

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 4
3171422

BETWEEN STACEY ROY
 Applicant

AND CARRINGTON RESORT JADE
 LP
 Respondent

Member of Authority: Rachel Larmer

Representatives: Lawrence Anderson, advocate for the Applicant
 William Tan, for the respondent

Investigation Meeting: 5 October 2022 at Kerikeri

Submissions Received: 7 October 2022 from the Applicant
 No submissions from the Respondent

Date of Determination: 9 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Respondent Carrington Resort Jade LP is a resort hotel and conference centre that runs a restaurant and associated winery in Northland. The Applicant, Ms Roy, has worked on and off for the Respondent over the past 12 years.

[2] She was most recently employed on 22 December 2020 as a junior Sous Chef. Ms Roy said she was provided with an unsigned written employment agreement which she then signed and returned by hand to Mr William Tan.

[3] Ms Roy said she did not receive a signed copy of her employment agreement back from Mr Tan. Over time her duties and responsibilities evolved. When her employment ended in

April 2022, she said she was effectively working as the Acting Head Chef, because she was in charge of the restaurant kitchen.

[4] Mr William Tan is the CEO of Gorges Jade Holdings Limited, which is a parent company of the Carrington Group and its partnership entities in New Zealand. Carrington Resort Jade LP is a subsidiary partnership entity which is part of the Carrington Group. Mr Tan is also the General Manager of Carrington Estate and of the Carrington Resort.

[5] On Sunday 24 April 2022 Ms Roy was sick so did not attend work. She went into work the following day (Monday 25 April 2022) around 11.50am ready to start her shift at 12:00 pm. When Ms Roy arrived at work she went to the desk in the kitchen to check her work emails on the work computer that was available to everyone.

[6] Ms Roy saw an email from Mr Tan that had been addressed to the kitchen staff. The email instructed the kitchen staff to notify Mr Tan if Ms Roy attended work, because he said she was not allowed back in the kitchen until after he had spoken to her. The email also noted that Ms Roy was aware of that.

[7] Ms Roy says she was shocked and felt very uneasy reading this email, so she went straight down to Mr Tan's office to see him in order to find out what was going on. Mr Tan was in his office with the door open along with the Head Chef of the Winery. Ms Roy went into the office while both men were in there.

[8] Mr Tan told Ms Roy that she needed a medical certificate for her sick leave the previous day and he insinuated that she had been "*pulling a sickie*". Mr Tan then told Ms Roy that "*everyone had an issue with me in the whole resort and everyone had refused to work with me and would all present resignations if they had to work another hour with me.*" When Ms Roy asked who in particular did not want to work with her and why not, Mr Tan did not give her specific names or details, instead just saying it was "*the whole resort*".

[9] Mr Tan told Ms Roy that she was lazy and only wanted to work when it suited her and that she never worked when it was busy. Ms Roy said that Mr Tan spoke to her in a very condescending and disrespectful way, he had his elbows on the table and he was flicking his pen and tapping it on the desk and leaning back in his chair as he said these things to her.

[10] Ms Roy said these accusations were a real shock to her as she had put in long work hours over the summer and she was a hard worker. Ms Roy said she prioritised her job over family time because she was in charge of the restaurant kitchen, so felt she had to be there a lot of the time. Ms Roy therefore did not believe Mr Tan's accusations were fair.

[11] Mr Tan then accused Ms Roy of being on drugs and being mentally unstable. She told the Authority this is something she had heard him say to at least three other staff.¹ Ms Roy told the Authority that it was "*one of Mr Tan's favourite lines to use*".

[12] Ms Roy said that she broke down crying and raised her voice, because she felt that Mr Tan was not wanting to hear anything she had to say. Mr Tan then proceeded to tell Ms Roy that she should go home for three days while he figured out what to do with her. Ms Roy said she asked Mr Tan why she had to go home and he just kept repeating "*go home*" to her.

[13] Ms Roy said she did not want to miss out on work and she wanted to know what her status was immediately, so she asked Mr Tan what he wanted from her. She asked if he wanted her to resign and he told her "*Stacey it is up to you if you want to resign*".

[14] Ms Roy said at that point she got up and walked out because he would not tell her anything about the allegations or why she was not being allowed to work as normal. Ms Roy said she was very upset and crying. She returned to the restaurant and picked up her belongings and left work for the day.

[15] On Tuesday 26 April 2022 Ms Roy found an email that had been sent to her by Mr Tan that was dated 11:56 am on Sunday 24 April 2022. She had not seen it before she reported to work on Monday 25 April 2022.

[16] Mr Tan's email set out a number of issues that ranged from reporting requirements when she was sick, to the fact that the team had reported to Mr Tan that Ms Roy was not going to do any orderings or rostering, that he had received a "*large number of complaints from almost the whole F&B [Food and Beverage] team about her attitude, work ethic and work quality.*"

¹ Ms Roy gave the Authority the names of these three other employees and details about what Mr Tan had said about them. These three employees did not include the employee who brought proceedings against the Respondent in *Maheno v Carrington Resort Jade LP* [2022] NZERA 635.

[17] Mr Tan claimed that “*everyone in the kitchen explained to me that they do not wish to work with you [...].*” Mr Tan alleged that “*we have had a few chefs resign because of the alleged mistreatment they received from you.*” He ended the email by saying “*you will need to arrange a time, to come and see me in my office to address the issues raised before you walk back to the kitchen.*”

[18] Ms Roy was upset to see this because she was not provided with any specific allegations or names of those who had complained about her, or details about the complaints other than the very generalised information that was included in the email of 24 April 2022.

[19] Ms Roy contacted an employment advocate (Mr Anderson) on 27 April 2022 and he raised unjustified disadvantage grievances on her behalf with the Respondent by email at 11:34 am on Thursday 28 April 2022. His email was read at 11.35am that same day.

[20] The personal grievances that were raised included the fact that Ms Roy had been sent home on an unlawful suspension and that “*unsubstantiated and malicious complaints*” had been made against Ms Roy. It was alleged that Mr Tan had failed to follow a fair and proper process regarding those complaints, which had also unjustifiably disadvantaged Ms Roy in her employment. Ms Roy’s advocate proposed mediation.

[21] Mr Anderson’s personal grievance letter of 28 April 2022 expressly stated that he represented Ms Roy so Mr Tan was asked to “*Please direct communications in this matter through me*”.

[22] No response was provided to these personal grievance claims.

[23] However, on Saturday 30 April 2022 at 11:10 am, Mr Tan emailed Ms Roy directly with the subject title “*Your resignation and your unannounced visit*”. The was not copied to Ms Roy’s advocate.

[24] Mr Tan’s email of 30 April 2022 alleged that Ms Roy had stormed into his office unannounced, yelling and shouting in an unacceptable manner. It said that she did not provide an explanation or medical certificate for her absence the previous day. Mr Tan referred to a discussion about “*the whole restaurant team*” coming to see him to complain about Ms Roy and the fact that Mr Tan had been told that the Respondent had lost “*five kitchen staff in the past three months*” because of Ms Roy.

[25] Ms Roy says that Mr Tan included further information in the email that had not been discussed during the meeting, in particular he claimed that:²

Each of the restaurant team members that came to see me brought me a written resignation letter, explaining to me that if they were to work with you for even one shift or one hour, they rather all leave Carrington. (sic)

[26] Mr Tan claimed that Ms Roy had resigned and had “*provided no notice period for your resignation*”. He also stated that the Respondent would not be processing her “*final pay and holiday pay until all of the company properties (sic) had been returned.*” Ms Roy told the Authority she did not have any company property to return.

[27] Ms Roy’s advocate emailed Mr Tan back at 7pm on 30 April 2022 pointing out that Mr Tan’s email contradicted the instruction he had been given on 28 April 2022 to communicate with her advocate and not directly with her.

[28] Ms Roy’s advocate noted that the Respondent’s email of 30 April 2022 was an unjustified dismissal, which would be pursued as a personal grievance claim along with the other unjustified disadvantage personal grievances that had previously been raised.

[29] Ms Roy’s advocate informed Mr Tan that Ms Roy “*did not consent to any deductions to her pay/final pay and revokes any prior consent to deduction from her pay.*”

[30] Ms Roy’s advocate again repeated that Mr Tan needed to contact him instead of communicating directly with Ms Roy, and the Respondent was asked to identify what property it wanted returned, because Ms Roy did not believe she had any company property.

[31] The Respondent also did not reply to the unjustified dismissal personal grievance claim. Nor did it identify what company property Ms Roy needed to return.

[32] Ms Roy discovered that she had only paid up until 24 April 2022 and that she had not been paid her holiday pay or alternative public holiday entitlements in her final pay. Her suspension from 25-28 April 2022 was also unpaid.

[33] Ms Roy says she has had difficulty putting together her wage arrears claim because the Respondent failed to provide her with copies of her wage and time records or holiday and leave

² Although the Respondent was directed to provide copies of these resignation letters it failed to do so.

records or pay slips, despite being requested to do so on a number of occasions. She noted that the Respondent had also breached directions from the Authority to disclose that information to her.

[34] Ms Roy claimed that the Respondent had failed to comply with its employment record keeping obligations in the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 (the HA03) because it had not kept, or produced upon request, her wage and time or holiday and leave records.

[35] The Respondent denied all of Ms Roy's claims.

[36] It said it had acted as a fair and reasonable employer at all times. It denied suspending or dismissing Ms Roy. The Respondent alleged Ms Roy had verbally resigned without notice to Mr Tan in his office on 25 April 2022. The Respondent said that the Applicant was not owed any wage arrears and was not entitled to any of the remedies she had claimed.

The Authority's investigation

Statement in Reply not filed within 14 days of service

[37] Ms Roy's Statement of Problem was served on the Respondent on 9 May 2022. The Statement in Reply was therefore due to be lodged by the Respondent by 23 May 2022. However, that did not happen.

[38] In addition to not responding to the personal grievance claims that Ms Roy raised with the Respondent on 28 and 30 April 2022, the Respondent did not comply with the obligation to file its Statement in Reply within 14 days of service of the Statement of Problem on it.

[39] On 30 May 2022 the Authority emailed the Respondent advising that because it had failed to file its Statement in Reply (SiR) within time, it now needed to apply for leave to file a Statement in Reply out of time.

[40] The Respondent was given seven days within which to do that. However, that did not occur.

[41] The parties were also asked to advise the Authority of their availability to attend a case management conference (CMC) and an investigation meeting in Kerikeri in August 2022. The Applicant did so but the Respondent did not.

[42] On 7 June 2022 Mr Tan emailed the Authority to advise that he had been ill and on leave, so he said the Statement in Reply would be filed by the end of the week (which was 10 June 2022).

[43] Mr Tan did not respond to the request for information about the Respondent's availability to attend a case management conference, but he did say that the Respondent was not available to attend an investigation meeting on the proposed August dates.

Leave granted to file SiR out of time and difficulties in arranging CMC

[44] Although Mr Tan had not sought leave on behalf of the Respondent to file the Statement in Reply out of time, the Authority nevertheless granted leave for it to do so. The Respondent filed its Statement in Reply after 6:00 pm on 10 June 2022. However, it still did not provide its availability to attend the CMC that the Authority had been trying to set up.

[45] On 13 June 2022 the Authority emailed the parties saying that it proposed to set the CMC for 22 June 2022. At that point the Authority had sent three emails to the Respondent and had left four voicemails for it, asking it to advise its availability to attend the CMC. Mr Tan was asked to respond as soon as possible to the proposed CMC date of 22 June. He did not do so.

[46] That resulted in further emails being sent, and voicemails being left for, Mr Tan asking him to confirm his availability on 22 June 2022. After not receiving any response from Mr Tan, the Authority confirmed to the parties that the CMC had been set for 22 June 2022.

[47] On 15 June 2022, Mr Tan emailed the Authority to say he would not be available for the scheduled CMC. He did not explain why he was not available, why somebody else could not attend on behalf of the Respondent, or what alternative times or dates he would be available.

[48] That resulted in further emails and telephone calls to Mr Tan, which he did not answer, so the Authority Officer left voicemails for him. Mr Tan was asked for an explanation as to why the Respondent was unavailable on 22 June and for an indication of when the Respondent would be available to attend a CMC.

[49] Mr Tan eventually replied that he would be on leave on 22 June 2022. However, he again did not identify any alternative dates on which the Respondent would be available to attend a CMC.

Rescheduling of CMC to suit Mr Tan

[50] After the Authority had sent three more emails and left four more voicemails for Mr Tan, it identified an alternative date (a month away) that Mr Tan was available. The Authority then confirmed that the CMC date had been changed from 22 June to 21 July 2022 so that Mr Tan could attend.

Directions to provide Ms Roy with copies of relevant information

[51] On 22 June 2022 the Authority directed the Respondent to provide the Applicant with copies of relevant disciplinary/behaviour concerns and with copies of her wage and time and holiday and leave records, a copy of her individual employment agreement, her pay slips including her final pay slip, a copy of her personnel file and any documentation relating to the allegations/complaints the Respondent said it had received about Ms Roy and about the concerns it had regarding her.

[52] That information was to be provided by 6 July 2022. However, that did not occur.

[53] The direction to the Respondent to provide this information to the Applicant was repeated on 27 June 2022.

[54] On 28 July 2022 the Respondent provided what it said was a wage and time record (it was not), a screenshot of some videos (and an online link to these screenshots along with a password) and a one page screenshot of a payslip summary. This was insufficient to meet the Authority's directions.

CMC held on 21 July 2022

[55] The CMC was held on 21 July 2022. During the CMC Mr Tan confirmed that the Respondent had CCTV videos (without audio) of Ms Roy in the restaurant/bar area after she had left Mr Tan's office. Mr Tan also said the Respondent had texts and emails from staff complaining about Ms Roy. These had not been attached to the Statement in Reply or disclosed to the Applicant or Authority.

Breaches of Authority's directions

[56] The Respondent was directed to provide Ms Roy with copies of the relevant documentation by 28 July 2022. However, that did not occur.

[57] The information filed by the Respondent on 28 July 2022 did not include the information that had been discussed during the CMC (which Mr Tan said the Respondent had and would be disclosing), nor did it include the documentation that the Authority had already directed the Respondent to provide.

[58] By agreement with the parties at the CMC, the Respondent was to file its witness statements and relevant evidence (documents and CCTV footage) by 15 August 2022. However, that did not occur.

[59] That omission meant that the Applicant was unable to file her witness statements and relevant documents as per the agreed timetable. Ms Roy therefore requested and was granted a two week extension to enable her to do so.

Amended Statement of Problem

[60] After reviewing the limited information the Respondent had filed on 28 July 2022, Ms Roy filed an Amended Statement of Problem. This was served on the Respondent, but it did not file an Amended Statement in Reply.

Respondent failed to comply with agreed timetable directions

[61] The Respondent failed to file its witness statements by 15 August 2022, as it had agreed it would and as it had been directed to do.

[62] The Authority emailed and called Mr Tan and left him voicemails asking for the Respondent to file its evidence. Mr Tan did not reply to the Authority's emails or voicemails and he did not answer any of the Authority's phone calls.

[63] On 12 September 2022 Mr Tan emailed the Authority saying the Respondent's witness statements would be filed by the end of the day. This was the date on which the Applicant's evidence was due to be filed, so the Authority asked her to hold off filing her evidence until after she had reviewed the Respondent's witness statements.

[64] After 6pm on 12 September 2022, the Respondent filed its witness statements. This consisted of statements from five existing employees (including Mr Tan) and one former employee. On 19 September 2022 the Respondent filed a further witness statement for a

second former employee, meaning there were six witness statements filed in total. No explanation was given for this late filing.

[65] Although the Respondent had not requested a variation to the timetable and had not explained the delay or asked for an extension of time, the Authority accepted this late evidence.

Ongoing failure by Respondent to provide relevant documents

[66] On 13 September 2022 the Authority emailed the Respondent pointing out that it had still not provided relevant documents such as Ms Roy's current employment agreement, employment records, relevant emails, text messages, letters of resignation, file notes, messages, minutes, warnings or any other instructions it had issued to Ms Roy.

[67] The Authority noted that the Respondent had not provided any of the documents relating to the allegations/complaints or concerns it said it had about Ms Roy's conduct and only one resignation letter had been provided (from Ms Mou) and that had been attached to the Statement in Reply.

[68] The Authority referred to Mr Tan's claim that a large number of people had made a large number of complaints about Ms Roy, so the Respondent was directed to search for all relevant records and documents and to provide them or to confirm that no documentation had not been able to be located. That was to occur by 19 September 2022, but did not.

[69] The Respondent was also again directed to provide the Applicant with a copy of her personnel file. That was to occur by 16 September 2022, but did not.

[70] The Respondent failed to comply with the Authority's directions regarding the disclosure of relevant information to Ms Roy. The Respondent did not confirm that it had searched for all relevant information but had been unable to find any. It did not provide Ms Roy with any additional documentation and it did not provide her with a copy of her personnel file. Instead, Mr Tan emailed the Authority alleging that the Authority Member was biased.

Respondent failed to attend Investigation Meeting

[71] The Authority conducted an in person investigation meeting in Kerikeri on 5 October 2022. Ms Roy attended the investigation meeting in person and was questioned by the Authority about her claims, evidence and the statements the Respondent's witnesses had filed.

[72] The Authority delayed the start time of the investigation meeting by half an hour so the Authority Officer could contact Mr Tan to remind him of the investigation meeting start time. The Authority Officer's phone call and email to Mr Tan was not answered, so a voicemail was left reminding the Respondent that the investigation meeting was to have started at 10am, and asking if the Respondent and its witnesses would be attending, and if so when.

[73] No response was received to those communications on 5 October 2022. The investigation meeting therefore proceeded in the Respondent's absence, in accordance with the Authority's power under clause 12 of Schedule 2 of the Act.

[74] Ms Roy filed written submissions on 7 October 2022, so the Respondent had another opportunity to engage in the Authority's investigation process at that point. Although the Respondent was given time to file submissions it did not do so.

Issues

[75] The following issues are to be determined:

- (a) Assessment of credibility;
- (b) Did the Respondent keep, and produce on request, wage and time records for Ms Roy?
- (c) Did the Respondent keep, and produce on request, Ms Roy's holiday and leave records?
- (d) Was Ms Roy suspended on 25 April 2022?
- (e) If so, did her suspension unjustifiably disadvantage her?
- (f) If so, what if any remedies should she be awarded?
- (g) Was Ms Roy dismissed or did she resign?
- (h) If she was dismissed, was her dismissal justified?
- (i) If not, what if any remedies should Ms Roy be awarded?
- (j) Should any remedies Ms Roy may be awarded be reduced under s 124 of the Act, on the grounds of contribution?
- (k) Is Ms Roy owed wage arrears?
- (l) Should interest be awarded on any wage arrears Ms Roy is owed?

(m) What if any costs and disbursements should the successful party be awarded?

Assessment of credibility

[76] Ms Roy told the Authority that she had been told by one of the Respondent's existing employees that Mr Tan had drafted the witness statements for the Respondent's witnesses and that he had been pressuring witnesses to sign the statements he had written for them.

[77] Mr Anderson therefore expressed concern that Mr Tan may have been improperly influencing the evidence that the Respondent's witnesses had given (via witness statements) to the Authority. Mr Anderson suggested the Authority witness summonsed the Respondent's employee who had given Ms Roy that information, because that person did not want to voluntarily attend the Authority's investigation meeting to discuss what she knew about employees allegedly being pressured by Mr Tan.

[78] The Authority declined to issue a witness summons on the basis the information provided by the Respondent's employee appeared to be hearsay only. Mr Anderson did not make it clear that the person who had conveyed this information to Ms Roy had personal knowledge of it herself. Instead it sounded as if that information had been reported to her and she had simply passed what she had heard from others on to Ms Roy.

[79] The Authority therefore advised Mr Anderson that he could witness summons that witness if she had direct evidence that there had been improper pressure put on the Respondent's witnesses by Mr Tan.

[80] The Authority also stated that Mr Anderson would be able to cross-examine Mr Tan and the Respondent's witnesses about the preparation of their witness statement to determine to what extent it reflected their own evidence and whether or not they had been subjected to any improper pressure regarding the content of their witness statements.

[81] However, because the Respondent and its witnesses did not attend the investigation meeting those inquiries could not be made.

[82] Ms Roy gave evidence under affirmation. She answered questions from the Authority that tested her evidence. The Respondent's witnesses did not appear so none of them gave sworn or affirmed evidence. Because none of the Respondent's witness attended the investigation meeting they could not be questioned or cross-examined. That omission meant

that Ms Roy's evidence was considered to be more reliable because it was given under affirmation and had been tested by questioning.

[83] The Authority therefore preferred the direct verbal affirmed evidence that Ms Roy gave over the unsworn written statements provided by the Respondent's witnesses. That meant that where there were material conflicts in the evidence, the Authority has accepted Ms Roy's version of events, as that was the only affirmed (and tested) evidence it had available to it.

Did the Respondent keep, and produce upon request, wage and time records for Ms Roy?

[84] Section 130 of the Act requires every employer to keep wage and time records for each employee. This must contain the information that is set out in s 130(1) of the Act. Section 130(1A) of the Act requires a wage and time record to be in writing or in a form that allows the information in the record to be easily accessed and converted into written form.

[85] Section 130(2) of the Act requires the employer when requested to provide the employee with access to or a copy of their wage and time record that relates to the previous six years of their employment. Section 130(4) of the Act provides that a penalty may be imposed for a breach of an employer's obligations under s 130 of the Act.

[86] The one page screen shot the Respondent provided on 28 July 2022 was insufficient to constitute Ms Roy's full wage and time record. Ms Roy produced two payslips to the Authority; one for the week ending 17 April 2022 (her second to last week of employment) and the other ending 24 April 2022 (her last week of employment). These were the two pay slips provided by the Respondent on 28 July 2022.

[87] This information was insufficient to meet the requirements of the Act, so the Respondent failed to establish it had keep the required wage and time records for Ms Roy.

[88] The Authority directed the Respondent to provide Ms Roy with a copy of her wage and time records on 22 June 2022, 27 June 2022, during the case management conference on 21 July 2022, in the directions of the Authority dated 25 July 2022 and in emailed directions on 13 September 2022.

[89] None of these directions resulted in the Respondent providing the wage and time records for Ms Roy, as required by s 130 of the Act. It therefore failed to establish that it had produced Ms Roy's wage and time records upon request.

[90] The Authority finds the Respondent breached its obligations under s 130 of the Act because it failed to keep, and produce upon request, Ms Roy's wage and time records. The Authority did not have a penalty claim before it so there is no penalty issue to determine.

Did the Respondent keep, and produce upon request, holiday and leave records for Ms Roy?

[91] Section 81 of the Holidays Act 2000 (the HA03) requires an employer to keep holiday and leave records for each employee, which must be produced upon request, going back six years.

[92] The information that an employer is required to record in the employee's holiday and leave record is set out in s 81(2) of the HA03. Section 82 of the HA03 deals with a request for access to an employee's holiday and leave records.

[93] Section 82(2) of the HA03 requires the employer to comply "*as soon as practicable*" with the request for a copy of an employee's holiday and leave record.

[94] The Respondent was directed to provide Ms Roy's holiday and leave records on 22 June 2022, 27 June 2022, during the CMC held on 21 July 2022, in the directions of the Authority dated 25 July 2022, and in further directions emailed to the parties on 13 September 2022.

[95] The screenshot of one payroll page the Respondent provided the Authority on 28 July 2022 was insufficient to meet the requirements of s 81 of the HA03.

[96] The Authority finds that the Respondent failed to comply with its obligations under sections 81 and 82 of the HA03 to keep and produce upon request Ms Roy's holiday and leave records. There is no penalty claim before the Authority for those breaches.

Was Ms Roy suspended on 25 April 2022?

[97] Ms Roy was scheduled to work on Sunday 24 April 2022. She was sick that day so did not attend work. She reported to work as usual at about 11:50am on Monday 25 April 2022, for her shift that was due to start at 12pm that day.

[98] When she logged into the computer in the kitchen office, Ms Roy saw an email from Mr Tan to the kitchen staff saying that she was not permitted to return to the kitchen, and instead had to speak to Mr Tan.

[99] Ms Roy was ready, willing and able to start work as normal at 12pm. It was the email instruction from Mr Tan to the kitchen staff that prevented her from doing so. Ms Roy said that when she spoke to Mr Tan, he sent her home for three days while he decided what to do with her.

[100] Ms Roy wanted to work and did not want to go home. She only left work because Mr Tan insisted she “*go home.*”

[101] Although Mr Tan denied that he had suspended Ms Roy, the Authority has preferred Ms Roy’s account of what had occurred. The Respondent prevented Ms Roy from working, so the Respondent’s actions in sending Ms Roy home effectively suspended her without pay from her normal duties.

Did Ms Roy’s suspension unjustifiably disadvantage her?

[102] Ms Roy was unjustifiably disadvantaged in her employment because her suspension was not carried out in a procedurally fair manner and she was not paid while on suspension.

[103] Ms Roy was not given an opportunity to be heard on a proposed suspension. Although the Respondent was supposedly relying on a contractual suspension clause, Ms Roy was not provided with a signed copy of a current employment agreement, although the draft that she had been provided with on 22 December 2020 (which was only signed by her and not the Respondent) did contain a suspension clause.

[104] Clause 17.1 of the December 2020 individual employment agreement, that Ms Roy said she had signed, required the Respondent to provide her with “*written notice of the suspension*”. That did not occur. The Respondent therefore did not meet its contractual obligations regarding a contractual right to suspend Ms Roy.

[105] The manner in which the generalised and non-specific concerns/complaints were raised with Ms Roy on 25 April 2022 was also unfair to her.

[106] If what Mr Tan had said in his witness statement, and what the Respondent had put in its Statement in Reply, was correct then there had been multiple complaints and letters of resignation from all of the kitchen staff. If so then that was clearly relevant documentation that should have been disclosed to Ms Roy on 25 April 2022. That did not occur.

[107] Despite Ms Roy asking for specific details of the complaints against her, and the names of those who had complained, she was not given that information by Mr Tan on 25 April 2022. That omission was also a breach of good faith.

What if any remedies should Ms Roy be awarded for her unjustified disadvantage grievance?

[108] Ms Roy's suspension and dismissal were so closely connected that it would be artificial to award separate amounts of distress compensation for each. The Authority has decided to adopt a globalised approach to assessing one overall award of distress compensation for all of Ms Roy's successful personal grievance claims.

Was Ms Roy dismissed or did she resign?

[109] A dismissal is a sending away that occurs at the employer's initiative. A free and voluntary resignation is not a dismissal. Whether or not an employee has resigned or has been dismissed involves an intensely factual inquiry.

[110] In this case, Mr Tan made a number of derogatory comments to Ms Roy on 25 April 2022. He accused her being a lazy mentally unstable drug user. He told her that no one wanted to work with her, and all of the F&B staff would immediately resign if they had to work even one more hour with her.

[111] Mr Tan declined to provide Ms Roy with specific details of who had made what complaints, when, and what their specific concerns were. Mr Tan did not provide Ms Roy with any documents that were relevant to the broad and generalised complaints he was making.

[112] The Authority was satisfied that Ms Roy was constructively dismissed.

[113] Ms Roy's affirmed evidence was that she had not verbally resigned. Even if the Authority had accepted Mr Tan's unsworn and unaffirmed written statement (that was not able to be tested at the investigation meeting) that Ms Roy had verbally resigned on 25 April 2022, her resignation would have been a constructive dismissal.

[114] It was reasonably foreseeable that an employee who was on the receiving end of Mr Tan's attitude and adverse comments (that Ms Roy was a lazy mentally unstable drug user, who no-one wanted to work with and that everyone would resign immediately instead of

working even one more hour with her) would not feel able to continue working in the face of that so would likely resign.

[115] In such circumstances, the initiative for a verbal resignation (had it occurred) clearly came from the Respondent, because it was based on the unfair and inappropriate way Mr Tan had treated Ms Roy. Such a resignation would not have been a free, genuine or voluntary resignation. The lack of notice indicated that, as did the personal grievance that was raised on 28 April 2022.

[116] However, due to the credibility findings that have been made, the Authority accepted Ms Roy's evidence that she did not verbally resign on 25 April 2022. If Ms Roy had verbally resigned then Mr Tan could and should have raised the notice obligations with her at that time. His failure to do that undermined the Respondent's claim that Ms Roy genuinely resigned.

[117] The Authority finds that the Respondent constructively dismissed Ms Roy via the email that Mr Tan sent her on 30 April 2022.

[118] That email made it clear the Respondent considered the employment was at an end and that from that point onwards it would not be complying with its contractual obligation to provide Ms Roy with work. The initiative for the ending of Mr Roy's employment therefore came from the Respondent and not Ms Roy.

[119] The Respondent was not legally entitled to withhold Ms Roy's wages or final pay. There was no company property that she needed to return, so there was no need for the Respondent to have threatened to withhold her wages.

[120] The Authority finds that Ms Roy was dismissed.

Was Ms Roy's dismissal justified?

[121] Justification is to be objectively assessed in accordance with the statutory justification test in s 103A(2) of the Act.

[122] The Respondent was unable to justify its dismissal of Ms Roy because “*its actions, and how it acted*” were not what a fair and reasonable employer could have done in all the circumstances at the time she was dismissed.³

[123] The Respondent failed to comply with its good faith obligations in s 4(1A) of the Act or with any of the four minimum procedural fairness tests in s 103(3) of the Act. These failings were serious and fundamentally unfair to Ms Roy.

[124] Ms Roy’s personal grievance claim for unjustified dismissal therefore succeeded.

What if any remedies should Ms Roy be awarded for her unjustified dismissal?

Mitigation of loss

[125] Ms Roy did not have an alternative job to go to when she was dismissed on 30 April 2022. The Authority was satisfied that Ms Roy appropriately mitigated her loss. She actively sought alternative work, but she found it difficult to obtain suitable employment.

[126] Ms Roy explained to the Authority the steps she had taken to obtain alternative work and she provided documents supporting the fact that she had actively sought alternative employment.

Lost wages – unjustified disadvantage grievance (suspension)

[127] Ms Roy is entitled to be paid the wages she lost during the period when she was suspended without pay. She reported to work on 25 April 2022 and was ready and willing and would have worked on 25, 26, 27 and 28 April 2022, had she not been unjustifiably suspended.

[128] Ms Roy’s uncontested evidence was that she would have earned \$1,287.88 gross from 25-30 April 2022 had she not been suspended, plus 8% holiday pay on that amount of \$103.03 gross. The Respondent was also required to pay the KiwiSaver CEC of \$41.73 being 3% of \$1,390.91 being the wage arrears plus holiday pay).

[129] There was no evidence from the Respondent that contradicted Ms Roy’s figures, despite it knowing about them since 12 September 2022. Ms Roy’s statement made clear the amounts she was claiming and how they had been calculated.

³ As per the s 103A(2) justification test in the Act,

[130] Accordingly, the Respondent is ordered to pay Ms Roy \$1,432.64 gross wage arrears during her unpaid suspension (being \$1,287.88 unpaid wages plus \$103.03 holiday pay plus \$41.73 KiwiSaver CEC) for the period 25 to 30 April 2022.

[131] The KiwiSaver CEC of \$41.73 must be deducted from the total gross amount of \$1,432.64 and remitted to IRD for the benefit of Ms Roy's KiwiSaver account along with a further \$41.73 as Ms Roy's individual KiwiSaver contribution.

Lost remuneration – unjustified dismissal grievance

[132] Ms Roy sought three months' lost remuneration.

[133] The Respondent is ordered to pay Ms Roy \$9,693.50 gross under s 128(2) of the Act to reimburse her for the remuneration she lost as a result of her unjustified dismissal.

[134] Ms Roy was entitled to eight percent holiday pay on the amount of lost remuneration she has been awarded. Accordingly, the Respondent is ordered to pay Ms Roy \$775.48 holiday pay associated with her award of loss remuneration for the unjustified dismissal grievance.

[135] The total amount payable is therefore \$10,468.98 gross (being \$9,693.50 lost remuneration + \$775.48 being 8% holiday pay on that amount). Ms Roy's KiwiSaver entitlements are addressed below.

KiwiSaver

[136] Ms Roy is a member of KiwiSaver. The Respondent is therefore ordered to add three percent on to the total gross amount of lost remuneration and holiday pay that Ms Roy has been awarded for her unjustified dismissal as the employer's KiwiSaver CEC and remit that (along with PAYE and any other deductions such as the ACC earner levy and Ms Roy's individual KiwiSaver contribution) to the Inland Revenue Department (IRD) in the normal way.

[137] The Respondent is also ordered to deduct and remit to IRD three percent of the total amount that Ms Roy has been awarded as lost remuneration and holiday pay, as her individual KiwiSaver contribution. All KiwiSaver deductions are to be remitted to the IRD for the benefit of Ms Roy's KiwiSaver account.

[138] The total amount of KiwiSaver deductions (employee contribution and employer's compulsory employer contribution (CEC)) are \$314.07 each.

[139] Accordingly, the total amount of lost remuneration that Ms Roy has been awarded to compensate her for her unjustified dismissal is \$10,783.05 consisting of lost remuneration of \$9,693.50 plus holiday pay of \$775.48 plus the CEC of \$314.07.

[140] From the total gross amount of \$10,783.05 Ms Roy's individual KiwiSaver contribution of \$314.07 must be deducted and remitted to IRD along with her PAYE.

Distress compensation

[141] Ms Roy gave considerable detailed evidence (in her statement and verbally during the investigation meeting) about the hurt, humiliation and distress that she suffered as a result of her unjustified suspension and unjustified dismissal.

[142] Ms Roy explained to the Authority the shock and disbelief she had when she saw the email that Mr Tan had sent to the kitchen staff saying that Ms Roy was not to work in the kitchen and instead had to go and meet with Mr Tan. Ms Roy explained how Mr Tan did not listen to her when she was trying to get her side across when she was speaking to him in the office.

[143] He spoke to her in an overbearing and condescending way. Ms Roy became overwhelmed to the point that she was crying in the meeting and explained how she was experiencing severe feelings of anxiety. Ms Roy explained how the email had made her physically sick, as if she needed to vomit. She said she could not think clearly and the email had "*hit her in the guts*".

[144] Ms Roy explained how she found it stressful being at home when she was otherwise expecting to have been at work. She felt sad, upset and lost while at home. She experienced feelings of disbelief and had considerable worry and anxiety about her life. She suffered financially because she was unable to pay her bills. She did not know what would be happening to her next and she described her suspension and dismissal as a "*sudden shock*".

[145] Ms Roy experienced ongoing disruption to her sleep. Others noticed that she was unhappy even though she had tried to put a brave face on things.

[146] Ms Roy explained how Mr Tan also refused to communicate with Mr Anderson, and she said at that point she realised that she had lost her job entirely. Ms Roy felt she had a good reputation in the community for making really good food, so she felt a lot of embarrassment to

no longer be working for the Respondent. Ms Roy said that she was worried about what people would think of her suddenly not working there.

[147] Ms Roy said she felt awful and would repeatedly find herself ruminating over what she had apparently done wrong. It was hard for her to understand because she was not given any specific allegations or information or even documentation to support what Mr Tan had said about her, both in the meeting and in the emails he had sent on 24 and 30 April 2022.

[148] Ms Roy explained how difficult it was having severely reduced income. She felt as if she was a burden on her parents and she is only now just in a position where she is financially able to start paying her parents back for the money they loaned her when she was without income.

[149] Ms Roy described how she had to try and sell things because she was so short of money. This included personal effects, vintage furniture she had been doing up and even her own clothes and other items.

[150] Ms Roy described feeling isolated, stressed and worried. She didn't feel she had anyone she could talk to about this. She found the whole experience emotionally challenging, very distressing and upsetting. It has also put a big strain on her relationship with her parents.

[151] The Respondent is ordered to pay Ms Roy on globalised award of distress compensation of \$24,000 under section 123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her unjustified disadvantage (ie suspension) and unjustified dismissal personal grievance claims.

Should Ms Roy's remedies be reduced under s 124 of the Act, on the grounds of contribution?

[152] Having determined that Ms Roy has two successful personal grievance claims, s 124 of the Act required the Authority to consider the extent to which Ms Roy's actions contributed towards the situation that gave rise to her personal grievances, and to reduce remedies accordingly.

[153] Contribution has to be proven on the balance of probabilities.

[154] The Respondent has failed to provide evidence that reached that standard of proof to establish it was more likely than not that Ms Roy had engaged in blameworthy conduct.

[155] The allegations about that which were put forward in the Statement in Reply and in witness statements that were filed by Mr Tan have not been tested, because none of the Respondent's witnesses attended the investigation meeting.

[156] With the exception of Ms Mou's resignation letter, no documents were provided to support the Respondent's serious allegations about Ms Roy.

[157] Ms Roy (under affirmation) was questioned about the content of the Respondent's witness statements and she denied the allegations made against her. That evidence was not contested because the respondent elected not to attend the investigation meeting.

[158] Accordingly, the Respondent has not established that Ms Roy has engaged in blameworthy conduct that has been proven on the balance of probabilities. Her remedies are therefore not to be reduced on the grounds of contribution.

Is Ms Roy owed wage arrears?

[159] The failure to pay Ms Roy wages while she was suspended has already been addressed. Ms Roy's last pay was recorded in a payslip dated 27 April 2022 that was for the pay period that ended on 24 April 2022.

[160] Ms Roy did not receive any pay after that. Her last pay was for the hours she had worked. It did not include any of her final pay entitlements such as holiday pay or alternative day holiday entitlements.

Unlawful deduction from final pay

[161] The screen shot of a final pay slip provided by the Respondent on 28 July 2022 showed that it had deducted \$4,757.08 from Ms Roy's final pay for her alleged failure to provide the required amount of contractual notice.

[162] Clause 15.4 of the 22 December 2020 employment agreement which Ms Roy said she had signed (but of which only an unsigned version has been provided to the Authority) provided that the Respondent could deduct a day's salary for each day that the employee did not work if they had left without giving the requisite notice.

[163] However, that clause did not apply because Ms Roy did not resign, so she was not required to give contractual notice. Ms Roy was constructively dismissed by email on 30 April 2022.

Breach of the Wages Protection Act 1983

[164] Even if there had been a valid authorisation to deduct money from her final pay, the Respondent was still required to have consulted with Ms Roy about the deduction before it was made. That did not occur. There was no consultation with Ms Roy about the amount to be deducted, the timing of the deduction, or the basis of the deduction.

[165] Instead, the Respondent acted unilaterally to withhold money from Ms Roy's final pay. That action breached s 4 of the Wages Protection Act 1983 (the WPA) that requires an employer to pay employees their full wages without deduction.

[166] The Respondent's unlawful deduction from Ms Roy's wages put her in a very compromised financial position. Not only did she lose her job and therefore income but she also was deprived of her contractual and statutory entitlements because she was not paid her annual holiday or alternate day holiday entitlements when her employment ended.

[167] Section 5 of the WPA enables employees to give written consent to their employer to make lawful deductions from their wages. Such consent may be given in an employment agreement. Consent may also be withdrawn at any time.

[168] The Respondent did not provide the Applicant (or the Authority) with a signed employment agreement establishing that it had the required consent from Ms Roy to deduct \$4,757.08 from her final pay.

[169] Mr Anderson had also put the Respondent on notice on 28 April 2022 that any previous consent Ms Roy may have given to deductions being made from her wages was rescinded. He expressly advised Mr Tan that Ms Roy did not consent to any deductions being made from her wages.

[170] The Respondent was therefore clearly on notice that it had no legal right to make any deductions from Ms Roy's final pay. The Respondent deliberately ignored that advice and improperly and unlawfully withheld Ms Roy's wages.

[171] The Respondent is ordered to pay Ms Roy \$4,757.08 to reimburse her for the unlawful deduction it made from her final pay.

Other wage arrears

[172] Ms Roy's written submissions set out her wage arrears claim.⁴ These claims were not disputed by the Respondent, which was on notice about the following calculations. These were based on the payroll information in the "MYOB Payroll 2022.1" screen shot the Respondent provided on 28 July 2022.

[173] The Authority finds Ms Roy was owed \$5,706.64 wage arrears consisting of:

- (a) \$1,875.50 annual leave due (60.50 hours x \$31 per hour);
- (b) \$1,790.04 holiday pay due as per final pay screen shot;⁵
- (c) \$109.97 KiwiSaver CEC on the above amounts (being \$3,665.54 consisting of \$1,875.50 + \$1,790.04 x 3%);⁶
- (d) \$1,736 outstanding alternative day holidays due (56 hours x \$31 per hour);
- (e) \$138.88 being 8% holiday pay on alternative day holiday entitlement due;
- (f) \$56.25 KiwiSaver CEC on the alternative day holiday entitlement being 3% of \$1,874.88 (being \$1,736 + \$138.88).

[174] The unlawful deduction of \$4,757.08 that the Respondent is reimburse to Ms Roy is included in the \$5,706.64 she is owed, so it is not to be paid in addition to the reimbursement of the unlawful deduction. That means the actual final amount to be paid has to be adjusted to reflect that.

[175] Accordingly, the Respondent owes Ms Roy wage arrears of \$949.56 gross (being \$5,706.64 - \$4,757.08) after the unlawful deduction had been repaid to her.

⁴ See paragraphs [8]-[10].

⁵ The screen shot of the final pay had different amounts recorded for "ANHL Annual leave" and "HP Holiday Pay" so that has been reflected in the Authority's orders.

⁶ The Authority noted this amount differs from the \$66.11 recorded in the final pay screen shot the Respondent filed on 28 July 2022.

Should interest be awarded on Ms Roy's wage arrears?

[176] Ms Roy has been deprived of wages, and therefore the use of money that was her money, that she should have been paid when her employment ended. The Respondent has had the benefit of the use of Ms Roy's money, so it is appropriate for it to pay Ms Roy interest on her wage arrears to reflect that.

[177] The Respondent is ordered to pay Ms Roy interest under clause 11 of the Schedule 2 of the Act, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016 on the amount of \$7,139.28 (being \$5,706.64 final pay wage arrears plus \$1,432.64 being unpaid wages during her suspension) from 1 May 2022 until that full amount has been repaid.

[178] Interest is to be calculated using the Civil Debt Interest Calculator on the Ministry of Justice website.

What if any costs and disbursements should Ms Roy be awarded?

[179] Ms Roy as the successful party is entitled to a contribution towards her actual legal costs.

[180] Mr Anderson asked that costs be reserved, so he could provide cost submissions. That was considered an appropriate way to proceed as it provided the Respondent with an opportunity to be heard on costs, once the outcome of the claims was known.

[181] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The current notional daily tariff is \$4,500. That will be pro-rated to reflect the two and a half hours that the Authority spent investigating this matter. The notional starting point for assessing costs is therefore \$1,875.

[182] The notional starting point will then be adjusted to reflect the particular circumstances of this case. The parties are therefore invited to file costs submissions that specifically identify whether the notional starting tariff should be adjusted, and if so by how much and on what grounds.

[183] Ms Roy has until 18 January 2023 to file any cost submissions and the Respondent has until 31 January 2023 to file any cost submissions in reply. No submissions will be accepted outside this timetable without the prior leave of the Authority.

[184] Proof of actual costs incurred and receipts for disbursements that are claimed must be also provided along with the costs submissions.

Summary of outcome

[185] The Authority summarises the outcome of this matter as follows:

- (a) The Respondent breached ss 130 and 132 of the Act;
- (b) The Respondent breached ss 81 and 83 of the HAO3;
- (c) The Respondent unjustifiably disadvantaged Ms Roy when it suspended her without pay from 25 to 30 April 2022;
- (d) The Respondent is ordered to pay Ms Roy wage arrears related to her unjustified disadvantage of \$1,432.64 for her unpaid suspension from 25 to 30 April 2022 (being \$1,287.88 unpaid wages + \$103.03 being 8% holiday pay + \$41.73 KiwiSaver CEC);
- (e) The Respondent unjustifiably constructively dismissed Ms Roy from her employment on 30 April 2022;
- (f) The Respondent is ordered to pay Ms Roy remedies for her unjustified dismissal of:
 - (i) \$10,783.05 lost remuneration under s 128(2) of the Act, being \$9,693.50 lost remuneration + \$775.48 being 8% holiday pay on that amount + \$314.07 being 3% KiwiSaver CEC;
 - (ii) The \$314.07 CEC above is to be remitted to the IRD for the benefit of Ms Roy's KiwiSaver account;
 - (iii) \$314.07 as Ms Roy's individual 3% KiwiSaver contribution is to be deducted from the lost remuneration she has been awarded, and remitted to IRD for the benefit of her KiwiSaver account;
 - (iv) After the individual and employer KiwiSaver contributions have been remitted to IRD, that will leave \$10,154.91 gross that the Respondent must pay Ms Roy directly;

- (v) \$24,000 distress compensation, without deduction, under s123(1)(c)(i) of the Act;
- (vi) \$4,757.08 to repay the unlawful deduction made from Ms Roy's final pay;
- (vii) \$949.56 wage arrears (in addition to the repayment of the unlawful deduction) for entitlements that were not paid to Ms Roy upon termination of her employment;
- (g) All of the legally required deductions from the wages paid to Ms Roy (such as PAYE, ACC levy, student loan deductions, KiwiSaver contributions and the like) must be deducted by the Respondent and remitted to IRD in the normal way;
- (h) Interest is to be paid on the amount of \$7,139.28 (being \$5,706.64 wage arrears owing in final pay plus \$1,432.64 wages arrears while suspended) to run from 1 May 2022 until that amount has been repaid in full. Interest is to be calculated using the Civil Debt Interest Calculator on the Ministry of Justice website.
- (i) Costs and disbursements will be determined based on the exchange of costs memoranda which is to occur in accordance with the timetable set in this determination.

Rachel Larmer
Member of the Employment Relations Authority