

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 737  
3274819

BETWEEN                      ALI GENCER  
   Applicant  
  
AND                              YA HAY LIMITED  
   First Respondent

Member of Authority:            David G Beck  
  
Representatives:                 David Cain, advocate for the Applicant  
   Halit Yilmaz for the Respondent  
  
Investigation Meeting:         17 September 2024 by audio visual link  
  
Submissions Received:         1 November 2024 from the Applicant  
   15 November from the Respondent  
  
Date of Determination:         12 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]         Ali Gencer while on an accredited employer work visa, was employed by Ya Hay Limited (YHL) as a chef, commencing on or around 16 September 2023. YHL traded initially as Kebab Father then Doner Kebab. The employment ended in disputed circumstances in November 2023 after YHL restructured Mr Gencer's role.

[2] Mr Gencer raised a personal grievance with YHL on 14 November 2023, alleging an unjustified dismissal. Mr Gencer claims compensatory remedies including lost wages, minimum entitlements and wage arrears and various penalties.

[3] Halit Yilmaz for YHL disputed the circumstances of the ending of the employment relationship and cited various issues about Mr Gencer's performance in a response to the personal grievance.

[4] When the matter was filed with the Authority on 24 January 2024, Mr Yilmaz did provide a discursive emailed response of 6 March 2024 and then did not respond or participate in exchanges of evidence as directed. However, Mr Yilmaz did provide comment on Mr Gencer's brief of evidence on 27 August 2024 and on 15 November 2024, Mr Yilmaz provided a further statement and he attended the investigation meeting.

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

[5] Mr Gencer and Mr Yilmaz both gave evidence at the investigation meeting by an audio-visual link. The parties provided submissions after the investigation meeting and additional background information.

[6] Pursuant to s 174E 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. I have carefully considered the submissions and documentation received from both parties and refer to them where appropriate and relevant.

### **Issues**

The issues the Authority must determine are:

- (i) Was Mr Gencer unjustifiably dismissed and/or disadvantaged or was the employment relationship ended by reason of a genuine redundancy enacted in a procedurally and substantively fair manner?
- (ii) If Mr Gencer was unjustifiably dismissed, what remedies are appropriate.
- (iii) Was Mr Gencer paid appropriately for all the hours he worked?

- (iv) Whether it is appropriate to impose any penalties against YHL for an alleged failure to disclose wage and time records and for alleged breaches of Mr Gencer's individual employment agreement.
- (v) If any remedies are awarded, should they be reduced under s 124 of the Act if it is found Mr Gencer contributed to the situation giving rise to his personal grievance claims.
- (vi) How costs are to be dealt with.

### **What caused Mr Gencer's employment relationship problem?**

[7] Mr Yilmaz says he engaged Mr Gencer after he responded to an advert he had placed on the internet. Mr Gencer who is a Turkish national and was living in Türkiye at the time, was seeking an overseas position. The 'offer and acceptance' of the job was concluded via email and a chat app. The position was approved by Immigration NZ as an employer sponsored visa of specialised chef. Mr Gencer says he had significant previous experience in the hospitality sector in Türkiye.

[8] The parties signed an individual employment agreement dated 10 August 2023. A schedule to the agreement describes the role as "Turkish Cuisine Chef (Head Chef)." The business trading as "Doner" and located in Christchurch, is described in the agreement as an "Ethnic Turkish food dining and takeaway shop." While the position is described as full-time in the cited schedule, the remuneration and hours provisions are less precise and contradictory. The remuneration is stated as "\$30 to \$35 per hour" and the hours of work in the schedule as:

The guaranteed hours of work for this position are a minimum of 30 hours per week worked Monday to Sunday on a rostered shift basis. It is understood that this is full compensation for all hours worked.

[9] An hours of work provision at part 5 of the employment agreement indicated the employee was to work the hours as per the schedule above but also provided Mr Gencer was:

- To "on occasions be requested by the Employer, or required by workload to work outside of the usual hours of work, on statutory/public holidays or weekends".

- To work “usual hours of work are from Ordinary hours of work” [sic] on a variable basis “set by us in accordance with a roster”.
- To be paid an “ordinary pay rate where an employee works overtime”.
- To take rest and meal breaks as arranged by the employer “so that they do not cause disruption to clients, customers or production”.

[10] The employment agreement also specified a three months’ probationary period in the main part but in the attached schedule this was one week and the notice period was three weeks.

[11] The parties disputed the extent of the hours Mr Gencer actually worked as no wage and time records were kept. Every week in the period inclusive of 30 September 2023 to 13 November 2023, YHL paid Mr Gencer a weekly amount of \$1,003.80. Mr Yilmaz says he did not pay PAYE on Mr Gencer’s wages as the business was struggling financially. Mr Yilmaz says this was a net figure for Mr Gencer working 40 hours per week at \$30 per hour (I note this calculation was inexplicably \$196.20 short of that calculation and Mr Yilmaz at times said Mr Gencer worked 42 hours per week). There were seven payments at the latter amount and a final payment of \$604.71 paid on 28 November 2023.

[12] Mr Gencer arrived in New Zealand on 14 September 2023 and says he commenced work two days later. Mr Yilmaz says this is incorrect and that Mr Gencer started on 19 September. Nothing particular turns on this dispute, except I note Mr Gencer was first paid on 30 September (for his first five days).

[13] Mr Yilmaz says the food business, which was one of two YHL operated in Christchurch, did not operate on a Monday but conceded Mr Gencer worked Tuesday to Sunday. Mr Yilmaz kept no wage and time records but claimed Mr Gencer worked between 40 – 42 hours per week. Daily hours were described by Mr Yilmaz as 10 am to 2pm then 6 pm to 9 or 10 pm (between 42 – 48 hours). Mr Yilmaz did not detail what breaks Mr Gencer took in the span of hours he suggested but says he could and did, take breaks when the business was not busy and he did not need to seek Mr Yilmaz’s approval.

[14] In contrast, Mr Gencer says for the first month he worked seven days a week but then was allowed to take Monday off and he worked on the remaining six days. Mr Gencer claimed he was working up to 84 hours per week in his first week then six weeks at 72 hours per week and 24 hours in his last week at work. In submissions, Mr Gencer claimed a shortfall in wages of \$9,864.69 using \$30 as his hourly rate. Mr Gencer kept no record of his hours of work and had no other evidence to establish his claims.

[15] Evidence from both parties showed the relationship quickly became strained, Mr Yilmaz claimed performance concerns were predominant but provided no documentation to support such allegations. Mr Yilmaz questioned Mr Gencer's experience and skill level and says he had to several times remonstrate with Mr Gencer over food handling/hygiene issues and customer issues. Mr Gencer denied this but he did recall being admonished by Mr Yilmaz over a botched Uber Eats order. Matters were also complicated by the business not initially doing too well. Mr Gencer says he was aware of slow sales in his first month but says with his extensive efforts it was picking up and he says he had doubled turnover after a month. Mr Yilmaz also says there were problems with the business premises lease and he was contemplating selling the business.

[16] Mr Gencer says he was also concerned at the range of menial duties he had to undertake and did not feel they sat well with a head chef role. Mr Gencer said he was promised by Fadime Yilmaz who is the sole director of YHL and is married to Halit Yilmaz, that his pay would increase to \$1,500 per week if he could lift the struggling business. Mr Gencer says his long hours and commitment did assist greatly and new custom started to emerge.

[17] In addition, when Mr Gencer commenced employment, he says he was asked to and did pay for, Mrs Yilmaz's cousin's airfare from Türkiye to New Zealand as Mr Yilmaz was planning to employ him. During his period of employment, Mr Gencer says he helped Mrs Yilmaz's cousin to learn how to run the business but says this was difficult due to language issues.

## **The ending of the employment relationship**

[18] Mr Gencer claimed when he raised an issue about his pay rate being inadequate in early October, Mr Yilmaz got angry and threatened to fire him. Shortly thereafter, Mr Gencer says he received an email on 20 October 2023 ostensibly from Fadime Yilmaz. It indicated in full:

It is with regret that I must inform you of a change in the operational structure of our store, leading to the decision that we will no longer be able to continue our working relationship. As part of the standard protocol, a 3 – week notice period is required.

Your last working day with us will be November 15, 2023, marking the conclusion of the 3-week notice period from the date of this communication.

We sincerely appreciate the effort and dedication you have demonstrated during your time at Doner. Your contributions have been invaluable, and we extend our best wishes for your continued success in your future endeavours.

Thank you once again for your hard work and commitment.

Best regards,

Fadime Yilmaz

Ya Hay Limited

[19] Mr Yilmaz in contrast, says before sending the above letter that he says he assisted his wife in drafting, he discussed a potential sale of the business with Mr Gencer and that he had someone who was interested in taking over the shop lease as the cousin was planning to return to Türkiye. Despite the above letter's content, Mr Yilmaz claimed he told Mr Gencer he could stay until the business was sold.

[20] Mr Yilmaz says he took no legal advice before sending the above letter but says he spoke to the Ministry of Business, Innovation and Employment over the need to give Mr Gencer notice. Despite this, Mr Yilmaz maintained he was not intending to end Mr Gencer's employment.

[21] Unfortunately, matters escalated according to Mr Gencer during his notice period when Mr Gencer disclosed he had consulted a lawyer as he was worried about his visa and he also sought assistance from MBIE's employment services. Mr Gencer says Mr Yilmaz

reacted badly on hearing of these consultations and acted in a threatening manner. After seeking assistance from the police, Mr Gencer says he was told on 6 November not to return to work for the remainder of his notice period (up to 15 November). Mr Yilmaz disputed this version of events.

[22] Mr Gencer through his advocate, raised a personal grievance with YHL in a letter of 14 November 2023. The letter identified procedural shortcomings in the restructuring process that disestablished Mr Gencer's role, stating Mr Gencer believed he had been replaced by another worker (the cousin). Mr Gencer claimed he had been 'sent away' during his notice period and this amounted to an unjustified dismissal. At this point in time, although raising an issue of unspecified wage arrears, no request was made for wage, time, and holidays records.

[23] Mr Yilmaz responded for YHL on 20 November, pointing out Mrs Yilmaz had no interest in or knowledge of Mr Gencer's situation. Mr Yilmaz's response is discursive but in explaining the 'restructuring', Mr Yilmaz claimed he had not revealed the real reasons for his decision as he believed this was confidential. Mr Yilmaz then disclosed he had made the decision predominantly due to his concerns over Mr Gencer's experience as a chef and what he says were other performance issues. Mr Yilmaz in the letter conceded he had dismissed Mr Gencer on 6 November after he had been contacted by the police, which he says destroyed his trust in Mr Gencer. During the investigation, Mr Yilmaz reiterated similar concerns about Mr Gencer as outlined in his letter.

[24] The matter remained unresolved so Mr Gencer made an application to the Authority on 24 January 2024. The Authority directed the parties to mediation on 25 March 2024 but despite two mediations being scheduled, no one from YHL attended.

### **Assessment**

[25] Dealing with the predominant issue, while Mr Yilmaz says Mr Gencer was aware of the trading difficulties YHL was facing and had been alerted to the business being potentially sold, by the time Mr Yilmaz decided to end the employment relationship, there was no proposal put to Mr Gencer that a redundancy was being contemplated. Further, a reading of the response to the personal grievance and the evidence given by Mr Yilmaz strongly establishes the dismissal was not for a reason of redundancy, genuine or otherwise.

[26] I find the dismissal was for an ‘ulterior motive’ in that the personal relationship between Mr Yilmaz and Mr Gencer had significantly deteriorated and at some point, Mr Yilmaz decided to employ the cousin as Mr Gencer’s replacement. While I have carefully considered the context of the breakdown in this relationship, this does not explain the complete absence of basic procedural steps prior to Mr Yilmaz peremptorily bringing the employment relationship to an end.

[27] I overall, find in terms of s 103 of the Act, that Mr Yilmaz for YHL did not act in a fair and reasonable manner in all the circumstances and Mr Gencer who was in an objectively vulnerable position, was treated shabbily - the dismissal and/or redundancy process was enacted in a flawed manner and caused significant detriment.

*Justification for dismissal*

[28] To justify a dismissal as fair and reasonable, an employer must fulfil the procedural fairness requirements of s 103A of the Act commonly known as the justification test.

[29] Section 103A(3)(a-d) of the Act requires that the Authority must objectively measure an employer’s actions against the following propositions:

- a) Whether given the resources available to the employer, did they sufficiently investigate their concerns.
- b) Did the employer raise the issues of concern with the employee prior to deciding to dismiss.
- c) Was the employee afforded a reasonable opportunity to respond to identified concerns.
- d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- e) any other contextual factor the Authority regards as appropriate to consider.

[30] Applying the above elements (otherwise known as procedural fairness obligations) broadly requires the Authority to look at whether YHL’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 and, I must also have regard to the Act's good faith provisions.

[31] I conclude, as submitted by Mr Gencer's advocate, that no fair process was enacted prior to the dismissal (in breach of the employment agreement and statutory requirements) regardless of the various grounds subsequently advanced as reasons for the ending of the employment relationship.

### **Finding**

[32] In the circumstances described, due to a failure of YHL to adhere to good faith and fair dealing during the brief period of employment, I find Mr Gencer was unjustifiably disadvantaged then unjustifiably dismissed and is entitled to a consideration of remedies claimed.

### **Was Mr Gencer paid for all the hours he worked?**

[33] To assess the claims advanced by Mr Gencer it has been problematic because YHL kept no wage, time, or holidays records. The duty to maintain records is an employer one, (s 130(1) of the Act and s 81 of the Holidays Act 2003 (HA)). It is not an employee responsibility. An employer cannot fulfil these obligations by assuming the employee is keeping records. The employer should have systems in place to ensure that task is conducted in accordance with the law. There is no evidence before the Authority that YHL had any system in place. Evidence showed Mr Yilmaz, although he did not work alongside Mr Gencer in the business, controlled the hours of work by imposing obligations on Mr Gencer without recording his actual hours worked.

[34] Due to the lack of record keeping, s 132(2) of the Act and s 83(4) HA apply so that evidence given by Mr Gencer may be accepted unless YHL and Mr Yilmaz can prove that the amounts claimed are inaccurate.<sup>1</sup>

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<sup>1</sup> *Shah Enterprise NZ Limited and Sapan Jagdishbhai Shah v A Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177, EMPC 1/2021 at [26].

[35] Despite a lack of documentary evidence, I accept Mr Gencer regularly worked additional hours above what was stated in his employment agreement. In the absence of credible and accurate wage and time records, I am charged with assessing what would be a fair and reasonable approach to wage arrears owed. Mr Gencer's advocate has carefully detailed claims the hours Mr Gencer was not paid for. The total amount Mr Gencer claims due in underpaid wages for the eight-week period he worked (estimated as 540 hours), is, less what he was paid, an amount of \$9,864,69 (inclusive of holiday pay).

[36] I am satisfied on the balance of probabilities that the applicant has discharged the onus of proving his claims and that YHL has failed to convince the Authority that the additional hours worked by Mr Gencer were properly remunerated.

[37] In the circumstances, I find the full amount claimed by Mr Gencer is established as unpaid and due. I observe Mr Gencer advanced an alternative claim that his unpaid wages should be paid at the rate of \$35 per hour and not his actual pay that was \$30 per hour. While Mr Gencer's employment agreement was ambiguous on this issue, I accept the evidence of Mr Yilmaz that the agreed hourly rate paid was \$30 per hour.

### **Consideration of remedies**

#### *Lost wages and other money lost.*

[38] Section 123(1)(b) of the Act also provides for the reimbursement of the whole or any part of wages or other money lost by Mr Gencer should I find that he has established a personal grievance.

[39] Here I find Mr Gencer's further lost remuneration was directly attributed to the personal grievance. Mr Gencer was unemployed for a period of seven weeks. Mr Gencer has claimed for seven weeks pay at a minimum of 30 hours per week.

### **Finding**

[40] In all the circumstances I consider it fair to award Mr Gencer the lost wages he claims that amounts to \$6,300.00

### *Compensation for hurt and humiliation.*

[41] Mr Gencer gave evidence of the impact of the abrupt dismissal and the uncertainty it created at a tough time to find immediate alternative employment and pay living costs. A situation that was exacerbated by Mr Gencer having just recently arrived from Türkiye, his unfamiliarity with New Zealand and his vulnerable personal situation and visa status.

[42] Mr Gencer was entitled to feel he had been misled, used, and humiliated by the nature of the dismissal and I was convinced from the evidence that it had a significant and ongoing impact on his self-confidence and well-being as described. The nature of the dismissal and Mr Yilmaz's lack of commitment to the original bargain YHL had struck caused significant ongoing distress to Mr Gencer.

### **Finding**

[43] I am convinced that at the time Mr Gencer suffered humiliation, loss of dignity and injury to feelings. Considering the circumstances and awards made by the Authority in similar situations and how this dismissal was effected, I consider Mr Gencer's evidence warrants compensation of \$14,000 under s 123(1)(c)(i) of the Act.

### **Contribution**

[44] Section 124 of the Act states that I must consider the extent to what, if any, Mr Gencer'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 by the Employment Court in *Maddigan v Director General of Conservation*.<sup>2</sup>

[45] In assessing the situation, I do not find that Mr Gencer in all the circumstances contributed to the matters that gave rise to his personal grievance. This is despite Mr Yilmaz advancing a series of less than complimentary observations of Mr Gencer that were impossible to substantiate.

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<sup>2</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[46] It is evident that the unjustified actions of Mr Yilmaz robbed Mr Gencer of any meaningful agency that led to this misconceived and unjustified dismissal.

[47] I find no reduction in the remedies I have awarded is warranted.

### **Penalties**

[48] Mr Gencer claimed a series of penalty actions against YHL but none were particularised sufficiently in the application to the Authority. In submissions I acknowledge Mr Gencer's advocate highlighted a series of potential breaches in more detail including for Ya Hay Limited's record keeping deficiencies and pointed to relevant case law but sought no specific amounts.

[49] I am not convinced YHL has been properly placed on notice of the breaches claimed and decline to order such by the use of the discretion available to the Authority under s 160(3) of the Act. It is my view that the other remedies provided adequately address the employment relationship problem as presented. This finding, however, does not condone the inappropriate actions of Mr Yilmaz on behalf of YHL and I have been apprised by Mr Gencer of a separate Labour Inspector investigation into YHL's record keeping issues.

### **Orders**

[50] I have found that:

- a. Ali Gencer was unjustifiably disadvantaged and unjustifiably dismissed by Ya Hay Limited.
- b. Ya Hay Limited is ordered to pay Ali Gencer the amounts specified below within 28 days of this determination being issued:
  - (i) \$9,864.69 gross wage arrears inclusive of holiday pay pursuant to s 131 Employment Relations Act 2000.
  - (ii) \$6,300 (gross) lost wages pursuant to s 123(1) (b) Employment Relations Act 2000.

(iii) \$14,000.00 compensation without deduction pursuant to s 123(1)(c)(i) Employment Relations Act 2000.

## **Costs**

[51] Costs are reserved.

[52] The parties are encouraged to resolve any issue of costs between themselves.

[53] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ali Gencer 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 Ya Hay Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[54] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>3</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>3</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)