

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA49
3019095

BETWEEN HELEN MAWHINNEY
Applicant

AND SFIZIO LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Alex Kersjes, Advocate for Applicant
Curtis Gregorash, for the Respondent

Investigation Meeting: 17 May 2018

Submissions Received: 22 May 2018 for the Applicant
4 June 2018 for the Respondent

Determination: 31 January 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Helen Mawhinney, claims she was employed by Sfizio Limited (“Sfizio”) but constructively dismissed shortly thereafter when she was informed she would not be paid for work performed on 4 August 2017. She says she was dismissed unjustifiably. She further alleges Sfizio breached its duty of good faith towards her. She requests a penalty be imposed, and seeks unpaid and lost wages, compensation, and costs.

[2] Sfizio says Ms Mawhinney agreed to undertake an unpaid competency assessment over a portion of a day in the hope of obtaining a position with it. It denies Ms Mawhinney was ever employed by it and rejects her claims.

Background information

[3] Sfizio Limited (Sfizio) owns two cafés in Wellington. The first café, trading under the name “Wadestown Kitchen”, has been operating since 2014. The second café, “Sfizio Espresso Bar”, was opened in Wellington’s central business district in 2016.

[4] In early August 2017 Sfizio advertised for an experienced barista. The advertisement advised it was “*offering great pay to the right person and a free lunch is included*”.

[5] Ms Mawhinney responded via a text message sent on 2 August 2017. She expressed interest in obtaining full time work, but said she was flexible and could take part-time work as well.

[6] Sfizio director, Ms Kathy Parfitt, replied to Ms Mawhinney’s inquiry. Amongst other things, she advised: “*Curtis [Gregorash] the other owner and I would love to get you in and have a chat and make a couple of coffees*”.

[7] Ms Mawhinney was interviewed by the directors of Sfizio’s on 3 August 2017 at the Wadestown premises. Over the course of half an hour (or thereabouts) the parties canvassed Ms Mawhinney’s previous experience, the till system, and her availability for work. She made 3 coffees for the directors to sample.

[8] At the end of the interview it was agreed Ms Mawhinney would attend the Wadestown Kitchen café the following day, 4 August 2017. The purpose of that arrangement is now central to their dispute.

[9] The next day Ms Mawhinney undertook a range of tasks between 8am and 4pm. During her lunch break she was allowed to, and did, take and consume food produced by the café.

[10] When the café closed Ms Parfitt told Ms Mawhinney that she was good fit but her barista skills needed to improve before she could be assigned to the city location but indicated she was suitable for the Wadestown Kitchen. Ms Mawhinney asked whether she should give her bank account number so that she could be paid for the day. Ms Parfitt replied “*oh, did Curtis not tell you? This was an unpaid trial.*”

[11] Ms Mawhinney says she was upset by that information. She informed Ms Parfitt that she had incurred child-care and travel costs to attend the café for the day and that she didn't accept nor agree that the work should go unpaid. She left the café soon after.

[12] Later that evening Ms Parfitt sent a text message to Ms Mawhinney:

Hi Helen,

Thanks so much for today, it was nice to work with you. You seem to be pretty comfortable and more confident by the end of the day. We just need to work a little bit on perfecting your barista skills.

I am really sorry if there was confusion about the day being an unpaid trial. It is standard practice for us before we hire someone.

I have talked with Curtis, and we would like to offer you a job with us, working at Wadestown. We will send a contract out to you over the weekend if you are keen.

...

[13] Ms Mawhinney replied by text message several days later on 8 August 2017. She reiterated her concerns about her expenditure to attend the café. She said she had researched the Ministry of Business, Innovation and Employment's website and considered she should be paid for her work. She went on to state:

I decline the job offer and moving forward in demand (sic) you pay me for the completed shift. As A) you did not tell me it was an unpaid trial (you used the term "work a full shift" with no indication of it being under volunteer/trial basis and B) It was not indicated in writing as it should have been and C) I carried our services that benefitted your business, I was legally considered an employee and am owed money.

...

[14] She set out her bank account details and advised Sfizio it had until the end of the week to pay her or she would pursue mediation.

[15] Mr Gregorash sent the following email in return:

In response, I am sorry but we don't pay for trial days. Trial days are there so that we can each figure out whether the job would be a good fit for the person. On a trial day you are not a productive member of the team and you can leave whenever you like. It is not a day of work. You are also not considered to be an employee before we ask you to be one. I did explain that it was an unpaid trial day (we never pay for trial days) so I am sorry if you did not hear me correctly or misunderstood.

I understand that you have declined our job offer but we also just want to formally rescind the job offer just so everything is clear.

...

[16] Ms Mawhinney responded:

As I have discussed with Kathy there was no mention of an unpaid trial. If you had said that I would never have agreed to this nor would have I stayed 8 hours -the child care and transport costs certainly wouldn't be worth it. I was very much a productive member of the team that day and was never told I could leave whenever. I was given a meal break and served customers all day.

...

[17] The parties continued to dispute whether Ms Mawhinney was owed wages. Their differences were recorded over several social media platforms and attracted public attention. They have not been able to resolve their matters and it is now left to the Authority to determine Ms Mawhinney's claims.

Issues

[18] The Authority is required, firstly, to determine whether Ms Mawhinney was an employee of Sfizio. In doing so the "real nature of the relationship" must be determined.¹ I must therefore examine:

- (i) whether the parties agreed Ms Mawhinney would undertake an unpaid competency assessment on 4 August 2017;
- (ii) the nature of the activities undertaken on 4 August 2017;
- (iii) whether Ms Mawhinney was a volunteer;
- (iv) whether a contract of service arose between them.

[19] If Ms Mawhinney is found to have been an employee of Sfizio, the Authority must determine whether she was constructively dismissed. If Ms Mawhinney was constructively dismissed, an assessment as to remedies is required.

Relevant legal definitions

[20] Section 5 of the Employment Relations Act (the Act) defines an "**employer**" as "... a person employing any employee or employees; and includes a person engaging or employing a home worker".

[21] An "**employee**" is defined at s 6 of the Act as follows:

6 Meaning of Employee

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) Means any person of any age employed by the employer to do any work for hire or reward under a contract of service; and

¹ Employment Relations Act 2000, s 6(2)

- (b) includes –
 - (i) a homeworker; 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 in volunteer; and
 - (ii) receives no reward for work performed as a volunteer.
- ...

[22] The phrase “**person intending to work**” is defined at s 5 to mean “a person who has been offered and accepted, work as an employee”.

Was Ms Mawhinney an employee?

Did the parties agree that Ms Mawhinney’s attendance at the café on 4 August 2017 was for the purpose of an unpaid competency assessment?

[23] Mr Gregorash says Sfizio never offers employment to a prospective employee before s/he undertakes a competency assessment. He says “*typically we text or email someone and offer her or him an unpaid competency assessment and that means it is in writing.*”

[24] Mr Gregorash accepts the arrangements concerning Ms Mawhinney’s attendance at the café on 4 August 2017 were not recorded in writing. Despite that omission, he says it was made clear to Ms Mawhinney during the interview on 3 August 2017 that she would undertake a competency assessment; the assessment was unpaid; it was an opportunity for both parties to “*check*” each other out, and; she could leave at any stage.²

[25] In contrast, Ms Mawhinney says at the end of the interview Ms Parfitt told her she was “*exactly what we are looking for*” and that they could “*give you 30 hours per week but the work might be stretched between the two cafés*”. She says Ms Parfitt advised “*we would like you to come in tomorrow and work a full shift starting 8 am and finishing around 3.30 pm.*” Ms Mawhinney accepts an offer of employment was not expressly made. But says that the overall tone and content of the conversation, and in particular the indication given as to hours plus the request to work a “*full shift*” the following day, led to believe she had got the job.

² Contained in the respondent’s Statement in Reply and which Mr Gregorash advised would form a portion of his written brief of evidence.

[26] Overall I have not been persuaded by the evidence given on behalf of Sfizio as regards what was communicated between the parties on 3 August 2017. I have preferred Ms Mawhinney evidence on those matters. My reasons for reaching these conclusions are as follows:

[27] Firstly, Mr Gregorash accepts he did not use the phrase “competency assessment” during Ms Mawhinney’s interview on 3 August 2017. He now says he told Ms Mawhinney that she would be undertaking a “trial”. Ms Mawhinney denies she was so advised, but even if I accept Mr Gregorash’s evidence, the term “trial” has a particular meaning in the context of employment relations in New Zealand including that the worker is employed over the course of the trial period and is paid.

[28] Mr Gregorash’s response to questions during the Authority’s investigation regarding what he said to Ms Mawhinney about the assessment were routinely prefaced by what he would usually tell a prospective employee before a competency assessment. This approach left it unclear about what exactly he said to Ms Mawhinney in this instance.

[29] Ms Parfitt’s testimony was equally equivocal. She said she was “*pretty sure*” that either she or Mr Gregorash told Ms Mawhinney of the nature of the competency assessment and that it would be unpaid. Ms Parfitt’s evidence was undermined by her concession that when Ms Mawhinney challenged her on the payment issue, she queried her as whether Mr Gregorash had informed her of Sfizio’s practice. She was further unable to explain how Ms Mawhinney would have been known of the duration of the assessment if not advised by Sfizio of it.

[30] Nor do I find it credible that Ms Mawhinney was advised she could leave anytime she wanted. I accept her evidence that if the arrangement was to have her attend the café to perform a competency assessment over 7.5 hours (which has not been disputed by Sfizio) on an unpaid basis, she would not have agreed to it without seeking to negotiate a reduction in the length of the assessment, given the cost of childcare.

[31] That Ms Mawhinney was not told her work on 4 August was unpaid is also consistent with, and supported by, her unchallenged evidence that she immediately protested Sfizio’s position on the matter at the end of day on 4 August 2017, and in written communication subsequent to the event.

[32] The emails sent by Sfizio between 4 and 8 August 2017 are also telling. Each suggests there may have some confusion or misunderstanding between them about payment for the day. Viewed objectively, the content of Sfizio's correspondence at that time supports my finding that the competency assessment had not been clearly discussed nor agreed to by Ms Mawhinney.

[33] Whatever Sfizio's intentions and stated practice may be regarding competency assessments, I am not at all satisfied that those matters were conveyed to Ms Mawhinney on 3 August 2017 and agreed in the way Sfizio now says.

Competency assessment or work?

[34] Mr Gregorash says the competency assessment was to evaluate Ms Mawhinney's ability to produce good coffee under a pressured working environment and to assess her interactions with clients. Having had Ms Mawhinney produce 3 separate coffees under the watchful gaze of the directors during her interview on 3 August 2017, it remains unclear what further evaluations Sfizio considered it needed in this regard. I note also that Mr Gregorash was not present at the café on 4 August 2017 and I can give little weight to his evidence concerning Ms Mawhinney's activities on the day.

[35] Sfizio submits that at all times throughout the day Ms Mawhinney was assigned to another staff member. It accepts Ms Mawhinney stayed past 3-30 pm to help pack down the café but says that assistance was at her own initiative. Ms Mawhinney does not dispute this point.

[36] If Sfizio is seeking to suggest that "assigned" staff were not able to perform their own tasks when supervising Ms Mawhinney, or that Ms Mawhinney did not work independently, I do not accept it.

[37] During the Authority's investigation Ms Parfitt agreed that neither she nor the other staff present were dedicated solely to supervising Ms Mawhinney when she undertook tasks. She acknowledged that Ms Mawhinney made coffees according to customer orders, prepared food for sale, delivered food and beverage items to customers sitting at tables, and engaged in money handling transactions (estimated by Ms Mawhinney as between \$50-\$100) when customers made purchases. She

reluctantly agreed that Ms Mawhinney performed most, if not all the tasks, that she would be required to perform as an employee.

[38] In *The Salad Bowl Limited v Howe-Thornley*,³ a case which also involved determining whether an individual was an employee when undertaking a work trial, Chief Judge Colgan observed at [26] that an interview alone between a prospective employee and employer would rarely amount to work in an employment relationship giving rise to employment rights and obligations including the expectation of payment. He went on to state, at [27], the following:

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee’s activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.

[39] The line between having Ms Mawhinney participate in a competency assessment and having her engage in work was crossed in the circumstances of this case. I have no doubt that, objectively assessed, her activities at the café on 4 August 2017 are better characterised as work that contributed to the business and provided it with an economic benefit.

Was Ms Mawhinney a volunteer?

[40] As set out at s 6(1)(c) a person who does not expect to be rewarded for work performed as a volunteer and received no reward for work performed as a volunteer is not an employee.

[41] I have found Ms Mawhinney performed work at the café on 4 August 2017. It is clear from the evidence that she expected to be rewarded monetarily for her work. I find the expectation was reasonable in the circumstances. I note also that, in circumstances similar to those in *The Salad Bowl*, Ms Mawhinney received a non-monetary “reward” for her work in the form of a free lunch.⁴ The nature of that

³ *The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152

⁴ Above n 3 at [36]

reward was promoted by Sfizio as a term of employment in its advertisement. Ms Mawhinney was not a volunteer.

What is the effect of the arrangements and activities between the parties?

[42] It is not disputed that on 3 August 2017 Sfizio offered and Ms Mawhinney agreed to undertake work tasks at the café on 4 August 2017. Applying the definition at s 5 Ms Mawhinney was a person “intending to work” at this point and therefore an employee pursuant to s 6.

[43] I agree that little by way of terms and conditions of employment were discussed between them including a rate of pay but in *The Salad Bowl* the Court observed “...neither the failure to agree upon a rate of remuneration or the non-payment of any money invalidates the parties’ agreement.”⁵

[44] The subsequent performance of the work, coupled with Ms Mawhinney’s reasonable expectation to be rewarded for the work, and that she was rewarded, reinforces my view that the circumstances between the parties satisfies s 6(1). Ms Mawhinney was employed by Sfizio and was an employee.

Was Ms Mawhinney constructively dismissed?

[45] A constructive dismissal includes circumstances where an employer’s breach of a term of employment is so serious that it is reasonably foreseeable the employee will resign rather than put up with the situation.⁶

[46] Sfizio’s resolute refusal to pay Ms Mawhinney wages for the work she performed on 4 August 2017 was a breach of the fundamental term of any employment relationship; that wages are paid in exchange for work. It was foreseeable that Ms Mawhinney would consider Sfizio’s approach on the issue was a repudiation of her employment with it.

[47] The breach was not the action of a fair and reasonable employer in all the circumstances. By that omission Ms Mawhinney was constructively dismissed. That

⁵ Above n 3 at [87]

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] IERNZ at 172

Sfizio offered Ms Mawhinney a position after the breach does not, in law, rectify the matter.⁷

Remedies

Arrears of wages

[48] Ms Mawhinney is owed arrears of wages corresponding to her work on 4 August 2017. I am satisfied the agreed hours of work were 8 am to 3.30 pm. She had an unpaid lunch break of half an hour and her assistance in the café after 3.30 was at her own initiative. She is owed \$119.07; the sum equal to 7 hours at the then minimum wage rate of \$15.75 per hour, plus holiday pay.⁸

Lost wages

[49] Section 123(1)(b) of the Act provides that an employee that had been dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that where an employee has a personal grievance and where the employee has lost remuneration as a result of the personal grievance, the Authority must order the lessor of the sum equal to the lost remuneration or 3 months' wages ordinary time remuneration.

[50] Ms Mawhinney did not quantify her claim for lost wages. Rather, the statement of problem requested "*lost wages to be calculated as appropriate*". Where an employee seeks reimbursement of lost wages as a result of an unjustified dismissal the employee should attempt to reduce his or her loss.

[51] Ms Mawhinney's refusal to accept Sfizio's offer of reemployment following her dismissal cannot be fairly characterised as a failure to mitigate. I find it was reasonable of her to reject its offer of re-employment where she no longer trusted Sfizio to act as a fair and reasonable employer. Notwithstanding that finding, Ms Mawhinney conceded she did not seek alternative employment in any form until "*probably late October [2017]*" when she set up a small cleaning business and became self-employed. Her failure to seek alternative employment until almost 3

⁷ *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2010]

⁸ \$15.75 per hour x 7 hours = \$110.25; plus holiday pay of \$8.82 (8% of gross earnings) = \$119.07

months after her dismissal means I am unable to assess her losses as a result of her personal grievance. I therefore decline to make an order under this head of claim.

[52] I consider however that Ms Mawhinney was entitled to be paid out 4 weeks' notice following her dismissal for the following reasons. Sfizio provided the Authority with a copy of a draft individual employment agreement given to people it offered employment and said to contain its "*standard terms and conditions*". The document records the notice period is 4 weeks. Having already found Ms Mawhinney was an employee at the conclusion of the interview, I have no basis on which to conclude Sfizio's standard notice period would not have applied to Ms Mawhinney, albeit an employment agreement was not signed. Sfizio must pay Ms Mawhinney the sum of \$1,890 (gross); the sum equal to 4 weeks' notice.⁹

Compensation

[53] Section 123(1)(c)(i) provides that where a personal grievance has been established the Authority (or the Court) may order compensation to the employee for humiliation, loss of dignity, and injury to the feelings of the employee. In assessing whether compensation should be ordered the focus is on the effect the employer's unjustified actions had on the employee.

[54] Ms Mawhinney claim for compensation is supported by the content of her emails to Sfizio in the days following her dismissal which clearly evidences her distress at the realisation that she would not be paid for her work. She remained emotional about the event when giving evidence before the Authority. I conclude it is appropriate to award \$7,000 in compensation.

[55] There is additional evidence of the parties each posting a range of disparaging comments about the other after 4 August 2017 through the use of various media platforms.¹⁰ The content and public nature of each party's communication was likely upsetting for the other. However, Ms Mawhinney's behaviour on social media after her employment ended cannot be characterised as contributing to the situation giving rise to the personal grievance. There is no evidence that Mawhinney contributed to her personal grievance. Equally, Sfizio's conduct on social media after 4 August

⁹ 30 hours per week at \$15.75 per hour x 4 weeks

¹⁰ Ms Mawhinney sought information as to whether other people had been "tricked" into working for Sfizio. The directors wrote scathing reviews concerning Ms Mawhinney's mother's business

2017 is not relevant in the particular circumstances of this case to an assessment regarding Ms Mawhinney's losses as a result of the breach giving rise to her personal grievance. The evidence concerning what each of the parties said about each other after 4 August 2017 has not been relevant to my assessment regarding remedies.

Penalties

[56] The Statement of Problem lodged on Ms Mawhinney's behalf sought penalties for "breach of good faith pursuant to s 4A [of the Act]". No further detail about the nature of the breach was provided. In final submissions the penalty was sought for a breach of s 4 Wages Protection Act. This claim was not signalled in the Statement of Problem, nor during the investigation meeting. I am unwilling to make penalty orders where the basis for the claim is unclear or where the respondent has not been put on notice of the matter. This claim is dismissed.

Orders

[57] Sfizio Limited is ordered to pay Ms Helen Mawhinney the following;

- (a) wages arrears of \$119.07 (gross) for work performed on 4 August 2017, and
- (b) the sum of \$1,890 (gross) comprising 4 weeks' notice, and
- (c) \$7,000 (without deduction) as compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[58] Costs are reserved.

[59] Note: This determination has been issued outside the timeframe set out at s 174C(3)(b) where the Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.¹¹

Michele Ryan
Member of the Employment Relations Authority

¹¹ Employment Relations Act 2000, s 174C(4)