

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 168
3049392

BETWEEN TLN
 Applicant

AND SIAM CUISINE LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant
 Robert Thompson, advocate for the Respondent

Investigation Meeting: 3 and 4 December 2019 at Christchurch

Submissions [and further 4 December 2019 from the Applicant
Information] Received: 4 December 2019 from the Respondent
 Application for additional non-publication made 20
 February 2020
 Names of recipients of text messages provided 10 March
 2020

Date of Determination: 28 April 2020

DETERMINATION OF THE AUTHORITY

- A TLN was not unjustifiably constructively dismissed.**
- B Siam Cuisine Limited unjustifiably disadvantaged TLN in her employment.**
- C Orders have been made for payments by Siam Cuisine Limited as below:**
- (i) The sum of \$3,059 gross being reimbursement of wages for a period of unpaid sick leave under s 123(1)(b) of the Employment Relations Act 2000 (the Act).**

- (ii) **Leave is reserved for Ms Oberndorfer or Mr Thompson to return to the Authority within five working days if there are further issues with reimbursement.**
- (iii) **The sum of \$12,000 without deduction being payment of compensation under s 123 (1)(c)(i) for humiliation, loss of dignity and injury to feelings.**

D Costs are reserved and a timetable set for an exchange of submissions.

Identity of the employer

[1] By agreement the identity of the respondent is Siam Cuisine Limited (Siam Cuisine). The proceedings are amended accordingly.

Non-publication of the applicant's name

[2] At the start of the investigation meeting an oral application was made by Ms Oberndorfer to prohibit from publication the applicant's name. The application was made on the basis that the applicant was a young person in employment and that the factors favoured non-publication of her name.

[3] The Authority took an adjournment so that Mr Thompson would have an opportunity to take instructions from his client.

[4] The Authority then heard oral submissions in response from Mr Thompson. The application for non-publication of the applicant's name was opposed by Mr Thompson on the basis that the normal principles should apply with respect to open justice.

[5] The Supreme Court in *Erceg v Erceg* stated the starting point is the principle of open justice. Specific adverse consequences that are significant must be shown by the person seeking non-publication before that principle can be departed from.¹

[6] The standard is a high one. The only ground advanced in support of the application is the impact that publication could have on future employment for TNL as a young employee. Whilst publication could have an adverse consequence on future employment I do not see

¹ *Erceg v Erceg* [2016] NZSC 135 at 13

that as an adverse consequence that is significant in the sense of being specific to the applicant and different from many other cases that the Authority sees.

[7] Ultimately I was not persuaded that the standard to justify a departure from the fundamental principle of open justice has been met in this application for permanent non-publication of the applicant's name. The application for non-publication of the applicant's name was therefore declined at the start of the investigation meeting.

[8] I accept that non-publication is an important issue for the applicant in this case. I advised the parties I would make an interim order prohibiting her name from publication for a period of 28 days from the date of this determination. This will enable a challenge to the Employment Court if the applicant wishes about the refusal of a non-publication order. At the end of 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication.

[9] I shall refer to the applicant as TLN which are three letters randomly selected.

[10] A subsequent application was made after the investigation meeting by writing on 20 February 2020 for non-publication of the names of two individuals who received text messages from the applicant at the material time. The respondent had been seeking the names of the recipients of those text messages and that had been resisted by Siam Cuisine including at the time of the investigation meeting. The non-disclosure impacted on the weight if any in those circumstances that the Authority could give to the text messages.

[11] The application for non-publication was not opposed by the respondent and on that basis the names of the two recipients were provided to the Authority and Mr Thompson on 10 March 2020. Mr Thompson was given an opportunity to make any further submission to the Authority with knowledge of the names however no further submission as received.

[12] I prohibit from publication the names of the two recipients of the text messages. Some other text messages were sent to TLN's fiancée. I do not prohibit from publication his name however I shall refer to him in this determination by the initial B.

Employment relationship problem

[13] Siam Cuisine Limited (Siam Cuisine) is a duly incorporated company that carries on business in the hospitality industry and is involved in recruitment of staff, including staff from overseas for restaurants.

[14] The sole director of Siam Cuisine is Murray McCarthy.

[15] On 1 March 2018 TLN was offered a position as a Personnel Officer with Siam Cuisine on \$22 an hour. Her role included staff recruitment activities, preparation of employment agreements and providing assistance in employment relations issues including with training and development of staff. TLN was very happy in her role.

[16] On 6 July 2018 TLN received a pay rise from \$22 to \$23 per hour and felt that she was heading in the “right direction” with her employment. She was also asked at or about this time to take over the task of completing bank reconciliations for a month. That responsibility remained until her employment ended. TLN found this a time-consuming and somewhat stressful part of her role. Further, TLN had concerns about her treatment by Mr McCarthy.

[17] TLN’s resignation was notified to Siam Cuisine by a letter dated 10 October 2018 from her then employment advocate, Mr Phil Butler. TLN says the issues that arose in the workplace and how they were dealt with by Siam Cuisine form the basis for her claim that she was unjustifiably constructively dismissed and disadvantaged. The claims arise from the same facts.

[18] TLN relies on the third category in the non-exhaustive list of situations where a constructive dismissal may arise in the Court of Appeal judgment in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd*.² She says that a breach or breaches of duty on the part of Siam Cuisine were causative of her resignation.

[19] TLN says these breaches are:

- (a) She was a victim of bullying that caused her to become unwell;
- (b) Siam Cuisine unjustifiably failed to assemble a response to her complaints in a timely manner;

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

- (c) Siam Cuisine unjustifiably refused to meet when there was medical advice that a meeting should proceed, notwithstanding that she was on medical leave; and
- (d) Siam Cuisine was “duplicitous” both in terms of their intentions with regard to the meeting that was held and what was presented to her.

[20] The remedies TLN seeks were clarified in final submissions. TLN seeks reimbursement of lost wages in the sum of \$6,692 gross made up of full loss of wages until 29 October 2018 and thereafter a shortfall in the hourly rate for new employment until 27 May 2019. There were additional remedies claimed in the statement of problem for loss of KiwiSaver and holiday pay on any lost wages. I will deal with any inconsistency between the statement of problem and submissions if I get to the point of remedies. There is also a claim for compensation in the sum of \$15,000.

[21] Siam Cuisine accepts that TLN was an employee from 1 March 2018. It does not accept TLN was unjustifiably constructively dismissed from her employment and denies that there was bullying or other actions that were unjustified and caused her disadvantage.

The Issues

[22] The Authority needs to resolve the following issues in this case:

- (a) What are the material provisions of the employment agreement?
- (b) What were the reasons for TLN’s resignation?
- (c) Was the resignation caused by breaches of TLN’s employment agreement with Siam Cuisine?
 - (i) Was there behaviour of a bullying nature during TLN’s employment with Siam Cuisine?
 - (ii) Were the actions of Siam Cuisine after receiving the letter from TLN’s representative of 14 September 2018 those of a fair and reasonable employer?
 - (iii) Was it a breach of obligations not to meet with TLN until she was medically fit to work?

- (iv) Was Siam Cuisine duplicitous in terms of its intention with respect to the meeting and what was presented at the meeting?
- (d) If there were breaches by Siam Cuisine then were they of a serious nature that would mean it was reasonably foreseeable that TLN would not be prepared to continue to work;
- (e) If there was a constructive dismissal then was it justified?
- (g) Alternatively if the claim for unjustified constructive dismissal is not made out were there actions that were unjustified and caused disadvantage to TNL?
- (h) If either claim is made out then what remedies should be awarded and are there issues of contribution or mitigation?

Material provisions of the employment agreement

[23] TLN was party to an individual employment agreement with Siam Cuisine signed on 9 March 2018. She agreed to perform her duties in accordance with the instruction of her employer diligently and in a manner to promote the interest of her employer.³ Schedule B of the employment agreement contained the employer regulations including a code of conduct with employee obligations in clause 12 (a).

[24] Siam Cuisine committed to providing where reasonably practicable a safe work environment.⁴ Both parties recognised the importance of maintaining a mutually supportive policy about work related stress. TLN was obliged to inform Siam Cuisine at an early stage if she was suffering from the effect or potential effect of work related mental or physical harm.⁵

What were the reasons for TLN's resignation?

[25] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)*⁶ set out the approach to be taken where there is a claim of a breach or breaches of duty.

³ Clause 3(e) of the employment agreement.

⁴ Clause 17(b) of the employment agreement.

⁵ Clause 18 of the employment agreement.

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419

[26] The first matter to determine is whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances leading to resignation have to be examined not simply the communication of the resignation.

Email of 10 October 2018 containing the resignation

[27] TLN's resignation was communicated in an email from Mr Butler dated 10 October 2018. It followed a meeting on 9 October 2018 between Mr Butler, TLN, Mr Thompson and Neptune Jiang who is a consultant with Siam Cuisine and advises the company on performance and systems.

[28] In the email Mr Butler advised that TLN was resigning with immediate effect and that the resignation was in the nature of an unjustified constructive dismissal. The matters referred to in that resignation letter are the same as the breaches relied on as being causative of the resignation.

[29] It was set out in the email that at no time prior to the meeting was there advice that Mr McCarthy would not be attending the meeting. Mr Butler wrote that during the meeting Mr Thompson advised that he had been provided with a timeline of events from Mr McCarthy, a copy was not provided, although Mr Thompson referred to it. Further to that Mr Thompson advised he had asked Mr McCarthy not to respond to the event on 3 September and Mr Butler set out TLN's view of that event. I will set the next paragraph in the email out in full:

Our client concluded the company through its sole voice Murray has once again treated her unfairly. He and the company have been duplicitous both in terms of their intentions with regard to the meeting and in what they presented to her yesterday. She had not been told he was not going to be in attendance. She had not been told that Murray as the Managing Director had decided that you and Neptune (Murray's recent current partner in life) would commence an investigation some 25 days after the complaint had been received. There was no explanation offered as to why nothing had been done during the 25 days. There were no apologies for anything. It was from her perspective a further illustration of the bullying this company perpetuates. The strategy adopted was to coerce TLN into resigning. It was successful.

[30] The email concluded with advice about the immediate resignation and that grievances for unjustified actions and dismissal were raised. The unjustified actions alleged in that letter were those in the period of 90 days prior to 10 October 2018 which is from 12 July 2018. There was advice that mediation assistance would be sought.

Oral evidence from TLN

[31] TLN was asked by the Authority about her decision to resign. She said that she made the decision to resign two hours after the meeting on 9 October 2018 and discussed it with B, her father and then Mr Butler. She said in her oral evidence that she was at a loss at the end of the meeting and felt it was not safe to go back and that they were never going to do anything to give her a fair chance.

[32] The focus on whether any breaches were causative of the resignation is on the matters raised in the resignation letter supplemented by evidence about the timing of the resignation.

Was the resignation caused by breaches of TLN’s employment agreement with Siam Cuisine?

Was there behaviour of a bullying nature?

Defining bullying behaviour

[33] Ms Oberndorfer and Mr Thompson referred the Authority to cases and definitions that guide the Authority when it looks at allegations of bullying. There are also obligations that sit with the need to address bullying because an employer has to take all reasonably practicable steps to prevent foreseeable or reasonably foreseeable harm to an employee and to take reasonable steps to maintain a safe workplace.

[34] Both a failure by an employer to comply with the duty to provide a safe workplace and a failure to address bullying may give rise to unjustified disadvantage claims⁷ and be relevant to an assessment of justification under s 103A of the Employment Relations Act 2000 (the Act).

[35] Ms Oberndorfer and Mr Thompson refer in their respective submissions to a definition for workplace bullying contained in “Preventing and Responding to Workplace Bullying: The Guidelines”.⁸

[36] The Guidelines define bullying as “repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.”⁹ Siam

⁷ *FGH v RST* [2018] NZEmpC at para [201]

⁸ WorkSafe New Zealand “Preventing and Responding to Workplace Bullying: The Guidelines, February 2014 (The Guidelines)”, first published in February 2014 and updated in March 2017.

⁹ Above n 8 at 7

Cuisine does not have its own bullying policy and I accept that the definition is an appropriate guide to the Authority in the circumstances.

When did the issues arise?

[37] The evidence supported that there were no significant issues in the employment relationship between TLN and Siam Cuisine until in or about July 2018. Although there was reference to interactions with other staff in the statement of evidence, TLN confirmed during the Authority investigation meeting that her allegations were about actions on the part of Mr McCarthy.

[38] TLN directly reported to the office manager who I shall call V. Mr McCarthy had ultimate oversight of the administrative staff.

[39] Mr McCarthy says that the first he knew about any concerns with his behaviour was when he received the letter dated 14 September 2018 from Mr Butler with the timeline attached. There is no evidence to support that concerns were raised with him at an earlier stage. TLN said she did raise concerns with V. One that was not disputed was along the lines that she felt Mr McCarthy did not like her but the evidence before me does not enable me to conclude this was escalated further by V.

[40] The letter of 14 September 2018 is brief but the timeline attached is detailed. Other documents were referred to in the timeline to support various matters raised and it was stated that Mr McCarthy would be able to access these from Siam Cuisine's records.

[41] Mr McCarthy does acknowledge on the dates provided in the timeline certain events occurred but he does not accept TLN's version of the events or that they constituted bullying.

[42] I will set out below the dates on which it is alleged events that amount to bullying behaviour took place and conclusions on the balance of probabilities about them.

July 2018

9 and 10 July 2018

[43] The interaction on 9 July 2018 provides context for the 10 July exchange. Although both fall outside of the statutory timeframe for the alleged unjustified action grievance they can be considered as background for the constructive dismissal.

[44] On 9 July TLN was asked to supply Mr McCarthy with a list to show the immigration status of staff. TLN was also working on the bank reconciliations, a comparatively new aspect of her job. She wrote in the timeline that Ms Jiang hovered behind her asking for the list. When Ms Jiang offered to do the banking reconciliation TLN said that she would rather do it herself to learn how to do it. When Ms Jiang asked for the list again TLN said that she would print it out and give to her when it was finished. She provided a partially completed list at the end of the day.

[45] On 10 July 2018 Mr McCarthy scheduled a staff meeting. TLN said that he told the assembled office team that they were “all just crap” and that they used to have just two people doing the whole office’s work and it was “pathetic and a joke.” TLN said that during the meeting he singled her out for not completing the list the day before to his standard and said that she had given Ms Jiang nothing but “shitty, nasty attitude” when she [Ms Jiang] was only trying to help. TLN said that she apologised and said that had not been her intention and that he rolled his eyes.

[46] Mr McCarthy accepted that the meeting on 10 July 2018 was called. He did not agree that he singled out any particular employee and certainly not TLN and denied rolling his eyes. His recollection was that it was a team improvement meeting because the team had been “dropping the ball” and errors needed to be fixed and changes made. He considered that TLN took a team improvement meeting personally. When questioned at the Authority investigation meeting he said that he could have said “crap” at the meeting. V in her evidence said that she could only recall the meeting but “did not feel anyone singled out.”

[47] A text message sent by TLN to one of her friends disclosed aspects of the above stating that the reason she was singled out was because she forgot to update a spreadsheet because she was sick, rather than for her attitude.

[48] I conclude it is likely Mr McCarthy held a meeting at which he was generally critical of the performance of those who participated. Although V could not recall anyone being singled out she accepted that beyond the fact the meeting happened she could not recall much more about it. A person singled out for criticism is more likely than other participants to recall it because they are directly impacted. It is less likely I find that TLN would have fabricated an account of an exchange in her timeline that painted her in a poor light because

of her perceived attitude. I accept it more likely that she was singled out for some criticism by Mr McCarthy during the meeting.

[49] On its own this behaviour although it could be seen as inappropriate does not fall within the definition of bullying as set out above which requires repetition.

20 July 2018

[50] TLN wrote on the timeline that on this date she spoke to V and another member of the senior management team about a chef working with an expired visa. She wrote that she was told that she needed to ensure the chef ceased work immediately as to continue working was breaking the law. TLN called the chef and instructed they stop working immediately. Mr McCarthy then phoned her and asked why she had sent the chef home and she explained. He then she said berated her telling her that she made not only stupid decisions but decisions that she had no right to make. TLN said that she apologised saying that she had been instructed to cancel the shift by her manager. He responded that it was a “stupid thing to do” and that she had thrown a team member under the bus for saying that they had authorised her to cancel the shift.

[51] Mr McCarthy said in his evidence that the matter was serious and had put the business at risk. Further it created issues with immigration rules and left the restaurant short of staff for the nightly roster. He considered that it required an important discussion to ensure expectations moving forward. He thought that the message was possibly to “step up” and he did not think that he called her decision stupid. He was also concerned that TLN considered she had authority to give such an instruction to the chef rather than checking with the senior management team. He said that he may have felt frustrated at that time.

[52] There were two aspects of concern for Mr McCarthy. The first was the decision made to call the chef and tell them to leave mid-shift because of employment and immigration obligations. The second aspect was that he considered there was an attempt by TLN to blame others for what she had done. Given what he says may have been frustration for him at that time with an understanding of the wider ramifications I conclude it more likely that he did express to TLN that her decision was stupid. Further I conclude it more likely that he told her in essence that she had not been authorised to act in that way by someone more senior in all likelihood by saying to the effect that she was attempting to blame others for her action.

[53] I do not find that TLN had the opportunity during this discussion to have her explanation about any authority to act in this way investigated and considered properly. Such consideration could have impacted both on the conclusion that she made a stupid decision and did so without authorisation. The evidence I heard about this from TLN, V and Mr McCarthy did not enable me to reach any conclusions about what anyone said to TLN. Importantly V did recall in her evidence TLN asking her what to do about the chef. That accorded with what TLN told Mr McCarthy and therefore supports her account to that extent. V did not recall telling TLN to contact the chef and stop the chef from working. Her evidence was that she would always have told one of the senior management team, Murray or Sarah, as it was “not her call to make.”

[54] Objectively it seems less likely that a more senior person would have advised TLN to tell the chef to stop working immediately mid-shift. I cannot however discount a possibility that TLN misinterpreted what was said to her or took it in a more literal way than was intended and that she believed that she could advise the chef in the way that she did. Ms Oberndorfer submits that if TLN had acted without authority then she would have been disciplined. From the evidence and concerns raised Mr McCarthy tended to favour frank and forthright discussions about matters over a more formal process so I do not necessarily agree with that.

[55] Mr Thompson submits that this telephone call whilst critical of TLN’s decision making did not exceed reasonable management criticism. It was not unreasonable of Mr McCarthy to raise this issue with TLN and understandable that he would want to. What was unreasonable was that he did not consider her explanation in a measured way and talk to those she said she spoke to before he concluded her decision was “stupid” and that she had blamed others for it.

[56] It is likely I find that from this point Mr McCarthy view of TLN’s performance as an employee deteriorated.

30 July 2018

[57] The written account on the timeline provided that on this day TLN was called by Mr McCarthy when he was in a meeting with the management team. When she was on the speakerphone he asked her about how she sent out employment agreements and she explained that she would send them to the restaurant manager and ask them to print it out and

provide to the prospective employee. Mr McCarthy made a comment along the lines that he did not want to employ people who could not work out how to print out a document. He asked for TLN's thoughts and she said that she could try to come up with something. Mr McCarthy then responded that she obviously did "not think at all" or "use her brain." TLN said that she felt humiliated because the conversation was heard by other people.

[58] Mr McCarthy denied making the comment to TLN about not using her brain and not thinking. He said that discussion was about the process and that it was the individual's responsibility to print the document off.

[59] TLN provided a text message sent on 30 July to her fiancé B that she wanted to come home and that Mr McCarthy had made her cry. She elaborated about this in a text the following day 31 July 2018 to a friend. That person responded to TLN in the text that Mr McCarthy was a bully and TLN agreed. TLN in her text says that she was told by Mr McCarthy that she was making stupid decisions and not thinking. This reference appeared to refer to both what was said on 20 and 30 July to her. I conclude that it was more likely than not that Mr McCarthy said something to TLN that upset her along the lines she set out in the timeline particularly as it was said in front of others. It was inappropriate to make those comments.

Monitoring of external communications

3 August 2018

[60] V sent an email on this date to TLN asking that she send all curriculum vitae that come into the office from now on to Mr McCarthy and Ms Jiang.

[61] V said in her evidence said that Siam Cuisine did not want to miss out on good candidates and that Mr McCarthy and Ms Jiang wanted to see who was applying. There had previously been a concern that applications from New Zealanders had been overlooked.

[62] I do not conclude that instruction was unreasonable in the circumstances.

22 August 2018

[63] On 22 August V sent a further email to TLN about some matters that needed attending to. Amongst these was that she wanted to be shown any employment agreements that TLN

was sending out, and if she was emailing them, to please copy Mr McCarthy in. I do not conclude that instruction was unreasonable

24 August 2018

[64] On 24 August an email was sent to TLN and at least one other staff member. It asked that V be copied into all emails sent from the office. When she gave her evidence at the Authority investigation, V said that Mr McCarthy advised her copying others into the emails had occurred previously and that it was good for her to be aware of what was going on. Other common information was stored on Siam Cuisine's system Sharelink, but that did not include emails.

[65] At the end of that day TLN spoke to V about how the week had been difficult and that she felt like the whole team did not like her and that Mr McCarthy did not like her and did not want her there anymore. V said that it was not true and apologised for snapping at her during the week and explained that she had a young child who was not sleeping well.

27 August 2018

[66] V checked up on TLN after the discussion on 24 August. TLN said that things in the office felt a bit friendlier than the previous week but that V then said it was her [TLN's] negative attitude and bad mood bringing the office down. V in her evidence at the Authority investigation said that she was not the type of person who would follow up with TLN if she was OK and then "tear her down" and that she would not have responded in that way.

[67] TLN may have interpreted what V said in a negative manner however I could not be satisfied to the required standard that V criticised TLN as she says she did.

[68] In conclusion, there was evidence that some mistakes were happening and Siam Cuisine wanted to impose some reasonable controls to ensure that it would not continue. Although the copying in of V by TLN into every external email sent was a more significant control, the instruction was also given to another person in the administrative team.

[69] The controls imposed became more of a concern to TLN and contributed to her view that she was singled out after a conversation that she had with Mr McCarthy on 3 September 2018. It would have been preferable for TLN to have been more clearly told these measures

were part of a process or a structure to improve her and/or office performance at the time they were imposed.

Sick day on 31 August 2018

[70] TLN called in sick this day. V asked for a medical certificate because she said TLN had originally applied to have the day off and then retracted her application. She said that it raised questions for her whether the sick leave was genuine and that Mr McCarthy instructed her to obtain a medical certificate. A medical certificate was then sent in by TLN and she was satisfied with it. Siam Cuisine agreed to and did pay for the medical certificate.

[71] Siam Cuisine was entitled to ask for a medical certificate if it was felt that there was a question about whether the leave was genuine. Clause 12(d) of the employment agreement provided that the employer may require a medical certificate to verify the illness if the absence is for a period of less than 3 days provided there is reasonable ground to suspect the leave is not genuine. The employer is obliged to inform the employee of this suspicion and meet the reasonable costs of obtaining a medical certificate.

[72] Objectively assessed, there was a reasonable basis to suspect that the leave was not genuine given the earlier request for leave which was withdrawn. I do not conclude a breach in requesting a medical certificate which was paid for by Siam Cuisine.

3 September 2018

[73] On 3 September TLN said that she received a phone call from Mr McCarthy. She was questioned about why she had sent an employment agreement to an ex-employee on 30 August 2018. She clarified that it had been requested. She wrote in the timeline document that Mr McCarthy asked why she did not ask someone before doing so and she responded that she did not think it was an issue and they were required to supply one on request. She wrote Mr McCarthy then proceeded to tell her that she was untrustworthy, disloyal and that he spoke poorly about the employee and his mother, a friend and previous co-worker of hers. She was told when she said that the ex-employee's issues were nothing to do with her that she was sneaking around behind everyone's back and causing trouble. Further to that she was told that she had destroyed all trust between herself and Mr McCarthy and that it would take a lot of hard work to earn it back. She wrote that she was being made to copy others into everything she did was because she was not trusted to do her job properly and the call ended

with Mr McCarthy stating that he was now having to waste his time worrying about the office and that G, an accounts manager, would have to monitor everything she did in the future.

[74] Mr McCarthy accepted that there had been a discussion on this date. He did say that he could recall a conversation that trust and loyalty are the core principles of the company but did not accept that he advised TLN that trust was gone or that she had been disloyal or that he discussed a previous employee with her and said anything about sneaking around. He described the conversation as being about how to improve her performance.

[75] Given the quite different evidence from both TLN and Mr McCarthy about the nature of the exchange on 3 September 2018 the Authority needs to conclude which account of a conversation is the more credible of the two.

[76] The action of concern was that TLN sent an employment agreement when it was requested by that employee without notifying anyone at Siam Cuisine. I have concluded Mr McCarthy viewed the action with more seriousness than simply a failure to copy V into all external emails as instructed on 24 August 2018. Consistent with this he recalled making some reference to trust and loyalty being the core principles of the company. In short there were broader concerns.

[77] What was said about trust and loyalty and in what context is in dispute. Having considered the different accounts I prefer TLN's evidence and her account in the timeline as more likely. I have placed weight on the seriousness with which Mr McCarthy regarded the sending of an employment agreement to the former employee. At the heart of his concerns was that TLN had not told anyone what she was doing and in all likelihood he concluded there was more to her action resulting in issues for him about trust and loyalty. It is likely in those circumstances he expressed his concerns in a much more forthright manner than simply with reference to core values and did so at a time when he was at the least "frustrated."

[78] I have placed some weight on the text message sent that day by TLN to one of her friends about the exchange with Mr McCarthy. It refers to being told that she needed to "earn back his trust." Further there is reference to Mr McCarthy "going on about how important my job is and if he can't trust me I can't do the job." TLN wrote to her friend that Mr McCarthy told her that "he has enough to do without worrying about the office too" and that he will "get G to monitor everything til his trust is restored." The account of the exchange in

that text message is more restrained than the account in the timeline and then again in oral evidence.

[79] TLN said in her oral evidence that Mr McCarthy told her the trust and confidence had been irreparably broken. Those words however do not appear in the timeline or in the text message sent on that day to one of the recipients whose name is now disclosed to the Authority. I find it less likely the words irreparably and broken were used when referring to trust.

[80] What, however, I do conclude is that Mr McCarthy said words to TLN the effect that he had lost trust in her and that she would have to earn it back. I further conclude it likely that there was comment made about her being disloyal.

[81] TLN said that Mr McCarthy told her the reason that she was being made to copy people into her emails earlier was because they did not trust her to do her job properly. Mr McCarthy denies that and felt when questioned said that there may have been some confusion and this could have been misinterpreted.

[82] Until this point I have accepted that the earlier controls on their face were not unreasonable. I conclude it is more likely that Mr McCarthy did refer to the earlier email control in the conversation on 3 September in the context of being required because of a lack of trust in TLN and that there was to be monitoring of TLN's work from that point on by G.

[83] Whilst TLN has suspicions that the controls were implemented because of concerns about her performance it was only on 3 September in respect of the email monitoring that this was confirmed.

[84] Whilst accepting that Mr McCarthy saw TLN's actions in sending out the employment agreement as having wider ramifications his reaction and disapproval was objectively assessed disproportionate to what had been done. It is difficult to see how sending an employment agreement out to an ex-employee without checking first could result in conclusions of loss of trust and disloyalty particularly in the absence of a fair process.

Mistake discovered by TLN

[85] Later that day TLN discovered that she had made a mistake about a visa issue when she first started working with visas and immigration some four months earlier. She properly advised Sarah and V about the error and asked what she could do to fix it.

4 September 2018

[86] TLN was asked by V to provide a list of the important parts of the employment agreements that she changes, for example names or location, and scan a copy of the pages to Mr McCarthy and V before she sends out new contracts. She emailed Mr McCarthy and felt that his emailed response was mocking in nature when he had stated after asking if it was the template, "*I know what page its on.*" Mr McCarthy did not accept that it was mocking nature.

[87] I cannot determine with certainty on an objective basis the tone of this email. I acknowledge that TLN considered it mocking. It could equally be the questioning as to whether the information in the email was in the form of a template in which case page numbers would not be necessary. I do not find the exchange is unreasonable.

5 September 2018

[88] Sarah had a long telephone call in the middle of the office with Mr McCarthy about the visa issue and asked TLN questions on Mr McCarthy's behalf which she felt was humiliating because it suggested everything was her fault in front of her colleagues. TLN wrote on her timeline that this was humiliating and the questions suggested that it was her fault in front of others.

[89] She recalled Sarah making a comment at the end of the call: "why can't anybody do their job." The evidence did not enable me to conclude with certainty that this comment was about TLN and I did not hear from Sarah. There was then a meeting with Sarah, V and G about the visa issue. G asked for the file although TLN said she could tell he was not impressed at how little there was on it.

[90] TLN felt that the other employees in the office were "very cool" towards her and did not really talk to her. A text message sent by TLN at 12.15pm to a friend refers to a concern there may be a disciplinary process and she wonders "if they will try to take her down for it..."

[91] V did not recall the conversation being directed to TLN. I accept as Mr Thompson submits that TLN may have had heightened sensitivity to the matter. Equally I am not surprised that TLN found it humiliating to answer questions about her actions directed from Mr McCarthy through Sarah in front of her colleagues in the middle of the office. The questions could have been written down and a separate meeting held with TLN to enable her to answer them or the phone discussion held in a separate area. This was not handled sensitively.

[92] TLN also referred to Mr McCarthy's response to an email she had sent to him and V to approve employment agreement details of an employee that same date. TLN had put the hourly rate at \$27 p/h when it should have been \$17. He responded "\$27ph hello-wake up." He had copied both V and Sarah into the email. Whilst entirely appropriate to bring the error to TLN's attention others did not need to be copied in including an additional person Sarah. The agreed process was that TLN would copy Mr McCarthy and V into proposed employment agreements before they were sent out to prevent errors. TLN adhered to that and a potential error was picked up successfully before it went further. If Mr McCarthy had felt that Sarah needed to know about the employment agreement then he could have communicated with her separately.

[93] TLN went on a lunch break and received a call from her doctor who asked that she attend in the afternoon for some blood tests. TLN asked V if she could leave to go to the doctors and V asked if she could talk to TLN in private. I find it likely that she asked TLN what was going on with her and that a discussion took place about TLN's work slipping. In her evidence V said that she questioned if the illness had contributed to the mistakes but did not recall TLN responding about that.

[94] TLN then went home sick and as matters unfolded did not return to work again.

Conclusion on bullying

[95] At various times Siam Cuisine became concerned about TLN's actions or performance and Mr McCarthy raised issues with her in a direct fashion.

[96] Ms Oberndorfer submits that the Authority should conclude that Mr McCarthy was bullying in the manner in which he engaged with TLN for reason of the examples set out

above and there was a failure of the duty to provide a healthy and safe workplace and as a result TLN became unwell.

[97] Mr Thompson does not accept that the communications went beyond reasonable management criticism with an employee who was not performing adequately and whose work required monitoring. He submits that returning work for corrections and discussions about standards and expectations cannot be unreasonable. He refers to an employer not being required to cocoon employees from all stress and upset.¹⁰ Further he submits that TLN was self-conscious about the errors and therefore more sensitive about criticism and either misconstrued or exaggerated the events.

[98] I agree that the Authority should proceed with a measure of caution where there is a possibility of recollections being impacted by a subsequent legal process and an overlay of performance concerns in assessing a series of disputed exchanges. The Authority has had regard to other evidence close to the time of the exchanges and has undertaken careful analysis of the matters complained about. Not every exchange attracts criticism.

[99] On an objective analysis however it is clear that some of the exchanges complained of went beyond reasonable management criticism and performance measures. They were unreasonable and there was a significant power differential. Mr McCarthy would refer to TLN in an undermining manner in front of others. This is illustrated particularly by the findings about what occurred on 30 July 2018 that followed an earlier exchange on 10 July in front of other about her attitude. At a later point an additional person was copied into an email exchange when she made a mistake. That action tends to reinforce rather than point away from a tendency of Mr McCarthy to criticise in front of others. Whilst each incident viewed separately may not appear serious viewed together they show a pattern of making undermining comments in front of others that caused distress and humiliation to TLN who was a young employee. Treating issues in this way does not bring out the best in employees and in fact can result in a lack of confidence and an increase in mistakes.

[100] Mr McCarthy was entitled to raise concerns about TLN's actions or performance and entitled to hold her to a high standard. On two occasions on 20 July and 3 September 2018 he reached adverse conclusions without TLN having an opportunity to give any explanation. She was deprived of a measured performance process and inquiry such as that described in

¹⁰ *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31

*Trotter v Telecom Corp of New Zealand*¹¹ or a fair and reasonable disciplinary process before performance structures were put in place such as checking every external email and significant conclusions about trust and loyalty were reached. The discussions on both those days could be fairly described as attacking in nature.

[101] I conclude that there were actions that were unreasonable and repeated on the part of Mr McCarthy that could fall within the definition of bullying and resulted in adverse conclusions being reached without a proper process. They made TLN unhappy. She started to feel isolated in the workplace and thought that the other employees were unfriendly toward her. Quite properly in accordance with her own obligations in her employment agreement and in good faith she told Siam Cuisine how she felt and what she wanted done about it during her sick leave.

[102] Mr Thompson submits that TLN had a duty to disclose the bullying concerns and that she failed to do so before she went on sick leave until her letter dated 14 September 2018. He submits that it is unreasonable to expect Siam Cuisine to know that she was upset unless she brought the concerns to its attention.

[103] Mr McCarthy was the sole director and there were obvious challenges for her about complaining about his behaviour. TLN is a young employee and in her evidence said that she did not know what to do however she said that she told V that she was uncomfortable and felt singled out and that V responded along the lines “that is how Mr McCarthy is.” V did not accept that was said by her in her evidence and could only recall the one conversation with TLN about Mr McCarthy as set out earlier. I think it less likely that TLN simply made up a response from V along those lines even if V does not recall it. That sort of comment can have the effect of validating or excusing actions and would have impacted further on a decision by TLN about what she should do to complain. Whilst some responsibility appeared to be placed on V in Ms Oberndorfer’s submissions for not escalating concerns I could not be satisfied that she had sufficient understanding from the very brief discussion she could recall to justify that criticism.

[104] V did notice that TLN was more withdrawn at work compared to how she was at the start of her role although she put it down to another matter.

¹¹ *Trotter v Telecom Corp of NZ* [1993] 2 ERNZ 695 EmpC at 681

[105] TLN did raise how she was feeling through Mr Butler on 14 September 2018 and there was no doubt at that point that Siam Cuisine had knowledge about the concerns and the impact on her.

Did Siam Cuisine unjustifiably fail to assemble a response to her complaints in a timely manner?

[106] It is useful before I turn to the other alleged breaches to start with what TLN wanted to achieve from the meeting held on 9 September 2018 to resolve her concerns. In an email dated 4 October 2018 Mr Butler wrote to Mr Thompson about the purpose of the meeting. He wrote that it would be to address the behaviours TLN complained about, receive an apology, redress the wages lost because of the behaviour¹² and its impact on her health and receive undertaking that she would not be subjected to behaviour of that nature again.

[107] Ms Oberndorfer submits that Siam Cuisine had 25 days between the sending of the 14 September 2018 letter until the meeting on 9 October to undertake at least preliminary inquiries but failed to do so.

[108] Mr Thompson submits that there was a prompt response to the concerns in the letter when Mr McCarthy acknowledged the letter and agreed to a meeting once TLN was well. He says that meeting to discuss the concerns was delayed until TLN was well enough to attend a with a view to investigating further.

[109] There should be a prompt investigation into bullying concerns so that they can be resolved as soon as possible. This becomes time critical if the employee is still in the work place.

[110] I need to have regard to the circumstances in this case. TLN was on sick leave and was not having ongoing contact with Mr McCarthy. Whilst acknowledging that the investigation could have got underway earlier it is likely that Mr McCarthy would have disputed the version put forward by TLN which would not have resulted in a fair and reasonable investigation.

[111] Ms Oberndorfer submits that there was in fact a document prepared that simply reflected other employees recall about the events and exchanges in the timeline like a

¹² TLN had exhausted her sick leave entitlement as of 13 September 2018

defence. Mr McCarthy said in his evidence that whilst he may have read that he did not have any other part in its preparation. I accept his evidence on that point as more likely when the document is considered objectively. That document was also not the product of a fair and reasonable investigation into the actual concerns of TLN.

[112] In all the circumstances I do not conclude it unreasonable for there to be someone other than Mr McCarthy involved in the process. It would not be unusual for such an investigator to want to talk to TLN before carrying out an investigation with Mr McCarthy. Whilst there was delay TLN was not working with Mr McCarthy over that time.

[113] I am not satisfied in all the circumstances the delay could be said to be unreasonable so as to amount to a breach of a duty or obligations.

Was the refusal to meet when presented with a medical advice a breach of obligations?

[114] Mr McCarthy responded promptly to Mr Butler's letter of 14 September 2018. He advised that he had read the letter and welcomed a meeting but only once TLN is well.

[115] On 24 September Mr Butler wrote again to Mr McCarthy attaching a medical certificate from TLN's doctor. It advised that she was unable to resume work for a period of 14 days from 16 September 2018 due to the "stressors of the current working relationship." Materially it stated:

It would be in [TLN's] best interest (and that of the working relationship) to have the meeting with her employer as soon as possible to reduce stress levels.

I would encourage the employer to schedule the meeting as soon as possible.

[116] The meeting was held on 9 October following the provision of a medical certificate that TLN was fit to return to work on 8 October 2018 and the instruction of Mr Thompson by Siam Cuisine.

[117] The meeting could have been held in the period between 24 September and 8 October 2018 which is 10 working days. Siam Cuisine wanted TLN to be certified well and fit to return to work before a meeting was held.

[118] In some circumstances a failure to hold a meeting promptly may be a breach of obligations. The delay in this case was not so significant to enable me to conclude that it was a breach of duty to delay the meeting until TLN was well particular given the stressful nature

of such meetings. Any comment made at the meeting about a psychologist does not change that conclusion.

Was Siam Cuisine duplicitous in terms of its intention with respect to the meeting and what was presented at the meeting?

[119] The first issue raised by Ms Oberndorfer under this head was the fact that Mr McCarthy did not attend the meeting. I accept that the meeting did not proceed as envisaged by TLN in setting her agenda. It certainly would have been useful if advance notice had been given that Mr McCarthy would not be present. Having Mr McCarthy attend the meeting with the real possibility of him disagreeing to TLN's version of events would not have achieved a way forward. An independent investigation was necessary. The purpose of the meeting was to achieve a safe workplace for TLN could return to. I do not find a breach of obligations because Mr Murray did not attend the meeting.

[120] There was criticism that Ms Jiang was not independent and was not in a position of authority over Mr McCarthy. Her evidence was that she had separated from Mr McCarthy at that time and was brought back to assist with the business as a consultant. She said that Mr McCarthy would take advice from her for the best interests of the business. The company was also represented at that time and could be guided by Mr Thompson.

[121] TLN resigned before Ms Jiang could take any steps to investigate and I cannot be satisfied that Ms Jiang was not capable of carrying out an investigation guided by Mr Thompson in an unbiased manner. The evidence supports that Ms Jiang listened to TLN further about her concerns at the meeting and took some steps that I shall come to ensure no contact between Mr McCarthy and TLN pending an investigation. Ms Oberndorfer submits that Ms Jiang was not a reliable witness because she changed her evidence from her written account on one point. I disagree. The evidence that she gave although inconsistent was not favourable to her and does not support therefore that her evidence was untruthful or unreliable. I cannot be satisfied that Ms Jiang's mind was closed or that if she had been given the chance she would not have been able to carry out an unbiased investigation.

[122] Another concern was that a timeline document prepared by Siam Cuisine was not shown to TLN at the meeting. As already set out that timeline was not part of a fair and reasonable investigation into concerns were about how Mr McCarthy treated TLN and how that made her feel. Ms Jiang's evidence was that it was prepared to show Mr Thompson.

TLN when supplied with that document sometime after the meeting on 9 October 2018 viewed it as further proof that she would never be fairly treated or have her concern investigated properly. Often reflection on the appropriateness or otherwise by someone on their own actions follows rather than precedes an instinctive reaction to defend the actions. Therefore it is important to have a measure of objectivity and independence with an investigation.

[123] Ms Jiang needed to start an investigation afresh from the time of the meeting on 9 October 2018 with the focus on the concerns about what Mr McCarthy was alleged to have done or said to TLN and how it made her feel. Performance concerns do not justify bullying behaviour. I cannot be satisfied in those circumstances that it was a breach of obligations not to disclose that document prepared primarily for Mr Thompson at the meeting. It would undoubtedly have made matters worse with no corresponding benefit.

[124] I turn now to the outcome of the meeting as recorded in an email sent by Mr Thompson shortly after the meeting on 9 October. The issues were to be put to Mr McCarthy for formal reply with any inconsistency corroborated with people that TLN had identified. TLN was to return to work and would report to Sarah, a person she had selected after discussion at the meeting. Mr McCarthy would not attend the site while the investigation was being undertaken and TLN was not required to report to him. Mr Thompson in his email noted Siam Cuisine was prepared to hear any other requests for assistance.

[125] At the meeting Siam Cuisine did not agree to paid leave as requested by TLN until the investigation had been completed. I do not conclude that was unreasonable because Siam Cuisine proposed that Mr McCarthy was not going to be on site. TLN did not have to report to him until the completion of the investigation and TLN was cleared to return to work.

[126] TLN then resigned as notified in Mr Butler's email of 10 October 2018.

If there were breaches by Siam Cuisine then were they of a serious nature that would mean it was reasonably foreseeable that TLN would not be prepared to continue to work?

[127] I have found that there was a breach of duty towards TLN in that there was behaviour that was bullying in nature and adverse conclusions were reached about her actions and performance without a fair process. The breach was of a serious nature although concerns

were not raised about the behaviour until after TLN went on sick leave. I have not concluded other breaches of obligations made out as alleged.

[128] Siam Cuisine indicated at the meeting on 9 October that it was going to take steps to investigate the concerns. Further that it would remove any contact and reporting line that TLN had with Mr McCarthy whilst it did so. Two hours after that meeting TLN decided to resign. Siam Cuisine did not have an opportunity to alleviate further concerns before she did so or take the steps to investigate her concerns before that decision. I do not find that it would have been foreseeable to Siam Cuisine after that meeting on 9 October 2018 that TLN would resign. Her resignation was premature.

[129] TLN was entitled to resign but in all the circumstances she has not established that resignation was actually a dismissal.

[130] The claim for constructive dismissal is not made out.

Unjustified disadvantage

[131] I now consider alternatively whether any of the actions relied on as breaches for the constructive dismissal claim constitute alternatively an unjustified disadvantage under s 103(1)(b) of the Act.

[132] Section 103(1)(b) provides as follows:

(1) For the purposes of this Act, personal grievances means any grievance that an employee may have against the employee's employer or former employer because of a claim-

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;..

[133] I have found that there were exchanges between TLN and Mr McCarthy that were not reasonable and could be categorised as bullying in nature and further that adverse conclusions were reached without a fair performance or disciplinary process.

[134] For completeness, I have not concluded breaches with the balance of matters advanced and I do not conclude under this head that they are unjustified actions that caused disadvantage. The sole breach therefore is the behaviour of Mr McCarthy as set out in [133].

[135] Siam Cuisine agreed expressly in its employment agreement where practicable to provide a safe work place. It also had obligations to deal with TLN in good faith, fairly and reasonable and not in a manner that would damage the employment relationship. As set out earlier it failed to do so and it was reasonably foreseeable that if such conduct continued then there could be an impact on TLN in the workplace. A failure to take a more measured approach to performance concerns and adverse conclusions being articulated further resulted in TLN being concerned about her job security.

[136] I find that TLN's conditions of employment were adversely affected as a result and she was disadvantaged as a result. The behaviour was unjustified as a fair and reasonable employer could not have acted in this way in all the circumstances.

[137] TLN has made out her personal grievance that she was unjustifiably disadvantaged and she is entitled to consideration of remedies.

Remedies

Lost Wages

[138] TLN's sick leave was exhausted by 13 September 2018. I have considered whether there should be reimbursement from that date until the date of resignation. Siam Cuisine says that the reason for the sick leave was concern that TLN could be dismissed for the visa mistake and that she is not entitled to claim lost wages for the period of sick leave when she did not bring her concerns to her employer's attention.

[139] I will start with the first matter. It would be very unusual for one mistake to justify dismissal in the absence of a performance process. Part of TLN's concern about her mistake was the reaction of Mr McCarthy to other matters. The fact that she considered she could be dismissed I find was a consequence of what had occurred to that point.

[140] In respect of the second matter it would have been reasonably foreseeable to a person in Mr McCarthy's position that criticism in front of others and unfair dealing would have impacted on the happiness, health and well-being of TLN. I am satisfied that there is a causal link between the sick leave that commenced on 5 September 2018 and the behaviour TLN was subjected to which intensified from 3 September 2018 that I have found unjustified.

[141] Subject to any findings about contribution TLN is entitled to be reimbursed from when her sick leave entitlement ended on 12 September to 9 October 2018 inclusive after which date she resigned. That is a period of three weeks and four days.

[142] I have used Ms Oberndorfer's calculations based on an ordinary weekly rate of \$805 gross. \$805 multiplied by three weeks is \$2,415. \$161 multiplied by four is the amount of \$644. Combined that is a gross sum of \$3,059 gross.

[143] In the statement of problem there are claims for interest, holiday pay and KiwiSaver. These claims, although not referred to in final submission, have not been formally withdrawn.

[144] I reserve leave for Ms Oberndorfer and Mr Thompson to return to the Authority within five working days if there are further issues about the reimbursement that cannot be resolved between them.

Compensation

[145] The claim under this head is for \$15,000 compensation. The constructive dismissal claim was not successful so any compensation must focus on the actions themselves found to be unjustified and their effect rather than the loss of the job.

[146] Mr Thompson submits that there was no evidence to support an award of the amount sought.

[147] I do not agree with that. There was in fact compelling evidence before the Authority. TLN said in her evidence that there was a major decrease in her confidence and difficulty with trust remaining for a considerable time after she resigned. This was confirmed by the evidence of B who described a reduction in her motivation to do things and a closing off and a change from the bubbly, happy person she had been at the material period. I conclude that there was damage from the behaviour that was quite long-lasting.

[148] Subject to any issue for contribution an appropriate award under this head is \$12,000.

Contribution

[149] I do not conclude that TLN contributed to the situation that gave rise to her grievance and no reduction will be made.

Orders made

[150] I order Siam Cuisine Limited to pay to TLN the sum of \$3,059 gross being reimbursement of wages for a period of unpaid sick leave.

[151] I reserve leave for Ms Oberndorfer or Mr Thompson to return to the Authority within five working days if there are any further issues with reimbursement.

[152] I order Siam Cuisine Limited to pay to TLN the sum of \$12,000 being compensation for humiliation, loss of dignity and injury to feelings.

Costs

[153] I reserve the issue of costs.

[154] Ms Oberndorfer has until 11 May 2020 to lodge and serve submissions as to costs and Mr Thompson has until 25 May 2020 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority