IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 106
3151785

	BETWEEN	PHILLIP BOULTON Applicant
	AND	FOOD THINGY LIMITED t/a BIRD THE WORD Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Lawrence Anderson, advocate for the Applicant Russell Drake, advocate for the Respondent
Investigation Meeting:	21 November 2022
Submissions received:	28 November 2022
Determination:	6 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A written employment agreement was signed on 13 June 2021 by Phillip Boulton the applicant, and Michelle Bishop who is a joint owner and director of Food Thingy Ltd (FTL), the respondent.

[2] FTL trades as Bird the Word, a small café in the Rotorua CBD which opened in 2020.

[3] Under the agreement FTL employed Mr Boulton as a Café Assistant at $22 per hour for a minimum of 10 hours a week, commencing on 14 June 2021. His actual

days and hours were fixed by roster and were subject to any lockdown ordered during the Covid pandemic.

[4] On 22 July 2021 at a meeting with Ms Bishop and Aaron Bishop her business partner, Mr Boulton was told his employment was terminated and he would not be required to work out notice but would be paid for the following week until 29 July.

[5] Mr Boulton promptly raised a personal grievance, claiming he had been dismissed unjustifiably. He seeks a determination from the Authority that he has that grievance and two others of the unjustified disadvantage type.

[6] Mr Boulton claims his hours of work were reduced without consultation and he was not provided with rest breaks during his employment. He further claims he was not given a reason for his dismissal. He seeks compensation for the unjustified reduction of hours and lack of rest breaks, and a penalty for the failure to give a reason.

[7] Mr Boulton claims arrears of wages for a short period on 11 June 2021, when he went to the café to show Ms Bishop his suitability to be employed there. He claims he became an employee of FTL then for about three hours.

[8] Mediation between the parties did not resolve the employment relationship problem.

[9] To investigate the claims the Authority convened a meeting attended by Mr Boulton, Ms Bishop and Mr Bishop. They gave evidence or provided information, and written submissions were made on their behalf by advocates Mr Anderson and Mr Drake.

[10] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

Trial period provision

[11] The employment agreement signed on 13 June 2021 included a trial period provision. It was expressed to apply for 90 days commencing on the day Mr Boulton was to start work. That date was written in the agreement as 14 June 2021.

[12] In a note given by Mr Bishop to Mr Boulton on 22 July confirming his termination, FTL referred to the trial period provision and advised his termination was in accordance with it.

[13] If the provision is valid and effective, under s 67B of the ER Act, Mr Boulton is prevented from bringing a personal grievance or other legal proceedings in respect of his dismissal.

[14] Mr Boulton claims that although on its face the trial period provision appears to conform to the requirements of s 67A of the ER Act, it was invalid and could not be invoked effectively, for the following reasons

- He had previously been employed by FTL, on Friday 11 June when he demonstrated his skills to Ms Bishop at the café.
- In terminating his employment FTL did not comply with notice provisions in the employment agreement.
- His employment agreement had been bargained for unfairly by FTL.

Claim of previous employment

[15] Under s 67A of the ER Act, a trial period may only be entered into by an employer with an employee who has not previously been employed by the employer.

[16] After responding to an advertisement for a job at FTL's café and contacting Ms Bishop about it, on Friday 11 June, at her request, Mr Boulton went there at about midday when it was open for customers. He understood the purpose of his visit was to take part in a trial or demonstration of his skill and ability as a café worker.

[17] Afterwards Ms Bishop contacted him and confirmed FTL would like to employ him and he duly received an employment agreement to sign.

[18] The length of time Mr Boulton attended the café on the Friday was disputed. FTL says it was about one hour and Mr Boulton says about three hours. The actual

time, whether one or three hours, is a detail that is less important than the parties' intentions and expectations regarding the occasion and its purpose.

[19] It is relevant that Mr Boulton was one of several potential employees Ms Bishop wanted to see in action that day, and she had arranged an arrival time for one of those after Mr Boulton in the afternoon and before the usual 3.30 pm closing time. It seems unlikely Mr Boulton worked as long as three hours.

[20] Mr Boulton was asked to serve at tables, make coffee and handle payments made by customers. At the request of Ms Bishop he wore certain coloured clothing, to match the garb usually worn by staff of the café. He claims he became an employee for the three hours he estimates he spent at the café. In wages including holiday pay, he claims $71.28 for three hours work.

[21] No written employment agreement was entered into for this assessment. Ms Bishop, the Authority finds, told Mr Boulton in advance he would not be paid for the trial. Mr Boulton gave clear evidence that he had not expected to be paid for the trial, and he did not ask that day to be paid.

Hire or reward

[22] An employee is defined by s 6 of the ER Act as person employed to do any work for hire or reward under a contract of service. There was no written contract of service and, the Authority finds, no oral contract either.

[23] Mr Boulton was not hired for his work on 11 June, as he was not offered pay for it. If he received a reward he may have been an employee, but he received nothing except the attention paid by Ms Bishop to his demonstration of how well he could do the job.

[24] It was submitted for Mr Boulton that a reward he did receive was an offer of employment from FTL.

[25] By definition, a *reward* is something given in recognition of service, effort, or achievement. It strains the meaning of *reward* to say the employment offer was made on that basis.

[26] The employment was offered not as a reward but as an acknowledgement or approval of the skills and ability Mr Boulton had been able to show he had. The

demonstration of those attributes provided confirmation to FTL that Mr Boulton had what it was looking for in a café assistant. Flowing from that was the offer of the job.

[27] The Authority finds that Mr Boulton was not an employee during the time he spent at the café on 11 June but was a volunteer. The definition of employee excludes a volunteer. The Authority finds that Mr Boulton fitted within the exclusion of s 6(1)(c) of the ER Act.

[28] The Authority was referred to the test of what a customer watching Mr Boulton might have thought, upon seeing him waiting on tables and making coffee and working at the till. This seems an unreliable test, since the customer could not read the mind of Ms Bishop or Mr Boulton and see that she had no intention of employing him for what he was asked to do on Friday 11 June, and could not see that Mr Boulton in his mind had no expectation of payment or reward. A customer in a small owner-operator café will also not necessarily, just by looking, be able to tell apart an employee from the owner, or owner's family member or friend just lending a hand.

[29] Ultimately in this case it makes little difference whether it was only 1 hour or 3 hours that Mr Boulton spent in the café on Friday 11 June. There was no mutual intention to enter into a work relationship of any kind. There was no hire and no reward.

[30] The Authority was referred to the Employment Court judgment in *The Salad Bowl Ltd v Howe-Thornley*, but that case is readily distinguishable on its facts. The person found by the Court to be an employee worked during two days in the employer's business, and he received the reward of a meal. Also, the employer had intended to pay for the trial period and the worker had expected payment or reward.

[31] The Authority finds that Mr Boulton did not become employed before he entered into the written employment agreement the parties signed on 13 June 2021, which contained a 90-day trial period provision. The trial period commenced on 14 June when Mr Boulton commenced work.

[32] Therefore, the trial-period provision was available to be invoked at the will of FTL for a period of 90 days following the commencement of employment by Mr Boulton.

Compliance with employment agreement

[33] A 90-day trial period is to be strictly interpreted, in relation to all applicable provisions of both the ER Act and the employment agreement; *Smith v Stokes Valley Pharmacy (2009) Ltd*[1], an Employment Court decision.

[34] Section 67A(2)(b) of the ER Act requires a trial period provision to state that during the period, 'the employer may dismiss the employee'.

[35] The agreement between FTL and Mr Boulton conformed by stating, at clause 2.2,

> During the trial period the Employer may dismiss the Employee or give notice of dismissal;

[36] At clause 2.3 it also stated,

> Notwithstanding any other provision of this agreement, during the trial period either party may terminate this agreement by giving one week's notice of termination to the other party. The Employer may pay the Employee wages or salary instead of the Employee being required to work during the notice period.

[37] Mr Boulton was given notice of termination, expressed to be in accordance with clause 2.2.

[38] The Authority finds that during the trial period FTL dismissed Mr Boulton and did so in accordance with clauses 2.2 and 2.3. On 22 July, Mr Boulton was given a weeks' notice when he was told his final day of employment was 29 July. For that week FTL elected to pay Mr Boulton wages instead of requiring him to work.

[39] If the clause had required termination to be only on notice, then FTL could not have lawfully dismissed Mr Boulton summarily. As the case law shows, payment in lieu of notice is not a substitute for providing notice *if* notice is required. In this case clause 2.2 provided FTL the option of dismissing Mr Boulton or giving him notice.

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FTL dismissed Mr Boulton and paid him instead of requiring him to work during the notice period, as permitted by clause 2.3.

[40] The Authority finds that FTL complied with the employment agreement in dismissing Mr Boulton. The way FTL had paid Mr Boulton for the week following his dismissal did not prevent the trial period provision from being relied upon by FTL.

Calculation of final pay

[41] The Authority finds the final pay Mr Boulton received was calculated correctly. He was paid for the four days he had been rostered to work that final week. A fifth day – a Sunday – was a day he had asked to have off. He was paid at the average daily rate of pay for his period of employment.

Unfair bargaining

[42] In relation to a trial period under s 63A of the ER Act, s 68 of the Act provides that unfair bargaining for an individual employment agreement occurs if there has been a failure by the employer to give the employee a reasonable opportunity to seek independent advice about an intended employment agreement. It is claimed Mr Boulton did not receive that opportunity from FTL.

[43] With his signature he put on the employment agreement, Mr Boulton confirmed the following

> (a) I was given a copy of my intended agreement and informed that I was entitled to seek independent advice about that agreement.
>
> (b) I was given a reasonable opportunity to seek independent advice.
>
> (c) Any issues I have raised have been considered and responded to.
>
> (d) I agree to comply with any company policies which may be changed from time to time at the company's sole discretion.
>
> (e) I have read and fully understood these terms and conditions of employment and accept them fully.

(underlining added)

[44] It is Item (b) that is now called into question under s 68 by Mr Boulton.

[45] If there was unfair bargaining for any reason, under s 69 of the ER Act the Authority may provide one or more remedies including compensation and cancellation or variation of the employment agreement.

[46] The remedy sought by Mr Boulton is a variation of the employment agreement to remove from it the trial period provision, with retrospective effect. If such a thing can be done, FTL could not then rely on the trial period provision to deflect Mr Boulton's unjustified dismissal grievance.

[47] It is accepted by FTL that if it cannot utilise the trial period provision, it will not be able to justify Mr Boulton's dismissal. That action was apparently taken by FTL for reasons of poor performance rather than any misconduct on the part of Mr Boulton.

[48] Unfair bargaining may be found to have occurred under s 68 of the ER Act if Mr Boulton did not have a reasonable opportunity to seek advice and if FTL either knew or ought to have known he did not have that opportunity, or if FTL knew of circumstances from which it could be reasonably inferred he did not have that opportunity.

[49] It is a question of fact and degree whether Mr Boulton had a reasonable opportunity to seek advice. A declaration or confirmation such as that given by Mr Boulton that he had had such an opportunity if in fact he had not, will not provide an affirmative answer to the question. It may simply be an invalid declaration if it can be viewed as an attempt to contract out of the ER Act.

[50] The Authority finds it likely that Ms Bishop gave or sent Mr Boulton a copy of the intended employment agreement on Saturday 12 June, the day after the trial carried out at the café. She made it known to Mr Boulton that FTL wanted him to start on the morning of Monday 14 June. Ms Bishop asked Mr Boulton to sign the agreement and return it by then. Both signed on 13 June.

[51] The Authority finds from the evidence that the amount of time available for seeking advice between FTL giving Mr Boulton the agreement and receiving it back

signed by him, was not a matter of concern to Mr Boulton before he commenced work on Monday 14 June. He was not surprised to see the trial period provision or anything else in the agreement and he had no reason to think about seeking advice. He confirmed by his signature his satisfaction with the arrangements and circumstances under which he entered into the employment agreement.

[52] Ms Bishop too was unconcerned, as she felt able to rely on the express confirmation Mr Boulton had signed, stating he had been given a reasonable opportunity to seek advice.

[53] Mr Boulton's written evidence was that his concern or interest regarding the issue of having enough time to seek advice, only arose when his advocate asked him about it 'months later' after he was dismissed. He did not mention the issue when he raised his grievance by letter a few days after the dismissal, nor in the first statement of problem lodged on his behalf two months after his dismissal. The issue of being given a reasonable opportunity to seek advice, seems to have surfaced only as an afterthought.

[54] The issue cannot be determined by looking at Mr Boulton alone to see whether he was content with the opportunity he was given to take advice. The obligation under s 63A is that of an employer to give the employee that opportunity, and it must be *given*, not just offered for acceptance or rejection as the employee may see fit.

[55] The ER Act contains no definition of what a reasonable opportunity is or may be, where referred to as a requirement in s 63A of the Act. This may seem unsatisfactory when a failure by an employer to comply with s 63A may be met with a penalty of up to $20,000 imposed by the Authority.

[56] The Authority considers that viewed objectively, Mr Boulton was not given a reasonable opportunity to seek advice. That opportunity should be long enough for advice to be received as well asked for. Search engines such as Google and chat rooms are usually accessible at all times, but although they can provide *information,* what is required is *advice.* A weekend would probably be the worst time of the week anywhere to contact an advisor and obtain advice, even in a city the size of Rotorua. Having only a day and a bit to do that in, further narrowed the opportunity given to Mr Boulton.

[57] It should not have been left to Mr Boulton to ask for more time if he felt he needed it, when his priority, as he made Ms Bishop aware, was to start a new job as

soon as possible. The Authority gives no weight to the statement signed by Mr Boulton confirming, subjectively, that he had been given a reasonable opportunity. His opinion as a mature, experienced, and educated adult should not be completely disregarded but the real focus of the test of unfair bargaining includes what FTL knew or should have known, or inferred, about the reasonableness of the opportunity given to Mr Boulton to seek advice.

[58] FTL asked him to sign the agreement and bring it to work when he commenced on Monday 14 June. The employer knew as a plain fact that there was little more than one day over a weekend for seeking advice. If FTL did not actually know that was not enough time, it should have known as much since it controlled the timing of entry into an employment agreement.

[59] FTL could not safely rely on Mr Boulton's confirmation alone. It was required to assess for itself whether it had allowed him a reasonable opportunity to seek advice.

Sections 68 and 69 of the ER Act

[60] The Authority finds that the employment agreement entered into by FTL with Mr Boulton was bargained for unfairly within the circumstances set out in s 68(2)(d) of the ER Act. On 12 June when presented with the employment agreement for his consideration, Mr Boulton was not given a reasonable opportunity to seek advice about the intended agreement, despite the confirmation he signed the following day to the contrary.

[61] For an unfair bargaining remedy to be available under s 69 of the ER Act, it is enough that unfair bargaining occurred. It is not required to be shown in addition that an employment agreement was procured or induced by that unfair bargaining.

Appropriate remedy

[62] The remedy for unfair bargaining sought by Mr Boulton is an order for the variation of the employment agreement, made under s 69(1)(b) of the Act. That order may only be made if the parties have complied with s 164 of the ER Act, which requires the parties to be directed by the Authority to mediation.

[63] The Authority may only cancel or vary a contract where it is satisfied that other remedies would be inappropriate or inadequate.

[64] The Authority considers that the appropriate remedy for the problem in this case would have been a penalty for breach of s 63A(2)(c) of the Act. A penalty has not been claimed and cannot now be claimed, as the 12-month limitation period has expired. Compensation is also an appropriate remedy.

[65] The Authority is satisfied that the failure by FTL did not result in an employment agreement being imposed on Mr Boulton, because FTL had sought to avoid a possibility he might not have otherwise agreed to it if he had been able to seek advice. He told the Authority he was very experienced in hospitality work and was not surprised to find a trial period provision in the intended agreement after it was given to him by Ms Bishop. He had agreed to such provisions before in other employment. It seems likely he would have taken the job with the trial provision applying to it, without seeking advice no matter how long he was given to do that.

[66] Although compensation may be ordered as a remedy for unfair bargaining, the Authority finds no basis for quantifying compensation where no harm or loss was suffered by Mr Boulton through not being given the opportunity to seek advice. The failure to comply with a statutory obligation owed to Mr Bouton could have been more appropriately remedied with a penalty, some of which could have been awarded to Mr Boulton.

[67] The Authority therefore confirms the validity of the trial period provision relied upon by FTL on 22 July 2021, as providing a lawful way of terminating Mr Boulton's employment. Accordingly, by operation of s 67B(2) of the ER Act, he is unable to bring a grievance or other proceedings in respect of that dismissal.

Failure to give a reason for the dismissal

[68] A penalty is claimed for FTL's failure to provide Mr Boulton a reason for his dismissal upon his requesting that on 22 July 2021.

[69] The Employment Court found in *Smith v Stokes Valley Pharmacy (2009) Ltd*[2] that even where an employee is validly dismissed under a trial period provision, if requested an employer must, in good faith, give an explanation for the dismissal at the time that action is taken.

[70] The Authority finds that Mr Boulton asked the Bishops on 22 July for the reason why his employment was being terminated. He was told he would not be given a reason.

[71] Applying the Employment Court *Smith* decision, there was a breach of good faith by FTL in failing to comply with the requirement of s 4(1A)(b) of the ER Act to be responsive and communicative upon hearing Mr Boulton request a reason.

[72] The penalty sought by Mr Boulton for this breach may only be ordered under s 4A of the ER Act if the breach of good faith is deliberate, serious, and sustained, or was intended to undermine an individual employment agreement or an employment relationship.

Reasons for dismissal not required to be given in writing

[73] The Authority finds as a question of degree that the breach, although it was deliberate, was not serious or sustained, for the following reasons. The ER Act provides at s 67B(5)(b) that an employer is not required to comply with a request under s 120 relating to termination of employment under a trial period provision. Under s 120 of the ER Act an employee may request a statement in writing of the reasons for a dismissal.

[74] The Court's *Smith* decision and s 120 mean that FTL was required to *orally* give reasons for the dismissal of Mr Boulton upon request by him but did not have to give them *in writing* if requested anytime within 60 days following the dismissal. The Court noted this peculiarity.

[75] The Authority concludes that the exclusion from application of s 120 when a trial period provision has been invoked, gives an indication that a requirement to give reasons for dismissal orally was not intended to be enforceable by penalty available for

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a *serious* breach of good faith. If the omission to give oral reasons was serious, it might be expected the requirement would be backed up by s 120 being available to Mr Boulton.

[76] The breach was not sustained. The request was made and rejected on 22 July at the time of termination. The rejection was noted when Mr Boulton raised his grievance a few days later on 27 July, but the request for a reason was not repeated. There was no continuing breach.

[77] The breach of good faith did not undermine the employment relationship or the employment agreement. Both had completely ended by express termination of employment communicated by FTL on 22 July, before Mr Boulton was denied his request for a reason.

[78] The Authority finds that the breach of good faith by FTL does not meet the threshold of s 4A required to be reached before a penalty may be imposed by the Authority. A penalty is not imposed.

Reduction in hours of work

[79] Mr Boulton raised an unjustifiable disadvantage grievance about a reduction in his hours of work.

[80] The Hours of Work provision in his employment agreement required Mr Boulton to work, 'between 6.30 am to 4.30 pm on Monday to Sunday as rostered minimum 10 hours per week …… and any additional hours to be worked above your guaranteed minimum will be by agreement'.

[81] The Authority finds that Mr Boulton had an entitlement to work a minimum of 10 hours a week and any hours above those that he might be rostered to work in any week. A flexible roster determined his weekly hours, which were to be at least 10. If he was rostered in any week to work above 10 hours, that did not constitute an agreement covering all subsequent weeks.

[82] While Mr Boulton expected or hoped for more hours, he had no contractual entitlement above the weekly rostered hours, provided they were at least 10.

[83] The Authority accepts the evidence that on some occasions the reduction in hours was requested or required by Mr Boulton. He was away sick on two days and had asked not to be rostered on certain Sundays, to allow him time to pursue a leisure activity.

[84] Mr Boulton does not have a personal grievance arising out of a change in rostered hours. He remained rostered for a minimum of 10. There was no action to the disadvantage of any condition of his employment. FTL complied with the employment agreement.

Rest breaks

[85] Mr Boulton raised an unjustifiable disadvantage grievance about his entitlement to rest breaks under the ER Act.

[86] Rest breaks are provided for in Part 6D of the ER Act. For a work period of between two and four hours, an employee is entitled to one 10 minute paid rest break; s 69ZD(2). Two 10-minute breaks (and one 30-minute meal break) is the entitlement for a work period of between six and eight hours; a 69ZD(4). The entitlement to the second break is expressed to be where 'more than' six hours have been worked.

[87] Mr Boulton has calculated that he was entitled to a total of 50 paid 10-minute breaks based on the work periods of the 27 days he worked for FTL. He claims he did not have the break on all the 50 occasions and the only break he received was 30 minutes for meals (required where the work period was more than four hours).

[88] He claims he was 'refused' the rest breaks, by Ms Bishop in particular.

[89] He claims compensation of $5,000 to remedy his unjustified disadvantage grievance in this regard. A refusal by an employer to allow an employee to have rest break where entitled to one, may amount to an unjustifiable disadvantage in employment or the terms and conditions of employment.

[90] The employment agreement provided, at clause 4.3,

> You agree rest breaks and unpaid meal breaks shall be taken at times directed by the employer.

[91] The employment agreement House Rules provided,

> Breaks are to be taken at times acceptable to the business.

[92] Mr Boulton's written evidence was that there were no allocated 10-minute breaks, and there were entire days where he would not be allowed a short break. He says Mr Bishop looked shocked when he asked about taking breaks, as if such a thing was out of the question, and Mr Bishop would not give him a reason why he could not have a break.

[93] In answer to questions Mr Boulton said he was not allowed a 10-minute rest break for the whole time he was employed. He was allowed and did take a meal break of 30 minutes, which was paid.

[94] In her written evidence Michelle Bishop did not directly address the question of the availability to Mr Boulton of rest breaks. She said he took extended breaks of more than the allocated 10 minutes, particularly when his work performance began to deteriorate before his employment was ended.

[95] In answer to questions, Ms Bishop said he had been told that breaks were to be taken during down time, or when customers were not queued up at the counter awaiting service.

[96] Ms Bishop said she had told him to take responsibility for having the rest breaks.

[97] Aaron Bishop in his written evidence said that as Mr Boulton's performance and attitude began to deteriorate he started taking longer breaks and appeared to have no motivation to get back to work.

[98] In answer to questions, Mr Bishop said that Mr Boulton did have rest breaks. The requirement was for staff to take those at convenient times, or off- peak. He said there was always time to take breaks.

[99] The Authority finds from the evidence it is likely that Mr Boulton did have rest breaks but did not receive his full entitlement to those. He was not refused all breaks but was required to take them at times when the café was less busy. The arrangements provided in the employment agreement gave insufficient certainty to Mr Boulton about

when he could take a rest break and understandably left him feeling that the taking of rest breaks was discouraged was his employer.

[100] The Authority considers the rest breaks were not 'directed' by the employer as provided for in the employment agreement but were left up to Mr Boulton to take responsibility for. That situation would inevitably lead eventually to a disagreement between employer and employee about when the rest breaks should be taken.

[101] The Authority is satisfied on the balance of probabilities that FTL, as an employer, did not discharge its obligation to provide rest breaks as required by s 69ZD of the ER Act. The Authority does not find that Mr Boulton had no rest breaks whatsoever, although the number of untaken rest breaks cannot be determined by the Authority with any accuracy.

[102] The Authority finds that Mr Boulton was disadvantaged in his employment or conditions of employment by an unjustified action of FTL, and for that reason he has a personal grievance. He raised it as required within 90 days, when he lodged and served his statement of problem.

[103] He claims compensation, a personal grievance remedy that can be awarded under s 123(1)(c) of the Act. Arguably he lost a benefit of a non-monetary kind when he was not provided with an actual break in which to have a rest.

[104] Mr Boulton is entitled to recover compensation for the loss or deprivation he suffered. In assessing it the Authority does not take into account the fact that Mr Boulton was paid for a 30-minute meal break when the ER Act or the employment agreement did not require that. Although he received about $300 in total for 27 meal breaks, that amount is not to be set off against any compensation for the loss of actual rest breaks.

[105] The employer's failure regarding rest breaks did not lead to monetary loss but loss of a general welfare entitlement recognising a worker's capacity is not infinite.

[106] The compensation shall be $500. FTL is ordered to pay that sum to Mr Boulton within 28 days of the date of this determination.

Conclusion

[107] In summary,

- In respect of his dismissal, Mr Boulton is prevented by a valid and effective trial period provision in his employment agreement from bringing a personal grievance or other legal proceedings against FTL.

- The employment agreement was unfairly bargained for by FTL but in the absence of harm or loss to Mr Boulton caused by or resulting from the unfair bargaining, no compensation is awarded and no other remedy for unfair bargaining is appropriate in the circumstances.

- FTL did not act in good faith towards Mr Boulton when it refused to give him orally a reason for his dismissal. In the circumstances, the breach of good faith was not one for which a penalty may be imposed.

- FTL did not unlawfully reduce the hours of work of Mr Boulton.

- FTL failed to allow Mr Boulton a rest break on every occasion he worked for more than two hours and for more than six hours. Mr Boulton has a personal grievance for which the remedy is an order requiring FTL to pay him compensation of $500.

Costs

[108] FTL is entitled upon application to an order for its reasonable legal costs to be met by Mr Boulton. The Authority may determine the amount by applying its daily tariff or rate, with adjustments where appropriate.

[109] Any application for costs is to be made within 14 days of the date of this determination, and any reply within a further 14 days of any application for costs being made.

Alastair Dumbleton
Member of the Employment Relations Authority