

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 27
3104175

BETWEEN	RUI DE SOUSA, CHANTAL DE SOUSA, SARA CAVANAGH, CAMERON KEATS, NICHOLAS KEAN, GUILHERME ARAUJO, SONTHI BANPHET AND CHARLOTTE MORISON Applicants
AND	BAYSIDE FINE FOOD LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Jeremy Lynch, counsel for the Applicant
No attendance for Respondent

Investigation Meeting: 16 December 2020

Further information and submissions received: 23 December 2020, 14 January 2021

Determination: 22 January 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rui de Sousa, Chantal de Sousa, Sara Cavanagh, Cameron Keats, Nicholas Kean, Guilherme Araujo, Sonthi Banphet and Charlotte Morison (the applicants) were employed by Bayside Fine Food Limited (BFFL) at its Snells Beach café until they were advised on 19 March 2020 their employment would end by operation of their employment agreements. They say they were unjustifiably dismissed and seek remedies to compensate them for losses suffered consequent to their dismissals. Ms

Cavanagh and Ms Morison seek wage arrears for short pays.

[2] BBFL has not filed a statement in reply or otherwise engaged with the Authority process.

The Authority's investigation

[3] During the investigation meeting the Authority heard evidence from the applicants. The Authority is satisfied BBFL is aware of the application and has had a fair opportunity to participate in the investigation of these employment relationship problems.

[4] 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.

Issues

[5] The issues requiring investigation and determination are:

- a. Where the applicants unjustifiably dismissed?
- b. If so, what remedies should be awarded, considering:
 - i. Lost wages;
 - ii. Compensation under s 123(1)(c)(i) of the Act;
- c. If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicants that contributed to the situation giving rise to his grievance?
- d. Are Ms Cavanagh and Ms Morison owed wage arrears?
- e. Is either party entitled to a consideration of costs?

Relevant law

The test for justification

[6] When the Authority considers justification for the actions of BFFL and the dismissal it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of BFFL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[7] As part of this process the Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act. BFFL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in section 4 of the Act.

*Gate Gourmet & Ors v Sandhu & Ors*¹

[8] This recent judgment of a full bench of the Employment Court considered and declined wage arrears claims brought by workers employed in an essential service for payment of at least the minimum wage. In that case the workers had been required to stay at home during the level 4 lockdown and were not provided with work. The majority of the Court held the workers were not required to be paid under the Minimum Wage Act 1983².

[9] Mr Lynch filed helpful submissions on the application of the judgment to this matter. His primary submission is that *Gate Gourmet* applies to a narrow range of circumstances which do not apply to the applicants other than possibly Mr Keats who was paid no more than the minimum wage.

¹ *Gate Gourmet & Ors v Sandhu & Ors* [2020] EmpC 237.

² *Ibid* [46].

The parties' employment agreements

[10] The parties' individual employment agreements all contain the following clause:

25 Business Interruption

25.1 If the Employer's business is interrupted by unforeseen events beyond its control (for example by natural disasters, damage to the workplace premises including electrical failure or fire, governmental action, war, terrorism or health epidemic or pandemic) the Employer may be unable to provide work for you to perform ("Business Interruption"). If this happens, the Employer will endeavour to consult with you before determining whether our employment relationship can reasonably continue. This will include consulting with you about whether your work and remuneration will continue during and/or following the event/s causing the Business Interruption.

25.2 You acknowledge that the Employer will not be required to provide you with work or pay your remuneration where your usual work is not available due to Business Interruption.

[11] At the time of the applicants' dismissals clause 25 had only recently been agreed by the parties having been proposed by BFFL to the applicants in early March 2019.

Background

[12] On 18 March 2020 the applicants all received a text message requiring attendance at a "compulsory staff meeting" to be held at 3.30pm the following day. They duly attended the meeting at which they were handed identical dismissal letters:

Re: Closure of Bayside

Due to the unforeseen and unpredictable circumstances around the Coronavirus Pandemic, the elderly nature of our customer base and our recent issues with customers non-complying with self-isolation rules, the decision has been made by the owners to close Bayside.

Under Clause 25 of your Employment Contract – Business Interruption, a pandemic has been declared and therefore, for that reasons employment has been ceased as of today's date, Thursday 19th March 2020, effective immediately.

You will be paid for the duration of the rostered week and be compensated for an additional two weeks paid at your average hourly rate calculated over the last month. All accrued entitlements will be paid out accordingly.

We thank you for the contribution you have made to Bayside and should Bayside Fine Foods Limited make the decision to re-open post pandemic you will be contacted in regard to re-employment in the first instance.

[13] On 31 March the applicants' representative wrote to BFFL raising personal grievances for unjustified dismissal on grounds there was insufficient justification for their redundancies given the intention of the business to open after the pandemic. By this date level 4 lockdown had been declared. The letter set out the difficulty the applicants faced in finding alternative work in the circumstances and the effect of the dismissals being to deny them the opportunity to access, through employment, the Government wage subsidy. A proposal was put to BFFL to reinstate the applicants to their employment and apply for the wage subsidy in exchange for which the applicants would reduce their hours to reduce labour costs. The applicants sought a contribution to legal costs incurred. The letter concluded requesting mediation.

[14] On 21 April the manager of BFFL replied to the personal grievance letter:

- two weeks' notice of termination of employment had been given under clause 24.1 of the employment agreements;
- the business was closed because it was not financially viable and was not motivated by the Covid-19 lockdown, which occurred after the closure;
- it was unforeseen that a week later alert level 4 would be announced;
- the cafe had no financial capacity to reopen and BFFL could not apply for the wage subsidy; and
- the owners of BFFL acted in good faith and ensured staff received all their entitlements under the employment agreements including payment for the balance of the week commencing 16 March, two weeks payment "for transition support", holiday entitlements and small care packages of food.

[15] The letter did not respond to the request to attend mediation. Notwithstanding, the applicants applied for mediation assistance through the Ministry of Business, Innovation and Employment. BFFL did not respond to that request. On 12 May the applicants lodged a statement of problem in the Authority. BFFL has not filed a statement in reply and advised through counsel it did not intend to do so.

Discussion

[16] The dismissal letter purports to end the applicants' employment by invoking clause 25 of the employment agreements. Clause 25 is a type of frustration clause

which may be invoked to end employment in the event of circumstances outside the control of the parties which prevent the business continuing. Two questions arise – did circumstances exist at the relevant time to invoke clause 25 of the parties’ employment agreement and, if so, in invoking clause 25 did BFFL comply with the obligations contained therein?

Did circumstances exist to invoke clause 25?

[17] No. The test for frustration is high.³ On 19 March 2020, though New Zealand’s borders were about to be closed, gatherings of up to 100 were still permitted. The café could still operate. The Authority is satisfied circumstances did not exist at that time to reasonably invoke clause 25 of the parties’ employment agreement.

Having invoked the clause, did BFFL comply with its obligations under clause 25?

[18] No. Even if the circumstances anticipated by clause 25 had existed, BFFL failed to meet its obligations under clause 25 to consult with the applicants.

[19] It is not clear from BFFL’s stated concerns about the age of its clientele and non-compliance with social distancing what steps it had taken to address these concerns. The evidence of the applicants was they would have welcomed the opportunity to discuss how these concerns could be managed and would have made practical and workable suggestions. That evidence is entirely accepted – the applicants are experienced hospitality professionals who demonstrated to the Authority their commitment to the success of the café. BFFL, inexplicitly given the very recent introduction of clause 25 to the parties’ employment agreements, ignored obligations it freely entered to consult with the applicants in events where it was possible and reasonable to do so.

Were the applicants unjustifiably dismissed?

[20] Yes. The Authority is satisfied BFFL has failed to meet the minimum requirements a fair and reasonable employer could have been expected to meet given the ability of the café to operate at the date dismissal was advised and the clause 25

³ *Taylor v Air New Zealand Ltd* EmpC ARC 53/03, 28 October 2004.

obligations under the parties' employment agreement. The dismissals were substantively and procedurally unfair and unjustified. The applicants have been successful in their claims that they were unjustifiably dismissed. They are entitled to a consideration of the remedies sought.

What remedies should be awarded?

(i) *Lost wages*

[21] The applicants have established personal grievances for unjustified dismissal. The Authority is satisfied they have lost remuneration as a result of those personal grievances and they are entitled to be reimbursed for a sum equal to three months' lost remuneration⁴. The Authority received detailed evidence of the applicants' attempts to mitigate the impact of losing their employment with BFFL and is satisfied they have taken reasonable steps to do so.

[22] Consideration has been given to whether the level 4 lockdown announced a week after the applicants were advised of their dismissals impacts on their lost wages claim. The starting point for an assessment of lost wages is whether that loss results from the personal grievance⁵. I am satisfied it did. Subsequent events do not erode the mandatory statutory requirement for reimbursement of that loss to be ordered. The applicants faced a situation different to that of the *Gate Gourmet* workers who retained their employment through the lockdown. The cases are distinguishable.

[23] The applicants are entitled to three months lost wages calculated from 3 April 2020 being the end of their notice period and the effective date of dismissal in accordance with the following gross calculations:

Rui De Sousa: \$11,440.00⁶

Chantal De Sousa: \$4,192.50⁷

Saowaroj (Sara) Cavanagh: \$10,465.00⁸

⁴ Sections 123(1)(c)(ii) and 128 Employment Relations Act 2000.

⁵ *Ibid* section 128(1)(b).

⁶ \$22 per hour x 40 hours per week x 13 weeks = \$11,440.00.

⁷ \$21.50 per hour x 15 hours per week x 13 weeks = \$4,192.50.

⁸ \$23 per hour x 35 hours per week x 13 weeks = \$10,465.00.

Cameron Keats: \$10,920.00⁹

Nicholas Kean: \$11,440.00¹⁰

Guilherme Araujo: \$13,520.00¹¹

Sonthi Banphet: \$9,880.00¹²

Charlotte Morison: \$11,960.00¹³

(ii) *Compensation*

[24] The impact of the dismissals has had a profound and negative impact on the applicants. The Authority is satisfied they have experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation¹⁴. Given the evidence before the Authority of the impact of the dismissals on the applicants my view is they have suffered a similar degree of harm and it is appropriate that the awards are the same for each. The exception is Mr Keats for whom the evidence of harm was limited to what his co-applicants said about his work ethic, his relative youth and their indirect understanding of the impact of dismissal on him. The level of his award reflects the lack of direct evidence from Mr Keats on this issue.

[25] Mr De Sousa was employed in a front of house role by BFFL in January 2020. As a consequence of the dismissal he lost his accommodation in Snells Beach and now lives with his wife, Chantal De Sousa and their two primary school age children in Northland with extended family. He said though he is grateful for the accommodation he is struggling with the number of people living under one roof and it is not good for his mental health. He said as a consequence of the dismissal he is angry and anxious about what the future holds. He said he finds it humiliating not to be able to provide for his family and he is having trouble sleeping for which he has been prescribed medication. He has a chronic illness and it is difficult to meet the costs involved with his treatment. Rui De Sousa is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$8,000.00.

⁹ \$17.50 per hour x 48 hours per week x 13 weeks = \$10,920.00.

¹⁰ \$22 per hour x 40 hours per week x 13 weeks = \$11,440.00.

¹¹ \$26 per hour x 40 hours per week x 13 weeks = \$13,520.00.

¹² \$19 per hour x 40 hours per week x 13 weeks = \$9,880.00.

¹³ \$23 per hour x 40 hours per week x 13 weeks = \$11,960.00.

¹⁴ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

[26] Mrs De Sousa started employment with BFFL in September 2019 in a wait staff role. She said she has been hit really hard by her dismissal which was unexpected and is frustrated and angry by the way she was treated. She said these feelings have been compounded by BFFL's refusal to take steps to access the wage subsidy and BFFL's apparent change in reasons for the dismissal. She said the mixed message sent by the change in reasons are hurtful and heartless and that BFFL should have been upfront with the applicants. Mr and Mrs De Sousa have had to relocate their family consequent to their redundancies and this had been very unsettling for their children and their family life. Mrs De Sousa said she is struggling to pay the bills and feels embarrassed and as if she has failed. She says she lies awake at night worrying about what will happen to her and her family. Chantal De Sousa is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$8,000.00.

[27] Mrs Cavanagh was employed by BFFL in a front of house role in September 2019. She says she was hurt by the way she was treated by BFFL, she worked really hard during her employment and been loyal to BFFL and its conduct has failed to recognise these efforts. She said she felt the café had thrown her out "like a bag of rubbish" when it no longer had any use for her. She said it was humiliating and belittling to be treated with such disdain. Mrs Cavanagh's dismissal occurred one month after she and her husband had purchased a section with a view to building their first home, and because of the financial insecurity caused by her dismissal she is now constantly worried about how they will be able to meet the obligations they have entered. Saowaroj (Sara) Cavanagh is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$8,000.00

[28] Cameron Keats was employed by BFFL as a kitchen hand. The Authority heard that he was a very good worker who worked long hours for BFFL in what was his first full time job after school, that he had a real passion and talent for food and that he is understandably disappointed not to have been able to find another job in the hospitality industry. Although the evidence of harm consequent to his dismissal is limited the Authority is satisfied he is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$5,000.00.

[29] Mr Kean was employed by BFFL from October 2019 as a Floor Manager. His role was full time. He said the dismissal was a complete shock, that he was in a daze in the days following and could not believe it had happened. He said he has suffered financially as a result of his dismissal and has used up his entire savings to survive. He says his dismissal has exacerbated a pre-existing condition and he has not coped well as a consequence. He said this has caused difficulties between him and his partner. He said he has trouble sleeping and lies awake at night worrying about the future and feeling hurt and resentful that all his savings are gone. Nicholas Kean is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$8,000.00.

[30] Mr Araujo was employed for three months by BFFL prior to his dismissal. BFFL “headhunted” him from secure employment and he feels very upset that he left a good job to work for BFFL to then be dismissed three months later. He said he feels angry, hurt and humiliated by the way he has been treated. Mr Araujo has a wife and two young children. His wife was also made redundant and they are finding things really difficult. Guilherme Araujo is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$8,000.00.

[31] Mr Sonthi Banphet was employed as second chef by BFFL from March 2019. He said it has been very difficult to find another job as a chef in the area in which he lives since his dismissal and this has not been good for his self-esteem. He said he took pride in his work ethic and to now be out of work is very difficult. He said he feels like a failure and a burden. He said he feels angry at the management at BFFL and it is as if they did not care about the staff at all. He said he worked very hard for BFFL and to have been treated with disdain is very hard to deal with. He said he feels humiliated to have to receive a benefit to be able to put petrol in the car and he feels stressed, anxious and angry. He said he worries about what will become of him. Mr Banphet is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$8,000.00.

[32] Ms Morison said she was shocked by her dismissal and was devastated when she received the news. She said things have been really bad for her since her dismissal and she feels angry and humiliated by the way she has been treated. She said she lives

in a small town near the café, the hospitality industry in her area is small and rumours spread quickly. By way of example she said she has been told by a former Bayside café customer in the supermarket that the café had to close because one of the staff was infected with coronavirus. Charlotte Morison is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$8,000.00.

(iii) If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by the applicants that contributed to the situation giving rise to their grievances?

[33] The applicants did not contribute to the circumstances which gave rise to their personal grievances.

Wage arrears

[34] The Authority is satisfied Ms Morison and Ms Cavanagh have wage arrears owing. They had asked BFFL for payment of the arrears without satisfaction. Ms Cavanagh's wages for alternate holiday pay for 18 March were calculated at the incorrect hourly rate. Ms Morison was not paid for three days for which she was entitled to be paid for during the notice period. They are entitled to the following wage arrears calculated in gross:

Saowaroj (Sara) Cavanagh: \$24.00

Charlotte Morison: \$503.07

Summary of orders

[35] The Authority orders as follows:

- a) Within 14 days of the date of determination Bayside Fine Food Limited is ordered to pay the following sums:
 - (i) lost remuneration under s 123(1)(c)(ii) and s 128 of the Employment Relations Act 2000:

Rui De Sousa:	\$11,440.00
Chantal De Sousa:	\$4,192.50
Saowaroj (Sara) Cavanagh:	\$10,465.00
Cameron Keats:	\$10,920.00
Nicholas Kean:	\$11,440.00
Guilherme Araujo:	\$13,520.00
Sonthi Banphet:	\$9,880.00
Charlotte Morison:	\$11,960.00

- (ii) compensation under s 123(1)(c)(i) of the Employment Relations Act 2000:

Rui De Sousa:	\$8,000.00
Chantal De Sousa:	\$8,000.00
Saowaroj (Sara) Cavanagh:	\$8,000.00
Cameron Keats:	\$5,000.00
Nicholas Kean:	\$8,000.00
Guilherme Araujo:	\$8,000.00
Sonthi Banphet:	\$8,000.00
Charlotte Morison:	\$8,000.00

- (iii) wage arrears under s 131 of the Employment Relations Act 2000:

Saowaroj (Sara) Cavanagh:	\$24.00 (gross)
Charlotte Morison:	\$503.07 (gross)

Costs

[36] Costs are reserved. The applicants have been successful and are entitled to consideration of a contribution to costs incurred in representation. The applicants should file costs memorandum within ten working days of date of determination. If Bayside Fine Food Limited wishes to file a reply it will need to file an application for leave to do so within ten working days of date of determination.

Marija Urlich
Member of the Employment Relations Authority