

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 538
3144962

BETWEEN	HATSUE KOIZUMI Applicant
AND	HONEYBUNCH PURE NATURALS NZ LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Christine Rowe, advocate for the Applicant
Lisa Jolly, advocate for Respondent

Consideration of papers: 14 October 2022

Determination: 21 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hatsue Koizumi applied to have the Authority resolve claims of personal grievance and to recover wages including holiday pay, penalties, and interest.

[2] The claims were against Honeybunch Pure Naturals NZ Ltd (HPN) which was served with a statement of problem.

[3] The company did not lodge a statement in reply, nor seek leave from the Authority to respond to the application.

[4] HPN was invited by the Authority to take part in a case management conference, to be held before directions were given as to how the claims would proceed through the investigation and determination of them.

[5] The conference, held on 22 June 2022, was attended by Ms Christine Rowe advocate for Ms Koizumi, and Ms Lisa Jolly whose name is shown on Companies Office records as a director and owner of HPN.

[6] Ms Jolly vented views she had of the Employment Relations Authority before withdrawing from the conference and making it clear she and HPN wanted nothing further to do with the investigation.

[7] After consulting Ms Rowe, the Authority directed the claims would be determined 'on the papers' without holding an investigation meeting, a course permitted by s 174D of the Employment Relations Act 2000 (the ER Act).

[8] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority or the submissions received.

[9] As directed, an affidavit affirmed by Ms Koizumi and legal submissions from Ms Rowe, were received by the Authority.

[10] Although HPN rejected the opportunity offered to speak up for itself, there is not an impression to be gained from the information the Authority does have, that Ms Koizumi was treated with utter disregard for her rights under the employment relationship. She does not seem to have been mistreated or disrespected at a personal level.

[11] HPN was a small enterprise endeavouring to stay on its feet in the most difficult of times. Ultimately it could not prevail and cutbacks affecting Ms Koizumi and others were inevitable.

[12] Nevertheless, HPN fell short in its treatment of an employee and the Authority is satisfied Ms Koizumi has established most of her claims to receive remedies under the ER Act.

[13] The Authority finds that Ms Koizumi and HPN at material times and for about eight months, were in an employment relationship under the ER Act.

[14] Before joining HPN, Ms Koizumi had been an international flight attendant. When the Covid pandemic ended that employment, Ms Koizumi met Ms Jolly and agreed to become employed by HPN. She commenced on 27 July 2020 with the intention that the term of the relationship and remuneration under it would be reviewed after five weeks.

[15] A written employment agreement was given to Ms Koizumi on about 21 August 2020. Although the written agreement detracted from the remuneration terms originally agreed orally, Ms Koizumi signed her acceptance.

[16] The agreement also contained a trial period provision but one which was invalid and unenforceable, because Ms Koizumi had previously been employed by HPN. Under s 67B(4) of the ER Act the agreement remained effective, just as if it had no trial period provision.

Dismissal grievance

[17] The Authority finds that Ms Koizumi was dismissed purportedly on the grounds of redundancy, although Ms Jolly appeared to raise performance issues as well.

[18] Whether for redundancy or performance, the dismissal on 5 March 2021 without consultation or even minimal input being sought from Ms Koizumi before it was imposed, cannot be justified.

[19] The dismissal does not satisfy the test of s 103A of the ER Act; the actions of HPN and how HPN acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[20] Accordingly, the Authority finds that Ms Koizumi has a personal grievance of unjustifiable dismissal.

[21] The dismissal grievance was raised within 90 days. HPN did not respond to it.

Disadvantage grievance

[22] Ms Koizumi also brings a claim of unjustified disadvantage personal grievance. The foundation of this claim is ‘unilateral changes to her employment conditions’ during her employment, resulting in uncertainty about her hours and pay and stress from having to frequently question Ms Jolly about her pay and payslips, which she was not regularly provided with.

[23] The Authority accepts that Ms Koizumi is entitled to recover underpaid wages and holiday pay and it accepts her calculations of the amount, but it is not clear when exactly the unilateral changes occurred for the purposes of reckoning whether a grievance was raised about them within 90 days. The changes seem to have occurred in the first few weeks of the employment after it began in late July 2020. A grievance was not raised until late May 2021, when it was served on the employer.

[24] The underpayments of wages and holiday pay are more appropriately addressed by the recovery claim.

Penalty claims

[25] The claims for penalties identified in the statement of problem are for providing an invalid employment agreement (the unenforceable trial provision) and breach of good faith.

[26] In the submissions received by the Authority, the claims were widened to include failing to pay the full amount of wages when due and failing to comply with a request to provide a copy of the wage and time record. Those claims are well founded on the facts but as HPN was not put on notice of them, orders for penalties are not made.

[27] As to the penalty claims the employer was notified of, there is no penalty provided in the ER Act at s 67A or s 67B, for including an invalid trial period provision in an employment agreement. There is a requirement in s 65 for the content of an individual employment agreement to not be contrary to law or inconsistent with the ER Act.

[28] An employee may claim a penalty for breach of s 65.

[29] The Authority finds that the inclusion of the trial period provision in Ms Koizumi's agreement was contrary to s 67A(1) of the ER Act, which requires that the employee has not previously been employed by the employer. Ms Koizumi had worked for HPN about four weeks before being given the written agreement to sign.

[30] There was a clear breach of s 65 by HPN and a penalty is appropriate. Ms Koizumi only found out after signing the agreement that the trial period had been included in her agreement unlawfully.

[31] In considering the matters at s 133A of the ER Act the Authority is to have regard to in determining the amount of a penalty, HPN has not helped itself by withdrawing from this investigation. There are probably factors that could be put forward in its favour, but these did not find voice.

[32] In the circumstances the Authority considers the culpability of HPN to be moderate. The initial engagement which had made the trial period unlawful was intended to be temporary for about five weeks, HPN did not purport to invoke the unlawful provision. The term of it was intended to expire in late 2020, well before Ms Koizumi was dismissed. The loss or damage suffered by Ms Koizumi was minimal.

[33] It does not appear that Ms Koizumi was being set up for exploitation and although HPN has been before the Authority previously that was not in relation to a trial provision. Taking a charitable view perhaps, the breach may have been due more to inadvertence than design.

[34] Before it can order a penalty under the good faith requirements of s 4 of the ER Act, the Authority must find that the breach meets the standard set by s 4A. There does not seem to have been an intention by HPN or Ms Jolly to 'undermine', and while the employer's failure to comply with s 4 was deliberate and serious, the lack of consultation cannot be viewed as a sustained breach.

[35] In the circumstances \$2,500 is an appropriate penalty for the single breach of s 65 of the ER Act. Under s 136 of the Act, \$1,500 is to be paid to Ms Koizumi and the balance of \$1,000 to the Authority for payment into a Crown Bank Account.

Arrears of wages

[36] HPN's failure to comply with Ms Koizumi's request under the ER Act to be provided with a copy of the wages and time records kept for her has not assisted the quantification of remuneration, including commissions, owed to her. There is no reason to be sceptical about the extent of her claims and the Authority accepts the calculations provided of arrears of wages (\$4,228.70) and holiday pay (\$1,049.00). No commissions have been claimed.

Reimbursement

[37] Ms Koizumi found new employment and her loss of wages after dismissal was confined to a period of nine weeks. She is entitled to be reimbursed that amount under s 123(1)(b) of the ER Act.

Compensation

[38] The claim for distress compensation is \$15,000. The covid pandemic and unpredictable course of it, played a large part in what happened to Ms Koizumi's job, making an award at the lower end of the scale appropriate. Under s 123(1)(c)(i) she is to be paid \$11,000 by HPN.

Summary of remedies

[39] Following the scheme of the applicant's submissions, the Authority orders HPN to make the following payments to Ms Koizumi

- 1.1 **wage arrears:** \$4,228.70
- 1.2 **holiday pay @ 8% of gross earnings:** \$1,049.00
- 1.3 **lost wages (9 weeks - s 123(1)(b) of ER Act):** \$5,625.00

- 1.4 **interest:** to be calculated on the above wages and holiday pay of \$10,902.70 in total, from 2 July 2021 when the statement of problem was lodged, using the Civil Debt Interest Calculator available at www.justice.govt.nz/fines/civil-debt-interest-calculator
- 1.5 **compensation** (s 123(1)(c)(i) of ER Act): \$11,000.00
- 1.6 **penalty:** \$2,500.00 - \$1,500.00 to be paid to Ms Koizumi and \$1,000.00 to the Authority
- 1.7 **filing fee:** \$71.56 to be reimbursed
- 1.8 **costs:** \$3,750.00

[40] As to costs, the last item, although an investigation meeting was not held, the preparatory work of Ms Rowe did assist the Authority in its investigation and \$3,750 is a reasonable contribution to slightly higher costs, which were less than the Authority's daily tariff of \$4,500.

[41] All amounts assessed as due above, are ordered are to be paid by HPN within 21 days of the date of this determination.

Alastair Dumbleton
Member of the Employment Relations Authority