

[4] Ms Taifau claimed she is owed wage arrears, she was paid less than the minimum wage in breach of the Minimum Wage Act 1983 (“the MWA”), and that she was unjustifiably dismissed. She sought recovery of wage arrears, remedies for her dismissal grievance, recovery of unpaid notice and that a penalty be imposed on the Respondent for its breach of the MWA.

[5] Ms Taifau said she accepted an offer of employment at her job interview on 9 February 2022, and was told to start work the next day. She was to be paid \$20.50 per hour for a minimum of 35 hours per week, with the ability to work more hours if required.

[6] Ms Taifau said she was not given a written employment agreement until 25 February 2022, which was backdated to 16 February 2022 when the parties signed it. She said she had to ask for an employment agreement a number of times before being given one.

[7] The employment agreement had someone else’s name in it and it attached a job description for an accountant. Although the Authority asked for a copy of Ms Taifau’s job description, that was not provided.

[8] Ms Taifau claimed she was regularly provided with less than 35 hours work a week, and was underpaid her wages. She said she was paid \$175 cash for her first week of work and \$200 cash for her second week of work. She disputed the information in the Respondent’s Work Schedule, which its advocate prepared for the Authority’s investigation, and the accuracy of the payslips the Respondent gave the Authority.

[9] Ms Taifau said she was dismissed after she raised concerns about being underpaid and about her lack of payslips. When Ms Taifau was shown payslips on a mobile phone (she was not provided with copies of them), she saw they were inaccurate so challenged the Respondent about that, which she said led to her dismissal.

[10] Ms Taifau denied poor performance, poor timekeeping/attendance, and other misconduct allegations the Respondent made against her. She was not subject to any disciplinary processes (either for poor performance or alleged misconduct/serious misconduct), so she was not given any disciplinary allegations or documentation before being dismissed. Ms Taifau also denied that she was given any warnings before she was dismissed.

[11] The Respondent denied all of Ms Taifau’s claims. It said she agreed to do an unpaid work trial on 14 and 15 February 2022 instead of providing a work reference, but did not work for it

before then. It said her first day of paid employment was 16 February 2022 and it gave conflicting evidence about the provision of an employment agreement.

[12] The Respondent said Ms Taifau's performance, attendance and timekeeping were poor. She was summarily dismissed for serious misconduct on 7 April 2023, after receiving multiple warnings, because the Lim sisters could not continue working with her. The Respondent told the Authority it had dismissed Ms Taifau for lots of other reasons that were not recorded in the dismissal letter.

[13] The Respondent told the Authority it decided to dismiss Ms Taifau on 22 March 2022, due to an alleged incident that occurred that day (apparently involving disputed pay and/or payslips) when she allegedly screamed/shouted at Ms Lim. This was denied by Ms Taifau.

The Authority's investigation

[14] The Authority asked the Respondent to provide Ms Taifau's wage and time records, but that did not occur.

[15] The Authority held a two day in person investigation meeting in Auckland. The Authority was assisted during its investigation meeting by a Cambodian interpreter.

[16] There was some difficulties in communicating with the Respondent prior to the investigation meeting. Although the Respondent's evidence was originally due by 31 October 2022 (that was extended to 7 November 2022) it was not lodged until 10 February 2023. Both parties lodged witness statements.

[17] The Authority heard from Ms Taifau, Ms Lim, Chanthavy and Mr Miki. Ms Taifau's niece Rufina Taifau provided a letter in support. Another niece confirmed, in a separate note, that she had employed Ms Taifau as a cleaner in May 2022 for five hours a week.

[18] The parties both provided the Authority with documents during the course of the investigation meeting. The Respondent said it had other relevant documents that it had not provided, so it was given time after the investigation meeting to do so. However, that did not occur, and Mr Meyrick did not reply to the Authorities multiple attempts to communicate with him about that.

[19] The specific information the Authority was expecting to receive from the Respondent included records it said it had made in "*a Council book*" about food safety complaints/issues

relating to poorly cooked chicken, records of additional written warnings that had been issued but not provided to the Authority, the full name and contact details of the WINZ case officer it had been dealing with, WINZ information/documentation about the wage subsidy it received for employing Ms Taifau, and a copy of the correct position description for her Kitchen Hand role.

[20] Although this information was to be lodged by the Respondent by 14 April 2023, that did not occur. The Authority Officer called Mr Meyrick multiple times, but he did not answer. Voicemails were left, but these were not responded to. Emails were also sent to him, but these were not replied to.

[21] Both parties were given an opportunity to lodge written submissions after the investigation meeting. The Applicant did so, but the Respondent did not.

[22] The Respondent's submissions were due on 22 May 2022. Although the Authority Officer attempted to follow up with Mr Meyrick multiple times, to see if the Respondent intended to lodge submissions outside the timetable, no response was received. The Authority therefore proceeded to determine this matter based on the available evidence.

[23] The Authority queried with Ms Taifau how she wanted costs dealt with and whether she was pursuing her breach of the MWA and associated penalty claims, because this was unclear from her submissions. Mr Harrison responded to the Authority's queries about this on 24 July 2022.

Background facts

Job advertisement

[24] Ms Taifau responded to an advertisement on Facebook for a Kitchen Hand, which she said had offered a minimum of 35 hours per week for \$20.50 per hour. The Respondent said the advertisement was for \$19.50 per hour (which was less than the then applicable minimum wage of \$20 per hour) and for a minimum of 30 (not 35) hours per week.

[25] The Authority was not provided with a copy of the advertisement.

Interview and job offer

[26] Ms Taifau says that after making a phone enquiry, she was interviewed on 9 February 2022. The Respondent's witnesses were unsure what date the job interview occurred, as there were no notes of it. Mr Miki thought it could have been 10 February. A diary note provided by

the Respondent recorded that Ms Taifau had worked 2.5 hours on 12 February 2022, so the interview must have been prior to that.

[27] Ms Taifau said part of her job interview required her to peel eggs. She also claimed she was offered, and accepted, the job on the advertised terms, with her start date being the next day (10 February).

[28] She said it was agreed she would work Monday to Friday and some Saturdays, and that she would occasionally have to start work at 4am. Because the bakery was closed on Sunday, she was not required to work on Sundays.

[29] The employment agreement dated 16 February 2022 (that was provided to her and signed by the parties on 25 February 2022) had a handwritten note beside clause 5, which dealt with the hours of work, that said "*From 3H to 8H per day Monday to Saturday*". This note sat alongside the other "*hours of work*" information, that was set out in clause 5.1.

[30] The start date of 10 February 2022 was disputed by the Respondent. Although unclear on when the job offer was made, with the Respondent's witnesses suggesting it could have been either 14, 15 or even 16 February 2022, they all said Ms Taifau's first day of employment was 16 February 2022.

[31] Before being offered employment, Ms Taifau said she was not asked about her vaccination status, for a Curriculum Vitae ("CV"), for a reference or for the name of her previous employer(s).

[32] Ms Taifau said she was asked during the interview if she was on a benefit and said she was. Chanthavy had a case manager at WINZ she dealt with, as the Respondent could get a subsidy for employing someone who was on a benefit. That did in fact occur.

[33] The Respondent claimed that during the job interview Ms Taifau would not give the name of her previous employer(s), nor would she provide a reference, or a CV and she did not disclose that she was on a benefit.

[34] The Respondent said all of its staff had to be vaccinated as New Zealand was in Covid Level 3, and the offered involved food preparation. Ms Taifau was therefore asked during the job interview if she was vaccinated and said she had already had one vaccination, and intended to get the second one soon.

[35] Ms Taifau denied that. She said she was not asked about her vaccination status until after she had been employed for approximately two weeks, and she told them that she was unvaccinated.

[36] The employment agreement and job advertisement did not refer to vaccination.

[37] Ms Taifau was asked if she had experience as a kitchen hand. She said she did not, but she had worked in a café in front of house service, but did not have experience in the kitchen.

Unpaid trial period

[38] The Respondent alleged Ms Taifau offered to work an unpaid trial period instead of providing the name of her previous employer or a reference. Ms Taifau denied that. She said she did not agree to work without pay, and she was not asked to provide references or the name of her previous employer.

[39] The Respondent's witnesses gave conflicting and contradictory evidence about the unpaid work trial and about start date of Ms Taifau's employment.

[40] The Respondent claimed it had provided Ms Taifau with a handwritten offer of employment on either 14, 15 or 16 February 2022, which apparently recorded the unpaid work trial and that her employment was to start on 16 February 2022. Ms Taifau denied that.

[41] When questioned during the investigation meeting, Ms Lim accepted that Ms Taifau was supposed to start her on the job training on 10 February 2022, but said that did not occur after Ms Taifau received a call from her mother. Ms Taifau denied that.

[42] Chanthavy gave contradictory evidence about this, because she claimed to have given money to Ms Taifau on 10 February 2022, and when pressed on the matter acknowledged that Ms Taifau had done some work because she had been shown how to pack chicken in the store that day.

[43] A diary record produced by the Respondent showed that Ms Taifau worked for 2.5 hours on 12 February 2022. When questioned about this, Chanthavy said that did not occur on the recorded date of 12 February 2022, but had occurred on 10 February 2022. There were obvious contradictions in the evidence given to the Authority.

Employment agreement

[44] The Authority was provided with one employment agreement by Ms Taifau on the first day of the investigation meeting. It was signed by Ms Taifau and Ms Lim, was dated 16 February 2022 and contained a 90 day trial period provision. It attached a job description for an accountant, not a Kitchen Hand. The employer was recorded as Ms Lim.

[45] Ms Taifau said this was the first and only employment agreement she was given. It was handed to her by Chanthavy on 25 February 2022 (after repeatedly asking for it), who told her to backdate it to 16 February 2022. Chanthavy disputed that, and said Ms Taifau took it upon herself to backdate it and the Respondent just went along with that.

[46] Ms Taifau said that she requested a written employment agreement when she was offered the job during her job interview, and Chanthavy said they needed to get one from the Respondent's accountant.

[47] The Respondent's witnesses gave conflicting evidence about the employment agreement. Ms Lim thought Ms Taifau had signed an employment agreement on 16 February 2022, but Ms Taifau denied that.

[48] Chanthavy said she handed Ms Taifau an employment agreement with an unpaid trial period in it on 14 February 2022, but a copy could not be provided because it had been lost. She also told the Authority she had requested an employment agreement from her accountant, who had emailed her the employment agreement.

[49] When the Authority asked if she could get a copy of it from the accountant, Chanthavy then said that the accountant had just talked to her about the agreement, but did not have a copy of it.

[50] Chanthavy further claimed she had sent a copy of that employment agreement to "Wendy" (no surname) who was a case office at Work and Income New Zealand ("WINZ"). However, when questioned about that, she subsequently said she had not, and had merely advised WINZ that the Respondent was not paying Ms Taifau during the initial work period, because it was an unpaid trial.

[51] The employment agreement Ms Taifau said she was handed on 25 February 2022, which was backdated to 16 February 2022, did not say anything about an unpaid trial period or an

agreement to work for less than the contractual hourly rate of \$20.50, which was recorded in handwriting in clause 6.1.

[52] The trial period was invalid, as Ms Taifau had already been working for more than two weeks when she got it. The hours of work were set out in handwriting in clause 5.1, and could be read as either 30 or 35 hour per week.

[53] The Authority considered that it looked like it had initially said (in handwriting) 30 hours per week, which had then been overwritten in darker handwriting to say 35 hours per week. These were not described as minimum hours, as the clause stated, “*the Employee shall work [30/35, as the case may be] hours per week*”.

Cash payments

[54] The Respondent told the Authority Ms Taifau wanted to be paid in cash, which she denied. Ms Taifau said the Respondent wanted to pay her in cash, which it denied.

[55] The Respondent said Ms Taifau constantly asked for money. She denied that. Ms Taifau said she asked for a loan of \$300 once, because she could not pay her bills because she had been underpaid. She said she repaid the full amount she had been loaned.

[56] Chanthavy said Ms Taifau had been given loans and/or cash gifts totalling approximately \$2,000. No records were made of these alleged cash payments, which Ms Taifau denied receiving. Chanthavy said she thought there may be approximately \$200 owing by Ms Taifau, but was not seeking to recover it. Ms Taifau denied owing money to Chanthavy, Ms Lim, or the Respondent.

[57] Although there were no records or documentation recording the dates and amounts of the various cash gifts or loans, Chanthavy provided a supplementary statement on 6 March 2023 that set out what she could recall about cash payments. She said she gifted Ms Taifau \$50 at the job interview, but Ms Taifau disputed her evidence about that.

[58] Ms Taifau said she was given \$175 cash after her first three days of employment and \$200 cash after her second three days of employment. Ms Taifau said when she queried that amount with Ms Lim, she was told she had been paid “*a training wage of \$12 or \$15 an hour*”. Ms Lim denied that.

[59] The Authority noted that \$12 an hour x 34 hours is \$408, and \$15 per hour x 34 hours was \$510, not the \$375 Ms Taifau said she had been given in cash. The situation with the alleged cash payments was therefore unclear.

First week of work

[60] Ms Taifau said that she was not provided with a minimum of 35 hours work during her first week of employment, so only worked 16 hours and was paid \$175 cash. On 10 February 2022 she started work at 10.30 am and finished at 2.30 pm, with a 15 minute break. She said she worked six hours on 11 and 12 February between 8.30 am and 2.30 pm, with a 15 minute break.

Second week of work

[61] Ms Taifau was also not provided with the minimum 35 hours work during her second week of employment. Ms Taifau said she worked six hours a day on 14, 15 and 16 February and was paid \$200 cash on Wednesday 16 February 2022.

First payslip

[62] The Respondent's first pay slip for Ms Taifau (which was provided to the Authority, but not to Ms Taifau while she was employed) said she had been paid \$374.13 gross for the pay period ending 20 February 2022. Ms Taifau disputed that.

[63] According to the Work Schedule, prepared by the Respondent and disputed by the Applicant, her first pay was for 18 hours work she did over the period 16 to 19 February 2022. She was not paid for any work she did on 14 or 15 February 2022.

Timekeeping and attendance

[64] The Respondent claimed that Ms Taifau's timekeeping and attendance were poor. It said she had unapproved absences from work, arrived late to work, and would leave early without permission. These absences were reflected in the Schedule of Work Hours it provided the Authority, which Ms Taifau disputed.

[65] Ms Taifau states that there were no rosters or timesheets, so the shifts she was required to work were verbally advised to her, texted to her, or written on a piece of paper and left on the desk or stuck on a board for her to see. Ms Taifau denied that she was "*regularly off work*" or late or that she would "*often just walk out of work early*", as alleged by the Respondent.

[66] Ms Taifau said she was only absent on three occasions. She sought permission to attend a hospital appointment with her mother on 12 March 2022, which was granted by Ms Lim. Ms Taifau had been rostered to work five hours that day, according to the Respondent's Schedule of Work Hours. Because she had not yet become entitled to paid sick leave, she was not entitled to be paid for that day she was not at work.

[67] On 13 March 2022, Ms Taifau said she woke up feeling ill, so notified Ms Lim by text message at 4.41 am that she would not be attending work because she was unwell.

[68] The Authority noted the Respondent's Schedule of Work Hours did not have 13 March 2022 recorded as a day Ms Taifau had been rostered to work. The bakery was not open on Sundays, and 13 March 2022 was a Sunday. It was therefore very unlikely to have been a working day for Ms Taifau.

[69] On the third occasion, Ms Taifau left work two and a half hours early on 31 March 2022, after advising Ms Lim by text that she felt unwell. She left work with Ms Lim's consent, which was recorded in a text message that was provided to the Authority. Ms Taifau was therefore not entitled to be paid for the two and a half hours she was rostered on, but did not work that day.

[70] Ms Lim claimed that Ms Taifau did not attend work on 21 February 2022, as she had taken her mother to hospital. However, the Respondent's Schedule of Work Hours showed that Ms Taifau did work on 21 February 2022. Ms Taifau's permission to take her mother to hospital occurred on 12 March 2022, so it was likely Ms Lim was confused about her dates.

Performance and phone usage issues

[71] Ms Lim claimed she issued a number of verbal or text message warnings to Ms Taifau regarding her poor performance and phone usage, which was not permitted during work hours. Ms Taifau denied that she had used her phone at work, contrary to the requirement that she was not permitted to do so unless on a break.

[72] Ms Taifau said she had never received any written or verbal warnings while employed. She further denied that she had received any written, text or verbal warnings about her phone usage or poor performance. The Authority was not provided with any documented warnings for poor performance and/or phone usage.

[73] Although Ms Lim produced diary entries claiming to be warnings to Ms Taifau, Ms Taifau said she had never seen these before, and that they had not been raised or discussed with her. The first time she was made aware of these was during the Authority's investigation meeting.

Warnings

(i) Verbal warnings

[74] Chanthavy said she issued over 20 verbal warnings to Ms Taifau. These were not documented and she could not provide many details about them. Ms Taifau denied getting any warnings at all, whether verbal or written. Chanthavy said she did not escalate the verbal warnings as she "*wanted to give Ms Taifau a chance*".

[75] When Chanthavy was questioned about the warnings she said she had issued by phone to Ms Taifau, she told the Authority that Ms Taifau had been informed "*If you do this again you will be fired*". Chanthavy also claimed that she issued a verbal warning, face-to-face, to Ms Taifau for poor attendance on 9 March 2022. Chanthavy told the Authority that she said to Ms Taifau "*Why you keep lying to me, you are a Christian, I will fire you.*"

[76] Chanthavy claimed Ms Taifau left work early on 17 March 2022, so she was warned that if she did that three times then she would be fired. Chanthavy also claimed Ms Taifau was late to work on 18 March 2022, and was late again on 21 and 22 February 2022. However, she was not issued with a written warning or dismissed. Ms Taifau denied these allegations.

(ii) Written warnings

[77] Although the dismissal letter recorded a written warning was issued on 17 February 2022, the Respondent's witnesses thought that date could be wrong. No information could be provided about this alleged warning, that Ms Taifau denied receiving.

[78] The Authority was provided with a diary note written on the page for 22 February 2022, that was said to be a "*warning*". It appeared to be written by Ms Lim and said:

On 21.02.22 you call me 45 mn before stard 7am to 1pm you call me 6.15am you can't come because you take your mon to docde. On 22.02.22 you tax me ca't work because the workincom stop you money you have to clear with them this leler just want to tell you your time work you have to lele me know 48 H before stard for fruter lees teme 48H I will stop the contract to you meuly. (sic)

[79] One of the text messages Chanthavy sent Ms Taifau on 13 March 2022, in response to her saying she was sick so would not be at work on 13 March, said:

I give you one more week. If you still off not turning to work I get new people replaced u because I can't get txt one hour before start txt me can't come bakery only have three people work not many. People can replace all the time if you okay tomorrow you have to start Monday at 4.00 am to 1.30 pm. (sic)

[80] On the second day of the investigation meeting, the Respondent provided the Authority with a handwritten note dated 22 March 2022. This was written by Ms Lim after the alleged “*screaming incident*” that had occurred that day (which is discussed later). It said:

This is a confirmation letter of complaint due to you work performance, adn standard during training and working hours and each employee was given during induction process duty and responsibilities you performance hasn't shown any knowledge of respect to your position, your loyalty to other around you as well. (sic)

[81] Ms Taifau denied seeing, or receiving, the 22 February 2022 and/or the 22 March 2022 warnings/diary notes.

Allegations of aggressive behaviour

[82] Ms Lim claimed that Ms Taifau showed unacceptable aggressive behaviour when they attempted to discuss performance issues with her and/or discipline her. Each party claimed that the other was shouting or screaming during work time, which the other party also denied.

[83] Ms Taifau denied allegations she was aggressive. She pointed out she was not disciplined for this before she was dismissed and it was not identified as a concern in the dismissal letter.

Marijuana related allegations

[84] The Respondent alleged that Ms Taifau attended work twice smelling of marijuana, had a customer complain that she she smelt of marijuana, and that she was seen by Chanthavy sitting in the car park with a customer smoking marijuana, after another customer alerted Chanthavy to that. Chanthavy said that was one of the reasons Ms Taifau was dismissed.

[85] Ms Taifau denied all of these marijuana related allegations. She said she was asked once about smelling of marijuana, which she said must have been because she was wearing her brother's jacket. The other allegations were not raised with her while she was employed. No

disciplinary action was taken regarding the marijuana allegations, and it was not referred to in the dismissal letter.

Payslip problems

[86] Ms Taifau said she believed she was being underpaid and that Ms Lim was deliberately not accurately recording all of the hours she had actually worked, which is why Ms Taifau said she kept asking to be given copies of her payslips.

[87] Ms Taifau was not given payslips while employed, and she disputed the accuracy of the payslips that were provided to the Authority. Ms Taifau said that after repeatedly asking for payslips, she was shown some on Ms Lim's mobile phone and immediately saw they were not accurate. That was apparently the catalyst of the alleged incident that occurred on 22 March 2022 (discussed below).

[88] The payslip information did not tally with the IRD record Ms Taifau gave the Authority, as the IRD record showed she had been paid \$369.30 more than the payslips recorded she had been paid.

[89] According to the Respondent's payslips Ms Taifau was paid \$907.13 in February, \$2,609.65 in March and \$1,099.51 in April 2022. The IRD record showed Ms Taifau was paid \$374.13 in February, \$3,142.65 in March and \$1,468.81 in April 2022.

22 March 2022 alleged incident

[90] An alleged screaming/shouting incident was said by the Respondent to have occurred between Ms Taifau and Ms Lim on 22 March 2022. Chanthavy said that she received a call from her sister asking her to come to the bakery, which she did along with her partner Mr Miki. Chanthavy said she arrived at the bakery to find Ms Taifau outside with Ms Lim arguing over payslips. Ms Lim, Mr Miki and Chanthavy alleged that Ms Taifau was "*screaming and shouting*", an allegation Ms Taifau denied.

[91] The 22 March 2022 incident was not covered in the witness statements of any of the Respondent's witnesses, so it was evidence that developed when these witnesses were questioned during the investigation meeting. The Respondent's witnesses all said they decided to dismiss Ms Taifau that day, because of that alleged incident.

[92] Although this was not recorded in writing anywhere, Chanthavy's evidence to the Authority was that on 22 March 2022 she had told Ms Taifau:

You will be fired if you don't stop screaming, you should find a new job as my sister is scared of you, I give you three weeks' notice to find a new job. My sister cannot work with you as she is scared of you and my brother cannot be here all the time. Every time you ask for a loan and I refuse you make trouble at the bakery. If you can find another job earlier, you can go earlier.

[93] Chanthavy also said she told Ms Taifau she could resign if she wanted to or she would be given a dismissal letter.

[94] Ms Taifau denied she was screaming and said she was questioning Ms Lim about the inaccuracies she saw in the payslips she had been shown by Ms Lim on her mobile phone.

Verbal dismissal on 1 or 2 April

[95] When giving evidence Chanthavy told the Authority that on 1 or 2 April 2022 she told Ms Taifau "*I will give you a dismissal letter next week. This is because you went to smoke marijuana in a car with a customer*". Ms Taifau denied the marijuana allegation and that it had been raised with her while employed.

[96] When questioned, Chanthavy agreed it had not been raised with Ms Taifau at the time it had occurred and that the date of the alleged incident was not known. There was no documentation about any of the alleged marijuana concerns.

6 April 2022 discussion with Mr Miki

[97] On 6 April 2022 Ms Taifau had an informal discussion outside the bakery with Mr Miki, who asked her if she enjoyed working in the bakery/café. Ms Taifau said she loved her job and she liked the sisters. Mr Miki told Ms Taifau that the (Lim) sisters did not like her.

[98] Mr Miki told the Authority he informed Ms Taifau on 6 April 2022 that they would be having a meeting with her on 8 April 2022, which she was welcome to bring a support person to.

[99] Mr Miki claimed that Ms Taifau responded by screaming at him and saying that "*we hated her and we were bullying her*". Mr Miki claimed that Ms Taifau "*carried on screaming and shouting and abusing us for some time*". She denied responding in this way. There was no documented record made of this second alleged screaming incident, which Ms Taifau denied.

7 April 2022 dismissal

[100] Mr Miki arrived at the bakery just before 4.00 am on 7 April 2022, with Ms Taifau due to start work at 4.00 am that day. Mr Miki said she turned up about 10 minutes late, and had bloodshot eyes and looked tired when she arrived. He said he noticed a strong smell of alcohol, as if she had been up partying and was still under the influence of alcohol. Ms Taifau denied that she was under the influence of alcohol, had been partying up or was late to work.

[101] Mr Miki told the Authority he had a pre-prepared dismissal letter dated 7 April 2022 with him that he had intended to give Ms Taifau the following day. However, he decided to give Ms Taifau the dismissal letter then and there because, “*she was no use to anyone in that condition*”. The dismissal letter did not refer to the alcohol use allegations Mr Miki said he was concerned about, or which was the catalyst for the dismissal on 7 April 2022.

Dismissal letter

[102] The dismissal letter was dated 7 April 2022 and it referred to “*action taken*” from the meeting on 6 April 2022. However, there was no “*meeting*” on 6 April, just a casual chat for a few minutes outside.

[103] The dismissal letter said Ms Taifau was being dismissed for serious misconduct, and it referred to the following disciplinary concerns:

- (a) Poor attendance;
- (b) Continuously failing to follow instructions;
- (c) Not providing documentation of sick leave;
- (d) Late informing manager of absences;
- (e) Poor food quality (undercooked or overcooked);
- (f) Leaving work early.

[104] The dismissal letter claimed she had been “*counselled repeatedly*”, there had been “*many discussions*” to help her, she had been given a verbal warning for a customer complaint on 25 February 2022, and a written warning on 17 March 2022.

[105] Ms Taifau denied all of these allegations. She said she had not received a verbal warning and had not received or seen any written warnings. Ms Taifau also disputed that she had a poor

attendance record, had left work early, was late to work, regularly took sick leave or had been asked for medical certificates that she had failed to provide.

[106] Ms Taifau claimed that she was dismissed because she queried what she was being paid for the hours she had worked, as she believed she had been underpaid. She had also insisted on receiving payslips (which never occurred) in order to verify her underpayment claim, so she believed it was those requests that had resulted in her dismissal.

Reasons for the dismissal

[107] Ms Lim, Chanthavy and Mr Miki told the Authority that they decided to dismiss Ms Taifau after the alleged incident on 22 March 2022. This incident was not referred to in the dismissal letter. Nor was Ms Taifau given a warning about it, because it was not mentioned in the written warning Ms Lim said she had issued on 22 March 2022, immediately after the alleged screaming/shouting incident that had apparently occurred that same day.

[108] All the Respondent's witnesses agreed that Ms Taifau had been dismissed for a number of reasons that were not recorded in the dismissal letter. These included screaming/shouting, the fact that the Lim sisters (particularly Ms Lim) were scared of Ms Taifau and did not want to work alone with her, lying at the job interview and because of the marijuana allegations.

[109] Other reasons for her dismissal included that Ms Lim and Chanthavy believed Ms Taifau had lied to them at the beginning of her employment by saying that she was not in receipt of a benefit when she was, and because she had told them she had one vaccination and intended to get a second vaccination, when she was in fact unvaccinated.

The issues

[110] The following issues are to be determined:

- (a) The Authority's findings on the material conflicts in the evidence;
- (b) Is the Applicant owed wage arrears?
- (c) Was the Applicant paid below the minimum wage?
- (d) If the MWA was breached, should a penalty be imposed on the Respondent?
- (e) Was the Applicant's dismissal justified?
- (f) If not, what remedies should she be awarded?

- (g) If remedies are awarded, should they be reduced under s 124 of the Employment Relations Act 2000 (“the Act”) on the grounds of contribution?
- (h) Is the Applicant owed unpaid contractual notice pay?
- (i) What costs and disbursements should the successful party be awarded?

The Authority’s findings on the material conflicts in the evidence

[111] There are a number of material conflicts between the parties, which the Authority has resolved as follows.

Minimum number of hours of work

[112] The Respondent was responsible for placing the job advertisement on Facebook, but did not provide a copy of it to the Authority, which it could have easily done to disprove Ms Taifau’s claim that it offered a job for a minimum of 35 hours per week.

[113] The employment agreement should have had the total number of hours Ms Taifau was required to work each week clearly recorded, so the Respondent’s failure to ensure that had occurred weighed against it.

[114] On the balance of probability Ms Taifau was offered and accepted employment for at least 35 hours per week, so she was entitled to be paid on that basis.

Consequences of failure to keep or produce wage and time records

[115] The Respondent’s failure to keep or produce wage and time records, as required by s 130 of the Act, prejudiced Ms Taifau’s ability to bring an accurate wage arrears claim, under s 131 of the Act.

[116] Because the Respondent failed to prove on the balance of probabilities that Ms Taifau’s evidence about the wages she was paid and the hours, days, and times she worked was incorrect, the Authority could accept as proved her evidence about such matters, in accordance with s 132(2) of the Act.

Start date, days, times and hours worked

[117] This conflict in the evidence was resolved in Ms Taifau’s favour, by relying on s 132(2) of the Act. Accordingly, the Authority makes the following findings about material disputed facts:

- (a) Ms Taifau started work on 10 February 2022;
- (b) She accepted an offer of employment for a minimum of 35 hours work per week, as advertised and as recorded in the employment agreement;
- (c) She did not agree to work less than her contractual minimum of 35 hours per week, with the exception of her sickness absence which is set out in (n) and (p) below;
- (d) She was entitled to be paid for not less than 35 hours per week, even if the Respondent did not give her 35 hours work a week;
- (e) She worked on 10, 11, 12, 14, 15 and 16 February 2022, for a total of 34 hours and was paid \$375 cash for this work;
- (f) She did not agree to an unpaid trial period, to work for free or to work for less than \$20.50 per hour;
- (g) She worked 16 hours in her first week of employment, when she should have been given 35 hours work;
- (h) She was paid \$175 cash for her first week of employment, when she should have been paid \$717.50 for 35 hours work;
- (i) She worked 18 hours in her second week of employment, when she should have been given 35 hours work;
- (j) She was paid \$200 cash when she should have been paid \$717.50 for her second week of employment;
- (k) The cash payments were not reported to IRD, nor was PAYE remitted to IRD, as was legally required;
- (l) She was paid \$4,985.59 by the Respondent over the period 1 February to 30 April 2022, according to her Inland Revenue records;
- (m) The Work Schedule provided by the Respondent is not an accurate record of the days and times the Applicant worked, so cannot be relied on;
- (n) Ms Taifau did not attend her scheduled five hour shift on 12 March 2022 because she took her mother to the hospital that day. That absence was authorised by the Respondent;

- (o) Ms Taifau texted the Respondent that she was sick on Sunday 13 March 2022, but according to the Respondent's records she was not scheduled to work that day, and she did not work on Sundays (as the bakery was closed), so this was not an unauthorised absence;
- (p) Ms Taifau left work two and a half hours early on 31 March 2022, after becoming unwell. She left work early with the Respondent's prior knowledge and approval, as per text messages;
- (q) Ms Taifau was entitled to be paid for 35 hours per week at the rate of \$20.50 per hour for the seven weeks from 10 February to 31 March 2022, less the seven and a half hours she was scheduled to work but did not actually work due to being unwell (as per (n) and (p) above);
- (r) Ms Taifau was to be paid \$21.50 per hour from 1 April 2022, as this rate increase was reported by the Respondent to reflect the minimum wage rate that had increased to \$21.20 per hour on that date; and
- (s) Ms Taifau should have been paid \$752.50 for the period 1 to 7 April 2022, to reflect a 35 hour week paid at the rate of \$21.50 per hour.

Medical certificates

[118] The Respondent's claim (that Ms Taifau disputed) that she had failed to provide requested medical certificates, was resolved in Ms Taifau's favour. Her evidence that she was never asked to do so was accepted. The Respondent was not legally entitled to make such a request in these particular circumstances.

Unpaid trial

[119] Ms Taifau's evidence that she did not agree to do an unpaid work trial and did not agree to be paid a lower 'training rate' of pay was accepted. She was in dire financial straits, to the point where she could not afford to pay for petrol to get to work. It was therefore highly unlikely that she would have agreed to work for free.

[120] Also, an employer that is expecting an employee to work for free during a trial or training period must ensure that is properly documented, and that did not occur here. Although the Respondent claimed it had done so, Ms Taifau disputed that, and the Respondent was unable to

produce any evidence that supported she had agreed to work for free or for reduced pay, other than asserting that had happened.

Prior warnings

[121] There was considerable confusion and conflicts in the Respondent's evidence about what warnings had been issued, the nature of the warning, the conduct Ms Taifau had been warned about, who issued the warning, what it referred to, where it sat in a graduated warning process, how long the warning lasted for and how and when it was issued.

[122] More importantly, none of the alleged warnings had been issued after a fair or proper disciplinary investigation or process. Basic good faith and procedural fairness requirements had not been met at all, for any warnings. The Respondent was therefore unable to justify any of the warnings it claimed to have issued, meaning they could not be relied on to justify Ms Taifau's dismissal on 7 April 2022.

Multiple verbal warnings

[123] Although Chanthavy claimed to have issued at least 20 verbal warnings to Ms Taifau, that was not supported by documentary evidence and it was denied by Ms Taifau. Ms Taifau's evidence about that has been preferred.

Verbal warning referred to in the dismissal letter

[124] In terms of the reference made in the dismissal letter that Ms Taifau had received a verbal warning relating to a customer complaint, the Authority was told that related to a customer who had the cost of chicken sandwich refunded to them after complaining about the quality of it.

[125] Ms Taifau said that she was not the only employee working that day, and there was no evidence she was the person who had prepared the sandwich that was not up to the required standard. The date of the complaint and the name of the customer was unknown, and there was no evidence the complaint was raised with Ms Taifau before her dismissal.

[126] A diary entry for 28 February to 5 March 2022 recorded that there had been a customer complaint, but it did not say what the complaint was about, what date it had been received, how it had been investigated, what date it had been raised with Ms Taifau, or whether it had resulted in a warning. The diary note also did not align with the 25 February 2022 verbal warning referred to in the dismissal letter about the customer complaint.

[127] In the absence of any supporting documentation, other than the fact that there was a diary note of a “*customer complaint*” (but no other information recorded), this is not a matter that the Respondent can rely on as constituting a valid warning that was issued as part of a graduated warning process.

[128] The diary notes the Respondent provided to the Authority were disputed by Ms Taifau. The Authority accepted her evidence that these were never shown or given to her, so they cannot be used to justify her dismissal.

[129] The Authority was provided with a photograph of a page in a diary for 22 February 2022, but the content of that was not accepted as constituting an enforceable or valid warning. Ms Taifau also denied seeing it, so it was not a warning that could be relied on by the Respondent to justify her later dismissal.

Text message warning

[130] The text message warning on 13 March 2022 was unjustified, so cannot be relied on by the Respondent. An employer cannot replace an employee for being unwell for one day, particularly when that is not even a working day for the employee.

17 March warning referred to in the dismissal letter

[131] The evidence given by the Respondent’s witnesses about the 17 March 2022 written warning referred to in the dismissal letter was very unclear. No-one could explain what it related to, and Ms Taifau denied receiving any written warning.

[132] It was therefore not a warning that could be relied on by the Respondent to justify a subsequent dismissal, because no-one knew what Ms Taifau had supposedly been warned about. If it existed, it must have been unilaterally imposed, without any prior disciplinary process, which also made it unfair and unjustified.

Performance issues

[133] Based on the evidence they gave to the Authority, Ms Lim and her sister were clearly dissatisfied with Ms Taifau’s performance, particularly regarding the undercooking or overcooking of chicken. Although the Respondent was given an opportunity to produce records about food safety concerns/events, it failed to do so.

[134] These criticisms of Ms Taifau's cooking of chicken and/or time keeping were never subject to a formal performance management process or a disciplinary process. No documentation about them was generated, disclosed to Ms Taifau or recorded by the Respondent.

[135] The content of the so called warnings appeared to be generalised verbal complaints, rather than a record of the behaviour that had been reprimanded or clear advice about what would happen if that same conduct was repeated. No advice was given about the duration of the alleged warning(s).

[136] It is up to an employer that wants to issue an employee with a warning to ensure that a fair and proper process is undertaken, the warning is properly documented and the employee is given a copy of it. None of that occurred.

Reasons for the dismissal

[137] According to all of the Respondent's witnesses, the dismissal letter did not accurately reflect or record the real reasons for Ms Taifau's dismissal. The dismissal letter also did not record that the dismissal decision had been made on 22 March 2022. These were serious breaches of good faith and procedural fairness.

[138] The reasons for the dismissal are to be assessed at the time the dismissal occurred. Meaning that what was recorded in the 7 April 2022 dismissal letter is taken to be the reasons for the dismissal, because those are the reasons Ms Taifau was given for her employment ending immediately that day.

Other alleged misconduct/serious misconduct not referred to in the dismissal letter

[139] The Respondent cannot rely on other alleged misconduct/serious misconduct that was not raised with Ms Taifau while she was employed, that was never the subject of a formal disciplinary investigation or process and that was not recorded as a reason for her dismissal, in order to subsequently justify her dismissal.

[140] Nor was other alleged misconduct, which included an alleged failure to disclose her non-vaccinated status, alleged failure to inform the Respondent that she was on a benefit, marijuana related allegations, the disputed screaming/shouting/aggression allegations and claims that the sisters were scared of Ms Taifau and did not want to work alone with her, proven to the required standard of proof.

[141] None of these issues were documented or formally raised (for example in writing or within a performance or disciplinary process) with Ms Taifau, so she had no opportunity to understand what the concerns were, take advice, or respond to them.

Payslips

[142] Ms Taifau had expressed concerns about the accuracy of the payslips while she was employed and that had led to the alleged incident on 22 March 2022. In accordance with s 132(2) of the Act, Ms Taifau's evidence that the Respondent's payslips were inaccurate was accepted.

Is the Applicant owed wage arrears?

[143] Ms Taifau should have been paid \$5,022.50 for the period 10 February to 31 March 2022. This consisted of 35 hours per week at the rate of \$20.50 per hour, for seven weeks. She should also have been paid \$752.50 for the week 1 to 7 April 2022, paid at the rate of \$21.50 per hour for 35 hours work that week.

[144] Ms Taifau should have been paid total gross wages of \$5,775 for the eight weeks she was employed over the period 10 February to 7 April 2022.

[145] She was also entitled to be paid eight percent of her total gross earnings as holiday pay in accordance with s 23(2) of the Holidays Act 2003 (the HA03). This amounts to \$462.00 (being eight percent of \$5,775, which is the amount Ms Taifau should have been paid in accordance with her employment agreement).

[146] Ms Taifau should have been paid a total of \$6,237.00 gross during her employment (being \$5,775 wages plus \$462 holiday pay).

[147] Ms Taifau's IRD records record that she was paid a total of \$4,985.59 from which PAYE of \$791.97 was deducted. The payments the Respondent reported it had made to her were recorded by IRD as follows:

- (a) \$374.13 from 10 to 28 February 2022;
- (b) \$3,142.68 from 1 to 31 March 2022; and
- (c) \$1,468.81 from 1 to 30 April 2022, noting the employment ended on 7 April 2022.

[148] Ms Taifau also said that she was given \$175 cash at the end of her shift on 12 February 2020 and \$200 cash on 16 February 2022. No PAYE appears to have been deducted from these cash payments or remitted to IRD. It is the Respondent's obligation to ensure that occurs.

[149] The amount the IRD has recorded that Ms Taifau was paid by the Respondent plus the \$375 cash she says she received during the first two weeks of her employment, meant she had only received \$5,360.59 when she should have received \$6,237. This means she is owed wage arrears of \$876.41.

[150] Accordingly, the Respondent is ordered to pay Ms Taifau wage arrears of \$876.41. It is also ordered to calculate and remit to IRD the correct PAYE that should have been, but was not, paid on the \$375 cash it paid her during the first two weeks of her employment.

Was the Applicant paid less than the minimum wage?

[151] The MWA required Ms Taifau to be paid not less than \$20 per hour from 1 April 2021 to 31 March 2022. From 1 April 2022 the minimum wage rate for an adult increased to \$21.20, so she was entitled to be paid at least that amount for her last week of work in April.

[152] As per the MWA, Ms Taifau was entitled to be paid \$4,750 for the period 10 February to 31 March 2022, based on her working 237.5 hours at a rate of \$20 per hour.

[153] A minimum of 35 hours for 7 weeks equals 245 hours. However, that figure of 245 hours of work has to be reduced by seven hours, to reflect time the Authority was satisfied Ms Taifau did not work. That consisted of five hours on 12 March 2022, when she took her mother to hospital and two and a half hours she did not work on 31 March 2022, when she left work early because she was unwell.

[154] Although Ms Taifau reported in sick on 13 March 2022, that was likely not a working day for her so did not require her total working hours to be adjusted.

[155] Ms Taifau was entitled to be paid not less than \$21.20 for the 35 hours she was entitled to work from 1 to 7 April 2022. Accordingly, she should have been paid not less than \$742, for that period, as per the MWA.

[156] Adding \$4,750 which was the minimum wage she was entitled to be paid for the period 10 February to 31 March 2022 with the \$742 minimum wage she was entitled to be paid for the first week in April 2022 equals \$5,492 total pay.

[157] According to the IRD records and Ms Taifau's evidence about her cash payments, she was paid \$5,360.59, which leaves \$131.41 shortfall. However, once an adjustment is made for the PAYE that should have been paid to IRD on the cash payments, but was not, the difference will be less than \$100.

[158] Accordingly, the Respondent breached the MWA, because Ms Taifau was not paid at least the minimum wage for a minimum of 35 hours per week over the duration of her employment (i.e. from 10 February until 7 April 2022), because she was paid approximately \$100 less than she was entitled to under the MWA.

Should a penalty be imposed for the breach of the MWA?

[159] The breach of the MWA is at the lowest end of the scale. The actual pay rate in accordance with the employment agreement was not less than the minimum wage rate for the applicable period. The difference has arisen because the Respondent deducted pay for hours that it claimed Ms Taifau was not at work.

[160] The Authority has not allowed those deductions because the Respondent failed to keep or produce wage and time records for Ms Taifau. Section 132(2) of the Act was applied, meaning Ms Taifau's evidence about her hours of work, days and times of work and pay was accepted as proven.

[161] In these circumstances, the Authority does not believe it necessary to impose a penalty in order to punish or deter the Respondent. Ms Taifau's penalty claim therefore does not succeed.

Was Ms Taifau's dismissal unjustified?

Date of dismissal

[162] Although Ms Taifau was arguably constructively dismissed on 22 March 2022, when she was told she had three weeks to leave or she would be dismissed, and also verbally dismissed on 1 or 2 April when Chanthavy told her she would be dismissed the following week, her actual dismissal occurred on 7 April 2022 when she was handed the dismissal letter by Mr Miki.

[163] Justification is to be assessed in accordance with the justification test in s 103A of the Act. This requires the Authority to objectively assess whether the employer's actions, and how

the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Taifau was dismissed.¹

[164] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4(1A)(c) and the four procedural fairness tests in s 103A(3) of the Act, which set out minimum procedural fairness requirements.

Good faith

[165] Section 4 (1A) of the Act requires an employer who is making a decision that may adversely impact on an employee's ongoing employment, to provide the employee with access to relevant information and an opportunity to comment on it, before a final decision is made.

[166] The Respondent failed to comply with its good faith obligations. It did not provide Ms Taifau with access to any information, much less all relevant information. Nor was she provided an opportunity to comment on it, before she was dismissed.

[167] The Respondent's failure to meet any of its good faith obligations regarding the warnings it claimed to have issued and regarding its decision to dismiss Ms Taifau fundamentally undermined its ability to justify her dismissal.

Procedural fairness tests in s 103A(3) of the Act

[168] Prior to her dismissal Ms Taifau did not have any disciplinary or poor performance allegations formally put to her. The Respondent therefore failed to sufficiently investigate the concerns it had about Ms Taifau's performance or other alleged misconduct, in breach of s 103A(3)(a) of the Act.

[169] The Respondent failed to raise its performance and misconduct concerns with Ms Taifau before she was dismissed, in breach of s 103A(3)(b) of the Act. That meant that Ms Taifau was deprived of any opportunity, much less a reasonable opportunity, to respond to her employer's concerns before she was dismissed, in breach of s 103A(3)(c) of the Act.

[170] The failure to follow a fair and proper process or to comply with minimum good faith obligations meant that the Respondent dismissed Ms Taifau without giving her an opportunity

¹ Section 103A(2) of the Act.

to provide her explanation, much less genuinely considering her explanation before deciding to dismiss her, in breach of s 103A(3)(d) of the Act.

[171] These significant breaches of basic procedural fairness requirements meant Ms Taifau was not given an opportunity to understand the specific concerns that had put her ongoing employment at risk, or to take advice or to respond to her employer's concerns before she was dismissed.

[172] The Respondent's failure to meet any of the minimum procedural fairness tests in s 103A(3) of the Act, fundamentally undermined its ability to justify Ms Taifau's dismissal in accordance with s 103A(2) of the Act.

Section 103A(5) of the Act

[173] The procedural fairness failings that occurred were not minor process errors and they did result in Ms Taifau being treated very unfairly, so s 103A(5) does not prevent the Authority from finding that Ms Taifau was unjustifiably dismissed.

Substantive justification

[174] Although the Respondent claimed that Ms Taifau was dismissed for serious misconduct, the matters recorded in the dismissal letter dated 7 April 2022 refer to performance concerns, namely, under or overcooking of chicken, poor timekeeping, failing to follow instructions and not providing documentation for sick leave.

[175] None of these reasons could justify a serious misconduct dismissal. Nor could they justify a dismissal for misconduct and/or poor performance in these particular circumstances.

[176] A fair and reasonable employer could not dismiss for poor performance before it had implemented a performance management process whereby they had made the deficiencies in Ms Taifau's performance clear to her in writing, and gave her specific standards that she needed to meet within a stated timeframe, which would then be objectively reviewed. She also had to be put on notice of the likely consequences of failing to meet the required standard of performance/conduct.

[177] In such circumstances Ms Taifau should also have been the subject of a fair and proper graduated warning process before being dismissed. However, that did not occur.

[178] Although the Respondent claimed it had given Ms Taifau multiple warnings, the available evidence did not meet the required standard of proof for it to be able to prove that had occurred.

[179] The verbal warnings were non-specific and were not a part of a formal disciplinary or performance monitoring process. The content of the alleged verbal warnings were so unclear as to be basically meaningless and the unfair way they were issued (if they were indeed imposed) was not justified.

[180] The supposed written warning did not amount to a formal written warning within the context of a formal graduated warning process. The Respondent was evidentially unable to establish that it had dismissed Ms Taifau at the end of a poor performance management/monitoring process and after a justified graduated warning process had been exhausted.

[181] Although the Respondent had other reasons for dismissing Ms Taifau, these were not raised with her within a disciplinary or performance management context which meant they could not be relied on to justify her dismissal on 7 April 2022.

[182] A fair and reasonable employer cannot tell an employee they are being dismissed for one reason, while actually dismissing the employee for other reasons, that the employee had not been disciplined for, and which had not been disclosed to the employee.

Outcome

[183] The Authority finds that Ms Taifau's dismissal was procedurally and substantively unjustified. Her unjustified dismissal personal grievance claim therefore succeeds.

What remedies should be awarded?

Mitigation

[184] Ms Taifau had an obligation to mitigate her loss. The Authority heard that WINZ had provided her with two employment opportunities, which did not eventuate into job offers. The Authority was therefore not satisfied that Ms Taifau had taken adequate steps to mitigate her loss.

[185] Ms Taifau admitted that she did not proactively seek other employment, which she attributes to the stress and distress of her dismissal. She also suggested that she was not well

enough to work because of the effects of the dismissal on her, but that was not accepted in the absence of medical evidence to support such a claim.

Lost remuneration

[186] The failure to appropriately mitigate her loss meant Ms Taifau has not been awarded lost remuneration, on the basis her lost remuneration was more likely attributable to her failure to mitigate her loss, than to her dismissal.

Distress compensation

[187] Ms Taifau gave evidence about the adverse effects her unjustified dismissal had on her. She had to see a doctor and went on medication. She was unable to pay her rent or car payments, which put her under significant financial stress. The Authority accepts that Ms Taifau was stressed and distressed as a result of her unjustified dismissal.

[188] The Respondent is ordered to pay Ms Taifau \$15,000 under s 123 (1)(c)(i) to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

Should remedies be reduced on the grounds of contribution?

[189] Having established a personal grievance for unjustified dismissal, s 124 of the Act requires the Authority to determine the extent to which Ms Taifau's actions contributed towards the situation that gave rise to her personal grievance, and to reduce remedies accordingly.

[190] Contribution denotes blameworthy conduct that is proven on the balance of probabilities. In this case the Respondent was unable to establish that blameworthy conduct to the required standard of proof.

[191] The absence of documentation regarding a poor performance, performance concerns or misconduct/disciplinary concerns fundamentally undermined the Respondent's ability to establish wrongdoing by Ms Taifau. She denied the allegations against her, and the Respondent simply did not have sufficient evidence to be able to rebut those denials.

Is the Applicant owed unpaid notice?

[192] Clause 13.1 of Ms Taifau's employment agreement provided that either party could give one month's written notice to terminate the employment.

[193] That did not occur, because Ms Taifau was dismissed without notice, and without being paid in lieu of notice. That was a breach of her employment agreement which only allowed the Respondent to dismiss her without notice for serious misconduct. A serious misconduct finding was not justified in all the circumstances of this matter.

[194] The concerns recorded in the dismissal letter were performance concerns, and could not fairly or reasonably be viewed as amounting to examples of serious misconduct. That finding meant Ms Taifau is entitled to be paid her contractual notice.

[195] The Respondent is ordered to pay Ms Taifau \$3,260.83 as unpaid contractual notice pay (being \$752.50 per week based on a 235 hour week at the then applicable pay rate of \$21.50 per hour x 52 weeks, divided by 12 months).

Summary of outcome

[196] Within 28 days of the date of this determination, the Respondent is ordered to pay:

- (a) Ms Taifau \$19,137.24 gross consisting of:
 - (i) \$876.41 wage arrears;
 - (ii) \$3,260.83 unpaid notice; and
 - (iii) \$15,000 distress compensation for her unjustified dismissal;
- (b) IRD the correctly calculated PAYE that has not yet been paid on the \$375 cash payments it made to Ms Taifau in February 2022.

What costs and disbursements should the successful party be awarded?

[197] Ms Taifau as the successful party is entitled to a contribution to her actual legal costs.

[198] The Authority is advised that there have been Calderbank communications between the parties. It is therefore appropriate for costs to be determined after the parties have been given an opportunity to file costs submissions.

[199] The Applicant may file cost submissions withing 14 days of the date of this determination. The Respondent has 14 days from receipt of the Applicant's cost submissions within which to file its submissions.

[200] No costs submissions will be considered outside of this timetable without the prior leave of the Authority.

[201] This matter involved a two day investigation meeting, so the starting point for assessing costs is \$8,000. That notional starting tariff will then be adjusted to reflect the particular circumstances of the case. The parties are therefore invited to identify factors they say should result in adjustments being made to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority