

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 540
3197319

BETWEEN KIM MCLEOD
Applicant

AND SUN COURT HOTEL
LIMITED
Respondent

Authority Member: Natasha Szeto

Representatives: Ira White, advocate for the Applicant
Michael Grantham, counsel for the Respondent

Investigation meeting: 20 June 2023 at Taupō

Submissions and further 28 June and 3 July 2023 from the Applicant
information received: 21 June, 28 June and 3 July 2023 from the Respondent

Date of Determination: 19 September 2023

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Ms McLeod was employed as a Breakfast and Prep Cook / Kitchen Assistant with Sun Court Hotel Limited (Sun Court). There was an incident at work on 16 May 2022 where Ms McLeod used offensive language about one of the Front of House staff. Ms McLeod did not return to work after the incident, and Sun Court terminated her employment for abandonment on 12 October 2022.

[2] Ms McLeod says that the incident on 16 May 2022 was a situation of Sun Court's making. She claims that she was unjustifiably (constructively) dismissed and actions taken by Sun Court in the lead up to her dismissal disadvantaged her. She says that her termination for abandonment was unjustified. Ms McLeod seeks lost wages and compensation for her personal grievance claims.

Issues for Investigation and Determination

[3] The issues that the Authority has been asked to determine are:

- (a) Whether Ms McLeod was unjustifiably disadvantaged in her employment in respect of:
 - Instructions that were given to her by the Head Chef
 - Sun Court's response to the incident, including whether Ms McLeod received support [on the day].
 - The lack of training and lack of support in the kitchen
- (b) Whether Ms McLeod was constructively dismissed from her employment.
- (c) Whether Ms McLeod was unjustifiably dismissed because her position was terminated due to abandonment.
- (d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for any blameworthy conduct by Ms McLeod that contributed to the situation giving rise to her grievance?

[4] For the Authority's investigation, I heard evidence from Ms McLeod, Shahn Beveridge (Kitchen Assistant), Laura Crowther (HR & Operations Manager), Chrissy Simmen (General Manager), and John Funnell (owner).

[5] As permitted by s174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. This determination does not record all evidence and submissions received, but all material provided has been considered.

Background

[6] Ms McLeod started work for Sun Court as a Breakfast and Prep Cook in July 2021. Ms McLeod had basic cooking skills and experience and was given two days' training and induction with Sun Court. Six months into her employment, Ms McLeod received a small increase to her hourly rate.

[7] Ms McLeod worked the breakfast shift solo starting at 6:30 am. The Head Chef would usually come in at 10:00 am. Additional staff were rostered on when Sun Court

knew in advance that a large breakfast service (20 or more people) was expected. Ms McLeod raised with Sun Court that she would like someone more senior to cook with her on multiple occasions – the most notable being in her performance appraisal on 11 February 2022.

The Incident

[8] On the evening of 15 May 2022, Ms McLeod received a text from the Head Chef about the next day's breakfast service. She was advised there would be a table of ten for 6:30 am all having the Big Suncourt (BC) breakfast. Ms McLeod had been asked to start her shift early on 16 May 2022 because breakfast had to go out by 6:30 am for the group to make a trip they had planned.

[9] On 16 May 2022, Ms McLeod arrived for her shift at 5:45 am. She started to prepare meals based on the instructions from the Head Chef the night before. The cabinets were not ready as they had not been replenished over the weekend. Around 6:10 am, Ms McLeod buzzed the front of house staff (Food and Beverage Manager, and waitress) to ask how the guests would like their eggs. The front-of-house staff told Ms McLeod that the guests would be ordering individually off the B&B (bed and breakfast) menu instead of the Big Suncourt breakfasts that Ms McLeod had prepared.

[10] The change in orders was stressful for Ms McLeod. She asked the front of house staff to help her by slowing down the service, meaning that meals would be delayed going out from the kitchen. Ms McLeod felt that the front of house staff were not being supportive, and she directed a comment to the waitress about the Food and Beverage Manager - which he overheard – calling him an offensive name and threatening to walk out.

[11] After the group ordering their breakfasts had departed, a further twelve orders came through individually between about 7:30 am and 10:00 am. Ms Beveridge the Kitchen Assistant had started work around 8:00 am. The Head Chef also came into the kitchen around 8:00 am or 8:15 am (he usually started his shift at 10:00 am) in response to a request from Ms McLeod and / or Sun Court management. Ms McLeod's recollection is that nobody from management came to the kitchen to check on her.

[12] That night Sun Court's HR & Operations Manager Laura Crowther emailed Ms McLeod a letter asking to meet with her to discuss two concerns: an incident reported by the front of house staff regarding alleged use of verbally abusive and threatening

language towards other team members, and an alleged failure to follow reasonable instructions from management in regards to serving customers in a timely manner. There was no mention of the text the Head Chef had sent Ms McLeod the night before. Sun Court invited Ms McLeod to a disciplinary meeting on 19 May 2022.

[13] Ms McLeod responded via email that night raising concerns she had around the incident including the instructions from the Head Chef. The next day on Tuesday 17 May 2022, Ms McLeod sent Sun Court a letter raising a personal grievance for unjustified disadvantage due to the instruction to prepare the Big Suncourt breakfasts and the lack of acknowledgment that resulted in a horrible experience in the kitchen. Sun Court acknowledged the personal grievance on 18 May 2022. Ms McLeod provided Sun Court with a medical certificate and was on leave from 16 May 2022 until 31 May 2022 “pending mediation investigation for work related incident”.

[14] From approximately 18 May 2022 the parties were involved in two parallel processes – an investigation into the 16 May incident, and Sun Court’s response to Ms McLeod raising a personal grievance. On 19 May the parties attended an investigation meeting regarding Ms McLeod’s alleged serious misconduct (use of offensive language / threats) and failure to follow reasonable instruction.

[15] Ms McLeod provided another medical certificate covering the period 30 May 2022 to 6 June 2022. On 16 June 2022 the parties attended mediation, which was unsuccessful at resolving the issues between them.

[16] On 11 July 2022 Sun Court invited Ms McLeod to a disciplinary meeting relating to the incident. Sun Court advised Ms McLeod there would be no further action required in respect of the allegation that she had failed to follow a reasonable instruction. By this stage, Ms McLeod had exhausted her leave entitlements and was on unpaid leave.

[17] On 19 July Ms McLeod’s representative sent Sun Court a letter clarifying the personal grievance relating to unjustifiable disadvantage also related to Sun Court failing to act in good faith by not providing chef/kitchen service support as promised when Ms McLeod commenced her employment in July 2021 and as detailed in her February 2022 appraisal.

[18] On 7 September 2022 Ms McLeod attended a disciplinary meeting. Sun Court sent Ms McLeod a follow-up email on 9 September outlining its preliminary decision

that Ms McLeod's actions on the morning of 16 May 2022 amounted to misconduct, with the proposed outcome being that she would be issued with a written warning. Sun Court acknowledged that Ms McLeod received instructions from the Head Chef which she acted on, then later received different instructions. However Sun Court said Ms McLeod had demonstrated that she was capable of preparing 10 breakfasts by herself and irrespective of the stress of the situation, there was no justification for the language used. The outcome advised to Ms McLeod was a written warning, and her feedback was invited by 13 September. Ms McLeod did not respond to Sun Court's preliminary decision.

[19] On 14 September 2022 Ms McLeod was issued with a first written warning for misconduct. Sun Court also asked Ms McLeod to confirm her ongoing employment status at Sun Court, noting there was no medical certificate covering her absence from 6 June 2022 and she had made a statement at the 7 September 2022 disciplinary meeting implying that she was not returning to work. Ms McLeod did not respond to the 14 September letter from Sun Court. She did not provide additional information or medical certificates.

[20] Around the end of September 2022 Ms McLeod started to look for other employment but did not advise Sun Court of this. Sun Court concluded that Ms McLeod did not intend to return to work. On 12 October 2022 Sun Court terminated Ms McLeod's employment on grounds of abandonment and sent her a letter confirming this. On 14 November 2022, Ms McLeod started new employment outside the hospitality sector.

Unjustifiable disadvantages

[21] Ms McLeod claims that the instructions she was given by the Head Chef affected her to her disadvantage, and that Sun Court's response to the incident also unjustifiably disadvantaged her. Ms McLeod also asks, in a more general sense, for a finding that she was unjustifiably disadvantaged by the lack of training provided by Sun Court and lack of support in the kitchen and that these actions (or inactions) led to the incident on 16 May 2022.

[22] In order to conclude that Ms McLeod was unjustifiably disadvantaged in her employment, I would have to find that Ms McLeod's employment or one or more of the conditions of her employment were affected to her disadvantage by an unjustifiable

action by the employer. Ms McLeod has the burden of establishing that a condition of her employment has been affected to her disadvantage. Sun Court would then have to establish that its actions were what a fair and reasonable employer could have done in all the circumstances that the action occurred.

[23] Ms McLeod's employment was not affected to her disadvantage by the Head Chef's instructions. It is common ground between the parties that the Head Chef's instructions for the breakfast service on 16 May 2022 were incorrect, although the reason for this can only be the subject of conjecture as the Head Chef did not give evidence before the Authority. When the complaint by the two staff members was first investigated, Sun Court put to Ms McLeod that she may have failed to follow a lawful instruction in relation to serving customers in a timely manner. However, Sun Court did not take any adverse action against Ms McLeod in relation to this allegation, and it took no action at all after hearing from Ms McLeod and attending a mediation with her. The allegation was formally withdrawn at the time Ms McLeod was invited to a disciplinary meeting relating to the alleged use of verbally abusive and threatening language. Although the lawful instruction allegation could have been withdrawn earlier (as soon as Sun Court determined it was not going to take any further action to investigate the Head Chef's actions) Ms McLeod was not unjustifiably disadvantaged by any delay.

[24] The second part of Ms McLeod's disadvantage claim relates to Sun Court's response to the 16 May 2022 incident. This claim has two limbs – the first being Sun Court's immediate response and whether it checked on Ms McLeod's wellbeing, the second being its investigatory response to the complaints by the two staff members which Ms McLeod says unfairly disadvantaged her.

[25] Ms McLeod told the Authority that between 6:15 am and 10:00 am no-one from Sun Court management came to assist her or to check on her wellbeing. After the guests ordering their breakfasts had departed, around twelve orders came through individually between about 7:30 am and 10:00 am. The Kitchen Assistant Ms Beveridge had meanwhile started in the kitchen around 8:00 am and the Head Chef arrived around 8:00 am – 8:15 am. Ms McLeod says that there was no acknowledgement from management about the text that had been sent from the Head Chef the night before.

[26] Sun Court's General Manager Ms Simmen gave evidence to the Authority that she had received a phone call from front of house staff that morning. The Food and

Beverage Manager told Ms Simmen he could not work when he was being so disrespected. Sun Court's owner Mr Funnell went down to the kitchen and Ms Simmen rang the Head Chef and told him that he needed to come in to work. Around 9:30 am or 10:00 am that morning, Ms Simmen also went down to the kitchen. Ms Simmen asked the Head Chef whether everything was okay, and he replied that they were sweet and it was all sorted. According to Ms Simmen, Ms McLeod was leaning on the bench looking at her phone with Ms Beveridge and she also said everything was sweet. The only person not relaxed at that time was the Food and Beverage Manager.

[27] Although there was a difference in the parties' recollections, I prefer the evidence of Ms Simmen and Mr Funnell who said they went to the kitchen to check on the staff on the morning of 16 May, which was also supported by Ms Beveridge's evidence. Ms Simmen routinely visited the kitchen, as did Mr Funnell on his way to feed the pigs. It would have been unusual if they had not stopped in to see the kitchen staff, and it would have been particularly unusual if they had not checked on the staff after being contacted by the Food and Beverage Manager in an upset state. I accept Sun Court's evidence that it was generally concerned about retaining its Front of House staff and kitchen staff including Ms McLeod.

[28] In addition, it was undisputed that the Head Chef – who was part of Sun Court's management team - had come into work early in response to the incident. I find this was to provide support or check on the staff in the kitchen including Ms McLeod. It is possible that a routine occurrence such as Ms Simmen and Mr Funnell visiting the kitchen staff may not have registered with the staff on that particular morning. Mr Funnell and Ms Simmen both told the Authority that the front of house staff were upset, whereas Ms McLeod did not appear to be. That is a reasonable explanation for why they would only have spent a short period of time "checking in" with Ms McLeod. Ms Simmen also said that she felt that her managers (the Head Chef and Ms Crowther) were handling the situation very well.

[29] Based on the factors above, I find that Ms Simmen, Mr Funnell and the Head Chef all checked on Ms McLeod on the morning of 16 May, and that Ms McLeod was not unjustifiably disadvantaged in terms of actions Sun Court took in relation to checking on her wellbeing immediately following the incident.

[30] In relation to Sun Court's investigative response to the incident, Ms McLeod felt that Sun Court's response to the incident was "heavy handed" towards her. Ms

McLeod says that there should have been early acknowledgement of the Head Chef's incorrect instructions to her. This issue was noted by the front of house waitress in her complaint and was raised by Ms McLeod in her email to Sun Court management on the night of 16 May, so I accept that Sun Court was aware of the incorrect instructions by late in the day on 16 May.

[31] Based on the information before the Authority, I find that immediately following the incident, Sun Court focused on the language Ms McLeod had used which was the basis for the complaints made by the front of house staff and that it was reasonable for it to have done so when initiating its investigation.

[32] When Ms Simmen went down to the kitchen on the morning of the incident, she saw Ms McLeod and Ms Beveridge standing together. At that stage, she had very little information about the incident except what she had heard from the Food and Beverage Manager. Ms McLeod did not raise any issues about the Head Chef's instructions at that point, and Ms Simmen had no reason to think that Ms McLeod had any concerns that warranted her immediate attention.

[33] Sun Court told the Authority that any complaints would usually be followed by a discussion and a line manager would direct what would happen. After receiving the complaints, Ms Simmen and Ms Crowther decided to deal with the matter through consultation as they felt that following the investigative line would be the best way to get to the truth about what had happened and why. Later the same day, Sun Court sent Ms McLeod the email and letter inviting her to a potential disciplinary meeting with Ms Simmen and Ms Crowther to discuss issues raised.

[34] The focus of Sun Court's investigation at that stage was on the complaints about the language Ms McLeod had used, which it was obligated to investigate. Ms McLeod's language was offensive. She accepted that and offered an apology to the Front of House staff through her managers at an early opportunity. Sun Court's Code of Conduct stipulates that aggressive, argumentative or discourteous behaviour towards another worker, guest or customer is an example of misconduct which would invoke a system of warnings. I find that Sun Court took appropriate action in line with the Disciplinary Procedure under its Code of Conduct including obtaining Ms McLeod's version of events, and her explanation for why she had used offensive language. On 19 May when Ms McLeod formally raised the Head Chef's involvement, Sun Court asked him for a statement and provided this to Ms McLeod. Shortly after the investigation

into the complaints began, Ms McLeod raised a personal grievance which then required two separate enquiries. Ms McLeod continued to participate in the disciplinary process (including attending a meeting on 7 September 2022) but chose not to comment on the preliminary decision to issue a written warning.

[35] Although Sun Court could have acknowledged the incorrect instructions earlier (as I have noted above), I consider this only to be a minor procedural deficiency which did not disadvantage Ms McLeod because Sun Court withdrew the reasonable instruction allegation once it had confirmed the Head Chef's involvement. There was no further investigation of the Head Chef's role because Sun Court accepted Ms McLeod had been given incorrect instructions. Irrespective of the incorrect instructions, Sun Court was obligated to continue and conclude its investigation into the complaints about Ms McLeod's language and I find Ms McLeod was not unjustifiably disadvantaged by the actions that Sun Court took by following up and investigating the circumstances of the incident.

[36] The claim that Ms McLeod was unjustifiably disadvantaged by the lack of training provided by Sun Court and lack of support in the kitchen and that these actions (or inactions) led to the incident on 16 May 2022 requires a more detailed analysis of the history of Ms McLeod's employment at Sun Court.

[37] Ms McLeod acknowledged that her individual employment agreement with Sun Court was the entire agreement and there was nothing in the agreement relating to apprenticeship, supervision, or a pay review in her agreement. I find that Ms McLeod's training was basic, but sufficient for her role.

[38] Based on the evidence before the Authority, I accept Sun Court was supportive of Ms McLeod undertaking external training and would have met the cost. However Ms McLeod told the Authority her priorities and career aspirations had shifted after a significant event in her personal life and she felt she was being asked to work too many additional hours which she did not wish to do. She had not wanted to do the training offered as the timing did not suit. From Ms Crowther's perspective, Sun Court offered additional hours and training which Ms McLeod was free to decline – there was no pressure from Sun Court. Ms McLeod cannot claim lack of training as a disadvantage in her employment when she was offered training but chose not to undertake it.

[39] Ms McLeod also says she felt disadvantaged in her work because Sun Court had promised but never given her additional support in the kitchen in the form of a second chef who would be there at the beginning of the shift to assist with preparation. On 11 February 2022 at Ms McLeod's performance appraisal, the parties discussed that Ms McLeod should be rostered on her shifts with a 'stronger' person. Ms McLeod did not have a second chef rostered on to assist her routinely, but she acknowledged there were senior chefs who worked alongside her when it was known in advance that there would be large groups of guests coming through the restaurant.

[40] Sun Court's evidence was that it was difficult to recruit for senior chefs. Covid times and border closures meant Sun Court was constantly recruiting. Ms Crowther said it had always been the intention to provide more senior support to Ms McLeod but circumstances meant it could not be provided. Based on the evidence before the Authority, there were multiple occasions on which more senior chefs were rostered on to assist Ms McLeod, although not consistently and the roster depended to a large extent on Sun Court receiving advance notice about the demands of a particular service.

[41] To ensure sufficient coverage, Sun Court held a weekly food and beverage meeting between staff. The kitchen and front of house had run sheets which generally said how many customers were expected for the a la carte breakfast. The bed and breakfast menu was pre-ordered. The food and beverage meetings, run sheets and shifts were arranged around large events, which Sun Court considered to be around 20 guests. It was the responsibility of the Head Chef to decide whether additional resource was needed for a kitchen service, but it would be sanctioned by Ms Simmen and Mr Funnell. Ms Simmen said that larger groups were often booked into the restaurant but could also walk in off the street. It was never an operational or money issue to have additional staff rostered on.

[42] Sun Court believed it supported last minute changes by making the Head Chef available to come into work if required. On occasions, the restaurant did not even offer service if staff were not available which happened on one occasion in March 2022 where the restaurant was closed for breakfast.

[43] On 16 May 2022, Sun Court did not have advance notice that the breakfast service would be difficult or stressful. Ms McLeod had agreed to come in early as she understood the group needed to be served by 6:30 am. The parties were largely in agreement that the last-minute change to ten people ordering individually off the menu

at the same time with the added time pressure was what caused the situation to become more stressful than the usual pressures of working in a kitchen environment.

[44] The parties did not agree on whether the changed orders were within Ms McLeod's competency to handle. Ms Simmen said there was no reason for her to think that Ms McLeod could not handle breakfast service and even ten a la carte meals would have been perfectly within Ms McLeod's competency – especially given that normal breakfast service did not open until 7:30 am. Ms Simmen also acknowledged that front of house may have been putting pressure on the kitchen staff, but ultimately Front of House staff did not have the ability to speed up or slow down service – guests would have to wait until their meals were ready.

[45] Ms McLeod felt the incident happened as a direct result of Sun Court's broken promises to give her additional support. She accepts the language she used was "horrible" but she felt that she had been set up to fail. On the day of the incident, she was under pressure, had extreme stress and the incident was the result.

[46] Based on the evidence before the Authority, I find that Sun Court did everything that a fair and reasonable employer could do to ensure that Ms McLeod was trained and supported in her employment. Sun Court planned as much as possible for large groups and created the roster accordingly. In its weekly food and beverage meetings, it provided a forum for staff to discuss how to handle upcoming guest demand. It gave its staff options for how to respond to changes and challenges (by calling on the Head Chef). In conjunction with that, I find that Sun Court had no reason to anticipate that 16 May would be a particularly difficult service, and one that necessitated Ms McLeod requiring extra support. I accept Sun Court believed Ms McLeod was competent to handle the breakfast service on the day because she had worked for Sun Court for ten months at the time of the incident and had always worked the first part of the breakfast shift solo since she started her role in July 2021. Although I accept Ms McLeod raised issues about additional support in February 2022 at her appraisal, that review also recorded that Ms McLeod was competent to perform the breakfast cook role.

[47] Ms McLeod also told the Authority she had never received an order she could not handle and had never encountered a situation where she needed to call in additional resource at short notice. Ms McLeod was aware that she could call on the Head Chef for assistance.

[48] The day of the incident was a perfect storm, but I do not accept that it was a situation of Sun Court's making. The change to the orders on the morning of the incident was stressful for Ms McLeod, but based on the information before the Authority I find Ms McLeod was both experienced enough and competent enough to have handled the orders. Her reaction to the situation cannot be attributed to Sun Court's lack of support.

[49] Looking at the circumstances of the alleged disadvantages objectively, it is clear Ms McLeod considered Sun Court's response in investigating the incident to be unfair and heavy-handed towards her and she raised a disadvantage grievance in response to Sun Court's decision to investigate the complaints. However, for all the reasons given above, I find Ms McLeod was not unjustifiably disadvantaged in her employment. Sun Court acted as a fair and reasonable employer in relation to all the grounds of alleged disadvantages Ms McLeod has claimed.

Was Ms McLeod unjustifiably (constructively) dismissed?

[50] In some circumstances a resignation may amount to a dismissal. It was stated by the Court of Appeal in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* that:¹

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.

[51] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited*² where a constructive dismissal might occur. These situations are not exhaustive:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

¹ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965.

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

[52] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[53] The Court of Appeal³ has stated the broad legal approach as starting with the question of whether the resignation has been caused by a breach of duty on the part of the employer by looking at all the circumstances of the resignation. If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under those conditions.

[54] Ms McLeod claims constructive dismissal on the third ground under *Woolworths*, on the basis that Sun Court breached a duty to her and should have been able to reasonably foresee that rather than putting up with breaches, she would resign. Ms McLeod says Sun Court breached its duty of good faith on multiple occasions (by not providing promised support) as well as significantly breaching her individual employment agreement by unilaterally changing her conditions of employment (not rostering additional staff to her shifts), failing to investigate Ms McLeod's concerns, and predetermining the investigation outcome.

[55] Ms McLeod says she was not confident working without support, Sun Court's rostering system did not work, and the Manager and Head Chef were not available to provide that support. She says these breaches were calculated to or likely to destroy or seriously damage the relationship of trust and confidence such that she believed her agreement had been repudiated by Sun Court and in those circumstances, it was reasonably foreseeable that she would resign from her position.

[56] Based on the evidence before the Authority, I find that the end of Ms McLeod's employment was not caused by breaches of duty by Sun Court.

[57] Because there was no clear evidence that Ms McLeod resigned, it is more challenging for her to show a direct connection between any breaches by Sun Court and the end of her employment. Ms McLeod has submitted that her effective resignation may have been during the 19 May 2022 investigation meeting when she stated: "I'm not happy to return to this working culture". I do not accept that was a clear resignation

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

(nor did Sun Court see it as such) because following that statement, Ms McLeod continued to engage with Sun Court through the mediation and disciplinary processes up until 7 September 2022.

[58] Irrespective, there was no breach of duty by Sun Court sufficient to amount to a repudiation of the employment agreement. The alleged failure to provide extra support on the breakfast shift was not a unilateral change to Ms McLeod's employment conditions. Ms McLeod had not routinely or consistently had extra support on the breakfast shift since she started in her role. This situation did not change after she raised the issue of additional support in her February 2022 appraisal, which was still more than three months prior to the incident and almost five months prior to the end of her employment. In terms of the issues Ms McLeod has raised about the investigation into the incident, I have already concluded that Sun Court acted as a fair and reasonable employer and there was no disadvantage to her. The conduct of Sun Court's investigation did not breach any duties to Ms McLeod. I conclude Ms McLeod was not constructively dismissed from her employment with Sun Court.

Was Ms McLeod unjustifiably dismissed because her employment was terminated for abandonment?

[59] In order to answer this question, I must consider:

- (a) Whether the dismissal was substantively justified.
- (b) Whether the dismissal was procedurally fair.

[60] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances that the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair.

[61] I must consider whether the employer sufficiently investigated the allegations, raised its concerns with the employee before taking action against them, gave the employee a reasonable opportunity to respond, and genuinely considered the employee's explanation before dismissing them. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[62] In this case, Sun Court justified its decision to dismiss Ms McLeod on the basis that she had abandoned her employment and had no intention of returning to work. Ms McLeod's individual employment agreement contains an abandonment clause at 13.4 which provides that in the event the employee has been absent from work for three consecutive working days without any notification to the employer and the employer has made reasonable efforts to contact the employee, the agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[63] Sun Court says that it was not immediately obvious that Ms McLeod had no intention of returning to work after 16 May 2022. Ms McLeod's last contact with Sun Court was at the 7 September disciplinary meeting but I accept that Sun Court did genuinely want Ms McLeod to return to work and tried to engineer a return-to-work plan to support her return. Ms McLeod chose not to engage in this process. Sun Court's attempts to resolve the employment relationship issues with Ms McLeod included multiple communications, meetings, and attending mediation.

[64] On 14 September Sun Court asked Ms McLeod to confirm her ongoing employment status and provide medical certificates for her absence and – when there was no response from Ms McLeod – Sun Court confirmed verbally with her representative on 28 September 2022 that Ms McLeod had received the correspondence. By the end of September Ms McLeod had started looking for other roles outside the hospitality sector.

[65] The management team at Sun Court debated the termination of Ms McLeod's employment, including giving consideration to whether Sun Court had done enough to adequately discuss the issue with Ms McLeod. Sun Court did not make the decision lightly. It took advice and gave due consideration to whether it was being fair and reasonable before embarking on an abandonment path. I accept that Sun Court wanted to follow best business practice and that it gave Ms McLeod fair and reasonable opportunity to engage.

[66] At the time Ms McLeod's employment was terminated for abandonment on 12 October 2022, Ms McLeod had been absent from work since 17 May 2022. Medical certificates covering her absences had expired on 6 June 2022, and there had been no communication from Ms McLeod since 7 September 2022. This was far in excess of

the three consecutive working days stipulated in Ms McLeod's individual employment agreement.

[67] Ms McLeod told the Authority she felt relieved when her employment was terminated by Sun Court. From May to September 2022 she felt that she was not mentally capable of returning to full time work and she did not want to have to engage with Sun Court.

[68] I find that Sun Court was substantively justified in dismissing Ms McLeod for abandonment, and it followed a fair and reasonable process. It follows that Ms McLeod was not unjustifiably dismissed by Sun Court.

Was there a breach of good faith / breach of Individual Employment Agreement?

[69] Ms McLeod said that she felt her employer was not acting in good faith throughout her employment. Her allegations relating to breach of good faith and / or breach of her individual employment agreement overlap significantly with the claims that she has raised as disadvantages and in relation to what she alleged was a constructive dismissal.

[70] The duty of good faith is a reciprocal duty which means it applies equally to the employer and employee. The duty of good faith is wider than the implied mutual obligations of trust and confidence. Parties must not do anything likely to mislead or deceive and must be active and constructive in maintaining the employment relationship.⁴

[71] Sun Court did not breach its duty of good faith towards Ms McLeod. I have found that Sun Court fully and fairly investigated the allegations against Ms McLeod (as part of the disciplinary investigation) and it did consider the contributing factors Ms McLeod alleges led to the incident (namely the Head Chef's incorrect instructions). There was no evidence of predetermination in respect of the disciplinary process or outcome, nor in respect of the response to the personal grievance. The withdrawal of the allegation relating to failure to follow lawful instructions shows that Sun Court had an open mind throughout the disciplinary investigation. As above, I have found there was no unilateral change of Ms McLeod's employment conditions or repudiation of the employment relationship. I find that Sun Court intended to provide more support to Ms

⁴ Employment Relations Act 2000, s 4.

McLeod and its other staff but circumstances around recruitment and retention in the hospitality sector did not accommodate that. It was not necessary for it to do so, nor was it possible based on the climate in the hospitality sector at the time.

[72] To the contrary, it was Ms McLeod who obfuscated with her employer around the issue of secondary employment. While it is ultimately immaterial to my determination, there was evidence presented before the Authority that Ms McLeod deliberately misled Sun Court as to whether she had secondary employment while employed with Sun Court. Ms McLeod also stopped engaging with Sun Court after the disciplinary meeting on 7 September. Neither of these actions were constructive in maintaining the employment relationship.

[73] Based on the evidence before the Authority, I find no support for the claim that Sun Court breached its duty of good faith towards Ms McLeod.

Findings

[74] Ms McLeod's claim that she was unjustifiably (constructively) dismissed from her employment with Sun Court Motel has been unsuccessful. Ms McLeod's employment was justifiably terminated on grounds of abandonment and she was not unjustifiably dismissed. Further, Ms McLeod was not unjustifiably disadvantaged by Sun Court, nor did Sun Court act in bad faith towards her. I conclude that Sun Court acted as a fair and reasonable employer throughout Ms McLeod's employment.

[75] Consequently, Ms McLeod is not entitled to an assessment of remedies.

Costs

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

[77] If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[78] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Natasha Szeto
Member of the Employment Relations Authority

⁵ [Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi](#)