IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 3
5558684

	BETWEEN	JORE TOA TEMARAMA Applicant
	AND	HOB EAT TO GO LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Andy Bell, Counsel for Applicant Mr Eran Ben-Shachar, on behalf of the Respondent
Investigation Meeting:	6 October 2015
Submissions Received:	On the day of the investigation meeting on behalf of the Applicant
Determination:	5 January 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Eran Ben-Shachar is the director of the Hob Eat to Go Limited (HEG). He says his sons and their friends, largely either college or university students, wanted to operate a business providing healthy food to individuals in financial difficulty. HEG was incorporated on 28 January 2015 and began trading on 31 January 2015 from a food cart based in central Wellington. Customers paid what they could afford.

[2] Alongside volunteers HEG engaged two employees, including the applicant, Mr Jore Temarama. Mr Ben-Shachar's son, Maor, was HEG's Operations Manager and had known Mr Temarama at school. It was through this connection that Mr Temarama and Mr Ben-Shachar met and discussed terms of employment.

[3] No employment agreement was signed but it was agreed Mr Temarama would work 25 hours per week as a casual employee. He began work on a training wage of $11.40 per hour. Although HEG paid wages at the end of the month a pattern emerged whereby Mr Temarama would receive an advance on wages on Fridays which were later reconciled in wage calculations at the end of each month.

The events leading to termination of employment

[4] Over the 2015 Easter break Mr Temarama stayed with relatives north of Wellington city. On Saturday 28 March he realised he had not received the advance on wages he anticipated. He sent a text message to Mr Ben-Shachar asking why he had not been paid.

[5] Text messages between the two were exchanged over several hours. Mr Ben-Shachar expressed concerns about Mr Temarama's attitude towards HEG's food preparation policies and procedures. Mr Temarama agreed he had recently left a bag contained meat products open but reiterated that he needed to be paid weekly to pay board and transport to and from work. Mr Ben-Shachar said there was no entitlement to advance payments of wages but offered to transfer $50 into Mr Temarama's bank account. He advised that the sum may not be accessible until after the Easter holidays finished and offered to advance $20 in cash and deliver it to Mr Temarama's home in Karori that day. Mr Temarama advised Mr Ben-Shachar to electronically transfer $50 and "*not to worry*" about the cash.

[6] Mr Temarama was due to commence his next shift at 5pm on Sunday 29 March. At 2.31pm that afternoon Mr Ben-Shachar sent a text to Mr Temarama informing he would meet with him that evening at the food cart to discuss their issues. Mr Temarama responded with a short text saying "*right".*

[7] At 4.03pm Mr Temarama sent a text to Maor. He advised he was out in Porirua[1] and unable to come to work because he had insufficient funds to travel back into Wellington. That message was forwarded by Maor to Mr Ben-Shahcar who responded: *I have understood just now that you decided to resign. I need to pick up the key from you as soon as possible.* Mr Temarama replied: *are you firing me? Because I never said I was going to resign?* Mr Ben-Shachar stated: *if you don't come to work it is resignation, are you in Karori I want to pick up the key tonight.*

[1] 18 kilometres north of Wellington City

[8] Mr Temarama responded:

> *I am not in Karori I am up north and was relying on my pay to get me home so I could go to work. Since I wasn't paid this week and wasn't informed until it was too late, I now have no way to get home until I am paid. I will bring the key back in when I can but I still need to be paid what I am owed.*

[9] Increasingly terse messages were exchanged between the two. Mr Temarama advised his mother of his concern that he had been dismissed and she sent a text to Mr Ben-Shachar asking to meet with him to discuss her son's employment.

[10] An additional dispute arose about the return of the key to the food cart which resulted in HEG deducting $250 from Mr Temarama's final wages. HEG's documents refer also to an incident (after Mr Temarama's employment ceased) where it is alleged that a gas cylinder attached to the food cart had been tampered with. The inference is that Mr Temarama may have been involved in that event which Mr Temarama denies. I understand that matter has been reported to the Police and is not relevant to the issues that need to be determined by the Authority.

[11] Mr Temarama received a Certificate of Service from HEG which advised that his employment ended on 26 March 2015 by mutual agreement.[2] Mr Temarama raised a personal grievance on 6 May 2015. The parties attended mediation but did not resolve their differences.

[12] Mr Temarama seeks remedies of compensation and wages corresponding to his claim that he was unjustifiably dismissed from HEG. He also claims he is owed wages earned during his employment. HEG denies that Mr Temarama was unjustifiably dismissed. It says Mr Temarama's employment terminated under a 90-day trial period or alternatively that he resigned from his employment.

Issues

[13] The Authority is required to examine the following matters:

(i) whether Mr Temarama owed wages;

(ii) whether Mr Temarama's employment end according to a 90-day trial period, alternatively did he resign from his employment or was he dismissed;

[2] It was not clear from the evidence when Mr Temarama received this document

(iii) if Mr Temarama was dismissed, was it was unjustifiable;

(iv) if Mr Temarama was unjustifiably dismissed did he contribute to the dismissal;

(v) is Mr Temarama entitled to remedies?

Is Mr Temarama owed wages?

[14] Mr Tamarama begin on an hourly rate of $11.40 per hour - the minimum rate applicable to a "starting out worker" or a "trainee", as defined in Minimum Wage Order 2014. Mr Ben-Shachar's evidence is that his youngest son was 15 years old at that time and he assumed Mr Temarama was the same age. However Mr Temarama was 18 when his employment with HEG began and did not fall within either of the categories of worker referred to above.

[15] Mr Temarama worked a total of eight weeks. The parties initially disputed Mr Temarama's hours of work but concessions were made by each side during the investigation meeting on this issue. Taking into account that Mr Temarama should be paid for the training he undertook at the beginning of his employment,[3] the parties largely agree as to Mr Temarama's hours of work and I determine these as 106.49 hours.

[16] HEG submitted that that Mr Temarama frequently consumed HEG's food whilst working. It says money should be deducted from wage arrears to compensate for this activity. Mr Temarama says staff were allowed to eat breakfast and/or lunch using HEG produce. I note also that $250 was deducted from Mr Temarama's wages on the basis that he had not returned keys.

[17] Any deduction from wages may only occur with an employee's written authorisation as is required pursuant to the s 5 of Wages Protection Act. I have no evidence of Mr Temarama furnishing written authorisation to allow deductions that correspond to the instances described above, and decline to take those matters into consideration.

[18] According to Inland Revenue Department information Mr Temarama received wages of $978.12 gross. That sum does not reflect the adult minimum wage rate he

[3] calculated as 12.5 hours

was entitled to receive. The difference between what was paid and what should have been paid is $539.50 (gross) and this sum is owed to Mr Temarama. This calculation includes reimbursement of the deduction made from final wages. Mr Temarama is also entitled to holiday pay calculated at 8% of gross earnings. This sum is $121.41.

How did Mr Temarama employment end?

Was there a 90-day trial period?

[19] HEG advised in its written statement that Mr Temarama was employed pursuant to a 90 day trial period, the inference being that his employment ended in circumstances where a personal grievance for an unjustified dismissal cannot be raised.

[20] The Employment Relations Act sets out what is required before a 90 day trial period provision may lawfully exempt an employer from a future claim of an unjustified dismissal. A 90-day trial period must comply with s67A(2) and (3) of the Act, including that it must be set out in writing in an employment agreement and signed by a prospective employee before he or she begins work. Mr Ben-Shachar properly acknowledged there was no written agreement between the parties and therefore Mr Temarama cannot have been subject to a valid 90 day trial period.

Did Mr Temarama resign from his employment?

[21] Mr Ben-Shachar advanced an argument that Mr Temarama's non attendance at work on 29 March 2015 was a resignation. I do not accept that proposition. It is clear from the text exchange between the pair on 29 March 2015 that Mr Temarama quickly challenged Mr Ben-Shachar's assertion that he had resigned.

[22] English is a second language for Mr Ben-Shachar. During the investigation meeting it became clear that Mr Ben-Shacar regarded Mr Temarama absence from work as conduct which inevitably justifies immediate dismissal. Mr Ben-Shachar is mistaken in this view. There is no law that automatically sanctions a dismissal due to non-attendance at work. Whether an employer may justifiably dismiss for absenteeism is determined on case by case.

[23] Section 103(A) of the Employment Relations Act sets out the test against which justification of a dismissal is measured. The Authority is required to objectively assess whether an employer's actions (-the grounds for the dismissal-) and

how the employer acted (-the process the employer took before dismissing the employee-) were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[24] Looking firstly at the process HEG followed before determining Mr Temarama's employment was terminated. Mr Ben-Shachar accepts that he did not raise any concerns with Mr Temarama about his attendance at work before he formed a view that the employment relationship was over. I understand Mr Ben-Shachar was inexperienced as regards New Zealand's employment law standards but that does not allow HEG to bypass its obligations. An employee's right to be advised of a potential cause for dismissal before that event crystallises is a principle of natural justice that is fundamental to modern employment relationships.[4] In addition an employee should be provided with an opportunity to respond to the concerns[5] and an employer is required to genuinely consider the employee's explanation.[6] Nor do I consider the procedural flaws were minor or that Mr Temarama was not treated unfairly despite the omissions.

[25] While it might be said that HEG was aware, from the content of the text messages, of the reasons for Mr Temarama's failure to attend work, Mr Temarama was unaware that his job was at risk until after he was told to return his work keys and his employment was terminated. It follows that HEG did not adhere to minimum standards of procedural fairness before ceasing Mr Temarama's employment and he was unjustifiably dismissed.

[26] I have already found Mr Temarama's dismissal was procedurally unjustified. I do not need to determine whether there were reasonable grounds on which to justify his dismissal although I regard it is far from certain that a fair and reasonable employer could justifiably dismiss an employee for failure to attend the workplace where it was aware the employee required wages to finance transport and wages had not been paid. I acknowledge however, that Mr Ben-Shachar sought to provide interim funds to enable Mr Temarama to travel to work. I shall return to this matter later in the determination.

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[4] at s 103A(3)(b) Employment Relations Act 2000
[5] at s 103A(3)(c) Employment Relations Act 2000
[6] at s 103A(3)(d) Employment Relations Act 2000

Remedies

Lost wages

[27] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost *"as a result of the grievance".*

[28] At the investigation meeting Mr Ben-Shachar advised HEG ceased trading on 15 May 2015. There was no independent evidence to support that contention, however Mr Ben-Shachar made appropriate concessions throughout the investigation, and on balance I accept this evidence.

[29] I consider it likely that Mr Temarama's employment would not have continued with HEG beyond 15 May 2015. Wages lost as a result of his grievance would have ceased on that date. Subject to my findings on contribution he is entitled to reimburse of wages totalling $2581.25.[7]

Should Mr Temarama be awarded compensation?

[30] Compensation for hurt and humiliation may be awarded to address non-economic damages for distress, humiliation and injury to feelings. I accept Mr Temarama's evidence that he was distressed and lost confidence by his dismissal, particularly in circumstances where this was his first job after having left school. Subject to findings as regard contribution I assess he should be compensated with a payment of $5,000 pursuant to s 123(1)(c)(i) of the Act.

Did Mr Temarama contribute to his dismissal?

[31] I am required to assess whether Mr Temarama's actions contributed to the situation that led to his dismissal[8]. Contributing behaviour needs to be both blameworthy and causative of the outcome.[9]

[32] A significant portion of evidence given on behalf of HEG focussed on Mr Temarama's performance in the role. Mr Ben-Shachar reports that by late March he had warned Mr Temarama on several occasions of the need to comply with HEG's

[7] 7 weeks at 25 hours per week x $14.75 an hour (noting that the minimum wage rate increased to $14.75 on 1 April 2015)
[8] Section 124
[9] *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

food preparation policies. Mr Temarama acknowledges that there were two incidents where he left food inappropriately stored but says it was never conveyed to him that HEG was dissatisfied with his work.

[33] Mr Ben-Shachar agreed that the warnings he gave to Mr Temarama were not communicated in a way that would have let him know that his employment was at risk and I am unwilling to conclude that Mr Temarama was given warnings that were disciplinary in nature. Without having made performance concerns abundantly clear to Mr Temarama HEG is not able to rely on those matters as an alternative justification for his dismissal. Nor, in these circumstances, can I properly regard the failings as blameworthy and causative of his dismissal.

[34] I consider there is a stronger argument for contribution when I assess Mr Temarama's communication with HEG on 28 and 29 March 2015. It is clear Mr Temarama was concerned about his wages not been paid and that needed these to fund his travel to work the following week. On 28 March 2015 Mr Ben-Shachar offered no less than 4 times to either transfer funds into Mr Temarama's account or deliver cash to his home. Any ostensible disadvantage that may have flowed from HEG's omission to advance wages on 27 March, as had been the practice, was offset by this action.

[35] As noted Mr Temarama accepted the offer to transfer funds to his bank account but advised "*don't worry about the cash*". Mr Ben-Shachar reiterated again that if Mr Temarama needed cash, to text him.

[36] As late as two and ½ hours before his shift was due to commence Mr Temarama agreed to meet Mr Ben-Shachar at the workplace that evening. It remains unclear then why Mr Temarama did not state at a time before he was due to begin work within the hour that he was unable to attend work on Sunday evening because he was unable to afford transport, particularly given Mr Ben-Shachar's repeated offers of assistance in this respect. One hours' notice by an employee that he or she is not able to attend work will usually be uneventful and unlikely to result in a dismissal, however it was a Sunday evening over a public holiday period and HEG's staff worked alone. I have no doubt Mr Temarama's short notice of absence in all the circumstances caused substantial inconvenience to HEG. I consider the omission is blameworthy and there is a causative connection between the omission and the dismissal. Bearing in mind Mr Temarama's relatively young age and inexperience I

assess his contribution to the situation that gave rise to his personal grievance as being 15 percent.

Orders

(i) Hob Eat to Go Limited is ordered to pay Mr Jore Temarama the sum of $660.71 (gross) comprising arrears of wages and holiday pay entitlement; and

(ii) Pursuant to s.123(1)(b) of the Act and after an assessment as to contribution Hob Eat to Go Limited is ordered to reimburse Mr Temarama the sum of $2,194.06 (gross) for lost wages[10];

(iii) Pursuant to s 123(1)(c)(1) and after an assessment as to contribution Hob Eat to Go Limited is ordered to pay Mr Temarama the sum of $4,250 without deduction[11].

Costs

[37] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

[10] $2,581.25 minus 15%
[11] $5,000 minus 15%