IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 360
3304040

	BETWEEN	LJT Applicant
	AND	MKP LIMITED First Respondent
	AND	NHR Second Respondent
Member of Authority:	Helen van Druten	
Representatives:	Applicant in person NHR for the Respondents	
Investigation Meeting:	19 March 2025 at Auckland	
Submissions received:	Up to, and including, 20 March 2025 from the Applicant Up to, and including, 26 March 2025 from the Respondents	
Determination:	19 June 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 11 December 2023 LJT accepted a position with MKP Limited as Head Chef for a new restaurant in Auckland. His signed employment agreement stated that his employment would start on 8 January 2024. Between 12 December 2023 and 7 January 2024 (the Interim Period), he worked with the General Manager preparing for the restaurant opening.

[2] LJT's employment agreement had a 90-day trial period clause and MKP Limited ended his employment under this clause on 3 April 2024. LJT disputes the start date of his employment. He claims that the work he did from 12 December 2023 to 7 January 2024 should be included as employment, therefore the 90-day trial period

clause was not applicable and he was unjustifiably dismissed. In the alternative, he claims that he was unjustifiably disadvantaged by the actions of MKP Limited immediately prior to termination of his employment.

[3] LJT also brings a claim against NHR as a person involved in breaches of minimum entitlement under s142Y of the Act.

[4] MKP Limited claim that LJT was not an employee until 8 January 2024 and therefore ending his employment on 3 April 2024 was in accordance with the terms and conditions of his employment agreement trial period clause. MKP Limited claims that prior to 8 January 2024, LJT was engaged as an independent contractor to provide advice and expertise about the restaurant opening and was paid for that work on invoice.

[5] LJT also raises claims for hours worked and not paid between 12 December 2023 and 3 April 2024.

Non-publication

[6] This determination is issued subsequent to the determination [2025] NZERA 360 issued on 19 June 2025. That determination is removed from the Authority website.

[7] In accordance with the interlocutory judgment of the Court on 22 December 2025, all names and identifying details of the parties are removed from this determination and prohibited from publication.[1] Accordingly, a random generator has been used to refer to the parties in these proceedings and does not resemble specific names.

The Authority's investigation

[8] For the Authority's investigation written witness statements were lodged from LJT (Applicant), NHR (Director and Second Respondent), VYU (Human Resources) and YKH (General Manager). All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[1] [2025] NZEmpC 282 at [31].

[9] 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.

The issues

[10] The issues requiring investigation and determination are:

(a) When did LJT commence work as an employee?

(b) Was his employment subject to a valid 90-day trial period?

(c) Was LJT unjustifiably dismissed and/or disadvantaged by the actions of his employer? If so, is he entitled to lost wages, compensation for hurt and humiliation and/or a penalty for breaches of the Act?

(d) Did the first respondent pay LJT correctly for his hours worked?

(e) For the period from 12 to 18 February 2024, has the first respondent breached the Minimum Wage Act 1983 by not paying the correct hourly rate for the hours worked?

(f) If any remedies are awarded, should this be reduced (under s 124 of the Act) for blameworthy conduct by the applicant that contributed to his own grievance?

(g) Should leave be granted to LJT to recover any award of minimum standards from NHR?[2]

(h) Should either party contribute to the costs of representation of the other party?

Background facts

[11] The restaurant opened its doors to customers in February 2024. Prior to the opening date there was a lot of work needed to get the restaurant open, from fitout and design to its people, marketing and systems preparation. Two people were involved initially - NHR and YKH.

[12] NHR is the director of MKP Limited. He is the director and shareholder of several other hospitality businesses in Auckland and has been in business for over 30

[2] Employment Relations Act 2000, s 142Y.

years. Within his existing businesses, NHR said he is very "hands-on" and when an opportunity arose to purchase another business, he said that he considered it on the basis that he could be more "hands-off" in the day-to-day running of the new business.

[13] From around August 2023 onwards he and YKH discussed the business including concept, design and marketing with many of those meetings held while YKH was still working full-time in another business for NHR who offered her the opportunity to become General Manager of the new restaurant. This would include everything needed to 'get the restaurant ready' with a planned opening date of end of January 2024. NHR said that he was a mentor to YKH and provided guidance, but there was a high level of trust between them so as long as the restaurant was ready when the liquor licence was granted. He had minimal daily input other than approvals on spend, oversight on preparation and involvement in key decisions.

[14] Recruiting a Head Chef was one of the first tasks. YKH used her work associate contacts on social media to put the "word out" that she was looking to recruit and was looking at hiring before Christmas with a start date in January. One of those work associates was LJT.

[15] On YKH's recommendation, LJT was offered and signed an employment agreement on 11 December 2023 to start on 8 January 2024.

Jurisdiction issue

[16] The Authority only has jurisdiction over LJT's claims under s 103(1)(a) where he was an employee and therefore entitled to the rights and obligations of employees under the Act.

[17] If LJT was not an employee before 8 January 2024, then LJT may not bring a personal grievance or legal proceedings in respect of the dismissal as termination of his employment would be within the 90-day trial period in his employment agreement. Any grievance would be limited to a disadvantage claim under s 103(1)(b) of the Act.[3]

[18] It is agreed that at least from 8 January 2024, LJT was an employee.

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[3] Employment Relations Act, ss 67B(2) and 67B(3).

[19] The start date of employment is important because on 3 April 2024, MKP Limited terminated LJTs employment under the 90-day clause of his employment agreement following receipt of a serious allegation by one of the kitchen employees. YKH and the HR Manager, VYU discussed this briefly with NHR and they decided to terminate LJT's employment under the 90-day trial period rather than undertake a disciplinary process.

[20] LJT submitted approximately 400 pages of text conversations between YKH and himself as evidence. YKH raised a privacy objection to this, but the texts provided a useful insight into the work relationship and what was discussed between them in that interim period. Only texts sent to or from LJT were included in considerations.

Relevant law

[21] Section 6 of the Act defines an employee and is relevantly set out as follows:

> ***6 Meaning of employee***
>
> (1) In this Act, unless the context otherwise requires, employee—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
> …
> (ii) a person intending to work; but
> …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship
> …

[22] The application of s 6 of the Act is set out in *Bryson v Three Foot Six Ltd* [4] and the decision of the Court of Appeal in *Rasier Operations BV v E Tu Incorporated*.[5] Those tests are well known:

(a) Firstly, I must look at the written and oral terms of employment which may indicate the nature of the relationship.
(b) Second, I must consider how the work was carried out in practice, looking at the real nature of the relationship.
(c) Third, based on how the work was carried out in practice, I must apply three relevant common law tests:
    i. Control, being an analysis of who decides what work is done and how it is done;
    ii. Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and
    iii. The fundamental test, being an analysis of whether the individual is in business on their own account.

[23] The statements by the parties are relevant but not determinative.[6]

Was LJT an employee prior to 8 January 2024?

[24] LJT claims that as he had a signed agreement to begin employment in January 2023, and worked for MKP Limited prior to that date, he was "a person intending to work" and within the definition of employee under the Act.[7] He submits that it then follows that he was not a 'new' employee as required by s 67A(1) and the trial period would therefore be invalid.

[25] Section 6 of the Act provides that the term "employee" includes "a person intending to work".[8] This is further defined in s 5 of the Act as meaning "a person who has been offered, and accepted, work as an employee".

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[4] *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC); and *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34.
[5] *Rasier Operations BV v E Tu Incorporated* [2024] NZSC 177.
[6] Employment Relations Act 2000, ss 6(2) and (3).
[7] Employment Relations Act 2000, s (6)(1)(b)(ii).
[8] Employment Relations Act 2000, s (6)(1)(b)(ii).

[26] Section 6(1)(b)(ii) cannot be considered in isolation as LJT proposes. LJT had a signed employment agreement with a confirmed start date. He was not an employee prior to that date as required by s 6(1)(a) unless the parties agreed to change his start date (which they did not) or if the Authority determines that he was an employee under ss 6(2) and 6(3) of the Act.

[27] Section 6(2) states, to the effect, that when deciding whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them. The essence of s 6(3) requires that the Court or Authority must consider "all relevant matters".

[28] I turn then to considering the real nature of the relationship and all relevant matters as required by ss 6(2) and (3) of the Act.

Intent of the parties

[29] There was nothing in writing and very little discussion defining the nature of the relationship in the Interim Period. LJT said that he did not give much thought to whether he was an employee or contractor over that time. He had the security of a full-time job. The parties trusted each other at that time, and none of them really thought about the nature of the working relationship and the need to define it.

[30] Section 6 does not require anything in writing before a person may be regarded as an employee or require agreement in advance. As in *Arachchige v Rasier New Zealand Ltd & Ors*,[9] it was only when the employment was terminated that the employee sought to define the nature of that employment.

[31] On 2 December 2023, LJT met with YKH and NHR to discuss the role. At that meeting, LJT said that he mentioned he was not working and was available to work earlier than January 2024:[10]

> I offered to start earlier if needed and suggested invoicing as an option for any small tasks over the holiday period…they said they would keep this in mind. I raised this because I was worried my holiday pay from [my previous employer]

[9] *Arachchige v Rasier New Zealand Limited & Ors* [2020] NZEmpC 230 at [46].
[10] LJT's witness statement at paragraph 10.

> wouldn't cover my living expenses…before receiving my first salary payment in mid-January, based on their suggested start date.

[32] YKH emailed LJT on 4 December 2023 to ask if invoicing was acceptable and LJT agreed on the condition of a signed employment agreement with a confirmed start date.

[33] At the time of signing the agreement on 11 December 2023, I am satisfied that LJT and YKH intended employment to start on 8 January 2024. Both LJT and YKH talked by text about the official start date (of 8 January 2024) and referenced this several times during their text chats before and after 11 December 2023. YKH had emailed LJT on 11 December 2023 to offer the position "starting on Monday 8 January". There were also emails from LJT on 4 and 11 December 2023 communicating his understanding of that start date:

> "Regarding the invoicing arrangement, I am happy to proceed on that basis, provided we have a clear start date and a signed contract in place".
>
> "Looking forward to starting as Head Chef at [the restaurant] on January 8th".

[34] NHR's approach was clear. He told YKH that no one was to be employed over the Christmas/New Year period as the restaurant had no income and too many public holiday days that would need to be paid if they did that. Objectively, this makes sense. Cost was an obvious driver and NHR indicated some hesitation in employing a Head Chef in early January 2024 before systems were up and running and a confirmed opening date in place.

[35] NHR says that LJT was a contractor though no agreement, deliverables or discussions were evidenced to support this claim. Given his business experience, I find it unusual that NHR never sought to define the relationship before or after his meetings with LJT on 20 and 29 December 2023. I conclude that this was because he had delegated this task to YKH whom he trusted would manage this.

Nature of the relationship

[36] I find that YKH's management style was very relaxed as it related to LJT. The nature of the text and email conversations between them, viewed from 12 December

2023 onwards, were not that different pre-11 December, post-11 December 2023 or after LJT's official start date on 8 January 2024.

[37] The texts between YKH and LJT are best described as work-related chat. No interview notes were provided, no formal expectations were set and staff were predominantly recruited on an informal basis. YKH said that she had a list of tasks to get the restaurant ready for opening but I saw no evidence that this was shared with him.

[38] The day after LJT signed his employment agreement, they both continued the same sorts of chat discussions about various restaurant matters. LJT was keen to make a good impression as he had been told that there may be an opportunity to oversee more of NHR's restaurants and his bonus was KPI based so he needed to show results. As he had before his employment, LJT was bursting with ideas for every part of the restaurant setup and sent these ideas to YKH.

[39] The hundreds of text messages exchanged between YKH and LJT (as evidenced to the Authority) indicate a mutual excitement about a new restaurant opening and a relatively ad hoc process of working together to do what needed to be done. His texts were sent to YKH at all times of the day.

[40] YKH said that she was clear that "we had the agreement" to be on site on 9 January 2024 and she was on leave from Christmas through to 8 January as it was school holidays. While that is accepted, LJT said that she had given him the "OK" to continue preparations without her. Text evidence supports this and shows that between 25 and 31 December 2023, YKH sent over 40 texts in response to the approximately 80 texts LJT had sent her. None of these texts questioned why LJT was working between Christmas and New Year.

Control test

[41] I turn then to the common law tests as outlined in *Bryson*.[11] The control test involves looking at who decides what work is done and how it is done.

[11] At [34].

[42] There was little control by YKH in the Interim Period, or even after 8 January 2024. LJT was largely free to come and go as he pleased and was only required to attend meetings (such as interviews) at times that suited all attendees. Texts were predominantly with an *if it suits you* sentiment. I did not see evidence that YKH was instructing LJT as he claimed. There were no required hours set by YKH and LJT had a large amount of discretion in terms of what work he did and when, where and how he did it. This was reflected in emails and text messages sent at all times of day, including early morning and at midnight.

[43] This lack of control over LJT's work would demonstrate that he cannot be regarded as an employee where he was autonomous; free to work when, where and how he wished. This does not take account of the existing relationship between LJT and YKH. At the start, they both saw themselves as more than work associates (friends in LJT's mind) and the relationship was conversational. Both knew what needed to be done so they just got on and worked it out together. On balance, I find that this relaxed approach was a feature of the casual nature of the relationship between them rather than the freedom given to a contractor.

[44] YKH did not control LJT's work until performance issues began to arise in February 2024.

Integration

[45] Based on communications, I agree with LJT that he was well integrated into the business in that Interim Period. There was no discernible difference between the work he was doing from 12 December 2023 compared to the work he did from 8 January 2024. He contributed to the core kitchen and food related decisions for the business, including menu content and design, kitchen equipment and staffing requirements. He used his personal connections to recruit employees.

[46] On at least two occasions, LJT was introduced as Head Chef to prospective employees. While YKH said that she would do that out of respect as he was about to be Head Chef, he was not introduced in the future tense or as a consultant.

[47] LJT had a key to the premises from 28 December 2023 to work there if he wanted to do so. He used his own laptop for his work and brought it onsite as needed.

[48] There are also multiple references in the text messages to *we* rather than *you* by both YKH and LJT. This leans towards both parties seeing LJT as integral to the business.

[49] LJT was given a work email address on 16 December 2023 and used this to email suppliers, set up interviews and discuss work matters with contacts in his capacity as Head Chef. I find that suppliers would have seen their interactions with LJT as Head Chef, not as a private consultant.

Economic reality test

[50] There was nothing to stop LJT working as a private chef in December 2023. By his own account, he had at least 20 years' experience working as a chef and his private chef business has been in place for at least five years providing chef services. He had an active business bank account and tax management system and showed experience invoicing and managing his accounts.

[51] Despite that opportunity, LJT was unlikely to take on external work as he already saw himself integrated into his new employment and YKH treated him as such. The work undertaken for MKP Limited was not to build his business as a chef consultant, it was for the sole benefit of MKP Limited. He took on no financial risk and was expected to undertake the work himself.

[52] No hourly or project-based rate was discussed or set for his work between 12 December 2023 and 7 January 2024. LJT used his annual salary to decide his hourly rate and MKP Limited never questioned this. They also never questioned how many hours were invoiced.

[53] Between 12 December 2023 and 7 January 2024 LJT invoiced for work done under his business account and LJT included GST in his invoice. NHR claimed this was because LJT was a contractor for another company owned by NHR (not MKP Limited) providing expertise to get the restaurant ready. LJT disputed this, claiming that he was asked to invoice only because MKP Limited was not up and running and the work he was doing was for the benefit of MKP Limited, not the other company. I prefer LJT's evidence as YKH was paid as an employee in her other employment rather than as

contractor for a similar reason. From 8 January 2024, LJT was paid by MKP Limited (notwithstanding an error by the payroll administrator), indicating that NHR saw a distinction between LJT's work pre and post 8 January 2024.

Industry Practice

[54] I also considered industry practice but this was neither helpful nor determinative as the parties provided competing evidence regarding this factor. Given that NHR has been in hospitality for over 30 years, I preferred his evidence that 'contracting out' work does happen but quite often the working relationship is not clearly defined as it is commonly networks / contacts based. The evidence of industry practice is therefore largely unhelpful, serving to reinforce that while informal relationships work well when everything is going well, they can cause unnecessary time and cost if the relationship sours.

Other considerations

[55] LJT presented evidence from a paper by Chief Justice Inglis to support his claim that he could not have been a contractor as he was working "for the employer, within the employer's business to enable the employer's business interests to be met".[12] I considered this viewpoint, but it cannot be taken out of context. The same paper by Chief Justice Inglis also emphasises the need to consider the relationship, between the particular parties, in the particular circumstances, at the particular point in time.

Conclusion on status as an employee in the Interim Period

[56] Based on the volume, timing and content of emails sent by LJT over the Interim Period, I find that LJT was engaged and enthusiastic about the new restaurant and put many hours into thinking about and planning for its success.

[57] There are factors supporting a contractor relationship over the Interim Period. LJT referred himself to an official start date, there was no formal requirement or deliverables set by MKP Limited for him beforehand and he was paid on an ad hoc basis upon invoice. If YKH needed specific input from him on materials, equipment, and staff so that these could be already underway when he started, LJT had considerable

[12] As outlined in the paper "Employment Status – who has it and why does it matter"? The paper was presented by Chief Justice Inglis at Victoria University of Wellington on 16 September 2020.

flexibility to come and go as he wished, work as and when he wished, and contribute as much or as little as he wished.

[58] Despite this, I consider the real nature of the relationship was that of an employee during the Interim Period. There was no discernible difference in the way YKH treated LJT before and after 8 January 2024, until his performance became an issue in March 2024. She did not control where, when and how he did his work during the Interim Period, but she did not do that when he was an employee either. That was her style. Both of them had a vested interest in the business and LJT's engagement with suppliers and contractors in the Interim Period was in his capacity as the Head Chef, not as a contractor. Fundamentally, this work was an early start to his employment and invoiced out of convenience for both parties.

Is the trial period clause applicable?

[59] Part 3 of LJT's employment agreement specifies a 90-day trial period. Its validity is disputed by LJT on two counts:

(a) He was never told about the 90-day trial period until he received the employment agreement. There was an onus on MKP Limited to properly explain the application of the provision to LJT and the possibility of his employment being terminated under the provision. This claim is rejected as LJT demonstrated he understood what the trial period meant and he accepted employment on that basis.
(b) his employment started on 12 December 2023 therefore the 90-day period had ended by 3 April 2024.

[60] I agree with LJT that any trial period had ended by the date of his dismissal, though I place the start date of his employment as 20 December 2023. Despite a large number of emails being sent between 12 December 2023 and 7 January 2024, he did not bill for that time in his 16 January 2024 invoice, so I do not consider that he saw this as official work. I therefore conclude that LJT became an employee on 20 December 2024 (being the first date he billed for his time worked) and this employment continued on an as required basis through until 8 January 2024.

[61] Notably, even though his employment in the Interim Period was not continuous, the trial period would still not be valid under s 67A(1) of the Act.

Unjustified dismissal claim

[62] As LJT's termination of employment was not within the 90-day trial period, I conclude that LJT was unjustifiably dismissed. The actions taken by MKP Limited in terminating LJT's employment were not actions of a reasonable employer for both substantive and procedural reasons:

(a) LJT was given no warning of the meeting. He was notified of the meeting, told about the allegations and his employment was terminated on the same day.
(b) LJT was not given a chance to seek advice or support.
(c) LJT was not provided with a copy of the allegations against him.
(d) Substantively, MKP Limited never gave LJT an opportunity to provide a considered explanation or give feedback on the allegations made against him. Even before meeting with him on 3 April 2024, MKP Limited had discussed and predetermined their decision on his employment because there had been similar concerns raised earlier about LJT and MKP Limited did not want someone "like that" in the business.

[63] LJT has established his claim for unjustified dismissal.

Unjustified disadvantage claim

[64] The grounds relied on by LJT for his disadvantage claim relate to the same matter as his claim for unjustified dismissal. These have been appropriately addressed so the Authority makes no further findings in respect of the unjustified disadvantage claim.

Provision of wage and time records and payment

[65] LJT also raised concerns about his salary payment for hours worked. Specifically, he alleged that:

(a) Improper tax deductions were made
(b) He was unpaid for hours worked

(c) He was paid below minimum wage for 12-18 February 2024.

Tax Deductions

[66] The improper tax deductions referred to by LJT's relate to his first salary payment which was incorrectly paid into his business account, meaning that both PAYE and GST were deducted. I accept that this was most likely an inadvertent error by the MKP Limited accounts person. She manages the accounts for all NHR's businesses including the company LJT was invoicing and the new MKP Limited and future salary payments were paid into the correct account. LJT will need to follow this up with Inland Revenue to seek return of any amounts owing to him.

Hours worked prior to 8 January 2024

[67] LJT seeks payment for all work done between 12 December 2023 and 7 January 2024 that he has not yet been compensated for. This is declined for several reasons including that:

(a) NHR did not withhold payment of any invoices presented by LJT. He paid the initial invoice even though two hours claimed overlapped with the first day of employment.
(b) An invoice sent by LJT on 16 January 2024 for "[LJT] hours over Christmas New Years" invoiced NHR for 30 hours. However, the invoiced hours did not match the hours in LJT's work record evidence. When questioned on the days and hours invoiced (which included 2 hours on 8 January 2024), LJT said that the dates might have been wrong and he only invoiced for on-site work. NHR said he did not check the hours or days invoiced and trusted [LJT] had it right.
(c) LJT chose to work many hours on his own volition. If it had been otherwise, he would have invoiced substantially more than 30 hours in his 16 January 2024 invoice. His hours were intermittent and on an as-required basis.
(d) LJT had ample opportunity to invoice for all hours worked before 8 January 2024 and he did not do so.
(e) Despite the substantial hours put in by LJT, many of these were voluntary hours based on his passion and excitement for the role and that does not necessarily translate to paid hours.

Hours worked from 8 January 2024

[68] LJT said that he was underpaid for his hours worked throughout his employment. Payslips show that LJT was paid a standard 40 hours each week regardless of the hours he worked. The two roster examples provided in evidence show that LJT worked significantly more than 40 hours per week throughout his employment.

[69] LJT claims 117.75 hours worked but not paid between 8 January 2024 and 3 April 2024. His employment agreement at Clause 6 says:

> Where the Employee and the Employer agree, the ordinary hours of work may be spread over 6 or 7 days of the week and/or exceed 40 hours in any one week. Subject to the clause below, any hour worked in excess of 40 hours per week will be paid at the Employee's ordinary rate of pay.

[70] The difficulty with quantifying this claim and particularly LJT's claim for the week of 12-18 February 2024 is that:

(a) LJT's hours were not signed off by his employer, so other than a roster there is no evidence of the hours rostered versus hours worked other than the evidence presented by LJT.
(b) LJT set the kitchen roster so he had flexibility to set his own hours.
(c) LJT did not raise any concerns with his employer or claim additional hours prior to his termination of employment.
(d) His hours worked were not unusual for a restaurant building up to an opening and LJT did not work there long enough to establish a normal work pattern post-opening.
(e) YKH said LJT made it clear he would be in the kitchen until he was comfortable other chefs knew what they were doing. I agree that this was his choice. YKH considered this part of being a Head Chef in a new restaurant and said that he could have rostered himself off if he wanted as there was a sous chef to cover him.

[71] The hours clause in the agreement should not be used to take advantage of an employee's enthusiasm and commitment to doing a good job. It also cannot be used to retrospectively claim for hours that an employee chose to work. Had the employment relationship not turned sour, it is more likely than not that LJT would never have claimed for those hours.

[72] Opening week for the restaurant was 12-18 February 2024. According to LJT, he worked so many hours they equated to below minimum wage. It is reasonable to expect that there is a plan to manage this loading even for an exceptional week. I do not accept that YKH can rely on the approaches she put forward that i) [LJT] did not ask for lieu days so he did not get them or ii) he could have taken them if he wanted as he set the roster or iii) the restaurant was only initially open 5 days to allow rest. She should have offered LJT lieu days or a plan to manage his work hours.

[73] As YKH did not record LJT's days (other than what was written on the roster), I accept LJTs evidence that he worked 83.5 hours the week of 12-18 February 2024.

[74] For the reasons above, I consider that a notional sum to recognise his hours worked above 50 hours a week for the period from 8 January 2024 including 12-18 February 2024 should be awarded and this also addresses the minimum wage concerns raised for the opening week. The relevant period for the calculation is from 8 January 2024 to 3 April 2024 and excluding 12-18 February which is calculated separately. This equates to 117.75 hours claimed less 110 hours (being a notional 10 hours per week spread across the 11 weeks to account for LJT's decision to roster himself for additional hours). This leaves a balance of 7.75 hours.

Holiday pay

[75] At time of submissions, LJT also claimed that his holiday pay was not paid out. His payslip of 7 April 2024 shows that it was paid so this matter is resolved.

Good faith obligations

[76] Section 4 of the Act imposes mutual good faith obligations on parties who are in an employment relationship.

[77] LJT raised this as a concern in several aspects of his employment. I agree that his work prior to 8 January 2024 should have been defined clearly, more closely managed and his work hours more closely managed. While this was YKH's responsibility the evidence did not indicate that she was unresponsive or

uncommunicative in her relationship with LJT and I conclude there was no breach of good faith in that regard.

[78] LJT also alleged that the offer by MKP Limited to accept 4 weeks' pay and resign or we'll invoke the 90-day clause was in bad faith. MKP Limited claimed this was a without prejudice offer. A without prejudice offer needs more than just the words to be said. This was not an option presented without prejudice. The serious complaint against LJT was received on 27 March 2024. All three witnesses said they discussed it in advance, decided what needed to happen (predetermined the outcome) and spoke with LJT at 4pm on 3 April 2024. He was not given any prior warning of the meeting. LJT was declined an opportunity to think about his options and was escorted from the premises. He was sent a trial period dismissal letter the same day terminating employment immediately with one weeks' notice paid out.

[79] This was not the actions of a fair and reasonable employer.

Breach of Minimum Wage Act

[80] I do not accept that there was a breach of the Minimum Wage Act for 12-18 February 2024 as opening week was an exceptional week. However, MKP Limited had sufficient time in the following weeks for these hours to be offset with lieu days or payment for those additional hours. Accepting LJT's hours as evidence, he should be paid for a portion of those hours, as lieu days are not an option.

Should leave be granted to LJT to recover any award of minimum standards from NHR?

[81] Given the findings made against MKP Limited in this determination, LJT has applied to recover against NHR under s142Y of the Act.

[82] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employee can only do so with prior leave of the Authority (or Court) and to the extent the employer is unable to pay the money owing.

[83] The first matter the Authority must be satisfied of is whether there has been default in payment of the holiday pay and wage arrears. I am satisfied this is not the case therefore there is no basis to proceed against the second respondent.

Remedies

Unjustified dismissal

[84] As LJT has been successful with his personal grievance for unjustified dismissal under s 103(1)(a) of the Act, I must turn to consider what remedies he may be entitled to in terms of those provided for under s 123 of the Act.

[85] Compensation is awarded pursuant to s 123(1)(c)(i) of the Act; it is for the humiliation, loss of dignity and injury to feelings suffered as a result of the unjustified actions (including dismissal). I must consider and quantify the harm caused to LJT and the loss suffered by him by MKP Limited.

[86] LJT felt very aggrieved that he had poured 20 years of his personal intellectual property into the menu and felt that he was treated as disposable when his employment was terminated so quickly. For him, the impact of his termination has had significant impact on his wellbeing and ongoing earnings as a chef.

[87] I accept that LJT suffered financial and emotional distress because of MKP Limited actions and this was affirmed by his witness's affidavit. Both parties agree that the industry relies heavily on relationships and this decision could have affected his ability to gain employment.

[88] Looking at this harm and loss against others who have been unjustifiably dismissed, this sits at the lower-level and I quantify appropriate compensation to be $12,000.

Unpaid notice

[89] LJT's contract requires four weeks' notice by either party. As LJT was unjustifiably dismissed with immediate effect on 3 April 2024 and he was paid one weeks' notice, he is entitled to payment of his remaining 3 weeks' notice as payment in lieu at his ordinary hourly rate.

Contribution

[90] As I have awarded compensation to LJT, I must consider whether his actions contributed to the situation giving rise to his grievances.[13]

[91] I find LJT's actions contributed to the unjustified actions of MKP Limited on two counts:

(a) NHR claimed that after the meeting on 3 April 2024 LJT deleted all emails and information in the work email files containing restaurant information belonging to the business that he allegedly created in the Interim Period. LJT was evasive when asked about this and more likely than not, he has held onto material created by him in the course of his employment with MKP Limited.

(b) On 3 April 2024, LJT was dismissive of the serious allegations made against him and made an inappropriate comment that he did not deny making. While acknowledging procedural defects in the employer process, the duty of good faith applies to all parties in an employment relationship. Had LJT not responded as inappropriately as he did, the result may have been different.

[92] On that basis, LJTs compensation is reduced by $1,500. The Authority also orders that within 7 days of this determination, LJT is required to provide NHR (as MKP Limited Investment (2023) Ltd) any and all material created during his work with the restaurant (from 20 December 2023) held by him on his personal laptop that is the intellectual property of MKP Limited or other companies owned by NHR or created during his employment with MKP Limited. This is to be provided in a form easily accessible by NHR. This should include all staff details and information, stock take lists, menu notes, supplier details and information specific to the restaurant's kitchen and food operations.

[13] Employment Relations Act 2000, s 124.

Wage arrears

[93] In the absence of rostered hours to the contrary, LJT is awarded payment of 33.5 hours for the week of 12-18 February 2024 and 7.75 hours for the period from 8 January 2024 to 3 March 2024 at his contracted hourly rate.

Summary of orders

[94] No order is made against the Second Respondent.

[95] Within 28 days of the date of this determination, MKP Limited is required to pay LJT:

(a) $4,903.85 as 3 weeks' notice (4-week notice period less one week already paid)
(b) $1,685.70 (less applicable deductions) as wage arrears; and
(c) $71.55 Authority filing fee
(d) $10,500 compensation under s 123(1)(c)(i) of the Act that has been reduced under s 124 of the Act.

[96] Within 7 days of this determination, LJT is required to provide NHR (as MKP Limited) any and all material created during his work with the restaurant (from 20 December 2023) held by him.

Request for name suppression

[97] LJT requested name suppression in this determination. This was discussed with both parties during the investigation meeting. While the application was declined and the reasons given for that decision, only information relevant to the issues is included in this determination.

Costs

[98] The Authority has clear statutory power to order costs and expenses to be paid as the Authority thinks reasonable.[14] Having succeeded in his application LJT is entitled to an order requiring MKP Limited to contribute to his professional costs. Based on

[14] Employment Relations Act 2000, Schedule 2, clause 15.

information provided by LJT, this is limited to professional representation provided to LJT by Hesketh Henry in May 2024. Parties cannot claim for their own time spent in case preparation and attending the investigation meeting or the cost of going to mediation.

[99] Therefore, upon receipt of an invoice evidencing the amount paid by LJT, MKP Limited is ordered to pay LJT's professional legal costs incurred in May 2024 relating to this matter to his official assignee (as notified by LJT) up to the value of $4,500 (including GST).

[100] LJT is also entitled to receive a payment of $71.55 to reimburse the expense of paying the Authority filing fee. These payments are to be paid with 28 days of this determination.

[101] If the parties are unable to resolve costs, and an Authority determination on costs is needed, LJT should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MKP Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[102] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[15]

Helen van Druten
Member of the Employment Relations Authority

[15] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1