

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 487
3210179

BETWEEN DENIZE PAULINE
WALTERS
Applicant

AND TE HANA CAFE LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: Applicant in person
Aynaz Nowparvar, advocate for the Respondent

Investigation Meeting: 23 February 2024 by AVL

Submissions and further information received: 10 April, 22 April, and 11 June 2024 from the Applicant
31 May 2024 from the Respondent

Determination: 16 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Denize Pauline Walters was employed by Te Hana Café Limited (THC) as a cook. On 11 October 2022 THC dismissed Ms Walters for serious misconduct.

[2] Ms Walters disputed THC's actions and claimed she was unjustifiably dismissed by THC. She also claimed she was unjustifiably disadvantaged during her employment for THC.

[3] THC disagreed with Ms Walters and said its actions were justified. THC also opposed Ms Walters' grievance claims on the basis she had not raised her claims within the statutory timeframe.¹

¹ Employment Relations Act 2000, s 114.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Walters, THC owner, Frederick Ketelaar and THC employees, Sarah Cox, and Jamie Dick. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Whether Ms Walters raised her grievances with THC within 90 days in accordance with s 114 of the Act?
- (b) Whether Ms Walters was unjustifiably disadvantaged and/or unjustifiably dismissed by THC? If Ms Walters was unjustifiably disadvantaged and/or unjustifiably dismissed, was she entitled to:
 - (i) Remuneration for lost wages; and
 - (ii) Compensation for humiliation, loss of dignity and injury to feelings?
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Walters that contributed to the situation giving rise to her grievance(s)?
- (d) Should either party contribute to the costs of representation of the other party?

Context

The 17 August 2022 altercation

[7] THC operates as a café situated in Te Hana and is owned and operated by Mr Ketelaar. On Wednesday 17 August 2022 Ms Walters worked at the Café in the morning. Ms Dick and Ms Cox were also working at the café at this time.

[8] Around this time, the café business was also up for sale. While carrying out her work, Ms Walters had a conversation with Ms Cox about the potential sale of the café. During this conversation, Ms Walters expressed her personal view of how the sale of the café was imminent.

[9] Concerned about the possible effect of the café sale on her own employment, Ms Cox then spoke to Ms Dick. Ms Cox told her about Ms Walters' views. Sharing the same concern as Ms Cox, Ms Dick in turn contacted Mr Ketelaar (who was not at the café at the time). This prompted Mr Ketelaar to travel to the café to confirm to Ms Cox, Ms Dick and Ms Walters about the café not being sold.

[10] After Mr Ketelaar left the café, Ms Walters and Ms Cox became engaged in a heated exchange where Ms Walters called Ms Cox "a fucken shit stirrer" and then threatened to "smack" Ms Cox in the head. Ms Walters then approached Ms Dick and admonished her for relaying her conversation with Ms Cox to Mr Ketelaar. Ms Walters, Ms Cox, and Ms Dick continued to argue amongst themselves before Ms Walters abruptly left the café.

Contact with Mr Ketelaar

[11] After Ms Walters left the café, she was contacted by Mr Ketelaar by text message to address what occurred earlier in the morning (the 17 August incident). In his message, Mr Ketelaar asked Ms Walters about whether she intended to continue working at the café. Ms Walters replied to Mr Ketelaar by text message and apologised for what happened. She also said she would return to work the next day.

[12] Ms Walters did not return to work at the café. On Thursday 18 August 2022 Mr Ketelaar sent the following message to Ms Walters:

To make this a bit clearer. On the NZ employment website it states that in cases of serious misconduct an employer can dismiss an employee without giving notice. This is how serious this is. I will get legal advice about this and go thru the whole drama if I must, but maybe we can get to some agreement taking into account your great work and the fact that I can't accept any blame in this matter.

[13] On Saturday 20 August 2022 Mr Ketelaar texted Ms Walters saying:

... I would like you to take next week off on full pay so things can settle down a bit more and we can look forward to a fresh start. I will also have a serious

conversation with Jamie and Sarah and if the problems continue, I will organise mediation...

[14] During this time, Mr Ketelaar was also in the process of updating employment agreements for his staff. Shortly after 18 August 2022 Mr Ketelaar arranged for Ms Walters updated employment agreement to be delivered to her.

[15] On Wednesday 24 August 2022 Mr Ketelaar sent a text message to Ms Walters acknowledging her good work and informing her he was addressing the 17 August incident by applying for mediation on the same day.

[16] Ms Walters responded to Mr Ketelaar by email on Saturday 27 August 2022. In her email she referred to various previous unraised issues she had in the workplace and was hoping these would also be addressed at mediation. Ms Walters' email also inferred her expectation of other THC staff also attending the planned mediation.

THC's investigation into Ms Walters conduct

[17] On 21 September 2022 THC sent Ms Walters a letter inviting her to a disciplinary meeting to discuss an allegation for serious misconduct against for her involvement during the 17 August incident (disciplinary letter). The disciplinary meeting was scheduled for 24 September 2022.

[18] Ms Walters was unable to attend the disciplinary meeting and on 27 September 2022, Ms Walters asked THC whether the disciplinary meeting could be delayed by four weeks so she could prepare for the serious misconduct allegation against her. THC declined Ms Walters' request. The reason for doing so was because it said four weeks was an unreasonable amount of time and it said Ms Walters was on "paid suspension" since the 17 August incident. This was the first reference to Ms Walters being suspended by THC.

[19] THC provided Ms Walters with new dates for her to attend a disciplinary meeting in the following week. After further communications between Ms Walters and THC, Ms Walters decided not to attend a disciplinary meeting. As a result, THC made a preliminary decision to dismiss Ms Walters. This preliminary decision was sent to Ms Walters on 5 October 2022 seeking her feedback (preliminary decision letter).

[20] Ms Walters provided written feedback on 7 October 2002. On 11 October 2022 THC sent a letter to Ms Walters confirming its decision to terminate Ms Walters' employment (dismissal letter).

Did Ms Walters raise her grievances within the statutory timeframe?

[21] In a memorandum to the Authority on 31 March 2023, THC opposed Ms Walters grievance claims because it said she raised her claims outside the statutory 90-day period for raising a personal grievance.

[22] THC's memorandum referred to Ms Walters' claim for unjustified dismissal which it said was raised when she lodged her statement of problem at the Authority on 18 March 2023. Given Ms Walters' employment was terminated on 11 October 2022, THC said Ms Walters was 69 days outside of the statutory timeframe for lodging her grievance.

[23] THC's memorandum did not make any reference to challenging whether Ms Walters' unjustified disadvantage claim was within the statutory timeframe. Apart from the memorandum, THC also did not provide any further submissions or arguments to support its views as expressed in its memorandum.

[24] It should be noted, all the evidence of communications between THC and Ms Walters from the 17 August incident up until her receiving the disciplinary letter was submitted by Ms Walters. THC did not produce any evidence of text messages and emails covering this period.

[25] Ms Walters also provided an email from her to Mr Ketelaar on 14 October 2022. The emails said the following:

... this email is to inform you that since you made no attempt to mediate an incident involving a gossiping issue [on] the 17th August resulting in an argument between myself and 2 other staff I will be now filing a Personal Grievance application to the Employment Relations Authority for unfair dismissal, negligence, bullying, emotional distress ...

[26] From 18 August 2022 to 14 October 2022, there were numerous other communications between Ms Walters and THC in respect of her views around what occurred on and after 17 August 2022 including her views on workplace gossiping, bullying and her expectations around addressing these issues through mediation. Based

on these communications, THC was sufficiently notified by Ms Walters about her grievances within the statutory timeframe.

Unjustified disadvantage

[27] In determining whether THC's actions were justifiable, the Authority must consider whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or disadvantage allegation had occurred.²

[28] Ms Walters made several different claims which appear to fall under both her claims for unjustified disadvantage and unjustified dismissal. Given these claims related to matters associated with her dismissal, these claims are addressed later as part of the Authority's assessment of Ms Walters' unjustified dismissal claim.

[29] Ms Walters' remaining unjustified disadvantage claims related to her allegations against THC for:

- (a) Failing to properly address the issues of gossiping in her workplace;
- (b) Accusing her of theft from the café tip jar; and
- (c) Her suspension from the workplace.

Gossiping complaints

[30] Ms Walters said she raised issues about gossiping in the workplace prior to the 17 August incident. The only available evidence showing Ms Walters had raised the gossiping issue with THC arises from her text messages sent to Mr Ketelaar after the 17 August incident and her response to the preliminary decision letter. In addressing the circumstances of what occurred on 17 August 2022, Ms Walters' text messages briefly refer to her previously raising issues about gossiping in the workplace.

[31] THC did not provide any specific closing submission to address Ms Walters' unjustified disadvantage claims in respect of workplace gossiping.

[32] Based on all the available information, there was insufficient evidence to properly determine when, why and how Ms Walters raised these complaints prior to the 17 August incident. Although there was available evidence to assess THC's workplace

² Employment Relations Act 2000, s103A.

dynamic both during and after the 17 August incident, a determination could not be made in respect of an unjustified disadvantage to Ms Walters in respect of her historical gossiping claims.

Stealing accusation

[33] After the 17 August incident Ms Walters and Mr Ketelaar also exchanged text messages about her pay while she was on leave. When Ms Walters queried her pay, Mr Ketelaar responded by saying he needed to first calculate what money Ms Walters had taken from the café tip jar.

[34] The interaction between them was captured in three text messages. It was unclear during the investigation meeting and from the evidence what the agreed employee arrangements were in respect of the tip jar. Like Ms Walters' gossiping claims, there was insufficient evidence to determine fully the details behind any such accusations by THC and the extent of any disadvantage (if any) to Ms Walters. For these reasons, a determination also could not be made in respect of Ms Walters' claims in respect of THC's alleged stealing accusations.

Workplace suspension

[35] Mr Ketelaar text messages on 20 August 2022 requiring Ms Walters to not attend work was effectively a notice of suspension (THC's suspension notice). THC did not dispute it suspended Ms Walters on full pay.

[36] Ms Walters' employment agreement did not contain a suspension clause. Putting aside the absence of a suspension clause, the Employment Court has provided general guidance as to an employer's obligations around workplace suspensions. In deciding whether to suspend Ms Walters, THC had to comply with the rules of natural justice and to follow a fair and reasonable process:³

The rules of natural justice also mean an employee generally ought to be told a suspension is being contemplated and the reasons why and given an opportunity to be heard before a decision is made. These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer's conduct. The surrounding circumstances can include immediate safety issues as well as the length of the proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made.

³ *Hong v Auckland Transport* [2019] NZEmpC 54 at [48] & [50].

[37] THC's suspension notice did not provide specific detail as to why it wanted Ms Walters to take leave and whether Ms Walters was able to be heard before its decision to suspend her was made.

[38] THC's reasons for Ms Walters to take leave were also vague given Mr Ketelaar's reason for Ms Walters to take leave was for things to "settle down". The opportunity for Ms Walters to comment on taking leave was also expressed as "Hope you can go along with that." This was not a sufficiently express communication to Ms Walters to allow her to comment on what was effectively her suspension from the workplace.

[39] Up until the end of her employment, Ms Walters was not given a specific reason for her suspension. Ms Walters first became formally aware of her suspension when she received THC's preliminary decision letter on 5 October 2022. Even so, she was not given a reason why she was suspended.

[40] Ms Walters was entitled to be properly consulted by THC about its intention to suspend her from the workplace. Although the nature of the disciplinary letter allegations was serious, it was never identified as a ground for her suspension. Up until the end of her employment, THC failed to properly explain its reasons for suspending her from the workplace. For these reasons, Ms Walters was unjustifiably disadvantaged by THC.

Unjustified dismissal

THC's investigation

[41] Ms Walters believed she was treated unfairly by THC when it decided to change its conflict resolution approach from attending mediation to undergoing a disciplinary investigation.

[42] Ms Walters did not dispute her actions towards Ms Dick and Ms Cox during the 17 August incident. However, based on the text messages from Mr Ketelaar on 18 and 20 August 2022, the issues relating to the incident were to be addressed through mediation.

[43] Around four weeks after being told the matter was to be dealt with by mediation, Ms Walters received the disciplinary letter from THC. The letter set out the allegation

against her for serious misconduct and invited her to give her recollection of what occurred during the 17 August incident.

[44] THC did not make any submissions supporting its decision not to pursue mediation with Ms Walters. It also did not provide any submissions as to why it did not inform Ms Walters of its intention to investigate the 17 August incident and to interview THC staff.

[45] For the four weeks leading up to Ms Walters receiving her disciplinary letter, there was no evidence showing THC contacted Ms Walters to further discuss mediation or to signal the start of its disciplinary process.

THC's disciplinary process

[46] THC submitted it acted fairly and honestly throughout its disciplinary process. The disciplinary letter was relatively clear in terms of the allegations made against Ms Walters and its requirement for Ms Walters to attend a disciplinary meeting two days later at 11 am on 23 September 2022. It also provided supporting documents to Ms Walters to allow her to comment on the allegations against her. The supporting documents were in the form of witness statements from various THC employees including Ms Dick and Ms Cox.

[47] On 22 September 2022 Ms Walters contacted Mr Ketelaar by text message saying she could not attend the investigation meetings due to short notice, and she was attending her uncle's funeral. She also explained she had to also attend to her father who was admitted to hospital.

[48] Between 22 September to 27 September 2022 Ms Walters and Mr Ketelaar exchanged text messages to try and finalise a date for when Ms Walters could attend a disciplinary meeting. It was clear from the text messages Ms Walters was not happy about having to attend the investigation meeting because of her personal situation with her uncle and her father.

[49] On 5 October 2022 THC sent Ms Walters a preliminary decision letter. The letter referred to Ms Walters confirming her decision not to attend a disciplinary meeting after being refused her request for the meeting to be delayed by four weeks. The preliminary decision letter referred to THC's position as follows:

Our proposed decision is to terminate your employment without notice for serious misconduct as a result of your breach of your employment obligations, namely s 45 of the Health and Safety at Work Act 2015 (“the Act”), by using offensive language and engaging in physically threatening behaviour towards another staff member, Sarah Cox.

[50] Ms Walters provided a response to THC in the form of a letter which was received by THC on 7 October 2022. Ms Walters’ response letter covered many different events from before the 17 August incident up to her disciplinary process. She also responded to each of the witness statements provided to her with her disciplinary letter.

[51] When THC issued its dismissal letter on 11 October 2022, it said it considered Ms Walters’ views before confirming to summarily dismiss her for serious misconduct.

Assessment of Ms Walters’ dismissal

[52] THC disciplinary process was reasonable given THC had given Ms Walters an opportunity to meet to respond to its allegations. THC also considered Ms Walters’ views. Given the seriousness of the allegations against Ms Walter the reasons to dismiss her were sound.

[53] However, any assessment of THC’s disciplinary process had to consider the events and communications with Ms Walters before she was given her disciplinary letter. Ms Walters said THC breached its obligation of good faith for several reasons including THC’s failure to progress the matter to mediation.

[54] From her communications with Mr Ketelaar on 20 and 24 August 2022, it was reasonable for Ms Walters to believe she was awaiting mediation and was expecting a return to the workplace. It was also reasonable for Ms Walters to believe THC initially decided to address the 17 August incident using mediation. This was especially given THC arranged for Ms Walters to sign an updated employment agreement while she was suspended. By signing the agreement, Ms Walters felt she would be returning to work after mediation.

[55] THC’s decision to proceed with a disciplinary process adversely affected Ms Walters because she:

- (a) Did not know THC commenced an investigation into the 17 August 2022 before the disciplinary letter was sent.
- (b) Had not received any contact from THC for around four weeks before receiving the disciplinary letter; and
- (c) Was presented with statements from her work colleagues which covered not only the 17 August incident, but their personal views about Ms Walters (including views about her family). This was made worse by a THC employee who also provided a statement but was not present during the 17 August incident.

[56] There was no evidence to show THC considered the effect of these circumstances on Ms Walters prior to sending her the disciplinary letter. If it had done so, it would have been in a better position to consider Ms Walters' request to delay the disciplinary meeting.

[57] THC's failure to inform Ms Walters about starting its investigation and interviewing staff meant its investigation was not transparent and exposed itself to predetermining the outcome of any disciplinary action against Ms Walters. This was partly because Ms Walters was not invited to provide a statement in the same way as the other THC employees.

[58] THC's investigation into the 17 August incident was flawed and these flaws adversely affected its disciplinary process leading to its decision to dismiss Ms Walters on 11 October 2022. For these reasons, Ms Walters was unjustifiably dismissed by THC.

Is Ms Walters entitled to remedies?

[59] Ms Walters established her claims against THC for unjustified disadvantage and unjustified dismissal. She was entitled to a remedy for each of her grievance claims.

Lost wages

[60] A case management conference was held between the parties on 31 August 2023 to discuss arrangements for the investigation meeting for this matter. During the case

management conference, the parties agreed to the issues for investigation which included a claim by Ms Walters to a remedy for lost wages.

[61] Upon review of Ms Walters' statement of problem, the available evidence, and her submissions, it was clear the basis of her claims for remedies was solely for compensation for hurt and humiliation. For this reason, no award is ordered to Ms Walters for lost wages under the Act.

Compensation for hurt and humiliation

[62] For her grievances Ms Walters sought a total compensation of \$80,000 for humiliation, loss of dignity and injury to her feelings. Ms Walters provided a significant amount of evidence covering the hurt she suffered because of events during and after the 17 August incident.

[63] As already referred to in this determination, a significant amount of Ms Walters' distress arose from the shock of receiving the disciplinary letter and reading the statements from her co-workers. The following factors also contributed to her distress:

- (a) During her suspension she was isolated from the other workers and felt like she was treated differently by being the only one to remain away from the workplace; and
- (b) She said she felt she was treated unfairly and with no empathy by THC when it required her to participate in the disciplinary process while dealing with two concurring family tragedies.

[64] Ms Walters said she suffered physically and psychologically and as a result was diagnosed with depression. Although Ms Walters did not provide medical evidence to support the medical impacts on her, I accept, Ms Walters did suffer hurt and humiliation because of THC's actions.

[65] Given how closely related Ms Walters' successful unjustified disadvantage claim was to her successful unjustified dismissal claim, it was appropriate for a global amount to be awarded for both claims. Considering similar cases, an appropriate remedy in this case is an award to Ms Walters of \$15,000 as compensation for hurt and humiliation. THC is ordered to pay this amount to Ms Walters within 28 days of the date of this determination.

Should the remedy be reduced for blameworthy conduct by Ms Walters?

[66] The Authority must consider whether any remedies awarded should be reduced due to any actions of the worker which contributed to the situation giving rise to the personal grievance.

[67] Given the failures by THC in this case were primarily about how it communicated its intended actions to Ms Walters, there was no evidence to suggest Ms Walters contributed to the circumstances giving rise to her grievances. No reduction is warranted to the remedy awarded to Ms Walters.

Costs

[68] Ms Walters was self-represented. As a result, there was no issue as to costs. However, it is appropriate for THC to reimburse her the Authority filing fee of \$71.55 within 28 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority