

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 537
3199279

BETWEEN	ALICE COOPER Applicant
AND	SWEET GREENS LIMITED TRADING AS SPROUT CAFÉ Respondent

Member of Authority:	Nicola Craig
Representatives:	The applicant in person No appearance for the respondent
Investigation Meeting:	15 June 2023 at Whangārei
Submissions received:	At the investigation meeting from the applicant Nothing received from the respondent
Date of determination:	18 September 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] From January 2020 to July 2022 Alice Cooper was a café assistant at the Sprout Café in Whangārei. The café was operated by Sweet Greens Limited (Sweet Greens or the company).

[2] Emily MacFarlane is the sole director and shareholder of Sweet Greens.

[3] Ms Cooper claims that she was unfairly treated when working at the café, had her hours reduced and finally was unfairly dismissed. During the time it was involved in the proceeding, Sweet Greens disputed Ms Cooper's claims.

The Authority's investigation

[4] Both Ms Cooper and Sweet Greens were initially represented by advocates in the Authority. However, that situation did not last.

[5] At a case management conference held on 24 January 2023 to make arrangements for an investigation meeting, Sweet Greens' representative advised that she would be withdrawing from representation but would participate in the conference as a matter of courtesy. She advised that the Sprout Café was to cease operating in the next few days and did not have money to fund representation or pay remedies. There was no intention to go down the formal liquidation route but the company did not intend to further participate in the Authority's proceeding. The advocate confirmed her withdrawal in writing a little later.

[6] Ms Cooper's advocacy service provided her witness statement to the Authority as timetabled but advised the Authority shortly before the investigation meeting that it no longer represented her.

[7] Ms Cooper attended the investigation meeting in Whangārei on 15 June 2023. Despite waiting for some time before commencing the meeting, there was no appearance for Sweet Greens. Ms Cooper wished to proceed with the investigation meeting, expressing her view that she had not been treated in the way she been at Sprout Café in decades of hospitality work. She was the only witness, answering questions under oath from the Authority.

[8] The Authority later checked with Ms Cooper whether she wished to claim costs in relation to this matter but no comment was received.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[10] The issues for investigation are:

- (i) Was Ms Cooper disadvantaged by unjustifiable action of Sweet Greens regarding:

- (a) lack of appropriate response to her bullying complaint and not providing a safe and healthy workplace; and
- (b) unilateral reduction in hours of work and resulting pay?
- (ii) Was Ms Cooper unjustifiably dismissed by Sweet Greens?
- (iii) If a grievance is established what, if any, remedies should Ms Cooper receive?
- (iv) Alternatively, to the disadvantage grievance regarding hours of work and pay, does Sweet Greens owe Ms Cooper arrears of wages and other money?
- (v) Did Sweet Greens breach its obligations and, if so, should a penalty be imposed relating to:
 - (a) its duty of good faith to Ms Cooper under s 4 of the Act;
 - (b) the requirement under s 130 of the Act to keep or provide wages and time records; and
 - (c) the requirement to pay wages under s 4 of the Wages Protection Act 1983?
- (vi) Should either party have to contribute to the other's costs?

The parties' backgrounds

[11] Ms Cooper had extensive hospitality experience having worked for over 30 years in New Zealand and Australia, including as a chef and managing restaurants. She was a mature woman used to working hard.

[12] Ms Cooper was working as a cleaner at a Whangārei gym when she became friends with the previous owner of the café next door. Ms Cooper began helping out at the café. The owner sold the business to Ms MacFarlane who at a time changed the café's name to Sprout.

[13] Ms MacFarlane had other work and so was not usually at the café. Her husband had also worked in a different industry but spent of periods of time running the café.

Ms Cooper's initial work hours

[14] The employment agreement offered by Sweet Greens included the earlier trading name of the café name but was provided by Ms MacFarlane. It identified Ms Cooper's hours of work as Tuesday to Thursday from 6.30am to 2pm, at an initial rate of \$18 gross an hour.

Ms Cooper's sense of hurtful treatment

[15] Initially Ms Cooper felt she had a good friendly relationship with Ms MacFarlane and her husband. Overall Ms Cooper got very good feedback from them about her work. She was keen to work hard, opening the shop early if it looked like there was the chance of a sale. She also tried to squeeze in extra tasks in the café when she had time.

[16] After a while another employee left. Ms Cooper's sense was that Ms MacFarlane's husband (who I refer to as the manager) had treated that employee harshly then when they left, Ms Cooper was next on the list. She saw the manager as berating and belittling her, sometimes in front of others. She saw his behaviour as nagging and micromanaging, with extensive task lists left on a white board but additional frequent surveillance of her activities both in person and by phone calls if he was not on site. For example, he would stand over her and tell her how to cook things she cooked satisfactorily every day or how to do the dishes.

[17] Ms Cooper accepted that on occasions she made mistakes, as staff and the manager also did, but she would adjust when concerns were raised with her. There were no written warnings given.

[18] Ms Cooper was yelled at in front of customers and staff by the manager. Once he yelled outside the café, within hearing distance of others, "do you want a verbal warning?". None was given. The manager later came inside and said he was joking and took the comment back.

[19] On another occasion Ms Cooper broke down in tears after being yelled at and told to go home for not making coffee properly. She was called "bloody useless". Generally, it was most unusual for her to cry in front of others but here she felt so affected by the manager's treatment of her.

[20] Whilst Ms Cooper was used to high pressure hospitality roles, she had not experienced anything like this before. She felt like she was treated as a child.

[21] Other staff mentioned to Ms Cooper that they made mistakes sometimes but were not subjected to the same harsh treatment as they saw Ms Cooper receiving. For example, on occasions they forgot to write some supplies needed on the whiteboard, the manager would say something like “don’t worry about it”.

[22] Ms Cooper raised her concerns with Ms MacFarlane in around mid to late 2021. Another staff member also expressed her view to Ms MacFarlane that her husband was picking on Ms Cooper.

[23] The stressful work situation was causing Ms Cooper to go home with headaches. This led to her seeing her doctor on 17 March 2022, shortly after she was yelled at.

[24] The doctor’s notes recorded Ms Cooper reporting she liked the work but was stressed as being bullied, had called a meeting and told the manager that this had to stop. This resulted in the behaviour getting better for a week but then reverting (to the unfair treatment). She described to the doctor changing hours so she was not working with the manager, which made her feel better. Ms Cooper referred to herself as being nagged at all the time, for example about not making a salad correctly despite having followed the recipe provided.

[25] Ms Cooper let the doctor know that her asthma had been playing up but was better at that point with less stress. The doctor ordered an increase in her blood pressure medication and gave her a letter to take to Ms MacFarlane and her husband.

Sweet Greens’ concerns

[26] Although not willing to attend the investigation meeting I had material from Sweet Greens about its perspective on what happened with Ms Cooper, particularly the dismissal letter, response to the personal grievance letter and statement in reply. These were put to her at the investigation meeting. I have considered whether the way she was treated was simply the actions of a reasonable employer dealing with performance issues.

[27] I had some difficulty with Sweet Greens’ material. Surprising the grievance letter and statement in reply of problem contained reference to a dozen or two time

dated events in the absence of any supporting contemporaneous documents or notes. Most of the dates are not specified in the dismissal letter which is the earliest documentation I had available.

[28] The dismissal letter refers three meetings between Ms Cooper and either Ms MacFarlane or her husband culminating in a final warning, supposedly on 21 April 2022. The grievance response goes further, referring to having had more than four formal meetings as part of the disciplinary process.

[29] What were described as “behavioural issues” were summarised although the first was referred to as “theft” and the second involved a similar allegation.

[30] The first concerned soup. From Ms Cooper’s recall, one Friday afternoon she and another staff member were tidying up. Ms MacFarlane and her husband were out of town for the weekend so would not come in and sort out any leftovers as they usually did. There was a small bowl of soup left. The other staff members said she would take it home for her mother. Ms Cooper did not object as she thought in the circumstances of the owners not being able to use the soup, they would not mind.

[31] Instead the owners were annoyed and had a discussion with the other staff member about theft of soup and told her she was dismissed.

[32] An issue also arose about eggs which a customer provided. Ms Cooper knew the customer from her previous work at the gym. The customer brought reject (small) eggs in as a gift for Ms Cooper. Sweet Greens brought eggs from the same supplier. Ms Cooper saw this as a situation where Ms MacFarlane and her husband were confused about which eggs were taken home by staff.

[33] Sweet Greens say that they gave verbal warnings for these incidents but it did not give written warnings because it asked Ms Cooper if she wanted a written or verbal warning and she said she did not want written warnings. Ms Cooper denies being given proper warnings. The scenario described by Sweet Greens of offering a choice of warning type is unusual. On the evidence before me I cannot conclude that warnings were given. In any event on the evidence before me it is hard to see that a fair and reasonable employer who had investigated properly would have seen a warning as justified.

[34] Other matters raised were things such as cutting protein bars to the wrong size or forgetting to write an item needing to be purchased up on the board.

[35] Sweet Greens' position in justifying its actions could have been considerably stronger had it attended the investigation meeting and provided any other documentation it had.

[36] Instead I am left with detailed later descriptions without any contemporaneous documents or other evidence along with Ms Cooper's evidence in opposition, which was credible. I am unable to conclude that the treatment Ms Cooper received was simply Sweet Greens appropriately following up with her about performance or conduct concerns.

Inadequate response by Sweet Greens to Ms Cooper's concerns

[37] Ms Cooper raised sincere concerns with Ms MacFarlane about the way she was being treated. She did so in a reasonable way and was entitled to a proper response.

[38] Ms MacFarlane replied that she would sort it out. She later reported back that her husband was going to stop such behaviour. Little else is known about what Ms MacFarlane did, if anything. It is not evident that satisfactory steps were taken by Sweet Greens. Ms Cooper enjoyed a brief reprieve due to him staying away from the store for a couple of weeks with customers having good experiences. However, on return the situation continued. Ms Cooper was not contacted later by Ms MacFarlane to check how things were.

[39] I conclude that Sweet Greens failed to take adequate steps to deal with Ms Cooper's legitimate concerns and when the behaviour continued, failed to provide a safe and healthy working environment.

Hours of work

[40] Sweet Greens initially employed Ms Cooper to work Tuesday to Thursdays from 6.30am to 2pm, as set out in their employment agreement.

[41] Ms Cooper's hours at the café increased at times when business picked up. She acknowledged to the Authority that there was no agreement as such that she would work full time. Ms Cooper saw herself as getting to a point of working Monday to Friday approximately 5.30am to 3pm. However, her hours of work were variable as other staff

left and started with no formal variation to her employment agreement. At one point Ms Cooper had some time off for health reasons and a new staff member was brought in to cover.

[42] Ms Cooper clearly on occasions did more days with longer hours than the employment agreement specified. She tried to be flexible to fit in with work requirements. At times she would open and close the café, for example if the owners were away. Occasionally she would leave around ten minutes before the official closing time if things were quiet and there was another staff member to close up. At times her hours had quite a high degree of variability between different weeks.

[43] In its response to the grievance letter Sweet Greens stated that the base number of hours remained more or less the same with changes occurring by agreement between Ms MacFarlane and Ms Cooper.

[44] With the changeable nature of the arrangements, considering the timesheets and Ms Cooper's evidence, I was not able to establish that a sufficiently clear arrangement was made to give her a contractual right to longer hours. I am not satisfied that there was an unjustified action on Sweet Greens' part regarding hours of work and so no grievance is established.

[45] Ms Cooper therefore also cannot establish arrears of wages. She was paid for the hours she worked. There is no basis for a penalty in this regard.

Dismissal

[46] On 21 July 2022 Ms Cooper arrived to open up, finding notes all around the café about what to do. Around 6.30 am the manager called her. There was an issue about whether she had carried out the cooking of chicken and vegetables in the order he prescribed. He hung up.

[47] A few minutes later the manager called back, saying he had spoken to his wife and they had agreed to fire Ms Cooper on the spot. He told her to "shut the shop and go home. You're fired".

[48] Ms Cooper obeyed, in shock. About 8am she texted the manager:

... I'm gutted you just fired me for not turning the vegetables on and not following instructions. I've rung WINZ and they need a termination letter. Can you please get this to me today.

[49] A couple of hours later Ms Cooper messaged again:

... this is crazy! I'm at work doing my thing and you call me to ask if I've got the veggies on and the chickens ordered. I tell you I got the chickens in the oven and I just ne[xt] to cut up the veggies. Everything was going fine. I didn't get it how you then said that I wasn't follow your instructions. I was doing exactly what you told me to do. I was confused but nonetheless kept working. Then you give me another call about half an hour later and all you say is that I'm fired! Shut up the shop and go home! How is this fair?

[50] Ms Cooper heard nothing for several days. Then on 26 July Ms MacFarlane messaged to say they had got her messages. Further Ms MacFarlane would write up Ms Cooper's termination letter and do her final pay on the normal pay run.

[51] In terms of pay, on 21 July 2022 Ms Cooper was paid for the period until 20 July for what appears to be what she was owed. Then on 28 July she was paid for one hour in the 21 to 27 July period. I am presuming this is for an hour of the time she worked on 21 July before being sent away. No letter was received.

[52] The employment agreement required the parties to give three weeks' notice in writing of termination of employment although dismissal without notice was permitted for serious misconduct.

[53] About two and a half weeks after her dismissal, on 8 August 2022. Sweet Greens sent a dismissal letter to Ms Cooper. This letter purported over several pages to set out dates and times for various events and disciplinary action allegedly taken against Ms Cooper. Ms Cooper accepts that some discussions occurred but denies that she was given warnings or that there was any basis for such action by Sweet Greens.

[54] Ms Cooper reports herself and family members later being subject to unpleasant and abusive behaviour from Ms MacFarlane's husband. This included yelling at Ms Cooper in an RSA, making disparaging comments about Ms Cooper to her son at his workplace and seemingly following her son-in-law in a vehicle. Some of this may relate to the parties living in a relatively small area but it appears the husband went out of his way to make or continue contact. Ms Cooper reports an element of trying to persuade her and her family not to pursue this case, which is disturbing.

Dismissal grievance established

[55] The test for determining the justifiability of a dismissal is whether it objectively comes within the range of actions which a fair and reasonable employer could have taken in all the circumstances.¹

[56] This assessment includes examining whether, have regards to available resources, the employer sufficiently investigated, raised its concerns with the employee, gave her a reasonable opportunity to respond and took the response into account.²

[57] The detailed dismissal letter coming so long after the actual termination appears to be a belated attempt to justify the dismissal announced very much in haste. In the absence of contemporaneous documents and witnesses for Sweet Greens, with Ms Cooper's evidence being credible, I cannot be satisfied that the letter accurately describes events as they occurred during Ms Cooper's employment. Her actions would not substantively have justified dismissal.

[58] No notice was paid by Sweet Greens, making this a summary dismissal. That would not be justifiable where dismissal was for performance concerns.

[59] The process was also significantly inadequate. Ms Cooper was dismissed over the phone without any notice of a disciplinary process being activated. She was only given a minimal chance to be heard, before Ms Macfarlane's husband hung up. The lengthy disciplinary letter was not sent for a long time after the dismissal and can be seen as an ex post facto attempt to justify a spontaneous decision taken without fair process. Sweet Greens did not act as a fair and reasonable employer could have done.

[60] Ms Cooper was unjustifiably dismissed by Sweet Greens.

Remedies awarded

[61] Ms Cooper seeks \$7,500 compensation for each of her disadvantage grievances, although only one was successful.

[62] For the dismissal Ms Cooper seeks lost wages and \$25,000 compensation for humiliation, loss of dignity and injury to feelings.

¹ The Act, s 103A(1) and (2).

² The Act, s 103A(3).

[63] Ms Cooper was clearly deeply affected by her treatment at Sweet Greens and the abrupt manner of her dismissal. This impacted her physical and mental health. She was prescribed medication to help with sleeping problems.

[64] As regards lost wages I recognise that Ms Cooper was not in a position initially to seek other work. She should be awarded three months' lost wages, as recognised by s 128(2) of the Act, subject to any contribution element. In the absence of more substantial medical evidence I do not exercise my discretion to award lost wages beyond that point. Ms Cooper recognises that she chose to have this matter completed before attempting to find other work. That was her choice but impacts on her lost wages remedy.

[65] I have calculated That Ms Cooper worked 380.5 hours in the 13 weeks prior to her dismissal, an average of 29.27 hours a week. To determine 13 weeks' lost wages I multiply 380.5 hours by the \$21.20 hourly rate to get \$8,066.60 gross, subject to any deduction for contribution.

[66] I have considered making separate compensation orders for Sweet Greens' failure to deal properly with the unfair treatment and the dismissal. But on reflection the effects of both grievances seemed intertwined for Ms Cooper.

[67] Ms Cooper felt crushed by the way she was treated when at the café. Her health was impacted with medical support being sought at least twice. Ms Cooper describes her treatment in the workplace as making her head numb, her hands shaky and giving her a sense that she did not want to be where she was. She felt like she was in a dark place, feeling nothing but worthless. On the evidence before the Authority Ms Cooper was singled out for unfair treatment in a way other staff at the same time were not. She was humiliated at being yelled at in front of others.

[68] Despite its difficulties, Ms Cooper's job was important to her both in terms of her sense of self-worth and her finances. She understandably prided herself as being a hard worker who went the extra mile for her employer. The abrupt manner of her dismissal over the phone was distressing for Ms Cooper. She felt helpless and could not understand why such an event would lead to her dismissal. She waited almost a week for any response and then a further week and a half for a dismissal letter when she had advised that her WINZ application depended on it.

[69] Ms Cooper has been undergoing counselling and mirimiri for her physical and spiritual wellbeing for an extended period as a result of events with Sweet Greens.

[70] Covering both the failure to deal adequately with the treatment to Ms Cooper during her employment and the dismissal, \$25,000 is a fair assessment of compensation for humiliation, loss of dignity and injury to feelings.

[71] Although Ms Cooper acknowledges making the occasional mistake as others did, on the evidence before me I do not assess this reaching the standard of being blameworthy. I thus make no deduction for contribution from the remedies.³

Good faith already captured

[72] Sweet Greens' actions around the dismissal were not active and constructive in establishing a productive employment relationship with Ms Cooper.⁴ It did not act in good faith. Having captured these actions as part of the grievances I do not consider it necessary to award a penalty regarding them.

Records inadequate

[73] There was a delay in the provision of records to Ms Cooper's then representative requested wages and time records from Sweet Greens in August 2022. No response was received. The company's representative arranged for the provision in January 2023 of a full set of the timesheets as part of her last involvement with the Authority.

[74] Ms Cooper was provided with payslips when at Sweet Greens although not always on a consistent basis. The payslips are fairly comprehensive. Most of the requirements in s 130(1) of the Act are met by the payslips. However, three elements are not met as the payslips do not set out:

- (i) Ms Cooper's postal address as required by s 130(1)(c);
- (ii) whether she was on an individual or collective employment agreement (s 130(1)(e)); and
- (iii) the number of hours worked each day in a pay period (s130(1)(g)).

³ The Act, s 124.

⁴ The Act, s 4(1A)(b).

[75] Therefore on the information available to me, Sweet Greens breached s 130 of the Act by failing to keep adequate time records.

[76] There is no specific form for wages and time records, other than they must be in writing or kept in a form or manner that allows the information to be easily accessed and converted into written form.⁵

[77] Sweet Greens breached its records' obligations. I consider this is a situation where a penalty should be awarded. The recording of the number of hours worked each day can be important for several purposes.

[78] In assessing the appropriate penalty, the requirements of s 133 of the Act and relevant caselaw has been considered - *Borsboom (Labour Inspector) v Preet PVT Limited and Anor, Nicholson v Ford and Labour Inspector v Daleson Investment Limited*.⁶

[79] For a company the maximum penalty is \$20,000. The breach is an on-going one which appears to be a matter of negligence. I take into account that many elements of the wages and time records requirements were met. I have no information to suggest that Sweet Greens has been involved in other breaches. In terms of Sweet Greens' financial position, the company informed the Authority that it had ceased trading but in the absence of further information such as accounts, I do not make a deduction in this regard.

[80] A penalty of \$1,000 is appropriate with half to go to Ms Cooper.

Costs

[81] In her statement of problem Ms Cooper sought costs. She was represented until just prior to the investigation meeting. However, I do not have before me any information about what costs of representation she incurred, if any. Leave is granted for her to return to the Authority if she wishes to make a claim for costs.

[82] In the meantime Ms Cooper should be reimbursed by Sweet Greens for the Authority's filing fee of \$71.56.

⁵ The Act, s 130(1A).

⁶ *Borsboom (Labour Inspector) v Preet PVT Limited and Anor* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

Orders

[83] Within 28 days of the date of this determination Sweet Greens Ltd is to pay the following:

- (i) To Alice Cooper:
 - (a) for her grievances, \$8,066.60 gross for lost wages and \$25,000 as compensation for humiliation, loss of dignity and injury to feelings; and
 - (b) \$71.56 for the Authority's filing fees.
- (ii) To the Authority a penalty of \$1,000, with \$500 of the money received to be paid into a Crown account and \$500 forwarded to Ms Cooper.

Nicola Craig

Member of the Employment Relations Authority