

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 608
3263079

BETWEEN JAKE PIRRET-BUIK
 Applicant

AND SECOND SLICE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Danny Gelb, advocate for the Applicant
 Lawrence Anderson, advocate for the Respondent

Investigation Meeting: 19 July 2024 in Auckland

Determination: 10 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jake Pirret-Buik said he was unjustifiably dismissed from a pizza delivery job he had only just started. He said his manager wrongly accused him of taking cash paid by a customer at a delivery.

[2] He sought orders for payment of lost wages and distress compensation for loss of the job which he said he was told would be for 30 hours a week.

[3] Second Slice Limited (SSL) denied Mr Pirret-Buik was employed on the basis on an ongoing part-time job. It said he worked for only two days, 14 and 15 April 2023. It denied he had even come to its store, a franchised-branch of Domino's Pizza, in Pakuranga, on the evening of 18 April, which was when Mr Pirret-Buik said he was dismissed by store manager Nishi Gupta.

[4] SSL also disputed Mr Pirret-Buik's claim that he had worked two earlier nights, on 7 and 8 April 2023. It did not accept GPS records Mr Pirret-Buik provided of

journeys in his car on those dates showed trips made to deliver pizza for its business. SSL claimed, instead, that Mr Pirret-Buik had followed another delivery driver around and stopped near the same addresses on those nights.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Mr Pirret-Buik, his brother Daniel Pirret-Buik, a former fellow worker Keira Gray, Ms Gupta, current SSL employee Akshay Silswal and SSL sole director and shareholder Jashan Singh.

[6] Under affirmation, all witnesses answered questions from me and the parties' representatives. The representatives gave oral closing submissions, speaking to written synopses, about the facts and legal issues for resolution.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring determination were:

- (a) What was the nature and terms of Mr Pirret-Buik's employment by Second Slice Limited (SSL)?
- (b) Was Mr Pirret-Buik dismissed on 18 April 2023?
- (c) If Mr Pirret-Buik was dismissed, was the decision to dismiss him and how that decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (d) If SSL's actions were not justified (by disadvantaging and/or dismissing Mr Pirret-Buik), what remedies should be awarded, considering:
 - Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act?
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Pirret-Buik that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to any costs of representation of the other party?

Assessment of the evidence

[9] As noted in Mr Pirret-Buik's closing submissions, disputes of fact arising from the evidence needed to be resolved on the basis of what was more likely than not to have happened, that is on the balance of probabilities, sometimes called the civil standard of proof. Here that assessment relies, to the extent possible, on what can be corroborated from available records from the time – which included the GPS records from Mr Pirret-Buik's car, the store's shift rosters, records of deliveries made, and text messages exchanged between Ms Gupta and Mr Pirret-Buik.

[10] From assessing whatever corroborating information was available against some conflicting statements of the witnesses, the following findings on some key facts are made.

Mr Pirret-Buik worked for SSL on 7 and 8 April

[11] It was more likely than not that Mr Pirret-Buik had been asked to work for SSL on 7 and 8 April 2023, before the formalities of entering a written employment agreement were completed. He was asked to fill in on those days after the roster for that week had been prepared by Ms Gupta, so the shifts he had worked were not listed on the roster.

[12] Ms Gupta confirmed the store was short staffed around this time and she needed people to fill shifts. Mr Pirret-Buik said he drove his own car to deliver the orders, not the store's moped delivery bike. The GPS records for his car show he was at or nearby addresses matching addresses in the store's order records for those days.

[13] While some of those GPS records did not match the exact address on the store's order records, this was consistent with parking across the street or near to the premises where the delivery was being made.

[14] There was no evidence to support the allegation that Mr Pirret-Buik had simply shadowed another delivery driver. It was no more than speculation offered by Mr Singh in his evidence. It did not meet the necessary standard of probability.

[15] Mr Silswal's evidence that he did not recall seeing Mr Pirret-Buik at the store during those days did not negate Mr Pirret-Buik's evidence. The store roster showed Mr Silswal was due to be on duty at times that crossed over with hours Mr Pirret-Buik

said he worked. Mr Silswal said he was the store's shift runner all through April, and was in the store for his entire shifts, so would have seen Mr Pirret-Buik coming and going if he was working doing deliveries. However, Ms Grey was also rostered on for shifts on 7 and 8 April but Mr Silswal insisted he had not seen her at work on those days. When pressed on this point, he accepted it was possible he would not see a delivery driver picking up orders. If this were so for Ms Grey, it was equally possible he did not see Mr Pirret-Buik.

[16] Ms Grey's evidence was helpful because she said she had seen Mr Pirret-Buik working at the store, remembering him from when he had worked there before under its previous owners in 2022. Due to a family bereavement Ms Grey was not rostered to work on 14 and 15 April, which were dates SSL accepted were days Mr Pirret-Buik had worked. This made it more likely than not that the days she remembered seeing him were the only *other* days he worked, which were 7 and 8 April.

[17] Mr Pirret-Buik's name was not recorded in the order delivery records. This was consistent, however, with someone who had not yet completed the formal employment process and not yet been issued a code to sign into the delivery record system. In those circumstances, the supervisor or someone else in the store would log into system so their name, rather than the actual delivery driver, would show on the record.

Mr Pirret-Buik was not given an employment agreement until 18 April

[18] Ms Gupta said she gave Mr Pirret-Buik an employment agreement to fill in and sign on 9 April. She said he took it away to read but, by 18 April, had not returned it.

[19] On 18 April Ms Gupta sent Mr Pirret-Buik a text at 2.36pm: "Come today after 8 to see me in store". She said she wanted to get his employment agreement signed and returned to her. She said Mr Pirret-Buik had not come to see her on the evening of 18 April by the time she had left the store when her shift ended at 8.30pm.

[20] Mr Pirret-Buik said he did go and see Ms Gupta at the store that evening. He said Ms Gupta told him Mr Singh did not want him working for the company anymore and gave him a copy of an employment agreement, telling him he had to sign and return it if he wanted his final pay. According to Mr Pirret-Buik he asked why, Ms Gupta told him it was "because of what happened" on one of the days he worked in the previous week and she then said "you know what you did". Mr Pirret-Buik said he was confused,

refused to sign the agreement, leaving the store and taking it with him. He said he felt she was “firing me on the spot” for “implied false accusations”.

[21] Those events are considered later in this determination but Mr Pirret-Buik’s account of when he got a copy of the employment agreement is accepted as more likely than Ms Gupta’s account for the following reasons.

[22] Firstly, there is no evidence corroborating that he gone to the store on 9 April. He was not asked to work that day. There is evidence, in the form of his car’s GPS record, that his car was outside the store on 18 April from 8.37pm to 8.41pm, the period during which Mr Pirret-Buik says he went into the store, spoke with Ms Gupta at the front counter and promptly left with the agreement he said she gave him to sign.

[23] Secondly, the only support for Ms Gupta’s account of giving Mr Pirret-Buik a copy of the employment agreement on 9 April came from Mr Singh. He said he had printed out a copy of the agreement and given it to Ms Gupta to give to Mr Pirret-Buik. Mr Singh accepted, however, he had had not been at the store on any of the days and times Mr Pirret-Buik was said to have worked or visited there during April 2023. Mr Singh’s account of Ms Gupta handing over the agreement on 9 April simply relayed what she told him later.

[24] Thirdly, if Ms Gupta’s purpose on 18 April was to get a signed employment agreement, and she had in fact given one to Mr Pirret-Buik on 9 April, it was likely her text message to him on 18 April would have said something like “please bring your signed agreement, I need it if you want to be on the roster for more work”. It did not.

[25] The issues for resolution in this determination are considered in light of those findings of fact.

The nature of the employment

[26] The parties agreed Mr Pirret-Buik was employed by SSL but disagreed on the nature and terms of the employment.

[27] He had worked for the previous owners of the store between May and November 2022, during his last year at high school.

[28] In March 2023 he had called into the store. He spoke to Ms Gupta. He told her he had worked for the previous owners. He asked about the prospect of work with SSL. In the following days Ms Gupta checked with Mr Singh who had approved hiring Mr Pirret-Buik. When Mr Pirret-Buik called into the store a few days later to check the situation, Ms Gupta confirmed he would be offered work. According to Mr Pirret-Buik's oral evidence he told Ms Gupta he hoped to get up to 30 hours work each week and she said "we could do 30". He also said Ms Gupta then arranged for him to work a shift on 7 April and told him an employment agreement would be ready then. Ms Gupta denied any number of hours was agreed or that Mr Pirret-Buik was asked to work on 7 or, subsequently, on 8 April. Mr Pirret-Buik said he was asking during his 7 April shift if he could also work on 8 April and agreed.

[29] SSL submitted Mr Pirret-Buik was offered work on a casual basis only, arranged week by week, with no expectation of ongoing work.

[30] Its submission was inconsistent with the written agreement given to Mr Pirret-Buik, whether this was done on 9 April as Ms Gupta said or on 18 April as he said. Its written terms are the best evidence about the basis on which SSL had offered employment and Mr Pirret-Buik had agreed to work.

[31] The agreement was headed: Individual Employment Agreement (Permanent Part-time – Hourly Wage). At clause 1.2 it said "your employment with us is on a part-time basis" with hours and days of work to "be notified to you on our roster ... [and] ... we will endeavour to let you know five days in advance of the new roster, unless there are exceptional circumstances. Before the roster is created, you need to give the store manager your availabilities for the week."

[32] A schedule to the agreement headed "Your Key Terms" had the start date and pay rate left blank but included a clause saying the "nature of the employment" was "part time". Under the heading "Days and hours of work" it stated (underlined emphasis added):

The weekly roster dictates the days and hours that you will work, as agreed between you and the Employer, based on your availability. You may be offered additional hours which you can choose to accept or decline.

[33] The wording allowed for employees to advise their availability for work each week but required them to work whatever hours they were then rostered. Only

additional hours were open to the choice to accept or decline in the way that would be required for a truly casual employment agreement.

[34] The evidence did not, however, establish Ms Gupta had agreed orally to a minimum of 30 hours work each week as Mr Pirret-Buik alleged. Considering the information available from the rosters for shifts worked by other delivery drivers around this time, it was unlikely Ms Gupta would have guaranteed at least 30 hours a week on each roster. Rather, the more typical 20 hours a week is to be taken for the purposes of this determination as, more likely than not, the intended and agreed level of hours.

The 15 April payment incident

[35] As already canvassed, the evidence established Mr Pirret-Buik worked for SSL on four days – 7, 8, 14 and 15 April 2023.

[36] The event which, according to Mr Pirret-Buik, led to SSL dismissing him occurred near the end of his shift on Saturday, 15 April. Ms Gupta sent him on a delivery to a Sunnyhills address. The customers, who he described as “very intoxicated”, paid by using a card on a portable EFTPOS machine. On returning to the store, Mr Pirret-Buik said he told Ms Gupta the customers had asked for a receipt but the machine would not print one. When Ms Gupta checked the machine, the last payment came up as an error. Mr Pirret-Buik understood this meant no payment was made so he returned to the Sunnyhills address. He explained the problem to the customers who, he said, then paid him \$50 cash which he took back to the store and gave to Ms Gupta.

[37] Mr Pirret-Buik had set out his account of 15 April in his written statement for the Authority investigation. Ms Gupta’s written witness statement, lodged after his, did not refer to that evidence. Asked at the investigation meeting why she had not commented on it, Ms Gupta said “because nothing such happened”. Asked if she thought he stole any money, she said “no”. Asked if she had told Ms Grey that he had stolen \$50, she said “no”. Asked if she thought Mr Pirret-Buik had done nothing wrong, Ms Gupta said “yes”.

[38] Ms Grey’s evidence was that she asked a co-worker in late April where Mr Pirret-Buik was and was told “he had been fired cos he had stolen money”. She said she then asked Ms Gupta about this during a quiet moment in the store. Ms Grey said

Ms Gupta told her Mr Pirret-Buik was “fired because he stole \$50”. Ms Grey said Ms Gupta told her that “he had taken money to give as change but the customer paid by EFTPOS instead and [he] never returned the money to the register”.

[39] Ms Gupta denied any such conversation took place with Ms Grey.

[40] Ms Grey’s evidence was that she had sent a message to Mr Pirret-Buik on a social media app, relaying her conversation with Ms Gupta, asked if he was contacting a lawyer and volunteered to be a witness if he wanted. Asked why she had done that, Ms Grey said she did not think what Ms Gupta said about Mr Pirret-Buik was consistent with what she knew of his character and “thought it was the right thing to do” because “other people” had previously had issues with SSL.

[41] Ms Grey, when questioned about why she had left the job herself in late October 2023, said she was not getting enough hours and had a new job to start in late 2023. She denied her evidence was motivated by any bad feeling towards SSL.

Dismissal on 18 April 2023

[42] The accounts given by Mr Pirret-Buik about the events of 15 April and by Ms Grey about her late April discussion with Ms Gupta are accepted as more likely than not to be correct, for the following reasons.

[43] Firstly, relying on the findings made earlier about what happened on 18 April, Mr Pirret-Buik’s account of going to the store that night was more credible than Ms Gupta’s denial.

[44] Secondly, Ms Gupta did not have a satisfactory explanation of why, if Mr Pirret-Buik had not come to the store that evening as she had asked, she made no further attempt to contact him to ask if he still wanted work. She had said the store was understaffed and needed the ‘manpower’ but agreed she had made no further attempt to contact him by text or telephone after that evening. A reasonable inference may be made that she did not try to contact him because she knew he had been told that evening that his employment with SSL was over.

[45] Accordingly, Mr Pirret-Buik has established his claim he was dismissed on 18 April. It was an unjustified dismissal. Whatever concerns SSL may have had were not put squarely to him for response. A conclusion about his employment was made

without considering whatever response he may have had, given the chance. He was treated unfairly as a result, losing the prospect of work over the following weeks.¹

Remedies

[46] Having established his personal grievance, Mr Pirret-Buik was entitled to an assessment of remedies.

Arrears and lost wages

[47] Mr Pirret-Buik claimed a combination of arrears for the days between 7 and 18 April and, after then, lost wages as a personal grievance remedy.

[48] Lost wages were claimed for two periods. The first was from 18 April to 11 May 2023 when he left New Zealand for a pre-planned and extended European holiday with his family. The second was for the 13 weeks after his return to New Zealand in September 2023.

[49] For both the arrears and lost wages claimed, Mr Pirret-Buik sought awards on the basis of pay at the rate of \$22.70 an hour for 30 hours a week, less an amount SSL had already paid him for hours it accepted he had worked on 14 and 15 April.

[50] His evidence did not support orders at the levels Mr Pirret-Buik sought.

[51] Text messages exchanged between Ms Gupta and Mr Pirret-Buik show he was slow to provide information about days he was available to work. This resulted in Ms Gupta not having that information when preparing the next week's roster.

[52] He was, however, entitled to pay for the six hours Mr Pirret-Buik said he worked on 7 and 8 April. At the rate of \$22.70, arrears of \$147.10 are due to him. This amount includes the eight per cent holiday pay loading for employment ended within 12 months.²

[53] The lost wages award is limited to three-and-a-half weeks, from 18 April to his departure on an extended family holiday on 11 May. Mr Pirret-Buik and Ms Gupta agreed he had talked about being away from then as part of their initial discussion about

¹ Employment Relations Act 2000, s 103A.

² $\$22.70 \times 6 = \$136.20 \times 8\% = \$147.10$.

working for SSL. Even if his employment had not been terminated in April, there was no requirement or certainty he would have returned to the job after that holiday anyway.

[54] The award is not extended to cover the period from September 2023 to January 2024, as Mr Pirret-Buik had sought, because he did not provide adequate evidence of what he had done to find alternative work and income in the period claimed after his return from holiday. He had not established that he had done what he could reasonably have done during those weeks.

[55] At the 20 or so hours Mr Pirret-Buik could reasonably have been expected to be rostered to work each week from 16 April to 10 May 2023, his total loss amounted to 70 hours for the three-and-a-half weeks before his extended family holiday began. Again, allowing for the eight per cent holiday pay loading for employment ending within 12 months, SSL must pay Mr Pirret-Buik \$1,716.12 as lost wages under s 123(1)(b) of the Act.³

Compensation for humiliation, loss of dignity and injury to feelings

[56] Mr Pirret-Buik gave evidence of being shocked by his sudden dismissal, a slump in confidence and embarrassment for him amongst family and friends, heightened by the resulting financial pressures. He also felt the sting of the suggestion that he had been dishonest with company cash. He said this had also affected his mental health but there was no medical evidence of substantial or ongoing consequences. He was now working in his family's business.

[57] Weighing his evidence, the particular circumstances of the case and the general range of awards in cases of this type, an appropriate award of compensation under s 123(1)(c)(i) of the Act to mark the effects of his unjustified dismissal on Mr Pirret-Buik is \$8,000.

No reduction for contributory behaviour

[58] No blameworthy conduct by Mr Pirret-Buik was established as contributing to the situation giving rise to his grievance so no reduction of remedies was required under s 124 of the Act.

³ $\$22.70 \times 70 = \$1,589 \times 8\% = \$1,716.12.$

Summary and orders

[59] Mr Pirret-Buik was unjustifiably dismissed by SSL.

[60] To settle his personal grievance for unjustified dismissal, SSL must pay Mr Pirret-Buik the following sums within 28 days of the date of this determination:

- (i) \$1,716.12 as lost wages; and
- (ii) \$8,000 as compensation for humiliation, loss of dignity and injury to his feelings.

[61] SSL must also pay Mr Pirret-Buik arrears of wages of \$147.10, also within 28 days of the date of this determination.

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If unable to do so, and an Authority determination on costs is needed, Mr Pirret-Buik may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, SSL would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Robin Arthur
Member of the Employment Relations Authority

⁴ See www.era.govt.nz/determinations/awarding-costs-remedies.