

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 6  
3210879

BETWEEN UELE HOEFT LINO  
Applicant

AND RESTAURANT BRANDS  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Kalesita Lino, representing the Applicant  
Laura Briffett, counsel for the Respondent

Investigation Meeting: 12 and 13 December 2023 in Auckland

Submissions and/or further evidence: 13 December 2023 from the Applicant and  
from the Respondent

Determination: 10 January 2024

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The Applicant, Mr Uele Lino, claims that he was unjustifiably disadvantaged or unlawfully discriminated against by the Respondent, Restaurant Brands Limited (RBL) not allowing him to work all Saturday shifts as a Shift Supervisor on a permanent basis.

[2] Mr Lino also claims that he was unjustifiably disadvantaged in his employment by RBL not paying him the correct amounts due to him.

[3] RBL denies that it unjustifiably disadvantaged or discriminated against Mr Lino. RBL accepts that Mr Lino was owed 40 hours back pay. This was paid on 6 December 2022. RBL has not received any communication from Mr Uele in regard to any further payments due to him.

**The Authority's investigation**

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Uele Lino and Mr Famaile Lino, his father.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Mr Tauseef Ali, Restaurant Manager at KFC Greenlane, Mr Ravi Sharma, Auckland KFC Area Manager, and Mr Martin Hill, RBL Human Resources

[6] Oral and written submissions were received from Ms Lino for the Applicant and Ms Briffett for the Respondent. In particular, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[7] 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 requiring investigation are whether or not Mr Lino was:

- unjustifiably disadvantaged in his employment by RBL:
  - not allowing him to work all Saturday shifts as a Shift Supervisor on a permanent basis;
  - not paying him the correct amounts due to him.
- discriminated against in his employment by RBL

### **Background**

[9] RBL operates the New Zealand outlets of KFC, Pizza Hut and Carl's Jnr. Mr Lino was employed at the KFC restaurant in Greenlane, Auckland.

[10] KFC restaurants employees are either a Restaurant Manager (RM), an Assistant Manager (Assistant RM) or a Team Member. Each shift must have a Manager on Duty (MOD) who is the RM or an Assistant RM. If there is neither an RM or an Assistant RM working, a Team Member who has completed a Leading A Shift (LAS) qualification, will be appointed as Shift Supervisor for that shift or part of a shift.

[11] It is mandatory that each restaurant must have a Team Member qualified as a Cook available on each shift to correctly cook the product.

[12] Mr Lino commenced employment as a Team Member on 11 March 2022. He was a student who worked two fixed shifts each week, from 5.30 p.m. to 12.30 a.m. on Friday and from 4.30 p.m. to 12.30 a.m. on Saturday each week. These hours were guaranteed.

[13] Mr Uele also worked 'cover' shifts outside of the fixed shifts from time to time. These were worked on an 'as and when required' basis when other employees were absent or shifts were vacant.

[14] The employment agreement provided to Mr Lino (the Employment Agreement) covered the shift structure in the following clauses:

#### **4. HOURS OF WORK & ROSTER**

##### **4.1 Hours of Work**

The Employee's ordinary days and hours of work, shall be in accordance with this clause, and shall only be changed thereafter by mutual agreement. The Employer shall advise the Employee of the process to be used to facilitate such a change. Ordinary hours shall not exceed 8 hours in any one day or 40 hours in any week.

The Employee's agreed days and hours of work (including unpaid meal breaks) will be:

Thursday: 4:00 PM - 10:00 PM

Saturday: 4:00 PM - 8:00 PM

##### **4.5 Cover Shifts**

Where an existing Employee is unable to work their contractual shifts due to leave/absence or there is a current open shift vacancy, a 'cover shift' requirement may be created. Such cover shifts shall be offered to existing Employees, either fixed hours of work Employees or Casual Employees, at the Employer's discretion. The Employee leading the relevant shift shall contact Employees with the appropriate qualification to identify willingness to work. The Employee is under no obligation to pick up, or work, any such cover shifts.

##### **4.8 Shift Supervisor in Charge Shifts**

An Employee, where qualified, may be requested by the Employer to temporarily become the Shift Supervisor/Leader for a particular shift/s even when this is not included in the roster. Where this request has been made by the Employer and accepted by the Employee, the Employee will be paid the Sole Charge allowance, as set out in Schedule B, only for that particular shift/s or hours worked

[15] The KFC Greenlane operated on the basis of a Restaurant Manager (RM), two Assistant Restaurant Managers (Assistant RMs), and approximately 88 employees over a number of shifts. The RM Mr Tauseef Ali reported to Mr Ravi Sharma the Area Manager for the KFC Greenlane restaurant.

[16] Mr Sharma explained that depending on the employee's qualifications, experience and the needs of the business, Team Members might be assigned to different roles at each shift: Cook, Front of House, Drive thru, Burger Station, or Shift Supervisor.

#### *Cook and Shift Supervisor roles*

[17] Specific training courses must be completed for a Team Member to qualify as a Cook or a Shift Supervisor. Team Members who are qualified to do so can be asked to operate a

shift as a Cook or Shift Supervisory on an 'as and when required' basis. If the offer of the shift is accepted, the Team Member is paid an allowance for the hours worked as a Cook or Shift Supervisor.

[18] The training to qualify to run a shift as a Shift Supervisor is called Leading a Shift Training (LAS) and consists of modules which can be completed online, and practical training. A Team Member who is accepted on to LAS training is required to sign a Memorandum of Understanding which includes the following clauses:

2. On completion of the shift supervisor/leader training, the Employee commits and agrees to being available to undertake and run shifts in a sole charge capacity. The Employee's commitment relates to any shifts the employee has agreed to work as permanent fixed shifts and any additional shifts that the Employee may agree to work.  
...
4. Should the Employee subsequently decline to run shifts, the Employee's training status and ordinary hourly rate of pay shall revert to the level below the shift supervisor/leader ordinary hourly rate of pay as specified in the Collective/Individual Employment Agreement (i.e. second tier rate).

[19] Once LAS qualified the Team Member receives an additional LAS allowance irrespective of whether they are working a shift as a Shift Supervisor. When they are requested to work a shift as Shift Supervisor, he or she will receive in addition a Shift Supervisor allowance for that shift.

[20] This differs from the Cook allowance which applies to a shift worked by a Team Member as a Cook. On other shifts the Team Member receives only the Team Member rate of pay.

[21] A Shift Supervisor operates as the MOD for the shift he or she is supervising. A Team Member who is requested to work a shift as Shift Supervisor is undertaking a temporary assignment, however an Assistant RM performs permanent supervisory duties on a salaried, full-time (40 hours per week) basis.

[22] In normal circumstances Mr Ali said most shifts are managed either by the RM or an Assistant RM where one is available.

[23] There was also a provision in the Employment Agreement for a variation to the terms and conditions of it to be made at clause 22 which stated: "Any variation to this agreement must be mutually agreed to by both parties and recorded in writing".

*Mr Lino's training*

[24] At the time Mr Lino commenced employment in March 2022, KFC Greenlane had no RM and Mr Sharma said he assisted by managing the restaurant on occasion. During this time he said Mr Lino told him he wanted to become trained as a Cook. Mr Sharma said he accordingly liaised with the RBL Learning and Development Team, and Mr Lino was accepted for training and qualified as a Cook within a month.

[25] Mr Ali was subsequently appointed as the restaurant RM and said he was so impressed by Mr Lino's performance that he put him forward for a nomination in September 2022 for a 'Make the Colonel Proud' award" (an employee recognition award).

[26] Mr Sharma who coordinated the nominations from all the restaurants in his area, said he fully supported Mr Lino's nomination, and he chose Mr Lino for the nomination in preference to the approximately 300 employees in his area.

[27] Mr Sharma said he had discussed Mr Lino completing the LAS course on a restaurant visit. Mr Ali said he regarded Mr Lino as a good Team Member with leadership skills and was happy to also recommend Mr Lino for the LAS training. They therefore completed the assessment required for Mr Lino to be accepted for training by the RBL Learning and Development Team.

[28] LAS training is completed by online modules, and by practical training. Mr Ali said he trained Mr Lino in the practical areas, but because Mr Lino's fixed shifts were evening/night shifts and Mr Ali worked during the day, training was slow.

[29] To assist Mr Lino complete his training in the practical area Mr Sharma suggested he worked some extra day shifts on Tuesdays when Mr Ali would be available to train him. Although sometimes Mr Ali was not able to train on the extra shift, nonetheless Mr Lino was able to complete the LAS training sooner as a result of the additional training time.

[30] On 28 November 2022 Mr Lino successfully gained a LAS qualification which qualified him to receive the LAS qualification pay rate, and to work as a shift supervisor on an 'as and when required' basis, receiving the Shift Supervisor allowance when he did so.

*Shift Supervisor Shifts prior to LAS training completion*

[31] Mr Ali said that that because the restaurant was short staffed at the time, he asked Mr Lino to act as Shift Supervisor after he had commenced the LAS training, but before he had completed it.

[32] Mr Ali said he knew he was not supposed to allow an unqualified Team Member to work as a Shift Supervisor, but Mr Lino was responsible and he trusted him to be able to take responsibility for those shifts when he or another qualified employee was not available to work. In total, Mr Lino worked 19 shifts as Shift Supervisor before he was qualified to do so.

[33] Due to the fact that he was running shifts as Shift Supervisor before he was LAS qualified and therefore did not receive the LAS allowance, Mr Ali agreed with Mr Lino that he would arrange to pay him the equivalent of the Shift Supervisor allowance.

*Meeting 22 November 2022*

[34] On Tuesday 22 November 2022 Mr Ali called Mr Lino into his office for a meeting. At that time they discussed various matters including the monies owed to Mr Lino in respect of past shifts when he had worked as a Shift Supervisor but not been paid the Shift Supervisor allowance.

[35] Mr Ali said he had agreed with Mr Lino that if he ran a shift as Shift Supervisor before he was LAS qualified, he would pay him for the 158.3 hours when he worked as Shift Supervisor which at \$4.33 per hour equated to \$685.44. Mr Lino disagreed with the calculation and he thought it came to a larger amount. So Mr Ali processed it as Mr Lino's calculation in an amount of \$1,400.00 which he put through the payroll as "additional hours".

[36] During the meeting Mr Lino said they had also discussed his fixed shift hours and looked at the fixed shift roster and noticed that there was no manager working on the Saturday evening shift. It was Mr Lino's fixed shift and Mr Lino said it was verbally agreed by Mr Ali that he would run all Saturday nights shifts as Shift Supervisor.

[37] Mr Ali said Mr Lino had asked him if he could run the Saturday shift as Shift Supervisor as he had done on a few Saturdays in October and early November when another Team Member, Mr X, had been off work. Normally Mr Lino worked as a Cook on the Saturday night shifts.

[38] Mr X was LAS qualified and worked a fixed shift on a Saturday night. Mr Ali said that he would usually ask Mr X to work as Shift Supervisor on a Saturday night if he was available because he had more experience than Mr Lino, having been employed for 5 years whereas Mr Lino had been employed for 8 months.

[39] Mr Ali said he had agreed that Mr Lino could work the Saturday shifts as Shift Supervisor, but only until he had recruited Assistant RMs because once recruited, they would automatically be the MOD on the shifts if they were rostered.

[40] Mr Ali said at that time he spoke to Mr Lino on 22 December 2022 he believed Mr X and one other employee would be appointed as Assistant RMs and therefore the restaurant would not have Shift Supervisor vacancy on a Saturday because Mr X had a fixed shift on a Saturday night.

[41] The other employee accepted the Assistant RM position and started in the role on 21 December 2022. Mr Ali said he still had a vacancy for an Assistant RM position that overlapped with Mr Lino's Friday and Saturday fixed shifts. At the time of his conversation with Mr Lino Mr Ali believed that Mr X was also interested in applying for the Assistant RM role, and would be appointed as the second Assistant RM.

[42] Mr Ali said that when fully staffed, he would only need a Shift Supervisor to cover a Sunday night shift. Moreover he would need approval from Mr Sharma to pay a Team member as Shift Supervisor when there was also an Assistant RM working, and he knew Mr Sharma would never approve it.

[43] On Monday 28 November 2022 Mr Lino said he read the roster which had been sent out to the Team Members that day and seen that he was not rostered as the Shift Supervisor on the Saturday night shift. He had been rostered as the Shift Supervisor on Friday 2 December 2022, when he was also rostered as a Team Member, and on Sunday 4 December 2022.

[44] He messaged Mr Ali and asked him to find a Team Member to work on the Friday night shift. Mr Ali responded: 'I will update all today.'

[45] The following day, 29 November 2022, Mr Ali sent out a revised roster. Mr Lino was set down for the Friday night as a front of house Team Member position and removed as the Shift Supervisor. Mr Lino therefore messaged Mr Ali to query the change.

[46] Mr Ali responded: “This week I am tryna put ur hours I owe that’s why I have given u less shift as I can cover up those”.

[47] On 1 December 2022 Mr Lino and Mr Ali exchanged text messages:

UL: Hey Seef, I was thinking from next week onwards, that I run as shift supervisor for my fixed shifts (Friday and Saturday afternoon) which makes more sense and fair for all of us

TA: Friday and Saturday will be [Mr X]’s shifts since he is stepping up to be a argm and those will be his fixed shifts  
Only Sunday night shifts will be available

UL: but we agreed that I will run the shifts on Saturday? How is that fair to me now you are giving it to [Mr X]? What is the point of me working hard to qualify as a shift supervisor? So, is the opportunity only for the Assistant restaurant managers? That’s wrong

TA: I will see you tmrw and explain how ss and argm shifts work bro

UL: but my point is we had already agreed last week Tuesday 2 November 2022 that I would run the Saturday shifts but you have taken it off me. Why?

TA: when there’s a argm on shift than what’s the point of having a ss clocked in as sole charge. Who’s gona pay 2 managers. Ss only runs shifts when there is no argm but now we have 2 argm  
And I only agreed for u to run shifts when there is no argm

UL: your missing the point and your lying. On Tuesday 22 November, We both looked at the fixed shift roster and we both saw no other manager works on the afternoon shift except for me. You said Saturdays will be my shifts to run. But you are now changing your story which is wrong

TA: Bro come see me tmrw I will ask Ravi to come as well and then we can explain to you how shifts work

UL: I will bring my support person tomorrow and meet you and Ravi at 10 am

[48] Mr Ali said it was agreed to meet on Monday 5 December 2022 when both Mr Sharma and Mr Lino Snr, Mr Lino’s father and his support person, would be available.

[49] Mr Sharma said he became aware of Mr Lino’s Shift Supervisor concerns on 1 December 2022 when Mr Ali sent him screenshots of the text messages. That was also the day he discovered that Mr Lino had been running Shift Supervisor shifts before he had completed the LAS qualification.

[50] Mr Sharma said he was in the restaurant on 2 December 2022 and started to speak to Mr Lino about the Saturday Shift Supervisor issue, but he had been interrupted by Mr Lino Snr who entered the restaurant from the carpark and told him he could not talk to Mr Lino.

[51] He said he tried to explain to Mr Lino Snr that he had assisted Mr Lino with the LAS qualification and this worked well with his business studies course, however Mr Lino Snr kept repeating that he could not talk to his son. Mr Sharma said he began to feel threatened by Mr Lino Snr whom he found to be loud and aggressive.

[52] As a result, a formal meeting to discuss Mr Lino's concerns was arranged for 5 December 2022.

*Meeting 5 December 2022*

[53] The meeting on 5 December 2022 was attended by Mr Lino, Mr Lino Snr, Mr Ali, Mr Sharma and Mr Hill. Mr Hill said he had been asked to be at the meeting by Mr Sharma, but he was not aware of Mr Lino's concerns prior to the meeting.

[54] Mr Lino said that at the start of the meeting Mr Sharma asked him to explain his concerns. He explained that Mr Ali had asked him to work as the Shift Supervisor on Saturday nights but then had not rostered him as the Shift Supervisor as agreed.

[55] Mr Lino said in response Mr Sharma explained how the RM, Assistant RM and Shift Supervisor roles worked, and that the Shift Supervisor role was a temporary role. Mr Lino said that he understood the operational structure and that Mr Sharma was "going off-topic".

[56] Mr Ali denied he had promised Mr Lino that he could work all the Saturday night shifts as Shift Supervisor during the meeting held on 22 November 2022 because he knew from his own experience that it was not possible for this to happen at KFC. He said he had only agreed Mr Lino could be a Shift Supervisor when an Assistant RM was not rostered. When he said that Mr X had applied for the Assistant RM position, Mr Sharma had corrected him.

[57] Mr Sharma said that Mr Ali's misunderstanding arose from the fact that Mr X had been going to apply for the position, then had changed his mind. He subsequently changed his mind again and decided to reapply. However at the 5 December 2022 meeting Mr Sharma clarified that at that time there was still an Assistant RM position to be filled and that Mr Lino was able to apply for it.

[58] If successful, Mr Lino would become a full-time salaried member of staff at a higher rate of pay. Mr Sharma explained that there were other candidates, but Mr Lino would be a strong contender for the role.

[59] The arrears owing to Mr Lino for the Shift Supervisor duties he undertook before becoming LAS qualified were discussed. Mr Sharma said he calculated the amount owed during the meeting, which came to a lower number than that Mr Ali had paid Mr Lino, however he decided to leave it as \$1,400.00 and “give Uele a win.”

[60] He agreed to pay the higher amount because Mr Lino was a good employee. As a result Mr Lino received a higher amount than he would have done if he had been LAS qualified when working the shifts as Shift Supervisor.

[61] He and Mr Hill explained to Mr Lino that it would be processed as a pay adjustment, not as payment for hours he had not worked.

[62] Mr Sharma also offered to pay Mr Lino for the two shifts he had expected to work, on 2 and 3 December 2022.

[63] During the meeting Mr Lino Snr asked Mr Ali why Mr Lino was being given less shifts than two other employees who were also Shift Supervisors. Mr Lino Snr said that Shift Supervisors are equal and had the same qualifications as each other, so should be treated the same.

[64] Mr Hill said Mr Sharma had explained earlier in the meeting that there were no permanent Shift Supervisor roles. Mr Ali had tried to explain that qualifications, experience and availability were relevant to Shift Supervisor allocation.

[65] Mr Lino said he had experience and he had time available since he had finished school and not yet started college. Mr Ali confirmed that was the case.

[66] Mr Hill said that during the meeting Mr Sharma was trying to explain the way in which shift supervision worked, and why that was relevant to the main issue Mr Lino had raised; however neither Mr Lino nor his father seemed to accept or understand the explanations and why they were relevant to Mr Lino’s concerns.

[67] Mr Hill said the Linos appeared to think that any supervisory shift should be allocated evenly between the qualified Team Members, and this would be a permanent situation.

[68] He said that during the meeting Mr Sharma attempted to work with the Linos to find a solution, and enquired if Mr Lino might be interested in applying for an Assistant RM position.

[69] Mr Hill said that the Linos offered no constructive suggestions when Mr Sharma invited them to do so, and the meeting had ended when they walked out.

*Following the Meeting*

[70] After the meeting, Mr Sharma said he spoke to Mr Ali to advise that he could not make pay adjustments as he had proposed, and that he needed to make formal pay adjustment. Mr Hill had agreed to process the changes needed. He and Mr Ali had also spoken about Mr Lino carrying out Shift Supervisor duties when not qualified to do so.

[71] On 9 December 2022 Mr Lino sent an email to Mr Sharma and Mr Ali raising a personal grievance for having been disadvantaged, misled and treated unfairly.

[72] Mr Sharma responded on 14 December 2022 repeating what he had explained in the 5 December 2022 meeting, and offering again to pay Mr Lino for the shifts on 2 and 3 December 2022 which he believed had been promised to him. He also encouraged Mr Lino to apply for the Assistant RM role, and assured him the Shift Supervisor roles would be allocated in accordance with his employment agreement.

[73] Mr Lino responded later that day, 14 December 2022, reiterating that Mr Ali had lied to, and misled, him in relation to the promise to work Saturday nights as Shift Supervisor. He also stated that he had been lied to when told by Mr Ali that Mr X was an Assistant RM.

[74] Mr Sharma replied on 18 December 2022 offering a third time to pay Mr Lino a top up in respect of the Shift Supervisor allowance for 2 and 3 December 2022 shifts. He also repeated that shifts would be allocated in line with the Employment Agreement, and that normally, as previously explained, supervisory shifts would be carried out by Assistant RMs.

[75] Mr Sharma again encouraged Mr Lino to apply for the Assistant RM role, and stated:

Regarding your claim of short payment, what do you believe you are owed here? Is this the difference between Supervisor rate and team member rate x 40 hours or something else? From your second email it also appears that you and Tauseef had come up with a solution there. Has that solution not happened? Of course if there has been an underpayment I will address it.

Please let me know so I can process any payment due to you soonest.

[76] Mr Sharma said KFC did not pay the 'top up' because Mr Lino did not respond about it.

[77] There was no further communication from Mr Lino about his concerns until he lodged a Statement of Problem in the Authority on 30 January 2023.

**Was Mr Lino unjustifiably disadvantaged by RBL not providing him with Saturday shifts as Shift Supervisor on a permanent basis?**

[78] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[79] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[80] Mr Lino must therefore establish that there was an unjustifiable act by RBL which adversely affected his terms and conditions of employment.

[81] Mr Lino claimed that at the meeting on 22 November 2022 Mr Ali had promised him that he could work all his fixed Saturday shifts as Shift Supervisor but then had then reneged on that agreement, so that he believes he had been misled and disadvantaged as a result.

[82] To succeed in his claim Mr Lino must establish that either a term and condition of employment was breached by an unjustifiable action of RBL, or that there was a binding promise made by Mr Ali which created a legitimate expectation, in this case that he would work all his Saturday shifts as Shift Supervisor.

*Term and condition of employment*

[83] The Employment Agreement set out the agreed terms and conditions of employment.

[84] Mr Lino was employed as a Team Member. He had qualified as a Cook and received the Cook's allowance for any hours when he was working a shift as a Cook.

[85] Mr Lino also qualified to run a shift as a Shift Supervisor, completing the LAS qualification on 28 November 2022. Upon completing the LAS training he became entitled to

receiving the LAS allowance, and, when working a shift as Shift Supervisor, the Shift Supervisor allowance.

[86] The Employment Agreement stated at clause 4.8 that a LAS qualified employee “may be requested by the Employer to temporarily become the Shift Supervisor/Leader for a particular shift/s”.

[87] I find that the use of the words ‘may’ and ‘temporarily’ in the Employment Agreement clarifies that working as a Shift Supervisor is not a guaranteed term of employment.

[88] The only way in which it could have become a guaranteed term of employment that Mr Lino would work all Saturday night shifts as Shift Supervisor would have been by way of a variation. The Employment Agreement at clause 22 set out that a variation must be mutually agreed to, in this case by Mr Ali and Mr Lino, and recorded in writing.

[89] Mr Lino claims that it was agreed by Mr Ali that he could work all Saturday night shifts as Shift Supervisor at the meeting on 22 November 2022. However to be binding, the Employment Agreement states that the variation must not only be mutually agreed, it must be recorded in writing. There was no written variation to the Employment Agreement.

[90] As a result I find there was no change to Mr Lino’s contractual terms and conditions of employment that he would work all Saturday night shifts as Shift Supervisor.

[91] Terms and conditions of employment may be varied by what can be referred to as ‘custom and practice’, i.e. by the way the terms are applied in practice, constituting the ‘totality of the employment relationship’. The Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Christchurch Press* referred to:

...the totality of the employment environment consisting of both the conditions articulated in an agreement and those terms which are understood and applied by the parties in practice.<sup>1</sup>

[92] To become a term and condition of the employment relationship what is required is an established practice of the way “things are usually done and have been done”.<sup>2</sup>

---

<sup>1</sup> *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Christchurch Press* [2005] ERNZ 288at [35]

<sup>2</sup> *Benterman and Curd v New Zealand Steel Limited* [2020] NZERA 37 at [54]

[93] Mr Lino had been employed at KFC for 8 months by November 2022, he was not a long-serving employee with an extensive history of working Saturday night shifts as a Shift Supervisor.

[94] Mr Lino ran five Saturday shifts as Shift Supervisor between 15 October and 22 November 2022 when Mr X, who worked Saturday nights as a fixed shift, was away. Mr Ali's evidence was that he would choose Mr X to operate as Shift Supervisor for the Saturday night shift if he was available due to his being more experienced. Under the terms of the Employment Agreement, this was within Mr Ali's discretionary power.

[95] I am not persuaded that the five shifts worked by Mr Lino on a Saturday as Shift Supervisor establishes a long-running practice sufficient to replace the agreed contractual terms and conditions of employment without a written variation.

[96] Turning to whether or not Mr Lino had a reasonable expectation based upon what occurred between him and Mr Ali at the meeting held on 22 November 2022, I note that Mr Lino is adamant that Mr Ali promised he could work all the Saturday shifts as Shift Supervisor. Mr Ali denies this is the case. There were no witnesses and no written record.

[97] I have no doubt that Mr Lino's belief that a promise had been made is genuinely held, however in considering what is more likely to have occurred I observe the following facts as persuasive against it being a commitment by Mr Ali to appoint Mr Lino as Shift Supervisor on a Saturday on a permanent basis:

- a) Mr Ali was an experienced employee of KFC and had worked at a managerial level since 2017. He therefore was well aware of the practice regarding allocating shifts as a Shift Supervisor;
- b) Mr Ali was aware that an Assistant RM would always act as the MOD/Shift Supervisor if available to work the shift. At the time of the 22 November 2022 meeting Mr Ali believed, albeit mistakenly, Mr X had applied, and would be appointed as an Assistant RM, Mr X worked a fixed shift on a Saturday and would therefore automatically operate the shift as Shift Supervisor when the appointment was finalised;
- c) Moreover Mr X usually worked the Saturday shift as Shift Supervisor because it was his fixed shift. He was also more experienced than Mr Lino and Mr Ali's evidence was that he would therefore choose Mr X to run the shift if he was

available, Mr Lino had acted as the Shift Supervisor in October and early November because Mr X was absent from work;

- d) Mr Ali knew Mr Sharma would never have approved paying another Team Member to work as a Shift Supervisor if an Assistant RM was also working the shift;
- e) Mr Ali's understanding that Mr X had applied for an Assistant RM position was incorrect at the time of the 22 November 2022 meeting and he had to be corrected on that understanding by Mr Sharma. However I accept from the evidence of all at the meeting that the misunderstanding by Mr Ali was genuinely held. This is apparent from the text message exchange with Mr Lino on 1 December 2022

[98] I find given these facts that Mr Lino was mistaken in believing Mr Ali had promised he could work Saturday shifts as Shift Supervisor on a permanent basis.

[99] However I find it reasonable to conclude that during the meeting on 22 November 2022 Mr Ali led Mr Lino to understand that he could work the Saturday shifts as Shift Supervisor until an Assistant RM was appointed. At that time, Mr Lino had worked the previous 5 Saturday shifts as Shift Supervisor; Mr X was absent; and no Assistant RM had been appointed and was available to cover the Saturday night shifts.

[100] On Monday 28 November 2022 Mr Lino realised from the roster issued that day that he was not rostered for Saturday night, 2 December 2022, and this led to his text message exchange with Mr Ali. He had also not been rostered to work on Friday 2 December 2022 as stated on the first roster version on 28 November 2022.

[101] As I have found, there was no requirement that Mr Ali appoint Mr Lino as the Shift Supervisor on any shift, and Mr Lino had no entitlement to run the shift.

[102] I note however that Mr Lino was subsequently rostered to work as the Shift Supervisor on Saturday nights until an Assistant RM was appointed in late February, apart from two, one being Saturday 2 December 2022.

[103] I determine that Mr Lino was not unjustifiably disadvantaged by RBL not providing him with Saturday Supervisory shifts on a permanent basis.

**Was Mr Lino unjustifiably disadvantaged in regard to payments?**

[104] Mr Lino claims that he is owed payments by RBL.

[105] Mr Lino worked a number of shifts as a Shift Supervisor before he was qualified to do so. Mr Ali appointed Mr Lino as a Shift Supervisor because he trusted him to act responsibly in that role. However Mr Lino was not entitled to receive the LAS qualification allowance rate, and he was not entitled to receive the Shift Supervisor allowance for the shifts he worked.

[106] The meeting on 22 November 2022 was to discuss the payments to Mr Lino for working as a Shift Supervisor because Mr Ali knew he could not pay him the Shift Supervisor allowance through the RBL payroll system due to Mr Lino not being LAS qualified.

[107] Mr Ali had arranged to make the payments in a different and unorthodox manner, and processed these at the amount calculated by Mr Lino although his calculation of the amount Mr Lino was owed came to a lower amount.

[108] Mr Sharma realised during the meeting on 5 December 2022 that the calculation was incorrect resulting in Mr Lino receiving a greater amount than he was entitled to receive. However he decided to pay the greater sum claimed by Mr Lino as an act of good will.

[109] I find there are no monies owing to Mr Lino in respect of the shifts worked as Shift Supervisor before he was entitled to receive the Shift Supervisor rate.

[110] However I accept that there was a genuine belief on Mr Lino's part that Mr Ali had promised him he could run the Saturday shift on 3 December 2022 as Shift Supervisor until an Assistant RM was appointed.

[111] Mr Sharma offered during the meeting on 5 December 2022 (the offer being repeated in the subsequent emails to Mr Lino) to pay for the Saturday 3 December shift Mr Lino believed had been agreed he could work as Shift Supervisor. Mr Sharma also offered to pay for the Supervisory shift on Friday 2 December 2022 which Mr Lino had been rostered to work on the first roster version on 28 November 2022.

[112] Subsequent to the meeting held on 5 December Mr Sharma reiterated the offer to pay Mr Lino for the two shifts on Friday 2 and Saturday 3 December 2022 in his emails on 14 and 18 December 2022.

[113] Mr Sharma also asked Mr Lino in the email dated 18 December 2022: “Regarding your claim of short payment, what do you believe you are owed here?”

[114] Mr Sharma requested that Mr Lino respond but Mr Lino neither accepted the payment offer or provided details on what he believed he was owed.

[115] I determine that Mr Lino was not unjustifiably disadvantaged by RBL in regard to payments.

**Was Mr Lino discriminated against by RBL not providing him with Saturday shifts as a Shift Supervisor?**

[116] Section 104 of the Act prohibits an employer discrimination against an employee in their employment on any of the specified grounds of discrimination set out in s 105 of the Act. The prohibited ground in s 105 of the Act are comprehensive and include sex, age, religious belief, ethical belief, colour, race and age.

[117] Mr Lino has not identified any of the prohibited grounds in s 105 of the Act, nor how he was treated any differently from someone without a protected characteristic he may have, or that he was treated differently to someone without a protected characteristic but with the same or substantially similar qualifications, experience or skills as him.

[118] In regard to Mr X, even if Mr Lino did have a protected characteristic, he was not treated unfavourably in terms of the rostering of Saturday Shift Supervisor shifts:

- Mr Lino had worked all Saturday night shifts as Shift Supervisor except for two;
- Mr X who had been employed 5 years compared to Mr Lino’s 8 months, had greater experience than Mr Lino which provided justification for Mr Ali choosing him to work as Saturday night Shift Supervisor,
- Mr Lino was a trained Cook, one of the few in the restaurant, and could therefore only be utilised as a Shift Supervisor in Mr X’s absence if another trained Cook was available to work in his place.

[119] Whilst not relevant to the issue of discrimination, I also comment on the fact that Mr Lino and Mr Lino Snr claimed at the meeting held on 5 December 2022 that Mr Lino had been given less shifts to work as Shift Supervisor than the other employees who were qualified to do so.

[120] There were four other Team Members at KFC Greenlane LAS qualified and able to run shifts as Shift Supervisors. Mr Hill ran an audit following the 5 December 2022 meeting and on analysis of the results found that Mr Lino was the second most utilised Team Member for Shift Supervisor shifts, even though he was the most recently qualified.

[121] I determine Mr Lino was not discriminated against by RBL not providing him with Saturday shifts as a Shift Supervisor.

### **Costs**

[122] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[123] If they are not able to do so and an Authority determination on costs is needed RBL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Lino 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.

[124] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[125] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>3</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

---

<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].