IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 520
3275320

	BETWEEN	MORIAH LAMOND Applicant
	AND	RECHARGE ENTERPRISES LIMITED First Respondent
	AND	GARETH WATT Second Respondent

Member of Authority:	David G Beck
Representatives:	Kim Ahern, advocate for the Applicant Gareth Watt for the Respondents
Investigation Meeting:	12 July 2024 in Dunedin
Submissions Received:	18 July 2024 from the Applicant 24 July 2024 from the Respondents
Date of Determination:	29 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Moriah Lamond was initially employed by Gareth Watt, the sole director/shareholder of Recharge Enterprises Limited, to work 'sole charge' at his newly established retail health food business in Cromwell commencing on 13 October 2023 before she was moved because of the business not taking off, to Mr Watt's other hospitality business in Clyde on 24 October (a café/juice bar). The employment ended in disputed circumstances on 18 January 2024.

[2] Ms Lamond raised a personal grievance with Recharge Enterprises Limited on 23 February 2023, alleging she had been unjustifiably dismissed. Ms Lamond claims compensatory remedies including lost wages; minimum entitlements; wage/holidays arrears and various penalties.

[3] Mr Watt says Ms Lamond's employment was initially part-time and he then employed her in a casual capacity but decided to not engage her further due to performance concerns observed during the brief period of employment. Mr Watt was of the belief that Ms Lamond was the subject of a 90 days' trial period and could be dismissed without providing any justification.

[4] When the matter was filed with the Authority, Ms Lamond claimed Mr Watt should be held liable for any potential compensatory awards as a person involved in breaches of her minimum entitlements pursuant to s 142Y of the Employment Relations Act 2000 (the Act).

[5] The parties subsequently attended an unsuccessful mediation and the matter remains unresolved.

The Authority's investigation

[6] Mr Watt did not provide the Authority with a response to Ms Lamond's application but he did participate in teleconference and he filed a written brief of evidence on 1 July 2024 in response to Ms Lamond and her mother's evidence submitted on 6 June .

[7] Mr Watt attended and gave evidence at the investigation meeting and so did Ms Lamond and her mother, Victoria Bonham. All parties provided submissions after the investigation meeting and additional background information.

[8] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I, likewise, have carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

Issues

[9] The issues the Authority must determine are:

(i) A 'threshold' issue of whether Ms Lamond was dismissed in accord with a valid 90-day trial period provision of her employment agreement and is prevented from advancing her unjustified dismissal claim.

(ii) If not, was Ms Lamond unjustifiably dismissed?

(iii) If Ms Lamond was unjustifiably dismissed, what remedies are appropriate given Ms Lamond is claiming:

(a) lost wages; and

(b) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 ("the Act").

(c) Various penalties.

(d) That Mr Watt should be held personally liable to pay remedies under s 142Y of the Act.

(iv) If any remedies are awarded, should they be reduced under s 124 of the Act if it is found Ms Lamond contributed to the situation giving rise to her personal grievance claims.

(v) How costs are to be dealt with.

What caused Ms Lamond's employment relationship problem?

[10] Mr Watt says he engaged Ms Lamond initially from 13 October 2023, after being approached by her mother, Victoria Bonham, indicating Ms Lamond was looking for part-time work in Cromwell. Ms Lamond lives in Cromwell but was working in Wanaka and finding the commute cost prohibitive and difficult to work around childcare responsibilities.

[11] Despite indicating he was an experienced employer and had operated his current business for over three years with up to 18 workers, Mr Watt chose to engage Ms Lamond without an employment agreement and paid her in cash. Mr Watt also withheld 20% of Ms Lamond's pay but did not remit this to the IRD and placed it in his business account (a fact Ms Lamond was initially unaware of). Mr Watt explained that since the impact of COVID on the local tourist industry, his business had struggled and he candidly admitted: "I haven't paid the IRD PAYE or GST for quite some time as we can't afford too! I'm in regular contact about this with IRD". [1]

[12] I find from the evidence, it was more likely than not, that Mr Watt imposed the cash and tax arrangement, as a 31 October 2023 text to Ms Lamond says:

> Hey just checking if I pay you cash today would you mind me taking 20% off which is what it would amount to if I put through the books.

[13] Ms Lamond says she did not respond to the text but Mr Watt turned up with her cash wages (minus 20%) and she thereafter, felt uncomfortable but compelled to accept the arrangement. Ms Lamond would text back the hours she worked and I find she formed a reasonable belief that Mr Watt was remitting the 20% deduction to the IRD as he had provided her with a new employee form that she detailed her IRD number on.

[14] Mr Watt says he struggled to keep the two businesses running and at times had to reduce other workers' hours. Mr Watt explained he originally intended to place Ms Lamond at his Clyde café business (T/A Recharge Bar) working front of house/barista and when the Cromwell business foundered, he moved her to Recharge Bar to make coffees and other duties but he says he encountered problems arranging her hours of work and fitting her into the roster of other workers.

[15] A tension point was Ms Lamond had not agreed to work Mondays or weekends and she says pressure was placed on her to do so and, the hours she envisaged would be available did not materialise (these were from Ms Lamond's perspective, 24 hours - Tuesday to Friday inclusive – whereas Mr Watt claimed she originally said she was available for 27 and a half hours per week).

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[1] Gareth Watt's statement of 13 June 2024.

[16] Ms Lamond also required flexibility in her starting times to drop her child off and collect from school but Mr Watt struggled with this concept and after initially agreeing to a 9:30 am start he placed pressure on Ms Lamond to change her hours to accommodate other workers and this led to a proposal that they, at one point, be reduced to 16 hours per week.

The dismissal

[17] To bring matters to a head, Mr Watt, after ancillary concerns that Ms Lamond was not fitting in well with the café's demands, decided to formalise the working arrangement as 'casual' with no agreed hours of work. To facilitate this on 18 January 2024, Mr Watt presented Ms Lamond with an employment agreement that had a retrospective start date of 20 November 2023 and purported to place Ms Lamond on a 90 days' trial period. Ms Lamond says Mr Watt gave her a pen and urged her to sign it there and then. Ms Lamond says she felt pressured and anxious, she did after a break of about 20 minutes, sign the agreement. Mr Watt says he provided another version of the employment agreement a few weeks earlier that was not signed but the copy provided to the Authority was signed by both parties and dated 18 January 2024. The employer party is stated as "Recharge Enterprises Ltd T/A Recharge Bar".

[18] Ms Lamond says at the end of the workday of 18 January (around 3pm), Mr Watt provided her an envelope and advised he was ending the employment relationship based on the trial period. There was no discussion about reasons beyond this. The enclosed letter dated 18 January and signed by Mr Watt, said only: "It is with great disappointment under the 90-day trial period, Recharge Enterprises will no longer be able to employ you".

[19] Ms Lamond later the same day (4:14pm), texted Mr Watt indicating: "Thanks for your letter, so you don't want me back from today the 18th onwards?

[20] Mr Watt replied: "No thanks".

[21] Ms Lamond then texted to ask for her one week's notice pay and outstanding holiday pay. She was not provided with a response text but Mr Watt provided a final payslip that showed Ms Lamond was paid her last pay for the period 15-21 January 2024 for 16.5 hours at $25 per hour, amounting to $412.50 and $33 holiday pay. No accrued holiday pay or notice

pay was paid. This was preceded by Ms Lamond's only other payslip for the 8-14 January period that indicated Mr Watt had placed her on Recharge Enterprise's payroll system (with tax and student loan payments being shown as deducted).

The parties' evidence.

[22] In giving evidence, Mr Watt candidly described his perspective of the situation as Ms Lamond's employment being problematic and that he only employed her after being approached by Ms Bonham who he regarded as a friend. He says he then struggled to accommodate Ms Lamond's agreed hours due to his changing business needs and what he saw as Ms Lamond's inflexibility. He described the situation as "an absolute mess" and explained at the time, he was very busy setting up the business in Cromwell and that Ms Lamond was the only person he paid in cash. While Mr Watt engaged a person to do bookkeeping/wages work he recalled telling them that Ms Lamond was to be employed "off the books".

[23] While acknowledging at least 24 hours per week were promised at the outset, when he moved Ms Lamond to the Recharge Bar, Mr Watt felt he had to reduce her hours as he employed other workers with competing needs and they apparently resented Ms Lamond not being willing to work occasional weekends.

[24] Mr Watt says he moved Ms Lamond around the business on different tasks but found it hard to establish a niche for her. He claimed when it was not working out just before Christmas 2023, he discussed with Ms Lamond and her mother the possibility of her looking elsewhere for work. Mr Watt then recalled asking Ms Lamond how her job hunting was going and says he was told she had not been looking for work so he resolved to put in place an employment agreement.

[25] Ms Bonham recalled Mr Watt calling her and him being fixated on persuading Ms Lamond to work occasional weekends and telling her that other staff were resentful that Ms Lamond would not accede to this request. However, she recalled Mr Watt saying he would get Ms Lamond working on juice production and that would help maintain her hours. I observe that clear communication was not aided by Mr Watt texting Ms Bonham and Ms Lamond using texts as communication with Mr Watt.

[26] Mr Watt disclosed texts between himself and Ms Bonham of late November 2023, in which he expressed his frustration with Ms Lamond's availability during the week that led him to suggest she was avoiding working on Fridays and texting Ms Bonham: "I will maybe be suggesting she find other suitable work somewhere else for Tuesday to Thursdays". I observe that involving Ms Lamond's mother in the rostering dispute was not ideal but she was reciprocating and eventually in an exchange of 27 November, Mr Watt resolved to put in place a roster of Tuesday to Thursday for the next six weeks. It was not clear Ms Lamond agreed to this or whether it was just imposed as she also indicated at this point, she was willing to work on a Friday. What I can glean from the text exchanges is that Mr Watt appeared to be moving to operate Ms Lamond's employment on an 'as required' basis to suit his rostering issues with other workers. The placing Ms Lamond in the juice bar section of the cafe did not work out.

[27] Turning to the day of the dismissal, Mr Watt says the previous day he was irritated by a text exchange with Ms Lamond over a minor issue with a co-worker and he had just returned from a long-awaited day off. He conceded the next day he resolved to get rid of Ms Lamond as he felt he could not accommodate her hours and he considered Recharge Bar was fully staffed. He says he did not seek legal advice and Googled trial periods and their operation. Mr Watt says he thought he could just end the employment of Ms Lamond without engaging in any discussion as to his reasoning as he had trial periods in place for his other workers.

[28] In contrast, Ms Lamond described her struggles in fitting into the workplace and getting the hours she thought she had agreed. She says she felt trapped into accepting cash payments as she had given up her previous permanent job and was struggling financially.

Assessment of issues

The 90 days trial period

[29] Dealing with the first issue; it is well established law (s 67A(1) of the Act) that to be bound by a 90 days' trial period provision Ms Lamond must have agreed to this prior to the commencement of her employment. This was not the case and once she signed the employment agreement, Ms Lamond had already been employed for just over three months.

In *Smith v Stokes Valley Pharmacy (2009) Ltd* Chief Judge Colgan's observation of Parliamentary intent and what it means in practice when the trial provision was enacted is:

> [46] During the Bill's second reading in the House, the Minister said:
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> "This bill is a moderate bill. It has been prepared to protect the rights of employees. It has been prepared and drafted to give new employees the opportunity to say 'Give me a go; I will prove myself.' and to get their foot in the employment door.
>
> … This bill applies only to new employees. It will not affect existing employees, and the trial period is established only by agreement. So it is up to the new employee to say 'Give me a trial period.' The bill will not affect the rights of existing employees.
>
> … We have specifically provided, in our bill, that an employee is one who has not been previously employed by that employer."
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> [47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing. [2]

Finding

[30] I find Recharge Enterprises Limited is unable to rely on the 90 days trial period of the employment agreement pertaining to Ms Lamond that was signed on 18 January 2024. As a result of this finding, I turn to the fairness or otherwise of Ms Lamond's summary dismissal.

Justification for dismissal

[31] To justify a dismissal as fair and reasonable, an employer must fulfil the procedural fairness requirements of s 103A of the Act commonly known as the justification test.

[32] Section 103A(3)(a-d) of the Act requires that the Authority must objectively measure an employer's actions against the following propositions:

a) Whether given the resources available to the employer, did they sufficiently investigate their concerns.

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[2] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

b) Did the employer raise the issues of concern with the employee prior to deciding to dismiss.

c) Was the employee afforded a reasonable opportunity to respond to identified concerns.

d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and

e) any other contextual factor the Authority regards as appropriate to consider.

[33] Applying the above elements (otherwise known as procedural fairness obligations) broadly requires the Authority to look at whether Recharge Enterprises Limited's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred and, I must also have regard to the Act's good faith provisions.

[34] While I appreciate Mr Watt's difficult business circumstances, his good motive in engaging Ms Lamond and that he had limited access to resources to assist him. It was clear that the summary dismissal on an ill-informed reliance on the 90 days' trial provision, including how he obtained Ms Lamond's concurrence with the employment agreement, was effected in a wholly procedurally unfair manner that caused MsLamond significant and unnecessary distress. These were not the acts of a fair and reasonable employer.

[35] Substantively, I find that Mr Watt had no good reason to dismiss Ms Lamond other than a desire to force her to be more flexible with her availability to work weekends. I accept there were some tensions in the employment relationship but nothing apparent that would reach the level of a complete breakdown in trust and confidence that would require MsLamond to be summarily dismissed. Ms Lamond did not engage in any level of misconduct, serious or otherwise and was entitled to insist that her hours and days of work be as she originally agreed.

[36] I accept that Mr Watt's motivation of trying to juggle hours for all workers was real but he made the mistake of luring Ms Lamond from secure employment elsewhere, without properly recording her agreed hours of work in an employment agreement (in itself a breach

of s 63A of the Act). Mr Watt also initially operated the employment engagement in an informal manner by imposing cash payments upon Ms Lamond and not providing the whole span of regular hours agreed. Ms Lamond was thus placed in an unenviable and vulnerable position.

[37] Mr Watt essentially converted what had been agreed to as a permanent part-time job with agreed hours, into a casual position with no guaranteed minimum hours. The employment agreement's schedule that he belatedly imposed described hours as "Casual 9:30 am till close"- "Monday to Sunday" to be set by a weekly roster.

Finding

[38] In the circumstances described, due to a failure of Recharge Enterprises Limited to adhere to good faith and fair dealings during the brief period of employment, I find Ms Lamond was unjustifiably disadvantaged then unjustifiably dismissed and is entitled to a consideration of remedies claimed.

Consideration of remedies

Lost wages and other money lost.

[39] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages or other money lost by Ms Lamond should I find that she has established a personal grievance.

[40] Here I find Ms Lamond's lost remuneration was attributed to the personal grievance. Ms Lamond says Recharge Enterprises Limited paid her up to 21 January 2024 until she found alternative employment commencing 7 February 2024. Ms Lamond claimed the interim wages lost as being for a period of seven days for 5.5 hours per day at an hourly rate of $27 (inclusive of holiday pay). This amounts to $1,039.50.

[41] In addition, Ms Lamond claimed $846.00 being an amount lost as a result of not being paid agreed hours throughout the employment period. Further a figure of $339.00 was claimed for holiday pay not paid in addition to Ms Lamond's cash wages.

Interest

[42] Ms Lamond has claimed interest on the lost remuneration awards made. Section 123(1)(b) of the Act allows the Authority to consider reimbursing "other money lost" by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid on the unpaid and lost wages and holiday pay. However, given the Authority's discretionary approach to this matter and applying guidance from the Court of Appeal in *Gilbert v Attorney-General* [3], I limit the period of interest to six months.

Finding

[43] In all the circumstances of the limited engagement I consider it fair to award Ms Lamond the amounts of lost wages and other money claimed in the total sum of $2,224.50 with interest.

Compensation for hurt and humiliation.

[44] Ms Lamond gave evidence of the impact of the abrupt dismissal and the uncertainty it created at a tough time to find immediate alternative employment and pay living costs.

[45] Ms Lamond was entitled to feel she had been used and humiliated by the nature of the dismissal and I was convinced from the evidence that it had a significant and ongoing impact on her self-confidence and well-being as described. Ms Lamond and her mother described a difficult situation where she had been struggling to juggle childcare responsibilities with earning an income and other extraneous factors that unfortunately impacted on her that cannot be exclusively attributed to the loss of her job with Recharge Enterprises Limited. However, the nature of the dismissal and Mr Watt's lack of commitment to the original bargain they had struck over available hours caused significant ongoing distress to Ms Lamond and she became isolated in the workplace.

Finding

[46] I am convinced that at the time Ms Lamond suffered humiliation, loss of dignity and injury to feelings but has now moved on. Considering the circumstances and awards made by

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[3] *Gilbert v Attorney-General* [2010] NZCA 421 at [100].

the Authority in similar situations and how this dismissal was effected, I consider Ms Lamond's evidence warrants compensation of $15,000 under s 123(1)(c)(i) of the Act.

Contribution

[47] Section 124 of the Act states that I must consider the extent to what, if any, Ms Lamond's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation.* [4]

[48] In assessing the situation, I do not find that Ms Lamond in all the circumstances contributed to the matters that gave rise to her personal grievance. The unjustified actions of Mr Watt robbed her of any meaningful agency that led to this misconceived and unjustified dismissal.

[49] I find no reduction in the remedies I have awarded is warranted.

Penalties

[50] Ms Lamond claimed a series of penalty actions against Recharge Enterprises Limited but none were particularised sufficiently in the application to the Authority. In submissions I acknowledge Ms Lamond's advocate highlighted a series of potential breaches but as remedies sought a global amount of $8,000 without identifying the specific breaches they were linked to.

[51] I am not convinced Recharge Enterprises Limited and Mr Watt have been properly placed on notice of the breaches claimed and decline to order such by use of the discretion available to the Authority under s 160(3) of the Act. It is my view that the remedies provided adequately address the employment relationship problem as presented. This finding, however, does not condone the inappropriate actions of Mr Watt in initially not providing an employment agreement, failing to agree hours of work, and paying Ms Lamond in cash while withholding her PAYE contributions.

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[4] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Garth Watt's potential liability

[52] Likewise, the attempt to join Mr Watt to the proceedings in a personal capacity under s 142Y of the Act is misconceived. This provision of the Act is confined to situations where the default in payments is "due to a breach of employment standards" and no finding of that nature has been made.

Orders

[53] I have found that:

a. Moriah Lamond was unjustifiably disadvantaged and unjustifiably dismissed in and from her employment with Recharge Enterprises Limited.

b. Recharge Enterprises Limited is ordered to pay Moriah Lamond the amounts below within 28 days of this determination being issued:

(i) $2,224.50 gross combined lost wages and holiday pay arrears.

(ii) $15,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

(iii) Interest is to be paid on the arrears figures (i) above in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a period of six months commencing from 21 January 2024.

Costs

[54] Costs are reserved.

[55] The parties are encouraged to resolve any issue of costs between themselves.

[56] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Moriah Lamond may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Recharge Enterprises Limited will then have 14 days to lodge any reply

memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[57] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[5]

David G Beck
Member of the Employment Relations Authority

[5] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*