

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 656
3189799

BETWEEN

BOMI KIM
Applicant

BRAK BURNS LIMITED (IN
LIQUIDATION)
First Respondent

DELTA PRIVATE EQUITY
LIMITED
Second Respondent

Member of Authority: Marija Urlich

Representatives: Simon Greening and Erin Drew, counsel for the
Applicant
No appearance for the Respondents

Investigation Meeting: 10 October 2023 in Auckland

Determination: 6 November 2023

DETERMINATION OF THE AUTHORITY

[1] Ms Kim was employed by Brak Burns Limited (BBL), formerly known as Burgered Restaurants Auckland Limited, as a sous chef from 21 July 2021 until her dismissal on 11 April 2022 by way of redundancy. By letter dated 5 July 2022 she raised personal grievances with BBL for unjustifiable disadvantage in her employment consequent to failure to pay wages when due and owing and unjustifiable dismissal. Ms Kim seeks remedies of compensatory damages and reimbursement of lost wages with holiday pay calculation. Ms Kim also seeks arrears of unpaid wages and annual leave and public holiday pay. Penalties are sought for breaches of the requirement to provide wage, time and holiday and leave records on request, the employment agreement, good faith obligations and unlawful deductions. An award of costs is also sought.

[2] BBL did not file a statement in reply or otherwise engage with the Authority. On 5 September 2023 BBL was placed in liquidation. By correspondence dated 19 October 2023 the liquidator consented to the proceedings continuing and advised it would not enter an appearance on behalf of BBL (in liq).

[3] Delta Private Equity Limited (DPEL) has not filed a statement in reply.

The Authority's investigation

[4] Ms Kim's statement of problem was served by courier on BBL and Murray Osmond, its sole director at 12.23pm, 23 January 2023 and on DPEL and Zachary Star, its sole director, at 5.25pm, 20 January 2023. The addresses for service are those recorded on the companies office registry.

[5] BBL and DPEL did not file statements in reply within the 14-day statutory period from date of service of the statement of problem. They have not otherwise engaged with the Authority. The Authority is satisfied service has been effected.

[6] The notice of investigation meeting scheduled for 10 October 2023 was couriered to the respondent companies and their directors at the addresses for service provided on the companies register. The investigation meeting commenced shortly after the scheduled start time to accommodate lateness and continued in respect of DPEL with Ms Kim giving evidence under affirmation. The Authority was assisted by a translator of the Korean language. It was unnecessary to reconvene the investigation meeting following the liquidator's consent to the proceedings continuing against BBL (in liq).

[7] BBL and DPEL had a fair opportunity to participate in the Authority process and reasonable steps were taken to make them aware of the investigation meeting. BBL's liquidator has consented to the proceedings continuing. It is appropriate to move to determine this matter based on the information before the Authority. As permitted by s 174E of the Employment Relations Act 2000 (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.

Issues

- [8] The issues identified for investigation and determination are:
- a) Was Ms Kim unjustifiably disadvantaged or unjustifiably dismissed?
 - b) If so, is she entitled to a consideration of remedies including:
 - i. Lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act) and calculation of holiday pay on any award of such;
 - ii. Compensation under s 123(1)(c)(i) of the Act;
 - c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Kim which contributed to the circumstances which gave rise to his grievance?
 - d) Are arrears of wages due and owing?
 - e) Are arrears of holiday pay due and owing?
 - f) Is an award of penalties warranted for any established breach by:
 - a. failing to provide wage, time and holiday pay records on request under s 130(2) of the Act and s 75 Holidays Act 2003 respectively?
 - b. breaching terms of the employment agreement under s 134(1) of the Act?
 - c. breaching good faith obligations under s 4A of the Act? and
 - d. breaching Minimum Wage Act 1983 under s 10?
 - g) If a portion of any penalty awarded be paid to Ms Kim?
 - h) Should either party contribute to the costs of representation of the other party?

The parties' employment agreement

[9] On 21 June 2021 BBL offered Ms Kim employment. The letter of offer was signed by Matt Young, Guru-People. Attached to the offer was an individual

employment agreement signed by a representative of BBL and dated that day. Ms Kim countersigned the job offer and employment agreement on 30 June. Clause 7 of the employment agreement is titled 'Remuneration Details' and includes Ms Kim was to be paid fortnightly into her nominated bank account.²

Relevant law

The test for justification

[10] When the Authority considers justification for the actions of BBL (in liq) including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of BBL (in liq) and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[11] BBL (in liq) could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[12] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.¹

[13] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal placed emphasis on the Act's legislative context. In particular, the Court referred to the strengthening in 2004 of the provisions relating to the duty of good faith and to the requirement in the Act's objects of "acknowledging and addressing the inherent inequality of power in employment relationships". The provisions specified included s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [85].

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;...

[14] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law.”²

Discussion

Was Ms Kim unjustifiably disadvantaged in her employment?

[15] Ms Kim’s evidence was she was not paid full wages owed to her on pay periods commencing 5 December 2021, 27 February, 13 March and 27 March 2022. She says she raised the non-payment of wages with BBL on multiple occasions and was told the wages were delayed. However, BBL did not pay the arrears or engage with her about how the arrears might be paid. Ms Kim’s evidence is accepted.

[16] Failure to pay wages in full when due and owing is a serious breach of the duty owed to Ms Kim as an employee.³ BBL breached this duty because it did not pay Ms Kim when it agreed it would under the terms of the parties’ employment agreement, continued not to pay her what she was owed and failed to engage constructively with her regarding its failure of duty. This failure has caused Ms Kim to suffer a disadvantage in her employment. She has established a personal grievance for unjustifiable disadvantage in respect her employer’s, failure to pay her wages when due and owing.

Was Ms Kim unjustifiably dismissed by way of redundancy?

[17] The next part of Ms Kim’s employment relationship problem concerns her personal grievance for unjustified dismissal.

[18] On 1 April 2022 BBL managers came to Ms Kim’s workplace and told her BBL could no longer pay her and she could leave work then or finish her shift. She left work then. On 6 April she emailed one of the managers, Gareth Needham asking for a letter

² *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

³ *Wages Protection Act 1983, s 4.*

confirming the advice she had received on 1 April. On 7 April she received an unsigned letter under Mr Needham's name, recording his role as Guru-People and Acting General Manager-Operations, advising her the business in which she was employed was closing, outlining the reasons why and asking her to attend a meeting on 11 April to discuss her role being made redundant. The letter did not advise her she could bring a support person or representative to the meeting;

[19] Ms Kim attended the meeting on 13 April. BBL was represented by Mr Young, Mr Needham and two head chefs. They told Ms Kim her role was redundant because BBL was closing down and she could accept a new role with Burgered Restaurant New Zealand Limited or be made redundant. Ms Kim elected the redundancy option because she felt she had no other choice. She said she did not accept the offer of employment because she could not trust the business after all the issues with her pay. At the meeting it was agreed her last day would be Monday 11 April and she would be paid one month's usual wages in lieu of notice. Ms Kim asked the BBL representatives for a signed copy of the 7 April letter, a written reference and a calculation of her final pay including outstanding wage arrears.

[20] On 13 April Mr Young emailed Ms Kim a reference letter. The other requested documents were not provided. On 26 April Mr Needham sent her a signed copy of the 7 April letter. The final pay and arrears calculation remains outstanding. Ms Kim followed up this request with Mr Young on 29 June and 3 July. She did not receive a response.

(i) *Was Ms Kim's redundancy genuine?*

[21] The 7 April letter states the business was closing because the government COVID-19 pandemic support for businesses had ended, the business had not recovered from the pandemic lockdowns and the ongoing impact of COVID-19 and the then director had taken ill suddenly and been replaced by Ms Osmond who had decided the business needed to close with immediate effect. No supporting information was provided though it is accepted the business would have been negatively impacted by the events as outlined to Ms Kim.

[22] While it is accepted Ms Kim's dismissal occurred in this context, the circumstances of her dismissal were so swift and the process so deficient as to render BBL vulnerable to questions as to the genuineness of her dismissal. For example, Ms

Kim was not provided with information about how other staff might be impacted or why a seemingly related business was in a position to offer her employment. She was given no information about how her arrears claim would be met if she accepted the new employment. This is information Ms Kim could reasonably be expected to receive in a fair redundancy process. For this reason, there is insufficient evidence to satisfy the Authority Ms Kim's redundancy was genuine.

(i) *Has BBL complied with the notice and consultation requirements of s 4 of the Act?*

[23] BBL did not meet the notice and consultation obligations owed to Ms Kim. Ms Kim went into the meeting unprepared and without any reasonable opportunity to bring a support person or representative. BBL is unable to establish it has fairly considered any issue raised by Ms Kim because it cannot establish it fairly put any such issue to her for comment. It has failed in the consultation obligations owed to Ms Kim.

[24] BBL was responsible for and wholly in control of the process which has resulted in Ms Kim's dismissal. The deficiencies outlined above are not minor or technical and mean BBL cannot demonstrate it acted fairly and reasonably in dismissing Ms Kim. Ms Kim's dismissal for redundancy was unjustified.

Remedies in relation the personal grievance

[25] Ms Kim has established personal grievances for unjustified disadvantage and unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement

[26] Ms Kim seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. She said she started looking for another job immediately and found new employment on 19 April but could not commence her new employment until her work visa was transferred from BBL. The consequence of this is she was out of work for 12 weeks.

[27] After reviewing the evidence of loss and Ms Kim's attempts to secure employment, the Authority is satisfied she is entitled to an award of \$12,375 (gross)

being 12 weeks' pay calculated at the agreed rate of pay and hours of work.⁴ Holiday pay of \$990 is ordered to be paid on this sum.

Compensation for humiliation, loss of dignity and injury to feelings

[28] It is appropriate to globalise the award under this heading because the consequences of the unjustifiable action Ms Kim suffered in her employed have dovetailed into those she experienced from her unjustified dismissal.

[29] Ms Kim said this was a very stressful time for her, she felt miserable and the ongoing wage arrears caused her financial hardship. She said the work visa she held with BBL was the basis for her residence application which was delayed with the change to her work visa. She said she could not do anything except wait and that she cried every day thinking what she might have done wrong.

[30] The Authority is satisfied Ms Kim has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$18,000 under section 123(1)(c)(i) is appropriate.

Contribution

[31] 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.

[32] Ms Kim did not contribute in a blameworthy way to the circumstances which led to her being disadvantaged in her workplace or her employment ending. It is not unreasonable for an employee to request payment for wages due and owing and as a redundancy Ms Kim's was a no-fault dismissal.

⁴ Ms Kim's employment agreement provided she would work at least 37.5 hours per week worked at an hourly rate of \$27.50, 12 weeks lost wages = \$12,375.

[33] There are no deductions from the monetary remedies for reasons of contribution.

Are arrears of wages due and owing?

[34] Ms Kim is entitled to be paid by BBL for hours worked at the agreed rate of pay, which was \$27.50 per hour.⁵

[35] Brak Burns Limited (in liquidation) is ordered to pay Ms Kim wage arrears totalling \$11,765.75 (gross) because the evidence establishes between 5 December 2021 and 2 April 2022, she worked 218.53 hours for BBL for which she should have been paid at the rate of \$27.50 per hour and these arrears remain unpaid. The payment is to be made within 21 days of the date of this determination.

[36] In addition, Brak Burns Limited (in liquidation) is ordered to pay Ms Kim 1 months' pay in lieu of notice as agreed at the 13 April meeting being \$4,125 (gross).

Are holiday pay arrears due and owing?

[37] As an employee Ms Kim was entitled to holiday pay upon the termination of her employment.⁶ Ms Kim is also entitled to be paid holiday pay on the wage arrears calculated at eight per cent of total gross earnings and payment for alternative holiday pay for any public holiday worked.

[38] Brak Burns Limited (in liquidation) is ordered to pay Ms Kim \$2,303 in holiday pay entitlements and \$220 (gross) in alternative leave entitlement within 21 days of the date of this determination. These sums are from Ms Kim's calculations of the annual leave balance and alternative leave due when her employment ended. Her calculations are accepted. BBL did not provide holiday and leave records on request.⁷

Should interest be ordered on the arrears?

[39] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

⁵ Refer letter of offer and written individual employment agreement 21 June 2021.

⁶ Holidays Act 2003, s 27.

⁷ Employment Relations Act 2000, s 132.

[40] It is appropriate where a person has been deprived of the use of money to make an award for interest. Ms Kim is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[41] Brak Burns Limited is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:⁸

- (i) Interest on the sum of \$18,413.75 calculated from 11 April 2022 until the date payment is made in full.⁹

[42] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Is Brak Burns Limited (in liquidation) liable for a penalty?

[43] As found above BBL's failure to pay wages when due is a breach of the parties' employment agreement. It is also a breach of the Minimum Wage Act 1983. Ms Kim seeks penalties for these breaches. She also seeks a penalty for failure to provide a wage, time and holiday and leave record on request.¹⁰ The request was made in writing by her representative by email dated 5 July 2022. A penalty is also sought for breaches of good faith under s 4A of the Employment Relations Act 2000.

[44] The maximum penalty against a company is \$20,000.¹¹ There are four statutory breaches and a breach of the employment agreement. The breaches are sufficiently interrelated to warrant globalisation. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹²

[45] BBL's actions must be seen as intentional and its culpability high. As the employer it was responsible for payments of wages and holiday pay, to maintain those

⁸ www.justice.govt.nz/fines/civil-debt-interest-calculator.

⁹ Total wage arrears of \$15,890.75 plus total holiday pay arrears of \$2,523 = \$18,413.75.

¹⁰ Employment Relations Act 2000, s130(1)(4).

¹¹ Employment Relations Act 2000, s 135.

¹² *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

records and provide them immediately on request. The failure to do so is a serious breach and the failure of BBL to provide the records on request has hindered Ms Kim's ability to bring her claim – she has not had the benefit of those records to calculate her arrears claims and has had to use her own resources to do so which will likely have caused delay. BBL was also responsible for the redundancy process which has breached the statutory good faith duty owed to Ms Kim.

[46] At all relevant times, as demonstrated by Mr Young and Mr Needham's position titles BBL had access to professional support and advice. On the information before the Authority the subject failures were intentional actions in breach of obligations owed by BBL to Ms Kim to pay wage arrears and holiday pay when due and owing.

[47] There is compelling evidence of direct loss suffered by Ms Kim as a result of BBL's breach and she has spent time and resources seeking to enforce statutory obligations. As a worker dependant on a visa which restricted her ability to work to BBL she was particularly vulnerable.

[48] BBL (in liq) is no longer trading and the liquidator has indicated there is unlikely to be any funds to distribute to creditors. That is a relevant factor to weigh in a penalty setting.

[49] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$6,000. Brak Burns Limited (in liquidation) is ordered to pay half the penalty to Ms Kim to compensate her for the inconvenience and resources expended in pursuing the payment of a statutory entitlement. The penalty is to be paid within 21 days of the date of this determination.

The claim against Delta Private Equity Limited

[50] DPEL is recorded in the companies register as the ultimate holding company of BBL. DPEL did not employ Ms Kim. At this stage there is no actionable claim against DPEL.

Costs and reimbursement of filing fee

[51] Ms Kim is entitled to a contribution to the costs of representation incurred in bringing her personal grievances to the Authority for determination and seeking to recover arrears from BBL (in liq). She seeks a contribution to costs of \$3,250.00 incurred. An uplift for a without prejudice save as to costs offer is not allowed because it was made prior to these proceedings being commenced.

[52] Applying the Authority's usual notional daily rate Brak Burns Limited (in liquidation) is ordered to pay Ms Kim \$2,000.00 as a contribution towards those costs and the filing fee of \$71.56. In making this award account the Authority's usual daily tariff for costs has been taken into account and that the investigation meeting ran for half of the time usually allocated for one day.¹³

Summary of orders

[53] The Authority orders as follows:

Within 21 days of the date of determination Brak Burns Limited (in liquidation) is ordered to pay Bomi Kim the following sums:

- (i) \$18,000 under s 123(1)(c)(i);
- (ii) \$11,765.75 (gross) under s 123(1)(b);
- (iii) \$18,413.75 (gross) in wage and holiday pay arrears;
- (iv) \$6,000 penalty half of which is to be paid to Bomi Kim and half to the Crown;
- (v) \$2,000 in costs and the filing fee of \$71.56; and
- (vi) is to calculate and pay interest on total arrears.

Marija Urlich
Member of the Employment Relations Authority

¹³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmp 135.