3076092

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| | BETWEEN | BROOK CHURCHOUSE<br>Applicant |
| | AND | BACCHUS GENUS LIMITED<br>Respondent |

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| Member of Authority: | Eleanor Robinson |
| Representatives: | Jenifer Silva, Advocate for the Applicant<br>Tom Gethin, Representing the Respondent |
| Investigation Meeting: | 15 April 2020 by telephone |
| Determination: | 16 April 2020 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Brook Churchouse, claims that he was unjustifiably dismissed by the Respondent, Bacchus Genus Limited, trading as The Good Home (BGL), on 29 April 2019.

**The Authority's investigation**

[2] 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.

**Issue**

[3] The issue requiring investigation is whether or not Mr Churchouse was unjustifiably dismissed by BGL.

**Background**

[4] The Good Home is a 'gastropub' in Whangaparoa, owned and operated by Mr Tom Gethin as sole Director and Shareholder. It employs approximately 20 employees, of whom approximately 5 are full-time. A number of the part-time employees are college students and

by their nature not long-serving employees, although Mr Gethin said that a number return to work at The Good Home following overseas travel or between study periods.

[5] Mr Churchouse commenced employment at The Good Home on 30 July 2018. He was employed as 'Front of House' in which position his duties included taking customer orders and, once he reached the age of 18, serving behind the bar. Mr Churchouse reported to Mr Gethin.

[6] Mr Churchouse was issued with an individual employment agreement which set out his terms and conditions of employment and in accordance with which he was employed to work a minimum of 20 hours per week between Monday to Friday 8.00 a.m. to 1.00 a.m. on rostered shifts (the Employment Agreement). He was advised of his upcoming shifts by means of a phone App.

[7] Mr Churchouse worked in accordance with the roster on Saturday 27 April 2019. Later that day Mr Churchouse said that he had resigned by going into The Good Home and giving a copy of his written resignation to Mr Gethin in which he provided two weeks' notice advising that his last day of employment would be 12 May 2019.

[8] Mr Churchouse said Mr Gethin had initially responded positively to the news of his resignation. In answer to an enquiry by Mr Gethin as to where he would be working following his resignation, Mr Churchouse said he had replied that he was: "probably just going to some café or barista work somewhere". He said he had not told Mr Gethin where he was going to be working in order to avoid any unpleasantness. Mr Gethin had then wished him the: "best of luck" and given him a hug.

[9] Mr Gethin said that prior to the events which took place on 28 April 2019 he had held a discussion with Mr Churchouse during which, in response to a request by Mr Churchouse for more hours and his being unable to provide them, he had noted that Mr Churchouse might seek additional hours by working elsewhere. He said he had no objection to Mr Churchouse having a second job.

[10] Subsequent to that conversation Mr Gethin said that the owner of a café in the same small retail precinct in close proximity to The Good Home had spoken to him and requested a reference for Mr Churchouse which he had willingly provided.

[11] During the conversation about his resignation on 28 April 2019 Mr Gethin said he had asked Mr Churchouse where he would be working following his resignation and Mr Churchouse had replied that he would moving to a 'new job in the City." Mr Gethin said he had concluded that Mr Churchouse had decided not to take up the job at the nearby cafe.

[12] Following this conversation with Mr Churchouse, Mr Gethin said that the owners of the café had come into The Good Home and spoken to him about Mr Churchouse's move to work at their café. He then concluded that Mr Churchouse had been untruthful when he had told him he was going to 'work in the City'.

[13] Mr Churchouse said that later on Sunday 28 April 2019 he had received a text message from a co-worker informing him that all his shifts for the following week had been allocated to her. As a result he had checked the roster and realised that the shifts previously allocated to him had been removed.

[14] Mr Churchouse said he had texted Mr Gethin to ask why his shifts had been removed to which Mr Gethin had replied that he did not: "…deal with liars".

[15] Mr Gethin said he had felt that Mr Churchouse had deliberately concealed the information relating to his future employment from him and as a result he no longer had any trust in him.

[16] There followed a text message exchange between Mr Churchouse and Mr Gethin in which Mr Gethin had texted:

> Hi. Don't deal with Liars. You said you had a new job in the City. Not true. Don't want to deal with people I can't/don't trust. I don't trust liars. Was happy to wish you well. But end of the day. You're a liar. Don't say 'it was a wee joke'. Do yourself a favour. Don't abuse people stuff or trust.

[17] Mr Churchouse responded by stating that he would come in to work on the following day to which Mr Gethin responded by text message stating what he would do if Mr Churchouse did so: "If you come in I'll sack you on the spot and inform your new employer. Up to you?"

[18] A subsequent meeting between the parties did not resolve the matter.

**Was Mr Churchouse unjustifiably dismissed by BGL?**

[19] Section 4 of the Act provides:

> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; …
>
> (2) The employment relationships are those between—
>
> (a) an employer and an employee employed by the employer: ...

[20] Although Mr Churchouse had provided his resignation to BGL on 28 April 2019, he did so with notice and was therefore still an employee of BGL until that notice period came to an end on 12 May 2019. Until that time I find that the good faith obligations under s 4 of the Act applied.

[21] Mr Churchouse was dismissed from his employment with BGL on 28 April 2019. Justification for dismissal is stated in s 103A of the Act which at sets out the Test of Justification as being:

> ***S103A Test of Justification***
>
> 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> 2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[22] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

*Substantive Justification*

[23] It is not disputed by the parties that there were no formal disciplinary issues or processes held by BGL with Mr Churchouse in respect of any performance concerns. In fact the working relationship between Mr Churchouse and Mr Gethin appears to have been a positive one.

[24] There is no evidence that Mr Churchouse was made aware that his employment would be in jeopardy as a result of any performance concerns. Therefore there is no justification for the dismissal on that basis.

[25] I find that there is a lack of substantive justification for Mr Churchouse's dismissal on 28 April 2019.

*Procedural Justification*

[26] In accordance with s 103A (3) of the Act, BGL was required to carry out a fair investigation and follow a fair procedure into any performance or misconduct concerns it had with Mr Churchouse.

[27] In *Ministry of Maori Development v Travers-Jones* the then Chief Judge Goddard stated in regards to a fair procedure:

> What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.[1]

[28] In this case there is no evidence that Mr Gethin discussed the fact that he considered Mr Churchouse had not been honest with him in respect of his having stated he was going to work' in the City' rather than having accepted alternative employment with an employer situated in close proximity to The Good Home, prior to informing Mr Churchouse that he would be dismissed if he attended for work on Monday 29 April 2019.

[29] A fair and reasonable employer acts in accordance with the duty of good faith as set out in s4 of the Act. Accordingly I find that a fair and reasonable employer would have discussed his concern with Mr Churchouse and providing him with an opportunity to provide an explanation prior to dismissing him.

[30] In all the circumstances I find that dismissing Mr Churchouse was not a decision a fair and reasonable employer could have taken.

[31] I determine that Mr Churchouse was unjustifiably dismissed by BGL.

**Remedies**

*Lost wages*

[32] Mr Churchouse commenced alternative employment immediately upon the termination of his employment and there is no claim for lost wages.

*Compensation*

[33] Mr Churchouse said he suffered hurt and humiliation following his dismissal by BGL, not just at the loss of his employment without having been able to serve his notice period but also because it was exacerbated by the fact that he lives and works in a small community.

[34] Considering the range of awards in cases of this kind, the relatively short duration of the employment and the circumstances of this case, I consider an award of compensation of $4,000.00 to be appropriate.

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[1] *Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at [30].

*Contribution*

[35] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[36] The duty of good faith as set out in s 4 of the Act is a mutual duty under which both parties are expected to be: 'communicative and responsive".

[37] There was no obligation for Mr Churchouse to inform Mr Gethin of the identity or nature of his new employment since there were no restrictive covenants in the Employment Agreement.

[38] However I accept Mr Gethin's evidence as supported by the wording in the text message exchange, that Mr Churchouse did choose to tell Mr Gethin something about the nature of his new employment, namely that the employment would be 'in the City" rather than at a café close to The Good Home.

[39] I find that this had the effect of undermining Mr Gethin's trust and confidence in Mr Churchouse and was a breach of good faith on the part of Mr Churchouse.

[40] I find contributory fault on the part of Mr Churchouse and reduce the remedies awarded by 30% pursuant to s124 of the Act.

[41] BGL is therefore ordered to pay to Mr Churchouse the sum of $2,800 as compensation following the reduction for compensation.

**Penalty**

[42] Mr Churchouse is seeking a penalty in relation to the non-production of a wages and time record when he requested BGL to produce it.

[43] Pursuant to s 132 of the Act an employer is expected to produce a wages and time record when requested by the employee to do so in order that the employee may show that the failure: prejudiced the employee's ability to bring an accurate claim under s 131 of the Act, i.e. in respect of any arrears.

[44] When assessing the level of penalty I have regard to the principles governing the imposition of a penalty. In this case there is no claim for arrears of wages pursuant to s 131 since Mr Churchouse has confirmed that he was paid his full entitlement upon termination of BGL, and therefore the non-production of the wages and time record did not affect any such claim.

[45] However employers are expected to produce wage and time records when requested by an employee to do so, that is a statutory requirement.

[46] I determine that a penalty of $150.00 is appropriate in all the circumstances of this case.

[47] I order that BGL is to pay a penalty of $150.00, to be paid to the MBIE Trust Account.

**Filing Fee**

[48] BGL is also ordered to pay Mr Churchouse the filing fee of $71.56 within 14 days of the date of this Determination.

**Costs**

[49] Mr Churchouse has applied for costs.

[50] Costs are at the discretion of the Authority. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2] that costs are modest.

[51] The investigation was conducted by telephone and lasted approximately half of an investigation meeting day.

[52] Based on the Authority's usual notional tariff based approach[3], and adopting as a starting point the notional daily tariff of $4,500.00, I find that half a day of investigation time equates to $2, 250.00.

[53] Accordingly, BGL is ordered to pay to Mr Churchouse the sum of $2,250.00 as a contribution towards costs.

**Eleanor Robinson**
**Member of the Employment Relations Authority**

[2] [2005] 1 ERNZ 808.
[3] *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10].