IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 374
3118992

	BETWEEN	SCARLET HUNTER Applicant
	AND	MEDINA TRADING LIMITED (T/A HOTEL DEBRETT) Respondent

Member of Authority:	Peter Fuiava
Representatives:	Jeremy Lynch, counsel for the Applicant Sheronika Chandra and Wayne Tomlinson for the Respondent
Investigation Meeting:	18-20 January 2022 and 27 June 2022 at Auckland
Submissions received:	25 February, 7 June, and 17 October 2022 from the Applicant 20 May and 16 October 2022 from the Respondent
Determination:	17 July 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Scarlet Hunter was employed as a junior housekeeping supervisor for Medina Trading Ltd (MTL, the hotel or the company) which trades as Hotel Debrett in the Auckland city business district. She has asked the Authority to investigate a claim of workplace bullying and alleged sexual and racial discrimination by Naz Utku who at the time was Ms Hunter's housekeeping manager at the hotel. Ms Hunter considers also that she has been unjustifiably disadvantaged by the hotel's general manager, Sheronika Chandra, who Ms Hunter says failed to investigate properly her complaints concerning Ms Utku.

[2] In addition, Ms Hunter states that she was unjustifiably disadvantaged by the company's failure to provide her with an average of 40 hours' work per week as stipulated by her individual employment agreement with MTL. Instead of 40 hours per week, Ms Hunter asserts that she was provided with an average of 30.03 hours during the course of her employment; commencing 19 September 2019 and ending 23 December 2020.

[3] Ms Hunter contends also that she was required by her employer to make herself available at any time of the week to take up a 'TBA' (to be advised) shift for which she seeks reasonable compensation under s 67D of the Employment Relations Act 2000 (the Act). Closely related to this claim is the concern that the hotel's wages and time record and holiday and leave record for Ms Hunter does not document what such records must record under s 130 of the Act and s 81 of the Holidays Act 2003 (HA). It is also alleged that MTL's rest and meal breaks policy is inconsistent with the Act and that the hotel operated a 'piece rate' system of remuneration from mid-June 2020 onwards following the first COVID-19 Alert Level 4 lockdown.

[4] Last but not least, Ms Hunter claims that she was unjustifiably and constructively dismissed by her employer and that her resignation from employment was not voluntary but came about because of MTL's breach of its duty towards her and that her resignation was foreseeable in all the circumstances.

[5] MTL deny Ms Hunter's claims in their entirety.

How did the Authority investigate?

[6] For the Authority's investigation, a written witness statement and a witness statement in reply were received from Ms Hunter who called no other witnesses. For MTL, witness statements from its general manager, Ms Chandra, company director, Wayne Tomlinson, the hotel's (then) housekeeping manager, Ms Utku, her partner, Chris Bosman, and housekeeping supervisor Martha Amos, were provided. All witnesses answered questions under oath or affirmation from myself and the parties' respective representatives.

[7] The investigation meeting took three full days (18-20 January 2022) and closing oral submissions were heard remotely via Zoom on 27 June 2022. On 27 September

2022, I requested a copy of Ms Hunter's work roster covering the period from 11 August to 23 December 2020, which had not been provided to the Authority at that stage. The requested information was provided.

[8] This determination has not been issued within the three-month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[9] 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.

Alleged procedural unfairness

[10] On the morning of the first day of the investigation meeting, Ms Hunter made an application for a witness exclusion order of MTL's witnesses. That application was granted so that it could not be suggested that a witness for the hotel had modified their evidence based on what they had heard in the meeting room prior to giving evidence. With the exception of Ms Chandra, who remained in the room as MTL's representative, the remaining witnesses including its company director Mr Tomlinson waited outside until it was their time to give evidence.

[11] Ms Hunter was the first witness to give evidence which was paused at some point in the afternoon so as to accommodate MTL's request that Mr Boseman, Ms Utku's partner, could give his evidence before the end of the first day and be excused. The request was granted.

[12] On the beginning of the second day of the investigation meeting, Mr Tomlinson was granted leave to remain in the room with Ms Chandra as I had indicated that he would give his evidence immediately after Ms Hunter's cross-examination and re-examination was completed.

[13] MTL has subsequently raised the concern that it was disadvantaged by Mr Tomlinson's exclusion from the room on the first day of the investigation meeting. I disagree. Ms Chandra remained present in the room throughout the investigation

meeting as one of the company's representatives and she has taken a leading role in all areas of its defence. Compared to Mr Tomlinson, who did not work closely with Ms Hunter, Ms Chandra had a greater understanding of her personal grievance because, as will be seen, she had more to do with Ms Hunter as the hotel's general manager. In any case, the effect of the witness exclusion order against Mr Tomlinson was temporary and he remained in the meeting room from the morning of the second day onwards.

[14] At the end of the third day of hearing, time did not allow for oral closing submissions to be made and therefore timetabling directions by agreement were made for written closing submissions to be filed at a later date. Although these were provided by the parties, there was some delay before oral closing submissions could be heard remotely via Zoom. This was partly because of Omicron but largely because of a disputed paragraph in MTL's written closing submissions that needed to be resolved with the timely assistance of a duty Authority Member.

What are the relevant facts?

[15] Ms Hunter first arrived in New Zealand from her home country of Chile in August 2017 as the holder of a working holiday work visa during which time she worked with Ms Chandra and Ms Utku. At some point, Ms Hunter departed the country but returned to New Zealand in October 2018 as the holder of a partnership work visa which Ms Utku supported.

[16] Ms Utku says she was asked to provide a reference for Ms Hunter's work visa application as her friend and not as a contact person. It is noted that sometime during Ms Hunter's first period of employment with MTL in 2017, she had mistakenly placed a bottle of wine left behind by a guest in her own locker rather than submit the item to lost property as required by hotel policy. Ms Utku had come to Ms Hunter's defence, attributing the incident to an honest mistake. Because she had done so, I find it plausible that Ms Hunter would ask Ms Utku to support her partnership-based work visa application which she would make a year later. That application was based on Ms Hunter's relationship with her then New Zealand citizen or resident partner with whom she also worked at the hotel.

[17] Another example of the friendship that I find once existed between Ms Hunter and Ms Utku is shown in a series of text messages between the pair on 15 September

2019, which predates Ms Hunter's personal grievance letter of 14 July 2020. In one text message (15 September 2019 at 9.41 am) Ms Hunter says to Ms Utku: "Naz, I am broken" and says that she will check with housekeeping supervisor Martha Amos if someone could take her turndown shift. Ms Utku asks what has happened and advises her to get some fresh air or to take a walk on the beach. Ms Hunter then replies that she is upset about seeing her now ex-partner mentioned above with his new girlfriend who worked at the hotel also. Ms Hunter says in another text message: "I don't even want to see the hotel."

[18] Ms Utku gave evidence during the investigation meeting that when she received Ms Hunter's text message, she was shopping in Glenfield Mall with her partner Mr Boseman. This was confirmed by Mr Boseman in his oral evidence to the Authority and the couple gave consistent evidence as to how it came to be that Ms Hunter was invited to their home later that evening for dinner because Ms Utku felt concerned for Ms Hunter who was emotionally upset and crying over the phone.

[19] Mr Boseman has his own personal views about Ms Hunter's love life which I have put to one side. However, I accept that both he and Ms Utku were sufficiently worried for Ms Hunter's welfare and that this motivated them to invite her for dinner which she accepted. The couple subsequently picked Ms Hunter up from her home later that same evening and upon arriving home, the two women talked over pizza while Mr Boseman sat in the lounge. Because of the unsolicited support that Ms Utku offered to Ms Hunter at a low point in her life in mid-September 2019, I am satisfied that this was only possible because the pair were not only co-workers but were good friends also.

[20] Some two weeks before Ms Hunter had dinner at Ms Utku's house, MTL had offered her fulltime employment as a junior housekeeping supervisor which Ms Hunter accepted; signing her individual employment agreement with the hotel on 3 September 2019. The agreement expressly stated that she was required to work an average of 40 hours per week for which she was paid $19 per hour.[1] Although there was a supervising component to the role, Ms Hunter was not required to supervise any staff

[1] The minimum wage on 1 April 2019 was $17.70 per hour. This increased to $18.90 on 1 April 2020.

and she worked primarily as a housekeeping attendant and sometimes as a waiter in the hotel's bar and restaurant.

[21] Ms Hunter stated that after she was granted her partnership-based work visa in September 2019, Ms Utku's behaviour towards her changed in that she held her support of her visa application over her head and frequently reminded Ms Hunter that she was only in the country thanks to her. Ms Hunter further claimed that Ms Utku racially harassed her in a WhatsApp Message (14 September 2019) in which Ms Utku messaged that she would "never hire Latinos again." Coming from a country in South America, Ms Hunter considered Ms Utku's message derogatory, belittling and ignorant. Ms Hunter further claimed that Ms Utku had sexually harassed her by commenting (sometime after September 2019) that the state of her red hair looked like that she "just had sex." Ms Utku does not deny making the comment which she says was said in jest but has since been taken out of context by Ms Hunter who has taken advantage of her goodwill as well as other members of the housekeeping team.

[22] Ms Hunter alleged further that she was bullied by Ms Utku in various messages to staff via WhatsApp and Facebook Messenger and that her manager had also manipulated the housekeeping roster to bully her. For example, Ms Hunter had requested two days annual leave in mid-March 2020 but it was alleged that, upon receiving her request, Ms Utku had lost her temper and declined her leave.

[23] On another occasion, it was said that Ms Utku had failed to give Ms Hunter a TBA (to be advised) shift when an extra room attendant was required on 20 March 2020. Ms Utku had instead given the shift away to someone else because she did not want to give the shift to Ms Hunter. When Ms Hunter brought this particular concern to Ms Chandra, it was alleged that she was very upset with Ms Utku. It was further submitted that when Ms Hunter raised verbal complaints about Ms Utku, Ms Chandra did not take her complaints seriously. Ms Chandra has admitted that she did not undertake a formal investigation into the red hair comment made by Ms Utku.

What are the issues?

[24] The issues to be investigated are those set out in a minute from the Authority dated 28 June 2021:

(a) Was Ms Hunter unjustifiably disadvantaged by MTL when it failed to take any action concerning her complaints of bullying and harassment?

(b) Is Ms Hunter owed wage arrears and if so, how much?

(c) Did MTL breach the remuneration provisions of Ms Hunter's individual employment agreement and if so, what is the appropriate remedy?

(d) Was there an availability provision to Ms Hunter's employment agreement and what should she be awarded by way of reasonable compensation?

(e) Has Ms Hunter been refused a copy of her time and wages record by the hotel and if so, should a penalty be imposed against MTL?

(f) Was the disciplinary process used for Ms Hunter fair and reasonable?

(g) Did the hotel operate and enforce a rest and meal breaks policy that was inconsistent with the Act and if so, what is the appropriate remedy?

(h) Was Ms Hunter constructively dismissed from her employment?

Was Ms Hunter unjustifiably disadvantaged by the hotel when it failed to take any action concerning her complaints of bullying and harassment?

[25] An unjustified disadvantage is a personal grievance whereby one or more conditions of an employee's employment is affected to the employee's disadvantage by some unjustifiable action by their employer.[2] Ms Hunter must therefore establish that either one or more conditions of her employment has been affected to her disadvantage through an action or actions by MTL.

Coffee-incident complaint

[26] Ms Hunter takes issue with Ms Chandra's handling of a complaint she made on 17 March 2020 against Ms Utku for allegedly humiliating her in front of other staff. On that day, Ms Hunter's shift started at 9 am and she had made for herself a cup of coffee which she had forgotten about and was reheating in the microwave at 9.02 am

[2] The Act, s103(1)(b).

when Ms Utku allegedly started yelling at her about having coffee after her shift had started. Ms Hunter alleged that Ms Utku had said to her that she lived "in a bubble" and that she had also made circular motions with her finger towards her head which Ms Hunter took to mean that there was something mentally wrong with her.

[27] Ms Chandra stated that as part of her investigation she received two emails (17 March and 18 March 2020 respectively) from two staff members who had witnessed the incident. Those emails record that Ms Utku had asked Ms Hunter in a "soft tone" whether she had signed into work because she had work to do upstairs and could not be having coffee on company time. The emails further record that Ms Hunter did not handle the situation well and followed Ms Utku into her office despite being told that she wanted to be left alone. Ms Hunter's behaviour towards Ms Utku was described by one witness as "not good."

[28] Before Ms Chandra could report back to Ms Hunter the outcome of her investigation, New Zealand entered into COVID-19 Alert Level 4 which I accept caused significant disruption to the hotel's operations. Ms Chandra concedes that after lockdown, she did not get back to Ms Hunter because Ms Hunter was on annual leave at the time. Even so, this does not explain why Ms Chandra could not report back to Ms Hunter once she had returned from annual leave. To this day, Ms Chandra has not advised Ms Hunter the outcome of her investigation.

[29] In applying the test of justification, s 103A(3) of the Act requires the Authority to consider four procedural fairness factors which are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee; whether the employer gave the employee a reasonable opportunity to respond to the concerns; and whether the employer genuinely considered the employee's explanations (if any) before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

[30] In terms of the procedural fairness factors above, MTL failed to provide Ms Hunter with an opportunity to comment on the emails it received from two members of

its staff which *prima facie* suggest that she was the aggressor and not Ms Utku. Ms Chandra acknowledges that she did not report back to Ms Hunter the outcome of her investigation which I find a fair and reasonable employer could have done in the circumstances.

[31] Even if Ms Hunter's complaint was dismissed which the emails from two independent eyewitnesses appear to suggest, a fair process drives acceptance of a decision. That did not happen here with Ms Hunter's complaint and she was not obliged to follow Ms Chandra up regarding her investigation. I find that Ms Hunter's personal grievance concerning the handling of her 17 March 2020 complaint is established on the facts and that the effect this has had on Ms Hunter is that she legitimately feels that her complaint has not been properly resolved.

Alleged racial harassment

[32] Ms Hunter alleges that Ms Utku made a negative comment about race. She refers to a WhatsApp message from Ms Utku on 14 September 2019 stating that she would never hire Latinos again. Ms Hunter says in her written witness statement to the Authority that she found the comment to be derogatory, belittling, ignorant and reductive given that Latin America comprises many countries and Latinos are not all the same.

[33] The above WhatsApp message must be considered in its correct context. Ms Utku 's message was sent the day before Ms Hunter had texted Ms Utku on 15 September 2019 (see [17]-[19] above) that she felt "broken" after seeing her former boyfriend and his new partner together at the hotel. For the reasons given above, I find that Ms Utku and Ms Hunter were friendly towards each other with the former providing the latter emotional support at a low point in her life.

[34] I find that Ms Hunter was not offended by Ms Utku's Latino comment given that the two women were already on friendly terms with each other. If Ms Hunter considered the comment derogatory and ignorant, which she did not, it is not plausible that she would then reach out to Ms Utku the following day for emotional support.

[35] I accept that on its face Ms Utku's message that she would not hire Latinos is both inappropriate and unprofessional of a manager. However, a more fulsome

transcript of the text messages shared between Ms Utku and Ms Hunter on the morning of 14 September 2019 show that Ms Utku was frustrated with another staff member (not Ms Hunter) who had not come to work at 9 am. Following the text in question Ms Hunter stated that she was feeling stressed because she had not met anyone of value in her life. Ms Utku's response was one of reassurance stating, among other things, that Ms Hunter was healthy, pretty, lived in New Zealand with a "roof over her head" and had people who loved her. Ms Hunter thanked Ms Utku for her warm and uplifting words of support and stated that "[a]ll of them (the staff) like u (Ms Utku) and respect u." The full text message exchange between Ms Hunter and Ms Utku make clear that Ms Hunter was not offended by Ms Utku's Latino comment and that she understood where it had come from.

[36] It is apparent from the text message exchange between Ms Hunter and Ms Utku that English is their second language. However, this neither justifies nor excuses what is clearly a poor remark. However, when the comment is considered in its correct context, I find the comment was a spontaneous expression borne out of frustration rather than rooted in ignorance and racism.

Alleged sexual harassment

[37] Ms Hunter alleges that, on one occasion, Ms Utku said to her that the state of her red hair was such that "it looks like you just had sex." Ms Utku does not deny saying this to Ms Hunter but says that this was a joke and Ms Hunter's hair was in a mess on that occasion. Ms Utku further stated that she had given Ms Hunter some money to purchase some hair clips for her hair for health and safety reasons and that when the comment was made, the pair started laughing and that no offence was taken.

[38] It is not clear from Ms Hunter's written witness statement to the Authority precisely when the comment was made but apart from Ms Hunter and Ms Utku, no-one else was present. Ms Hunter says that she felt embarrassed and offended by the comment which implied that she was promiscuous and/or a prostitute. This is denied by Ms Utku who says that Ms Hunter changed a lot after her relationship with her ex-boyfriend ended and that she was now twisting her own words against her.

[39] As the circumstances in which Ms Utku made her comment and how it was received by Ms Hunter was not witnessed by a third person independent of the parties

themselves, it has not been established on the balance of probabilities that Ms Utku sexually harassed Ms Hunter under s 108 of the Act.

[40] A further example of Ms Utku having allegedly sexually harassed Ms Hunter was reprimanding her for wearing a low V-neck tee-shirt which she appears to have collected from the hotel laundry room. I am not satisfied that this constitutes sexual harassment as Ms Utku was simply reminding Ms Hunter that the V-neck tee-shirt was not part of the current staff uniform. Whether it was ever a part of the staff uniform is not known.

Alleged workplace bullying

[41] Ms Hunter alleged that Ms Utku used the roster as a way to bully her at work. Ms Hunter gave as an example a request that she made at the beginning of March 2020 to have Wednesday 11 and Thursday 12 March 2020 off as annual leave. It was alleged that Ms Utku's response to the request was to lose her temper and to yell at Ms Hunter from her office, which Ms Utku denies. The request for leave was not approved.

[42] It is noted that the months between November and March is peak season for the hotel which operates at close to full occupancy. When Ms Hunter applied for leave in March 2020, she would have known that there was a possibility her application would be declined given the hotel's operational requirements for that time of year. Although Ms Hunter was not granted annual leave for 11-12 March 2020, a copy of the roster shows that she was given a rostered day off by Ms Utku on 12-13 March instead. The reason why Ms Hunter appears not to be given 11 March 2020 off from work was due to two other housekeeping attendants being away on their rostered days off (RDOs). Given the busy period of trade, I find Ms Utku's decision to decline leave was both fair and reasonable in all the circumstances.

[43] Another example of Ms Utku allegedly using the roster to bully and to punish Ms Hunter was her decision not to give Ms Hunter an extra shift on Friday 18 March 2020 when Ms Utku needed an extra room attendant at short notice. Ms Hunter was rostered as 'TBA' for that day and the extra shift ought to have gone to her. When Ms Hunter asked Ms Utku for the shift, she said that she did not want to give her the hours.

[44] The extra shift did in the end go to Ms Hunter because of the intervention of Ms Chandra who Ms Hunter had spoken to after being denied the shift. I accept that it was incorrect of Ms Utku to have denied Ms Hunter the extra shift but that error was corrected by MTL. There was no disadvantage.

[45] Ms Hunter alleged that Ms Utku would use WhatsApp and Facebook Messenger as a way to bully her. For example, on 16 June 2020, Ms Utku messaged the housekeeping chat group stating:

> … if you planning to leave, leave now at least you will save somebody that need to work so I don't need to spend time or energy. Leave now if you don't want to work.

[46] Ms Hunter says that the message was aimed at her specifically and that she had been bullied and ridiculed in front of the other housekeepers who were part of the chat group. Although this is Ms Hunter's perception, the message makes no specific reference to her or any particular individual. The message was sent to the entire housekeeping team. While the message ends harshly, the message is preceded by a plea from Ms Utku to the housekeeping team to maintain their cleaning standards and that they were fortunate to be employed given the impact of the COVID-19 pandemic on the hotel.

[47] Ms Hunter states that she has never been comfortable using social media such as WhatsApp and Facebook Messenger as a means of communication with other staff. She says that the chat group became a toxic place where staff were reprimanded, bullied, and ridiculed. I find Ms Hunter's reticence with using WhatsApp and Facebook Messenger a recent phenomenon in that when she first started employment with MTL in late 2017 she communicated with the housekeeping team via these platforms with no issue.

[48] It was Mr Tomlinson's evidence that because the housekeeping team was scattered across three floors and 25 rooms, WhatsApp and Facebook Messenger had its advantages of offering the team instantaneous communication with each other. Ms Utku stated that Messenger had been around 'like forever' and if a message was not specifically addressed for her, she did not be read it. Further, Ms Amos stated that it was a matter for the staff member to read messages or not and if a message was not highlighted with her own name, she did not read the message either.

[49] Ms Hunter stated that, on 31 January 2020, Ms Utku messaged on the Facebook Messenger chat group:

> @Scarlet Hunter and @Olga everybody almost finished any you have still 3 rooms
>
> You have to finish your rooms until 14.25

Ms Hunter considers the above message unreasonable because it was not necessary for Ms Utku to reprimand her in a public forum. I do not consider Ms Utku's message a reprimand but a reminder to Ms Hunter and her co-worker to work with some urgency so that their rooms were ready for guests to check-in.

[50] Another example given by Ms Hunter of alleged bullying was a WhatsApp private conversation between her and Ms Utku on 15 March 2020.

Ms Utku:	You sign out at 13.15 and change it to 13.45.
Ms Hunter:	Nooo
	U changed it
	I am sick about ur games
Ms Utku:	GO TO SPEAK WITH SHERONIKA (Ms Chandra), I DON'T HAVE ANYTHING TO SPEAK WITH YOU ANYMORE

[51] Ms Hunter alleges that that the use of capitals by Ms Utku shows that she was enraged. This message requires contextualisation as well because before Ms Utku's message, she had put a question mark against Ms Hunter's timesheet as another staff member had signed her off for the day thirty minutes earlier at 13.15 and not 13.45. While I accept that Ms Utku was upset with Ms Hunter, this is because Ms Hunter provoked the situation by suggesting that Ms Utku had changed her sign-out time which was clearly not true.

[52] On 31 October 2020, Ms Utku messaged on Facebook Messenger the following to the housekeeping team:

> Good morning, We have full house and have 2RA (room attendants) and Scarlet, 😬 and help.

According to emojipedia.org, the emoji used above by Ms Utku above could indicate a range of negative or tense emotions including nervousness, embarrassment, or

awkwardness. Ms Hunter stated that she felt humiliated and belittled by the message, especially at it had been sent to all of housekeeping. I agree. Ms Utku's message was both unprofessional and hurtful of Ms Hunter; a point I shall return to later in this determination at [122].

[53] Another cited example of alleged bullying was a prohibition against staff using the hotel's computers for personal use. However, because of the pandemic, I accept that MTL did so because they did not wish staff to stay any longer at the hotel than they needed to after completing their shift.

Is Ms Hunter owed wage arrears and if so, how much?

[54] Ms Hunter seeks wage arrears arising from MTL's failure to provide her with an average of forty hours' work per week. In addition, she says that she was not paid for all her time, specifically time spent waiting around for a room to become available to be cleaned which during the investigation meeting was referred to as 'gap time.'

[55] It was Ms Amos' evidence that when a room was not ready to be cleaned, the housekeeping attendant could always help another colleague or be allocated another task. Ms Amos further stated that gap times were not frequent, occurring once a fortnight. However, when they arose there was always other work to do. I prefer the evidence of Ms Amos. While I accept that gap times did arise from time to time, the information and evidence before me indicates that staff continued to be paid for this nevertheless.

[56] Ms Hunter's employment agreement did oblige her employer to provide her with an average of forty hours of work per week. By letter of 19 June 2020, Ms Chandra wrote to Ms Hunter to seek her consent to a temporary variation of her employment agreement. The proposal was a reduction of Ms Hunter's hours of work to 15 – 20 hours per week because of the financial impact of the COVID-19 pandemic on the business. Ms Hunter did not agree and consequently her employer was still obliged to provide her with an average of 40 hours' work per week.

[57] Ms Chandra's letter of 19 June 2020 also stated that Ms Hunter worked full-time and worked an average of 33 hours per week. On its face, it would appear that MTL concede that it did not provide Ms Hunter with the required number of hours of

work every week. However, Ms Chandra explained that the reason Ms Hunter did not get her 40 hours of work per week was because she was always late for her shift or would call in sick. Had she worked her full rostered hours, she would have met the 40-hour per week average.

[58] I am satisfied with Ms Chandra's explanation which is supported by multiple WhatsApp messages Ms Hunter sent to Ms Utku that she was either running late or was sick and was not coming into work. The WhatsApp messages provided cover a period from June 2019 to March 2020 and record that when late, Ms Hunter was late from 10 minutes to 1 hour and 15 minutes. It was Ms Hunter's evidence that if she was late to work, she would make up the lost time by leaving work later. However, the explanation ignores the reality that by arriving late, her duties were reallocated to another housekeeping attendant which left her with less work to do. In my view, this has fed into Ms Hunter's notion that she was not paid for a gap time.

[59] Ms Chandra concedes that, after the first lockdown in 2020, Ms Hunters' hours fell below the 40-hour per week average. A schedule of Ms Hunters' work hours from 21 June to 23 December 2020 show that she worked less than 40 hours per week. When Ms Hunter did not agree to her weekly work hours being reduced, MTL could have had a different discussion with her around the affordability of her role. However, such a discussion never took place and the company was obliged to meet its contractual obligations to Ms Hunter as a result.

[60] I accept that MTL went to efforts to give Ms Hunter as many hours it could which included offering her hours in its restaurant and bar. Although doing so constituted a technical breach of her work visa conditions, an email from Ms Hunter to Ms Chandra (22 June 2020) shows that she was willing to work shifts in the restaurant which indicates that both parties were not complying with the visa conditions. However, despite offering her hours in the restaurant and bar, the hotel consistently fell short of providing Ms Hunter with an average of 40 hours of work per week resulting in wage arrears for her.

[61] Ms Hunter has calculated that she has worked on average 30.03 hours per week for the duration of her employment and therefore seeks wage arrears of 10 hours per week for the duration of her employment. Ms Chandra submits that Ms Hunter declined

an average of 7.6 hours of work per week and that she could have worked an average of 41.18 hours per week.

[62] The difficulty for MTL is that its wages and time record do not record the hours of work which for one reason or another, Ms Hunter turned down or did not undertake. Its 41.18 average hours per week has been reconstructed from memory and was never put to Ms Hunter for comment during the investigation meeting which in all likelihood would have been disputed.

[63] However, in light of the WhatsApp messages between Ms Hunter to Ms Utku from June 2019 to March 2020, it would not be safe to include this period in calculating wage arrears for Ms Hunter. The period I have adopted is from 21 June 2020 to 13 December 2020. I have excluded from the calculus periods of time where Ms Hunter received the COVID-19 wage subsidy or the wage subsidy extension and was not working. In addition, I have excluded two weeks in late November/early December 2020 when she worked over 40 hours per week, as well as, the last week of her employment for the week ending 20 December 2020 when she was on sick leave but had only 11.5 hours of sick leave available to her to use.

[64] The total shortfall in hours of work per week over the relevant period is 198.67 hours. Ms Hunter's hourly rate was $19. MTL is ordered to pay Ms Hunter wage arrears of $3,774.73.

[65] The Authority has the power under cl 11 of the Second Schedule to the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Ms Hunter has been deprived of the use of her wages for over two-and-a-half years. MTL is ordered to pay interest on $3,774.73 from 23 December 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.[3]

[3] www.justice.govt.nz/fines/civil-debt-interest-calculator

Did the hotel breach the remuneration provisions of Ms Hunter's individual employment agreement and if so, what is the appropriate remedy or remedies?

[66] On 2 July 2020, MTL announced new housekeeping rules in that there would no longer be a housekeeping supervisor following behind the housekeeping attendant to quality check their work and that every housekeeping attendant would need to self-check their own rooms before they were released for use. Ms Hunter stated that the change effectively meant that she was expected to do the same job but in less time.

[67] In addition, the hotel introduced new cleaning times for check out and stay over rooms which Ms Hunter says is evidence that housekeeping attendants were paid according to a 'piece rate' system rather than actual hours worked. Ms Hunter's witness statement includes a schedule of the old versus new cleaning times, for example, previously 60 minutes was allocated to cleaning a classic room which was reduced to 40 minutes under the new rules.

[68] However, Ms Chandra explained that the new cleaning times were justifiable because housekeeping attendants were no longer required to set up the minibar or clean crockery which saved around 11 to 13 minutes per room. I find Ms Chandra's explanation credible. I accept also Mr Tomlinson's evidence that the 'piece rate' system was not his business model and that housekeeping attendants, including Ms Hunter, were always paid for the hours worked.

[69] It was submitted that clause 4.1 of Ms Hunter's employment agreement contemplated a piece rate method of remuneration in that her pay was in full compensation for all the work *and* all the hours she performed. However, if a piece rate system was intended to apply to the employment relationship, this would have been expressly provided for in the employment agreement, which it is not. In addition, Ms Chandra and Ms Utku were unanimous in their evidence that housekeeping attendants were paid on an hourly rate and not by the number of rooms cleaned. Cumulatively considered, I find that there was no piece rate system of remuneration for Ms Hunter who, like her co-workers, was paid an hourly rate for the hours worked.

Was there an availability provision in Ms Hunter's employment agreement and what should she be awarded by way of reasonable compensation?

[70] Ms Hunter's individual employment agreement with MTL stated that she was to work "as per her roster." The employment agreement did not guarantee a set number of work hours for her, only an "average" of 40 hours per week. Ms Hunter takes issue with being rostered on a TBA shift which meant that she was required to be available to work for the whole day but with no obligation on the hotel to provide her (and other staff) with any work. It was submitted that the use of TBA shifts by MTL gave the company all the benefits and advantages of a 'zero hours contract' and that it could require its housekeeping workforce to work whenever it liked.

[71] MTL denies that housekeeping staff rostered on TBA shifts were expected to be available to work 24 hours a day, seven days a week which Ms Chandra stated was never expected of Ms Hunter. Ms Chandra further stated that Ms Hunter's interpretation of how a TBA shift worked was in direct contrast with the hotel's longstanding practice of using such shifts as a way to address workload increases brought about by an unexpected increase in room reservations.

[72] I have been provided with rosters for Ms Hunter from 2019 and 2020. When these rosters are compared against each other, the number of TBAs for Ms Hunter were relatively low in 2019 compared to 2020. The most plausible explanation for the marked increase in TBA's in 2020 is the unpredictability of trade levels as a direct result of the COVID-19 pandemic.

[73] Ms Hunter seeks reasonable compensation for her availability from 12 August to 23 December 2020. During this four-and-a-half-month period, it is noted that the clear majority of Ms Hunter's work hours were subject to TBA which meant that she could be required to work (or not) and if she was, that she might be required to work longer (or shorter) hours. This scenario is best demonstrated in two Facebook messages from Ms Utku (sometime in June 2020) to the housekeeping team stating:

> If you see TBA with no hours we might call you for work, so do not make any plan.
>
> If you see TBA with hours you will come to work but we might call you and say don't come to work because there is not enough room for you to clean.

[74] Ms Hunter stated that being on a TBA shift made it impossible for her to plan anything outside work for that day because she was expected to keep herself available for the entire day (and night). It was Ms Utku's evidence that she provided the housekeeping staff their roster two weeks in advance and that she displayed this on the notice board in her office and disseminated a copy of the same via the team's chat group on Facebook Messenger. Ms Chandra submitted that, because housekeeping staff were aware of their TBA shifts two weeks in advance, staff were never expected to be available 24 hours per day, seven days per week.

[75] Availability provisions are defined by s 67D(1) of the Act under which:

> (a) the employee's performance of work is conditional on the employer making work available to the employee; and
>
> (b) the employee is required to be available to accept any work that the employer makes available.

[76] An availability provision must not be included in an employment agreement unless there are genuine reasons based on reasonable grounds to include one and the availability provision provides for 'reasonable compensation' to the employee for making themselves available to perform work.[4]

[77] Applying s 67(D)(1) to the established facts, I am satisfied that Ms Hunter's performance of work was conditional on MTL making work available to her. It must then be shown that Ms Hunter was required to be available to accept any work that the employer made available.

[78] Ms Chandra submitted in her written closing submissions that Ms Hunter had sufficient notice of TBA shifts and RDOs (rostered days off) to be able to plan her personal life accordingly. Further, if she needed time off for personal reasons, she could request it. Ms Hunter asserts that her roster changed so much from its initial draft so as to be barely recognisable when it was finalised.

[79] It is noted that on 10 September 2020, Ms Hunter emailed Ms Utku to complain about a change she had made to her roster for the week ending 13 September 2020. Ms Hunter stated that it was not appropriate for Ms Utku to make "drastic" changes to her

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[4] The Act, s 67D(3).

roster when half of the week had already gone. While I accept that, on this occasion, there was a late change to Ms Hunter's roster for that week, the evidence of Ms Utku, Ms Chandra and Ms Amos show that housekeeping operated between the hours of 6.30 am to 9.30 pm Monday to Sunday. As such, I dismiss Ms Hunter's claim that, whenever she was on a TBA shift, she was effectively on-call 24-hours per day, seven days per week. This is not how the hotel operates.

[80] However, that being said, the evidence before me demonstrates a significant increase in the number of TBA shifts for Ms Hunter once the hotel resumed trading after the August 2020 Alert Level 3 lockdown. To be clear, this was the experience for all housekeeping staff and not Ms Hunter only.

[81] I find the increase in TBA shifts during this period attributable to fluctuating trade levels for the company due to the COVID-19 pandemic which required greater flexibility when rostering staff. Availability provisions are permitted under s 67D(2) but only if the following requirements are met:

> (a) the employment agreement specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
>
> (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

[82] Section 67D(2)(b) requires that an availability provision may only "relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work." For Ms Hunter, her employment agreement required her to work an "average" of 40 hours per week, but those hours were not guaranteed. This meant that if MTL required her to work more hours than she was originally rostered on a TBA shift, she would need to make herself available to work.

[83] The Employment Court in *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* stated that the availability provisions (in s 67D) reflect that an employee's time is a commodity which has value.[5] To emphasise the point, the court stated at [29] that "this ought not to be regarded as a startling or novel proposition."

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[5] *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] ERNZ 78 at [29].

[84] On 17 October 2022, Ms Hunter provided me with a copy of her roster for the period from 12 August to 23 December 2020 which MTL confirmed was correct. From that information, I have taken into account the number of hours for each of Ms Hunter's TBA shifts which, for the most part, had a start and finish time. I have cross referenced this data with Ms Hunter's room attendant worksheets that were provided and MTL's closing submissions which include a schedule of the actual hours Ms Hunter worked for the relevant period.

[85] I have not given any weight to the middle column of the above schedule entitled "Lost hours of work" because that information was not put to Ms Hunter for comment during the investigation meeting. In a post-investigation meeting teleconference, both parties agreed that I should not take the column into account and it has not been.

[86] My analysis has uncovered that on 10 October 2020, Ms Hunter was rostered to work a TBA shift starting 9 am to 3 pm. However, she worked 3 hours and 15 minutes only, losing two hours and 45 minutes of work for which she would have been counting on for income. In addition, it is noted that for the week ending Sunday 11 October 2020 (Monday 5 to Sunday 11 October), Ms Hunter was rostered RDO for 6-7 October and TBA for the remainder of the week for a total of 26 hours. However, MTL's records show that instead of working 26 hours as per her roster, Ms Hunter in fact worked 32.75 hours; an additional 6.75 hours. There were a number of other examples where Ms Hunter's actual hours exceeded her TBA hours during the period of 12 August to 23 December 2020.

[87] To be clear, I have excluded a seven-week period in mid-2020 during which time Ms Hunter received the COVID-19 wage subsidy extension and did not work. A limitation with my analysis was due to MTL's wage and time record and holiday and leave record for its staff.

[88] Section 130(1) of the Act requires every employer to keep a wages and time record which, among other things, includes a record of the number of hours worked each day in a pay period and the pay for those hours.[6] Because the hotel does not record this information, it was not possible to compare Ms Hunter's TBA hours and her actual hours on a day-to-day basis. In addition, MTL's holiday and leave records do not

[6] The Act, s130(1)(g).

appear to record the amount of payment for any annual holiday, sick leave, bereavement leave, or family violence leave that has been taken.[7] The absence of this information has prevented me from making a more fine-tuned assessment as I have had to exclude the weeks ending 20 September, 4 October, 13 December, and 20 December 2020 from the calculus due to periods of sick leave and annual leave taken by Ms Hunter.

[89] Based on the information and evidence before me, I have found that Ms Hunter has worked an additional 51.41 hours over and above her TBA rostered shifts for the period from 12 August to 23 December 2020. This is the result of her having to stay behind to complete a TBA shift which is conditional on her employer making that work available to her.[8] In addition, there is the two hours and 45 minutes of a shift on 10 October 2020 which was cut short and which Ms Hunter had made herself available to work.

[90] In total, I find evidence of Ms Hunter making herself available for her employer for 54.16 hours under a TBA shift. This is time that has impacted on her own personal time which she could not have reasonably been expected to mitigate.

[91] Ms Chandra submitted that Ms Hunter was never coerced to accept a TBA shift. However, it is noted that the clear majority of Ms Hunter's shifts for the relevant period were subject to TBA which meant that if Ms Hunter did not work, she did not get paid. Under such circumstances, I am satisfied that this was a situation contemplated by s 67(D)(1)(b) of the Act where an employee is required to be available to accept any work that the employer makes available.

[92] There is no evidence indicating that MTL paid Ms Hunter any compensation for her availability. Under s 67D(3) of the Act, an availability provision must be precluded when the employment agreement does not provide the payment of reasonable compensation to the employee for their availability.

[93] It was submitted that a reasonable level of compensation in this case was half of Ms Hunter's agreed hourly rate of $19 ($9.50). Section 67D(6) of the Act provides a non-exhaustive list of factors for assessing reasonable compensation. As noted

[7] Holidays Act 2003, s 81(h).
[8] The Act, s67D(1)(a).

already, the clear majority of Ms Hunter's shifts from 12 August to 23 December 2020 were subject to TBA.

[94] The additional hours of work affected Ms Hunter's ability to plan outside of work and while it benefits MTL to have housekeeping attendants holding themselves available to work overtime to enable it to meet its business needs, this comes at a personal cost to the affected employee. The *Postal Workers* decision makes clear that an employee's time is a commodity that has value. Ms Hunter has never been compensated for making herself available to work a TBA shift and if she is not compensated, she will have suffered an unjustified disadvantage.

[95] I take into consideration also that Ms Hunter is a single person with no dependents in New Zealand for whom she is responsible. It is noted also that the average housekeeping hourly rate, even in Auckland, is not high and for Ms Hunter to have been paid an additional $9.50 an hour to her hourly rate of $19 in the midst of the pandemic would most likely have caused MTL to have had a discussion with her about alternative arrangements.

[96] On balance, I find that a substantial reduction should be made against the proposed rate of $9.50 for reasonable compensation. Initially, I had in mind a reduction of 75 percent however because of the shortcomings noted above with MTL's wages and time record and holiday and leave record, I have adopted a 60 percent reduction instead.

[97] MTL is ordered to pay Ms Hunter reasonable compensation for her availability of $205.81 (54.16 hours x $3.80 per hour) within 28 days of the date of this determination. Using the civil debt interest calculator, MTL is to also pay interest on this amount from 23 December 2020 to the date of payment.

Has Ms Hunter been refused a copy of her time and wages record by the hotel and if so, should a penalty be imposed?

[98] The issue here is not that MTL has refused to provide Ms Hunter a copy of its wages and time record and holiday and leave record for her, but that the company's records do not document everything required by s 130(1) of the Act and s 81 of the HA.

[99] The shortcomings of MTL's record keeping are acknowledged and it will need to better record the matters identified going forward. However, I decline to award a penalty because this is not a case of a failure by an employer to keep a wages and time record or a holiday and leave record.

[100] It was submitted that MTL did not keep in one single document all that is required by s 130 of the Act and, consequently, Ms Hunter had to 'join the dots' across multiple documents to compile her own wages and time record. While this is not ideal, it remains that her individual employment agreement, payslips, timesheets, and room attendant worksheets are in written form and could be considered cumulatively to discern most (but not all) of the information that a wages and time and holiday and leave record is required to include.

Was the disciplinary process used for the Ms Hunter fair and reasonable?

[101] On 31 October 2020, MTL introduced a new health and safety induction policy for its staff which Ms Chandra asserted was not specific to Ms Hunter but applied to everyone. I am not persuaded that this is so when on a plain reading of the policy there are several matters which have nothing to do with health and safety and which are directly connected to matters arising from Ms Hunter's personal grievance. Those matters are as follows (verbatim):

> 23 I agree to receive weekly roster on Friday for the coming week.
>
> 24 I aware, I cannot change timesheets times after signed by authorised person for check in or check out and I have noted the reason for any variance in my timesheet compared to the roster, e.g., if I started or finished later than roster.
>
> 25 Without sign in or sign out by authorised person signature, I cannot start to work or I cannot leave the work.
>
> 26 I know, any missing details on my timesheet is incomplete, the timesheet won't be processed for payroll on Tuesday, if I miss one payroll period, my wages will be processed in the next payroll period which will be following Tuesday.
>
> 27 I will not make any holiday bookings until my leave dates are approved; the hotel will not be responsible for any changes to my holiday plans if these were made before my leave request has been formally approved.

[102] On 30 October 2020, Ms Hunter stated that she felt pressured by Ms Utku to sign the health and safety induction policy. While she did so reluctantly, Ms Hunter

noted at the bottom of the page the points with which she did not agree, which included point 25 above.

[103] On 31 October 2020, Ms Hunter received a letter from the hotel setting out allegations of serious misconduct against her. Ms Chandra is understood to have drafted the letter of misconduct which alleged that Ms Hunter had not followed the hotel's new time guidelines for room cleans and was taking significantly longer to clean rooms which resulted in her not being able to turnover rooms in time for check-ins. The letter recorded that the room cleaning time allowance was emailed to Ms Hunter on 17 July 2020.

[104] It was further alleged that on 24 October 2020, Ms Hunter had taken an unauthorised break from 2.20 pm – 2.30 pm. It was noted that she was entitled to one paid 10-minute break per four-hour shift. Finally, it was alleged that, on 26 October, she had failed to complete all turndown duties in that dirty glasses were not washed and the soap dispensers in public areas were not filled.

[105] The misconduct letter from MTL alleged that it considered Ms Hunter's behaviour to be a breach of trust and confidence and was serious misconduct. Ms Hunter was invited to attend a meeting to discuss the above allegations and to bring with her support person or her representative.

[106] I find none of the allegations levelled against Ms Hunter serious enough to reach the threshold of serious misconduct. Nor could it be said that her performance was destructive of the requisite trust and confidence in her as an employee especially when the new cleaning times and allowances affected all housekeeping staff and not Ms Hunter only.

[107] The information and evidence before me establish that Ms Hunter struggled to comply with the reduced cleaning times for rooms. However, in such circumstances, a fair and reasonable employer could have provided her with a performance improvement plan and remedial training and support to ensure she was reasonably able to comply with the new cleaning time allowances.

[108] In its closing submissions, MTL now concedes that its misconduct allegations against Ms Hunter sit more comfortably at the level of general rather than serious misconduct. In explanation, Ms Chandra says that its usual representative from the Restaurant Association of New Zealand (RANZ) was busy and was not able to review the misconduct letter before it was sent out. However, this concession was never communicated to Ms Hunter who subsequently resigned on 25 November 2020.

Did the hotel operate and enforce a rest and meal breaks policy that was inconsistent with the Act and if so, what remedy or remedies are available?

[109] Ms Hunter says that MTL failed to provide her with rest and meal breaks in accordance with Part 6D of the Act. Ms Chandra states that all staff including were allowed to take breaks when needed. Section 69ZD sets out an employee's entitlement to rest and meal breaks which relevantly states:

- One 10-minute paid rest break if an employee's work period is two hours or more but not more than four hours (subs (2)).

- One 10-minute paid rest break and one 30-minute meal break if their work period is more than four hours but not more than six hours (subs (3)).

- Two 10-minute paid rest breaks and one 30-minute meal break if their work period is more than six hours but not more than eight hours (subs (4)).

…

[110] Ms Hunter's employment agreement with MTL does not record a specific time for the taking of rest and meal breaks. Instead, the agreement states that the hotel agrees to comply with its statutory obligation to provide breaks which are taken at a time that does not adversely impact upon the performance of an employee's duties and as notified by the hotel. It was Ms Chandra's evidence that there were never any formal times allocated for rest and meal breaks which was worked out on the day between staff and their supervisor/manager depending on the needs of the staff member and the hotel's operational requirements.

[111] However, it is noted that MTL's policy on rest and meal breaks, as recorded in its employee guidebook, is inconsistent with s 69ZD(2) of the Act in that the guidebook does not explicitly state that employees are entitled to a 10-minute paid rest break when their work period is two hours or more but not more than four hours. In addition, some

of Ms Hunter's room attendant worksheets, copies of which were provided to the Authority, show that she was not always provided with rest and meal breaks in accordance with s 69ZD of the Act. For example, Ms Hunter's worksheet for 20 September 2020 records a seven-hour shift that started at 9am and finished at 4 pm for which only one ten-minute break was recorded. There was also a note from Ms Hunter's supervisor, Ms Utku, stating that "your break time is only 10 min. please be strict with your timing." However, under s 69ZD(4) of the Act, Ms Hunter was entitled to two 10-minute paid rest breaks and one 30-minute meal break.

[112] Similarly, Ms Hunter's worksheet for 3 October 2020 records that she worked from 9 am to 3.30 pm; a shift of 6.5 hours. However, her worksheet records one break of 10 minutes. She was not provided with an additional 10-minute break and one 30-minute break. In addition, Ms Hunter's room attendant worksheet for 10 October 2020 records that she worked from 9 am to 12 pm; a three-hour shift for which no break was recorded. As noted above, Ms Hunter was entitled to a 10-minute paid rest break for such a period.

[113] Based on the information and evidence before me, I find that the company has failed to provide Ms Hunter with rest breaks and meal breaks in accordance with Part 6D of the Act. Ms Hunter seeks a penalty against MTL in the sum of $10,000.

[114] The Authority derives its jurisdiction to award a penalty for a breach of this nature under s 69ZF of the Act. Penalties are discretionary but s 133A sets out in a non-exhaustive way several mandatory factors that employment institutions must have regard in determining the amount of penalty to impose. In considering whether a penalty is warranted and, if so, at what level, I have taken into consideration the mandatory factors set out in s 133A of the Act and the Employment Court's decisions in *Nicholson v Ford*[9], *A Labour Inspector v Daleson Investment Ltd*[10] and *Borsboom v Preet Pvt Ltd*.[11]

[115] As noted above, in early July 2020, MTL had introduced new cleaning room times. While there was now less time to clean a room, this was mitigated by the removal of other cleaning tasks such as setting up the minibar and cleaning the crockery. While

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[9] *Nicholson v Ford* [2018] NZEmpC 132.
[10] *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.
[11] *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

these tasks were removed, it remains that housekeeping work is physically demanding and staff are required to perform their duties in a timely manner if a room is to be released on time. While MTL has argued that all staff took their breaks subject to their own needs and the hotel's operational requirements, a fair and reasonable employer, aware of its obligations under the Act, would comply with the duty to provide rest breaks and meal breaks which is a minimum employment standard.[12]

[116] Ms Hunter is a work-visa holder and while I do not regard her vulnerable for that reason, she has had to engage the services of a lawyer to seek redress of a fundamental employment right. The imposition of a penalty on MTL is necessary to ensure that it complies with its statutory obligations which in my view requires it to be more pro-active rather than to leave it to staff to take a break if and when they can find one.

[117] I have been provided with four room attendant worksheets for Ms Hunter which show that she was not provided with a break because either the company's breaks policy did not permit a ten-minute break for a work period of two to four hours or the hotel did not expressly record that it provided Ms Hunter with the correct number of breaks for the hours worked. It is noted that MTL had access to professional support and advice through RANZ. That said, my sense is that its breaches arise out of negligence or a lack of care to detail rather than a deliberate or intentional course of action. It remains though that there is a need to deter the hotel from breaching the Act in this way again, to reflect the extent to which Ms Hunter had to go through to have this fundamental employment right enforced, and to reflect the objects of the Act which includes building productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[118] While there is evidence of four separate breaches, these are essentially the same and can be globalised into one. The maximum penalty for a company or corporation is a penalty not exceeding $20,000.[13] There is no evidence of MTL having any financial difficulty in paying a penalty. Standing back and looking to other similar cases for penalties involving the failure to provide rest and meal breaks (of which there are few),

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[12] The Act, s 5.
[13] The Act, s 135(2)(b).

a fair penalty is $3,000 of which $2,500 is to be paid to Ms Hunter and $500 to the Crown Bank Account pursuant to s 136 of the Act.

Was Ms Hunter constructively dismissed from her employment?

[119] Ms Hunter stated that, after everything she had experienced during her time at the hotel, she simply could not take anymore and resigned. Ms Chandra stated that the hotel had continuously tried to maintain a positive working relationship with Ms Hunter and that all her issues and complaints had been addressed to the best of their ability. When she resigned, Ms Chandra stated that she accepted it.

[120] Ms Hunter claims that her resignation was forced upon her by the various actions by her employer that disadvantaged her and that she did not resign but was constructively dismissed. A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. Ms Hunter pointed to a number of examples which led to her resignation which included the ill-treatment she received from Ms Utku, the hotel taking her side rather than accept Ms Hunter's point of view, the hotel's rest and meal breaks policy which was inconsistent with the Act, and being rostered on TBA day after day which left Ms Hunter feeling that the only thing in her life was the hotel.

[121] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? Second, if there was such as breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, was there a substantial risk of resignation?[14]

[122] In response to the first question, I find that there has been a breach of duty. While I have dismissed Ms Hunter's claims of alleged racial and sexual harassment by Ms Utku, the following have been found:

(a) Ms Chandra failed to report back to Ms Hunter concerning her coffee-incident complaint against of Ms Utku (see [31]) which

[14] *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 at 172.

created the impression that the hotel did not take her complaints seriously.

(b) That Ms Utku's WhatsApp message (31 October 2020) to the entire housekeeping team concerning Ms Hunter (above at [52]) was both unprofessional and hurtful.

(c) The hotel's failure to provide Ms Hunter an average of 40 hours' work per week resulting in wage arrears (above at [64]).

(d) Rostering Ms Hunter on TBA shifts for four-and-a-half months between 12 August to 23 December 2020 without reasonable compensation (above at [94] above);

(e) The inclusion of several matters in MTL's health and safety policy which had nothing to do with health and safety but arose from Ms Hunter's personal grievance with the hotel (see [101]);

(f) MTL conceding that the examples it relied on of (alleged) serious misconduct by Ms Hunter was general misconduct instead (above at [108]); and

(g) MTL's rest and meal breaks policy was not compliant with the Act and room attendant worksheets showed that MTL failed to ensure that Ms Hunter received the correct number of rest and meal breaks as required by law (see [113] above).

[123] I acknowledge that the threshold to establish a constructive dismissal is high given that the employee has the responsibility of proving their case. Even so, it is noted that MTL made no effort to inquire whether Ms Hunter's resignation was genuine. It simply accepted the resignation without question. When I combine this with the number of findings I have found against the hotel, I am compelled to conclude that MTL breached its duty to Ms Hunter.

[124] To amount to a constructive dismissal, there must not only be a breach of duty on the part of the employer, but it must also have been reasonably foreseeable that Ms Hunter would resign as a result. Such a resignation must be a proportionate and

reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she has no other option.

[125] When the various matters noted above are considered cumulatively, I find these to be reasonably sufficient to justify Ms Hunter's decision to leave her employment at MTL. The claim of unjustified constructive dismissal is established on the facts.

Remedies

[126] Ms Hunter has been constructively dismissed and is entitled to remedies.

Lost wages

[127] As a work visa holder, Ms Hunter needed to apply for another work visa so that she could work lawfully for her new employer. It is noted that she was offered alternative employment on 17 December 2020 in the horticultural industry. She applied for a new work visa on 23 December which was approved on 13 January 2021. Ms Hunter commenced her new employment on 22 February.

[128] It is not clear to me why Ms Hunter was not able to commence working for her new employer once her work visa application was approved but I take into consideration that she had moved outside Auckland, the Christmas and New Year holidays, and the ongoing impact of the pandemic as contributing to the delay which was not inordinate. I find that Ms Hunter has made reasonable efforts to mitigate her loss and that she is entitled to eight weeks' lost wages.

[129] MTL is to pay Ms Hunter the sum of $6,080 gross (calculated as 8 weeks x $760 per week (40 hours x $19 per hour).

Compensation

[130] Ms Hunter is entitled to compensation for both unjustified disadvantage (for the lack of reasonable compensation for her availability) and unjustified dismissal. Rather than award compensation under separate causes of action, an award of compensation on a totality basis is appropriate in the circumstances.

[131] It is noted that when Ms Hunter resigned, she had a work visa that entitled her to work for the hotel only. To have resigned close to the Christmas holidays, with no family support in New Zealand, and no new employment to go to at that time, was a "scary time" for her. Ms Hunter says the whole period was very distressing for her and that for the first time in her life, she was prescribed medication for anxiety.

[132] Compounding matters further for Ms Hunter was an incident on 27 November 2020, two days after she had tendered her resignation, where Ms Utku is alleged to have banged on her desk gleeful that Ms Hunter was leaving. The incident was not properly investigated by Ms Chandra and it is therefore not clear what was exactly said by Ms Utku. However, in Ms Hunter's mind, this was yet another example of the hotel siding with its housekeeping manager rather than take her complaint seriously.

[133] Standing back and looking at matters holistically, I am satisfied that Ms Hunter suffered humiliation, loss of dignity, and injury to feelings resulting from her work situation at the hotel. I order MTL to pay Ms Hunter the sum of $16,000 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1)(c)(i) of the Act.

Contribution

[134] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded. It is noted that MTL has raised the issue of Ms Hunter coming to work late on several occasions. However, the hotel had the opportunity to raise this as a disciplinary matter early on in the employment relationship but chose not to do so. I do not treat Ms Hunter's past tardiness as a reason to reduce her remedies now. Consequently, there is to be no reduction in remedies awarded.

Conclusion and summary of orders made

[135] The Authority makes the following orders. Medina Trading Limited trading as Hotel Debrett is ordered to pay the following amounts to Scarlet Hunter no later than 4 pm Thursday 10 August 2023:

(i) $3,774.73 (gross) in wage arrears under s 131 of the Act;
(ii) $205.81 (gross) as compensation for a lost benefit (availability compensation);

(iii) interest on $3,980.54 ($3,774.73 + $205.81) from 23 December 2020 to date of payment using the civil debt interest calculator;

(iv) penalty of $3,000 of which $2,500 is to be paid to Ms Hunter and $500 into the Crown Bank Account;

(v) $6,080 in lost wages; and

(vi) $16,000 in compensation under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings.

Costs

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

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

[138] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15]

Peter Fuiava
Member of the Employment Relations Authority

[15] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].