

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 45
3121340

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| BETWEEN | ALEXIS DIETZ Applicant |
| AND | GOOD FOOD VIBES LIMITED Respondent |

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| Member of Authority: | Pam Nuttall |
| Representatives: | May Moncur, advocate for the Applicant Doug Cowan, counsel for the Respondent |
| Investigation Meeting: | 13 January 2022 at Auckland |
| Submissions received: | 11 January 2022 from Applicant 12 January 2022 from Respondent |
| Determination: | 21 February 2022 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Alexis Dietz was employed on 12 August 2019 to work in a restaurant business owned by Good Food Vibes Limited t/a Big Fish Eatery (Good Food). Ms Dietz was in New Zealand on a student visa which allowed her to work for twenty hours per week during the university semester and for a greater number of hours per week outside this period.

[2] Ms Dietz was dismissed by Good Food on 3 July 2020. This dismissal followed a telephone conversation between her husband, Jonathon Dietz, and William Chung, the major shareholder and director of Good Food. During this telephone conversation

Mr Dietz raised questions about an apparent reduction in his wife's wages, related to payment of the Covid 19 wage subsidy.

[3] Good Food maintained that Ms Dietz was employed on a casual employment agreement which meant that her employment could come to an end at any time. The employment agreement stipulated seven days written notice to terminate the agreement. Good Food considered that providing verbal notice to Ms Dietz was sufficient process to bring the employment relationship to an end.

[4] The dismissal occurred in a context of sustained adverse verbal commentary about and directed at Ms Dietz by William Chung, during her food service shift when he was one of the chefs in the restaurant kitchen.

[5] Ms Dietz sought findings that she was unjustifiably dismissed and that the interactions between her and Mr Chung on the day of the dismissal were a breach of good faith which should attract a penalty under s 4A of the Employment Relations Act 2000 (the Act).

The Authority's investigation

[6] During the Authority's investigation witness statements were provided by Alexis Dietz, Jonathon Dietz, William Chung and Ronja Nintscheff, the Operations Manager for Good Food. The representatives also provided written submissions and gave oral closing submissions.

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

The issues

[8] The issues for investigation and determination were:

- (a) Was the decision to dismiss Ms Dietz, and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) Did Good Food t breach its statutory duty of good faith under s 4 of the Act?
- (c) Did the actions of Good Food on 3 July 2020 unjustifiably disadvantage Ms Dietz?

- (d) If Good Food's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
- Lost wages; and
 - Compensation under s123(1)(c)(i) of the Act; and
 - Penalties
- (e) If any remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Mss Dietz that contributed to the situation giving rise to the unjustifiable dismissal grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Background

[9] Ms Dietz was employed as Wait Staff at Good Food by Ronja Nintscheff, following a referral by a friend of Alexis who was already working in the restaurant. A signed copy of the employment agreement was not provided to the Authority although Ms Nintscheff's evidence, based on invariable practice, was that she was 100% sure that she would have signed the agreement and that Ms Dietz would also have been asked to sign. The document was the usual template at the time for staff considered to be "casual" employees and neither party disputed the validity of the unsigned document as a record of the employment agreement between them. Other staff were employed using the same template at the time Alexis was an employee.

[10] The agreement document was headed "Individual Casual Employment agreement between an Employer and an Employee." However, clause 3.1, under the heading "Nature and Term of the Agreement", was entitled "Individual Agreement of Ongoing and Indefinite Duration".

[11] Clause 6 dealt with hours of work. There were no minimum guaranteed hours, but the employee worked on a roster with two days' notice of each new roster and one day off within the rostered period.

[12] Clause 7.2 provided for an annual review of salary/wages after 12 months employment (and "every 12 month anniversary thereafter") and a "Feedback session...to review progress in reflection to wages" eight weeks from the date employment commenced.

[13] Clause 8 specified that casual employees are not entitled to paid leave, sick leave or bereavement leave and cannot accrue annual leave. Holiday pay of 8% was to [be] paid on top of the gross income fortnightly.

[14] There were also clauses about joining Kiwisaver and the obligations of the employer to provide information and consider comment in the event of restructure and redundancy.

[15] Trial periods were specified not to apply to employees under Casual Employment Contract in clause 13.1.

[16] Clause 13.2 set out under the heading “General Termination”:

The Employer may terminate this agreement for cause, by providing **7 days** notice in writing to the Employee. Likewise the Employee is required to give **7 days** notice of resignation.

[17] Clause 14 set out a detailed process for resolving employment relationship problems, beginning with clarifying the problem and then raising the problem as soon as possible, ordinarily with the employee’s direct manager to discuss the problem. Next steps were specified, including contacting the MBIE mediation service and attending mediation, involving a Labour Inspector, referring the problem on to the Employment Relations Authority with rights to refer the problem to the Employment Court or further levels of appeal.

[18] Ms Dietz worked at Good Food’s restaurant until the first Covid-19 lockdown in March 2020. Good Food applied for the wage subsidy for Ms Dietz, along with its other employees, based on a weekly figure of hours worked determined by averaging total hours worked by the weeks of her previous employment.

[19] Good Food provided the Authority with a set of pay slips and a summary sheet of hours worked showing gross and net pay and holiday pay for each fortnightly pay period. These documents record that she was paid a covid wage subsidy from 6 April 2020 until 29 June 2020.

[20] However, the only conversation between Mr Jonathan Dietz and Mr Chung concerned an apparent shortfall in pay for the actual hours worked in the period

following the restaurant's re-opening after the first Covid-19 lockdown in 2020. It appeared that the 2.5 hours declared on the pay records for the pay period 15/06/2020-28/06/2020 were an adjusted figure following the deduction of "minus hours". It seems that Good Food believed it was entitled to offset the average hours figure on which the wage subsidy payment was based against hours actually worked in the re-opened restaurant.

[21] What this means is that the hours recorded on the pay documents do not reliably record the actual hours worked by Ms Dietz in the fortnightly pay period after the restaurant re-opened following the Covid-19 lockdown.

[22] Rosters provided prior to the investigation meeting also covered only four weeks of Ms Dietz's entire employment in the restaurant and the respondent undertook at the investigation meeting to provide any other rosters documents it could find to the Authority in a timely fashion. Apparently no further rosters could be discovered.

[23] Miscommunication over whether Ms Dietz was properly remunerated for all the hours worked subsequent to the Covid-19 lockdown was the precipitating factor for her dismissal and the contretemps during service in the restaurant on 3 July 2020. However, investigating this dispute ceased to be a live issue for the Authority with the withdrawal of a claim for wage arrears in the telephone conference on 14 June 2020.

[24] An accurate record of hours worked, as well as the pattern of work for which she was rostered, however, did continue to be material to the issue of the nature of Ms Dietz's employment.

What was the nature of Ms Dietz's employment?

[25] Good Food believed that it could peremptorily dismiss Ms Dietz because she had been employed on a casual employment agreement.

[26] The concept of casual employment refers to a situation of sporadic, occasional or intermittent engagement to work. In this situation a common law 'contract of service' exists between the parties only during each engagement to work. Although there may be some understanding or arrangement between the parties as to the worker's

continuing availability to work, these arrangements lack the necessary mutuality of obligation to create ongoing employment relations between the parties¹.

[27] In *Jinkinson*,² the court analysed the true nature of the relationship between the parties as required by the definition of “employee” in s6 of the Act in order to establish whether an on-going “contract of service” existed between the parties. The Act provides that the “label” applied to the employment relationship is not sufficient by itself to define this relationship.

[28] Drawing on authorities from previous New Zealand decisions and United Kingdom and Canadian appellate cases, the decision in *Jinkinson* characterises “casual” engagement as occasional, irregular, spasmodic, ephemeral, transitory, unpredictable, unreliable and unforeseen in nature, usually requiring engagement on a call-in basis.

[29] At the time of the dismissal, Mr Chung’s comments to Ms Dietz indicate that he believed that the written contractual description of Ms Dietz as a casual employee defined the nature of the employment relationship and that he acted on that belief.

[30] Was that belief objectively justified? The terms of the employment agreement as set out above provide conflicting indications as to employment status.

[31] The nature of the agreement is explicitly labelled as casual, entitlements to various types of leave are specifically excluded and holiday pay is provided for on a “pay as you go” basis. Trial periods are specified as not applying to casual agreements and termination on notice is provided for. There is an express exclusion of any specified minimum hours.

[32] However, there is also the heading “Individual Agreement of Ongoing and Indefinite Duration”, clauses providing for annual salary review and feedback after 8 weeks employment, provisions for joining Kiwisaver and for employer obligations in the event of restructure and redundancy. The exclusion of specified minimum hours occurs in clauses about setting hours of work by roster and about variation to hours of work.

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at 233 (*Jinkinson*).

² At 234-235.

[33] These clauses expressly provide that additional hours (not the usual hours of work) may be required when there are unforeseen circumstances and a lack of staff in the restaurant. These circumstances are, in fact, the situations in which truly casual engagements arise, but the document seems to provide for them as a separate category from the usual hours of engagement.

[34] Casual employment does not involve any expectation of ongoing work. The worker is simply not offered a new assignment or is not rostered for work. However, this employment document provides for termination for cause on seven days written notice and for summary dismissal without notice for serious misconduct. Both these clauses are only relevant to permanent, ongoing employment where dismissal must be justified, in this case either by showing “cause” or establishing serious misconduct by fair process.

[35] The written employment agreement, then, seems an equivocal guide as to the agreed nature of Ms Dietz’s employment. Good Food, however, is quite clear in the evidence of Ms Nintscheff, that its intention was to offer casual employment and that it viewed its staff as consisting of three categories, casual, full-time permanent and part time with designated days of work and fixed hours. Ms Nintscheff’s written statement records at [12] that “[t]here was a mutual agreement that she was not guaranteed any hours of work. She would only be asked to work depending on the business needs and her schedule”.

[36] However, Ms Nintscheff did concede that she did not recall specific details of her initial interview with Ms Dietz and that her comments relied on what was the usual practise when a prospective staff member came to the restaurant for an interview. So there is no specific evidence that the casual nature of the relationship was explicitly addressed with Ms Dietz at the time of her engagement to work or that she turned her mind to the status of her working arrangement when she was hired.

[37] In the absence of clear evidence as to the parties’ common intention, I must adopt the approach set out by Judge Couch in *Jinkinson*³ and rather than determining the categorisation of the arrangement between the parties and then inferring from this the particular obligations they had to each other, “a sounder approach is to look at the

³ At 231.

obligations assumed by the parties and then decide the nature of the relationship created”.⁴

[38] The most fundamental obligation, the “irreducible minimum of mutual obligation necessary to create a contract of service”, is that the employer had an obligation to offer the employee further work and the employee had an obligation to carry it out.⁵

[39] Looking at the written document as a whole, while it is clear that the contractual document does contain some terms incompatible with casual employment and that perhaps it does require what *Jinkinson* describes as “some ongoing mutual obligations on the parties”⁶, the written agreement does not impose an obligation on Good Food to offer Ms Dietz on-going work.

[40] Conflicting evidence was provided as to whether there was an on-going expectation of work being offered and performed in the day-to-day operation of the agreement. Although the limited roster record made it difficult to determine expectations of Ms Dietz’s work pattern based on weekly rostering, Ms Nintscheff accepted that it would be likely that Ms Dietz was rostered every week, commenting that we “always like to support staff because they have to pay rent”.

[41] The summary of pay history recorded the hours worked for 17 fortnightly pay periods (excluding the covid lockdown and the fortnight when hours were contested as described in [20] above). For 14 of these fortnightly pay periods at least 20 hours work is recorded; in the remaining 3 fortnightly periods the figures are 16 hours, 15.25 hours and 9.75 hours.

[42] However, both Mr Chung and Ms Nintscheff insisted that Ms Dietz was only rostered to work when the business required extra help or according to whether additional support would be needed depending on forecasted sales and weekly bookings. Ms Nintscheff’s evidence was that rostered hours were determined both by the needs of the business and Ms Dietz’s university needs.

⁴ At [29] at 231.

⁵ At 237. *123 Casino Limited t/a 123 Palm Bar & Restaurant & Function Centre v Qi Zuo* [2020] NZEmpC 88 at [22].

⁶ *Jinkinson* above n1 at 236.

[43] Evidence was contested as to whether Ms Dietz could and did refuse shifts when they were offered to her and whether she was reliably present for shifts for which she was rostered. Ms Nintscheff's evidence was that she called in sick noticeably more often than other staff and that it was a consideration when rostering for Ms Dietz to be the extra staff member on the shift or be put on shifts for quiet nights for this reason. However, she agreed that this issue was never put to Ms Dietz though there may have been some general conversation about being reliable.

[44] Ms Dietz denied this evidence in her written statement in reply and to the Authority. She said she never turned down a shift unless she was too unwell to work and always had to ask someone to cover for her if she was unwell. She described working with a cast on when she broke her arm until the restaurant manager decided she should not be working in the restaurant. So it is unclear if there was an obligation on Ms Dietz to always accept work offered her.

[45] She was rostered to work every week and was included in the employer's application for wage subsidy payment on the basis of averaging her total hours of employment to establish notional weekly rostered hours. It seems that the employer also believed that, once the restaurant reopened it was entitled to offset the wage subsidy payment against actual hours work in the expectation that the average weekly hours figure should be achieved. The worker believed that she was not able to refuse work offered. The pattern of hours worked did vary, peaking over the summer holiday period when the restaurant was very busy and the university semester had finished. However, the restaurant relied on the "casuals" to cover fluctuation in busy periods which recurred with some regularity and were not wholly unexpected. So it seems that not all of Ms Dietz working hours fitted the description of casual work as occasional, irregular, spasmodic, ephemeral, transitory, unpredictable, unreliable and unforeseen in nature, which we draw from the case authority cited in *Jinkinson*.

[46] Even should Ms Dietz's initial engagement have been unequivocally entered into on a casual basis, it does seem that an expectation of a pattern of at least some hours of regular work each week became established. To that extent the employment agreement had "morphed" into a permanent on-going relationship. (My investigation did not encompass the application of the "zero hours" provisions to Ms Dietz's situation).

[47] However, even if I am wrong in this conclusion, at the time of her dismissal Ms Dietz had been engaged on a period of rostered work which was on-going for a period of two further shifts. As confirmed in both *Jinkinson* and *Rush Security Services Ltd*⁷.

[48] Ms Dietz was dismissed on 3 July 2020, ostensibly on notice, and returned to complete the shifts for which she had been rostered on 4 July 2020 and 5 July 2020. Her uncontested evidence is that she was not rostered for any shifts in the following week beginning 6 July 2020 “but would have attended any shifts I would have been rostered for”.

[49] This means that when Ms Dietz was dismissed she had been engaged for a rostered period of on-going work which had not been completed, that she is therefore eligible to bring a personal grievance for unjustified dismissal and that the test for justification, as set out on s103A of the Act, is applicable.⁸

Unjustified dismissal

[50] Given this context, was the decision to dismiss Alexis Dietz, and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time?

[51] A clear sequence of events leading to Ms Dietz’s dismissal emerged from the evidence given to the Authority:

- a) On 1 July 2020 Ms Dietz messaged Ms Nintscheff, the restaurant operations manager, raising concerns about apparent discrepancies in the hours for which she had been paid in the previous pay cycle. Several messages were exchanged concluding with a message on 2 July in which Ms Nintscheff says: “I’ll pop in tomorrow around 2pm and you can address all your concerns then and we can work through resolving things together.” The tone was informative and reasonable. Ms Dietz asked to include her husband in the discussion.
- b) On July 3 about 10.10am Ms Dietz received a message from Ms Nintscheff, who was well on in her pregnancy, that she had an emergency appointment with her midwife and that William Chung would meet with her instead of Ms Nintscheff. Ms Dietz had only spoken to Mr Chung on one other occasion.

⁷ *Jinkinson* above n1; *Rush Security Services Ltd, (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76 at [21].

⁸ *Surplus Brokers Limited v John Neil Armstrong* [2020] NZEmpC 148.

- c) Ms Dietz phoned Mr Chung as she arrived to start work at 11am, but he was at a dentist appointment and said he would call back. Ms Dietz explained she was heading into work and that it would be her husband who answered the return call.
- d) Mr Chung left the dentist appointment, having had 5 teeth extracted, and sat in the dentist carpark and spoke to Mr Jonathon Dietz who was in the restaurant carpark, talking on his wife's phone. It was about 12 noon and the conversation lasted 8 minutes.
- e) Mr Dietz raised the issues concerning pay discrepancies and the conversation became heated.
- f) Mr Chung decided to terminate Ms Dietz's employment and contacted Ms Nintscheff to check on the process for dismissal. His evidence was that he had never dismissed an employee before this.
- g) Mr Chung arrived at the restaurant very angry. He took Ms Dietz outside with Darrow Benito, the shift manager for the day, at about 12.30 pm and instructed Mr Benito to give Ms Dietz two weeks' verbal notice of termination of her employment. Ms Dietz's written evidence records one week's notice, but nothing turns on this discrepancy. Mr Chung refused to provide notice in writing because he expressed fears of some form of legal trap.
- h) Ms Dietz's evidence recounts angry comments by Mr Chung about her husband's involvement including comments that Darrow, the restaurant manager, was present as a witness to the dismissal so that her husband did not accuse Mr Chung of threatening her.
- i) Mr Chung's evidence is clear that this is the point at which Ms Dietz was dismissed.

[52] Mr Chung's evidence was that his two reasons for Ms Dietz's dismissal were a conversation he had with her on the only other occasion they had spoken and the telephone conversation with Mr Dietz.

[53] The previous conversation between Ms Dietz and Mr Chung was at her investigation and involved seeking support or assistance with obtaining residency in New Zealand. Mr Chung's account is that Ms Dietz asked for a management role to help her get a visa. The deal being proposed was that if he would make her a manager in return her husband, who did not at this point have a visa which would allow him to work in New Zealand, could volunteer to do some of the delivery driving for the restaurant. There was also talk about a "nest egg", which Mr Chung's written evidence interpreted as a family inheritance. Ms Dietz's testimony at the investigation meeting was that this money was college funds not used in the US, which would be transferred after her university graduation in New Zealand.

[54] Mr Chung clearly believed he was being offered some sort of underhand arrangement which was at least unethical and possibly illegal. When asked if he thought he was being bribed, he responded that he thought he was being offered something “dodgy”. He did think that money was on the table, that something financial was being offered. That what he understood from the conversation was that she was offering him some kind of deal.

[55] Mr Chung’s written testimony describes his reaction to the interaction:

This conversation left me very concerned about what Alexis’ intentions were and what sort of a person she was. Good Food Vibes is my life. I have spent countless hours, creating, working in and on and trying to make this business as successful as possible. To hear Alexis ask me to jeopardise my life’s work was very troubling.

[56] However, Ms Dietz maintained that she suggested that her husband could occasionally help the restaurant as a volunteer “to show that I cared about his business so that Mr Chung would consider supporting me towards residency...”. She explained that she thought he could substitute for other restaurant workers who went out on deliveries when they were they were busy and never intended her husband would supplant the usual driver. Ms Dietz’s evidence was that she “never said or implied I wanted to pay for residency or was seeking guarantees of support”.

[57] None of these concerns was put to Ms Dietz. Mr Chung said “we never spoke again about the matter.” But he did speak to Ms Nintscheff about it either straight away or the next day. By his own account he told her about an “offer” from Ms Dietz, that Ms Dietz wanted to be a manager. That she offered her husband as a driver so that Tintin did not need to be the driver, that she was going to get a “nest egg” and so Mr Chung’s thought was she was offering something financial.

[58] It was in this context that Mr Chung fielded a phone call from Mr Dietz raising an enquiry about the way in which his wife’s pay and hours had been calculated, suggesting Mr Chung may have been advised in error about the operation of the wage subsidy and asking if he was ok with mediation as a means of resolving the matter.

[59] Mr Chung described the conversation as calm and polite at the outset but said that it became more heated...it didn’t end up polite and wasn’t pleasant. His evidence was that “Jonathon accused me of being fraudulent and spoke to me in a completely inappropriate manner”. He said that he took it that Mr Dietz was saying that I was ripping her off because we made her do the hours. It became clear that he resented Mr

Dietz being involved in the matter and believed that he was being threatened in some way. That by the end of the phone call he believed that “they wanted to do something bad to me”. Mr Dietz described Mr Chung as becoming agitated during the wage subsidy discussion, insisting that he had kept Ms Dietz on during the lockdown as a favour when he didn’t have the hours and saying he would be talking to Ronja (Ms Nintscheff) about whether he needed Alexis anymore.

[60] At this point Mr Chung made the decision to dismiss Ms Dietz. His evidence was: “Honest truth is, after conversation with Jonathon...I didn’t want to work with dodgy people in my company. I just didn’t want to work with dishonest people around me at that time”.

[61] The basic requirements of procedural fairness to establish that a dismissal was justified are set out in s103A (3) of the Act. In the evidence presented to the Authority it was clear that none of these requirements had been satisfied. No investigation was undertaken, concerns were not raised with the employee, there was no opportunity to respond and so no genuine consideration of any explanation was possible. The decision to dismiss Alexis Dietz, and how that decision was reached, were not what a fair and reasonable employer could have done in all the circumstances at the time.

[62] Ms Dietz’s dismissal was therefore unjustified.

Breach of good faith?

[63] Subsequent events gave rise to the claim for a breach of good faith. Although Mr Chung was clear that he had dismissed Ms Dietz immediately following his arrival at the restaurant, this was not completely obvious to her amidst the tirade of recrimination and hostility which accompanied the process.

[64] Ms Dietz left the restaurant on a delivery to a customer, phoned her husband about what was being yelled at her in the restaurant and was advised to do her best for the rest of the shift and to record what was being said.

[65] The transcript of the recording was accepted between the parties and covers a short period between Ms Dietz’s return from the deliveries before she is sent on a break by the restaurant manager and a longer period following her return to the restaurant around 4.50 pm. At these times it seems that Mr Chung was in the kitchen cooking a large order and that Ms Dietz was in the “pass” between the restaurant and the kitchen.

[66] The recording is of an on-going angry diatribe traversing the wage subsidy issues, Mr Dietz's involvement, suspicions as to what the conversation seeking help with the visa involved, fears of being legally threatened by the mediation suggestion, accusations against the Dietz's as foreigners and migrants, accusations of scamming, threats to write letters to immigration and so on.

[67] Mr Chung acknowledged to the Authority that this was not an ok way to speak to Ms Dietz and that he would not usually speak to anyone like that. He expressed that he regretted talking that way in the heated moment and did not mean anything to be personal towards her.

[68] Ms Dietz was understandably distressed and humiliated, phoned her husband to pick her up to go home during her break and returned later to the restaurant to complete her shift. At this point the angry ranting continued until Mr Chung left the restaurant.

[69] Clearly this behaviour did not satisfy the good faith duty "to be active and constructive in...maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative"⁹. Although Ms Dietz had been given (verbal) notice at this point the employment relationship continued until the end of the notice period or at least until the end of the current period of rostered engagement.

[70] Ms Dietz submitted that the breaches were not minor and constituted workplace bullying. The gravity of the breach and the reasoning behind it were felt to justify imposing a penalty.

[71] The relevant requirements for imposing a penalty for this breach of good faith are set out in s 4A(a) & (b) of the Act. Liability for a penalty is incurred if the failure to comply with the duty of good faith is "deliberate, serious and sustained;" or "intended to...undermine an employment relationship".

[72] I am not persuaded that the behaviour, unacceptable though it was, reached the threshold necessary to justify imposing a penalty. The breach of duty was "deliberate" in that the actions done, and words spoken, were intentional. Whether they were in any other sense directed towards breaching the duty of the employer is more problematic. The evidence detailed the considerable strain Mr Chung was under on that day. As well

⁹ Employment Relations Act s 4 (1A)(b).

as the business anxieties of Covid-19, he was dealing with a disintegrating marriage, caring for small children, one of whom had leukaemia, his own poor state of health including a medical condition which necessitated that morning's teeth extractions and was undertaking psychological counselling. He was cooking a large, valuable food order in the kitchen throughout the afternoon. His behaviour that day tends to suggest a psychological meltdown rather than a deliberate breach of duty.

[73] The breach, although it occurred over a period of several hours can also not be characterised as sustained. Good Food as the employer over a period of time had behaved in a calm and reasonable manner. The response of Ms Nintscheff to Ms Dietz's raising of issues about the wage shortfall and the Covid-19 subsidy payments is rational, constructive and pleasant. Almost all of Good Food's interactions with Ms Dietz had not been interactions between her and Mr Chung. So it is difficult to characterise this breach as sustained.

[74] Equally the breach does not seem to have been directed at "undermining an employment relationship". If anything, the relationship might be said to have been already undermined by the time this tantrum ensued. The decision had already been taken to give notice and end the relationship...this bad behaviour could not be viewed as being undertaken in order to produce an outcome that had already occurred.

Unjustified disadvantage

[75] But this does not mean that Ms Dietz should be without a remedy. This behaviour resulted in disadvantage in the remaining days of her employment and subsequently for Ms Dietz which can be distinguished from the effects of her unjustified dismissal.

[76] She was humiliated and distressed by the unwarranted accusations and remarks which were being flung at her in a situation in which co-workers, and perhaps customers, were able to hear what was being said. She believed that she was an object of pity in the eyes of co-workers and was being blamed for having caused a situation which she was told by co-workers she ought to apologise for. She lost social contact with her co-workers and believed this was a result of what they had seen and heard in the restaurant that day...that she was shunned as a result and would be an outcast. She gave evidence of nightmares and lost sleep as a result of never being spoken to again by any of the staff she had worked with. Her husband's evidence described a longer

term effect of being unable to return to the Stonefields shopping centre because being in the vicinity of the restaurant caused her to hyper ventilate. And that the isolation from previous work friends made her feel she had done something bad.

[77] I find that Ms Dietz suffered unjustified disadvantage during the remaining period of her employment and subsequently as a result of Mr Chung's behaviour on the afternoon of 3 July 2020 and that compensation should be awarded for this unjustified disadvantage.

Remedies

Lost wages

[78] Ms Dietz found alternative employment after a period of 5 weeks. Reimbursement of lost wages in the sum of \$1,939.14 gross is awarded, calculated on the basis of averaged weekly working hours of 19 hours per week plus holiday pay.

Compensation

[79] Ms Dietz also sought compensation for humiliation, loss of dignity and injury to feelings arising from the unjustified dismissal.

[80] Both Ms Dietz and her husband described the stress and pressure arising from her dismissal because she was the sole breadwinner. Since her husband did not have a visa allowing him to work there would be no other income until after Ms Dietz's graduation when they anticipated a change in visa status would allow them both to work. Living pay check to pay check just covered tuition fees and living expenses. Both feared being forced to leave New Zealand and Mr Dietz described his wife losing sleep, waking crying in the night and suffering nightmares. They asked friends for help with the rent to afford psychological counselling for Ms Dietz but after 4 counselling sessions the counsellor declared a conflict of interest. (At the investigation meeting it was established that ironically this was because she was also providing counselling to Mr Chung). Compensation of \$14,000.00 is awarded under s123 (1)(c) of the Act arising from the unjustified dismissal.

[81] Compensation of \$5,000.00 is awarded under s123 (1)(c) of the Act as a consequence of the unjustified disadvantage.

[82] Although it was evident that Mr Chung continued to be sceptical as to the nature of his conversation with Ms Dietz about assistance with her visa this was not advanced as being blameworthy conduct on the part of Ms Dietz that contributed to the situation giving rise to the unjustifiable dismissal grievance. Accordingly, there is no reduction in the awards made.

Summary

[83] I have found that:

- a. Ms Dietz was unjustifiably dismissed from her employment with Good Food.
- b. Good Food breached its duty of good faith under s 4(1A)(b) but that the threshold for awarding a penalty was not reached.
- c. Ms Dietz was unjustifiably disadvantaged in her employment with Good Food
- d. Good Food must pay Ms Dietz the following sums:
 - i. \$1,939.14 gross lost wages
 - ii. \$14,000 in compensation under s123(1)(c) as a result of the unjustifiable dismissal
 - iii. \$5,000 in compensation under s123(1)(c) as a result of the unjustifiable disadvantage.

Costs

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

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

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

Pam Nuttall
Member of the Employment Relations Authority