

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 565
3150501

BETWEEN

JIMIN HONG
Applicant

AND

S&C CENTREPLACE
LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Dave Cain, advocate for the Applicant
Daniela Proske for the Respondent

Investigation Meeting: 20 July 2022 at Hamilton

Submissions received: 20 July 2022 and 5 August 2022 from the Applicant
4 August 2022 from the Respondent

Determination: 01 November 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Jimin Hong worked for S&C Centreplace Limited (S&C) as a bar staff worker. Ms Hong says she has a personal grievance for unjustified dismissal and unjustified disadvantage and claims compensation for hurt and humiliation. Ms Hong claims arrears of wages and says she was not provided with rest or meal breaks during her employment and seeks penalties for S&C's failure to provide them.

[2] S&C says its actions were justified and denies Ms Hong's claims.

What has the Authority's process been?

[3] Ms Hong, her partner Jeon Hangyeom, flatmate Anna Zhang and former S&C employee Won Ju Moon provided witness statements. S&C was represented by its owner and manager, Daniela Proske. Ms Proske provided a witness statement. Former S&C employees provided witness statements or letters of support for S&C.

[4] Ms Hong and her witnesses attended the investigation meeting in person, along with Ms Proske and one of the former S&C employees, Diksha Rana. Ms Celine Villaluz, another former S&C employee, gave evidence by telephone. The witnesses answered questions under affirmation from the Authority and the representatives. Closing submissions were provided by the parties at and after, the investigation meeting.

[5] As permitted by s 174E of the Employment Relations Act (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but states findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[6] The following are the issues for investigation and determination:

- a. Was Ms Hong unjustifiably disadvantaged in her employment?
- b. Was Ms Hong unjustifiably dismissed from her employment?
- c. If S&C's actions were not justified, what remedies should be awarded and are there any issues of contribution?
- d. Should S&C incur any penalties?
- e. Should either party contribute to the costs of representation of the other party?

What happened?

[7] S&C operates a food outlet trading as "Cizzlin" in Hamilton.

[8] Ms Hong was employed by S&C from 23 July 2020 as a bar staff worker on a part-time basis. Her tasks included serving customers, cleaning, handling cash and maintaining food and drink stocks.

Employment agreement

[9] Ms Hong signed an employment agreement on 23 July 2020. The hours of work clause provided that:

The employer will roster the employee on for each week/fortnight. The timing of working hours will be set out in a roster. The employer will let the employee know at least one week in advance of the new roster, unless there are exceptional circumstances.

Normal requirements of the job mean that the employee must work hours in excess of these if required. The employee is expected to be flexible with time arrangements.

[10] The agreement stated either party was to give no less than four weeks' notice of termination of employment in writing.

Hours of work and breaks

[11] Ms Hong says she agreed with the restaurant's head chef that she would work 20 hours per week. Initially, Ms Hong worked four days a week - Monday through to Thursday.

[12] Ms Hong says her shifts were usually five hours, but she was never allowed any breaks. Ms Hong often worked morning shifts, and says staff who did closing shifts were given half hour meal breaks. She says she was not allowed to go to the bathroom if there were any customers in the restaurant.

[13] Ms Proske says S&C did not forbid Ms Hong from using the bathroom but Ms Hong's manager did suggest she go before 12pm and after 1.30pm outside peak customer demand. Ms Proske says when Ms Hong worked, she always had a break at 11.30am taking her telephone to the bathroom. Ms Proske considered that to be her rest break. Ms Hong acknowledges she took bathroom breaks at 11.30am but did not consider these to be rest breaks. Ms Proske says S&C had an arrangement with morning staff that they take their meal break after 4.5 to 5 hours at the end of their shift and S&C provided a half price lunch.

[14] In early March 2021, Ms Hong says Ms Proske changed her weekly hours without consultation.

[15] Ms Hong says she had not been the subject of any formal disciplinary proceedings or formal written warnings during her employment at S&C. Ms Proske

affirmed this but says Ms Hong's behaviour towards Ms Rana and attitude at work became an issue. Ms Proske says she had a conversation with Ms Hong on 22 April 2021 or towards the end of April 2021, counselling her that the climate in the restaurant was bad and asked Ms Hong why she had stopped talking to the restaurant chef.

[16] Ms Proske says she told Ms Hong that her hours would reduce because of her behaviour towards Ms Rana and general attitude. Ms Proske says she wanted to ensure Ms Hong and Ms Rana did not work together. Ms Proske, Ms Rana and Ms Villaluz outlined concerns about Ms Hong's negative behaviour. Ms Hong denied the concerns.

[17] Ms Hong denies any such meeting occurred with Ms Proske and says she was not at work on 22 April 2021, which is confirmed by S&C's time records. Ms Proske has no written record of the meeting. She claimed to have had a witness to the meeting but did not make that witness available to the Authority.

Mr Hangyeom's accident

[18] On Wednesday 28 April 2021, Ms Hong's partner, Mr Hangyeom was injured at work and taken to hospital. Ms Hong says she was informed of this at around 4.30pm and then closed the restaurant at 6pm to attend the hospital.

[19] Mr Hangyeom was placed on ACC for six weeks and says he was told to remain on bed rest to aid recovery. Mr Hangyeom remained on ACC for ten weeks. I accept Mr Hangyeom's injuries required assistance at home during his recovery period.

[20] Ms Proske notes Mr Hangyeom's accident happened on the Wednesday indicated and on the following Friday, she and Ms Hong worked together all morning. Ms Hong accepts she worked on this day but was worried about Mr Hangyeom but forgot to tell Ms Proske about his accident. Ms Hong says the next week's roster was the furthest thing from her mind at the time. Ms Zhang a flatmate, says she cared for Mr Hangyeom during Ms Hong's Friday shift.

[21] On 30 April 2021 at 3.06pm, Ms Proske text messaged Ms Hong's rostered hours for the next week. Ms Hong says she realised she had forgotten to tell Ms Proske about her availability that week. Ms Hong responded saying she forgot to explain she was only available the next Wednesday because Mr Hangyeom was on ACC with two broken arms and required her as an attendant carer.

[22] Ms Proske says the chef and her called Ms Hong numerous times to check her availability for work. Ms Proske says Ms Hong did not answer the calls and she could not make sense of what was happening. Ms Hong acknowledges she missed one call from the restaurant manager. Although Ms Proske was unable to provide evidence corroborating the calls, I accept it is more than likely than not, that more than one call was made given S&C's staffing requirements.

[23] On Monday 3 May 2021 at 4.07pm, Ms Proske sent Ms Hong a text asking her to meet on 5 May 2021 and to bring a medical certificate for a Tuesday two weeks prior when she was absent.

Dismissal by text message

[24] On 4 May 2021 at 10.40am, Ms Proske and Ms Hong exchanged the following texts:

Ms Proske: OK Lillian. If you don't want to talk to me I just send you quick a text [sic]. A letter will follow. I am terminating your contract with cizzlin.
Ms Hong: Hello Daniela, I can not attend the meeting cuz, I need to take my bf to clinic tomorrow. Could you tell me what about the meeting, And a letter?
Ms Proske: Yes that means I am going to replace you.

[25] Ms Hong says she did not return a phone call from the chef as she was too upset to talk and felt overwhelmed with Mr Hangyeom still unwell and her just being dismissed.

Confirmation of dismissal

[26] Ms Hong texted the following day (5 May) asking when and how she would receive a letter confirming her dismissal. Ms Proske responded it would be sent by email.

[27] On 11 May 2021, Ms Hong received a letter from Ms Proske stating that as of 10 May 2021 she was terminating the employment "on four weeks' notice". Ms Hong says the letter included allegations not previously raised with her. They included:

1. Unacceptable behaviour
Your behaviour towards me and the staff of Cizzlin was rude and aggressive. On several occasions you refused to come to work because you wanted to go on holiday or a 3 hour shift was to [sic] for you. You are unfixable in your work times.

2. Harassment of work colleagues
I could not put on the roster with Diksha because you did not like her. It displays a bad attitude to our customers. It was very stressful for me and Diksha too, who came to me several times and cried and, was concerned about your behaviour towards her.
When I wanted to train another person for the job you told me in your own words that you can't stand another Indian worker so the boss suggested to train another person when you were not rostered on the shift.
3. Neglect of Duties
On Wednesday the 28th April you did the afternoon shift and the next morning the staff were surprised that nothing was prepared for the next morning. It busy that night. We already told you to get your duties done and focus on the task before socialising.
4. Repeater [sic] failure to follow instructions
I told you a few times to prepare properly in the mornings otherwise we will struggled when it gets busy and for the next shift. None of the girls in the front of the shop felt comfortable working with you as your performance was slow and bad preparation which didn't work as part of a team player and didn't help things run smoothly.

I had already discussed with you our concerns on the 22nd of April so that we feel this is the best for our team at Cizzlin.

Was Ms Hong unjustifiably disadvantaged in her employment?

[28] Ms Hong says she was disadvantaged by S&C's failure to provide rest and meal breaks and cancellation of shifts or changes to rostered hours.

Rest and meal breaks

[29] Ms Hong claimed whilst working she was not afforded rest or meal breaks and was denied bathroom visits at busy times. She says this put her health and safety at risk and had a detrimental impact on her enjoyment of work.

[30] Ms Hong's employment agreement did not contain any provision relating to rest or meal breaks. S&C's timesheets show Ms Hong regularly worked the morning shift between 9.30am to 2-2.30pm. That work period ranges from 4.5 to 5 hours.

[31] Section 69ZD of the Act prescribes entitlements to, and an employer's duty to provide, rest breaks and meal breaks. It fixes a graduated scale, stating:

Entitlement and duty

(1) An employee is entitled to, and the employee's employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.

...

Work period between 4 hours and 6 hours

(3) If an employee's work period is more than 4 hours but not more than 6 hours, the employee is entitled to—

(a) one 10-minute paid rest break; and

(b) one 30-minute meal break.

[32] Section 69ZE(3) of the Act outlines the timing of rest breaks and meal breaks in the absence of agreement. For a work period between four and six hours, s 69ZE(4) says:

If section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

- (a) the rest break one-third of the way through the work period; and
- (b) the meal break two-thirds of the way through the work period.

[33] Section 69ZD defines what a work period is:

In this Part, unless the context otherwise requires, **work period**—

- (a) means the period—
 - (i) beginning with the time at which, in accordance with an employee's terms and conditions of employment, an employee starts work; and
 - (ii) ending with the time at which, in accordance with an employee's terms and conditions of employment, an employee finishes work; and
- (b) includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

Assessment

[34] I am not persuaded Ms Hong was forbidden to take bathroom breaks during the busy lunch period, although accept she was requested to take them prior to or afterwards. The timing of Ms Hong's morning breaks appears to meet the requirements of ss 69ZD(2)(a) and 69ZE(4)(a) and were capable of being deemed rest breaks.

[35] Notwithstanding, I find S&C regularly breached ss 69ZD(3)(b) and 69ZE(4)(b) of the Act by not providing 30-minute meal breaks. While S&C may have offered half price lunches to Ms Hong on the morning shift at the end of the work period, that was not sufficient to meet the requirements of the Act.

[36] Although Ms Hong's work periods were relatively short and S&C's operational requirements may have required that work periods be short, she worked the shifts at S&C's behest and was entitled to breaks in accordance with the Act.

Finding

[37] An employer who does not comply with ss 69ZD and s 69ZE is liable to a penalty imposed by the Authority.¹ Ms Hong seeks a penalty in relation to the breaches and compensation under s 123(1)(c)(i) of the Act as an unjustified disadvantage. I consider S&C's actions were unjustified and meant she was not given a reasonable opportunity for rest, refreshment, and attention to personal matters appropriate for her the length of her work periods.

[38] I find S&C's actions in failing to provide a meal break were unjustified and Ms Hong has been unjustifiably disadvantaged by this omission.

Cancelled shifts and changes to rostered hours

[39] Ms Hong says S&C would at times fail to give her reasonable notice when cancelling her rostered shifts and that she would not receive any payment for the cancellations. Ms Hong says unilateral changes to her rostered hours of work were made without consultation or agreement which had a detrimental impact on her work and finances.

[40] Section 65 of the Act sets out the form and content required in an individual employment agreement and includes a requirement that employment agreements include:

...any agreed hours of work specified in accordance with s 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work...

[41] Ms Hong's employment agreement did not specify a number of guaranteed hours of work, days of the week on which work was to be performed, start and finish times of work or any flexibility on those matters that would comply with s 67C of the Act. I observe there was no availability provision in Ms Hong's employment agreement that would comply with s 67D of the Act.

[42] Ms Hong's employment agreement stated S&C would let her know "at least one week in advance" of the next weeks' roster, unless there are "exceptional circumstances". Ms Hong has provided texts between her and Ms Proske from January

¹ Employment Relations Act 2000, section 69ZF.

to May 2021 which show Ms Hong was on occasion advised of her rostered hours less than a week in advance, and on at least one instance, one day's notice.

[43] It is clear that S&C's roster arrangements were flexible and required Ms Hong to be the same. While Ms Hong declined work on some occasions, this is entirely understandable in the circumstances. S&C secured flexibility from Ms Hong whilst not providing agreed hours of work or an indication of the arrangements Ms Hong was to work.

Finding

[44] I find that S&C failed to give Ms Hong notice of her rostered hours in accordance with her employment agreement. Those actions were unjustified particularly in light of S&C's failure to adhere to statutory requirements concerning agreed hours or arrangements relating to work times in the employment agreement.

[45] S&C's actions caused Ms Hong disadvantage as it gave her limited ability to plan work around her personal life and affected her financially when the number of hours available to her were unilaterally reduced. I find Ms Hong has established S&C caused her an unjustified disadvantage.

Was Ms Hong unjustifiably dismissed from her employment?

Test of justification

[46] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[47] Section 103A of the Act details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner. These elements summarised and discussed further below, are:

- (a) Whether the employer properly identified the issues of concern with the employee prior to deciding to dismiss;

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

Disciplinary process

[48] I have had regard to the resources available to S&C in assessing whether it sufficiently investigated the allegations against Ms Hong before taking action and dismissing her.² It is a small business with around eight employees. Ms Proske appears to manage staff along with the chef, without any specialist support.

[49] I note S&C provided no written record of her interactions with Ms Hong regarding Ms Rana and did not detail to Ms Hong the possible disciplinary consequences of not adjusting her behaviour. I accept Ms Proske attempted to raise concerns in an informal manner with Ms Hong about her behaviour towards Ms Rana. However, S&C's consequent dismissal process fell well short of meeting the four minimum procedural fairness requirements set out in s 103A(3) of the Act to address the situation. These omissions are discussed below.

[50] Ms Hong was asked to come to a disciplinary meeting without any explanation as to what it was about and not alerted to the need to have a support person or representative present.

[51] S&C did not sufficiently investigate its concerns before it dismissed Ms Hong, in breach of s 103A(3)(a) of the Act nor as explained above, did it sufficiently raise its concerns with Ms Hong before she was dismissed, in breach of s 103A(3)(b) of the Act.

[52] Ms Hong was not then given a reasonable opportunity to respond to S&C's concerns before she was dismissed, in breach of s 103A(c) of the Act.

[53] Finally, because S&C did not provide Ms Hong with a genuine opportunity to provide an explanation to its concerns in breach of s 103A(3)(d) of the Act, it could not

² Employment Relations Act 2000, s 103A(3)(a).

engage in the required exercise of genuinely considering Ms Hong's responses or any other contextual circumstances (s 103A (4)).

[54] I consider s 103A(5) is not applicable as the defects in the process were not minor and they resulted in Ms Hong being treated unfairly. The dismissal was unjustified on procedural grounds.

Finding

[55] A fair and proper process assists an employer to arrive at a decision that is justified. Having heard from the witnesses, I accept S&C had some concerns to raise with Ms Hong about aspects relating to her performance at work. I also accept Ms Hong's behaviour towards Ms Rana was not satisfactory. However, S&C had already addressed that issue by ensuring the pair did not work shifts together.

[56] S&C's letter of dismissal of 11 May was a belated attempt, on embellished grounds, to justify a procedurally unfair dismissal that had already taken place on 4 May 2021. I find that S&C's failure to undertake any investigation or disciplinary process was not what a fair and reasonable employer could have done in all the circumstances and this fundamentally undermined S&C's ability to justify its dismissal of Ms Hong on substantive grounds.

Should remedies be awarded and are there issues of contribution?

[57] Ms Hong has established she was unjustifiably dismissed and disadvantaged and is entitled to a consideration of remedies.

Lost wages pursuant to section 123(1)(b) of the Act

[58] Ms Hong was able to secure alternative employment within a short period of time and Mr Hangyeom's care needs were such that Ms Hong would not have been available for work immediately following her dismissal. Ms Hong does not seek an award of lost wages.

[59] Ms Hong has identified unpaid wages for shifts cancelled without reasonable notice totalling \$259.88 (gross). She has also identified one day of sick leave for which she should have been paid but was not, being \$89.78 (gross). Those amounts should be paid to Ms Hong pursuant 123(1)(b) of the Act.

Compensation pursuant to section 123(1)(c)(i) of the Act

[60] Ms Hong seeks between \$3,000 to \$6,000 in compensation under s 123(1)(c)(i) of the Act in relation to her disadvantage grievance, and \$25,000 in compensation in relation to her dismissal grievance.

[61] Having regard to the particular circumstances of this case, I consider that an award of \$6,000 in relation to Ms Hong's unjustified disadvantage grievances is appropriate.

[62] Ms Hong says after her dismissal, she shut down. She says she cried a lot on her own because she did not want Mr Hangyeom or her flatmate to know how upset she was. She felt embarrassed because she had never been in a situation like that before. Ms Hong considered herself a "great worker" and S&C had no reason to terminate her employment – she thought it was completely unfair how she was treated. I accept Ms Hong was impacted by the dismissal, but not to the extent that a high award is warranted. Further, while Ms Hong says she was stressed about money and finding another job, she found another job very quickly. Ms Zhang agreed to care for Mr Hangyeom and Ms Hong commenced employment on 8 May 2021, before she even received S&C's letter of dismissal. In relation to her unjustified dismissal, I find an award of \$8,000 is appropriate.

Contribution

[63] Section 124 of the Act states that I must consider the extent to what, if any, Ms Hong's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. Having considered the evidence, in the circumstances I consider Ms Hong failed to be active and communicative with S&C during her final shift and in not answering calls after that shift from S&C regarding her availability in light of Mr Hangyeom's accident. I do not, however, find her behaviour was sufficiently blameworthy in the circumstances. A reduction of remedies in relation to her dismissal grievance is not appropriate.

Should S&C be ordered to pay penalties?

[64] I have accepted S&C breached ss 69ZD and s 69ZE of the Act, which are both employment standards. In the circumstances, I consider these breaches have been

adequately addressed by the remedies awarded for Ms Hong's personal grievance for disadvantage. No penalty is imposed on S&C under this head.

[65] In closing submissions, Ms Hong's advocate asked that penalties be imposed on S&C for failing to provide complete wages and time and holiday and leave records, and for a breach of good faith under s 4 of the Act. Neither of these claims were included in the statement of problem lodged, and I do not in fairness allow them to be raised at this late stage. The claim for a penalty in relation to a breach of good faith was also made outside of the statutory timeframe, and the claim in relation to providing records may have been also.³ The penalty claims are dismissed.

Orders

[66] S&C Centreplace Limited is ordered to pay Jimin Hong the following amounts within 28 days of the date of this determination:

- a. \$259.88 (gross) unpaid wages;
- b. \$89.78 (gross) sick leave pay;
- c. \$6,000 compensation for disadvantage grievances;
- d. \$8,000 compensation for dismissal grievance.

Costs

[67] Costs are reserved.

[68] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Hong may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

³ Employment Relations Act 2000, section 135(5).

[69] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁴

Sarah Blick
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.