

Employment relationship problem

[1] Mr Ma came to New Zealand as an international student. Mr Ma completed a Diploma course in cookery in September 2014. Up until 3 November 2014 he was working on a student visa which allowed him to work up to 20 hours a week during school terms and full time during school holidays.

[2] In June 2014 Mr Ma began to look for a full time job for the coming school holidays. He found an advertisement placed by Mak-Rush Limited (referred to in this determination as “Bella Bambina”) on a local Chinese website Skykiwi looking for a kitchen hand. Mr Ma responded to the advertisement and was contacted by text by one of the Chinese kitchen hands that worked for Bella Bambina

[3] Mr Ma attended the restaurant and met the chef, Goce Najdovski, on 24 June. They spoke for about 15 minutes with the result being that Mr Ma was invited to come and work at the Bella Bambina Restaurant for a pre-employment assessment with a view to obtaining employment. No details about what the pre-employment assessment was to consist of or how long it would last were discussed.

[4] There is a conflict in the evidence about whether that was to be paid or not. Mr Najdovski says that he told Mr Ma that it was unpaid. Mr Ma says he was never told that and he expected to be paid. Mr Ma and Mr Najdovski both agree that there was no specific timeframe set for the pre-employment assessment and no other specific terms or conditions were discussed.

[5] Mr Ma worked at the restaurant for the first time on Wednesday 25 June 2014. There is a conflict in the evidence about whether or not he did any work and over how long Mr Ma was present.

[6] Mr Ma claims he worked in the kitchen clearing and washing dishes and doing other small jobs from 6pm until 10pm. Mr Najdovski says that Mr Ma did not work as many hours as he claims but he could not tell the Authority how long Mr Ma was at the restaurant.

[7] Mr Najdovski also says that Mr Ma did not actually do any work on 25 June. He says Mr Ma merely watched others in the kitchen because there were enough staff already working and insufficient work available for Mr Ma. Mr Najdovski says that

meant a proper assessment of Mr Ma's abilities could not be undertaken. Mr Najdovski admits that he did not communicate that to Mr Ma.

[8] On 26 June (the day after he first attended the restaurant) Mr Ma received a text asking him to work the next day. Mr Ma took this to mean he had successfully passed his pre-employment assessment and was being offered ongoing employment which he gratefully accepted.

[9] The text exchange is as follows:

*Hi, can you come tomorrow at 6pm to Bella Bambina to work please.
Thanks. (Mr Najdovski to Mr Ma)*

*I cannot express to you how grateful I am, thank you give me an
opportunity c u tmr! (Mr Ma to Mr Najdovski)*

Thanks (Mr Najdovski to Mr Ma)

[10] Mr Najdovski says that this was not an offer of employment but was just a continuation of the pre-employment assessment. He admits that he did not communicate that to Mr Ma.

[11] Mr Ma claims he worked 5 hours on 27 June (6pm to 11pm), 4.5 hours on 28 June (6pm to 10.30pm) and 4.5 hours on 29 June (6pm to 10.30pm). He has not been paid for these hours.

[12] Mr Najdovski says Mr Ma did attend the restaurant but did not work the hours he claims. Mr Najdovski was unable to tell the Authority how long he thought Mr Ma was actually at the restaurant.

[13] On 28 June Mr Ma texted his employer his bank account number and IRD number. Mr Ma said that although there had not been a discussion about payment, the advertisement he had responded to said that the position would be paid minimum wage, so he was expecting to be paid that amount. Mr Najdovski says he did not request Mr Ma's bank details or IRD number, but admits he did not take that opportunity to tell Mr Ma that his time at the restaurant was on an unpaid basis.

[14] Mr Ma says that on Sunday 29 June at the end of his shift (around 9pm) Mr Najdovski (who was working on the roster) asked Mr Ma how many hours he was available to work. Mr Ma said he was available full time because he was on school

holidays. The parties agree that Mr Najdovski added Mr Ma to the roster for the following week (Monday 30 June to Saturday 05 July) with a start time of 5pm.

[15] Mr Ma says he worked 5.5 hours on 30 June (5pm to 10.30pm), 6 hours on 01 July (5pm to 11pm) and 5.5 hours on 2 July (5pm to 10.30pm). He has not been paid for these hours.

[16] Mr Najdovski says that although Mr Ma was added to the week's roster he considered that was still part of the pre-employment assessment period because he was unhappy with Mr Ma's performance. Mr Najdovski admits he did not tell Mr Ma that. Mr Najdovski says Mr Ma never passed his pre-employment assessment, so was never offered work, so is not entitled to be paid for any of the hours that Mr Ma says he worked.

[17] Mr Najdovski says that 01 July was the first time that Mr Ma was in the kitchen where his skills and knowledge could really be seen and assessed. Mr Najdovski says that Mr Ma had an opportunity to do some kitchen prep (such as washing and cutting up vegetables) and cooking. Mr Najdovski says that Mr Ma's performance was "*terrible and he wasted a lot of product*". On 01 July Mr Ma was asked to cook some potato which he left in the oven for too long and it burnt. Mr Najdovski was very unhappy about this.

[18] Mr Najdovski says that when Mr Ma worked on 02 July he was unable to keep up with any type of cooking or even washing the dishes. Mr Najdovski says that when he told Mr Ma off for standing beside the dishwasher while it was running instead of doing other work in the kitchen that Mr Ma said some unpleasant things in Mandarin. Mr Najdovski was unhappy about this because he understood Mandarin because his wife speaks it.

[19] Mr Najdovski says he decided on 02 July that he did not want to work with Mr Ma and he told the owner of the business Ms Oxana Shchajlevakova that Mr Ma was not suitable to work at the restaurant. Mr Najdovski decided to remove Mr Ma from the roster but he did not have any communications with Mr Ma about that.

[20] On 03 July Mr Ma received a text message from Ms Shchajlevakova saying:

*Good evening, David. You don't need to come Friday and Saturday, we will give you a call next week when the new roster will be made.
Thank you*

Oxana

[21] Mr Ma replied:

Ok, that's fine. I want to know how long and what time did you pay my wage? Thank u

[22] There was no response to Mr Ma's request. Mr Ma did not hear anything more about his job. He says he knew that he had been rostered on for the remainder of that week so attempted to contact the restaurant to find out when he was next working, but no one responded to his phone calls or text messages.

[23] On Sunday 06 July Mr Ma went to the restaurant at around 11pm. He said the restaurant was near his house and he went there when he knew there would be no customers because he wanted to find out what was happening with his work. He said that he called the restaurant when he first arrived, but there was no answer to his calls or text messages. He then knocked on the door and Mr Najdovski responded.

[24] There was a discussion during which Mr Najdovski told Mr Ma that he did not have a job in the restaurant and Mr Ma asked to be paid for the hours that he had worked. This became an unpleasant exchange with both parties getting heated.

[25] Mr Ma says that when he asked for his wages Mr Najdovski started to talk about the incident when the potatoes got burnt. Mr Ma says that when he insisted on being paid for the hours he had worked Mr Najdovski became aggressive, telling him he was going to call the Police. Mr Ma says that at point he told Mr Najdovski he was going to report him to the Labour Department for not paying wages and Mr Najdovski responded by threatening to write to New Zealand Immigration to get Mr Ma deported.

[26] Mr Ma claims he was unjustifiably dismissed and he has not been paid wages for the days and hours he worked or holiday pay upon termination.

[27] Bella Bambina says there was no employment relationship. It says there was no offer and acceptance because Mr Ma failed his pre-employment assessment. Bella Bambina says Mr Ma is not entitled to be paid for the time he worked because it was agreed his pre-employment assessment would be unpaid. There was no employment documentation provided. The only documentary proof of the days and hours Mr Ma

worked is found in the roster for the week commencing 30 June which Mr Najdovski handed up during the Authority's investigation meeting. No roster was provided for the previous week.

Issues

[28] The issues for determination are:

- (a) Were the parties in an employment relationship?
- (b) If so, was Mr Ma dismissed?
- (c) If so, was Mr Ma's dismissal justified?
- (d) If not, what if any remedies should be awarded?
- (e) Is Mr Ma owed unpaid wages?
- (f) What if any costs should be awarded?

Were the parties in an employment relationship?

[29] Section 6 of the Employment Relations Act 2000 (the Act) defines the meaning of "employee". Section 6(1) states that:

"Employee-

- (a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
 - (b) *includes-*
 - (i) *a homemaker; or*
 - (ii) *a person intending to work; but*
 - (c) *excludes a volunteer who-*
 - (i) *does not expect to be rewarded for work to be performed as a volunteer; and*
 - (ii) *receives no reward for work performed as a volunteer*
- [...]"

[30] Section 5 of the Act defines a person intending to work as:

“Person intending to work means a person who has been offered and accepted, work as an employee; and intended work has a corresponding meaning.”

[31] Fundamental to sections 5 and 6 of the Act is the concept of offer and acceptance.

[32] I do not accept Bella Bambina’s submission that there was no offer and acceptance and therefore no employment relationship.

[33] Mr Ma was aware of the nature of the position and the rate of pay from the advertisement. He made it clear to Mr Najdovski that he was seeking paid employment, there was no evidence to suggest that he had agreed to work for as a ‘volunteer’ for no reward.

[34] Even if Mr Ma could be categorised as a volunteer (and I find he cannot) then he was expecting a “*reward*” for the work he did because he was expecting to be paid. This is evident from him sending his bank account details and IRD number in, by his text inquiry to Ms Shchajlevakova about when his wages would be paid, and his conversation with Mr Najdovski on 06 July asking to be paid for the hours he had worked. I therefore find that Mr Ma does not fall within the definition of “*volunteer*” in s.6(1)(c) of the Act.

[35] Mr Najdovski says that it was usual practice for Bella Bambina to require new employees to undertake an unpaid pre-employment assessment. He told the Authority there was no set period or criteria used for the pre-employment assessment as it varied from person to person. He said some people he could see immediately that they were suitable while some people had to work for longer to show they were suitable.

[36] I am satisfied there was offer and acceptance. Mr Ma went to Bella Bambina seeking paid employment. He was asked to come and work as a kitchen hand and he did so. He had an expectation of ongoing employment as he was called back after his first day of work and was also put onto the weekly roster.

[37] I find that the evidence did not establish on the balance of probabilities that Mr Ma agreed to work for Bella Bambina for free. The evidence strongly suggests he expected to be paid and he acted consistently with that expectation.

[38] If Bella Bambina did not intend to pay Mr Ma then it had to make that very clear from the outset. I consider it did not do so. In this case there was no documentation to support the contention that Mr Ma had agreed to work an unspecified number of days and hours for an unspecified period of time for free.

[39] Mr Najdovski admitted to the Authority that he did not tell Mr Ma any details about the pre-employment assessment such as who would be assessing him, how he would be assessed, what criteria he would be assessed against, how long the assessment would take, when he would be advised of the outcome and other such basic details. Bella Bambina appears to have acted on its own assumptions about what was required of Mr Ma before he would be paid without ever clearly communicating that to him.

[40] I find that Mr Ma was told to come in to work, which he did, and then he did work. If he was attending the restaurant without working I expect Bella Bambina to have made a record of that (which it did not). I find that the work Mr Ma initially did was basic such as washing dishes but from 01 July it included food preparation and even cooking.

[41] I am satisfied on the balance of probabilities that Mr Ma comes within the definition of employee in s.6 of the Act and within the s.5 definition of a person intending to work. I find that the parties were in an employment relationship.

Was Mr Ma dismissed?

[42] Dismissal is a sending away that occurs at an employer's initiative. I am satisfied that is what occurred here. Mr Ma did not freely or voluntarily resign. Mr Ma remained ready, willing and able to continue working and that was his expectation of what would occur.

[43] The employment relationship ended because Mr Najdovski unilaterally removed Mr Ma from the roster. Although he was not told until 06 July that he would not be given any more work his employment effectively ended on 02 July when he was told not to come in to work.

[44] I am satisfied that amounts to a dismissal in law – Mr Ma was 'sent away' at Bella Bambina's sole initiative. I therefore find that Mr Ma was constructively

dismissed when he was removed from his rostered days and hours of work and told not to come into work until further notice but was not given any more work.

Was Mr Ma's dismissal justified?

[45] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether Bella Bambina's actions and how Bella Bambina acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Ma was dismissed.¹

[46] When assessing justification, the Authority must apply the four procedural fairness tests in s.103A(3) of the Act.

[47] I find that Bella Bambina is unable to establish that Mr Ma's dismissal was justified. I find that its actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time that Mr Ma was constructively dismissed.

[48] A fair and reasonable employer is expected to comply with its statutory obligations. I find that Bella Bambina did not. It failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act. It also breached its good faith obligations to Mr Ma under s.4(1A) of the Act which required it to provide him with information relevant to his ongoing employment and an opportunity to comment on that before a final decision was made that affected his ongoing employment.

[49] The failure to comply with its statutory obligations undermines Bella Bambina's ability to justify its dismissal of Mr Ma.

[50] Bella Bambina did not engage Mr Ma on a trial period which complied with the requirements of s.67A of the Act because he had no written employment agreement. Mr Ma is therefore not precluded from pursuing a personal grievance claim for unjustified dismissal.

[51] I find that Bella Bambina unjustifiably Mr Ma.

¹ Section 103A(2) of the Act

What if any remedies should be awarded?

Mitigation

[52] Mr Ma is required to mitigate his loss. Failure to do so breaks the chain of causation between his unjustified dismissal and the lost remuneration he is claiming.

[53] Mr Ma says that he did look for other jobs but has not been able to obtain employment since his employment with Bella Bambina ended. He says he made some phone calls to prospective employers but did not get an interview. He says he also contacted the career service team leader of his school to help with his job search.

[54] Mr Bushe produced a number of pages of jobs from the Seek website which related to vacancies from November onwards. He identified 12 positions that he believed Mr Ma could have applied for. Mr Bushe put this information forward to show that there were numerous jobs available had Mr Ma been actively seeking employment.

[55] I consider that Mr Ma's evidence of mitigation of loss is inadequate. He produced a document which he says was provided to him by his school which identified eight jobs that appeared to have been suitable for him but he could not tell the Authority whether he had applied for any of them. Mr Ma did not proactively follow up these available opportunities because he says he left that entirely up to his school to do for him.

[56] Mr Ma did not produced any evidence of vacancies he had actually applied for which undermines his ability to establish he adequately mitigated his loss. I therefore consider that Mr Ma's period of lost remuneration should be reduced on the grounds he failed to adequately mitigate his loss.

Lost remuneration

[57] Mr Ma claims \$1,496.25 (being his lost remuneration during school holidays – \$14.25 x 35 hours x 3 weeks) plus a further \$2,850 during school time (\$14.25 x 20 hours x 10 weeks).

[58] I consider that if Mr Ma's employment had not ended he would more likely than not have worked 27 hours per week. He was available for full time work during

his school holidays and had been rostered on to start at 5pm for the week commencing 30 June.

[59] Mr Ma appears to have worked approximately 4.5 hours a day. I therefore consider it appropriate to award him lost remuneration of \$1,539 (being four weeks x 27 hours x the minimum wage of \$14.25 per hour).

Distress compensation

[60] An award of distress compensation must be based on the evidence given in support. Mr Ma's evidence was minimal. He said in his witness statement "*I was really upset and hurt by the dismissal [...] I told my friends about the dismissal and they comforted me*".

[61] Mr Ma also told the Authority that he was upset about the way that he had been treated.

[62] The evidence supports a minimal award of distress compensation.

[63] Bella Bambina is ordered to pay Mr Ma \$300 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[64] Having determined that Mr Ma has a personal grievance s.124 of the Act requires me to assess the extent to which he contributed to the situation which gave rise to his grievance and to reduce remedies accordingly.

[65] Contribution denotes blameworthy conduct which has been established on the balance of probabilities. The evidence fell short of that required standard so I find that remedies are not to be reduced to reflect any contribution.

Is Mr Ma owed wage arrears?

[66] I am satisfied that Mr Ma did work for Bella Bambina but was not paid anything for the hours he worked.

[67] I do not accept Mr Ma's evidence about the hours he worked. Mr Ma signed out on the roster sheet when he finished work each day. It is clear that for 30 June

and 01 and 02 July he has told the Authority that he worked an extra hour than he actually did.

[68] The roster records Mr Ma as ending work at 9.35pm on 30 June (Mr Ma's evidence was that he finished at 10.30pm). It shows him leaving work at 10.05pm on 1 July (he says he left at 11pm) and it shows him leaving work at 9.20pm on 2 July (his evidence was that he left at 10.30pm). I consider the roster is likely to be accurate as that is what Mr Ma would have expected to have been paid on.

[69] The roster shows he worked 4.5 hours on 30 July, 5 hours on 01 July and 4.5 hours on 02 July (total 13 hours over 3 days).

[70] The available roster shows that Mr Ma told the Authority in his evidence that he worked more hours each day than he actually did on 30 June and 10 and 02 July. I therefore consider it likely that he also overestimated the hours he actually worked the previous week so an adjustment needs to be made to reflect that.

[71] I also accept Mr Najdovski's evidence that Mr Ma did not work as late as he has claimed on 27, 28 or 29 June. It appears from the roster information that Mr Ma has overestimated his actual hours of work by approximately one hour each day, so I address his wage arrears claim on the basis that he worked for 3 hours on 25 June, 4 hours on 27 June, 3.5 hours on 28 June and 3.5 hours on 29 June.

[72] I am not satisfied that there was a mutual agreement that Mr Ma would not be paid for the hours he worked. As an employee the Minimum Wages Act 1983 applies to him and the hours he has worked. I find on the balance of probabilities that Mr Ma worked 28 hours. He is entitled to be paid the current minimum wage of \$14.25 for each hour he worked.

[73] Bella Bambina is ordered to pay Mr Ma wage arrears of \$399. Mr Ma is also entitled to 8% holiday pay of \$31.92 on that amount.

What if any costs should be awarded?

[74] I am satisfied upon production of a GST receipt that Mr Ma has incurred legal costs in excess of the daily tariff so as the successful party he is entitled to a contribution towards his actual costs.

[75] Costs are to be assessed in accordance with the Authority's usual notional daily tariff based approach to costs. This matter involved a half day investigation meeting so the notional starting point for assessing costs is \$1,750.

[76] I am not aware of any factors which would warrant an adjustment to the notional daily tariff and neither of the parties identified any for me. Bella Bambina is therefore ordered to pay Mr Ma \$1,750 towards his actual costs and to reimburse him \$71.56 for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority