

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 5
3208899

BETWEEN CHERY AKABA MARR LINO
Applicant

AND RESTAURANT BRANDS
LIMITED
First Respondent

Member of Authority: Eleanor Robinson

Representatives: Kalesita Lino, representing the Applicant
Laura Briffett, counsel for the Respondent

Investigation Meeting: 6 and 7 December 2023 in Auckland

Submissions and/or further
evidence: 7 December 2022 from the Applicant and
from the Respondent

Determination: 10 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Chery Lino, claims that she was unjustifiably disadvantaged by being bullied and harassed during her employment as a Team Member with the Respondent, Restaurant Brands Limited (RBL).

[2] Ms Lino also claims that RBL did not carry out a proper investigation into her concerns.

[3] RBL denies that Ms Lino was bullied or harassed during her employment and claims that it carried out a full and fair investigation into her concerns.

The Authority's investigation

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Chery Lino and Mr Famaile Lino, her father.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses, Mr Tauseef Ali, Restaurant Manager at KFC Greenlane, Mr Ravi Sharma, Auckland KFC Area Manager, and Mr Martin Hill, RBL Human Resources.

[6] Oral and written submissions were received from Ms Kalesita Lino for the Applicant and Ms Briffett for the Respondent. In particular, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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.

Issues

[8] The issue requiring investigation is whether or not Ms Lino was unjustifiably disadvantaged in her employment with RBL by:

- bullying and harassment;
- RBL failing to investigate her concerns properly.

Background

RBL Operation in New Zealand

[9] RBL holds the New Zealand franchise for KFC for the Master Franchisor and operates the New Zealand outlets of KFC, Pizza Hut and Carl's Jr. in New Zealand.

[10] The Master Franchisor has restaurant operation compliance check requirements (ROCC) and each restaurant has a Balanced Scorecard result (BSC). Each restaurant gets a BSC score every quarter. If a restaurant consecutively fails three ROCCs then it can be temporarily shut down and all the employees have to undergo training on ROCC requirements.

[11] One of the ROCC requirements is that all employees wear a name badge. As a result of this requirement, RBL's uniform policy requires all staff to wear name badges at all times.

[12] The Master Franchisor's ROCC team members conduct random audits of RBL's KFC restaurants. Mr Ali, Restaurant Manager at KFC Greenlane said that if team members are found not bearing a name badge that can result in a 'violation' of the Master Franchisor's rules. He said he had experienced being marked down for team members not wearing name badges at one of the previous stores he managed.

[13] Although the RBL Uniform Policy stipulates that 'correct' name badges are worn, the name badges are ordered in batches and it is not unusual for a new staff member not to have their own named badge ready for them to wear on commencing employment.

[14] As a result it has been a common practice in KFC restaurants over a number of years for a new employee to wear an available name badge until their own named badge arrives. These can be in the name of an absent or former employee, or a 'Trainee' named badge.

[15] Ms Lino commenced employment as a Team Member at the KFC Greenlane restaurant in Auckland on 22 September 2022.

[16] Mr Ali has been the Restaurant Manager at the KFC Greenlane restaurant since August 2022. There are two Assistant Restaurant Managers (Assistant RMs) and approximately 86 Team Members. Mr Ali reported to Mr Sharma, Area Manager, for restaurants including 9 KFC restaurants in Central and East Auckland.

[17] Ms Lino worked two fixed shifts a week of 9.5 hours per week, from 4.00 p.m. to 10.00 p.m. on a Thursday and from 4.00 p.m. to 8.00 p.m. on a Saturday each week. These hours were guaranteed.

[18] Ms Lino also worked 'cover shifts' outside of the fixed shifts from time to time. Ms Lino agreed to work these on an 'as and when required' basis when other employees were absent or shifts were vacant. Cover shifts did not form part of Ms Lino's guaranteed contractual hours and she had no entitlement to be rostered for cover shifts or to any income associated with cover shifts unless she worked one.

[19] Prior to the commencement of her employment Ms Lino was provided with an individual employment agreement which she signed electronically and returned. In relation to her working hours the Employment Agreement stated:

4. HOURS OF WORK & ROSTER

4.1 Hours of Work

The Employee's ordinary days and hours of work, shall be in accordance with this clause,...

The Employee's agreed days and hours of work (including unpaid meal breaks) will be:

Thursday: 4:00 PM - 10:00 PM

Saturday: 4:00 PM - 8:00 PM

4.5 Cover Shifts

Where an existing Employee is unable to work their contractual shifts due to leave/absence or there is a current open shift vacancy, a 'cover shift' requirement may be created. Such cover shifts shall be offered to existing Employees, either fixed hours of work Employees or Casual Employees, at the Employer's discretion. The Employee leading the relevant shift shall contact Employees with the appropriate qualification to identify willingness to work. The Employee is under no obligation to pick up, or work, any such cover shifts.

Such shifts are not permanent shifts unless a variation to the Employee's fixed shifts is agreed and confirmed in writing by the Employer and Employee. Except for specified circumstances (including but not limited to Parental Leave, ACC, extended sick or annual leave or extended Leave Without Pay or in active recruitment for a period not less than 2 months), existing Employees will be offered such shifts as fixed shifts after four months of consistent cover provided the Employee meets the qualifications requirements.

[20] The Employment Agreement incorporated a requirement that employees familiarise themselves with the company policies. These included a Uniform Policy and a Bullying and Harassment Policy which Ms Lino confirmed she had received.

[21] Mr Ali said Ms Lino was a good employee, willing to work in both the front of the restaurant and in the drive-through area and she was available to work cover shifts which assisted him in ensuring the restaurant was fully staffed.

[22] Mr Ali said he was not aware of any problems in the relationship he had with Ms Lino prior to the events in November 2022.

Employee Recognition

[23] Mr Ali said all Regional Managers (RM), Area Managers and in restaurant managers know the restaurant employees by name, name badges are not therefore necessary for them to identify employees.

[24] "Make the Colonel Proud" is an employee recognition scheme for regions or areas. Mr Ali said each month he would send Mr Sharma the name of the employee he wanted to nominate and Mr Sharma would choose one person from all the nominations for the restaurants in that region to be named. There is no financial or other benefit made to the recipient.

[25] KFC also have a Guest Experience Survey (GES) whereby customers can leave feedback on their customer experience on an online survey. In return for their feedback the customer receives a food and drink order when they spend \$5. As part of the survey they can add comments on their server.

[26] Mr Ali said that provided the employee logs into their till correctly, the correct name will show on the receipt to customers i.e., provided Ms Lino logged in to the till in her name, the customer would know the name of their server.

[27] Ms Lino's evidence was that often the RM or the Assistant RMs would sign into the till, so the employee's name was not the shown name on the till receipt.

[28] Mr Ali said that even when Ms Lino was wearing an incorrectly named badge, some of her GES comments provided very positive feedback about her, much more than any other employee. Confirmation of customer feedback comment was provided to the Authority confirming Mr Ali's evidence.

Ms Lino's name badge events

[29] Mr Ali said as a result of his experiences with the ROCC audit requirements, he would ask Team members to wear either a 'Trainee' badge or a spare named badge if their own badge had not arrived. Mr Sharma confirmed that this was in accordance with normal practice in other KFC and associated RBL franchise restaurants.

[30] Mr Ali said he ordered name badges in batches from a central warehouse. He believed he had ordered the name badge for Ms Lino as part of a batch on or about the time she commenced employment, however when he checked subsequently, he had not in fact sent the email.

(i) First occasion

[31] When Ms Lino commenced work on 22 September 2022 her own name badge was not available that day and Mr Ali asked her to wear another employee's name badge which she did.

[32] On that first occasion, Ms Lino said that she had asked Mr Ali if a name badge had been ordered for her, he confirmed one had been, and when she checked, he also confirmed that he had the correct spelling of her name.

[33] Ms Lino said she had also told him that she did not like wearing a badge with another name on it, and however he had not "been focussed" on what she was saying.

(ii) *Second occasion*

[34] On the second occasion, Mr Ali had noticed Ms Lino was not wearing a name badge and fetched one from the office to her to wear. On that occasion she said she had not said anything because she was afraid of Mr Ali.

(iii) *Third occasion*

[35] On the third occasion in November 2022, Ms Lino said she arrived at work and greeted Mr Ali who asked her to take a name badge and to wear it. She had been concerned about what happened if a customer wanted to complete a GES to provide feedback on their experience, mentioning her by name. Another employee advised her to write her name on a piece of paper and stick it over the other name, which she did.

[36] Later that shift she said Mr Ali had noticed what she had done. He had made no objection but asked her to remove the handwritten sticker from the name badge if a member of the ROCC team came into the restaurant. Ms Lino she agreed to do that.

(iv) *Fourth occasion*

[37] On 28 November 2022 Ms Lino wore a name badge with another person's name on it. Ms Lino said she was embarrassed and upset when a customer queried her ethnicity because of the name on the badge being Indian.

[38] Ms Lino's parents were waiting in the queue behind the customer to place an order and overheard the customer's comment. When they reached the front of the queue Mr Lino said they saw Ms Lino's name badge and realised why the customer had made the comment. Mr Lino said he told Ms Lino to remove the name badge and throw it in the rubbish bin.

[39] After the incident Ms Lino said she was able to exchange the name badge for the 'Trainee' badge which another new employee had been wearing. She had no objection to wearing a Trainee named badge, and finished her shift.

[40] She had not told Mr Ali about the incident with the customer, the comment about her ethnicity, or how it had made her feel.

[41] Ms Lino said customers often commented on her ethnicity because she is an islander and sometimes she was wearing a name badge with an Indian name on it. She found this embarrassing and upsetting. However when questioned she confirmed she had not told Mr Ali about any these incidents.

[42] Ms Lino said when she returned home, her parents questioned her about the name badge she had been wearing and she told them she had not wanted to do it, but Mr Ai had insisted on it.

29 November 2022

[43] The following day, 29 November 2022, Mr Ali received a text message from Ms Lino's father stating he was disappointed to see Ms Lino wearing someone else's name badge, and asking him to sort it out. Mr Ali responded: "It's already on order from the store. It's a delay from the warehouse."

[44] Mr Lino sent another text in reply stating that it appeared employees were being forced to wear badges with another person's name on them and went on to add: "Bullying in the workplace is not tolerate, fear to wear it meaning bullying is exist in the kfc Greenlane".

[45] Until that point, Mr Ali said that, whilst being aware that Ms Lino had not particularly liked wearing a name badge with another person's name on it, he had not been aware that she felt so strongly about the issue. It was a usual practice in KFC restaurants when employees did not have their own name badge, and no other employee had ever raised an objection to doing so with him.

[46] In particular, Ms Lino had not told him she had been receiving awkward questions from customers, about her ethnicity, or that she was feeling stressed and anxious about having to wear an incorrectly named badge.

[47] Mr Ali said he received a subsequent text message from Ms Lino informing him that she would not be working the cover shift she had agreed to work that day because: "You upset my dad".

[48] Mr Ali replied by asking if her father was working or her, and stating that he would like Ms Lino to do her fixed shifts. Ms Lino responded: "My dad right, you bullying me."

[49] Mr Ali responded that she could raise a complaint about him, and added: "Your dad doesn't work for me so I don't have to listen to what he says". Ms Lino responded that she had proof of his [Mr Ali's] bullying of other employees and added that her dad was upset because Mr Ali told her she had to wear the incorrectly named badge.

[50] Mr Ali asked if Ms Lino would like to have Mr Sharma or another manager's name so she could raise her complaint about him, to which she responded: 'tauseef [Mr Ali] personal grievance is the first step'.

[51] Ms Lino continued to ask why Mr Ali had changed the roster when she had said only that she would not work the agreed cover shift that day, 29 November 2022, not the other two cover shifts she had agreed to work, adding: "don't black mailing me that is not good for you".

[52] Mr Ali said he found cover for the two other cover shifts Ms Lino had agreed to work which were scheduled to be on 30 November and 4 December 2022. This was because he was concerned she would refuse to work those cover shifts given that her refusal to work the cover shift on 29 November 2022 was without a good reason. Not having the cover shifts filled would leave the restaurant not fully staffed.

[53] Ms Lino and Mr Ali exchanged further text messages about this decision:

TA: Like I said before do your fixed shifts please, I can't find staffs last minute when you say you can't come to your shift

CL: I just asked for today, why taking me off the roster tomorrow and Sunday??
I don't feel comfortable coming to work you bullying me.

TA: Because I can, I don't wana run around and look for staffs if you do the same thing tmrw and say your not coming work because you dad is upset so please stick to your fixed shift
Its fine I will speak to my manager and take advise from him and let you know what you can do about your shifts ...

CL: You don't get what I am asking you. I already roster for Wednesday and Sunday apart from my fix shift and I asked you only for today and you take my name off the roster why? I want you to answer me.
You need to reinstate my roster for tomorrow Wednesday 30 and Sunday 4th as I have just for today I won't make it to work but you took me off the roster without good reason.

TA: Sorry I already found someone to cover those shifts

CL: I want to know what is your reason for taking me off the roster tomorrow and Sunday.
This is clearly you bullying me.

[54] The text message exchange ended by Mr Ali asking Ms Lino for the reason she was not at work that day, to which she responded: "I answer it for you in my personal grievance".

30 November 2022 Complaint

[55] Ms Lino raised a complaint on 30 November 2022 by sending an email to Mr Ali, copied to Mr Ravi Sharma, Area Manager. In the email Ms Lino alleged that Mr Ali had bullied

her in relation to the requirement that she wear a name badge, and claimed he was misusing his power in relation to the rostering of shifts.

[56] Later that same day, Mr Sharma said he telephoned Ms Lino with the intention of checking on her well-being, and assuring her that she would not have to wear a name badge with someone else's name on it.

[57] When Ms Lino answered her telephone, Mr Sharma introduced himself as the Area Manager and asked if he could speak to her about her complaint.

[58] Ms Lino said "talk to my Dad" and handed the telephone to Mr Lino. Mr Sharma said Mr Lino told him he could not speak to Ms Lino and he would file a complaint.

[59] As a result Mr Sharma said he called the HR department for advice and it was decided that he should try to talk to Ms Lino in person when she was next on shift at the restaurant.

[60] He also called Mr Ali for an explanation. Mr Ali told him he had asked Ms Lino to wear a name badge to adhere to ROCC expected standards. This sounded to Mr Sharma to be the normal manner of proceeding when no name badge with the team member's name on it was available, but he nonetheless decided to tell Mr Ali to ensure no one was expected to wear an incorrectly named badge in the future.

[61] Later that evening, Mr Sharma said he emailed Ms Lino to formally acknowledge her complaint, and advise her that he was investigating it.

2 December 2022

[62] On 2 December 2022 Mr Sharma paid a routine restaurant visit to the Greenlane KFC. He wanted to check with Mr Ali whether or not Ms Lino had attended work and that his direction concerning the name badges was being followed. He was accompanied by the RBL Operations Director.

[63] On arrival he realised that Ms Lino was working and thought it would be a good opportunity for him and the Operations Director to check how she was feeling, show that the management team was concerned, apologise and assure her she did not have to wear an incorrectly named badge.

[64] Ms Lino's older brother also worked at the restaurant and Mr Sharma said he thought Ms Lino might feel more comfortable speaking to him and the Operations Director if her brother was present.

[65] Mr Sharma said he asked Ms Lino's brother to go upstairs in the restaurant to a more private area to speak but he refused, and said Ms Lino would talk to Mr Sharma on Monday.

[66] At that time Mr Sharma said he did not know about a meeting on the Monday.

[67] The Operations Director went to take a call and Mr Sharma said he was speaking to Ms Lino's brother about his shifts when Mr Lino came into the restaurant and said: "you don't talk to my kids". Mr Sharma said he replied that he was having a normal conversation with a staff member.

[68] Mr Sharma said he felt threatened by Mr Lino whose manner was aggressive with a raised voice. He said Mr Lino was moving closer to him, and he tried to calm him down. Ms Lino left her workplace behind the restaurant counter and joined them. Mr Sharma said Mr Lino told him to leave, and that they would see him on Monday.

[69] Mr Sharma said he urgently set up a meeting for Monday 5 December 2022 at RBL's head office and asked Mr Ali and Mr Hill, HR Business Partner, to attend it with him.

5 December 2022 Meeting

[70] Ms Lino and her parents attended the meeting on 5 December 2022 with Mr Sharma, Mr Martin Hill, and Mr Ali.

[71] During the meeting Ms Lino said she had been given the opportunity to talk about what had occurred and she explained that Mr Ali had told her four times to wear another person's badge. This had made her feel pressurised to wear a badge with another person's name on it, which adversely affected her sense of pride and her reputation.

[72] She said someone had suggested she put a sticker over the name on the badge with her own name on it. Mr Ali had offered her a trainee badge on that occasion but she had turned that down.

[73] Mr Sharma said he explained that Mr Ali had asked her to wear an incorrectly named badge to align with the ROCC expectations and he was satisfied Mr Ali's behaviour had not been bullying.

[74] Mr Sharma said he and Mr Ali both apologised to Ms Lino about how she felt about the name badges. He explained that employees had no entitlement to cover shifts as set out in the Employment Agreement, cover shifts were arranged over What's App by the manager according to a shift and Team Member's availability.

[75] Mr Sharma concluded by asking Ms Lino what she wanted to happen now her name badge was on the way.

[76] Ms Lino said she thought RBL was covering matters up and said that she wanted Mr Ali removed as manager and be made to leave because he was being a bully.

[77] Mr Sharma said Ms Lino's parents did not want to listen to his explanation, they insisted what had occurred was bullying and that Mr Ali needed to be dismissed.

[78] Mr Sharma said he also explained why he tried to involve Ms Lino's brother when he spoke to her to try to make her feel more comfortable when talking to him about her concern, but Mr and Mrs Lino were angry and accused him of trying to cover up what had occurred.

[79] Mr Hill said Mr Sharma kept trying to explain the process for ordering name badges and that the practice of asking team members to wear the badges of other people was common, because of the ROCC requirements. However now that RBL realised how important her name was to her, Ms Lino would not be expected to wear a badge with a different name.

[80] Mr Hill said throughout the meeting Mr and Mrs Lino were aggressive and his impression was that they did not want to engage in discussions. He said they talked over Mr Sharma and would not tolerate him making observations, comments or clarifications.

[81] Mr Hill said both Mr Ali and Mr Sharma apologised but these apologies were not accepted. He said Mr and Mrs Lino did not appear interested in hearing Mr Sharma's explanations. They just kept reiterating allegations of bullying, it was made clear that their aim was to end Mr Ali's employment and they had no interest in resolving the matter any other way.

[82] During the meeting Ms Lino said that she felt bullied by Mr Ali because she had said she would not work one cover shift but he had taken two other cover shifts off her. She referred to a 'misuse of power' by Mr Ali and that she believed other employees experienced this.

[83] Following the meeting Mr Hill said he and Mr Sharma discussed what had occurred. It was agreed that a discussion should be held with Mr Ali about using professional language in

any text message exchange with employees. It was appropriate there should be a coaching meeting with Mr Ali to ensure this type of issue did not arise in future.

[84] Mr Sharma said he and Mr Hill discussed Ms Lino's complaint. They were satisfied what had occurred with Ms Lino was not bullying under the definition in the RBL Bullying and Harassment Policy.

[85] They considered it was reasonable behaviour given that Mr Ali had not been aware that Ms Lino had strongly objected to wearing the name badge, and they also had not realised the cultural significance of her name to her until the meeting. In particular they considered:

- a) Wearing a "professionally prepared, legible and in good condition" name badge is a requirement of the uniform policy and ROCC;
- b) The ideal is that employees should wear their own name badge but wearing badges with another person's name on it is not unusual in restaurants when name badges are forgotten or waiting for a replacement;
- c) Mr Ali was aware in October 2022 that Ms Lino did not like wearing a badge with another name on it, however he had not been aware that this was so important to her or was more than a mild concern because she had not told him that;
- d) When Ms Lino suggested that she handwrite her name on a badge, Mr Ali had agreed to this provided she remove the handwritten sticker should a ROCC auditor come into the restaurant;
- e) Mr Ali's failure to order the name badges was a genuine mistake and there had been a delay;
- f) Mr Sharma's experience of Mr Ali was that he was a good manager; and
- g) How Mr Ali had acted did not amount to bullying as defined in RBL's Bullying and Harassment policy.

Communications 10 December 2022

[86] On 10 December 2022 Mr Sharma emailed Ms Lino and set out her concerns as he understood them as being:

1. You were asked or required to wear a name badge with a name that wasn't your name, and that Seef didn't take your objections to this seriously.
2. The nature of the communications from Seef on 29 November 2022.
3. You believe that you have been denied the opportunity to take on extra shifts over and above your fixed shifts.
4. You believe that Seef unfairly favours some employees over others when allocating shifts.

[87] Mr Sharma again apologised and stated that he understood from the meeting on 5 December 2022 how important her name was to Ms Lino. Mr Sharma assured Ms Lino that (i) her name badge was on order; (ii) she would not have to wear another person's badge; and (iii) that Mr Ali would not allow the situation to affect other employees in the future.

[88] Mr Sharma also informed Ms Lino that he continued to investigate the other matters she had raised and would take appropriate action once he completed the investigation. He also assured her that she would be offered extra shifts in accordance with the employment agreement.

[89] On 10 January 2023 Ms Lino lodged the first Statement of Problem with the Authority. After receiving it RBL conducted an investigation into Ms Lino's claim that Mr Ali was favouring other employees when allocating cover shifts.

[90] The investigation compared Ms Lino's cover shifts with two other employees who had a similar number of fixed shifts hours and had started on or about the same time as Ms Lino. It found that in the period from 22 September 2022 until 10 December 2022, Ms Lino had completed 24 cover shifts whereas the other two employees had completed 16 and 13 cover shifts respectively.

[91] RBL found there was no basis for Ms Lino's claim of favouritism.

[92] The parties attended mediation on 6 March 2023, but this did not resolve the issues and Ms Lino subsequently resigned.

Was Ms Lino unjustifiably disadvantaged and/or bullied in her employment with RBL?

[93] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has

since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[94] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[95] Ms Lino must therefore establish that there was an unjustifiable act by RBL which adversely affected her terms and conditions of employment.

Was Ms Lino unjustifiably disadvantaged in her employment with RBL?

[96] Ms Lino claims that being requested to wear a name badge with another employee's name on it disadvantaged her, and Mr Ali requiring that she did so amounted to bullying. Further that once she raised her complaint with Mr Ali, he bullied her by removing cover shifts from her.

[97] The RBL 'Policy on Prevention and Response to Workplace Bullying and Harassment' defines bullying as:

- ... **repeated** and **unreasonable behaviour**, directed towards a worker, or a group of workers, that can lead to physical or psychological harm.
- **Repeated behaviour** is persistent, and can involve a range of actions over time.
- **Unreasonable behaviour** means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, intimidating or threatening a person,. As well as harassment, discrimination or violence.

Wearing of the name badge requirement

[98] In order for the requirement to wear a name badge which is in a different name to the employee's own name to constitute a disadvantage in Ms Lino's employment, it must be unjustifiable and have an adverse effect on her terms and conditions of employment. To amount to bullying it must be both repeated and unreasonable.

[99] The RBL name badge policy was formulated to comply with the Master Franchisor ROCC requirements. These requirements were extensive and adherence to them was strictly monitored by the ROCC audit team which conducted random visits to the RBL restaurants. A violation of the Master Franchisor's rules could result in a temporary closure of the restaurant and I accept that compliance was a matter of significance for RBL.

[100] The ROCC standards required that "Name badges must be worn". This requirement was reflected in the RBL Uniform Policy which stipulated that Crew Members were issued with name badges.

[101] I find that the requirement to wear a name badge was not an unjustifiable action by RBL.

[102] Ms Lino claimed that not wearing a badge with her own name on it caused her a disadvantage in that she would not be nominated for a "Make the Colonel Proud" nomination, or be commented on favourably in the GES surveys.

[103] I find no evidence that Ms Lino's terms and conditions of employment were adversely affected by the requirement to wear a differently named badge. This is on the basis that:

- a) Ms Lino was known by name by Mr Ali, and his evidence was she was also known by name to the Assistant RMs, so there was no impediment to her being nominated for the 'Make the Colonel Proud' award;
- b) Ms Lino's concern that it might affect her GES system results is not borne out by the fact that she received higher than normal levels of customer feedback which identified her by name, even when wearing the wrong named badge;
- c) Ms Lino also agreed when questioned at the Investigation Meeting that the temporary arrangement of wearing a paper name cover on the badge helped solve her concern in respect of the GES reporting..

[104] Ms Lino claimed that she was bullied by Mr Ali.

[105] RBL had a Bullying and Harassment policy in place. That policy sets out that bullying is repeated and unreasonable.

[106] I have found that the requirement that name badges were worn was not unreasonable. Nor was Ms Lino the only employee expected to comply with the uniform policy and wear a name badge not in her own name.

[107] The evidence of RBL, and confirmed by Ms Lino and her parents, was that Mr Ali required all the employees in the restaurant to wear a name badge in order to comply with the RBL and ROCC requirements. Ms Lino was not singled out in the requirement.

[108] Moreover having new employees who did not have their own name badge wear another named badge was not unique to Mr Ali and KFC Greenlane. Prior to Ms Lino's complaint, it applied throughout all RBL restaurants and had done so for some years before Ms Lino made her complaint.

[109] Ms Lino's evidence was that there were four occasions when Mr Ali required her to wear another name badge:

1. on the first occasion she informed Mr Ali that she did not like to wear another named badge, but "he had not been focused". The inference from that is that he had not registered her comment.
2. On the second occasion Ms Lino had not told Mr Ali she did not want to wear the name badge;
3. On the third occasion Mr Ali had made no objection to Ms Lino applying a paper sticker with her own name over the other name on the badge, asking only that she remove it if the ROCC audit team entered the restaurant; and
4. On the fourth occasion on 28 November 2022, Ms Lino had completed her shift and had not spoken to Mr Ali about the incident or her embarrassment at the customer who questioned her ethnicity.

[110] Moreover Ms Lino's evidence was that she had never told Mr Ali about similar customer comments about her ethnicity when wearing an incorrectly named badge.

[111] In those circumstances I find credible Mr Ali's evidence that he was not aware that Ms Lino had a more than mild concern over being required to wear a differently named badge, and that he was only made aware of the serious extent of her concern through the text message exchange on 29 November 2022.

[112] Whilst Ms Lino's evidence was that she felt bullied by, and was afraid of, Mr Ali, this is not borne out by her email correspondence with him prior to this incident on 29 November 2022 which indicates a good and comfortable working relationship.

[113] In particular the email exchange with Mr Ali on 28 November 2022, the day the incident with the customer occurred, indicates a positive relationship at that stage in Ms Lino's employment. On 28 November 2022 Ms Lino emailed Mr Ali in some detail reporting her brother and another employee for not working diligently on the shift she also was working. Mr Ali responded:

TA: Thank you Chery I will action this with them. DW won't tell them who told me.

CL: Okay.

TA: Do u want a shift tonight? 5 -cls.

CL: yes please

TA: Thanks I will confirm u soon

CL: okay

Any update yet? And if possible am I also able to ger a shift tmrw?

TA: ya u can work today thanks and will put u for tmrw

[114] I do not find any evidence of bullying indicated prior to, or in this text message exchange, or that Ms Lino was afraid of Mr Ali as she claimed. On the contrary, Ms Lino is relaxed and confident about raising a complaint with him about other employees (one being her brother) and Mr Ali responds by assuring her he will deal with her concern, and significantly he will not inform the employees she has reported them.

Cover shifts

[115] Ms Lino claims that she was disadvantaged and bullied by Mr Ali removing two cover shifts she had agreed to work on 30 November and 4 December 2022, and by exerting a 'misuse of power' in the allocation of cover shifts, in particular after she lodged her Statement of Problem on 10 January 2023.

[116] In relation to the cover shifts on 30 November and 4 December 2022, Ms Lino had no entitlement to cover shifts: these were shifts that could be offered by RBL, and she was under no obligation to accept and work them.

[117] Provided Ms Lino was retaining her fixed shifts, I find there was no disadvantage to her and no adverse effect on her employment by not being offered a cover shift, or by refusing to work a cover shift she had agreed to work.

[118] Ms Lino had been offered and accepted a cover shift on 29 November 2022. At short notice, she advised Mr Ali that she would not be working it as agreed. There was no reason given for her refusal to work it other than “You upset my dad”. In that situation Mr Ali had to find another employee willing to take on and to work the cover shift.

[119] In the situation in which Ms Lino had at short notice refused to work the agreed cover shift on 29 November 2022, I find it reasonable that Mr Ali considered he could have no confidence that Ms Lino would work the two other agreed cover shifts.

[120] This is in the context that Ms Lino’s reason for not working the cover shift was not a contractually recognised reason, or the absenteeism of a nature in which an end date was usually determinable as is the case with annual or sick leave absenteeism.

[121] Cover shifts are intended to fill shift shortfalls, and I find Mr Ali was trying to ensure he had adequate restaurant cover in the situation in which Ms Lino’s last minute refusal to work one of the three cover shifts she had agreed to work, left uncertainty over her reliability in regard to the other two cover shifts.

[122] I find Mr Ali’s action in finding cover for those shifts was not unreasonable in the circumstances and not bullying.

[123] RBL carried out an investigation following Ms Lino raising the issue of favouritism and ‘misuse of power’ by Mr Ali in regard to the allocation of cover shifts.

[124] The report showed that Ms Lino had worked significantly more cover shifts in the period 22 September 2022 to 15 January 2023 than two other employees who commenced employment at a similar date to her.

[125] Mr Ali ‘s evidence was that he had no knowledge of the Statement of Problem being filed. Text messages provided to the Authority establish that Mr Ali offered Ms Lino cover shifts in December 2022 and January 2023. Ms Lino worked three of the offered shifts in January and February 2023, and she did not reply to a number of the text messages offering her cover shifts.

[126] I find no evidence of either disadvantage or bullying in regard to the allocation of cover shifts.

Adequacy of the investigation into Ms Lino's concerns

[127] Ms Lino claims that RBL failed to investigate her concerns properly and that this constituted bullying.

[128] Once Mr Sharma became aware that Ms Lino had raised a complaint about the name badge wearing requirement, he took immediate steps to address Ms Lino's concern.

[129] The Bullying and Harassment policy sets out a range of options for addressing the concerns raised by the employee.

[130] Mr Sharma initially tried Option 1 of the policy which was an informal approach, by trying to discuss with Ms Lino her complaint.

[131] On 30 November 2022 when Mr Sharma received a copy of Ms Lino's complaint, he immediately tried to speak to her to check on her wellbeing, to advise her she no longer had to wear an incorrectly named badge, and to apologise to her.

[132] Ms Lino refused to speak to Mr Sharma, handing the phone to Mr Lino who refused to discuss matters and told Mr Sharma he would be filing a complaint.

[133] Having failed to discuss the situation with Ms Lino, Mr Sharma emailed her after that call assuring her that he was investigating her complaint and that her name badge was on order.

[134] Mr Sharma sought advice from HR following the call with Ms Lino and Mr Lino, and spoke to Mr Ali for information on what had occurred.

[135] When Mr Sharma tried to speak to Ms Lino a second time on 2 December 2022, Mr Lino became involved on that occasion also, refusing to allow Mr Sharma to speak to Ms Lino other than at a formal meeting.

[136] When Option 1 proved impossible due to the intervention of Mr Lino, Mr Sharma took advice from Mr Hill, and decided to follow the more formal Option 2 of the policy, by arranging a meeting between Ms Lino as the complainant and Mr Ali as the subject of the complaint.

[137] At the 5 December 2022 meeting both Mr Ali and Mr Sharma apologised to Ms Lino, assured her she was not required to wear an incorrectly named badge anymore, and that her

name badge was on order. RBL also ceased the requirement for employees to wear incorrectly named badges in all its restaurants.

[138] Mr Sharma advised that he had investigated what had occurred and was satisfied that Mr Ali asking Ms Lino to wear an incorrectly named badge was not bullying, providing his reasons for this.

[139] Ms Lino did not accept the outcome by RBL because it did not result in the dismissal of Mr Ali.

[140] I find no disadvantage in the investigation. Ms Lino's complaint had been responded to immediately with the wearing of an incorrectly named badge ceased immediately.

[141] Ms Lino had a full opportunity to voice her concerns at the meeting on 5 December 2022 and Mr Sharma addressed them. The fact that the outcome was not that desired by Ms Lino does not negate the adequacy of the investigation carried out by RBL.

[142] Following the meeting, Mr Sharma emailed Ms Lino on 10 December 2022. Ms Lino did not respond to the email but returned to the workplace and worked both fixed and cover shifts until her resignation.

[143] RBL carried out further investigation into the concern raised by Ms Lino at the meeting that Mr Ali had exercised a 'misuse of power' in regard to the allocation of cover shifts. That investigation found no bullying by Mr Ali had occurred.

[144] I consider that Ms Lino should have received a copy of the report into cover shift allocation completed by Mr Hill, but I find this omission was minor, did not result in any unfairness to Ms Lino and, and does not distract from the adequacy of the investigation.¹

Conclusion

[145] I determine that Ms Lino was not unjustifiably disadvantaged and/or bullied in her employment with RBL.

¹ Employment Relations Act 2000 s 103A(5)

Costs

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

[147] If they are not able to do so and an Authority determination on costs is needed RBL 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 Mr Lino 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.

[148] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[149] 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.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].