

**NOTE: This determination contains an order prohibiting publication of certain information at [1]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI A TARA ROHE**

[2025] NZERA 137  
3154482

BETWEEN                      NICKOLA MAKING  
Applicant

AND                              ALAN WINDLE  
Respondent

Member of Authority:        Sarah Kennedy-Martin

Representatives:              Noreen Making, for the Applicant  
Scott Doolan, advocate for the Respondent

Investigation Meeting:        26, 27 March, 17 June, 26 August 2024 in Palmerston  
North

Submissions received:        4 October and 28 November 2024 from Applicant  
18 November and 5 December 2024 from Respondent

Determination:                 5 March 2025

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1]     The Authority made a non-publication order under clause 10 (1) of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting publication of the details of the incident referred to by Nickola Making at paragraphs [15] and [28] of this determination. The fact the incident occurred can be reported but not the detail because the detail is not relevant to the employment relationship problem that is resolved by this determination.

## **Employment Relationship Problem**

[2] Ms Making (Nikki) was employed at the Horseman Café until her employment was terminated for medical reasons on 20 July 2021. Nikki says the decision to dismiss her was unjustified because she was suffering from acute stress caused by the actions and inaction of her employer Alan Windle in relation to bullying she was experiencing at work. Nikki claims she was disadvantaged in her employment by failures to adequately address her complaints about the workplace and that she was being discriminated against because she had dyslexia, by having her supervisory role unilaterally removed from her, that she was suspended unjustifiably and an investigation into her conduct was unfair in the circumstances.

[3] Alan Windle is the owner of the Horseman Café and employed Nikki in 2015. There was a written individual employment agreement (IEA) signed by both parties. Alan says Nikki was not bullied instead others complained about her conduct at work and said she was bullying them. Alan's position is that he had no knowledge of Nikki having dyslexia so he could not have discriminated against her because of a disability. Alan says Nikki's termination for medical incapacity was after an eight month absence from work and was therefore justified both substantively and procedurally.

## **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Nikki, David Making, Colin Making and evidence was received from Michelle Vonsydow and Melissa Jones and for the respondent Alan Windle, Ailong King, and Cherie Grant. Colin Making and Cherie Grant's evidence was by way of affidavit evidence. All other witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also provided oral and written submissions.

[5] As permitted by s 174E of 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**

[6] The issues for investigation and determination were:

- (a) Was the decision to dismiss Nikki on the grounds of medical incapacity, and how the decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time.
- (b) Whether Nikki was disadvantaged by the actions of Alan, including how he responded to concerns about discrimination, unfair treatment and harassment on the grounds of dyslexia and whether the disciplinary investigation was warranted.
- (c) Were Nikki's supervisory responsibilities removed from her and if so, was this justified?
- (d) Was Nikki suspended and if so, was it justified?
- (e) Should any remedies be awarded to Nikki including compensation and lost wages?
- (f) Are there any statutory entitlements owed to Nikki including unpaid holiday pay arrears?
- (g) Should orders be made in relation to KiwiSaver?
- (h) Was there any blameworthy conduct by Nikki that contributed to the situation giving rise to her grievance and, if so, should any remedies awarded be reduced accordingly?

## **Background to the investigation meeting**

[7] The first investigation meeting (scheduled for 15 and 16 September 2022) was adjourned because no briefs of evidence on behalf of Nikki were lodged and a large number of documents raising new claims were lodged. On 27 October 2022, at a further case management teleconference (CMC), a new investigation meeting date of 14 March 2023 was set down. Four additional matters were addressed at that CMC:

- (i) Bryan Hoare was removed as a respondent because it was determined Mr Windle was the employer;
- (ii) Leave would be considered for the additional claims to be raised after the employer had been given an opportunity to respond;

- (iii) The application to keep aspects of the evidence confidential from the employer was declined. It was noted non-publication orders could be applied for given the sensitive nature of some of the evidence;
- (iv) An application for communications assistance for Nikki at the investigation meeting was granted.

[8] Mr Hoare was removed as a party to the proceeding but the Authority was advised before the investigation meeting that Mr Hoare had died. As an employee of the Horseman Café his evidence was relevant to some of Nikki's claims but was not able to be considered by the Authority in determining Nikki's claims.

[9] The investigation meeting set down for 14 March 2023 was adjourned to 28 August 2023 to allow time for the communication assistant to complete the assessment and make recommendations prior to the investigation meeting. An Amended Statement of Problem was lodged with leave to include new claims related to payment of statutory entitlements and KiwiSaver contributions. The investigation meeting was adjourned to 26 and 27 March 2024 on account of the applicant seeking to provide further evidence outside of the agreed timetable.

[10] On review of that evidence it was determined it was not admissible because it related to matters that were outside of the Authority's jurisdiction. Where that information was referred to again both at the investigation meeting and in submissions on Nikki's behalf it was not considered. Also not considered were statements described as "support statements" because the authors of those statements were not intending to give oral evidence at the investigation meeting.

[11] The parties' oral submissions were heard on 6 June 2024 and Ailong King's evidence was heard on 26 August 2024 in Palmerston North. Written submissions were timetabled and reply submissions from both parties were also received.

[12] Nikki requested communication assistance at the investigation meeting because of dyslexia. Section 80 of the Evidence Act 2006 provides that a witness in a civil or criminal proceeding is entitled to communication assistance to enable that witness to give evidence. Communication assistance may be provided to witnesses on the application of the witness or any party to the proceeding or on initiative of the Judge. Ms Making's application was accompanied by a report from a speech and language consultant. Based on the information in that report and in accordance with the role and

powers of the Authority<sup>1</sup> it was determined that communication assistance would be provided.

[13] An additional CMC was held with the parties' representatives and Sarah Paewai, Communication Assistant. Ms Paewai's recommendations were adopted to facilitate Ms Making's participation in the investigation and Ms Paewai attended the investigation meetings.

### **Nikki Making's employment at the Horseman Café**

[14] Nikki originally started work in the Horseman's Coffee Cart in 2015. When that was sold, Alan employed her in the Café in early 2017. By way of background there were a number of layers to the relationships in and outside of work. Ailong, Michelle and Melissa also worked at the Café with Nikki. Nikki and Ailong had been friends for many years and Nikki suggested Ailong come to work with her at the Horsemen Café.

[15] Most people involved talked about Nikki's behaviour changing around September 2019 because of a very stressful situation she was dealing with outside of work. Nikki acknowledged that was a difficult time for her. The detail of that is the subject of a non-publication order set out above.

[16] Nikki says over the time she worked in the Café there was a lot of teasing that was unkind and left her feeling upset. Nikki did not want to complain because she was scared she might lose her job. Some days she would be really upset by the time she finished. One example she gave was that on more than one occasion Bryan or Alan joked about selling her to the customers saying words to the effect of "she makes good coffee" and "would you like to buy her?" On other occasions either Alan or Bryan would call out to her saying her husband was there. She would walk out expecting to see her husband and instead a male customer was at the counter.

[17] On 2 July 2020, a document was signed by Nikki and Alan giving Nikki extra duties:

Nikki Making @ The Horseman's Café – 2/7/20

Duties will now include the additional:

Some baking as required and learning to do baking previously not done.

Stocking up of food cabinets daily and as required bread products and cakes.

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<sup>1</sup> Employment Relations Act 2000, ss 157 and 160.

Keeping on top of stock required and listing on fridge stock needed  
Facing drink fridges and noting low items  
Putting cake orders through as required  
Delegating duties as required to other staff members i.e. cleaning, tidying etc to keep the Café looking good. Recording in cleaning records and updating when done. Keeping temperature checks daily.  
Monitoring food and coffee quality going out by other staff members and assisting in raising their game  
Any problems seek help and assistance from owners.

[18] Nikki thought she was promoted and started the role with those extra duties when she returned from a holiday. Alan's evidence was that this was simply a list of extra duties, with a pay rise. It was not a promotion to a supervisory role.

[19] A couple of things went wrong after Nikki returned from leave on 5 August. She says she was making a sultana cake and either Alan or Bryan said she was doing it wrong and swore at her. They took over. There was also an incident where Bryan alleged David Making, Nikki's husband, threatened him. David Making and his father Colin Making had arrived at the Café to have coffees and were seated outside. Bryan went out to talk to them about not having family members serving their own family in the Café. David Making says he raised the issue of Nikki being teased and having things taken out on her at work. David was aware Nikki was very upset about how the cake issue was handled. He denies any threats were made. Colin Making gave evidence consistent with David Making's statement.

[20] The next day after the cake incident Bryan told Nikki she was demoted because she could not delegate work. On 8 August 2020, Nikki says she and David had a meeting with Alan and Bryan about the demotion and she was told not to worry because she still had a supervisor role and her pay would stay at the new rate. Alan says this meeting never happened. David and Nikki Making say it did and that they told Alan about Nikki's dyslexia at that meeting.

[21] In September the issues between the parties escalated. A rift got worse between Ailong and Nikki. Ailong came back from holiday unwell. This was during Covid times and Nikki asked her to wear a mask but Ailong refused. Nikki recalled writing on the list something they had run out of heard someone laughing at her spelling. When she turned around to see who was laughing she realised it was Ailong.

[22] Nikki says after that she took both Ailong and Michelle aside and asked them not to laugh if she made mistakes because it was upsetting and once again, she found it

hard enough having teasing from Alan and Bryan and she did not need it from them, especially Ailong who was her friend of many years.

[23] Then there was an issue about a mistake in a docket Nikki wrote up that resulted in a mistake being made with a customer's order. Alan had indicated his displeasure that a mistake was made with a customer's order. Nikki had taken the order and written the docket. Nikki's said the docket kept being taken out of the rubbish bin and placed in or on the till where she could see it. When it first happened she asked who did that. Ailong told her in a loud voice it was Bryan. Nikki says when she asked Bryan about it he told her to "just shut my mouth we are not talking about it now is not the time or the place" and said he was sick of hearing Ailong and Nikki squabbling all the time and referred to them as silly bitches. Nikki said they should talk about it and Bryan walked away. Nikki says she got angry because he ignored her. She accepts she swore at Bryan as he walked away. Nikki then she left work and went home.

[24] Nikki felt others were talking about her and the docket behind her back, perhaps making fun of her or criticising her but no-one was talking to her directly about it. Nikki's evidence was of high levels of stress and worry about making mistakes because of a lack of confidence in writing things down at work and the teasing she experienced.

[25] On 22 September, Nikki worked to cover Michelle and when she opened the till to serve a customer, she found the docket in the till again. She thought Bryan had been into the rubbish twice to get the docket out which she got upset about.

[26] On 24 September, a staff meeting was held and writing dockets to avoid mistakes was discussed among other things. Nikki understood she was to write the docket out in full and says she had real trouble with this because of her dyslexia. She says Bryan told her not to worry. The minutes of the meeting and Alan's evidence were that a line was to be put between orders rather than a requirement to write orders in full.

[27] The next day (25 September) Ailong and Michelle complained to Alan about Nikki's behaviour in the Café. Nikki did not know about this until later. Alan asked them to record their concerns in writing and their emails about this are dated 27 September 2020. Ailong said she was sick of Nikki's bullying behaviour. Michelle said she heard Nikki swear at Bryan but later in her statement to the Authority said she was asked by Alan to write the email complaint and felt she had no choice. In any event Michelle's email only confirmed that Nikki swore at Bryan and Nikki has accepted she

did that. I note Michelle did not say she was bullied by Nikki and instead that she enjoyed working with Nikki and never found Nikki to be rude.

[28] On 27 September, Nikki left work because of an unrelated incident. She was very disappointed in herself so on the 28 September she asked for a meeting to apologise. Alan says instead he called that meeting to discuss the concerns Ailong and Michelle raised with him two days prior.

[29] On 28 September, Nikki and David Making met with Alan and Bryan but it ended early. Nikki started to talk about the dockets and what she described as the abuse she was receiving from the others including Bryan. Nikki says they stopped her but she tried to say more about the docket and the teasing and then David went to say something but he was told he was not allowed to speak.

[30] Alan took the view support people were not allowed to speak and ended the meeting because he felt threatened by David Making. Nikki and David say it was Alan who behaved in a threatening way by slamming his hands down on the table, standing up and telling them to get out. Alan accepts he got frustrated, raised his voice, walked away from the table and asked Nikki and David to leave the café. He denies slamming his fists down on the table or any threatening behaviour.

[31] Nikki and David left but Nikki had to go back to ask what time she was expected to be at work the next day (29 September). That was a rostered day off for Nikki but she had agreed to cover Michelle. Nikki says the atmosphere the next day was cold. For example, she asked Bryan to do something for her and he told her to ask Alan who said yes but there was not much conversation. In contrast Nikki noticed when Ailong arrived later in the morning they all started laughing and carrying on together.

[32] Nikki formed the view Alan was favouring Ailong. She had expected support from Alan because Ailong was not allowing Nikki to supervise her and the teasing and what she described as bullying was undermining Nikki's ability to do her role.

[33] On 29 September, Alan received a personal grievance letter from Nikki. The personal grievance raised discrimination, bullying and harassment and recorded Nikki felt fear, anxiety and extreme stress at work with reference to:

- (a) A meeting at the start of August where bullying and harassment were discussed but nothing had changed for Nikki;

- (b) One employee continued to belittle and humiliate her at work
- (c) Ailong now also thought it was ok to abuse her in the café
- (d) Alan was now giving the silent treatment
- (e) These was all causing her stress and affecting her mental health and wellbeing

[34] Nikki's concerns about the dockets were also set out. Nikki explained why the docket being taken out of the rubbish on two occasions affected her and that she felt if there was a problem with understanding the docket someone could just ask her rather than what had been happening. She felt harassed because of her disability and she was scared of other employees and now Alan as well. She recorded that she called the meeting on 28 September to talk about how she felt bullied and harassed about the docket and wanted to raise her concerns and feelings which looked to include discussing her disability.

[35] Nikki also referred to a meeting on 24 September where her dyslexia was discussed and Alan said her disability was no issue and assured her he could deal with it as it had not been a problem for nearly five years of employment.

[36] Nikki came into work on 1 October and Alan said he had received her personal grievance email and could she come outside with him. Outside, Alan told her he had got hold of his lawyer and they wanted to get it resolved today. Nikki said she would like that and Alan said she could bring a support person to this meeting with his lawyer.

[37] That meeting did not take place and a letter went to Nikki requesting to meet with her on 6 or 7 October about her personal grievance. Also on 1 October all staff received a letter of expectation reminding everyone to behave respectfully and with courtesy.

[38] Several other things had happened. Ailong came to Nikki's house and told her the bosses used a swear word and said she had lied and to check their emails. Ailong denied this. There was an issue at work with food quality. Nikki's evidence was that she was feeling unsupported and excluded during the last few days at work. She took photos of some things, including some salmon, so she could show Ailong where she could improve. She also talked on her phone which Alan pointed out was a breach of the house rules because no phones were allowed at work. Alan recorded a note in

writing saying that he and Bryan felt unsafe being around Nikki so stayed away from work. Nikki also went to Ailong's house.

[39] New allegations were added and on 6 October 2020 Nikki received another letter with three new allegations and suspension was proposed with an invitation to meet on 9 October. David and Nikki responded by email seeking an extension to respond, pointing out the new material was unrelated to resolving Nikki's concerns (in her personal grievance email) and noted this appeared to have been overlooked. It was recorded that Nikki was now instead facing a counterclaim with "significant errors and misunderstandings, and misinterpreted circumstances and other misleading statements".

[40] Nikki did not return to work after receiving the proposal to suspend. She asked to defer any meeting for at least a week, confirm whether the suspension was to be paid, asked for further information about mediation and asked for a copy of her personal file and records of workplace meetings that had occurred.

[41] Nikki became unwell due to the stress of what unfolded at work and did not return to work. Medical certificates were provided from 20 October 2020 to 7 May 2021. On 20 July 2021, Nikki's employment was ended on the basis of medical incapacity.

### **The Horseman Café's perspective**

[42] Alan was generally pleased with how Nikki performed in the café after the coffee cart closed and said Nikki picked up skills inside and was given extra duties including book work tasks. He agrees she was given a list of additional duties in July 2020 as set out above but said she was never a manager or supervisor of the other staff. Alan explained the signed list of additional duties came about through Bryan who delegated duties to Nikki to ease the burden on Alan.

[43] Alan appeared to have been pleased with Nikki's work until approximately September 2020 which he says coincided with a general change to Nikki's state of mind and that she became a changed person and totally unbearable to work with. He said none of the staff knew what each day would bring. He says she was given a weeks' leave to sort out her personal problems but on her return nothing had changed.

[44] Alan was adamant he had never been told about or seen any document regarding any disability or dyslexia and appeared sceptical about whether Nikki had dyslexia. He gave evidence he had never heard this before so he spoke to other workers who confirmed no one else knew Nikki had dyslexia. Ailong went further in her evidence to say Nikki did not have dyslexia at all. Alan accepted Nikki had spelling problems but said this was just managed.

[45] Ultimately Alan said it was Nikki's own behaviour that led to the allegations. He and Bryan formed a view they could not safely work with her, after she swore at Bryan so they stayed away that weekend. When they returned he noted the atmosphere had changed and described it as follows:

We arrived before 2pm her finish time is at 2pm to start to be greeted by the same and also how unbearable towards the other staff she had been including no direction or help when required, not fulfilling her designated role.

...

We totally felt it was safer for us not to be there. It was over this weekend that I have serious concerns about her conduct towards myself, Bryan and the other staff. I did see the bullying claims made by Ailong.

[46] Alan says he took decisive steps to address Nikki's personal grievance claims. The first formal response was a letter dated 1 October 2020 requesting a meeting to resolve Nikki's concerns in her 29 September 2020 personal grievance email. Attached were emails from Michelle and Ailong about Nikki's behaviour and an instruction that Nikki not speak to either Michelle or Ailong about their email complaints.

[47] More issues came to Alan's attention. On 6 October Alan wrote to Nikki adding new concerns about storage of salmon and photos of salmon, visiting Ailong after being told not to contact her, and locking the café door early one morning on one occasion.

[48] Alan was very concerned about the comments from Ailong that Nikki had left salmon uncovered at the café and he formed the view Nikki took photos to use against him. That was why it became an allegation against her. The allegation about going to Ailong's house was withdrawn and Alan viewed Nikki locking him out of his own business to be unacceptable. Nikki says by this stage the relationship had deteriorated and she had been given advice not to be alone with Alan or Bryan and it was early in the morning and only on one occasion.

[49] Alan was also very concerned Nikki was on her phone when there was a no phones at work policy. These allegations were said to be capable of constituting serious

misconduct and it was proposed Nikki would be suspended on paid leave. The letter setting out the allegations and proposing suspension was emailed to Nikki on 6 October with a request the suspension proposal be responded to by 8.00pm that night because Nikki was working the next day. Nikki did not respond to the suspension proposal within the time frame. Several communications were exchanged but ultimately Nikki did not return to work and provided medical certificates from October to May 2021 saying that she was medically unfit for work. Once Nikki's sick leave and annual leave were exhausted she was placed on unpaid leave.

[50] Nikki's position was held open and Alan requested they attend mediation multiple times before starting the medical disengagement process resulting in Nikki's employment being terminated. The medical disengagement is discussed below. Alan says the responses he received on Nikki's behalf were confusing and false allegations were made about him and the business. He asked that David Making not to attend mediation as Nikki's support person.

[51] From February 2021, Alan, through his representative made four requests for information from Nikki's doctor about her prognosis and when Nikki could return to work. In May 2021, Nikki's doctor sent a brief email with a further medical certificate recording that work stress was the issue that was making her unwell. After eight months with no confirmed timeframe for a return to work or further information about work stress a medical disengagement process concluded and Nikki's employment was terminated.

### **Analysis – disadvantage claims**

[52] For Nikki's disadvantage claims to succeed she must show that one or more conditions of her employment were affected to her disadvantage by unjustified actions of her employer. Nikki says she was disadvantaged by being promoted and then demoted and not being supported in her supervisory role, by the failures to investigate her concerns about how she was being treated at work while at the same time commencing an investigation into her conduct and by suspending her from the work. She was also subject to a significant amount of teasing in the workplace. These actions caused her significant emotional distress.

### *Promotion*

[53] Shortly before the complaints from Ailong and Michelle, the issue of whether Nikki was promoted arose. While there was a conflict in the evidence about that, I found Nikki to be considered and careful with her recall of factual matters. At times her reference to dates was difficult to follow but that was true of many of the witnesses. I found Nikki's account of the sequence of events and her response to them was clear.

[54] The signed agreement supports Nikki's contention she was promoted. From 2 July 2020 Nikki's role included delegating duties as required to other staff members, monitoring food and coffee quality of other staff members and assisting in raising other's game. As well as supervisory tasks Nikki was also to stock the food cabinets, order food and was to be trained to do baking previously not done.

[55] In addition, other employees referred to Nikki as their supervisor. Ailong's email complaining about bullying from Nikki dated 27 September, refers to Nikki as her supervisor. Michelle's written statement also confirmed she was introduced to Nikki as the supervisor when she started work at the café in July 2020. Michelle also disclosed tensions on shifts caused by Ailong not following Nikki's directions and recalled that Alan had decided to put supervisor next to Nikki's name on the weekly roster to help with that. I note Alan denied this.

[56] Alan's evidence was that Nikki was not promoted despite the written agreement and the evidence of others. I preferred Nikki's evidence about the promotion over Alan's.

[57] That means the supervisory role was removed from Nikki by either Alan or Bryan or both with no consultation or explanation. This is relevant to what happened next because difficulties between Ailong and Nikki escalated and became the basis for an investigation into Nikki's conduct at work. Nikki raised her concerns about this in her personal grievance email dated 29 September before Alan commenced the investigation into Nikki's conduct.

[58] Removal of the supervisory duties in that way disadvantaged Nikki because it affected a condition of her employment. Her additional duties were agreed and became part of her terms and conditions of employment. Given the unilateral way in which the supervisory role was taken off Nikki, the employer's actions have not been able to be justified.

*Nikki's complaint, suspension and investigation into Nikki's conduct*

[59] An investigation into Nikki's behaviour at work was started but it went no further than informing Nikki she was under investigation and setting out the allegations. Nikki was suspended from work and then went on sick leave until her employment was terminated approximately eight months later.

[60] Dealing with conflict and disputes between employees can be difficult for employers. Nonetheless the obligations on them to act as fair and reasonable employers in s 103A of the Act and the good faith obligations require employers to step through a fair process of hearing from both sides and genuinely considering responses before responding. Natural justice requires that they remain objective and act impartially and not favour one employee over the other while investigating such allegations.

[61] Although no meeting was held despite multiple requests from Alan to meet and to attend mediation, Alan faces some difficulties with the allegations about Nikki. Nikki's personal grievance records she was bullied by his partner and Ailong and she needed his help to ensure she could supervise Ailong. In response she received allegations she was bullying Ailong and by implication Bryan and then Alan as well. Adding to this Alan's evidence that Nikki was not a supervisor, in the face of the evidence that she was and the additional allegations, leaves the impression the decision to investigate Nikki for serious misconduct failed to take into account Nikki's concerns in her personal grievance email of 29 September.

[62] The employer says it could not have done anything more and acted as a fair and reasonable employer. It wrote to Nikki on 14 October saying her claims had been investigated and not upheld. It also raised its concerns in writing when they arose and tried to make a time to meet to discuss those.

[63] Nikki was disadvantaged in her employment because of the process the employer followed. Alan was on notice of her concerns, there was a direct link between her concerns and those Alan was raising with her and the removal the supervisory role and this was overlooked.

[64] Alan was also on notice she was complaining about discrimination. She referred to a disability in her personal grievance email. If an employer had no knowledge of an employee's dyslexia and it was raised with them for the first time, a reasonable employer could be expected to gather further information about this from the employee.

[65] The letter of 14 October recorded that Nikki's dyslexia had been accommodated during nearly five years of employment and Alan denied any discrimination towards her. While Alan resiled from that position at the investigation meeting, saying instead he knew she had spelling issues but no knowledge of dyslexia, that response to Nikki's personal grievance email was insufficient given she was saying she was stressed about the docket writing mistake and teased because of her spelling and clearly set out how this was impacting on her.

[66] I also note Alan's written evidence indicating he did not believe Nikki had dyslexia and that when this was raised by those representing her Alan says he asked other staff and they had never heard of it either. Discussing an employee's disability for the purpose of gathering evidence to assert they do not have a disability is not likely to be the actions of a fair and reasonable employer. At the very least Nikki could have expected her information to be kept confidential by her employer and if her employer had concerns about the truthfulness of her statements about disability, she could also have expected her employer to raise those with her and not talk to other employees about that.

[67] In addition, I prefer Nikki's evidence she called the meeting on 28 September over Alan's. It appears she spoke first, and while Alan says he called it to tell her about Ailong and Michelle's complaints about her given the finding above, proceeding with an investigation into Nikki given all of the issues raised by Nikki first, resulted in unfairness to her.

[68] I am not satisfied the employer has been able to justify its actions because of the sequence of events and the fact the employer was on notice about Nikki's concerns before it started to investigate her. In addition, Alan had a closed mind about Nikki's disability and the impact on her at work.

[69] I find that Nikki was unjustifiably disadvantaged by her employer's failure to address her personal grievance email adequately and at the same time commencing and investigation into her conduct. The interpersonal matters were all intertwined and partly caused by Alan's decision to demote Nikki. Alan was on notice that Nikki was affected by a disability at work.

### *Suspension*

[70] With regard to suspending Nikki from work on 6 October, a fair and reasonable employer could be expected to consult before making a decision about suspension. A four hour time frame to provide a response is too short and gave Nikki no time to seek advice or to comment before a decision on suspension from work was made.

[71] Given the findings above about the nature of the allegations, it is also not clear they were serious enough, or that Nikki's part in the whole picture was blameworthy enough for a suspension to be justified.

[72] I find that Nikki's claim she was unjustifiably suspended is successful.

### *Teasing at work*

[73] I note the evidence of regular teasing and joking in the workplace. Nikki says this had a significant impact on her at work. She was teased about spelling and jokes about selling her to customers were made on more than one occasion. Alan accepted this happened but minimised those jokes saying it was simply light hearted and did not accept there could have been an impact on Nikki. Others confirmed jokes and teasing that had the potential to be offensive and Ailong confirmed Nikki's spelling was the subject of jokes.

[74] A workplace free from behaviours that cause harm and distress to employees in the workplace is implicit in the terms and conditions of employment. Workplace banter can quickly cross the line from appropriate to inappropriate depending on a number of factors that can include who the audience is and the type of workplace. Employers cannot rely on employees to raise this with them in all cases because the Act makes it clear there is a power imbalance implicit in employment relationships. In this case there was evidence the teasing and language used crossed that line and that many of the employees did not enjoy being made fun of.

[75] I find a condition of Nikki's employment was affected to her disadvantage by an environment of inappropriate conduct in the workplace because of the amount of teasing, nature of the teasing and frequent swearing in the workplace causing her distress.

[76] Given the employer participated in this I find this conduct towards Nikki was unjustified.

### **Discrimination**

[77] It was also claimed that Nikki was discriminated against on the basis of a disability, namely dyslexia. Section 104(1) of the Act defines a range of circumstances in which it may be said that an employee has been discriminated against. Nikki will have been discriminated against in her employment if by reason directly or indirectly of her dyslexia her employer either dismissed or subjected her to any detriment in circumstances in which other employees were not or would not be subjected to such detriment<sup>2</sup>; or it caused her to resign.<sup>3</sup>

[78] The discrimination said to have occurred was teasing, belittling and laughing at how she spelled things. The specific example given was the docket being taken out of the rubbish bin on more than one occasion and put in a place she would see it. It was also submitted on Nikki's behalf that payroll practices took advantage of her dyslexia for example that Alan knew Nikki was dyslexic and easily overwhelmed or silenced during verbal discussions.

[79] Alan's evidence was that he had no knowledge Nikki was dyslexic and he denies any irregularities in the payroll process or payment of holiday pay or KiwiSaver. Alan has no recollection of the meeting earlier in August with Nikki and David when Nikki says she talked about her disability and being teased at work.

[80] Nikki and David Making's evidence was that Alan knew about dyslexia. David said Nikki was belittled over it. He said Nikki took photos of the menu to help her memorise it. He recalled a specific time they approached Alan requesting the menu be numbered because that would help Nikki. Alan recalled the request for numbering but denies being told about dyslexia and could see no reason why the menu needed numbering.

[81] It was also David Making's evidence that he wanted to speak at the meeting on 28 September because he had contacted Citizens Advice Bureau and WorkSafe for advice about workplace issues and disability and was told it was important to let the employer know what the problem was so they could fix things. He went along with

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<sup>2</sup> Employment Relations Act 2000, s 104(1)(b).

<sup>3</sup> Employment Relations Act 2000, s 104(1)(c).

Nikki because he thought it would be easier for him to explain her dyslexia difficulties with the docket writing. Because that meeting ended early, I cannot be certain that Nikki's dyslexia was raised. It was also Nikki's evidence that she did not want to say she had dyslexia because she did not wish to draw attention to it and because of the teasing.

[82] On balance I accept Alan's evidence that he was not aware Nikki had dyslexia so as an employer he was unaware of what steps he could take to support Nikki until Nikki's personal grievance letter dated 29 September. I accept earlier conversations were had with David Making present about taking photos of the menu and Nikki being teased but it is not clear that dyslexia was put clearly to Alan.

[83] Nikki's claim that she was discriminated against on the basis of a disability is not successful.

### **Termination of employment on grounds of medical incapacity**

[84] Section 103A of the Employment Relations Act 2000 (the Act) provides the test for justification of any dismissal. The test requires the Authority to determine whether the employers' actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[85] It is well established an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing an employee for long term absence where it can be shown the decision was substantively and procedurally justified.

[86] The IEA contained clauses about medical incapacity:

- 24.1 In the event the employee is incapacitated and unable to work due to long-term illness or an injury, the employee's employment may be reviewed for reasons of incapacity.
- 24.2 Before taking any action under this clause, the employer shall require, at the employer's expense, the employee to undergo a medical examination by a registered medical practitioner nominated by the employer. The employer shall take into account any reports or recommendations made available to them as a result of the examination, or any other relevant medical reports or recommendations which the employer might receive from the employee or on the employee's behalf.

[87] Alan was rightly concerned about the amount of time Nikki had been unable to work which was approximately eight months and given an employer is not required to hold a job open indefinitely, consideration of medical retirement was reasonable in the circumstances.

[88] Letters show that by February 2021 Nikki was on notice that it was becoming increasingly difficult to hold her job open. This was because of the extended period away from work and no clear communications about the reasons for it or when she could return. In April 2021, it was accepted by both parties the medical issue had superseded the disciplinary investigation. Nikki was informed in writing that Alan was of the view the employment relationship had broken down because there had been repeated requests to attend mediation with no definitive response from Nikki's representative and no medical information had been provided. An up to date medical certificate was requested with detail regarding the nature of Nikki's illness, the likely next steps in her recovery and timeframes together with a prognosis of when she may be able to return to work. In the absence of any information a decision would have to be made about Nikki's continued employment based on the little information Alan had.

[89] A further medical certificate was provided with a brief reference to consultations since October 2020 regarding acute stress reaction secondary to workplace difficulties. It was clear no medical information was going to be provided. In response to that the full background setting out all the steps the employer had taken was sent to Nikki on 21 June 2021 with a proposal to give Nikki notice of termination of her employment for medical incapacity.

[90] A response was provided on 25 June setting out a number of issues on Nikki's behalf. This included that the disciplinary investigation was incomplete, it was inappropriate for a health practitioner to give Nikki's employer information about her health, new staff were already at the café, and references to strife and bullying and the promotion and then demotion. Ailong coming to work sick and coughing over food, was also raised and whether Alan had any industry qualifications. It was said that Nikki had been asked to work in Alan's other business, and that mediation was not declined. A number of allegations were also made about Alan and the business.

[91] The response ignores the fact there had been agreement that matters had moved on and they were dealing with the medical reasons why Nikki could not be at work.

[92] The process to be followed in the event an employee was unable to work because of a long term illness was in the IEA. The employer was permitted to require the employee to undergo a medical examination for the purposes of providing a report before a final decision was made on medical disengagement. That report and any further information the employee wanted the employer to have was also to be taken into account.

[93] At the time the decision to terminate Nikki's employment was being considered and was made, it was clear Nikki was suffering from a long term illness. Alan notified her as things tracked that her position could not be held open indefinitely. The communications between the parties show all efforts to have a medical report prepared failed. Alan was left with a situation where little or no information was provided about Nikki's prognosis and when she might be able to return to work. Nikki was informed at each step of the process as to what was happen and she was invited to participate.

[94] I understand the submissions on Nikki's behalf to be that Nikki was so unwell she could not attend mediation and any provision of Nikki's medical information to her employer would have been inappropriate. This may have been the case, however, Alan was not provided with any information to help him understand the nature of the illness and the prognosis and the IEA between the parties anticipated that medical information would be provided in the event the employee was suffering a long term illness.

[95] It was submitted on Alan's behalf he was in the position where he could "fairly cry halt" in all the circumstances. There are seven key principles an employer should consider before terminating for medical incapacity set out in the case of *Lyttleton Port Company Limited v Arthurs*.<sup>4</sup> With reference to those principles, Nikki had not been able to do her job for a lengthy period, and no information had been provided about her diagnosis or prognosis and it was clear no information was going to be provided. Given the nature of the business, being a small business, it was reasonable after an eight-month absence to terminate employment using the medical incapacity process set out in the employment agreement.

[96] Nikki was informed the outcome could include dismissal and there was a clear process set out and followed before any decisions were made. Even a large employer is not required to keep a job open indefinitely.

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<sup>4</sup> *Lyttleton Port Company Limited v Arthurs* [2018] NZEmpC 9 at [35].

[97] Alan was justified in bringing the employment relationship to an end in circumstances where no information was provided to the employer and there was a refusal to undergo a medical assessment as provided for in the IEA.

### **Additional claims**

[98] Eight additional claims were made. One was a disadvantage relating to KiwiSaver entitlements because of failures to pay the employer KiwiSaver contribution and failure to act on Nikki's instructions nominating a KiwiSaver scheme in 2015 when she started work. On balance I cannot be certain about what happened in 2015 so no orders in relation to KiwiSaver are made.

[99] The claims related to suspicious IR documents, income losses due to payroll errors, longstanding disadvantages relating to basic employment conditions in breach of the IEA, not having lunch breaks, breach of the harassment clause in IEA, reimbursement for security expenses were also matters for which there was insufficient evidence for the Authority to make findings about or they were raised outside of the required timeframe for raising grievances.

[100] It was claimed there were unpaid leave entitlements owing at the time Nikki's employment ended which were not paid to her on termination. Alan's evidence was that once Nikki's sick leave ran out they actioned a request from Nikki to use her accrued annual leave before she was placed on leave without pay. That would mean there was no accrued annual leave to be paid at termination.

[101] There is insufficient evidence of which public and annual holidays if any Nikki was not paid for.

### **Contribution**

[102] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. To a certain extent what occurred was intertwined and it was not a one sided story as to why Nikki's treatment at work and her own behaviour became the focus of attention in the work place. Alan made strong submissions that there should be full contribution to the situation that Nikki found herself in. Given the findings above that Nikki was disadvantaged by her promotion and then the demotion, the investigation crossing over with the personal grievance claim she made, and the inappropriate culture involving teasing and joking in the workplace, it would be unfair

to ascribe blame to Nikki for what transpired. Nikki has therefore not contributed to the personal grievance.

## **Remedies**

### *Compensation*

[103] Nikki sought compensation for humiliation, loss of dignity and injury to her feelings. Nikki gave evidence of the impact on her resulting from not being listened to, the humiliation of being suspended and investigated, being demoted and not having her claims properly considered. It was clear there were many layers to the interpersonal matters that unfolded. Although I did not receive any medical evidence, I accept Nikki's evidence about the impact the events set out above had on her.

[104] I have found four separate but interrelated disadvantages caused by the actions of her employer and Nikki is entitled to consideration of remedies for the those. I consider an appropriate award to be one globalised amount of \$20,000.00.

## **Orders**

[105] Alan Windle is ordered to pay Nickola Making within 28 days of this determination \$20,000.00 in compensation for humiliation and distress under s 123 of the Employment Relations Act 2000.

## **Costs**

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

[107] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party 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.

[108] 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.<sup>5</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>5</sup> [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies)