

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 10  
3039114

BETWEEN

CUCHULAIN (CULAIN) JONTY  
KIMBERLEY-CHANDRE  
(WALSH)  
Applicant

AND

FERRYMEAD AGADIR LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Culain Walsh in person  
Robert Thompson, advocate for the Respondent

Investigation Meeting: 17 September 2019

Submissions [and further 2 October 2019 from the Applicant  
Information] Received: 20 September 2019 from the Respondent  
Further information received on 11 October 2019

Date of Determination: 13 January 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Cuchulain (Culain) Jonty Kimberley-Chandre (Walsh) was employed from 1 May 2018 in the role of shift manager by Ferrymead Agadir Limited which trades as Dubba Deluxe. I shall refer to the company from hereon as Dubba. Dubba operates as a restaurant/takeaway offering Moroccan Cuisine with an emphasis on fresh and flavourful food and has several branches in Christchurch.

[2] Mr Walsh was party to a written employment agreement with Dubba that was signed on 1 May 2018.

[3] Mr Walsh says that in or about May 2018 he raised complaints about sexual harassment by his manager however these were not dealt with appropriately and the harassment continued. Mr Walsh says that he then heard from other employees that the manager was conspiring against him because of his complaints but that was never properly investigated.

[4] Mr Walsh asked to transfer from the Ferrymead branch he was working at to another branch of Dubba at Moorhouse Avenue. He says that at that branch he was subject to bullying and that Dubba breached his employment agreement in the way it dealt with the sexual harassment and the bullying complaint.

[5] Mr Walsh says that on 9 August 2018 following an incident when he was photographed he was unjustifiably suspended and then following a disciplinary process was dismissed for serious misconduct. He says that his dismissal was unjustified. Mr Walsh seeks payment of global compensation in the sum of \$30,000 and reimbursement of lost wages.

[6] Dubba does not dispute that Mr Walsh was dismissed but says that both the suspension and the dismissal were justified. It does not accept that Mr Walsh was bullied and says that it took fair and reasonable actions about sexual harassment complaints. It denies that his employment agreement was breached. Dubba says that it has acted fairly and reasonably at all times.

### **The issues for determination**

[7] The Authority in this matter will need to determine the issues that arose during the period of Mr Walsh's employment with Dubba from 1 May 2018 to 21 August 2018:

- (a) What was the nature of the complaints about sexual harassment?
- (b) Did Dubba take adequate steps to deal with Mr Walsh's complaints that he was sexually harassed in the workplace?
- (c) Did Dubba take adequate steps to deal with concerns raised by Mr Walsh including that he was bullied in the workplace?
- (d) Was Mr Walsh unjustifiably suspended?
- (e) What were the reasons for Mr Walsh's dismissal?

- (f) Was there a full and fair investigation into the allegations at the end of which a fair and reasonable employer could conclude there was serious misconduct?
- (g) Could a fair and reasonable employer have justifiably dismissed Mr Walsh?
- (h) If any of Mr Walsh's claims are made out then what remedies should be awarded and are there issues of mitigation and contribution.

## **Sexual harassment**

### *The first complaint about Tinder*

[8] After Mr Walsh commenced his employment he raised a concern about his manager with the then General Manager of Dubba, Jimmy Summerfield. The nature of the concern was that he felt uncomfortable when the manager questioned him about his Tinder account. The issue was put in the statement of problem as the manager was taking screenshots of Mr Walsh's Tinder profile and sending them to him and asking which way he was going to swipe for her. In his letter raising a personal grievance of sexual harassment dated 10 August 2018 he said that she also made other remarks "which insinuated she was keen on some form of sexual engagement with me."

[9] The exact date of these interactions was not able to be recalled in the evidence. There was agreement by Mr Walsh and Mr Thompson that the interactions had occurred sometime over the course of seven to ten days from 17 May 2018.

### *The second complaint about touching and comment about muscles*

[10] On 7 June 2018 Mr Walsh sent an email to Mr Summerfield. Mr Walsh indicated in his email that there were a few issues that he needed to raise in regards to behaviour that he was experiencing in the workplace and how it was making him feel towards his job at Dubba.

[11] He initially set out that he wanted to address a few things with the manager. He noted he had had a chat to Mr Summerfield about her "having a sexual interest in myself" after being questioned by her as to which way he would swipe on Tinder. He also wrote that it was obvious that she was intimidated by the presence of him and another employee coming on board and instantly being trained for management positions. He noted that there was a "great improvement" with the manager after she was spoken to by Mr Summerfield but that

in the last few shifts that Mr Walsh had undertaken her behaviour had deteriorated again and he was now feeling uncomfortable. He set out issues summarised as below.

(a) He heard the manager snap back at another employee in an aggressive manner in front of customers and he felt that was unprofessional and conveyed a bad example to junior staff and customers.

(b) That he was told off for talking and/or laughing whilst doing dishes out the back and that bothered him because he is naturally loud and there were other staff including the manager who talk while working. He considered that being told off for general laughter was unnecessary.

(c) That over the last few shifts the manager has been quite “touchy” towards him. He wrote that she has either lightly prodded him in the side or has touched the small of his back. He wrote that he knows there is banter amongst the workplace but that he did not feel comfortable at all with the manager doing that especially after raising the Tinder issue about two weeks earlier.

(d) Mr Walsh also referred to the fact he was struggling with other staff members telling him that they did not like the manager and that they had resignation letters in their car ready to hand in. He finally referred to an incident of a wrong order going out on Friday last week and having the whole night focussed on who was to blame. Mr Walsh concluded the letter by stating that he hoped he had not come across as too brutal in his wording and that he was looking forward to sorting it out.

[12] Mr Summerfield organised a meeting between Mr Walsh and the manager to try to resolve the concerns. The manager apologised and Mr Walsh confirmed that there was no further behaviour of a sexual nature after that meeting. Mr Walsh raised a concern that the manager was shown the email with his concerns. It is consistent with good faith obligations that the nature of concerns be conveyed to the person being complained about so they can respond particularly where they could be matters that impact on the continuation of their employment.

*Further text from Mr Walsh dated 19 June 2018*

[13] Mr Walsh sent a text message to Mr Summerfield. In that message he wrote that he got told the previous evening that the manager “has asked all the girls to email her anything that I do that could possibly be out of line”. Mr Walsh wrote amongst other matters “... I now feel miserable with the influence of [the manager] and how she manipulates other staff”.

[14] Mr Walsh had spoken with another employee who was going to manage the Moorhouse store about him working at that store. Mr Summerfield agreed to that transfer. Shortly thereafter his previous manager’s employment ended.

**Did Dubba take adequate steps to deal with Mr Walsh’s concerns that he was sexually harassed in the workplace?**

[15] Mr Walsh says that he has a personal grievance that he was sexually harassed in the workplace under s 103(d) of the Employment Relations Act 2000 (the Act) by his manager.

[16] Section 103(2) provides that:

a representative, in relation to an employer and an alleged personal grievance means a person

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- (a) who is employed by that employer; and
- (b) who either –
  - (i) has authority over the employee alleging the grievance; or
  - (ii) is in a position of authority over other employees in the workplace of the employee alleging the grievance.

[17] I accept that the manager of the first Dubba branch that Mr Walsh worked at was a representative of the employer as set out in s 103(2) of the Act. Section 108 of the Act then needs to be considered as it is concerned with sexual harassment by a representative.

[18] Section 108 of the Act provides:

(1) For the purposes of sections 103(1)(d) and 123(d), an employee is sexually harassed in that employee’s employment if that employee’s employer or a representative of that employer-

- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains -

- (i) an implied or overt promise of preferential treatment in that employee's employment; or
  - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
  - (iii) an implied or overt threat about the present or future employment status of that employee; or
- (b) by-
- (i) the use of language (whether written or spoken) of a sexual nature; or
  - (ii) the use of visual material of a sexual nature; or
  - (iii) physical behaviour of a sexual nature,-  
 directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[19] Clause 19.1 of the employment agreement provided as follows:

The parties to this agreement acknowledge that sexual or racial harassment in the workplace are totally unacceptable and undertake that they will take whatever steps are necessary to prevent such practices.

[20] Under s108 of the Act the onus is on an employee to establish that there was language and behaviour used by his manager of a sexual nature about the Tinder account as it would appear to a reasonable person or objectively. Further that the language or behaviour was unwelcome or offensive and that it had a detrimental effect on Mr Walsh's employment. In his submissions Mr Walsh set out that he was uncomfortable with what he considered was sexual interest from his manager about questioning over his Tinder account.

[21] Mr Walsh when he raised his grievance said that there were exchanges that "insinuated the manager was sexually interested in him."

[22] Mr Summerfield was not of the view that the exchange about the Tinder account was sexual harassment. He described the manager as "a loud and friendly person" and that he saw no evidence of sexual harassment.

[23] Objectively assessed the Tinder exchange was intentional, involved a new employee and could support overtones of flirtatiousness particularly given the known nature of the Tinder dating site and the power differential in the relationship. There was insufficient evidence about the discussion Mr Summerfield had with the manager for the Authority to

reach any conclusions about context. I conclude that the exchange about Tinder was of a sexual nature.

[24] It was unwelcome and unwanted behaviour. Mr Walsh said in his evidence that it did cause him some detriment and he had some days off work as a result and that it followed a family bereavement that had left him vulnerable.

[25] I conclude the Tinder exchange was sexual harassment and the second complaint and context has to be seen with this conclusion. The focus for the Authority is what steps were taken by the employer to address this with its obligation to provide a work environment that is safe and free of sexual harassment.

[26] After receiving the first complaint the evidence supports Mr Summerfield spoke separately to the manager and to Mr Walsh. The manager apologised to Mr Walsh and reassured him that that type of conduct would not occur again. Even though Mr Summerfield did not regard the conduct as sexual harassment I accept that he took the matter seriously and advised the manager of concerns. There were no notes taken about any discussion that took place with the manager about the first complaint with Mr Summerfield.

[27] The subsequent email sent by Mr Walsh supports that there was improvement after Mr Summerfield's discussion with the manager but he referred to a number of other concerns including her being "touchy" during a few shifts and making a comment about his muscles.

[28] A meeting was held involving Mr Walsh, Mr Summerfield and the manager where the further concerns were discussed. The manager apologised to Mr Walsh. Mr Walsh confirmed there was no repeat of behaviour in the nature of sexual harassment.

[29] There was then the concern raised on 19 June 2018 that Mr Walsh had heard from other employees about potential retaliatory action on the part of the manager. Mr Summerfield said that before that could be investigated Mr Walsh raised the possibility of going to work at the new store and he agreed to that.

[30] In his written evidence Mr Summerfield said that he understood Mr Walsh wanted a low level resolution to the allegations against the manager. Mr Walsh submits that had there been a disciplinary action about the Tinder complaint then the second complaint may not have arisen. Mr Summerfield viewed the first incident as other than sexual harassment and

considered that Mr Walsh wanted a low key but effective end to the behaviour. In those circumstances the actions he took in asking the manager to desist in making Tinder comments and apologise to Mr Walsh could not be regarded as other than fair and reasonable. It was very unfortunate that Mr Walsh felt uncomfortable again but after he complained Mr Summerfield intervened and there was not a repeat of the behaviour. I find that the actions taken in response to Mr Walsh raising concerns of sexual harassment were those that a fair and reasonable employer could have undertaken in all the circumstances as they existed at the time.

[31] Mr Summerfield's evidence was that he considered from discussions at the time of the complaint about retaliatory behaviour that agreement to Mr Walsh changing branches would resolve matters between the parties by separating them. The manager who was complained about shortly thereafter left her employment with Dubba.

[32] Between 19 June and starting at the new branch in or about late June/early July there was no evidence that any retaliatory action against Mr Walsh was taken by the manager of the Ferrymead branch. The issue was not mentioned again until the personal grievance was raised on 10 August. Mr Summerfield did not consider further action was required on his part because he regarded the matter resolved by agreeing to the transfer. I do not conclude that was unfair and unreasonable in all the circumstances.

[33] I do not find a grievance is made out about sexual harassment or that there is a breach of the employment agreement obligations about sexual harassment. That is because actions taken by Dubba about the complaint of sexual harassment were those of a fair and reasonable employer.

#### **Was Mr Walsh bullied in his employment?**

[34] Mr Walsh raised a personal grievance on 10 August 2018 that he felt bullied and discriminated against during the five weeks that he worked at the Moorhouse branch after he transferred from the Ferrymead branch. At the Moorhouse branch he dealt on a day to day basis with Adel Aberkane who is a working director of Dubba.

[35] In his letter of grievance dated 10 August 2018 he set out a number of concerns.

- (a) 4 July 2018-Mr Walsh left in tears because he said that Mr Aberkane, had been harassing him for the whole day telling him that everything he did was wrong.
- (b) 27 July 2018-Mr Summerfield accusing Mr Walsh wrongly of pressing the wrong sauces on customers' orders in front of customers.
- (c) Mr Aberkane indirectly told Mr Walsh to "quit" if he was not happy with how he was being treated.
- (d) Being told that he is not allowed to talk or allowed to whistle whilst doing the dishes.
- (e) Not receiving any training on the line.
- (f) Being left on the till with insufficient training in other areas of the restaurant to be able to work in the role of shift manager.
- (g) Favouritism shown to new staff about hours.
- (h) Being told that he is being paid too much.
- (i) Being harassed by Mr Aberkane to run around the restaurant and clean tables as soon as people stand up.
- (j) Being told by the manager of the new store that Mr Aberkane wanted to end the relationship before the 90 day trial period expired.
- (k) 1 August 2018 -being told that he is not good enough.
- (l) Reduction in hours (1-6 August).
- (m) 4 August 2018 - being rostered for a split shift with a 2 hour second shift.
- (n) 6 August 2018 – being rostered for a split shift with 6 hours between the two shifts.
- (o) Mr Aberkane not greeting Mr Walsh.

[36] On 2 August 2018 Mr Walsh sent a text message to Mr Summerfield that he would not be coming into work because of the nature of yesterday's argument. Mr Summerfield responded and thanked Mr Walsh for letting him know. He suggested a meeting the following day before Mr Walsh started and advised that he could put something in writing. Mr Walsh responded that sounded good. The evidence supported there was no meeting the following day. It was not clear whether Mr Walsh had attended at the work place.

[37] On 4 August 2018 Mr Walsh sent Mr Summerfield another text message advising that he was feeling unhappy and stressed at work and would not be coming in that day. He apologised for the short notice but finished with "at this point it feels like you guys don't even want me in there anyway." Mr Summerfield promptly responded by text message and said that was not the case and Mr Walsh was welcome at work anytime. He said that he was not sure what had given Mr Walsh the idea [he was not wanted] and that he hoped he felt better soon and that he would see him the following day.

[38] On 5 August 2018 Mr Walsh sent Mr Summerfield a text that he would not be coming in that day. He wrote that after the way he had been treated in the last few weeks he did not feel comfortable coming in. He said that he no longer enjoyed himself after the way he had been spoken to by Mr Aberkane and that he was harassing him every single shift. He wrote that he found himself getting ready for work and then feeling that he did not want to go anymore.

[39] Mr Summerfield again responded stating that he was sorry Mr Walsh was still not feeling well. He suggested that Mr Walsh go to the doctor so they can recommend when he return to work.

[40] In his oral evidence Mr Summerfield said that he was in the branch on 9 August 2018 at the start of Mr Walsh's shift. Mr Summerfield said that he was not provided with a doctor's note and asked for one from Mr Walsh who responded along the line he had "no worries" or was Ok. I recalled Mr Walsh to give evidence about that discussion. He could not recall the conversation with Mr Summerfield. In final submissions he has denied that such a conversation took place.

[41] The evidence supports Mr Summerfield was reasonably consistent in being responsive to concerns raised, emails and text messages sent. I think it more likely in those circumstances that he did check with Mr Walsh on the morning of 9 August about whether he

had a doctor's certificate and took from his response that he was ok to be at work. The discussion in all likelihood focussed on the medical fitness for work. The limited conversation did not enable conclusions to be drawn that Mr Walsh did not have concerns about the work environment but rather that he was well enough to return to work.

[42] In August there was knowledge by Mr Summerfield that Mr Walsh was unhappy and stressed at work in early August 2018. Mr Walsh was critical of Mr Summerfield's text on 5 August 2018 about seeing a doctor however objectively assessed it was not unreasonable. If Mr Walsh was absent for 3 or more consecutive days, his employment agreement provided a medical certificate must be provided.<sup>1</sup> The text exchanges from Mr Summerfield read as a whole were generally supportive to Mr Walsh.

*Conclusions about bullying and discrimination claims*

[43] Although the statement of problem framed this claim as bullying and discrimination and breach of contract there were some other issues raised in the grievance letter dated 10 August 2018 including that there had not been a performance evaluation held after the 90 day trial period had ended. Dubba did not accept there were valid concerns about bullying and discrimination during the five weeks of employment at the Moorhouse Branch.

[44] The performance evaluation was an example of a very recent concern given that Mr Walsh commenced his employment on 1 May 2018 and his 90 day trial would have ended on 30 July 2018. He then had a number of days in early August 2018 where he had not attended work for sickness or other reasons. A delay therefore in a performance evaluation taking place was not unreasonable. It was however appropriate for Mr Walsh to raise it as something to be undertaken going forward. It would also have been an opportunity to have discussed the training issue which I will set out in more detail below.

[45] The evidence supported that the lack of training opportunity and being left on the Till was one of the more significant concern for Mr Walsh.

[46] Mr Thompson, in a letter dated 16 August 2018 directed to Mr Walsh's grievance, stated amongst other matters that the training did not occur for a variety of business reasons unrelated to Mr Walsh. He also referred to Mr Walsh's conduct in recent weeks raising concerns to be addressed at the disciplinary meeting at which the events of 9 August were

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<sup>1</sup> Clause 12.3 of the employment agreement

also to be discussed. A separate letter sent on the same day by Mr Thompson referred to Mr Walsh being argumentative with the management team and that amongst other matters he told co-workers that he *hated working* for Dubba.

[47] Mr Walsh did not accept the matters as put in Mr Thompson's letter in an email dated 16 August 2018 in which he referred to the allegation as *false*. He provided at the disciplinary process a glowing reference from the then manager at the Moorhouse branch.

[48] Mr Summerfield in his evidence about training agreed that the aim initially was to keep Mr Walsh on the Till for two weeks with an intention to then move him onto the line for training. He said that the few times Mr Walsh worked on the line he was very slow and distracted staff. Mr Walsh questioned Mr Summerfield that he was not told that he distracted staff on the line. Mr Summerfield responded that he had told Mr Walsh this several times. I find that it is more likely than not that Mr Walsh would have asked why he was not undertaking training on the line and in turn therefore that Mr Summerfield or Mr Aberkane would have advised him about why this was. Mr Walsh remained concerned about being on the Till with limited opportunity available on the line.

[49] One of the concerns was that another new employee was put on the line instead of Mr Walsh. Mr Walsh wrote that Mr Summerfield told him that the new employee was the only person who could operate the new line but Mr Walsh did not agree with that.

[50] What is clear from the above is that this is not a straightforward matter where the Authority can conclude favouritism or a breach of the employment agreement to provide training during the five weeks of employment at Moorhouse. A business needs to run productively and can place employees in positions where it is felt they are most able to assist the business. It was I accept a source of significant concern for Mr Walsh and needed discussion and resolution.

[51] Mr Walsh also claimed that he was bullied. A helpful definition of bullying is found in a guideline document from Worksafe New Zealand about preventing and responding to bullying at work.<sup>2</sup>

Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or group or workers that can lead to physical or psychological harm.

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<sup>2</sup> Worksafe New Zealand "Preventing and Responding to Workplace Bullying Good Practice Guidelines" updated in March 2017.

[52] There is also a description of what workplace bullying is not in the Worksafe guide. This includes setting high performance standards, reasonable instructions and single instances of unreasonable behaviour.

[53] Mr Aberkane did recall in his evidence Mr Walsh leaving the branch in tears on 4 July 2018 however he said that the concerns he raised with Mr Walsh were reasonable concerns and instructions such as clearing tables. He did not accept that he did not say hello or greet Mr Walsh on two occasions. He said that he never told Mr Walsh that he was paid too much or that he was not good enough.

[54] Mr Summerfield said that there was no evidence of cutting of Mr Walsh's hours. He agreed that Mr Walsh did raise with him an issue about the two split shifts. Mr Summerfield said that these shifts were given to increase hours for work. Mr Walsh did not work the shift on 4 August 2018 and I was unclear if he worked the split shift in the week of 6 August 2018.

[55] Mr Summerfield also clarified in his evidence that a concern about advertising on Trade Me for position of assistant manager and shift manager on 31 July was not a sign that Mr Walsh would not be trained and/or promoted. He said that Dubba was hiring all the time and that the advertisement ran for a long time. There had also been some turnover of staff.

[56] The view of Dubba was that there was no bullying behaviour and that many of the other concerns raised had been discussed and explained to Mr Walsh previously.

[57] Dubba was obliged to provide Mr Walsh with a safe and healthy workplace. If Mr Walsh remained an employee then a fair and reasonable employer could have been expected to have investigated his concerns raised in the letter of 10 August 2018 about bullying and discrimination and training. A fair and reasonable employer could have been expected to have communicated the outcome of that investigation to Mr Walsh and then met with him to discuss and resolve the concerns if possible. I am not satisfied that it was unreasonable or unfair of Dubba to leave that investigation until after the disciplinary process had been completed. Mr Walsh was on paid suspension and therefore did not need in that intervening period to interact with Mr Aberkane.

[58] There was some discussion at the disciplinary meeting about Mr Walsh being argumentative and angry in the workplace towards management. He did not accept that he was and ultimately those matters did not form part of the reasons for dismissal.

[59] The evidence does not satisfy me that the claims of bullying, discrimination and breach of contract with respect to training are made out.

**Was Mr Walsh unjustifiably suspended?**

[60] On 9 August 2018 during a break Mr Walsh sat in the restaurant area and put his shoes/feet on a stool. Mr Aberkane took a photo of Mr Walsh on his cell phone. Mr Walsh reacted to that. The subsequent exchange was captured by Mr Walsh on his phone and was provided to Mr Thompson and the Authority.

[61] As a result of the nature of the exchange and because some of it was in front of customers and staff Mr Walsh was instructed by Mr Summerfield to leave the restaurant and cool down several times. I accept Mr Thompson's submission that this occurred on at least 6 occasions before suspension was proposed. Mr Walsh did not leave although did say that he would go "out the back to discuss" when customers arrived. Mr Summerfield did not consider that was appropriate because it was a small area with working chefs. The Authority was provided with pictures that confirmed the limited size of that area.

[62] Mr Walsh continued to ask Mr Aberkane over and over why he had taken a photo of him without permission. Mr Aberkane in response was consistent in referring Mr Walsh to Mr Summerfield to discuss that and also advised him that he was obstructing the [food] line and asked him to move away on several occasions. After the exchange had started customers came into the store.

[63] Mr Summerfield intervened again because Mr Aberkane told him he was feeling uncomfortable and Mr Summerfield said that he would give Mr Walsh one last chance to go outside and cool down. Mr Walsh said that he would not do it because Mr Aberkane had taken photos of him. Mr Summerfield then advised that he was proposing to suspend Mr Walsh and asked if he had any comment. Mr Walsh responded along the line that he could suspend him if he wanted. Mr Summerfield then advised that Mr Walsh was suspended and that he was to leave or that he would call the police. There was no further comment about the suspension from Mr Walsh except to ask the length of such suspension. Mr Summerfield then suspended Mr Walsh and advised that "the lawyers would be in touch". Mr Walsh was told the reason for the suspension being that he would not take a walk to cool down.

[64] Mr Walsh says that the circumstances were not such to justify suspension. Mr Walsh says that if his photo had not been taken by Mr Aberkane and that Mr Aberkane and Mr Summerfield had been straightforward about the photo when asked there would not have been an incident. Mr Walsh said that when customers arrived he offered to go out the back to talk and de-escalate the situation. He did not accept that there was an incident which could have led to a suspension.

[65] Mr Walsh' employment agreement provided in clause 16.5:

During an investigation into allegations of misconduct, the Employer may suspend the Employee on full pay.

[66] Mr Walsh is correct that the circumstances in which he was suspended did not fall into those prescribed in clause 16.5 of his employment agreement.

[67] An Employment Court judgment in *Hall v Dionex Pty Ltd*<sup>3</sup> considered circumstances where there was no express contractual clause to enable the employer to suspend. The judgment provides useful guidance about the power to suspend stating that the absence of an express provision is not necessarily fatal.

[68] Judge Inglis as the Chief Judge was then stated in *Hall*<sup>4</sup> after confirming the absence of an express provision to suspend:

...While that is not necessarily fatal, it will be an unusual case where it is justifiable to suspend an employee in the absence of a contractual clause authorising such a step. What will be required in such circumstances is good reason to believe that the employee's continued presence in the workplace may or will give rise to some other significant issues such as safety issues, particularly relating to other employees or customers.

[69] I find that this is an unusual case. Whilst Mr Walsh did not consider he was aggressive during the exchange he was objectively forceful and consistent in repeatedly asking Mr Aberkane why he took a photo of him. Mr Aberkane asked at least twice for Mr Summerfield to assist during the exchange saying that he was feeling uncomfortable with the interaction with Mr Walsh. Mr Walsh did not stop with his questions and said to the effect that he felt uncomfortable as well with Mr Aberkane taking the photo.

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<sup>3</sup> *Hall v Dionex Pty Ltd* [2015] ERNZ 502 at [55]

<sup>4</sup> Above n 3 at [55]

[70] Mr Walsh was given a warning before the suspension that it was his last chance to leave the store. He could have left the store to cool down and returned at a later time to talk to Mr Summerfield about the exchange and his concern with his photo being taken.

[71] In his evidence Mr Summerfield said that he felt he had no choice as Mr Walsh would not listen nor do as instructed. He said that Mr Walsh was “very abrupt with Mr Aberkane”. I accept that there were customers and staff who could hear the exchange and it was, or had the potential to be, disruptive to normal business activity and embarrassing.

[72] Mr Walsh’s continued presence and his heightened state of agitation about the photo being taken could have given rise to significant issues and Mr Summerfield felt concerned and considered that the situation needed to end.

[73] A letter from Mr Thompson dated 9 August 2018 was emailed to Mr Walsh after he was suspended. It set out from Dubba’s view what had led to the suspension. It confirmed suspension would be paid and that during the period of suspension Dubba would be carrying out an investigation into the events of the morning and a disciplinary meeting would be advised after the investigation stage. The letter from Mr Thompson provided the following restriction on Mr Walsh’s access to Dubba restaurants:

In the meantime, your suspension means that you cannot attend either the Dubba Dubba or Dubba Deluxe restaurants without seeking permission from the General Manager beforehand.

[74] I find that the decision to suspend was one that a fair and reasonable employer could have made in all the circumstances as set out above. There was an opportunity for Mr Walsh to have avoided suspension altogether in the knowledge that it was his last chance to leave and cool off. He did not take that opportunity. There was then an opportunity to comment about suspension.

[75] The claim that the suspension was unjustified is not made out.

**What were the reasons for Mr Walsh’s dismissal?**

*Preliminary findings in letter dated 20 August following the disciplinary meeting that formed the reasons for dismissal on 21 August 2018*

[76] The findings of serious misconduct set out in an email from Mr Thompson to Mr Walsh dated 20 August 2019 after the disciplinary meeting were that Mr Walsh on two separate occasions failed to follow reasonable and lawful instructions.

[77] The first occasion was that Mr Walsh was repeatedly asked to leave the premises and calm down but refused and that Mr Aberkane asked him to leave the cooking line as it was distracting and he refused again. The second was that despite the instruction during his suspension period Mr Walsh attended at a Dubba restaurant and attempted to elicit statements or information to support him.

[78] It was noted that the argument (interactions) with Mr Aberkane were in front of customers and staff and that his behaviour made Mr Aberkane and a staff member uncomfortable. The letter provided that the fact Mr Aberkane refused to discuss the photo was weighed and considered. The focus, it was written, was on behaviour following the photo and the reaction by Mr Walsh and refusal to listen to the employer's instructions.

*Was there a full and fair investigation into the allegations that formed the reason for dismissal?*

[79] There are four procedural fairness factors that the Authority must consider in s 103A of the Act when assessing the justification of a dismissal.

[80] There was no dispute about what was said and done during the exchange on 9 August 2018 because it was recorded on Mr Walsh's cell phone. Mr Walsh was clear about the allegations he was facing. He had an ample opportunity to explain the concerns at the meeting on 20 August 2018 and having been invited to bring a representative or support person attended with his father. His explanations were I accept genuinely considered and his main explanation that the whole exchange on 9 August was because Mr Aberkane had taken his photo and would not answer questions about it was weighed.

[81] In this case Dubba took further steps that were sensible and appropriate in seeking feedback about a disciplinary outcome as Mr Walsh was without a legal representative.

[82] After the letter with the preliminary findings was provided Mr Walsh was asked to respond to any disciplinary outcome.

[83] By email dated 21 August Mr Walsh reiterated his earlier explanations. Mr Thompson sent a further letter on 21 August asking whether he intended to rely to any possible sanction or the prospect of dismissal. Mr Walsh suggested by reply email that Mr Thompson should re-read his earlier email.

[84] Mr Thompson, in another email of the same date to Mr Walsh, stated that Mr Walsh's email discusses the findings but it was unclear if he opposed dismissal or there were other alternatives. Mr Thompson mentioned that he had suggested anger management but there was no agreement to that. He wrote further that his client was considering if a warning would suffice but would be interested to know if Mr Walsh was apologetic for his behaviour.

[85] Mr Walsh responded by email that he had nothing further to say and that he felt it's turned into a game that he is not prepared to play. He wrote that explanations have been made about the circumstances and nothing else needs to be said.

[86] Later on 21 August 2018 Mr Thompson advised that Mr Walsh's employment was terminated with immediate effect. It was noted in the email that there had been an invitation to express remorse or give reassurance that such events would not occur again but Mr Walsh "held to his position".

[87] I find that the process was one that a fair and reasonable employer could have undertaken.

### **Substantive justification**

[88] A deliberate or wilful failure to obey an instruction that is reasonable and lawful can amount to serious misconduct. Refusing to carry out a lawful and reasonable instruction was an example of serious misconduct in Mr Walsh's employment agreement. Mr Thompson has referred the Authority to an Employment Court judgment in *NZ Printing etc IUOW v Clark and Matheson Ltd*<sup>5</sup>. Judge Castle in that judgment stated:

Open and deliberate defiance to obey a lawful instruction given by a person in authority clearly amounts to misconduct of a degree that may justify dismissal.

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<sup>5</sup> *NZ Printings etc IUOW v Clark and Matheson Ltd* [1984] ACJ 283 at 286

[89] I have considered whether a fair and reasonable employer could conclude Mr Walsh's conduct amount to serious misconduct in this case.

[90] An instruction was given on multiple occasions to Mr Walsh to leave the premises and calm down and then return for a discussion. Mr Walsh explained during the disciplinary process that he was calm and professional and therefore the instruction was unreasonable. I find that a fair and reasonable employer could conclude that Mr Walsh was not calm but rather agitated and unduly and unreasonably persistent in his questioning of Mr Aberkane about the photo. This continued even when Mr Aberkane stated he felt uncomfortable and after he had asked Mr Walsh on multiple occasions to raise concerns about the photo with Mr Summerfield.

[91] Mr Walsh in his explanation said that Mr Aberkane would have felt uncomfortable because he had lied to him and could not answer a question about why he secretly took a photo. I find that a fair and reasonable employer could conclude that Mr Aberkane was uncomfortable because of the persistent questioning about the photo when he had referred Mr Walsh on numerous occasions to Mr Summerfield about his concerns. There is an attempt in employment law to have a degree of even handedness whilst acknowledging power imbalance between employees and employers. It would have been unacceptable for an employer to continue to question an employee in the manner that Mr Walsh questioned Mr Aberkane.

[92] The instructions to leave and calm down objectively assessed were both reasonable and lawful. Had one of the instructions been obeyed then it could have prevented an escalation of matters whilst still allowing Mr Walsh an opportunity to raise his concerns about the taking of a photo, once calm, with Mr Summerfield. Mr Walsh did not think it would have made a difference but I am not satisfied about that. As Mr Summerfield stated in evidence if Mr Walsh had left and returned calmer then there could have been a discussion including about why the photo was taken.

[93] Mr Walsh did say that he would go out the back and talk during the exchange but the instruction was to leave and calm down before returning for a discussion. A fair and reasonable employer could conclude that where the discussion took place was not an answer to a failure to obey a lawful and reasonable instruction to leave and calm down first.

[94] A fair and reasonable employer could conclude that the circumstances and what was said during the exchange supported a wilful and deliberate rather than an unintentional decision not to follow the instruction until Mr Walsh got an answer to his question. An exacerbating factor in addition to Mr Aberkane articulating his being uncomfortable was the presence of customers and other staff. A fair and reasonable employer could conclude that went to the trust and confidence Dubba could have in Mr Walsh.

[95] I accept that a fair and reasonable employer could be concerned that Mr Walsh attended at the premises of Dubba in breach of the advice in the letter of suspension on more than one occasion. Whilst at the premises he asked for statements and information that he thought would be supportive. Mr Walsh explained during the disciplinary process that he had every right to attend at Dubba premises unless trespassed. He explained that he thought he was not able to attend the Dubba premises for work but that did not consider that extended to not being able to buy food.

[96] Given the more wide-ranging allegations initially put to Mr Walsh it was not unreasonable for him to have wanted letters of support. He agreed however when questioned that he could have obtained these without going into the restaurant. Viewed with the event of 9 August 2018 a fair and reasonable employer could conclude that refusal to obey this instruction in the suspension letter exacerbated existing concerns about trust and confidence in Mr Walsh to obey reasonable instructions.

[97] I find that a fair and reasonable employer could have concluded that the failure by Mr Walsh to follow a reasonable and lawful instruction given on multiple occasions to leave the premises and calm down amounted to serious misconduct in all the circumstances including that part of the exchange was in the presence of customers and staff. A fair and reasonable employer could have found that the failure to obey the instruction not to attend at the Dubba restaurants without permission given in the letter of suspension exacerbated its concerns about the trust and confidence it could have in Mr Walsh as an employee.

**Could a fair and reasonable employer have reached a decision to dismiss?**

[98] I find that a fair and reasonable employer could have reached a decision to dismiss Mr Walsh in all the circumstances. There was a fair and reasonable process. Alternatives to dismissal were considered.

[99] Mr Walsh was justifiably dismissed and there is nothing further the Authority can do to assist him.

**Costs**

[100] I reserve the issue of costs.

**Helen Doyle**  
**Member of the Employment Relations Authority**