

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 427
3194799

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| BETWEEN | TYLER BRANFORD Applicant |
| AND | THE PHO HOUSE LIMITED T/A ZEKE Respondent |

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| Member of Authority: | Nicola Craig |
| Representatives: | Mike Harrison, advocate for the applicant Noel King, counsel for the respondent |
| Investigation Meeting: | 2 May 2023 at Auckland |
| Submissions [and further Information] Received: | At the investigation meeting and 8 May 2023 from the applicant At the investigation meeting from the respondent |
| Date of Determination: | 9 August 2023 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A university student, Tyler Branford, obtained part time front of house work with The Pho House Limited (TPL or the company). In 2022 TPL started trading as the Zeke Café in East Tamaki, Auckland.

[2] Ms Branford was notified of her dismissal by an email from “Zeke Management” in reliance on a trial period in her employment agreement.

[3] Ms Bradford claims that her trial period was invalid and her dismissal unjustified. TPL relies on its trial period and also says that it was not happy with Ms Bradford’s work.

The Authority's investigation

[4] An investigation meeting was held on 2 May 2023 and evidence heard under oath or affirmation from Ms Branford, two front of house co-workers, TPL's overall manager Bill Nguyen, his sister and manager Kylie Nguyen and manager Long Tran. Written statements were also received from the witnesses.

[5] Without notice, Mr Tran and the co-worker whose evidence TPL sought to provide were not present at the investigation meeting but were available by phone or video call. For Ms Branford, there was objection to witness statements only just being available and the two not being available in person. However, Ms Branford wished for the investigation meeting to proceed. I decided to go ahead rather than adjourn the meeting until all witnesses were available in person.

[6] All material from the parties was fully considered. However, as permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[7] The issues to be investigated are:

- (a) Can TPL rely on a valid trial period to prevent Ms Branford pursuing a dismissal grievance?
- (b) If not, was Ms Branford unjustifiably dismissed?
- (c) If a grievance is established, what remedies (if any) should Ms Branford receive?
- (d) Alternatively, is Ms Branford owed two weeks' wages as notice of dismissal?

Ms Branford's start with TPL

[8] Zeke was a new restaurant. The director Mr Nguyen and his sister had worked in hospitality but not had prior experience in managing a restaurant business. Ms Branford did not have any restaurant experience before starting with TPL. She needed work to cover her expenses while studying.

[9] There was no mention of a trial period during Ms Branford's interview.

[10] TPL sent Ms Branford a first employment agreement by email around 2 May 2022. The agreement was not signed by the employer at that point. It was an individual employment agreement which made reference in its body to a 90 Day Trial Period.

[11] It started when she commenced work and permitted TPL to dismiss Ms Branford by giving the period of notice detailed in Schedule 1. However, seemingly accidentally, there was no Schedule 1. There had been no discussion between the parties about when the trial period would finish or how long the notice period was for, in the trial period situation.

[12] On 17 May 2022 Ms Branford attended what she describes as a training shift for an hour or two. This was before the restaurant had opened to the public. All new staff were encouraged by TPL to attend at one of the slots. The aim was that they got to know each other and the managers went over what was expected.

[13] After the training shift Ms Branford returned the signed contract on her first day of work being 1 June 2022. She emailed back the agreement a few hours before her first shift at the open restaurant.

[14] After a period Ms Branford was not paid while her co-workers had been. She enquired about his and was informed that the contract had missing information and she needed to sign an additional section to the contract.

[15] On around 7 or 8 June 2022 TPL provided another version of the employment agreement. This second agreement was signed on 9 June 2022 by both parties. It included a Schedule 1 which contained the following trial period entry:

Last day of 90 Day Trial Period _____

Notice period for termination during the 90 Day Trial Period _____

No valid trial period

[16] Given that trial periods restrict what would otherwise be the right of the employee to challenge their dismissal as unjustifiable, the requirements must be strictly met.¹

[17] TPL argued that even though there were difficulties with the documentation, Ms Branford knew from early on she would be on a trial period and that should be enough.

[18] TPL's training day was two weeks after Ms Branford received the first employment agreement. The company argues there was time to seek advice but there was no evidence of notification, other than a reference in the body of the document, of her right to seek that advice. The acknowledgement before the signature provision included recognition that Ms Branford had had adequate opportunity to take independent advice before agreeing. There is authority that a declaration at the end of an employment agreement, with no accompanying advice beforehand, does not meet the requirement of s 63A(2)(b) of the Act – specific advice is required.²

[19] The first agreement referred to Schedule 1 as containing the notice period but there was no Schedule 1. TPL recognised this inadequacy by requiring signature of the second agreement.

[20] The provision in the second agreement was still not adequate as it does not specify when the trial period ends or what the notice period for a termination during the trial period is. Under s 67B(1) of the Act trial periods may be used in small-to-medium-sized businesses by giving the employee notice of the termination. In this agreement there was an indication that a notice period covering this situation was to be described in the Schedule but the underscored space was left vacant.

[21] In addition Ms Branford was already an employee at the time she signed the second agreement. This prevents the trial period from being effective.³

[22] There were inadequacies with both the first and second employment agreements. I am not satisfied that Ms Branford was covered by a valid trial period in her employment

¹ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

² *Senate Investment Trust Through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45 at [37].

³ *Smith v Stokes Valley Pharmacy (2009) Limited*, at n 1.

with TPL. Having concluded that she was not employed under a valid trial period, TPL must justify its dismissal of her in the usual way.

The restaurant in operation

[23] This was a new business. There were some quiet times with no customers. Ms Branford offered to finish early sometimes if there was little business.

[24] At different times, Mr Nguyen, Ms Nguyen and Mr Long acted as shift manager. Ms Branford felt she was getting mixed messages. There was a question about whether she should have been undertaking other tasks, such as cleaning bathrooms, during these quiet periods or whether she had to remain immediately available in case a customer entered.

[25] TPL regarded Ms Branford as staying away from the main on floor area, remaining behind the bar or out the back. She saw herself as finding jobs to do when there was no other work. She sometimes got specific instructions to do other tasks, other times she got told to use her initiative.

[26] On about five occasions Ms Branford was late for work. She messaged whoever was the manager that day if she had their number. Otherwise she explained when she arrived. Ms Nguyen did not want to make Ms Branford feel bad or stress her out so her replies to the messages about lateness were aimed at making Ms Branford feel more relaxed.

[27] TPL was also critical of Ms Branford's cellphone usage at work although I accept her explanation that she was not advised of any phone usage rules, saw others using their phones in quiet periods and she did not do it when there were customers around. As a new and relatively small business TPL did not have written policies. At times managers needed to use their phone to deal with work related messages.

[28] Ms Branford's first agreement specified contained no identified hours as the Schedule where the hours would have been detailed was not attached to the agreement. The second agreement specified in Schedule 1 that Ms Branford's hours were 15 to 25, which I consider refer to the total weekly hours. Ms Branford knew employment

agreements were required to specify a minimum number of work hours and she took this to be 25 hours as that was what she was initially working.

[29] In later weeks Ms Branford was rostered for 15 hours a week. Given that the agreement specifies a range of hours, I consider that the bottom end of the range should be the minimum number of hours she was entitled to.

Hours of work questioned

[30] The hours which TPL offered were higher to start with but dwindled over time. From the evidence at the Authority's meeting, this was largely because of concerns about Ms Branford's work. Ms Nguyen felt awkward about discussing Ms Branford's performance with her, instead reducing her work hours.

[31] After receiving another roster, on 9 July 2022 Ms Branford enquired about her hours with the management team. She explained that she was living with her grandmother and was the only one in the household who was working, as well as studying full time. She expressed that she needed the hours but felt like she was brushed off. As became apparent during the Authority's investigation meeting TPL had already decided by this time to terminate Ms Branford's employment.

[32] Ms Branford had started looking for other work, she says this was to a second job to back up the TPL work. She did not intend to leave TPL.

Decision on continued employment

[33] Ms Branford felt she had not got the training behind the bar as had been offered. TPL thought she and others spent time behind the bar when they should have been out assisting customers. Mr Nguyen recalled giving verbal warnings about this but accepted his statements were about these actions causing problems with other staff and himself rather than suggesting Ms Branford's employment could be at risk. A decision was made that Ms Branford did not deserve the bar training but that was never conveyed to her. Mr Nguyen regarded himself as a non-confrontational person.

[34] TPL saw other staff as stronger performers than Ms Branford. This included some who also had no previous hospitality experience. She started to notice that other staff were progressing quicker than her but had not received any indication that her job was at risk.

Ms Nguyen acknowledged that she had not raised concerns with Ms Branford about her not working hard enough. Ms Nguyen told the Authority that she was non-confrontational and wanted to create a safe environment where staff felt happy and at ease. I accept this was genuinely felt but it created a situation where the final outcome for Ms Branford came as a shock.

Ms Branford's dismissal not justified

[35] Ms Branford was rostered to work on the morning of 11 July 2022. Out of the blue at 11.55pm on the night of 10 July she received an email telling her that Zeke had made a decision to terminate her employment effective from 11 July 2022. The reason given was that her performance was not satisfactory.

[36] Several days before, the managers had discussed on 6 July that Ms Branford was to be let go. But Ms Nguyen put her name on the roster which came out later that day as Ms Nguyen felt that was less awkward (to wait for the termination email) than discuss with Ms Branford (TPL's performance concerns).

[37] No notice was given on their accountant's advice. This appeared to relate to there being no notice period specified in the blank underscored section of Schedule 1 about trial period notice.

[38] At 12.17am Ms Branford responded "No worries at all. I will bring my uniform in tomorrow morning". She also asked for confirmation that her breaks had not been deducted from her pays and queried in what way her performance was not seen as satisfactory.

[39] This relatively accepting response was explained by Ms Branford as a result of her panic and not knowing what to do. She described herself as a very non-confrontational person who wanted to keep things civil.

[40] The next day Ms Branford returned the uniform and received her accrued holiday pay out. She did not receive any pay in lieu notice.

[41] Under s 103A of the Act the test is whether objectively TPL had done what a fair and reasonable employer could have done when dismissing Ms Branford. I must consider whether the steps in s 103A(3) have been undertaken:

- (a) Having regard to the employer's resources, the employer sufficiently investigated the allegations;
- (b) Raised its concerns with the employee before dismissing;
- (c) Gave the employee a reasonable opportunity to respond; and
- (d) Genuinely considered any explanation before dismissing.

[42] In addition the requirement on the employer under s 4 of the Act to act in good faith should be considered. This includes being active and communicative in maintaining a productive employment relationship by being responsive and communicative.⁴

[43] It is unfortunate that there was a reluctance on both sides to talk to the other about what their concerns were. In addition to the points above about the Nguyens feeling non-confrontational, Ms Branford herself did not attempt to explore the differing instructions from TPL managers as that would have made her too anxious.

[44] Neither version of the employment agreement specified the notice period when the trial period is relied upon. The second agreement has several notice periods specified but the only one which appears relevant to this situation is a "Termination notice" of two weeks. That was not provided as the dismissal was summary.

[45] This dismissal was not the action a fair and reasonable employer could have taken and did not meet good faith obligations, particularly:

- it was for performance but without any prior warnings or even proper discussion about Ms Branford's performance
- managers had little understanding of the requirements for performance management and a reluctance to raise issues, meaning there was little chance for improvement
- before making the decision to dismiss there was no raising of TPL's concerns or giving Ms Branford a chance to respond

⁴ The Act, s 4(1A)(b).

- rostering Ms Branford on further shifts in order to try to soften the decision already made to dismiss.
- emailing about the dismissal very late at night shortly before Ms Branford was due to work
- the dismissal was summary with no notice period provided.

[46] TPL unjustifiably dismissed Ms Branford.

Remedies awarded

[47] For Ms Branford, 13 weeks of lost wages were sought. However, it became apparent at the investigation meeting that she had been able to obtain other work relatively promptly. I understand the claim to include elements of a period when Ms Branford had no work, then for a period when she earned less than she would have earned had she remained with TPL.

[48] Ms Branford describes herself applying for every advertisement she saw. She tried to find other work by submitting her CV or applying for other jobs, at hospitality and retail establishments. She started work on 23 July 2022.

[49] The claim is based on Ms Branford receiving the top end of the 15 to 25 hour range, namely 25 hours a week.

[50] I cannot see a basis to require payment at the top of the range. Rather lost wages should be calculated on the average hours. I have worked out that Ms Branford worked for five and a half weeks, which gives a weekly average of 18.72 hours. At those average hours, her earnings would have been \$396.86 gross a week – 18.72 hours x \$21.20.

[51] I proceed with reimbursement under s 128 of the Act. Before consideration of contribution Ms Branford would be entitled to two weeks of wages before she got other work – totalling \$793.72. She would also receive 11 weeks' worth of \$141,06, being the difference between the average TPL rate \$396.86 and the average rate in her new job of \$255.80 a week, totalling \$1,551.66. Together these lost wages sums amount to \$2,345.38.

[52] Ms Branford seeks \$12,000 compensation under s 123(1)(c)(i) of the Act. She felt embarrassed and inadequate about being dismissed and lacked confidence in her ability to perform a job effectively.

[53] There was financial pressure on Ms Branford and her family, with her being the only earner. She felt financially unable to attend some events and reluctant to go out. People would ask her about her work and she was embarrassed to tell them that she had been fired. Ms Branford's confidence and mood were affected. She felt anxious later when dealing with work supervisors and doubted her own ability.

[54] Unfortunately Ms Branford's last months with her late grandmother were spent dealing with and worrying about her situation with TPL.

[55] I consider \$12,000 a fair amount of compensation, before considering contribution.

[56] TPL is critical of Ms Branford's performance and seeks a deduction for her contribution to the situation giving rise to her dismissal.

[57] Ms Branford acknowledged that her five episodes of lateness over a three or four week period was quite a lot. I accept she was never warned that her lateness was problematic but that quantity over a short period of time can be regarded as reproachable. In terms of other elements TPL were displeased about, it appears Ms Branford was receiving different messages about work tasks, priorities and phone use and I cannot conclude that she was blameworthy regarding those aspects of her work. I have taken into account Ms Branford's lack of hospitality experience, the part time nature of the work and a relatively short period of employment.

[58] A deduction of 10% of remedies is made for contribution regarding the lateness.

Notice

[59] As the notice period payment is sought in the alternative to Ms Branford succeeding in her unjustified dismissal claim, it does not now need to be considered.

Orders

[60] After making the deduction for contribution, TPL is ordered to pay Ms Branford within 28 days of the date of this determination:

- (a) \$2,110.84 gross as lost wages; and
- (b) \$10,800 without deduction as compensation under s 103(1)(c)(i) of the Act.

Costs

[61] Costs are reserved.

[62] The parties are encouraged to resolve any issue of costs between themselves.

[63] If Ms Branford seeks costs she should lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum TPL 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.

[64] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would also be considered.⁵

Nicola Craig
Member of the Employment Relations Authority

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.