

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 97
3131737

BETWEEN	PETERASP KERSHAW Applicant
AND	CARPE DIEM RESTAURANT AND BAR LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	David Cain, advocate for the Applicant No appearance by the Respondent
Investigation Meeting:	21 December 2021
Submissions received:	21 December 2021 from Applicant
Determination:	17 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From 28 October 2020 to 24 November 2020, Peterasp Kershaw was employed as a member of the waiting staff of Carpe Diem Restaurant and Bar Limited (Carpe Diem). This employment relationship problem concerns personal grievances of unjustified dismissal, unjustified disadvantage, wage and holiday pay arrears, and a claim for penalties for various breaches of the Employment Relations Act 2000 (the Act) and the Wages Protection Act 1983 (WPA).

[2] There has been no engagement by Carpe Diem with the Authority's investigation and, consequently, the evidence of Mr Kershaw and that of his father, Neville Kershaw, have gone unchallenged.

The Authority's investigation

[3] On 2 February 2021, Mr Kershaw commenced proceedings in the Authority by lodging a Statement of Problem. The document was served on Carpe Diem at its registered office on 5 February 2021. No Statement in Reply was filed.

[4] A case management conference was held on 13 August 2021 to progress matters to an investigation meeting. Mr Kershaw's representative attended the call however there was no appearance by Carpe Diem. When the Authority telephoned its company director, Grant Solley, he hung up. The Authority Officer attempted to call Mr Solley again but the call went straight to his voicemail. A message was left for Mr Solley that the case management conference was proceeding. He did not rejoin the teleconference.

[5] Timetabling directions for the filing of witness statements were subsequently made in Carpe Diem's absence and a written minute from the Authority was emailed to both parties.¹

[6] At 11.59 pm, 17 August 2021, New Zealand was placed into COVID-19 Alert Level 4 in response to a case of the Coronavirus Delta variant in the community. On 9 November 2021, Auckland moved down to Alert Level 3, Step 2. As in person investigation meetings were not possible at that alert level, the Authority emailed the parties to ascertain whether they were amenable to attending the investigation meeting by audio visual link (AVL). Mr Kershaw consented. Carpe Diem did not respond.

[7] On 1 December 2021, the Authority advised the parties that the investigation meeting would be conducted by AVL. A Zoom link was emailed to the parties.

[8] On 21 December 2021 at 10 am, Mr Kershaw and his father, Neville, appeared before the Authority via AVL. There was no appearance by Carpe Diem.

[9] In Carpe Diem's absence, the Authority proceeded with the investigation meeting pursuant to clause 12 schedule 2 of the Act which enables it to act fully in the matter before it as if Carpe Diem had duly attended or been represented.

¹ Minute of the Authority dated 13 August 2021.

[10] As permitted by s 174E of 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

[11] The issues requiring investigation and determination are:

- (a) Was Mr Kershaw unjustifiably disadvantaged by Carpe Diem?
- (b) Was Mr Kershaw unjustifiably dismissed?
- (c) Was Mr Kershaw given rest and meal breaks as required by s 69ZD of the Act and if not, should a penalty be imposed?
- (d) Is Mr Kershaw owed wages and holiday pay by Carpe Diem?
- (e) If payment of Mr Kershaw's wages was unreasonably withheld, should a penalty be imposed against Carpe Diem under s 13 of the WPA?
- (f) Should a penalty be imposed against Carpe Diem for not providing Mr Kershaw with a written employment agreement or a copy of his wages and time record when requested?
- (g) How much should Mr Kershaw be compensated for hurt and humiliation if his claims for unjustified disadvantage or unjustified dismissal are made out.

Background

[12] In mid-October 2020, Me Kershaw was looking for a second part-time waiting job. His primary source of income at the time was working as a waiter for a cafe and eatery establishment in his local area. Mr Kershaw happened to come across a vacancy sign on Carpe Diem's front door advertising for additional staff, including waiting staff.

[13] Mr Kershaw applied for a waiting position and in support of his application he provided his *curriculum vitae* which recorded the contact details of his other employer. Mr Kershaw was interviewed by Melissa Davies, the day-to-day manager for Carpe Diem and he indicated to her that his preference was to work on Wednesdays which was his day off from his other job. He indicated also that he could pick up other shifts if he was available.

[14] Ms Davies employed Mr Kershaw as a waiter at the agreed rate of \$21 per hour. His wages were to be direct credited into his bank account every Thursday. No written employment agreement was provided.

[15] Mr Kershaw's first day of employment for Carpe Diem was 28 October 2020. He stated that he worked from 8 am to 4 pm that day. He worked the following Wednesday (4 November 2020) starting and finishing at the same time. Mr Kershaw did not work on Wednesday 11 November 2020 because that shift was cancelled by Ms Davies.

[16] Mr Kershaw stated that he received a text from Ms Davies at 12.04 am on the morning of the 11th of November stating that he was not required to work that day. When Mr Kershaw texted Ms Davies later that morning saying that he was rostered to work that day, she advised him to speak to Mr Solley about it. It is not clear whether he did so but his shift was not restored in any case.

[17] Mr Kershaw stated that his next shift for Carpe Diem was Saturday 14 November 2020 which was for six hours and 15 minutes. This was followed by a five-hour shift on Tuesday 17 November 2020.

[18] Unbeknownst to him at the time, Mr Kershaw's final shift for Carpe Diem was on Wednesday 18 November 2020 which lasted for only two hours. Upon attending work that morning, he was told by a close associate of Ms Davies to work in the kitchen and cook food because the previous chef had been "fired without notice". Mr Kershaw was reluctant to do so because he had no experience with cooking food and was not employed in that capacity. However, he was told that if he did not cook food, he would be given a written warning.

[19] Mr Kershaw described the shift as a complete disaster. Two hours into it, he was told by Ms Davies' associate to go home because he was "completely useless" behind the kitchen. By his own admission, Mr Kershaw stated that some French fries he had tried to make had come out "raw". As instructed, he left work after completing only two hours of an eight-hour shift.

[20] Mr Kershaw stated that the only wages he received from Carpe Diem was a \$301 payment into his bank account on 17 November 2020 which had the payee details of “FINSIHING TOUCH CD”.

[21] On 23 November 2020, Ms Davies texted Mr Kershaw that he had cost Carpe Diem \$140 when a customer had left without paying. Ms Davies forwarded the customer’s purported text message for Mr Kershaw’s information which read:

“Hello Carpe Diem.

We enjoyed a meal at your restaurant last week. Thanks to your waiter with glasses (Mr Kershaw) we didn’t get charged.

Guessing around \$140. Your loss our gain! The table next to us had a lot to say about this same waiter.

Let this be a lesson to your new business!
Part of the experience is the service and with him there was none.”

[22] Mr Kershaw denied responsibility for the incident stating that he had served the customer but that Ms Davies’ associate had him working both in the kitchen and serving customers that day. As such, he was not able to provide the customer in question with his full attention he had been trained. Mr Kershaw telephoned Ms Davies to discuss the matter further with her but the conversation became heated and ended with Ms Davies looking to him for reimbursement.

[23] On 24 November 2020, Mr Kershaw texted Ms Davies that he had not received his wages which he needed in order to pay his rent. She texted back that he would need to wait until this was sorted out with accounts as his hours did not match up. In the same text message, Ms Davies advised Mr Kershaw that he was no longer required by Carpe Diem. While he immediately queried why he was being let go, Ms Davies did not offer a response and his outstanding wages remained unpaid.

[24] Mr Kershaw subsequently engaged an employment advocate who raised a personal grievance in writing with Carpe Diem on 1 December 2020. Among other thing his personal grievance letter raised, Mr Kershaw sought a copy of his wages and time record.

[25] Shortly after raising his personal grievance, Ms Davies contacted Mr Kershaw’s other employer to let him know of the problems Mr Kershaw was causing Carpe Diem.

Mr Kershaw was unjustifiably disadvantaged

[26] The evidence establishes that Mr Kershaw was employed part-time by Carpe Diem as a member of its waiting staff. He was paid \$21 per hour.

[27] Section 103(1)(b) of the Act allows an employee to bring a personal grievance if the employee's employment, or one or more conditions of the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer.

[28] The question of whether a dismissal or other action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

The cancellation of shifts without reasonable notice

[29] There are two limbs to Mr Kershaw's unjustified disadvantage claim. The first relates to the cancellation of his shifts on 11 and 18 November 2020 at short notice. Mr Kershaw was asleep when Ms Davies texted him at 12.04 am to let him know that he would not be required at the restaurant that day. With the text being received shortly after midnight, Mr Kershaw had no opportunity to make alternative arrangements to minimise the income he had lost with that particular shift.

[30] The conduct of Ms Davies' associate towards Mr Kershaw on 18 November 2020 was another unjustified disadvantage. Under the threat of a written warning, he was pressured into working in the kitchen to cook food. This was against the health and safety concerns Mr Kershaw had for himself and other customers given that he did not know how to cook. This coercive action by Carpe Diem falls well short of the statutory test of what a fair and reasonable employer could have done in the circumstances.

[31] Instead of allowing Mr Kershaw to complete the remainder of his shift waiting tables; the role for which he had been employed, he was sent home after working only

two hours of an eight-hour shift. I accept that Mr Kershaw was made to feel useless by Ms Davies' associate and that he had been verbally abused.

Rest and meal breaks not provided

[32] The second limb of Mr Kershaw's unjustified disadvantage claim relates to Carpe Diem not providing him with any rest or meal breaks.

[33] Section 69ZD of the Act sets out an employee's entitlements to, and an employer's duty to provide, rest breaks and meal breaks. The relevant requirements of s 69ZD are set out in the table below:

Length of work period	Employee's minimum entitlement
2.00–4.00 hours	A 10-minute paid rest break
4.01–6.00 hours	A 10-minute paid rest break and a 30-minute meal break
6.01–8.00 hours	Two 10-minute paid rest breaks and a 30-minute meal break

[34] The events of 18 November 2020, where Carpe Diem chose to operate without a chef, suggests to me that the restaurant was not properly or professionally managed. It panicked and put Mr Kershaw into a role for which he was neither qualified, trained nor specifically employed to do.

[35] Given the *ad hoc* way in which Carpe Diem was managed during the course of Mr Kershaw's employment, I can have no confidence that it provided him with his rest and meal break entitlements. I accept Mr Kershaw's evidence that the restaurant was busy but that it was also understaffed which was why he was not allowed to take a break.

Conclusion on unjustified disadvantage

[36] On two occasions, Mr Kershaw had his shifts cancelled without reasonable notice. In addition to this, he was forced to cook food under the threat of a written warning and he was not provided with an opportunity to take a meal or rest break. These actions disadvantaged Mr Kershaw unjustifiably and are not the actions that a fair and reasonable employer.

Mr Kershaw was unjustifiably dismissed

[37] Section 103A of the Act requires the Authority to consider on an objective basis whether the actions of the employer, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[38] The Authority must consider the four procedural factors set out in s 103A(3) which includes the employer giving genuine consideration to an employee's explanation in relation to the allegations against the employee before dismissing or taking action against the employee.²

[39] On 24 November 2020, Mr Kershaw received a text message from Ms Davies stating that he was no longer required by Carpe Diem. A copy of the text message has been provided to the Authority which makes clear that Mr Kershaw was unequivocally dismissed by Carpe Diem. While Mr Kershaw asked Ms Davies why he was being dismissed, there has never been a response and he remains ignorant of the reasons behind his dismissal.

[40] Even if Mr Kershaw's dismissal had something to do with a customer not paying their bill, any disciplinary investigation would need to take into consideration the chronic understaffing at Carpe Diem which resulted in Mr Kershaw effectively having to perform the role of two people (chef and waiter) at the time of the alleged incident.

Conclusion on unjustified dismissal

[41] For the reasons given, the decision by Carpe Diem to dismiss Mr Kershaw cannot be said to be substantively or procedurally justified.

Remedies in relation to the personal grievance

[42] Mr Kershaw has established a personal grievance for unjustified disadvantage and unjustified dismissal. He is entitled to have remedies considered.

Lost remuneration

[43] Mr Kershaw's last day of employment for Carpe Diem was 24 November 2020. He seeks four weeks' lost wages on the basis that he was deprived of a secondary

² Employment Relations Act 2000, s103A(d).

income until his other employer provided him with more hours of work on 24 December 2020.

[44] Carpe Diem never responded to Mr Kershaw's request for his wages and time record. Over the course of his employment, it was submitted that he worked a total of 49.65 hours at the agreed rate of \$21 per hour. It follows that Mr Kershaw's total gross earnings from Carpe Diem was \$1,042.65. Assuming this sum to be indicative of what he could reasonably have been expected to earn in the four weeks following his dismissal, I find that an award of \$1,042.65 (gross) in lost wages is available to Mr Kershaw under s 128 of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[45] While Mr Kershaw worked for a relatively short time for Carpe Diem, he had two of his shifts cancelled without reasonable notice. Mr Kershaw stated that he was very upset about being told to cook food on 18 November 2020 because this was not what he was employed to do.

[46] Mr Kershaw was concerned for his own safety and the safety of others. Under pressure, he relented but was soon told that he was "completely useless" in the kitchen. He felt helpless in having to take that abuse from Ms Davies' associate who eventually sent him home after completing only two hours of an eight-hour shift.

[47] Mr Kershaw stated that he reminded Ms Davies on multiple occasions about the non-payment of his wages. He was supposed to be paid for the first time on Thursday 29 October 2020 and every Thursday thereafter but that never happened. When his pay did not come through the following week, he became very frustrated and upset because he needed his wages to pay his rent and car loan repayments.

[48] Aggravating Mr Kershaw's stress and frustration further was the decision by Carpe Diem to dismiss him which caught him by surprise. He later discovered from his other employer that Ms Davies had contacted the employer and had said disparaging things about him. Mr Kershaw was very embarrassed and was concerned that Ms Davies would go after his sole source of income in this way. He felt publicly vilified and harmed as a result.

[49] Any award under s 123(1)(c)(i) of the Act for hurt and humiliation is for the effects on the employee of the grievance. It is not to punish or be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct.

[50] Mr Kershaw seeks compensation in the range of \$5,000 to \$10,000 for unjustified disadvantage and a compensatory award in the range of \$12,000 to \$15,000 for unjustified dismissal. I have considered the harm he has experienced as noted above, the extent of his loss, where on the spectrum of cases his case lies, whereabouts also Mr Kershaw's case sits in terms of quantum, and what is fair and just in the present case.

[51] What stands out in the way that Mr Kershaw has been treated by Carpe Diem was him being forced to work in the kitchen under the threat of a written warning; the gratuitous verbal abuse he received from Ms Davies' associate while doing his best to cook food as well as serve customers; and the post-termination conduct of Ms Davies in contacting Mr Kershaw's sole remaining employer in order to disparage him.

[52] With respect to compensation for unjustified disadvantage, I am satisfied that Mr Kershaw experienced harm under each of the heads in section 123(1)(c)(i). Although Mr Kershaw worked for Carpe Diem for a short time, the degree of harm cannot be measured by reference to timeframe alone. A more informed and case-specific approach is required.³ I consider that an award of \$7,500 appropriate compensation for the impact that Carpe Diem's unjustified actions has had on Mr Kershaw.

[53] As for compensation for Mr Kershaw's unjustified dismissal by Carpe Diem, I take into consideration Ms Davies' post-termination conduct in contacting his other employer. This was tit-for-tat retaliation for the personal grievance Mr Kershaw had raised with Carpe Diem days earlier. Fortunately for Mr Kershaw, his other employer saw things that way as well and Mr Kershaw was not adversely affected by that action with his employer ultimately giving him more hours of work.

[54] Having regard to the particular circumstances of this case, I consider an award of \$7,500 under s 123(1)(c)(i) for unjustified dismissal is appropriate.

³ *Richora Group Limited v Cheng* [2018] ERNZ 337 at [59].

Contribution

[55] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[56] It has not been demonstrated that Mr Kershaw has done anything wrong or contributed to his own disadvantage or dismissal. A reduction in remedies is not warranted.

Wage arrears

[57] Mr Kershaw claimed that he worked a total of 49.65 hours for Carpe Diem at the agreed rate of \$21 per hour (\$1,042.65). The onus is on Carpe Diem to show that these hours are incorrect.⁴ A wages and time record was never provided to Mr Kershaw (or the Authority) and consequently Carpe Diem has not discharged the onus.

[58] On the sum of \$1,042.65, Mr Kershaw is owed eight percent holiday pay (\$83.41).⁵ He is further owed KiwiSaver employer contributions at three percent of his total gross wages (\$31.28).

[59] The total gross sum claimed by way of unpaid wages and entitlements is therefore \$1,157.34. Mr Kershaw was paid \$301 on 17 November 2020 which leaves \$856.34 of wage arrears to be paid.

Interest

[60] Mr Kershaw is entitled to an award of interest on the wage arrears and entitlements awarded. The Authority has the power to award interest under clause 11 of the schedule 2 of the Act. Interest is to reimburse someone for the loss of monies to which there is an established entitlement. It is appropriate to award Mr Kershaw interest as a person who has been deprived of the use of monies owed to him.

⁴ Employment Relations Act 2000, ss 130, 132(2).

⁵ Holidays Act 2003, s 23(2).

[61] Carpe Diem is ordered to pay interest on the sum of \$856.34 no later than 8 April 2022. Interest is to be calculated using the civil debt interest calculator.⁶ Interest on the sum of \$856.34 is to be calculated from 24 November 2020 until the date payment is made in full.

Is Carpe Diem liable to a penalty for found breaches?

[62] Various penalties were sought against Carpe Diem for failing to provide a written employment agreement in breach of s 63A of the Act; failing to respond to Mr Kershaw's request for a copy of his wages and time record in breach of s 130; failing to provide rest and meal breaks under 69ZD; failing to comply with the duty of good faith under s 4; obstructing or delaying the Authority's investigation under s 134A; allegedly not paying holiday pay under s 27 of the Holidays Act 2003 (HA); and liability under s 13 of the WPA for the unreasonable non-payment of Mr Kershaw's wages.

[63] In determining whether a penalty should be imposed, and if so, to what level, the starting point is the mandatory factors set out in s 133A of the Act and the guidance provided by the Employment Court in *Borsboom v Preet PVT Limited* and *Nicholson v Ford*.⁷

[64] The penalty sought under s134A of the Act is declined. While Carpe Diem has not engaged with the process, this has not delayed or obstructed the Authority's investigation.

[65] The penalty sought under s 75 of the HA for the alleged non-payment of holiday leave is declined also because the claim is speculative in nature and, in fairness to Carpe Diem, Mr Kershaw's personal grievance letter did not expressly ask for a copy of his holiday and leave record.

[66] Having granted relief in the form of wage arrears and the payment of interest, it is not necessary to also award a penalty under s 13 for the withholding of wages. The claim for a penalty under s 13 of the WPA is declined.

⁶ www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁷ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

[67] Section 3 of the Act sets out its objects. Of particular relevance to this case is the promotion of good faith in all aspects of the employment relationship by acknowledging and addressing the inherent inequality of power in employment relationships.

[68] The maximum penalty against a company is \$20,000.⁸ Of the four statutory breaches that now remain, they are sufficiently similar in nature to warrant globalisation. The starting point for penalties in this case is \$20,000.

[69] Carpe Diem's actions were not inadvertent or negligent. The breaches were serious in nature and pervasive such that intention can be inferred. Mr Kershaw suffered financially and emotionally. There is nothing before the Authority to suggest that Carpe Diem tried to mitigate matters with him rather it escalated matters by contacting his other employer.

[70] Not much is known about the financial ability of Carpe Diem to pay a penalty or whether it is actively trading. The company is still registered with the Companies Office. A check of the Employment Law database shows no relevant previous history.

[71] There is nothing particularly vulnerable about Mr Kershaw. He lives with his parents and has their support both financially and emotionally. However, Carpe Diem was responsible for providing him with an employment agreement, ensure that his wages were paid as agreed, afforded rest and meal breaks when required, conducted itself in good faith, and complied with the Act's requirements with respect to wage and time records. Compliance in these areas would have gone a long way in promoting and maintaining a productive employment relationship that addressed and acknowledged the inherent power imbalance between the parties.

[72] As I have already awarded Mr Kershaw compensation for hurt and humiliation for his personal grievances of unjustified disadvantage and unjustified dismissal, I am mindful of imposing a penalty for matters that essentially involve the same conduct.⁹ Standing back and taking into consideration the desirability for consistency, proportionality, and ensuring that the imposition of a penalty and the amount of any penalty is just in all the circumstances, I find \$3,000 to be a fair penalty. Carpe Diem

⁸ Employment Relations Act 2000, s 135(2)(b).

⁹ *Xu v McIntosh* [2004] ERNZ 448.

is ordered to pay half of this amount to Mr Kershaw in order to compensate him for the inconvenience and cost in pursuing this matter. The penalty is to be paid by Friday 8 April 2022.

Filing fee

[73] Mr Kershaw is to be reimbursed the filing fee of \$71.56 by Carpe Diem.

Summary of orders

[74] The Authority orders the following. Carpe Diem Restaurant and Bar Limited is ordered to pay the following sums to Peterasp Kershaw no later than 4 pm Friday 8 April 2022:

- (i) lost wages of \$1,042.65 (gross);
- (ii) compensation under s 123(1)(c)(i) of the Act of \$7,500 for unjustified disadvantage;
- (iii) compensation under s 123(1)(c)(i) of \$7,500 for unjustified dismissal;
- (iv) \$856.34 in wage, holiday pay, and KiwiSaver arrears;
- (v) Carpe Diem Restaurant and Bar Limited is to calculate and pay interest on total arrears;
- (vi) \$3,000 penalty half of which is to be paid to Peterasp Kershaw and half to the Crown; and
- (vii) the filing fee of \$71.56.

Costs

[75] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Kershaw may lodge, and then should serve, a memorandum of costs within 14 working days of the date of issue of this determination. From the date of service of that memorandum, Carpe Diem would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[76] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Peter Fuiava
Member of the Employment Relations Authority

¹⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].