

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 243
3110832

BETWEEN TRUDI DICKSON
 Applicant

AND STARTING IN FENCOURT
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrea Dunseath, counsel for the Applicant
 Dean Rangihuna, advocate for the Respondent

Investigation Meeting: 9 March 2021, in Hamilton

Date of Determination: 09 June 2021

DETERMINATION OF THE AUTHORITY

- A. Starting in Fencourt Limited is to pay Trudi Dickson compensation of \$15,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, by 9 July 2021.**
- B. Starting in Fencourt Limited is to pay Trudi Dickson reimbursement of \$2,060.00 pursuant to s 123(1)(b) of the Employment Relations Act 2000, by 9 July 2021.**
- C. Starting in Fencourt Limited is to Pay Trudi Dickson arrears of \$97.20 pursuant to s 131 of the Employment Relations Act 2000, by 9 July 2021.**
- D. Starting in Fencourt Limited is to pay a penalty of \$1,000.00 for breaching section 65 of the Employment Relations Act 2000; with \$500.00 to the Employment Relations Authority to be paid into a Crown**

Bank Account; and \$500.00 payable to Trudi Dickson. These amounts are payable by 9 July 2021.

E. Starting in Fencourt Limited is to pay a penalty of \$200.00 for breaching section 134 of the Employment Relations Act 2000; with \$100.00 to the Employment Relations Authority to be paid into a Crown Bank Account; and \$100.00 payable to Trudi Dickson. These amounts are payable by 9 July 2021

F. Starting in Fencourt Limited is to Pay Trudi Dickson costs of \$2,321.56, by 9 July 2021.

Employment relationship problem

[1] Starting in Fencourt Limited (SIFL) owns and operates a business called Flaggies Café and Bar, located in Hamilton. Dean Rangihuna is the sole director and shareholder of SIFL. Trudi Dickson worked part-time for SIFL as duty manager from February 2019 until she resigned in October 2019.

[2] Ms Dickson says that she was constructively dismissed, as a result of events on and before 15 October, so has a personal grievance of unjustified dismissal. Ms Dickson also says that her employment was affected to her disadvantage by unjustified actions by SIFL on and before 15 October. Remedies of lost remuneration, lost benefits of her Kiwisaver employer contributions and compensation of \$15,000.00 are claimed.

[3] Ms Dickson says that SIFL did not pay her all the wages she was due for the time she had worked. Arrears of \$90.00 gross plus holiday pay and Kiwisaver are claimed. A penalty is sought for the failure to pay wages. Ms Dickson says that SIFL never provided her with a written employment agreement, contrary to the Employment Relations Act 2000 (ERA). Ms Dickson says that SIFL failed to provide her with a safe work environment and deliberately breached good faith. Penalties and an order that a portion of the penalties be payable to Ms Dickson are sought for the breach of the ERA.

[4] In reply, SIFL disputes that it constructively dismissed Ms Dickson. It says that Ms Dickson has embellished the facts, but admits that it did not provide a written employment agreement. SIFL says it paid all wages it owed to Ms Dickson.

[5] Despite mediation, matters were not resolved.

[6] Ms Dickson lodged and served statements of evidence for herself and two others by 5 February 2021, as directed. SIFL did not lodge and serve any statements of evidence, contrary to directions. However, Mr Rangihuna attended the investigation meeting, gave some evidence and answered questions. Mr Rangihuna left the meeting after giving his evidence, so did not provide any submissions.

[7] The following issues arise:

- (a) Was Ms Dickson unjustifiably dismissed?
- (b) Alternatively, was Ms Dickson's employment affected to her disadvantage by unjustified actions by SIFL?
- (c) If Ms Dickson has a personal grievance, what remedies are established?
- (d) Is SIFL liable to a penalty for not providing Ms Dickson with a written employment agreement?
- (e) Are arrears of wages owed to Ms Dickson?
- (f) If yes, is SIFL liable for a penalty?
- (g) Did SIFL fail to provide Ms Dickson with a safe work place, making it liable to a penalty?
- (h) Were there breaches of good faith by SIFL, making it liable to a penalty?
- (i) What penalties should be imposed, if any?
- (j) Should costs be ordered?

Was Ms Dickson unjustifiably dismissed?

[8] There was a meeting between Ms Dickson and Mr Rangihuna after work on Tuesday 15 October 2019. When she got home after the meeting, Ms Dickson sent Mr Rangihuna an email as follows:

Dean Rangihuna

I Trudi Dickson officially resign from my position at Flaggies Café & Bar, Effective immediately as I have no work contract.

I refuse to be verbally confronted in front of customers.

After our meeting/discussion last night regarding other staff members and no apology after you told me off you fuck on Monday I feel I have no other option.

I will return the work key and request my vest back.

Trudi Dickson

[9] Mr Rangihuna responded on Wednesday morning at 8.00am:

I don't accept this resignation from you. I believe you have the experience and ability to right the things we discussed. I expect to see you on Thursday. Also I would like to clarify that during our discussion there was an apology regarding Monday. Right before I told you that nobody likes being harangued publicly, I apologised for the indiscretion.

Regards

Deans

[10] At 12.31pm on Wednesday Ms Dickson replied to Mr Rangihuna's email:

I have the experience and ability to recognize your email is incorrect.

There was no apology your response was nobody likes it Trudi and then you accused me of doing that to staff members myself. The word sorry or I apologize never occurred throughout our discussion. You also accused me of bullying staff and stated that I was not worth what you are paying me stating \$15 would also be too much. You implied that the two staff members did not like working with me stating with such a small staff basis I was the problem citing time off and replacement cover had my son in law not committed suicide that the time off would not have been necessary as you were aware.

Under no circumstances do I feel comfortable working in the environment you have created were I am sworn at belittled in front of customers sworn at and called a c_t in messages you have left in the diary I was open for discussion yesterday but after work discussion was more like a personal attack and I felt bullied by you Dean. I told you at the end of the discussion I would email you my resignation to which you replied I can't tell you what to do at 52 do what you need to do this is wasting my time so I am shocked at your email reply.

I have sought legal advice and as I have no employment contract my resignation is effective immediately.

Trudi Dickson.

[11] I will resolve the different accounts conveyed in these messages, but should first set out some background events.

[12] I accept Mr Rangihuna's evidence that he has been involved in businesses for about 20 years, having employed between 100 – 150 staff over that time. His evidence is that many of his diary entries communicating with staff are of the type to which Ms Dickson took objection, so that there was nothing special in the entries directed to her. There is no reason to doubt Mr Rangihuna's evidence that the manner of his communication to Ms Dickson matched the manner of his communication to others over the years. That does not assist SIFL in defending the present claims by Ms Dickson.

[13] From late May 2019, several non-work events affected Ms Dickson and for which she required time off work at short notice. The events included a bereavement, a brief illness and a medical emergency. Accommodating Ms Dickson's absences at short notice was no doubt inconvenient for the business. However, any reasonable employer would have supported their employee in the circumstances. Ms Dickson's evidence is that the attitude of Mr Rangihuna and another employee towards her changed (becoming negative) as these events arose. No evidence from this other employee was provided by SIFL. To the extent he mentioned the bereavement in his evidence, Mr Rangihuna was critical of Ms Dickson. There is also no reason to doubt Ms Dickson's evidence that, despite her communication to Mr Rangihuna that she would be fit to work on a particular Friday, he was critical of her for not communicating and told her not to bother coming in on that day.

[14] There is a diary entry dated 12 September in evidence, written by Mr Rangihuna as follows:

Why am I paying you guys to count when you can't! Sort it out or fuck off!!
Till over \$85!! Bullshit!!

[15] Other diary entries were written by Mr Rangihuna on 7 October and 10 October as follows:

Trudi, Float \$522!! I don't pay a duty manager to manage if they can't count!!
This gets sorted or its gets official. I'm over paying for something I ain't getting.

Trudi, if you need help using a calculator, ask!! Float Wednesday morning was \$519!! Don't assume anything. I don't make fuck ups with your money so don't make it with mine.

[16] SIFL's reply (repeated in Mr Rangihuna's evidence) that Ms Dickson's case is "enhanced by grabbing bits of messages from my diary and embellishing those facts to create a case". However, the evidence establishes that Mr Rangihuna often communicated in a vulgar and offensive manner. Ms Dickson was understandably offended by the text and tone of these messages.

[17] On 7 October, Ms Dickson needed to attend to a medical emergency affecting her husband. Ms Dickson rang Mr Rangihuna to alert him to the likelihood that she would not be able to get to work. The need to cover Ms Dickson's duty interrupted Mr Rangihuna's plans. When Ms Dickson attended work on 8 October, she saw the 7 October diary message.

[18] There was a txt exchange between Ms Dickson and Mr Rangihuna on Friday 11 October. Ms Dickson said that kegs had arrived and asked if he would like any in the chiller. Mr Rangihuna replied "Yes please" and Ms Dickson asked "Both?" Mr Rangihuna replied "Use your eyes maybe? You've run a bar before I thought? I shouldn't have to tell you." Ms Dickson's evidence is that Mr Rangihuna usually told them when kegs were due and gave instructions about what to do with them. He had not on that occasion, hence her txt message asking for instructions. Mr Rangihuna did not dispute Ms Dickson's evidence and I accept it. The critical tone in Mr Rangihuna's txt was understandably upsetting to Ms Dickson.

[19] On 14 October, Ms Dickson was at work. Mr Rangihuna messaged Ms Dickson, but as she was attending to other tasks, she did not respond immediately. When Mr Rangihuna arrived, he said to Ms Dickson "Is your phone not working Trudi?" Ms Dickson said "Yes", and Mr Rangihuna said "Thanks for the reply!" Mr Rangihuna then said to Ms Dickson "If you've got a fucken problem, fucken say so." Ms Dickson replied "I will". A customer said to Ms Dickson "That was embarrassing, but there's always one, love". Ms Dickson responded "Sorry, yes very embarrassing". Mr Rangihuna, having overheard the supportive comment from the customer, made a sarcastic comment to Ms Dickson. Ms Dickson challenged him about raising matters in front of customers. Mr Rangihuna became angry, picked up Ms Dickson's chilly

bag, pushed it towards her and said “Off you fuck, go on off you fuck.” Ms Dickson left work immediately, saying “You need to learn how to treat people”.

[20] Mr Rangihuna messaged Ms Dickson the following morning (15 October), asking “am I expecting you at work today?” Ms Dickson asked “...so when you said off you fuck you were not firing me?” Mr Rangihuna responded “Nope. But we do need to chat and tempt to fix things here.” Ms Dickson replied “I will be at work.”

[21] Ms Dickson reported to work at midday and when Mr Rangihuna arrived he said they would meet after work. During the meeting, Mr Rangihuna criticised Ms Dickson, saying that she was not worth the \$20 per hour he was paying her, and at present was not even worth \$15 per hour. He accused Ms Dickson of bullying staff and said that none of the staff liked working with her, they covered while Ms Dickson was away but Ms Dickson did not reciprocate. Ms Dickson said she did not like being belittled in front of customers, a reference to the incident from the day before. Mr Rangihuna accused Ms Dickson of doing that to others. Ms Dickson said she did not appreciate the diary notes that she was tired, that might be why the till was over and that she probably should have had the week off. Mr Rangihuna replied “Don’t you think you have had enough time off?” He said again “It’s all about you”. Ms Dickson tried to apologise, but Mr Rangihuna became angry. Mr Rangihuna said he had better things to do with his time and was entitled to run his business the way that he wanted. Ms Dickson said she would solve his problem and would email him her resignation. Mr Rangihuna said “I can’t tell you what to do at 52 Trudi, you do what you gotta do.” Ms Dickson confirmed that Mr Rangihuna wanted her to lock the door, which she did as she left.

[22] The foregoing gives context for the email exchanges between Ms Dickson and Mr Rangihuna, set out above. It is based on Ms Dickson’s evidence, which I accept.

[23] An employee’s resignation, induced by a breach of duty by the employer, has long been regarded as capable of falling within the categories of constructive dismissal for the purposes of a personal grievance claim.¹

[24] Ms Dickson announced her resignation to Mr Rangihuna at the end of the meeting on 15 October and followed up by her email that evening. Ms Dickson fully

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

explained her motivation for her resignation in her by email the following day at 12.31pm. I find that the emails express the reasons for Ms Dickson's resignation.

[25] SIFL did not produce evidence, other than Mr Rangihuna's assertions, to support its claim that Ms Dickson had alienated herself from other staff and clients, had a bullying and grumpy demeanour or the other assertions, so as to orchestrate her own demise. Mr Rangihuna's assertions lack coherence and plausibility. I do not accept them.

[26] I find that SIFL breached its duty to not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage its duty of trust and confidence owed to Ms Dickson, through the tone and text of Mr Rangihuna's diary and text messaging, his angry confrontation with Ms Dickson, his baseless accusations about Ms Dickson, his belittling of Ms Dickson in front of customers, his telling Ms Dickson to "off you fuck" and his failure to apologise to Ms Dickson. I find that these breaches of duty, taken together, were sufficiently serious to make it reasonably foreseeable that Ms Dickson would not be prepared to continue working under those conditions. Ms Dickson also made it apparent that she was not prepared to tolerate Mr Rangihuna's abusive, belittling and bullying behaviour, yet he persisted.

[27] SIFL's actions and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Ms Dickson was unjustifiably dismissed by SIFL and has a personal grievance.

[28] It is not necessary to consider the alternative grievance claim of unjustified disadvantage as it is based on the same facts.

What remedies are established?

[29] As explained, Mr Rangihuna left the investigation meeting after giving some evidence, despite knowing that it would continue. During her submissions, counsel sought to amend the claim for compensation made under s 123(1)(c)(i) of the Employment Relations Act 2000. I declined leave to amend the claim, as SIFL would not have had notice of the amendment.

[30] Ms Dickson characterised her experience as "horrific". Ms Dickson's physical and mental health has been "impacted" as a result of her grievance, causing her not to be the "happy person" she had been previously. It has caused Ms Dickson to be tearful.

Ms Dickson was out of work for about 2 months following the dismissal, so there was financial pressure on her as a result. The loss of income affected her ability to provide some family financial support at the time. This upset Ms Dickson. Stress attributable to the dismissal has been identified as a likely cause of the condition Ms Dickson was diagnosed with in October 2019. I find that compensation of \$15,000.00 as claimed is required as a remedy for these proven effects. There will be an order for that amount.

[31] Ms Dickson commenced alternative employment in the week starting 18 November 2019. Ms Dickson lost remuneration as a result of her grievance from 15 October 2019 until 18 November 2019, a period of 4 weeks. For part of that time, Ms Dickson was diagnosed with a condition and was medically unfit for work. However, that condition arose directly from the circumstances of the established personal grievance, so the lost wages are recoverable in the present action. Ms Dickson worked for SIFL at least 25 hours per week at \$20.00, so received at least \$500.00 per week. On the evidence available, I find that Ms Dickson's lost wages of \$2,000.00 (gross). Further, Ms Dickson lost other money payable, being SIFL's contribution to her Kiwisaver account. I increase the \$2,000.00 by 3% to cover this loss. There will be an order for \$2,060.00 to cover reimbursement.

[32] I must consider whether there was any blameworthy contribution by Ms Dickson to the circumstances giving rise to the grievance, and reduce the remedies appropriately to recognise that. There was no blameworthy behaviour by Ms Dickson that contributed to SIFL's breach of duty.

Is SIFL liable to a penalty for not providing Ms Dickson with a written employment agreement?

[33] SIFL admits not providing Ms Dickson with a written employment agreement. I find that SIFL breached s 65 of the Employment Relations Act 2000 and is liable to a penalty.

Are arrears of wages owed to Ms Dickson?

[34] I accept Ms Dickson's evidence that she worked 18 hours in the week ending 20 October 2019. That includes half an hour to cover the meeting with Mr Rangihuna on 14 October. Ms Dickson was only paid for 13½ hours, so there is a shortfall of \$90.00, plus holiday pay, a total of \$97.20. Additionally, SIFL should have paid for

Ms Dickson's benefit, a 3% contribution to her Kiwisaver account. That takes the arrears of wages or other money payable to a total of \$100.12. There will be an order for that amount.

Is SIFL liable for a penalty as a result of the arrears?

[35] Under s 134 of the Employment Relations Act 2000, every party to an employment agreement who breaches the agreement is liable to a penalty under the Act.

[36] In the absence of a written employment agreement setting out the time for payment of wages, I find that a term was implied that all wages would be paid weekly. The final wages were paid following the pay period ending 20 October 2019. Because SIFL did not then pay Ms Dickson her wages for all the time she had worked in that pay period, I find it breached the implied term of the employment. I find that SIFL is liable to a penalty under section 134 of the Act.

Did SIFL fail to provide Ms Dickson with a safe work place, making it liable to a penalty?

[37] The claim is based on a term implied into the employment agreement requiring the employer to provide a safe work place. However, the claim was not pursued in light of my indication that the personal grievance was made out.

Were there breaches of good faith by SIFL, making it liable to a penalty?

[38] A party to an employment relationship who fails to comply with the statutory duty of good faith is liable to a penalty under the Employment Relations Act 2000 if the failure was deliberate, serious and sustained. Parliament has set a high bar for the imposition of a penalty under this section.²

[39] Here, Mr Rangihuna's actions on behalf of SIFL were deliberate. Taken together, Mr Rangihuna's actions must be regarded as serious. However, the evidence does not support a finding that all of Mr Rangihuna's conduct was sustained. Ms Dickson's evidence is to the effect that Mr Rangihuna's conduct escalated after her absence on 7 October. Diary entries before then are not sufficient on their own to meet the high bar.

² *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112

[40] While SIFL breached its duty of good faith, it falls short of being sufficient to render SIFL liable to a penalty.

What penalties should be imposed, if any?

[41] To summarise, SIFL is liable for a penalty for its failure to provide a written employment agreement and to a penalty for its breach of the implied term to pay wages.

[42] The breach of s 65 of the Act was intentional. Mr Rangihuna considered he did not need to comply with the law. No specific loss was suffered by Ms Dickson, but SIFL avoided the cost of compliance with its statutory obligation. There is no evidence that SIFL has taken any steps to mitigate or remedy this breach. No specific vulnerability issue is relevant. SIFL has not previously been found to have engaged in similar conduct.

[43] The breach of s 134 of the Act was inadvertent. Mr Rangihuna arranged Ms Dickson's final pay without delay, but did not correctly tally her hours of work in the final week. The loss to Ms Dickson was relatively minor, amounting to about 3% of her final pay. SIFL took no steps to mitigate the effect of the breach when the issue was raised, as it disputed liability. No specific vulnerability issue is relevant. SIFL has not previously been found to have engaged in similar conduct.

[44] SIFL's maximum liability for the breach of s 65 of the Act is \$20,000.00. While the breach should attract an element of condemnation and deterrence, the penalty should be at the lower end. There is no specific evidence about SIFL's ability to pay a penalty immediately or over time. I will fix a penalty of \$1,000.00 as the appropriate level.

[45] SIFL's maximum liability for the breach of s 134 of the Act is \$20,000.00. A shortfall in the payment of wages, even inadvertently of a minor amount due, should attract some condemnation and deterrence. I see no basis on which I could properly globalise this breach and treat it as covered by the penalty imposed in respect of the breach of s 65 of the Act. However, the circumstances of the breach call for a penalty at a lower level than for the breach of s 65 of the Act. I will fix a penalty of \$200.00 as the appropriate level, as a proportionate response to the amount of arrears and the harm to Ms Dickson.

[46] I am asked to order a proportion of the penalty to be payable to Ms Dickson. I find that Ms Dickson was affected by both breaches. Non-compliance by SIFL with

the statutory obligation to provide a written employment to Ms Dickson at the formation of the employment relationship left her on an uncertain footing in her attempts to deal with Mr Rangihuna. The later personal grievance does not remedy the uncertainty that persisted throughout the relationship. Equally, Ms Dickson was in a position of reliance on SIFL to comply with its contractual obligation to properly and promptly pay her wages when due. An order for payment by this legal action does not remedy the breach of trust. I will order that 50% of each penalty is payable to Ms Dickson.

Should costs be ordered?

[47] Costs ordinarily follow the event. There is no reason in this present case not to apply this principle.

[48] The starting point in the Authority is usually the application of a daily tariff approach. Counsel submits that there should be an uplift from the amount that would apply under that approach. However, an award of costs should not be an expression of disapproval about a party's conduct. Here, the matter took less than a half-day. I am not able to say that SIFL through any specific conduct by Mr Rangihuna added to Ms Dickson's costs, assessed on a time basis. I assess costs at a half-day based on the daily tariff for a first day. There will be an order of \$2,250.00 in costs, plus a further \$71.56 to cover the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority