

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 620
3165121

BETWEEN TRACY TAHUHU
Applicant

AND ALPINE 182 DEGREES
LIMITED trading as THE
SPRINGFIELD HOTEL
Respondent

Member of Authority: Peter Fuiava

Representatives: Maryline Suchley and Anita Brockhouse, advocates for
the Applicant
No appearance by the Respondent

Investigation Meeting: 30 August 2022

Submissions received: 31 August 2022 from the Applicant

Determination: 25 November 2022

DETERMINATION OF THE AUTHORITY

- A. Alpine 182 Degrees Limited is ordered to pay Tracy Tahuu the following amounts by 4 pm Friday 23 December 2022:**
- (i) \$18,000 in compensation for humiliation, loss of dignity and injury to feelings for unjustified disadvantage and unjustified dismissal;**
 - (ii) \$316.25 being an unlawful deduction from Ms Tahuu's final pay;**
 - (iii) \$2,734,86 in wage arrears and holiday pay;**

(iv) interest on the sum of \$2,734.86 from 25 January 2022 to the date of payment using the Ministry of Justice civil debt calculator;¹

(v) lost wages of \$1,800;

(vi) costs of \$3,500; and

(vii) the filing fee of \$71.56.

What is the employment relationship problem?

[1] Tracy Tahuu was the front of house manager of Alpine 182 Degrees Limited which trades as The Springfield Hotel in Canterbury (the hotel). The establishment serves as a place of accommodation and as a pub for the local community. While there was both good fellowship and mirth at the pub, Ms Tahuu says that this was not always the case for her and that during her employment from August 2020 to 25 January 2022 she had been verbally abused by Blair Wallace, the hotel's sole company director and shareholder.

[2] Ms Tahuu was initially employed by the hotel as a cleaner in mid-2020. That role was part-time and was her re-entry into the work force after some time away due to a personal injury. She was no stranger to the hotel because her husband Ernie was a regular patron there and it was Ms Tahuu's evidence that some of her wages would be used to pay down her husband's bar tab. This barter-styled arrangement was agreed to by Ms Tahuu which also saw her wages being offset with large pots of Nutella and a ride-on mower.

[3] In June 2021, Ms Tahuu was promoted to front-of-house manager. She is particularly pleased with studying for and successfully obtaining her bar manager's licence. However, the gloss of that sense of achievement has been tarnished by the behaviour of the hotel's owner Blair Wallace towards Ms Tahuu who alleges that he verbally abused her on multiple occasions throughout her employment.

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

[4] This culminated in Ms Tahuhu raising a personal grievance that was emailed to Mr Wallace on 25 January 2022 by Ms Suchley. Attached to the email was a written statement from Ms Tahuhu (24 January 2022) which referred to a staff meeting a year earlier in which Mr Wallace's partner Shelley Watson had allegedly made the comment in front of staff that Ms Tahuhu could no longer work on Friday nights anymore because she was "not young enough" and that she did not have "big enough boobs". Ms Tahuhu left that meeting feeling inadequate and humiliated.

[5] Ms Tahuhu's written statement also referred to Mr Wallace's behaviour which was "very unstable" in that he would start yelling, shouting and throw things around the kitchen to intimidate her and the cook Abigail Atkins. Ms Tahuhu described working with Mr Wallace like "walking on egg shells" as she would never know when she was going to be yelled at and that she needed to check whether it was safe for her to go into the kitchen where he worked as he would become aggressive when he saw her, make loud banging noises, and throw things around.

[6] On the same day Ms Tahuhu raised her personal grievance with her employer, Ms Watson texted her to return the keys to the hotel as she was deemed a security risk. Ms Suchley also received an email from Ms Watson who threatened to lodge a fraud complaint against Ms Tahuhu with ACC. In addition, Ms Tahuhu discovered that she could no longer access the online payroll system and that her final pay had already been calculated. Ms Tahuhu surmised that she had been dismissed by the hotel without notice.

How the investigation was conducted

[7] The hotel has not engaged with the process. It has not filed a statement in reply to Ms Tahuhu's statement of problem which was filed with the Authority on 28 February 2022. Nor did it attend the Authority's case management conference by telephone on 2 June 2022. I am satisfied that the hotel is aware of the present proceedings because Ms Watson confirmed with the Authority that a copy of the statement of problem could be emailed to the hotel and so it was.

[8] Out of an abundance of caution and fairness to the hotel, the Authority arranged for an additional copy of the pleading, its supporting documents, and Ms Tahuhu's witness statements to be delivered to the hotel's registered office address.

In addition, the Authority emailed the hotel a reminder of the date of the investigation meeting. There was no response by the hotel.

[9] Ms Tahuhu and her witnesses attended the investigation meeting at the appointed time and place. I granted a short adjournment of 15 minutes to enable the hotel to attend the meeting in case its owners were caught in traffic. There was no appearance by the respondent and, consequently, the investigation meeting proceeded in its absence in accord with clause 12 of the Second Schedule to the Employment Relations Act 2000 (the Act) which enables the Authority to act fully in the matter before it as if the respondent had attended or been represented.

[10] For the Authority's investigation, written witness statements from Ms Tahuhu, her husband Ernie Tahuhu, her son from a previous relationship Christopher McGuire, and three of Ms Tahuhu's former work colleagues at the hotel: Joel Innes (who attended the investigation meeting by audio-visual link), Abigail Atkins, and Jacqueline Learned, were provided. Under oath or affirmation, Ms Tahuhu and her witnesses answered questions from myself and her representatives Ms Suchley and Ms Brockhouse. Following the investigation meeting, the Authority was provided with helpful submissions from Ms Suchley.

[11] 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.

What are the issues?

[12] The issues requiring investigation and determination are:

- (i) Was Ms Tahuhu unjustifiably disadvantaged by being subjected to an unsafe workplace (ongoing bullying and abuse) by Mr Wallace?
- (ii) Should a penalty be imposed on the company for failing to provide Ms Tahuhu with a written employment agreement?
- (iii) Was Ms Tahuhu unjustifiably disadvantaged by an unauthorised deduction from her wages of \$316.25?

- (iv) Was Ms Tahuhu unjustifiably disadvantaged by being paid less than the minimum wage for hours worked?
- (v) Was Ms Tahuhu sexually discriminated against to her disadvantage?
- (vi) Was Ms Tahuhu unjustifiably dismissed from her job?
- (vii) If the hotel's actions were not justified in respect of either of the claims of unjustified disadvantage or unjustified dismissal what remedies should be awarded considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act.
- (viii) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Tahuhu that contributed to the situation giving rise to her grievance?
- (ix) Should either party contribute to the costs of representation of the other party?

Was Ms Tahuhu unjustifiably disadvantaged by being subjected to an unsafe workplace (ongoing bullying and abuse) by Mr Wallace?

[13] Individually and cumulatively considered, the evidence of verbal abuse by Mr Wallace towards Ms Tahuhu is compelling. Her adult son "Chris" stated that he had worked as a trainee in the kitchen and had witnessed some of the verbal abuse towards his mother himself. On 16 September 2021, Chris was required to drive his mother to Hillmorton Hospital because she had suffered what he believed was a mental breakdown due to being "regularly abused, degraded and belittled by Blair." There was no conversation during the drive to the mental health facility just sobbing by Ms Tahuhu.

[14] For herself, Ms Tahuhu stated that throughout her employment she was primarily abused and bullied by Mr Wallace and to a lesser degree by Ms Watson. Ms Tahuhu's colleague, Joel Innes, gave evidence via audio-visual link that he

observed Mr Wallace “round on Tracy” and lecture her in a demeaning and aggravating manner. He observed outbursts of anger from Mr Wallace towards Ms Tahuhu that were done in front of staff or other patrons. Joel stated that a lot of the abuse took place in the kitchen where Mr Wallace worked for most of the time as the cook.

[15] Ms Atkins witnessed similar behaviours from Mr Wallace towards Ms Tahuhu but as Ms Atkins currently has her own claim in the Authority against the hotel, her evidence must be treated with some caution. Even so, insofar as Ms Tahuhu is concerned, it was Ms Atkins’ evidence that Mr Wallace’s tone of voice towards Ms Tahuhu was aggressive and she overheard him call her “stupid” and “emotional.”

[16] Of Ms Tahuhu’s witnesses, Jacqueline Learned struck me as a confident person who did not mince words and would not tolerate the behaviour of Mr Wallace if it was directed at her. It was Ms Learned’s evidence that, a number of times, he would shout and yell in the kitchen and that Ms Tahuhu would enter the kitchen to see if everything was alright. She would be worried that she may have done something wrong. Ms Learned stated that Mr Wallace knew that Ms Tahuhu was sensitive to any abuse and that she was frightened by him. Ms Learned further stated that she had spoken to Mr Wallace that Ms Tahuhu was not coping with his outbursts.

Conclusion

[17] In order to establish an unjustified disadvantage under s 103(1)(b) of the Act, Ms Tahuhu must show that one or more conditions of her employment was affected to her disadvantage by some unjustifiable action by the employer. The action complained of here is the verbal abuse she received at various times by Mr Wallace. There was an offensive remark by Ms Watson on 21 January 2021 towards Ms Tahuhu but as no personal grievance appears to have been raised within the 90-day period, it is not a matter that the Authority can take any further.

[18] However, based on the information and evidence provided by Ms Tahuhu and her witnesses, I am satisfied that she was unjustifiably disadvantaged as a result of verbal abuse and intimidating behaviour by Alpine 182 Degrees Limited’s owner Mr Wallace. This issue being resolved in Ms Tahuhu’s favour means that she is entitled to remedies which is discussed later in this decision.

Should a penalty be imposed on the company for failing to provide Ms Tahuhu with a written employment agreement?

[19] It was pleaded in Ms Tahuhu' statement of problem that she was not provided with an employment agreement. However, a copy of an employment agreement with the handwritten name of Tracy Tahuhu was provided to the Authority.

[20] When I put to Ms Tahuhu that how she had written her first name on the hotel's time sheets was very similar to the handwritten name in the employment agreement, she accepted that the writing on the employment agreement was hers.

[21] It cannot be disputed that Ms Tahuhu was provided with an employment agreement by the hotel. A penalty is therefore not warranted and this aspect of Ms Tahuhu's claim is dismissed.

Was Ms Tahuhu unjustifiably disadvantaged by an unauthorised deduction from her wages of \$316.25?

[22] The amount of \$316.25 was the cost of Ms Tahuhu's bar manager's licence which she has not used since her employment with the hotel ended. The amount was deducted from Ms Tahuhu's final pay on 1 February 2022.

[23] The deduction was arbitrarily made and without consultation with Ms Tahuhu. Section 5 of the Wages Protection Act 1983 requires any deduction by an employer of a worker's wages to be by written consent. The requirement that consent be obtained is underscored by cl 8.3.1 of Ms Tahuhu's employment agreement which states that before any deduction is made, she is to be consulted as to the circumstances and amount of the deduction. This the hotel did not do.

[24] Alpine 182 Degrees Limited is ordered to pay back Ms Tahuhu the unlawfully deducted amount of \$316.25.

Was Ms Tahuhu unjustifiably disadvantaged by being paid less than the minimum wage for hours worked?

[25] Accompanying Ms Tahuhu's statement of problem were copies of the hotel's time sheets which show that she was paid \$17 per hour during a 10-month period (June 2020 to 31 March 2021) where the applicable adult minimum wage was \$18.90 per hour. The difference between Ms Tahuhu's hourly rate and the minimum wage rate amounts to \$692.36 (gross) (364.4 hours x \$1.90).

[26] From 1 April 2021 until her employment ended on 25 January 2022; a period of some 10 months, Ms Tahuhu was paid \$18 per hour. However, the applicable adult minimum wage during this period was \$20 per hour. The difference in what Ms Tahuhu received and what she ought to have received if she was paid the correct minimum wage amounts to \$2,015.10 (gross) (\$1,007.55 hours x \$2.00).

[27] In addition to Ms Tahuhu's minimum wage arrears claim, she seeks payment for working on Good Friday in 2021 for which she was entitled to payment of time and a half which she did not receive. A further \$17.40 is sought. She also seeks payment of an additional \$10 for the week ending 4 April 2021 for two 10-minute paid breaks for which she has not been paid.

[28] Alpine 182 Degrees Limited has not engaged with the Authority's investigation and as such there is nothing before me that shows Ms Tahuhu's calculation of her wage arrears is incorrect. I find that she is owed wages in the total amount of \$2,734.86 which the hotel is ordered to pay.

Interest owed

[29] Ms Tahuhu seeks interest on the wages she is owed which is granted. Under cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. As Ms Tahuhu has been deprived of the use of what is owed to her, the Authority orders Alpine 182 Degrees Limited to pay interest on \$2,734.86 from 25 January 2022 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.

Was Ms Tahuhu sexually discriminated against to her disadvantage?

[30] The short answer to this issue is that the Authority has no jurisdiction to consider the issue as it relates to an event that took place on or about 21 January 2021. However, I am not satisfied that Ms Tahuhu sufficiently raised the inappropriate comment made by Ms Watson as a personal grievance within the 90-day period.² Leave to raise the personal grievance after the expiration of the 90-day period is now required but no formal application was made to Authority. The matter cannot be taken any further.

Was Ms Tahuhu unjustifiably dismissed from her job?

[31] Ms Tahuhu did not resign from her position as front-of-house manager. On 25 January 2022, her advocate Ms Suchley raised a personal grievance on Ms Tahuhu's behalf. The immediate effect of raising the personal grievance was Ms Tahuhu being blocked from the hotel's ipayroll system and her final pay being calculated. On 26 January 2022, Ms Tahuhu was asked to return the hotel's keys as she was now deemed a security risk.

[32] When the actions of Alpine 182 Degrees Limited are cumulatively considered, the overall impression is that of a sending away of Ms Tahuhu; a dismissal. The timing of the dismissal strikes me as both retaliatory and arbitrary but more importantly unjustified and without proper regard to fair process. I find that Ms Tahuhu was unjustifiably dismissed and that she is entitled to remedies.

What remedies should be awarded

[33] Ms Suchley submits that a compensation award in the amount of \$20,000 for humiliation, loss of dignity and injury to feelings is appropriate in the circumstances.³ In assessing compensation for Ms Tahuhu, I have considered the Employment Court's five-step approach in *Richora Group Ltd v Cheng* which asks the following questions:⁴

1. What was the harm experienced by the employee?
2. What was the extent of the employee's loss?

² Employment Relations Act 2000, s 114(1).

³ Employment Relations Act 2000, s 123(1)(c).

⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

3. Where on the spectrum of cases does this sit in terms of harm suffered?
4. Where on the spectrum of cases does this sit in terms of quantum?
5. What is a fair and just award in the present case?

[34] The impact of Mr Wallace's verbal abuse and aggressive behaviour towards Ms Tahuhu is best described by her husband Ernie who stated that when she started working for the hotel everything was great but that within weeks, she would return home crying, upset and mentally and physically "shattered." Ms Tahuhu's son Chris described her as quite positive, bubbly and happy but after working at the hotel for a while had become "depressed."

[35] It was Chris who drove his mother to a mental health facility in Canterbury after an incident she experienced at work where she was verbally abused by Mr Wallace. A letter from Ms Tahuhu's psychiatric registrar from Hillmorton Hospital (16 November 2021) mentions that she has "experienced emotional and verbal abuse from her employer" and that her workplace was a "toxic environment."

[36] It is clear that there is something in Ms Tahuhu past which predates her employment at Alpine 182 Degrees Limited for which the hotel is not responsible. However, even so, I am satisfied, having regard to Ms Learned's comment of Mr Wallace's knowledge of Ms Tahuhu's vulnerability to personal criticism and that she was not coping with his outbursts, that his mistreatment of her has both exacerbated and triggered Ms Tahuhu's underlying cognitive trauma.

[37] Aggravating the effects of the grievance on Ms Tahuhu is the implied threat by Ms Watson to report her to ACC for fraud; a baseless claim, but one designed to have an impact on Ms Tahuhu's mental health. The harm suffered in this case falls into the moderate to high range of the spectrum in terms of harm suffered and quantum of awards given. On a totality basis, I quantify the loss and harm Ms Tahuhu has suffered for her claims of unjustified disadvantage and unjustified dismissal at \$18,000.

Lost wages

[38] Ms Tahuhu started alternative employment as a hospital aide for her current employer on 16 March 2022. The role is full-time. Her final pay from the hotel was calculated up to 2 February 2022. Ms Tahuhu seeks lost wages of 15 hours per week at the minimum wage of \$20 per hour for the six-week period between 2 February to 16 March 2022, which is \$1,800. I order Alpine 182 Degrees Limited to pay this amount to Ms Tahuhu in lost wages.

Has Ms Tahuhu contributed to her own grievance?

[39] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[40] It has not been demonstrated that Ms Tahuhu has done anything wrong or contributed to her own disadvantage or dismissal. A reduction in remedies is not warranted.

Should the hotel pay costs and expenses to Ms Tahuhu?

[41] Given the number of witnesses attending the investigation meeting, the investigation meeting took some time, concluding at approximately 3 pm. Clause 15 Schedule 2 of the Act enables the Authority to order any party to a matter to pay to any other party such costs and expenses it considers reasonable.

[42] Costs generally follow the event and there is no reason for that not to be the case here. The current notional tariff for a one-day investigation meeting is \$4,500 which is adjusted upwards or downwards to reflect the circumstances of the particular case.⁵ On balance, I consider it appropriate to make a costs award of \$3,500 which the respondent is to pay Ms Tahuhu as a contribution towards her legal costs.

⁵ see <https://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1>

[43] It is also appropriate that Alpine 182 Degrees Limited reimburse Ms Tahuhu the filing fee of \$71.56 which she paid in order to commence proceedings in the Authority.

Peter Fuiava
Member of the Employment Relations Authority