



agreement, that her requests for payslips were ignored and that Mr Burnnand bullied and harassed her during the employment.

[3] Matters were not resolved through mediation and Ms Hill lodged the present application in the Authority.

[4] Ms Hill is claiming reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to her feelings as a result of her personal grievance of unjustified dismissal. There is a claim for costs. No other remedies are claimed.

[5] Mr Burnnand in reply disputes Ms Hill's claims and says that she resigned from her employment on 1 January. He provided a statement in support of that position. I considered that further mediation would not contribute constructively to resolving the matter. Arrangements were made for an investigation meeting. This determination resolves the employment relationship problems, as described in Ms Hill's correspondence and the statement of problem.

[6] To resolve the problem, the following issues arise:

- (a) What happened on 1 January 2020?
- (b) What happened on 2 and 3 January 2020?
- (c) As a result of these exchanges, was Ms Hill dismissed?
- (d) If Ms Hill was dismissed, was it justified?
- (e) If Ms Hill was unjustifiably dismissed, what remedies are appropriate?

#### **What happened on 1 January 2020?**

[7] Ms Hill attended work as usual. In summary, Ms Hill says that she went to the kitchen, at a customer's request, to ask how far away his order was from being ready. Ms Hill says that Mr Burnnand yelled at her. Christine Lewis is Mr Burnnand's partner and works in the kitchen as a cook. Ms Hill says that Ms Lewis also began to argue with her. Ms Hill returned to the bar. Mr Burnnand then came into the bar. Ms Hill's evidence is that she said "John, you can't speak to staff like that." Mr Burnnand replied "If you don't like it, you

know what you can do.” Ms Hill’s evidence is that she found this intimidating and it scared her. Ms Hill said to Ms Lewis “I’m out”, made a time-out sign with her hands and left.

[8] The following is taken from a typed “FULL AND FACTUAL ACCOUNT” of events written and signed by Ms Lewis, signed by Mr Burnnand and Beau McKay.<sup>1</sup> At about 5.30pm Ms Hill brought two orders into the kitchen. Ms Lewis arranged for Mr McKay to prepare one order, while she started with the second order (M’s order). Mr McKay completed the first order and took it out to the bar. Approximately 10 minutes later, Ms Lewis took the second order out. About 5 minutes later, Ms Lewis heard Ms Hill come into the kitchen and say something to Mr McKay. Ms Hill’s “tone” made Ms Lewis ask if there was a problem. Ms Hill gave Ms Lewis a “filthy look” and said she was talking to Mr McKay, then “demanded” to know why M’s order had not been completed first, since it came in first. After that, Ms Hill came into the kitchen frequently asking about orders. Eventually, Mr Burnnand followed Ms Hill from the bar, as she was “demanding” to know why an order was not yet ready. Mr Burnnand said they were not running a takeaway bar, then “an argument ensued”. Ms Hill and Mr Burnnand left the kitchen. A short while later, Ms Hill came back to the kitchen, said “That’s it ... I’m outta here”. Ms Lewis said “Ok, tataa” and Ms Hill left.

[9] I need to assess the evidence, to the extent of material differences.

[10] Ms Hill took care when giving her evidence to distinguish between what she personally knew and could recall and what she did not recall. Mr Burnnand was not as careful, sometimes relying on what he had been told about events by others, but without identifying that until challenged. Ms Lewis tended to be supportive of Mr Burnnand’s position. Mr McKay did not give evidence. I was told that Mr Burnnand does not have his contact details and he no longer works at the business. There is also a statement dated 26 January 2020 signed by the chef (Vicki Pooley). Ms Pooley was present on 3 January 2020. I was told by Mr Burnnand that Ms Pooley could not be contacted to answer questions as it was her day off. The need for witnesses to be available to answer questions had been mentioned prior to the investigation meeting. In light of their non-attendance, I place no weight on

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<sup>1</sup> Ms Lewis told me in evidence that she drafted this statement on or about 26 January 2020.

Ms Pooley's statement or on Mr McKay's apparent agreement to the abovementioned account.

[11] There is a difference in recollection between Ms Hill and Ms Lewis about the first two orders but it does not need to be resolved. On Ms Lewis' account, they were both delivered to customers by about 5.50pm. The later "argument" was not until 6.30pm (Mr Burnnand's and Ms Hill's recollection) or 7.30pm (Ms Lewis' initial recollection). I note Ms Lewis revised her evidence after she checked with Mr Burnnand about the time. The earlier events are of little significance.

[12] Ms Lewis' evidence is that they became busy with orders. There is no reason to doubt that evidence. Ms Hill's evidence is that she was asked by a customer about his order. She went to the kitchen and asked Mr McKay. Later, Ms Hill was asked by another customer about his order, so she returned to the kitchen to ask Mr McKay. There is no reason to doubt this evidence. Ms Lewis in her evidence repeated the words from the signed account that "Her visits to the kitchen didn't let up". However, Ms Lewis could not tell me how many "visits" Ms Hill had made to the kitchen. I accept Ms Hill's evidence that she responded to customer inquiries and did not go into the kitchen otherwise. The account and the evidence for Mr Burnnand probably exaggerates the frequency of Ms Hill's visits to the kitchen.

[13] Ms Lewis referred to Ms Hill's demeanour on the last visit to the kitchen. Her evidence is that Ms Hill stood with folded arms, impatiently tapping her foot. I find this evidence is also an exaggeration. Ms Lewis in evidence said that Ms Hill stayed 5 minutes, rather than returning to the bar to help Mr Burnnand. If that had been the case, a simple request or instruction for Ms Hill to return to her bar work would have resolved the point.

[14] Ms Hill's evidence is that she spoke to Mr McKay, as Ms Lewis was "quite uptight" and "unapproachable". Ms Hill had no reason to be impatient with Mr McKay. I do not accept that there was anything improper with Ms Hill's demeanour or the time she took to query Mr McKay about the customer's order.

[15] It is common ground that Mr Burnnand came into the kitchen from the bar. Mr Burnnand accepted the words but disputed the tone attributed to him. He said:

We are not a bloody Fish and Chip Shop we are a Restaurant and you need to tell them they will get them when they bloody get them.

[16] Ms Lewis' evidence is that she "gave him the nod as to say I had had enough of this", before Mr Burnnand started to speak. Ms Lewis was stressed by it being busy and considered Ms Hill's queries on behalf of customers were an unwelcome interruption. I find this set the tone for Mr Burnnand. Given Mr Burnnand's words, him stepping in for Ms Lewis and Ms Hill's reaction, it is likely that Mr Burnnand was "yelling abusively" at Ms Hill, as claimed by her. I also accept Ms Hill's evidence that Mr Burnnand hit his fist into the palm of his other hand while saying this. This gesticulation was probably for emphasis, rather than intended as threatening towards Ms Hill.

[17] Mr Burnnand and Ms Lewis say "an argument ensued". However, it is unlikely that Ms Hill reacted to Mr Burnnand by arguing with him. It is more likely that Ms Hill reacted as she claims by putting her hand up, telling him to stop stressing, to calm down and by explaining that she was only asking how far away the order was. It is common ground that Ms Hill then went back to the bar. It is also common ground that Mr Burnnand also went back to the bar.

[18] Back in the bar, Mr Burnnand remonstrated with Ms Hill. Ms Lewis did not hear the exchange. Ms Hill's evidence, which I accept, is that Mr Burnnand in front of patrons told her she should have listened to him. I also accept that Mr Burnnand again hit his fist into the palm of his hand. Mr Burnnand asked Ms Hill aggressively "Where is he", referring to the customer. I accept Ms Hill's evidence that she told Mr Burnnand to stop talking to staff like that. Mr Burnnand accepted in evidence that he said to Ms Hill "If you don't like it, you know what you can do" or something to that effect. I accept that Ms Hill was upset and decided to leave the premises.

[19] Ms Hill left the bar and went into the kitchen. Her bag and jacket or coat were in the store-room off the kitchen and she went to retrieve them and exit out the kitchen. Ms Lewis' evidence is that Ms Hill said "That's it... Im outta here". Ms Hill's evidence is that she said

“I’m out” and made a “time out” sign with her hands. Ms Lewis in evidence was emphatic that she did not see the “time out” gesticulation. Ms Lewis bolstered that evidence by telling me that Ms Hill had her bag in one hand and her coat in the other. The difference in evidence about the actual words and the gesture adds little to an understanding of what happened on 1 January. For present purposes, I will assume that Ms Hill said “That’s it... Im outta here” as she left.

[20] Ms Hill left work at about 6.30pm, an hour or two earlier than otherwise would have been the case.

### **What happened on 2 January 2020?**

[21] It is common ground that the next contact between Ms Hill and Ms Burnnand was the following day on 2 January. Ms Hill arrived at the workplace, early for her shift that night. Ms Lewis was not present. There are no other witnesses to the relevant exchange. However, Ms Hill recorded the exchange and the recording is now in evidence. I arranged a transcript.

[22] Ms Hill asked if she could have a word with Mr Burnnand. She said that she did not appreciate him and Ms Lewis yelling at and abusing her the previous night. Mr Burnnand denied they had done that. Ms Hill said that Mr Burnnand had told her that if she did not like the way she had been spoken to, she knew what to do. Mr Burnnand denied saying that. Ms Hill asked for a guarantee that “you’re not going to speak to me like shit”. Mr Burnnand denied doing that. He then said “I told you, if you don’t want to be here, don’t be here.” Ms Hill said it was about the way Mr Burnnand spoke to his staff. Mr Burnnand then said “Go home please and don’t annoy me”. Ms Hill asked and Mr Burnnand said he was not firing her but was telling her to go home. Mr Burnnand said that Ms Hill was trying to “catch” him, Ms Hill asked “at what?” and Mr Burnnand said “Just go away”. He repeated that several times. Ms Hill said it was her rostered shift. Mr Burnnand told Ms Hill to go away and “leave me alone because your attitude’s too bad for you to work tonight”. There was an exchange about what had been said the previous night. Mr Burnnand told Ms Hill to get out, leave the place and that she was starting to really annoy him. Ms Hill again asked for a guarantee that he would not treat her “like shit”. The exchange ended with Mr Burnnand

saying “You told me last night you were going, so you’ve gone as far as I’m concerned.” Ms Hill left.

### **What happened on 3 January 2020?**

[23] The next contact was the following day on 3 January. Ms Hill again arrived at the workplace, early for her shift that night. There was again an exchange between Mr Burnnand and Ms Hill. Ms Lewis was not present. As explained, I give no weight to a signed statement in Ms Pooley’s name. Relevant exchanges with Mr Burnnand were recorded in any event.

[24] It is not disputed that Ms Hill was in the kitchen, in work attire. Mr Burnnand came into the kitchen. Ms Hill asked Mr Burnnand if she could have a chat. Mr Burnnand said he did not have time and for her to “go away”. Ms Hill said it was her workplace. Mr Burnnand said that Ms Hill had told him she was finishing “so go away”. Ms Hill said “I didn’t say I was finishing”. Mr Burnnand left. Ms Hill had a brief exchange with another person, then Mr Burnnand returned. Ms Hill said she had not finished speaking to him. Mr Burnnand told her to “Please go”, Ms Hill said she was not going away and he said “I’ll get the Police”. Ms Hill told Mr Burnnand to get the Police and she would see him in Court. Ms Hill left shortly afterwards.

[25] Ms Hill in evidence says that Mr Burnnand slammed the door in her face, at some point in their exchange. In evidence, Ms Lewis attributed the door slamming to draft from other doors or windows being open. Ms Lewis was not present. It is more likely that the door slammed because Mr Burnnand intended to close it in that fashion, reflecting his demeanour at the time. I find that he slammed the door closed in Ms Hill’s face.

### **As a result of these exchanges, was Ms Hill dismissed?**

[26] Mr Burnnand says that Ms Hill’s statement as she left on 1 January amounted to a resignation.

[27] I do not accept that Ms Hill’s words were understood at the time as her resignation. If that had been the case, Mr Burnnand would have questioned her attendance on 2 January at the outset of their exchange that day. He did not. Rather, he repeatedly told Mr Hill to go away and leave him alone, before telling her that her attitude was “too bad” for her to work on

2 January. In the face of Ms Hill's persistence and to end the exchange, Mr Burnnand then claimed "You told me last night you were going, so you've gone as far as I'm concerned".

[28] I find that Ms Hill did not intend to communicate a resignation by what she did and said on 1 January. That finding is based on her behaviour in returning to discuss matters ahead of her shifts on 2 January and 3 January, as well as Ms Hill's evidence that she left the workplace on 1 January to de-escalate the situation.

[29] In summary, on 1 January Ms Hill's words and actions were not understood by Mr Burnnand nor intended by her as a resignation. Mr Burnnand's later decided to take advantage of words that are sometimes treated as a resignation. Before then, Ms Hill by her conduct and her words had made it clear that she was not resigning. Against that background, I find that Mr Burnnand dismissed Ms Hill on 3 January 2020 by telling her that she was no longer employed and threatening to call the police if she did not leave.

[30] On 5 January Ms Lewis messaged Ms Hill that there was a letter for her to collect at the hotel. There was a txt exchange between them, then Ms Lewis confirmed that the letter would be posted. The letter is headed "DISCIPLINARY ACTION OVER INCIDENT ON NEWS YEAR DAY". The incident is characterised as "Employment Abandonment" as the employer viewed Ms Hill's statement as a "verbal resignation". If that had not been Ms Hill's intention, it was deemed as "Serious Misconduct" and Ms Hill was invited to a disciplinary meeting.

[31] The letter adds little to an understanding of the events on 1 January, 2 January and 3 January. Ms Hill had not "abandoned" her employment. The employment agreement treated that as the consequence of being absent for two or more days without notification to the employer. "Walking off the job" is included as a type of serious misconduct, but a disciplinary process could only be instigated if the employment remained on foot. For the reasons given, the employment had ended because Mr Burnnand dismissed Ms Hill on 3 January.

### **Is the dismissal justified?**

[32] Mr Burnnand did not attempt to justify a dismissal. In any event, there is no basis on which the dismissal of Ms Hill could be justified, having regard to the test for justification set out at s 103A of the Employment Relations Act 2000. Mr Burnnand did not raise or investigate any concerns and he gave Ms Hill no opportunity to respond before he dismissed Ms Hill on 3 January.

[33] I find that Ms Hill was unjustifiably dismissed and has a personal grievance against Mr Burnnand.

[34] I agree with counsel's submission that the employment relationship problem is in essence an unjustified dismissal claim. It is not necessary to separately consider whether Mr Burnnand (and Ms Lewis) on 1 January breached duties owed to Ms Hill. It is also not necessary to canvass the assertions made by Ms Hill about Mr Burnnand's earlier conduct.

### **What remedies are appropriate?**

[35] The evidence in support of the claim for compensation for humiliation, injured feelings and lost dignity is limited. However, I accept that Ms Hill did suffer these effects as a result of being unjustifiably dismissed by Mr Burnnand. It was apparent to me during the investigation meeting that Ms Hill is still angry by the way she was treated. I fix \$10,000.00 as sufficient compensation to remedy this harm caused by Mr Burnnand.

[36] The post dismissal letter from Ms Lewis invited Ms Hill to a meeting including to discuss the possibility of resuming her employment and a disciplinary allegation. Ms Hill did not meet Ms Lewis or Mr Burnnand, despite further messages from Ms Lewis. Given that Mr Burnnand did not acknowledge the dismissal or admit his conduct, Ms Hill acted reasonably in not taking up the belated invitation to meet. Instead, Ms Hill actively sought other employment. Ms Hill properly mitigated her loss.

[37] Ms Hill was eventually employed elsewhere starting on 9 March 2021. However, Ms Hill lost remuneration until Monday 8 March 2021 as a result of her personal grievance. The employment agreement provided for work as rostered but a minimum of 12 hours per week. However, Ms Hill's actual hours of work (and days) and her ordinary pay varied

throughout her employment with Mr Burnnand. I am required to order Mr Burnnand to pay compensation for lost remuneration of the amount lost or 3 months' ordinary time remuneration, whichever is the lesser.<sup>2</sup> The amount lost was less than 3 months' ordinary time remuneration in this case.

[38] Taking the thirteen weeks preceding events on 1, 2 and 3 January (weeks ending 29 September 2019 to 29 December 2019), Ms Hill worked an average of 17.25 hours per week (Ms Hill was paid to the nearest quarter hour). Ms Hill's evidence, confirmed by Ms Lewis, was that she normally worked Wednesday to Sunday. Ms Hill was likely to have worked at least her recent average number of hours, but for her dismissal. Ms Hill received a pay marked as "Termination pay" on 20 January 2020. I treat this as payment for the shifts Ms Hill reported for but was sent home, so Ms Hill's loss starts from the week beginning 6 January 2020. There are 9 weeks from then until the week ending 8 March 2020. At \$18.00 per hour and an average of 17.25 hours per week, Ms Hill lost \$2,794.50 gross in wages. Ms Hill was also paid holiday pay each week. Ms Hill therefore lost a further \$223.56 in remuneration. The employer's KiwiSaver contribution was also paid to Ms Hill's KiwiSaver account at the rate of 3%, a further \$90.54. The total amount of wages and other money lost by Ms Hill as a result of her personal grievance was \$3,108.60.

[39] Ms Hill did not contribute in a blameworthy way to the circumstances giving rise to her personal grievance. Mr Burnnand yelled at Ms Hill, remonstrated with her, and hit his hand with his fist to make a point. Ms Hill appropriately took issue with Mr Burnnand's conduct. Mr Burnnand told Ms Hill she knew what she could do if she did not like it. Understandably, Ms Hill left the premises. This all came about because Ms Hill made inquiries on behalf of customers. On each of the next two days, Ms Hill attempted to discuss her concerns with Mr Burnnand but was sent home each time. The last time included the threat to call the police to remove Ms Hill. All the circumstances giving rise to the personal grievance are attributable to Mr Burnnand.

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<sup>2</sup> Employment Relations Act 2000 s 128(2) and (3).

## **Costs**

[40] Ms Hill has incurred costs for advice and representation in respect of the application to the Authority and the investigation meeting. Some of these costs are covered by a grant of legal aid, but that must be repaid.

[41] Costs usually follow the event. Ms Hill has succeeded. There is no reason to disentitle her to an award of costs. Often the Authority sets costs by reference to the well-publicised daily tariff approach. There is no reason to depart from that standard practice in this case. The investigation meeting took slightly less than a full meeting day. However, I required some steps to be taken after the meeting. I treat the investigation as the equivalent of a single meeting day to cover that extra work. The rate for a first day is \$4,500.00. There will be an order for costs to cover that amount together with a further \$71.56 to cover Ms Hill's application fee.

## **Summary and orders**

[42] There is a printed standard form employment agreement. Ms Hill's concern was that it was never signed by Mr Burnnand. It also did not identify the employer properly. However, Mr Burnnand accepted that the printed form represented the terms of Ms Hill's employment. Ms Hill was also concerned about not receiving all her payslips. Computer payslips were lodged with the statement in reply.

[43] As no specific remedies were claimed for these issues, it is not necessary to discuss them further.

[44] Ms Hill was unjustifiably dismissed and has a personal grievance against Mr Burnnand.

[45] I make the following orders:

- (a) John Burnnand is to pay Lucy Hill \$10,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) John Burnnand is to pay Lucy Hill \$3,108.60, pursuant to s pursuant to s 123(1)(b) of the Employment Relations Act 2000.

(c) John Burnnand is to pay Lucy Hill costs of \$4,571.56.

Philip Cheyne  
Member of the Employment Relations Authority