

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 288
5407413

BETWEEN

TUIONO TAUO
Applicant

A N D

COWBOYS BAR LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Emily Franco, Advocate for Applicant
Sandra Callanan, Counsel for Respondent

Investigation Meeting: 18 June 2013 at Auckland

Submissions Received: 20 June 2013 from Applicant
24 June 2013 from Respondent

Date of Determination: 08 July 2013

DETERMINATION OF THE AUTHORITY

- A. Ms Tauo was unjustifiably dismissed.**
- B. Cowboys Bar Limited is ordered to pay \$4132.92 net to Ms Tauo for lost remuneration under s128(2) of the Employment Relations Act 2000 (“the Act”).**
- C. Cowboys Bar Limited is ordered to pay \$8,000 to Ms Tauo as distress compensation under s123(c)(i) of the Act.**
- D. Costs are reserved.**

Employment relationship problem

[1] The respondent company, Cowboys Bar Limited (“Cowboys”) owns Cowboys Bar which is located in the Viaduct Harbour precinct, Auckland. Mr Nicholas David Gray is the sole director of Cowboys.

[2] The applicant, Ms Tuiono Tauo was the general manager of Cowboys until she was dismissed on 18 November 2012 by Mr Gray for serious misconduct. Mr Gray says Ms Tauo’s performance had been unsatisfactory for some time, she had been given a written warning and numerous verbal warnings and an incident of “*insubordination*” on 17 November 2012 “*brought things to a head*”. Mr Gray gave Ms Tauo “*two weeks’ notice*”. Mr Gray considered matters further and confirmed his decision to dismiss Mr Tauo at a meeting with her on 20 November 2012.

[3] Ms Tauo says she had one written warning more than two years prior to her dismissal which had been represented to her by Mr Gray as not to be taken seriously. Ms Tauo says she never received any verbal warnings. Ms Tauo says Mr Gray dismissed her on 18 November 2012 by giving her “*two weeks notice*” without giving her an opportunity to discuss the claimed incident of “*insubordination*” on 17 November. Ms Tauo says the dismissal caused her a great deal of embarrassment and humiliation and she suffered financial losses.

Issues

[4] The following issues arise:

- (a) Was Ms Tauo’s dismissal justified?
- (b) If so, what remedies should be paid to Ms Tauo?

Was Ms Tauo’s dismissal justified?

[5] Cowboys took over the bar and existing staff, including Ms Tauo, in June 2010. On 28 June 2010 Ms Tauo was offered, and accepted, fulltime employment as manager of Cowboys by Mr Gray at an hourly rate of \$20. Ms Tauo and Mr Gray signed an individual employment agreement (“the agreement”) on 28 June 2010.

[6] Ms Tauo and Mr Gray developed a friendship similar to that of “*brother and sister*” and Ms Tauo described Mr Gray as a “*good and generous employer.*” As part of her remuneration package, Ms Tauo was provided with subsidised accommodation

upstairs at the bar and was given the use of a company credit card and car. Mr Gray allowed the company credit card to be used by Ms Tauo to purchase personal items including overseas travel which amounts were deducted from her wages. Ms Tauo also had Court fines for unpaid parking which Cowboys paid and which were repaid by her from her wages. Cowboys also advanced a loan to Ms Tauo which she repaid by weekly deductions out of her wages.

[7] There were no issues around Ms Tauo's use of the credit card or company car but it does demonstrate the friendship and trust which developed between Ms Tauo and Mr Gray and Mr Gray's generosity to her. Similarly, Ms Tauo was a support to Mr Gray when he suffered bouts of depression.

[8] About three months after Cowboys took over the bar, Ms Tauo became the general manager and her wages were increased to \$22.50 per hour. In March 2012, Ms Tauo's wages were increased to \$25 per hour to recognise her seniority.

[9] Ms Tauo was responsible for running the bar but had no authority to hire or fire staff. Ms Tauo in her role as general manager was required to speak to staff if there were any issues about their performance but this was only after first discussing the matter with Mr Gray.

[10] Mr Gray's evidence was that during the course of Ms Tauo's employment he talked to her frequently about her performance usually on a Monday morning at Sierra Café which was close by. Issues included:

- Not wearing a cowboy hat behind the bar which was required;
- Having her young son Taylon in the bar;
- Texting instructions to staff members rather than speaking to them firsthand;
- Swearing.

[11] Mr Gray says he gave Ms Tauo numerous warnings about these matters but did not follow them up in writing. The only written warning which Mr Gray says he issued to Ms Tauo was on 28 October 2010, following the issuing of a general warning to all staff about drinking while at work. Mr Gray said he gave Ms Tauo "*one last warning*" which was verbal, at a meeting on 23 September at Sierra about a

number of matters and that he told Ms Penelope Strickland who was the Territory Manager for Dominion Breweries at the time that he had done so. Ms Strickland says at a meal at Soul Bar with Mr Gray and his father on 17 September, she was told that Ms Tauo had been given “*a last formal warning*”.

[12] Ms Tauo disagrees with Mr Gray. Ms Tauo says that she was only issued with the one written warning on 28 October 2010. Ms Tauo says she did not even read the warning at the time because of the way in which it was presented to her by Mr Gray. Mr Gray told her when giving her the warning letter that he was only giving it to her because he needed to be shown to be doing something about staff drinking while at work. Ms Tauo says apart from this one warning received more than two years before her dismissal she received no verbal or written warnings.

[13] Ms Tauo says she and Mr Gray would have the odd discussion about issues but that these were always sorted out between them. Issues discussed included Ms Tauo not wearing her cowboy hat. Ms Tauo says she was not warned about this but she agreed that sometimes she forgot to wear her cowboy hat because she did not wear the cowboy hat in the kitchen and when she went out to the bar to serve customers, sometimes forgot to put it back on. Another incident which Mr Gray talked to her about concerned the banking but Ms Tauo says that the matter was sorted out and there were no warnings issued. Ms Tauo accepts that she swore on occasion but so did Mr Gray and she “*assumed it was OK to speak like that to each other.*”

[14] There were a number of such conflicts of evidence between the parties. Findings of credibility are required. Credibility can be assessed by assessing witnesses personally, for example, demeanour, inconsistencies and contradictions in evidence. The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry.¹

[15] I did not find Mr Gray to be a credible witness, his evidence was vague, inconsistent and contradictory. At times he could not remember important facts and some of his statements about Ms Tauo were exaggerated. His claim about Ms Tauo swearing at him is one example. As can be seen from a text from Mr Gray to Ms Tauo set out in paragraph 19 of this determination, Mr Gray often swore and used swear words in his texts. I found Mr Gray was often evasive when answering questions from

¹ *New Zealand Merchant Service Guild IUOW v New Zealand Rail Ltd* [1991] 2 ERNZ 687(LC), at 603

the Authority and Ms Franco. I prefer the evidence of Ms Tauo who I found to be credible.

[16] It is my finding that Ms Tauo received one written warning only, more than 2 years before her dismissal. Ms Tauo did not read the warning letter because of the way Mr Gray presented it to her. I find Mr Gray did not verbally warn Ms Tauo at any time during her employment, there were discussions over various matters, but these were not warnings. I do not accept that Mr Gray gave Ms Tauo “*a last formal warning*” on 23 September. The evidence of Ms Strickland and Mr Gray on this matter differed. There may have been discussions between Mr Gray, his father and Ms Strickland about Ms Tauo’s performance but these were not conveyed to Ms Tauo and she was certainly not aware that Mr Gray had considered issuing her with “*warnings*”.

[17] On Friday 16 November, Ms Tauo says she worked a double shift from 10 am until the bar closed at 4.30am Saturday 17 November. Mr Gray was in the bar on the evening of Friday 16 November. Another staff member, Ms Tina Diamond made a “*smart*” comment to Mr Gray. Mr Gray had received some customer complaints about Tina being rude and was not happy with her work ethic. Mr Gray asked Ms Tauo to speak with Tina about these matters and Ms Tauo agreed to do so. Ms Tauo says this conversation occurred late on Friday evening 16 November.

[18] At the investigation meeting Mr Gray denied Ms Tauo had worked the Friday night shift and claimed the time sheet signed by her that she had, was not correct. Another staff member Ms Leah Foenander says Ms Tauo was present for just 30 minutes on the night/morning shift on Friday 16 and Saturday 17 November between 9pm and 4.15 am when she was working her shift.

[19] I prefer Ms Tauo’s evidence for the reasons above regarding credibility. I also prefer Ms Tauo’s evidence because Ms Foenander sent Ms Tauo a text at 2.18 pm on Saturday 17 November saying “*Was so much better working with u last night thank u!*. Why would Ms Foenander send such a text if she had worked with Ms Tauo for just 30 minutes? Further, Ms Tauo said that she had looked for Mr Gray at the end of the shift but could not find him. On Saturday 17 November at 11.06 am Mr Gray sent the following text: “*Great night last night team, only 10,500 left for today & tomorrow to hit budget!! Thanks.*” There was the following text exchange between Ms Tauo and Mr Gray. Ms Tauo at 11.06am: “*Where did u sneak too...*” Mr Gray in

reply: *“Home to sleep!”* Ms Tauo at 12.43 pm in reply: *“Yeah right!”* Mr Gray in reply: *“Seriously, ask Mohammed, what the fuck else would I do, anyway back to business 10500 today & tomorrow, lets fucking do it!!”* Why would there have been such a text exchange if Ms Tauo had not been working. I find Ms Tauo worked the night shift on Friday 16 November until 4.30am Saturday 17 November.

[20] Ms Tauo says she worked a full day shift on Saturday 17 November, finishing at 6.45pm. Ms Tauo believed that Tina was due to start work at 9pm that night. Mr Gray said Tina started her shift at 7pm and so Ms Tauo could have waited for 15 minutes to speak to her as he had *“directed”*. At the investigation meeting, Mr Gray accepted the rosters often changed and that Tina may have started at 9pm not 7pm.

[21] Ms Tauo says she was going to speak with Tina about the matter as discussed with Mr Gray but because Tina was not starting for another 2 or more hours, at 9pm, she thought she would send her a text to give her a *“heads up”* that she needed to talk to her about some customer complaints. Ms Tauo says she intended to speak with Tina when she saw her on the Sunday, 18 November.

[22] Ms Tauo, being tired from working a double shift the previous day went to bed and then sent a text to Tina at 9.20 pm as follows:

Hey Tina, I am suppose to come in n chat with you about a couple of complaints from customers last Saturday??? First treat our customer as VIP! They do pay our wages! Just a reminder if bar ain't making money then hours will definitely be cut! So please put on your hospo smile, and we'll talk later Also Nic knows about the complaint, so just a heads up, he's watching ... Talk later xx

[23] Ms Tauo did not return to the bar that evening. At 2.35am on Sunday 18 November a text was sent by Leah as follows; *I want to cry! This sucks.* When Ms Tauo checked her texts at approximately 3.30am she saw the text from Leah and sent one back as follows at 3.35am; *what the hell!!! What's happening?*

[24] Ms Tauo immediately rang Leah to find out what had happened and was told by Leah that Tina had taken the text sent by Ms Tauo badly and it had been very difficult working with her that evening. Ms Tauo apologised to Leah and told her that she would talk with her about it when she came in for her shift later that day. Ms Tauo then rang Mr Gray about the matter but received no answer.

[25] Mr Gray says he became aware of Ms Tauo's text to Tina on the evening of Saturday 17 November when another staff member, Leah told him about it. Mr Gray said he had to manage Tina because she was not working her shift properly as she was spending much of the night crying in the kitchen.

[26] Mr Gray said he was extremely concerned about the text from Ms Tauo *because this was a clear breach of the directive I had given [Ms Tauo]*. Mr Gray said he *apologised to Tina about the way she had received this information*. Mr Gray said Ms Tauo could have come to the bar on the Saturday 17 November to speak face to face with Tina as he had directed, as she was clearly awake.

[27] Mr Gray and Ms Tauo spoke about the text the next day, Sunday 18 November 2012. Both Mr Gray and Ms Tauo agree that they had a heated discussion about the text that Ms Tauo had sent to Tina the evening before. Mr Gray said he asked Ms Tauo *why are you sending Tina a bollocking by text?* And the response by Ms Tauo was that she did not believe it was a bollocking and that she had been too tired to go back down to the bar to talk to Tina. The conversation culminated in Mr Gray telling Ms Tauo she was the wrong person for the job and giving her two weeks' notice.

[28] Mr Gray says that he had warned Mr Tauo repeatedly, matters were not being resolved and the insubordination by her on 17 November brought matters to a head.

[29] Ms Tauo denies swearing or being abusive to Mr Gray, she does accept that she yelled at him during the course of the discussion on 18 November because he refused to talk with her about the incident or look at the text she had sent to Tina. Ms Tauo says when she explained to Mr Gray she had been tired and was simply giving Tina a heads up by way of text in relation to a conversation that she was going to have with her about complaints from customers and her attitude, Mr Gray dismissed her saying *two weeks' notice*. Ms Tauo was extremely upset, crying and had panic "*flashes*" about how she was going to provide for her young son.

[30] I prefer Ms Tauo's evidence and find she was dismissed by Mr Gray without the opportunity of properly explaining why she had sent the text to Tina.

[31] Mr Gray says after the dismissal he looked at the timesheets and concluded that Ms Tauo could have spoken with Tina as he had directed her to do before Tina started her shift on Saturday 17 November at 7pm. This was because according to the

roster there was a period of 15 minutes between Ms Tauo finishing at 6.45 pm and Tina starting at 7pm. Mr Gray believed Ms Tauo could have waited 15 minutes to speak with Tina.

[32] Ms Tauo sought a further meeting with Mr Gray in the hope she would get “*a second chance*”. Ms Tauo sent a text to Mr Gray at 2.51pm on 18 November as follows: “*Nic, I know your upset with me right now, but we do need to talk. So can you please make a time for us to talk? I’ve asked Leah to cover me so I’m going to head home, I cannot work looking like this.*” Mr Gray did not reply and so Ms Tauo sent a further text the next day, 19 November at 2.52pm saying: “*Hey Nic, can you please txt or ring to make a time and place to talk as soon as possible....Thanks.* Mr Gray at 3.24pm “*Tomorrow morning*”. Ms Tauo: “*Time?*” Mr Gray: “*10.30.* Ms Tauo: “*Ok. Thanks*”

[33] The meeting on Tuesday, 20 November was at Ms Tauo’s instigation, not Mr Gray’s. Ms Tauo pleaded for a second chance but Mr Gray refused. At the investigation meeting Mr Gray said “*Tui gave me no reason not to confirm her dismissal so she was officially dismissed*”.

[34] If Mr Gray had given Ms Tauo the opportunity to explain he would have realised Tina did not start her shift on 17 November until 9pm and that is why Ms Tauo did not speak with her then. Mr Gray could also have spoken with Ms Tauo about her reasons for sending the text rather than speaking directly with Tina. Mr Gray did not do so.

[35] Ms Tauo was given 2 weeks notice from 20 November and Mr Gray offered her continued use of the accommodation at the bar at the subsidised rate until 16 January 2013 to allow her time to find alternative accommodation. Ms Tauo says she was so humiliated by the treatment from Mr Gray and her dismissal she could not stay at the bar, she could not face people and wanted to leave as soon as possible.

[36] Mr Gray says he also took steps to find Ms Tauo another job. Mr Gray emailed his accountant and asked him to let Ms Tauo know about a position which may suit her and if she was interested to contact Ms Strickland. Ms Strickland was aware of a position at The General Store in Whitford. Ms Tauo did not make contact. Ms Tauo says Mr Gray did not contact her about the job, she received a message from his accountant’s assistant. Ms Tauo says she was so humiliated by her dismissal she

could not accept any help from Mr Gray. Ms Tauo eventually obtained employment at The Trident Tavern in March 2013. Ms Tauo has received remuneration totalling \$9702.60 since her dismissal.

Determination

[37] Apart from the written warning of 28 October 2010, Mr Gray confirms that there were no written warnings issued to Ms Tauo over her performance, rather he gave her numerous verbal warnings. I have not accepted Mr Gray's evidence. In any event, the individual employment agreement signed by both Ms Tauo and Mr Gray on 28 June 2010 sets out the steps to be taken in disciplinary situations.

17.0 DISCIPLINARY PROCEDURES

The procedures set out in this clause are to be followed in circumstances where the performance matter(s) causes concern is/are not of sufficient seriousness to warrant summary dismissal.

17.1 Performance related disciplinary concerns

The Employee must be advised:

- (a) *Of her/his right of assistance and/or representation at any stage;*
- (b) *Of the specific matter(s) causing concern and be given an opportunity to state any reasons or explanations;*
- (c) *Of the corrective action(s) required to remedy the situation.*

17.2 *The Employee must always be given sufficient time to take the necessary corrective action(s).*

17.3 Misconduct disciplinary concerns

Before any disciplinary action for misconduct is taken against the Employee, the Employer shall:

- (a) *Advise the Employee of the right to request assistance and/or representation at any stage of the disciplinary procedure.*
- (b) *Advise the Employee of the nature of the alleged misconduct.*
- (c) *Undertake an appropriate investigation into the facts surrounding the Employee's alleged misconduct.*
- (d) *Give the Employee a reasonable opportunity to state any reasons or explanations for the alleged misconduct.*

17.4 Disciplinary action

17.4.1 *Where the Employer considers that disciplinary action is warranted, the Employee shall be given an oral warning in the first instance which will state:*

- (a) *The nature of the misconduct.*
- (b) *The corrective action required to remedy the misconduct.*
- (c) *The consequences of failure to remedy the misconduct.*

17.4.2 The process and results of any oral warning shall be recorded in writing by the Employer, sighted and signed by the Employee and placed on the Employee's personal file.

17.4.3 The Employee shall be given a reasonable opportunity to remedy the misconduct.

17.4.4 Where the Employee fails to remedy the misconduct specified in the oral warning the Employee shall be given a written warning stating:

- (a) *The nature of the misconduct.*
- (b) *The corrective action required to remedy the misconduct.*
- (c) *The consequences of failure to remedy the misconduct.*

17.4.5 The Employee shall be given a reasonable opportunity to remedy the misconduct.

17.4.6 The process and results of any written warnings shall be recorded in writing by the Employer, sighted and signed by the Employee and placed in the Employee's personal file.

17.4.7 Where the Employee fails to remedy the misconduct specified in the written warning, the Employer may summarily dismiss the Employee.

17.4.8 Where the Employer gives the Employee two oral warnings concerning different matters, the Employer may give a written warning stating that any further misconduct will result in the Employee's summary dismissal.

17.4.9 Nothing in the preceding clauses shall affect the Employer's right to dismiss an Employee for serious misconduct without notice, or payment in lieu thereof or issue a written warning or final written warning in the first instance if the circumstances warrant it.

...

[38] Mr Gray, although he claimed having given Ms Tauo numerous verbal warnings, did not follow any of the procedures set out in Cowboys individual employment agreement. There is no evidence that Ms Tauo was advised that she could have a representative at any stage, that she was told of the specific matter and given an opportunity to explain or that she was advised of the corrective action required to remedy the situation.

[39] Mr Gray did not record the process and results of any oral warning he claimed to have given Ms Tauo. Mr Gray did not follow-up the oral warnings with a written warning stating the consequences of failing to remedy the alleged misconduct. There was no evidence of any written warnings being sighted and signed by Ms Tauo. The only written warning which was issued without going through the procedures set out in clause 17 was the warning of 28 October 2010.

[40] Clause 18.0 deals with situations where an employer may summarily dismiss an employee. This clause states:

18.0 SUMMARY DISMISSAL

18.1.1 *The Employer may dismiss the Employee without notice for serious misconduct.*

18.1.2 *The procedure for summary dismissal will be as follows:*

- (a) *The Employee must be advised of his/her right of assistance and/or representation at any stage.*
- (b) *The Employer will advise the Employee of the specific allegation, and the seriousness of the situation, and provide the Employee with an opportunity to refute the allegation or explain the misconduct. If the explanation is not satisfactory to the Employer, the Employer may, if the Employer deems necessary, inform the Employee that the allegations will be investigated further. The Employee may be suspended, on pay, to allow a full investigation to take place.*
- (c) *When the Employer is satisfied that the matter has been fully investigated, the Employer will arrange a meeting with the Employee and make the findings of the investigation known. The Employee will be allowed an adequate opportunity to make further representations to the Employer.*

[41] Schedule D to the individual employment agreement sets out types of conduct which may result in disciplinary procedures or in summary dismissal. In relation to summary dismissal, the Schedule states:

The following acts are considered serious misconduct and may result in summary dismissal:

...

- *Insubordination, threatening or abusive behaviour including fighting, sexual harassment ...*

[42] Once again, Mr Gray completely ignored the procedures set out in the individual employment agreement. He claims that the action by Ms Tauo in not speaking to Tina but sending her a text, amounted to insubordination.

[43] Mr Gray did not advise Ms Tauo of her right to seek assistance or representation at any stage, he did not inform Ms Tauo of the specific allegation, the seriousness of the situation, nor did he provide her with the opportunity to refute the allegation or explain the alleged misconduct. Mr Gray did not fully investigate the matter.

[44] Mr Gray was aware that a text was sent by Ms Tauo to Tina on Saturday, 17 November. He did not speak with Ms Tauo about the text and did not inform her when he met with her on Sunday 18 November of the issue of alleged misconduct that she must respond to. Following dismissal, Mr Gray claims to have “*investigated*” matters further by looking at the timesheets. When he met with Ms Tauo on 20 November, Mr Gray did not ask her about the timesheets nor did he ask her to explain the text to Tina. He simply confirmed the dismissal.

[45] Mr Gray did not comply with the required procedures when undertaking disciplinary action in relation to Ms Tauo.

[46] It is for Cowboys to establish that the dismissal of Ms Tauo was justifiable. The statutory test for justification is contained in s.103A of the Act. That section states:

103A Test of justification

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

- (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[47] The Full Court of the Employment Court in *Angus v. Ports of Auckland*², in analysing the section emphasised that the role for the Court is not to substitute its view for that of the employer.

The test requires the Authority ... to determine whether on an objective basis dismissal was within the range of responses open to a fair and reasonable employer. If dismissal is within the range then it will be justified.

[48] In this case, there was an agreed procedure for dealing with disciplinary matters. Mr Gray completely ignored the procedure. Further, Mr Gray failed to comply with the procedures contained in s.103A(3) of the Act. He did not sufficiently investigate the allegation that Ms Tauo had allegedly been insubordinate. He looked at timesheets in a type of “*investigation*” after he had dismissed Ms Tauo. Mr Gray did not raise his concerns with Ms Tauo before dismissing her and did not give her a reasonable opportunity to respond to concerns nor did he genuinely consider Ms Tauo’s explanation before dismissing her.

² [2011] NZEmpC 160

[49] Cowboys complied with none of the obligations set out in s.103A. Accordingly, Ms Tauo's dismissal was unjustified.

[50] Ms Callanan submitted that the errors in procedure were minor and did not result in Ms Tauo being treated unfairly. On this basis, Ms Callanan submitted that the Authority could not determine the dismissal to be unjustified. I disagree. The defects in procedure were significant and resulted in unfair treatment of Ms Tauo.

[51] On an objective basis, Cowboys' actions are not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In any event Ms Tauo's conduct did not constitute serious misconduct in my view. Following a discussion with Mr Gray about Tina's negative attitude and some customer complaints, Ms Tauo agreed to speak with Tina. Before doing so, she sent a text to Tina telling her that she had to talk with her about some customer complaints and (among other things) they would talk about it later. There was no indication of any disciplinary action being initiated by Ms Tauo, she was simply giving Tina an indication of matters they needed to talk about. Ms Tauo had told Mr Gray she would talk with Tina and that is exactly what she intended doing, such action in my view did not constitute "*insubordination*" and if Mr Gray had given Ms Tauo the opportunity of explaining her text, he would have realised this.

Remedies

[52] Ms Callanan submitted that Ms Tauo should have contacted Ms Strickland about the position at The General Store in Whitford and by not doing so failed to mitigate her losses. I do not accept that argument. As I have found, Ms Tauo was contacted by the assistant of Cowboys' Accountant and told to contact Ms Strickland about a possible position. Ms Tauo had been humiliated by Mr Gray's treatment of her and did not do so. This was understandable.

[53] Ms Tauo did attend numerous job interviews and provided the Authority with details of these job applications and rejections. It is my finding that Ms Tauo did attempt to mitigate her losses.

[54] Ms Tauo was paid two weeks wages by Cowboys on 20 November 2012. Ms Tauo's basic weekly wage at Cowboys was \$1,152.96 net. Ms Tauo earned a total of \$9,702.60 net in remuneration for the three month period from the date of dismissal.

[55] I award lost remuneration under s128(2) of the Act totalling \$4,132.92 net.

[56] Ms Tauo gave evidence of the humiliation, loss of dignity and injury to her feelings as a result of the dismissal. She felt unable to remain in the subsidised accommodation at the Bar because she could not face staff or patrons and so chose at great financial cost to her, to move out and find alternative accommodation. Ms Tauo relied on her partner and family financially until she was able to obtain a job and found this humiliating. Ms Tauo has not been able to tell her son Taylon, who referred to Mr Gray as “Uncle Nic” about her dismissal because she is so embarrassed.

[57] I order Cowboys to pay Ms Tauo compensation in the sum of \$8,000 pursuant to s.123(1)(c)(i) of the Act for the hurt and humiliation she suffered.

Contribution

[58] I am required under s.124 of the Act to consider whether Ms Tauo’s actions contributed towards the situation that gave rise to the personal grievance.

[59] I have made findings that I do not accept that oral warnings were ever issued to Ms Tauo and the one written warning was two years prior to her dismissal and was not presented to her by Mr Gray as a warning that she should be concerned about.

[60] Mr Gray did not follow the procedures of the individual employment agreement when wishing to discuss with Ms Tauo her alleged “*insubordination*”. Neither did he follow the steps in s.103A of the Act. It was Ms Tauo who wanted to speak with Mr Gray about what had occurred and wanted to show him the text to Tina. Mr Gray was not interested. Following her dismissal on 18 November, it was Ms Tauo who tried to resolve matters and keep her employment. Ms Tauo requested a meeting with Mr Gray so that a proper discussion could be had. Mr Gray was dismissive.

[61] Cowboys cannot satisfy the obligations upon it to justify the submission that there was contributory conduct on Ms Tauo’s part. It is my finding that Ms Tauo’s actions did not contribute to the situation and the award of remedies will therefore not be reduced.

Costs

[62] Costs are reserved.

[63] Ms Tauo has 14 days from the date of this determination in which to file and serve a memorandum as to costs. Cowboys has a further 14 days in which to file and serve a reply.

Anna Fitzgibbon
Member of the Employment Relations Authority