

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 215
3173822

BETWEEN DENISSE GOHANNA GUZMÁN
ROMÁN
Applicant

AND MAUNGA HOREPA
CONTRACTORS LIMITED
Respondent

Member of Authority: Lucia Vincent

Representatives: Kevin Murray, advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 20 January 2023 at Christchurch

Submissions Received: 20 January 2023 from the Applicant, with further
information received on 30 January 2023
No submissions from the Respondent

Date of Determination: 1 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Denisse Gohanna Guzmán Román, (Denisse) worked for the Respondent, Maunga Horepa Contractors Limited (Maunga), as a cleaner for about six weeks before being dismissed during her trial period.

[2] Denisse says her trial period did not apply because Maunga dismissed her for medical incapacity. Alternatively, she says Maunga unjustifiably disadvantaged her. Her concerns include a failure to provide breaks, unilateral changes to her employment agreement, failures to pay wages and holiday pay and breaching good faith.

[3] Maunga did not attend the investigation meeting or lodge a statement in reply and statements of evidence. It emailed the Authority providing information from one of the Directors. Unfortunately, I found this to be of limited assistance.

[4] I am satisfied it was appropriate to proceed despite Maunga's failure to attend or engage with the Authority in the usual way. I am not satisfied Maunga had good cause for its absence.¹

How did the Authority investigate?

[5] For the Authority's investigation, written witness statements were lodged from Denisse, her friend, flatmate, and landlord. All witnesses answered questions under oath or affirmation from me and the party's advocate. I also heard closing submissions.

[6] As permitted by section 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.

What are the issues?

[7] The issues requiring investigation and determination were:

- (a) Did Maunga and Denisse agree to a valid trial provision?²
- (b) Did Maunga dismiss Denisse in reliance on her trial provision preventing a personal grievance?³
- (c) If the answer to (a) or (b) is no, did Maunga unjustifiably dismiss Denise due to medical incapacity?
- (d) (Alternatively) Did Maunga unjustifiably disadvantage Denisse by dismissing her or by other specific actions?
 - (i) Failing to provide breaks;
 - (ii) Unilaterally changing her employment agreement;
 - (iii) Failing to pay wages and holiday pay;
 - (iv) Charging an unlawful premium; and

¹ Clause 12, Schedule 2, Employment Relations Act 2000 (Act).

² In accordance with section 67A of the Act.

³ Put another way, has Maunga complied with section 67B of the Act so it can rely on the statutory bar to bringing a personal grievance or other legal proceedings in respect of Denisse's dismissal.

- (v) Including an unlawful availability provision in her employment agreement?
- (e) Did Maunga breach the duty of good faith warranting a penalty?
- (f) Did Maunga fail to keep or produce Denisse's wages and time record warranting a penalty?⁴
- (g) What, if any, remedies should be awarded? Should I award Denisse:
 - (i) Reimbursement of earnings and compensation for any personal grievance?
 - (ii) Wage arrears and holiday pay?
 - (iii) Penalties for a breach of good faith or record-keeping obligations?
 - (iv) If any remedies are awarded, should they be reduced under section 124 of the Act for blameworthy conduct by Denisse that contributed to the situation giving rise to her grievance?
 - (v) Should either party contribute to the costs of representation of the other party?

Did Maunga and Denisse agree to a valid trial provision?

[8] Denisse did not appear to dispute she signed an employment agreement containing a valid trial provision before she started working for Maunga.

[9] To be eligible to enter into a trial provision, an employer must be a small- to medium-sized employer (SME) i.e. employ fewer than 20 employees at the beginning of the day on which the employment agreement is entered into. During our investigation meeting, Denisse's advocate accepted he could not prove Maunga was not an SME. I took that to mean it was accepted Maunga was a SME for the purposes of section 67A and I find Maunga was.

⁴ As required under section 130 of the Act.

[10] Denisse did not appear to dispute two further requirements of section 67A had also been met:

- (a) An employee must be new, i.e. Maunga could not have employed Denisse before;⁵ and
- (b) The applicable written employment agreement must include a trial provision i.e. Denisse's employment agreement had to contain a written provision that stated (or is to the effect that) for a specified period (not exceeding 90 days) starting at the beginning of her employment, she would serve a trial period, and during that period Maunga may dismiss her, and if it did, she could not bring a personal grievance or other legal proceedings in respect of her dismissal.

Was Denisse a "new" employee?

[11] Denisse accepted she signed the employment agreement soon after receiving it. One of the directors of Maunga had signed the copy lodged with the Authority which was dated 13 October 2021. Denisse started work with Maunga on 2 November 2021 due to the time taken to have her work visa conditions varied to enable her to work for Maunga. In between those two dates Denisse said she had met with Maunga's director and their lawyer. Although feeling somewhat under pressure to accept what was on offer during that meeting (including a lower pay rate and non-supervisory cleaning role), she was given the employment agreement to take away,⁶ giving her an opportunity to review it before signing and sending it back.

[12] The timeframes between the meeting to discuss the employment agreement, when it was signed and when she started work, satisfied me Denisse had sufficient time to read the agreement and seek advice. Although she accepted she did not appreciate the significance of her trial provision at the time, she accepted she read the agreement before signing it. Taking these circumstances into account, I find Denisse was a new employee for the purposes of the trial provision.

⁵ Applying the Employment Court's strict interpretation of who a "new" employee is as explained in *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [85] - applied in *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [35] to [60].

⁶ Denisse recalled it may have been emailed to her also.

Did the trial provision comply?

[13] Denisse's employment agreement contained a clause that materially stated:

- 43.1 The first 90 days of employment will be a trial period, starting from the first day of work;
- 43.2 During the trial period, the Employer may dismiss the Employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period;
- 43.3 During the trial period the Employee's work performance and general suitability will be assessed, and, if satisfactory, your employment will continue. However, if your general performance assessment is not satisfactory the Employer may give the Employee notice of one week of termination of their employment;
- 43.4 During the trial period, the Employee's normal notice period does not apply. Instead, either the Employee or Employer may end this agreement by giving notice before the trial period ends. For serious misconduct, the Employee may be dismissed without notice.
- 43.5 If dismissed during the trial period, the Employee cannot bring a personal grievance or other legal proceedings about the dismissal;
- 43.6 During the trial period, the employer and employee must treat each other in good faith.

[14] I am satisfied that the above clause met the requirements of section 67A.

[15] I find Maunga and Denisse agreed to a valid trial provision.

Did Maunga dismiss Denisse in reliance on her trial provision preventing a personal grievance?

[16] My investigation does not stop at concluding Maunga and Denisse agreed to a valid trial provision. To successfully claim the protections of section 67B against a personal grievance, Maunga must show it relied on the trial provision and complied with other requirements like notice. If it cannot, Maunga must defend Denisse's personal grievance brought for her dismissal during the trial period like any other dismissal - showing substance and fair process and that its decision was justified under section 103A of the Act (which it could not).

[17] To validly invoke a trial provision during a trial period, Maunga must have given Denisse notice of termination before the end of the trial period (whether the termination took effect before, at, or after the end of the trial period).

[18] After working for Maunga for six weeks, Denisse suffered a spider bite on her leg, causing her to be unfit for work on and from 9 December 2021. She contacted one of Maunga's directors to notify her absence. At around 3:30pm that day, Denisse received a visit at home from this director, initially asking about her welfare and to advise about another employee's resignation and various concerns regarding this.

[19] Denisse described what she recalled happened during this visit. She recalled being told she was dismissed on two weeks' notice due to an energy clash. I understood this to mean a clash of personalities between Denisse and Maunga's director. Denisse recorded the conversation which confirmed this aspect of Denisse's evidence.

[20] A transcript of the recording as well as listening to the audio also reveals a discussion between Denisse and Maunga's director during which each raises several concerns about the other. This culminated in Maunga's director saying to Denisse, "*Today I am giving you the two weeks' notice, I will write it down.*" When Denisse asked for reasons, the director asked, "*What do you mean, for what reasons? It didn't work, Denisse. It didn't work.*" What followed was a discussion during which both parties became increasingly upset and Maunga's director telling Denisse she did not need to come back if she preferred not to and would be paid to stay at home. I note Denisse's injury would have prevented her from returning to work for a further week or two in any case.

[21] After the weekend, on 13 December 2021 Maunga's director emailed Denisse as indicated. The email materially stated:

We refer to our discussion on Friday 10 December 2021 regarding your employment with Maunga Horepa Contractors Limited.

As you are aware, you are employed pursuant to a 90-day trial period. During that trial period, we are able to terminate your employment by giving one week's notice.

We met with you on 10 December 2021 to discuss concerns regarding your work performance and suitability to continue in the position. After considering your feedback we have decided to invoke the trial period provision.

This letter constitutes one week's notice of the termination of your employment pursuant to the trial period. Your employment will end on 20 December 2021. We will pay your final pay and holiday pay in the following pay run.

[22] The email was somewhat self-serving on Maunga's part. It exaggerated the informal nature of the discussion to say it was a meeting to discuss work performance and suitability.

Any consideration was cursory. I accept the nature of the discussion broadly covered these topics in terms of compatibility with other staff and discussions with customers - Denisse and Maunga's director had very different views about both.

[23] The statement of problem and correspondence from Denisse's advocate dated 22 February 2022 incorrectly claimed two witnesses were present when Denisse's employment was dismissed because of medical incapacity and that this occurred on 10 December 2021. Denisse clarified the correct date was 9 December 2021. Both of Denisse's witnesses confirmed neither of them were present during the meeting in which Denisse was dismissed. Denisse's evidence did not support any other reason for her dismissal other than an energy clash. The audio recording confirmed this.

[24] I note Maunga's director did not expressly refer to the trial provision when she gave Denisse two weeks notice which exceeded the one week required under the trial provision.⁷ However in the same sentence she stated it would be put in writing and Denisse followed this up asking for her to do so. Maunga's subsequent email after the weekend clearly confirms the dismissal on the basis of the trial provision. Neither during the discussion nor in the email was there any reason given to dismiss Denisse, like medical incapacity as alleged. Confirming that in writing as indicated and agreed by Denisse during the meeting, I am satisfied Maunga dismissed Denisse on the basis of the trial provision. I am reinforced in that conclusion given the apparent confusion by Maunga's director when Denisse asked for reasons for why she was being dismissed and the reason given was a personality clash.

[25] I am concerned that the subsequent email recording the dismissal attempts to reduce the notice period to one week. Due to timing of the conversation and email, the notice appears to be slightly short of the two weeks' notice initially given. Maunga should honour the full two weeks by ensuring full payment, even though it exceeded the required one week in the trial provision. I do not consider the shorter notice advised of one week vitiates the protections of section 67B because it still complied with the minimum notice of one week required by the trial provision. If it could be said to constitute an unjustified disadvantage personal grievance it can be remedied by ordering payment of the balance of two weeks which I do.

⁷ Two weeks was the general notice set out in the employment agreement – see clauses 35A and 35.3 regarding ending employment.

[26] Paying Denisse her notice period in lieu was provided for in the employment agreement.⁸ The Court of Appeal has confirmed notice can be paid out without undermining the requirement to give notice where it is provided for in the applicable employment agreement.⁹

[27] I find the protections afforded Maunga under section 67B apply to prevent a personal grievance for unjustified dismissal being brought by Denisse. It follows that I also do not consider that there was an unjustified dismissal personal grievance.

Did Maunga unjustifiably disadvantage Denisse by dismissing her or due to other specific actions?

[28] Denisse's advocate accepted that the basis of the unjustified disadvantage regarding her dismissal was materially the same as her unjustified dismissal personal grievance. I agree. However, Denisse raised several other specific claims which I deal with below.

Failing to provide breaks?

[29] Denisse says she worked without breaks on a number of occasions. This is despite her employment agreement providing for breaks in accordance with the Act.¹⁰

[30] Denisse's evidence was that she had control over when she worked which, I find, would have extended to when she took breaks. Although I accept the autonomous nature of her workload may at times have made it difficult for her to take breaks, the comprehensive schedule on breaks in her employment agreement as well as the control she had over when she worked confirm Maunga expected her to take breaks and left it to her to manage her workload to allow this. I do not consider this claim proven.

[31] Denisse did not pursue her point about breaks in submissions. Nor did she claim any remedy for a lack of breaks. It appeared to be a claim relating to the broader allegation around a failure to pay for all hours worked which I cover below.

⁸ Clause 35.4.1

⁹ *Ioan v Scott Technology NZ Limited* [2019] NZCA 836.

¹⁰ Clause 7A. Schedule 2 sets out comprehensive guidance on what, when and how to take breaks. Part 6D of the Act sets out minimum requirements for breaks.

Unilaterally changing her employment agreement?

[32] During the investigation meeting it appeared that this claim related solely to what was alleged to be a unilateral change to remuneration frequency to fortnightly from weekly. Clause 8.2 of the employment agreement, however, refers to payment being made fortnightly. Denisse signed her agreement and conceded that she had agreed to that. I do not accept this claim.

Failing to pay wages and holiday pay?

[33] There are several concerns raised about failures to pay for all time worked and holiday pay calculations. The parties appeared to dispute what constituted working hours and this issue remained unresolved, perhaps exacerbated by the lack of comprehensive time and wage records.

[34] It was clear that from the payslips provided and information given by Maunga to Denisse, albeit incomplete, that records were kept and the majority provided.¹¹ However, I am not satisfied that this was representative of all hours worked. It was unclear to me how wages and holiday pay had been calculated and paid out with discrepancies including an “advance” of \$1,000 recorded by Maunga as paid to Denisse on 23 November 2021. In the absence of records from Maunga proving otherwise, I accept Denisse’s claims around hours worked, wage arrears owing and holiday pay outstanding with adjustments as follows.¹²

- (a) Denisse’s records show she worked a total of 186.8 hours for which she should have received \$4,203. Her payslips show she was paid for 83.5 hours – one fortnight on the basis of \$22 per hour and the other \$22.50 the rate to which she was entitled.¹³ This amounts to \$1,851.38 (or \$1,577.08 net). I award the shortfall of \$2,351.62.
- (b) Denisse ought to have been paid in full for two weeks notice which I calculate on an average of 36.9 hours per week totalling 73.8 hours. This amounts to \$1,661.13 which I award.

¹¹ See for example the email dated 1 January 2022 confirming payments made for wages and holiday pay and fortnightly payslips dated 18 November 2021 and 16 December 2021.

¹² As permitted by section 132 of the Act - if an employer fails to produce the wages and time record and it has prejudiced an employee’s ability to bring an accurate claim under section 131 then the Authority can accept evidence from that employee as proven (for example the wages paid and hours worked) unless an employer can prove the claims are incorrect. All amounts are gross unless indicated otherwise.

¹³ Item 5, Schedule 1.

- (c) Denisse claims payment for Canterbury Anniversary Day on 12 November 2021 as an unworked public holiday. She should receive payment for this as her average daily pay being \$168.10.¹⁴
- (d) With gross earnings of \$6,032.23, Denisse should also receive annual holiday pay accrued of \$482.58.¹⁵
- (e) Denisse accepted she received total payments of \$3,017.10 (net) from Maunga which included an alleged “advance” of \$1,000 which Denisse could not understand the basis for. On an equitable basis I consider it fair to deduct this amount from the amounts owing (from which \$1,577.08 net has already been deducted from the amount at (a) above). I deduct the remaining \$1,440.02 from the amount owing under (a) leaving a shortfall for wage arrears of \$911.60.

[35] Although there is a level of disadvantage due to the dispute over hours and therefore pay, I do not accept it was at the level that amounts to a personal grievance for unjustified disadvantage. The claims appear however to mostly come from a dispute about hours worked which I have now resolved in Denisse’s favour.

Charging an unlawful premium?

[36] Denisse’s advocate withdrew the unlawful premium claim at the investigation meeting.

Including an unlawful availability provision in her employment agreement?

[37] The employment agreement recorded a minimum of 30 hours to be worked on any 5 days of the week, Monday to Sunday inclusive, during the normal business hours of Monday to Sunday 7am to 10pm.¹⁶ Denisse says she knew when to work these hours based on communications from Maunga’s director via WhatsApp on what jobs she had. Soon after starting she was given a list of jobs and clients and able to manage her workload herself. Given most cleaning was residential, Denisse planned this work between 9am and 5pm with some office work in weekends as required.

[38] Although the hours of work clause included a sentence saying, “The Employee may be required to work such additional hours, including hours at the weekend as are reasonably

¹⁴ As required under sections 9A, 12, and 49 of the Holidays Act 2003 (Holidays Act). I have calculated Denisse’s average daily pay on the basis she worked 186.77 hours across 25 days earning \$4,202.33 - working on average 7.47 hours each day.

¹⁵ Section 23 of the Holidays Act.

¹⁶ Clauses 7.1 to 7.2 and Item 4, Schedule 1.

required by the Employer”¹⁷ I did not understand Denisse to be saying Maunga required her to do so – instead allowing her to set her hours according to her workload (primarily during business hours Monday to Friday). Despite that, this aspect of the clause can be construed as an availability provision that has failed to comply with requirements such as paying reasonable compensation for availability.¹⁸ But because neither Maunga nor Denisse treated it as availability provision, I cannot find any discernible disadvantage was caused.

Did Maunga breach the duty of good faith warranting a penalty?

[39] Section 4A of the Act sets a high standard to seek a penalty for breaching specific aspects of the duty of good faith. Denisse’s advocate did not rely on this section but instead pointed to section 4(1A)(b) as a failure to be active and constructive in establishing and maintaining a productive employment relationship in which the parties were, among other things, responsive and communicative.

[40] Section 4A provides for a penalty for certain breaches of the duty of good faith which does not include the breaches alleged here. The section requires a high standard for a penalty to be imposed which includes it being deliberate, serious and sustained or intended to undermine an employment agreement or employment relationship.

[41] I decline to award a penalty under this head.

Did Maunga fail to keep or produce Denisse’s wages and time record warranting a penalty?

[42] Maunga failed to produce wage and time records upon request. I do not consider there is evidence to show a failure to keep any records at all.

[43] As an employer Maunga had to keep (and produce) in written form (or easily reduced to written form), records relating to things like time worked and wages paid.¹⁹ By failing to comply with the requirement to produce the records upon request, Maunga is liable to a penalty of up to \$20,000. The Authority has full and exclusive jurisdiction to deal with all actions for recovering penalties for breaching an employment agreement or any provision in the Act for

¹⁷ Clause 7.2.

¹⁸ As set out in section 67D of the Act.

¹⁹ Section 130

which a penalty is provided for in the particular provision.²⁰ I do not accept the maximum ought to be awarded.

[44] Section 133A sets out compulsory considerations when determining an appropriate penalty. These include the object of the Act (including recognising the inequality of power in employment relationships), the nature and extent of any breach, whether it was intentional, inadvertent or negligent, the nature and extent of any loss or damage suffered by any person, whether the person in breach paid compensation, reparation, restitution or taken other steps to avoid or mitigate any actual potential adverse effects of the breach, and the overall circumstances of the breach, including the vulnerability of the employee and any prior offences. This is a non-exhaustive list of considerations that are potentially relevant when determining an appropriate penalty for any breach. I have also had regard to case law relevant regarding penalties generally.²¹

[45] In the present case the sole breach alleged is in relation to the failure to keep and produce time and wage records. The payslips provided indicate that a record was kept electronically and that this could be readily reduced to written form. I find Maunga complied with its obligations to keep a record. Maunga however failed to produce a comprehensive copy of that record upon request.

[46] I am satisfied that a penalty is appropriate however not the \$20,000 sought which is the maximum penalty reserved for the most serious of cases. It appears as though the lack of engagement by Maunga has been caused by number of factors. Although only of limited assistance, an email from one of the directors indicated health issues may have been partially responsible for this lack of engagement and that any failure to produce records was inadvertent rather than deliberate. Weighing against this is the vulnerability of Denisse as an employee on a work visa who is entitled to receive her records when requested so she can accurately calculate any wage arrears and holiday pay. The failure to produce records made it more difficult to progress her claim in the Authority. Having regard to penalties awarded in other cases and the circumstances in this case, I consider a penalty of \$3000 is appropriate. Maunga has not provided any evidence as to any inability to pay and I consider that amount fair.

²⁰ Section 133.

²¹ See for example *Jeanie May Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[47] Denisse has sought payment of the full amount of any penalty to be paid to her under section 136. I am satisfied that this is appropriate and award accordingly.

Summary of findings and orders

[48] I have found Maunga can claim the protections afforded by section 67B of the Act preventing Denisse bringing a personal grievance in respect of her dismissal. I have found Maunga failed to produce the time and wage record when requested which prejudiced Denisse's ability to bring an accurate claim, warranting a penalty. I have found Maunga failed to pay Denisse her wages and holiday in full due to a dispute and awarded amounts accordingly.

[49] In summary I order Maunga to pay Denisse within 28 days of the date of this determination:

- (a) Wage arrears of \$911.60.
- (b) Notice of \$1,661.13.
- (c) Public holiday pay of \$168.10.
- (d) Annual holiday pay of \$482.58.
- (e) Interest on (a) to (d) calculated using the online justice calculator from the date the amounts were due (being 9 December 2021) to the date of the issue of this determination which I calculate to be \$136.83²²
- (f) Penalty of \$3,000 to be paid in full to Denisse.

[50] Denisse has sought costs. I award the equivalent tariff rate of a half day cost contribution amounting to \$2,250 plus the filing fee of \$71.56.

Lucia Vincent
Member of the Employment Relations Authority

²² <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/> based on a total sum owing of \$3,223.41

