

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 399
3024233

BETWEEN SARA HUGHES PARRY
 Applicant

AND MAX BURGER LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Tim Carter, counsel for the Applicant
 S J Frazer, counsel the Respondents

Investigation Meeting: 24 October 2018

Submissions Received: 28 November 2018 from the Applicant
 15 December 2018 from the Respondent
 24 December 2018 from the Applicant

Date of Determination: 5 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] At the beginning of 2017 the respondent, Max Burger Limited (MBL) traded as a café/restaurant/bar called Caroline. Damian Jones is the sole director of MBL and another company, Zen Coffee Limited', which trades under the name 'Meow'. Meow also conducts business as a restaurant and music venue.

[2] The applicant, Sara Parry, alleges MBL was obliged to place her into a contractually agreed position at Caroline when she obtained an Essential Skills Visa. She says its failure to do so unjustifiably disadvantaged her and/or breached her employment agreement. In the alternative, she claims MBL unjustifiably disadvantaged her and/or breached terms of

employment when it did not appoint her to the position when it next became available. She says those failings resulted in an actual or constructive dismissal and was unjustified.

[3] Ms Parry seeks remedies of loss wages following her dismissal, compensation for hurt and humiliation, and compensation for breach of good faith. Her claim for unpaid wages has since been withdrawn.

[4] MBL denies Ms Parry's claims in their entirety. It says her employment at Caroline came to an end when the visa for the position she was undertaking was declined by Immigration New Zealand (INZ) in March 2017. It says Ms Parry returned two months later seeking further employment and she accepted its offer of casual work for Meow. In mid - November 2017 it became apparent Ms Parry he did not have the appropriate work visa. MBL says when it asked her to resolve those matters with INZ she left its employment.

Summary of relevant information and events leading to Ms Parry's claims

[5] From May 2016 until January 2017 Ms Parry worked at Caroline on a casual basis. Over this period she held a 'United Kingdom Working Holiday Visa'. The visa allowed her to work but not in a permanent position.

[6] In late 2016 Ms Parry obtained certification to manage licenced premises. In January 2017 MBL offered Ms Parry a permanent position as 'Restaurant Manager' at Caroline. With the support of her then manager, Mr Michael Keane, who was also a personal friend, on 17 January 2017 Ms Parry applied to Immigration New Zealand (INZ) for an 'Essential Work Skills Visa'. Her application was accompanied by associated forms signed by Mr Keane on behalf of MBL. Ms Parry was issued with an interim visa while her application was processed.

[7] In February 2017 INZ indicated several difficulties with the application. Ms Parry and Mr Keane each supplied INZ with additional material including a signed employment agreement. The agreement recorded Ms Parry was, and would remain, able to work legally in New Zealand, the role was based at Caroline's premises, the position commenced on 1 February 2017, and hours of work were for 30-40 per week.¹

¹ The agreement recorded the hours of work as "30.4" but it is accepted by both parties that this is a typographical error.

[8] On 16 March 2017 INZ informed Ms Parry the Essential Skills Visa had not been granted. She was advised she could not lawfully work in New Zealand. The interim visa was cancelled. Ms Parry immediately applied to have INZ reconsider the decision. At her request, Mr Keane agreed to furnish INZ with information concerning MBL's recruitment process.

[9] Between 16 and 30 March 2017 Ms Parry kept in regular contact with Mr Keane. The pair met each other socially on 30 March 2017. The parties now dispute whether Mr Keane undertook to keep the Ms Parry's job open for her.

[10] On or about 18 April 2017 INZ advised Ms Parry that it intended to grant her a work visa. She sent a text message to Mr Keane stating "*Hypothetically if I could wrangle a legal way to stay would you have shifts for me at Caroline*".

[11] The sequence and timing of events beginning 18 April and early May 2017 was not at all clear from the evidence. I am satisfied that on 2 May 2017 Ms Parry received notice from INZ that an essential skills visa had been granted. She sent a text to Mr Keane as follows:

Yo. I got the criteria from Immigration ... I need to be employed by Max Burger as a duty manager working at Caroline, NO specific hours. I saw Damian and so informed him but thought I'd run it by you too ...

[12] On 8 May 2017 Mr Keane responded: "*Hey, yeah, so we can employ you, easy! ... I will be rostering you once you give me the green light?*"

[13] Ms Parry says she approached Mr Keane and Mr Jones individually sometime in late April to discuss the possibility of work. She says when she met Mr Keane she reminded him of her contractual right to a duty's manager's position but he told her the role at Caroline was no longer available.

[14] Ms Parry, Mr Keane and Mr Jones met together at a later point although it is unclear whether the meeting occurred before or after Ms Parry had received the visa and corresponding conditions. In any event, during this discussion Ms Parry accepted MBL's offer of casual work in the kitchen at Meow beginning in or around June 2017. Ms Parry began working at Meow on 30 May 2017.

[15] On 4 August 2017 Ms Parry sent a text to Mr Keane asking for a copy of her employment agreement. He advised she should have a copy of the agreement. Ms Parry

accepts she did not pursue the matter. In late August 2017 Mr Keane resigned from his position. In or around the same time Mr Jones' wife, Rahine O'Reilly, took over the management of Caroline and Meow.

[16] In the second half of October 2017 MBL appointed a new duty manager at Caroline. That event appears to have prompted Ms Parry to arrange a meeting with Ms O'Reilly. They met on 20 October 2017. Ms Parry advised Ms O'Reilly she wasn't getting enough hours of work and that she had a contract which provided she work at a Restaurant Manager at Caroline. Ms O'Reilly agreed to make enquiries with Mr Jones about the matter.

[17] They met again on 24 October 2017. Ms O'Reilly advised that there were no hours of work required at Caroline, nor was a duty manager role available. She offered Ms Parry a bar position at Meow for 30 hours a week. Ms Parry turned down the offer.

[18] On 13 November 2017 Ms Parry's solicitor contacted Mr Jones and advised the role Ms Parry was performing was not in accordance with her visa conditions. Ms O'Reilly spoke to Ms Parry the following day. Mr Jones subsequently contacted INZ to clarify the matter. On 16 November 2017 Ms O'Reilly sent the following email:

Dear Parry,

I hope you are well.

As we discussed on Tuesday, questions have arisen as to whether or not you can work under your current visa. We have now spoken to Immigration New Zealand. Unfortunately they have informed us that you have to cease work immediately. What they said, was, because the role for which you applied for your visa on was no longer available, due to your visa originally being turned down and the necessity to fill the role with someone else, you were obliged to apply for an amendment to your visa before you asked for an alternative role in the business.

As you have not done this and then misled us as to your work status you cannot continue to work for us unless this is sorted out. Feel free to contact me if you have any questions.

...

[19] Later the same day Ms Parry applied for a visitor's visa. Concurrently, her solicitor advised INZ that Ms Parry's conditions of employment were in breach of the visa requirements. Ms Parry did not return to the workplace and on 22 November 2017 MBL paid all outstanding wages and holiday pay.

[20] Ms Parry has been granted legal aid and asks the Authority determine her claims.

The issues

[21] The Authority is required to determine:

- (a) whether MBL unjustifiably disadvantaged and/or breached terms and conditions of Ms Parry' employment when she was not appointed to the position of Restaurant Manager:
 - (i) in May 2017 when her Essential Skills Visa was granted;²
 - (ii) in the alternative, when the position next became available;
- (b) whether MBL unjustifiably disadvantaged and/or breached terms and conditions of employment by its failure to comply with Ms Parry's visa conditions;
- (c) whether MBL breached its obligations of good faith;
- (d) whether Ms Parry was unjustifiably dismissed, either actually or constructively.

The Authority's investigation

[22] Ms Parry provided written and oral evidence to the Authority, as did Mr Keane, Mr Jones, and Ms O'Reilly.

[23] A number of written statements drafted by individuals who worked alongside Ms Parry at one or other of the venues were furnished to the Authority. By and large the statements were not relevant to the claims before the Authority, and those individuals did not attend the Authority's investigation meeting.

[24] A brief of evidence drafted by an ex-employee of MBL was provided on the basis that she would be present for the Authority's investigation. Unfortunately the individual did not appear at the meeting. Counsel said this was because the witness had been intimidated by the respondent. I was not satisfied there was sufficient evidence to establish that concern. Counsel was advised I was unwilling to rely on written statements by individuals who were not available for questioning. I asked to be provided with an affidavit from the individual on

² The personal grievance was not raised until 6 months after the date in which the action alleged to amount to a personal grievance occurred or first came to the employee's notice. However MBL has not objected to the claim being raised out of time and has actively engaged with the applicant on the matter. MBL must be taken to have consented to the claim. See *Commissioner of Police v Hawkins* [2009] NZCA 209.

that issue, or alternatively the contact details of the individual so as to make additional inquiry on the matter. Neither piece of information was provided.

[25] This determination has made finding of fact and law necessary to dispose of Ms Parry's claims. As is permitted by s 174 of the Employment Relations Act 2000 ("the Act") I have not referred to each item of evidence or every aspect of submissions furnished to the Authority over the course of the investigation, however all information received has been considered.

Assessment of evidence

[26] There are several material conflicts in the evidence between the parties as to about what was said or agreed between them at various junctures.

[27] In order to resolve the matters I have examined the evidence of each witness where statements have been made regarding key interactions and assessed whether the evidence given in respect of subsequent conduct tends to support or detract from witnesses' accounts regarding those events. I have also considered whether there are inconsistencies between written and oral evidence.

[28] Taking a common sense approach and applying the above considerations the Authority must determine factual disputes on the balance of probabilities: ie what is more likely to have happened than not.

The claims alleging an unjustified disadvantage

[29] Ms Parry is required to establish the actions (or omissions) alleged to give rise to her claims has occurred and resulted in a disadvantage. The onus then shifts to MBL to justify its actions according to the statutory test set out at s 103A of the Employment Relations Act 2000.

Was Ms Parry unjustifiably disadvantaged by MBL's failure to place her into the position of Restaurant Manager when the Essential Skills Visa was granted?

[30] The parties do not dispute that when Ms Parry received initial notice that the Essential Skills Visa was declined the employment relationship came to an end.

[31] Counsel for Ms Parry contends that Mr Keane's agreement to assist Ms Parry's application for reconsideration effectively affirmed the employment agreement. He says

MBL was then obliged to place her into the position of Restaurant Manager when she received the Essential Skills Visa.

[32] I have some doubts as to whether Mr Keane's assistance could be fairly characterised as an affirmation of the employment agreement where there was no certainty as to whether the terms of the agreement could be performed lawfully by Ms Parry. However it is not necessary to determine the matter. I find, on the evidence, that any obligations MBL may have held towards Ms Parry, if they existed, were extinguished on 30 March 2017. My reasons for this finding follow.

30 March 2017 and subsequent conduct

[33] As already noted Ms Parry and Mr Keane met socially on 30 March 2017. Mr Keane says Ms Parry told him she was returning to the UK. Ms Parry agrees she discussed the possibility of returning to Britain but says Mr Keane promised to keep her position open until if and when she had to leave New Zealand. On balance I have preferred Mr Keane's evidence on this issue. In making this finding I have examined the parties' conduct after 30 May 2017 as a means to assessing what was likely agreed between them.

[34] The text message of 18 April 2017 provides insight. The message opens with the word "hypothetically" and goes on to query whether there are any available shifts available at Caroline. There is nothing in this correspondence to indicate Ms Parry considered the Restaurant Manager role remained available for her. Nor is there any suggestion that Ms Parry challenged Mr Keane that he had agreed to hold the job open for her when he informed her the role was no longer available. Finally, Ms Parry conceded when questioned by the Authority that when she was offered a position as Meow (either in late April or early May) she accepted it "without protest" to her understanding the role remained available for her.

[35] I consider it more likely than not that Ms Parry would have expressed a greater entitlement to be returned to the position of Restaurant Manager in at least one, if not all, of the above instances, had Mr Keane agreed to keep the position for her. There is no evidence to demonstrate Ms Parry sought to hold Mr Keane to the undertaking purported.

[36] In reaching this conclusion I have considered whether Ms Parry may have been reluctant to force the issue in circumstances where she was seeking to obtain further work. But having examined the content of the text messages between them, I am satisfied their

interactions were generally robust and that Ms Parry was able to confidently raise issues of concern with Mr Keane.

[37] Returning to the discussion between the parties on 30 May 2017, I am satisfied Ms Parry advised Mr Keane of her return to the UK in such a way that it was reasonable for him to conclude she was not available to perform the role in any event. Although not in itself decisive of the matter, there was a significant drop in the number of text messages sent by Ms Parry and Mr Keane after 30 May 2017 and no further mention of Ms Parry's application is made at all compared to the frequency of contact and discussion on the issue prior to this date. The evidence tends to support MBL's position that Ms Parry's focus had shifted elsewhere.

Summary of findings

[38] The evidence concerning the parties' discussion on 30 March 2017 and Ms Parry's subsequent interactions with MBL to obtain work, leads me to conclude that by 2 May 2017 there was neither an ongoing obligation on MBL to place Ms Parry into the Restaurant Manager's position, nor could Ms Parry reasonably expect it would do so. It follows that Ms Parry's claim of an unjustified disadvantage or breach of contract on the basis that MBL failed to place her in the position of Restaurant Manager on receipt of her Essential Skills Visa is dismissed.

Was Ms Parry unjustifiably disadvantaged by MBL's failure to place Ms Parry into the position of Restaurant Manager when one became available?

[39] Ms Parry claims that when she was offered the casual position at Meow there was an agreement that she would be returned to her permanent contractual position of Restaurant (Duty) Manager when the role became available. She says that the position was vacant on several occasions following her employment on 30 May 2017 but that MBL failed to appoint her. She claims she was unjustifiably disadvantaged by the omission.

[40] Mr Keane agrees at the time Ms Parry accepted the casual position at Meow she asked whether she could return to the Restaurant (Duty) Manager's position sometime in the future. He says he advised the matter could be "looked at" if a role became available.

[41] Despite the absence of a written employment agreement which might have illuminated the parties' intentions, I have not been persuaded there was an arrangement of the type Ms Parry claims.

[42] Ms Parry's written brief of evidence says she routinely asked Mr Keane and Ms O'Reilly for management shifts at Caroline. MBL accepts Ms Parry asked for management shifts at Caroline from time to time, and there is no dispute she worked an occasional shift at those premises.

[43] However, there is no evidence Ms Parry advanced her requests to work at Caroline on the basis of a prior agreement, or that she was strung along with promises to that end. There is simply no evidence that she raised with MBL at all that she considered there was an agreement to be returned to a manager's position at Caroline.

[44] My finding is illustrated in the meeting held between Ms Parry and Ms O'Reilly in late October 2017. It is clear Ms Parry discussed her concerns about hours of work and she referred also to the February 2017 employment agreement. She accepts she made no mention of a pledge by Mr Keane or Mr Jones to transfer her to duty manager's position at Caroline when she agreed to work at Meow. In response to the Authority's question as to why she did not express to management her right to a Restaurant Manager's position as and when the position became available, Ms Parry conceded she "sat" on the matter. I understood her evidence on this point to mean she did not seek to enforce her understanding of the parties' agreement. She was unable to explain why she took this approach, and I do not find it plausible.

[45] Ms Parry has not been able to establish on the balance of probabilities to my satisfaction that there was agreement to transfer back to Caroline and into a duty manager's position as a term of employment. It follows there is no basis on which I can conclude MBL's failure to appoint her to the position resulted in an unjustifiable disadvantage or breach of contract. This claim is dismissed.

Was Ms Parry unjustifiably disadvantaged by MBL's failure to place her into the position in accordance with her visa conditions?

[46] Submissions on behalf of Ms Parry point to the text message she sent to Mr Keane on 2 May 2017 advising the visa conditions require she work at Caroline in the role of

Restaurant Manager. Counsel says MBL's failure to place Ms Parry in the position put her in breach of her visa conditions and she was unjustifiably disadvantaged by this action.

[47] It is an offence under the Immigration Act 2009 to employ a person who is not entitled to work.³ It was remiss of MBL not to ensure the Essential Skills Visa allowed Ms Parry to work in the position offered to her at Meow. Equally, Ms Parry was obliged to inform INZ if the circumstances on which her visa was granted had altered.⁴ Both parties were at fault regarding their respective obligations under the Immigration Act, but the Authority has no jurisdiction to determine conduct under that legislation.

[48] By her own evidence, when she sent the 2 May 2017 text message summarising the visa conditions, Ms Parry knew the Restaurant's Manager's role was not available.

[49] As noted, the evidence was unclear as to whether Ms Parry accepted the role at Meow before or after she received a copy of the visa. But there can have been no doubt in her mind by the time she began working at Meow on 30 May 2017 that the position did not align with the conditions attached to the visa. I do not accept MBL unjustifiably disadvantaged Ms Parry "in her employment" by failing to comply with her visa conditions when Ms Parry must be taken, by commencing the role at Meow, to have accepted the new terms and conditions of employment. This claim is also dismissed.

Was Ms Parry unjustifiably dismissed?

Actual dismissal

[50] Submissions on behalf of Ms Parry focus on the email sent by Ms O'Reilly to Ms Parry on 16 November 2017, and in particular to the statement concerning Ms Parry's visa conditions and that: "*you cannot continue to work for us unless this is sorted out*".

[51] As I understand, counsel submits that MBL was, or should have been, aware that Ms Parry would not be able to obtain a visa corresponding to the position at Meow. He says the email can only be construed as an actual dismissal. I do not agree.

[52] Ms Parry accepts she did not at any time during her employment at Meow, make inquiry with INZ as to whether her visa could be amended to suit her changed circumstances.

³ Immigration Act 2009, s 350
⁴ Above, s 58

The contention that Ms Parry would not have been able to obtain a suitable amendment to her visa has not been substantiated nor is her view concerning MBL's knowledge. The email of 16 November 2017 does not disclose a dismissal.

Constructive dismissal

[53] A constructive dismissal may arise in circumstances where it appears an employee has voluntarily decided to leave his or her employment but in reality the end of the employment relationship was at the initiative of the employer as a consequence of its actions or omissions. Where the constructive dismissal is said to have been caused by a breach of duty, the breach must be of such a character as to make the employee's resignation reasonably foreseeable.⁵

[54] As with Ms Parry's various claims of an unjustified disadvantage her claim of a constructive dismissal is premised on the proposition that the terms of the Restaurant Manager's position remained extant, or that it was a term of employment that she would be placed in the role when it became available. On the evidence provided I have not accepted those obligations existed, or that a breach of good faith in relation to those matters has been established. It follows that the claim for a constructive dismissal based on a breach of duty has not been made out.

Additional comment

[55] It is necessary to comment on an issue that arose in the course of the investigation meeting and pursued as a claim in final submissions. It is alleged that MBL's failure to provide Ms Parry with an employment agreement when she agreed to work at Meow, or provide the agreement at her request in August 2017, has resulted in a genuine uncertainty as to the terms of her employment at that juncture. It is further suggested that had MBL done so litigation between the parties may have been avoided.

[56] MBL says Ms Parry's terms of employment at this juncture were those contained in the original employment agreement but that the document has been mislaid.

[57] I am not persuaded by MBL's response. Ms Parry's first tranche of employment was located at Caroline. She was entitled to be provided with a draft written employment agreement when she entered into discussions for the role at Meow and MBL was obliged to

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140.

retain a copy of the document.⁶ However, penalties sought for those omissions were not brought within the statutory timeframe required⁷ and I can take those matters no further.

Costs

[58] In final submissions both parties made reference to matters that may require consideration in a costs setting. I am unwilling to advance a finding as to costs without each party each having an opportunity to consider the findings of this determination, and an opportunity to provide submissions on the matter. Costs are therefore reserved.

Note: This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.⁸

Summary

[59] Ms Parry's claims against Max Burger Limited are dismissed.

Michele Ryan
Member of the Employment Relations Authority

⁶ Employment Relations Act 2000, s 63A(2) and s 64(1) respectively.

⁷ Above, s 135(5)

⁸ Above, s 174C(4)