

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 334
3167141

BETWEEN	ABIGAIL ATKINS Applicant
AND	ALPINE 182 DEGREES LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Maryline Suchley, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	15 November 2022 at Christchurch
Submissions and Further Information:	15 November, 13 December 2022, 13 February, 10 March and 10 June 2023 from Applicant
Determination:	23 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Abigail Atkins was employed by Alpine 182 Degrees trading as Springfield Hotel (Alpine) which is a duly incorporated company that carries out the business of running a licensed bar. Blair Wallace is the sole director and shareholder of Alpine. Ms Atkins worked as a cook for just under two years at the Springfield Hotel until 19 November 2021 when she was dismissed.

[2] Ms Atkins says Alpine's actions in dismissing her were both procedurally and substantively unjustified because no reasons were given for her dismissal and there was little or no process followed.

[3] Ms Atkins also says Mr Wallace was verbally abusive towards her and other employees and makes a claim she was disadvantaged by this behaviour. She also makes three wage claims on the basis she was not paid for all her guaranteed hours, was paid less than the minimum wage for two months and did not receive all holiday pay owed to her when her employment ended. She also seeks lost wages and compensation.

[4] No statement in reply was lodged by Alpine and it did not attend either the case management conferences (CMC) or the investigation meeting. After the first CMC, Mr Wallace emailed an objection to an application for a witness to appear via audio visual link. Alpine confirmed the Authority had the correct email address.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Atkins, and four work colleagues from the Springfield Hotel, Tracy Tahuu, Joel Innes, Charles Hughes and Jacqueline Leslie Learned. All witnesses answered questions under oath or affirmation from me. Ms Suchley provided written closing submissions, further information and made an additional application which is dealt with below.

[6] Alpine did not participate in the Authority's investigation. I am satisfied the notice of investigation meeting was served to Alpine's address for service as advised to the Authority. The notice included advice that if Alpine did not attend the investigation meeting, the Authority may, without hearing the evidence from Alpine, issue a determination in favour of the applicant.¹

[7] After the investigation meeting Mr Wallace sought to provide written material to the Authority which was not accepted. The Authority has the power to proceed if any party without good cause fails to attend and may act as fully in the matter before it as if that party had duly attended or been represented.² The investigation meeting proceeded on this basis.

[8] 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

¹ Employment Relations Authority Regulations, schedule 1, form 8.

² Employment Relations Act 2000, schedule 2 clause 12.

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Ms Atkins employment with Alpine

[9] Ms Atkins worked at Springfield Hotel for approximately one year and 10 months and progressed to trainee cook and started an apprenticeship. Mr Wallace was her mentor. The individual employment agreement (IEA) between the parties is dated 2 January 2020 and provided for 30 plus hours work each week together with flexibility depending on work available. Ms Atkins worked five days a week. Her start time was always 11.00am but the finish time varied because she worked until the pub closed. Her workdays were anywhere between seven-to-eleven-hours long.

[10] Ms Atkins took her role as trainee cook seriously and wanted to make sure she did things right, especially food safety. Ms Atkins said over time her requests for assistance from Mr Wallace would often result in her being yelled at by him. She described being blamed for things such as the kitchen being left unclean when she had left it clean before her days off. She gave evidence of Mr Wallace's outbursts towards her and other employees for the duration of her employment and that this escalated in the last six months of her employment. In addition to shouting at her, Mr Wallace on more than one occasion called her names such as "dick", called her stupid, said she was self-entitled, and swore at her.

[11] Ms Atkins accepts Mr Wallace did from time to time organise a day and time for training for her but says these seldom eventuated as he would be too busy or just did not turn up. Ms Atkins described regularly being left on her own in the kitchen cooking meals or working at the bar with no assistance. She says there were times when Mr Wallace refused to assist her when she asked for help. Ms Atkins said progress with her apprenticeship was slow because Mr Wallace was seldom available to teach her. When they did arrange meetings with the assessor she said Mr Wallace was late or unavailable.

[12] Ms Atkins also described more than one occasion when Mr Wallace told her he thought she had ADHD and offered her medication. She also observed many outbursts where in addition to shouting and swearing she saw him throw things in the kitchen and slam doors.

[13] Over the last six months of work if Mr Wallace wanted to talk to Ms Atkins at work, she would feel physically sick. By then he had yelled at her and used demeaning language on multiple occasions, and she was fearful he would approach her in the same way. At some point during her last year of work Ms Atkins was so affected by what was happening at work, she started going to a colleague's house before work so they could go into work together, as support for each other.

[14] Witnesses gave evidence of their observations of Mr Wallace's conduct towards them and others that was consistent with Ms Atkins' descriptions. They said Mr Wallace regularly engaged in verbal outbursts including swear words, derogatory language and demeaning comments directed at employees of Alpine. It was also corroborated by those witnesses Mr Wallace threw things and slammed doors.

[15] Mr Carter and Ms Tahuu gave evidence they saw Mr Wallace yell at Ms Atkins in the workplace to the point of reducing her to tears. Ms Learned, who worked as a kitchen hand, gave evidence she witnessed Mr Wallace shouting at Ms Atkins on at least four occasions that included "very bad language" and shouting so loud the customers in the bar could hear.

[16] Mr Hughes managed the Springfield Hotel for a year and said he mentored Ms Atkins. He confirmed he spent a lot of time supporting Ms Atkins because Mr Wallace regularly talked down to her with no constructive feedback. Mr Hughes described Mr Wallace as someone who belittles and demoralises all who work for him despite their efforts.

[17] In November 2021, Mr Wallace sent a text to Ms Atkins asking her to come back to work to meet with him and she took Ms Tahuu with her as a support person. Ms Atkins was not advised of the right to representation and nor was she advised there were concerns or of any specific matters causing concern before the meeting. Ms Atkins' recollection of that meeting was of Mr Wallace rambling about an allegation she was spreading rumours about him. He told her she was to be suspended for three days and when she returned, he called another meeting.

[18] At the next meeting for the first 30 minutes Ms Atkins recalled Mr Wallace talked about his work in Australia as an executive chef and he raised the issue of her speaking negatively again. Ms Atkins said she denied that, but he would not let her say much because he kept talking over her. Mr Wallace told her a friend of his had food

poisoning from food she had cooked and that led into Mr Wallace telling her she was dismissed for gross misconduct.

[19] Ms Atkins says she knew she was dismissed at the meeting but remained unsure why other than generalised assertions above. When her representative requested her employment file Alpine provided a document that purports to be a file note recording a formal discussion with Ms Atkins. The document is undated with no information about who recorded the file note although it appears to have been written from Mr Wallace's perspective. It records Ms Atkins was allegedly sharing negative information about Alpine with numerous people, there were complaints from customers and concerns about Ms Atkins' work as a trainee cook.

[20] With regard to speaking negatively about Alpine, Ms Atkins' evidence was she gleaned this was a concern to Mr Wallace, but she was not provided with any specific detail. Ms Atkins also says no process was followed whereas the file note purports to describe a process whereby Ms Atkins was advised of the concerns, suspended while concerns were investigated and then dismissed after considering her feedback.

[21] Ms Atkins accepts she was told she was suspended between the meetings but confirmed to me the specific issues in the document were never raised with her. She is unaware of any customer complaints and was not given any specific examples other than one, an unspecified food poisoning allegation that related to a friend of Mr Wallace. With regard to general concerns about her work, Ms Atkins described a pattern of Mr Wallace frequently being dissatisfied as evidenced by his outbursts but there was never any specific information given to her about what the concerns were and little to no training to the extent her apprenticeship failed to progress. No information was given to her about what was investigated or by whom and what the outcome of any investigation was.

[22] After Ms Atkins received her final pay, she entered into a text message conversation about her unpaid holiday pay with Shelley Watson, the operations manager. Ms Atkins let Ms Watson know she was locked out of the system and could not access any of her annual leave details. Ms Watson provided some information including screenshots from the payroll system and a payroll history document.

[23] The text messages confirm Ms Atkins' employment was terminated for misconduct and that Ms Atkins would be paid out her holiday pay and one week of paid

notice. Ms Atkins did receive a final pay but remained concerned she had not received the holiday pay owed to her at the time of termination. Ms Atkins' evidence was she only took 4 days annual leave in the first year of employment so was entitled to a further 16 days over and above what she was paid out.

[24] In the course of the text conversation, Ms Watson said there were some weeks when Ms Atkins only worked 20 hours so had accrued less annual leave hours which would explain the difference. She says Ms Atkins' total annual leave hours taken added up to 217 and she was paid out a further 25 hours in her final pay.

[25] Ms Atkins gave evidence she had noted irregularities with her wages. She got into the habit of photographing her timesheets to compare them with what she was paid and on more than one occasion she said Mr Wallace reduced her hours and pay. Ms Atkins also said the payroll system was implemented during her employment. Prior to that there was no centralised system. She filled in timesheets that others approved before her hours were entered into the system.

[26] Ms Atkins responded to Ms Watson's text messages saying she was not employed part-time, she was contracted for 30 hours, and she did not have any weeks when she worked 20 hours. She said to the best of her knowledge she had taken 25 days annual leave in the second year of employment.

[27] The screenshots provided did not give Ms Atkins any detail showing what annual leave had been taken. They simply recorded Alpine's original position, that at the time her employment was terminated, Ms Atkins was owed payment for 25 hours of accrued annual leave and one weeks' notice. Ms Atkins asked for further information and appears to have been provided with a payroll history document.

[28] Ms Watson also conveyed Alpine was not required to pay Ms Atkins one weeks' notice but chose to because Ms Atkins was with them for almost two years. Ms Watson also set out in the text message conversation that all its employment contracts with Alpine were part time so there could be flexible hours as the hours available for work were expected to be less than 40 hours and there was no guarantee of any particular number of hours. She asked Ms Atkins to contact Mr Wallace if she had any further questions.

[29] Ms Watson's last communication reminded Ms Atkins she had had access to the payroll system for her entire employment and her leave balances were available with every pay slip.

Was Ms Atkins' dismissal justified?

[30] The test is whether the decision reached by Alpine to dismiss Ms Atkins, how it reached the decision, and the process it followed was what a fair and reasonable employer could have done in all the circumstances at the time, including whether it could have reasonably come to the conclusion she had committed serious misconduct.

[31] No witnesses for Alpine attended the investigation meeting to provide evidence. With no evidence about the content of the file note document or information about the veracity of that document I am not able to give it any weight. I prefer the evidence of Ms Atkins when I take into account the evidence of the other witnesses about Mr Wallace's outbursts and communication style.

[32] To the extent there were concerns about Ms Atkins work as a cook or that she had been speaking negatively about her employer, a reasonable employer could have been expected to have investigated the issues, raised them with Ms Atkins as concerns, given her an opportunity to respond and given genuine consideration to any explanations. There was no evidence of any specific issue being raised or genuine consideration given to anything Ms Atkins did say.

[33] This means I have found Alpine did not act as a fair and reasonable employer when making the decision to dismiss Ms Atkins. Without specific concerns being raised, Alpine could not reasonably have come to the conclusion Ms Atkins had committed any misconduct. Summary dismissal could not be justified in these circumstances by Alpine.

Was Ms Atkins disadvantaged in the workplace?

[34] The definition of a personal grievance includes a claim that the employee's employment, or 1 or more conditions of employment, was affected to the employee's disadvantage by some unjustifiable action by the employer.³ The action complained about is verbal abuse from Mr Wallace. The evidence of all four employees was consistent with Ms Atkins evidence that Mr Wallace regularly shouted, used swear

³ Employment Relations Act 2000, s 103(1)(b).

words and demeaning language when communicating with employees. Two witnesses confirmed they observed Mr Wallace directing this type of communication towards Ms Atkins on more than one occasion, but they could not recall specific dates.

[35] Ms Atkins' personal grievance was raised with Alpine on 19 January 2022 which means the communications she claims to have caused a disadvantage must have occurred between 19 October 2021 and her dismissal. Anything earlier will be outside the 90-day time frame.⁴

[36] Given I have accepted Ms Atkins' evidence about Mr Wallace's conduct towards her intensified over the last six months of her employment and the fact it appeared to be a continuing course of conduct right up until her dismissal, I am satisfied there was verbal abuse directed at Ms Atkins within 90 days of her raising her personal grievance with Alpine. Given the conduct described by all the witnesses was broadly consistent regarding shouting, swear words and demeaning language directed at Ms Atkins I am satisfied Mr Wallace's conduct was a breach of Alpine's implied obligation to provide a safe workplace and caused Ms Atkins to be disadvantaged in her employment.

Is Ms Atkins owed unpaid wages?

Was Ms Atkins paid correctly according to the hours she was guaranteed?

[37] Ms Atkins claims she was not paid all her guaranteed hours. This claim comes about because Ms Atkins says her IEA states she will be provided 30 plus hours of work a week. Between 9 January 2020 and 7 December 2021, Ms Atkins claims there is a shortfall from the weeks when she was paid for less than 30 hours.

[38] The text messages from Ms Watson to Ms Atkins shows Alpine believed all its employees to be on part-time contracts that were flexible because they could not guarantee 40 hours work each week. That was justification for the weeks when Ms Atkins was paid for less than 30 hours. It was also cited as part of the reason why her annual leave balance was lower than what Ms Atkins believed it was.

[39] Looking at the IEA, Ms Atkins' position is described as being part-time and clause 6.3 provided for fluctuation in work hours:

⁴ Employment Relations Act 2000, s 114.

The hours and/or days of work of part time employees may be increased or decreased by the employer in order to meet variation and fluctuations in trading patterns and labour requirements.

[40] Schedule A of the IEA then set out a summary of Ms Atkins terms and conditions. Under hours of work “30 +” was recorded in handwriting and typed underneath are the words “flexible hours as required by the employer. Hours may vary from week to week”.

[41] For an employer to be able to have the flexibility to only offer an employee the hours as required by the employer as described by Ms Watson in the text messages with Ms Atkins, the employment agreement between the parties would need to be a casual agreement. Casual employment in the strict sense is employment where the employee is employed when and if needed. There is no obligation on the employer to offer employment and no obligation on the employee to accept any particular engagement. The employment ends at the conclusion of each engagement.

[42] However, in some situations the employment may acquire a strong degree of continuity and regularity and may be held to shift from casual to permanent. In the context of this case, the inclusion of 30 plus hours in Ms Atkins IEA suggests it was not a casual agreement. In any event, the fact, Ms Atkins’ work pattern was regular, she predominantly worked 30 or more hours and that Alpine dismissed Ms Atkins also supports the conclusion it was a permanent part-time agreement and not a casual agreement. If there was any flexibility derived from clause 6.3 of the IEA, it can only be for the hours of work over and above the 30 hours specified.

[43] Based on the payroll history document I have calculated Ms Atkins is owed 140.85 hours in wage arrears in respect of periods she was paid for less than 30 hours per week. At \$20.00 per hour this amounts to \$2,817.00 in wage arrears.

Minimum wage arrears

[44] Ms Atkins’ IEA provided she would be paid the minimum wage. She also claims wage arrears for the period 9 January 2020 to 5 May 2020 in the amount of \$293.75 because she says she was paid \$18.00 per hour instead of the applicable minimum wage rate of \$19.00 per hour.

[45] The applicable minimum wage rate for period 9 January 2020 to 31 March 2020 was \$17.70 and Ms Atkins was paid \$18.00 per hour during that period. From 1 April

2020 to 1 April 2021 the rate was to \$18.90. According to the payroll history document, Ms Atkins' hourly rate increased to \$19.00 per hour from 13 March 2020. This means I find there was no minimum wage underpayment because during that period, she was paid just above the applicable minimum wage rate.

Annual leave

[46] Ms Atkins answered questions from me at the investigation meeting regarding the process for recording hours and leave. Alpine used a payroll system called ipay that was introduced during Ms Atkins' employment. Employees did not enter their own details into the system, rather hours and leave were recorded on time sheets and diaries and others entered them in the system.

[47] Based on the text messages between Ms Watson and Ms Atkins, the parties differ about how much annual leave Ms Atkins had owing to her at the end of her employment. Ms Atkins says she was owed 16 days accrued annual leave but she only received payment for 25 hours in her final pay. In confirming she used 25 days leave over the second year, Ms Atkins accepts she has used up the second years annual leave entitlement plus 5 days from the previous year.

[48] Ms Atkins was able to recall and describe the leave she had taken and in the absence of any evidence to the contrary I am willing to accept that evidence and that there could also have been irregularities with the data entered into the ipay system. I have used Ms Atkins' payroll history and Inland Revenue Te Tari Taake record of earnings to establish she worked an average of 39.17 hours in the last 12-months prior to her termination. Noting her evidence, if she took four days leave in the first year, she had 16 days remaining for the first year. I reduce this by five days to 11 days on the basis she took 25 days in the second year (five more than her annual accrual for her second year). Then given she only worked 10 months of the second year, I reduce that by another 3 days and find she was owed seven days annual leave. Ms Atkins is owed \$1,120.00 in holiday pay arrears.

Remedies

[49] Ms Atkins has been successful in her claim for unjustified dismissal and disadvantage so is entitled to a consideration of remedies. She may also recover holiday pay and wage arrears for annual leave accrued and the short fall in her wages for guaranteed hours.

Lost wages

[50] Ms Atkins claims lost wages. She was dismissed verbally on 19 November 2021 and her final pay included one week's notice so 26 November 2021 was her last day of employment. Ms Atkins found new employment and started work on 7 December 2021 which means she was without work for eight days.

[51] Section 123 (b) of the Act provides for the reimbursement of a sum equal to the whole or any part of the wages lost because of the grievance which has been established. This needs to be considered with s 128 of the Act which deals with lost remuneration.

[52] Section 128 (2) of the Act provides the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser.

[53] I am satisfied financial loss flowed from the decision to dismiss Ms Atkins and it would be appropriate to make an order for payment of eight days ordinary time remuneration amounting to \$1,280.00.

Compensation under s 123(1)(c)(i) of the Act

[54] Ms Atkins seeks compensation in the amount of \$25,000.00 under s123(1)(c)(i) of the Act. Compensation is claimed for humiliation, loss of dignity and injury to feelings. Ms Atkins gave evidence, in particular of how Alpine's actions affected her self-confidence, her fearfulness when she was approached by Mr Wallace and the length of time it took for her to recover after moving to a new employment environment that confirmed she was impacted by the actions of her employer. I was provided with information confirming Ms Atkins sought medical advice and was prescribed medication for anxiety for work stress.

[55] Given my findings above, considering the distress experienced from both the summary dismissal and the disadvantage, the impact on Ms Atkins and the general range of awards in similar cases, I agree an appropriate award for compensation under s 123(1)(c)(i) of the Act is \$25,000.00.

Contribution

[56] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. In this case, in the

context of a summary dismissal for matters that did not reach the threshold of serious misconduct, with no fair and reasonable process followed, I do not find that Ms Atkins' conduct contributed to the situation.

Request to indemnify Ms Atkins for cost of seeking compliance

[57] Ms Atkins representative sought an order to the effect that should Alpine owe any money to Ms Atkins, Alpine would indemnify Ms Atkins from and against all costs and disbursements incurred by the Applicant in recovering the debt.

[58] The Authority does not have jurisdiction to make such an order. There are statutory mechanisms in the Act that are available to the parties in the event any orders of the Authority are not complied with in the future.

Outcome

[59] Ms Atkins' claims that her dismissal was unjustified and that she was disadvantaged in her employment have been successful. I order that Alpine 182 Limited is to pay Abigail Atkins:

- (a) lost remuneration for the period of eight days in the amount of \$1,280.00 (gross);
- (b) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of \$25,000.00;
- (c) annual leave arrears under s 131 of the Act in the amount of \$1,120.00; and
- (d) wage arrears for the shortfall in guaranteed hours under s 131 of the Act of \$2,817.00.

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Atkins may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Alpine 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.

[61] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Sarah Kennedy-Martin
Member of the Employment Relations Authority