

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 185
3377743

BETWEEN CANDICE DAVIES
 Applicant

AND SPACE NEXT LIMITED
 Respondent

Member of Authority: William Fussey

Representatives: Adam Norton, advocate for the Applicant
 Xinxin Pan, for Respondent

Investigation Meeting: 25 February 2026 in Christchurch

Submissions received: 4 March 2026 from the Applicant
 10 March 2026 from the Respondent

Determination: 27 March 2026

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1] In January 2024, Candice Davies commenced employment as a Chef with Space Next Limited t/a Daydream Café (“the Café”). Ms Davies alleges that throughout her employment, the Director of the Café, Xinxin Pan, did not provide her the autonomy she was promised, raised her voice at her, undermined her, made fun of her weight, caused her anxiety by constantly changing her mind about various business-related matters, and failed to resolve issues.

[2] In October 2024, as a result of Ms Davies’ unhappiness with Ms Pan’s updated menus and following Ms Pan’s comments relating to Ms Davies’ husband’s alleged involvement with

the employment relationship of another employee, Ms Davies resigned with immediate effect. Ms Davies alleges constructive dismissal.

[3] Ms Davies also alleges she performed work that she was never remunerated for. Ms Davies seeks unpaid wages, initially claiming 140 hours before amending the claim to 124 hours in submissions made following the Investigation Meeting.

[4] The unpaid hours sought relate to various work Ms Davies alleges she undertook from home, including prior to her commencement and where she was unable to complete her duties at the work premises during standard working hours. The claim also relates to work undertaken at the Café on a public holiday (Matariki) which Ms Davies claims was not compensated at time and a half.

[5] Ms Davies alleges unjustified disadvantage for the failure to remunerate her for all hours worked.

[6] At the Investigation Meeting Ms Davies' representative said that her unjustified disadvantage claim also relates to the other issues that arose throughout her employment. However, these were never raised as a disadvantage in the personal grievance letter or Statement of Problem.

[7] Nevertheless, such issues do form part of the constructive dismissal claim and, if necessary, can instead be assessed as an unjustified disadvantage claim pursuant to section 122 of the Employment Relations Act 2000 ("the Act") which provides the ability to find that a personal grievance is of a type other than that alleged.

The Authority's investigation

[8] For the Authority's investigation, Ms Davies and her husband, Chris Davies, lodged written witness statements. Both attended the Investigation Meeting, confirmed their evidence, and answered questions under oath or affirmation. Ms Davies' son, Charlee Pearson, also provided a statement of support, however, this was of limited value as Mr Pearson did not attend the Investigation Meeting.

[9] For the respondent, Ms Pan and Garry Fuller provided witness statements, with both attending the Investigation Meeting, confirming their evidence and answering questions under affirmation. The Authority was assisted by a Mandarin interpreter.

[10] Following the Investigation Meeting, submissions were timetabled.

[11] As permitted by section 174E of the Act, this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received, although I have carefully considered all the material provided.

The issues

[12] The issues for determination are:

- (a) Whether the Café owes Ms Davies unpaid wages, and if so, how much;
- (b) Whether the Café constructively dismissed Ms Davies; and
- (c) Whether the Café unjustifiably disadvantaged Ms Davies.

Background

[13] In December 2023, Ms Davies interviewed at the Café. The interview went well, albeit Ms Davies and Ms Pan have differing views as to the autonomy and decision-making Ms Davies was offered in her role.

[14] Ms Davies described having “carte blanche” to act as she wished in relation to the menu, adding that Ms Pan had given her full control of (and responsibility for) the kitchen (e.g. menu and food ordering), while Ms Pan was to be responsible for front of house, coffee and training. Ms Davies said that she was only attracted to the position because she would have this level of autonomy and responsibility. Ms Pan says Ms Davies was to oversee kitchen operations and update the Café’s menus and offerings, but that as business owner she would retain decision-making power.

[15] Ms Davies was provided an employment agreement and job description and commenced employment shortly thereafter in January 2024. Her employment initially progressed relatively free of incident, although Ms Davies describes a “build up of tension and problems” over time.

[16] On 6 September 2024, an incident arose in which Ms Davies raised concerns about Ms Pan potentially cross-contaminating gluten free food. Ms Davies says Ms Pan responded

by aggressively saying she did not have time to worry about that. Ms Pan says her food hygiene practices were appropriate and that she had in fact said: “honey, no time to explain and discuss; let’s finish the shift first”. Ms Davies then walked out of the shift. Ms Pan says she was surprised by this and asked where Ms Davies was going but Ms Davies did not reply.

[17] On 10 September 2024, Ms Pan met with Ms Davies to discuss the incident and any issues between them. They both apologised, determined how the employment relationship would operate moving forward, and reached a positive resolution. The following day, Ms Davies emailed through a summary of the meeting from her perspective.

[18] Ms Davies then alleges that on 20 September 2024, having just read her 11 September 2024 email, Ms Pan came into the kitchen, angrily exclaimed that Ms Davies was going to get her into trouble, and berated her about the cost of her son’s invoice (her son having been engaged to undertake design work). Ms Davies says she broke down in tears.

[19] Ms Pan denies that an incident occurred on 20 September 2024, and says there was no issue between her and Ms Davies on that day. She also points to an email from Ms Davies’ son the night before having settled the issue about cost to her satisfaction.

[20] Ms Davies was also unhappy about other incidents she says occurred during her employment and commented that Ms Pan showed a consistent trend of being courteous and supportive via text message while displaying a negative attitude during day-to-day workplace interactions.

[21] Ms Davies did not provide specific dates or context for these other alleged incidents; however, she described one example in which Ms Pan referred to her as “fat and laughing” and remarked that a ladder would not support her weight, suggesting Ms Pan should use it instead. Ms Pan denies making these comments.

[22] In addition, Ms Davies did not appreciate Ms Pan regularly discussing personal issues and financial pressures with her. Ms Pan says she did so because she treated Ms Davies as one of her best friends.

[23] On 5 October 2024, Ms Davies informed Ms Pan she had a job interview on Monday 7 October 2024. Ms Davies says Ms Pan asked for another chance, saying she would try and communicate better, and expressing concern she may need to close the Café if Ms Davies was to leave. Ms Pan did not dispute these comments but added that she had also told Ms Davies

the potential new job was an excellent opportunity with better remuneration, and she would not stand in Ms Davies' way if she wished to move on.

[24] Ms Davies chose to stay; both in the hope that things would improve and because she would feel guilty if her departure necessitated the redundancy of her colleagues.

[25] On 13 October 2024, Ms Pan informed Ms Davies by text message that she had finished the new menu and asked to meet with her to discuss. On 15 October 2024, in advance of a potential meeting the next day, Ms Davies asked Ms Pan to email it to her. Ms Pan again indicated a desire to speak with Ms Davies first, but Ms Davies pushed further for an email copy, which Ms Pan then sent.

[26] The design of the two menus was quite different to the design Ms Davies' son had worked on, but the content was substantially the same as the previous menus. However, no third menu (seasonal) was provided, despite Ms Davies having worked on one and the Café having trialled using it. Ms Pan says she had decided not to progress with the seasonal menu.

[27] The new menus provoked a strong reaction from Ms Davies who expressed disappointment via various text messages that evening. For example, one message from Ms Davies said: "I had a glance at it and you have completely changed everything you had Charlee do! I honestly don't know what to say anymore." The reference to Charlee is to Ms Davies' son who had performed design work on the menu.

[28] Ms Pan explained the reasons for her changes, but Ms Davies responded: "just do whatever you want to do. I can't take the stress and anxiety anymore to be honest. I am so disappointed". Ms Pan explained further but Ms Davies alleged that Ms Pan was "undermining [her] position and controlling the kitchen". Ms Davies informed Ms Pan she had emailed Ms Pan and commented further: "for my health I cannot work until all of these issues are resolved". From that point onwards, Ms Davies did not attend work.

[29] Despite the clearly strong reaction and a subsequent declaration that she would not attend work again until issues had been resolved, Ms Davies later described the issue with the menus as "the final straw but a small thing in total". I took her to mean that although the menus were not a particularly serious issue when taken in isolation, this was the last in a series of actions she was unhappy about.

[30] The 15 October 2024 email from Ms Davies to Ms Pan outlines urgent issues at work from her perspective, mainly regarding food safety and hygiene, and interference in kitchen matters which she described as being her domain. The email concludes by stating: “these are all things that I would like to address with you in person with a support person in attendance, as I am no longer comfortable having these conversations alone”.

[31] Ms Davies then followed up with a further email the next day (16 October 2024), again requesting a meeting “to address and resolve issues that are making my position untenable”. The email listed six topics of discussion: job title / description; food safety, handling and hygiene; lack of working equipment; working / rostered hours; communication, including outside of work hours; and the undermining of her position.

[32] Ms Pan indicated a willingness to meet with Ms Davies and her husband (in his capacity as a support person) and made positive steps towards agreeing on a date and time. Eventually, on 18 October 2024, a meeting at 4pm on 22 October 2024 was agreed.

[33] On 21 October 2024, Ms Pan sent emails responding to Ms Davies’ 15 October 2024 and 16 October 2024 emails, and another responding to Ms Davies’ 11 September 2024 email summarising the meeting from the day prior.

[34] Ms Pan’s response to Ms Davies’ 15 October 2024 email discussed food safety and training, acknowledged that Ms Davies had been employed to take charge of the kitchen, apologised for changing her mind about the seasonal menu (but explained why), and discussed working hours and other matters.

[35] Ms Pan’s response to the 16 October 2024 email commented in relation to the six topics raised and noted she would discuss them further at the meeting arranged for the next day. It also raised a concern about Ms Davies’ husband previously having advised one of Ms Davies’ colleagues not to sign her employment agreement.

[36] The email reference to Ms Davies’ husband led Ms Davies to raise the concern that this had nothing to do with her own employment issues, adding: “I’m really not sure what you were trying to accomplish my [sic] bringing them up at all”. Ms Davies also reiterated that the current situation was causing her “severe anxiety and stress”.

[37] In her final email of the day (21 October 2024, 8.36pm) Ms Pan responded: “sorry, I’ve never meant to make you anxious. I apologise if I did. I hope you feel better now.

Tomorrow please let me know what I can do to support your health recovery”. The reference to tomorrow was to the meeting that remained scheduled for 4pm on 22 October 2024.

[38] On 22 October 2024, at 7.09am, Ms Davies emailed Ms Pan, resigning effective immediately. She stated: “the stress of this situation has become too damaging to me. I genuinely wanted to work through things, and move forward, however after receiving your emails where you involved my husband, it crossed too many boundaries. I feel that the trust is gone and the accusations have caused irreparable damage.”

[39] Over the next week or so, the exchange of emails continued with Ms Pan consistently apologising and suggesting Ms Davies continue the employment relationship (whether part-time or full-time), and Ms Davies explaining further her rationale for resigning.

[40] At one point on 25 October 2024, Ms Davies appeared to relent, concluding an email by stating: “if we are able to come to some agreements and set some boundaries, I would be willing to return”. However, Ms Pan says she felt insulted by other aspects of that email, particularly unfounded health and safety accusations. Ms Pan also questioned the genuineness of Ms Davies’ willingness to return given her email had also asked what would be different if she were to return, how she would be supported, and whether the workplace would be a safe environment.

[41] Consequently, Ms Pan’s response on 27 October 2024 did not offer an immediate return, albeit she did indicate an openness to continuing the discussion. Instead, she informed Ms Davies that “the final pay will be processed next Tuesday and you will get 20 more hours as compensation”.

[42] On 28 October 2024, Ms Davies replied: “I just need to make it clear that I do not accept 20 hours as compensation for anything. Half a week’s wages is insulting and doesn’t even cover the hours I did from home that I was never paid for.”.

[43] On 30 October 2024, Ms Pan replied: “I reckon you misunderstood me about the 20-hour compensation. I just wanted to do something to say a nice bye, rather than insult”. Ms Pan also said at the Investigation Meeting that the purpose of the additional 20 hours was to retain a positive relationship with Ms Davies.

[44] Ms Pan’s 30 October 2024 reply also sought more details regarding Ms Davies’ comment about the unpaid hours worked from home, commenting that Ms Davies had never

written hours worked from home on the roster. Ms Pan indicated that if Ms Davies produced a record of any additional hours, she could consider remunerating her for them.

[45] On 3 December 2024, Ms Davies raised claims for constructive dismissal and unjustified disadvantage.

Unpaid hours

[46] Ms Davies claims the following unpaid hours of work. Before setting out both Ms Davies' and Ms Pan's views on these, I make the following observations.

[47] Ms Davies did not keep a contemporaneous record of the hours claimed. Rather, she has subsequently estimated ballpark figures. Hence, although Ms Davies has put the unpaid hours into categories, she has not itemised them further. For example, she does not separate hours claimed for menu development into times and dates when she worked on each menu, nor does she indicate times and dates worked on other individual tasks at home, such as ordering supplies. In addition, the Café determined the hours it paid Ms Davies each week based on the hours she recorded; however, Ms Davies never included the additional hours she is now claiming.

[48] Ms Pan also says that she would add additional hours to those Ms Davies recorded if she was aware of any having been worked by agreement. For example, she inserted two hours on 21 April 2024 (a day Ms Davies did not work) to reflect some hours performed from home, and Ms Davies never told her these were insufficient. Ms Pan says there is no basis for the unpaid hours claimed as she understood Ms Davies' duties to have been performed at work or already have been remunerated. She adds further that the unpaid hours amount to little more than speculation.

[49] Ultimately, although Ms Pan was aware that Ms Davies occasionally performed work from home, the issue of underpayment was never raised with her. Ms Pan had therefore operated under the reasonable assumption that Ms Davies was being remunerated appropriately.

[50] The parties also dispute the amount of cash Ms Pan gave Ms Davies on one occasion. Ms Pan claims it was \$500, and Ms Davies says it was \$200; however, both agree it was given as a gift or discretionary bonus. It does not matter who is correct as the cash payment has no relevance to Ms Davies' claim or the Café's legal position. Although the cash may have been

gifted or issued as a bonus for hard work, this does not avoid the Café's obligation to remunerate in accordance with hours worked.

34 hours pre-employment commencement

[51] Ms Davies says she worked 34 hours between 18 and 30 December 2023 prior to the official commencement of her employment, including menu development, testing recipes, pricing menu items, and providing photos of signature dishes. Ms Davies says she initially sought payment of considerably fewer hours than 34 but was never paid for any of them. Ms Davies was unable to provide any details about the number of hours sought and Ms Pan denies ever being asked for such payment.

[52] Ms Pan accepted that Ms Davies performed work prior to her commencement. This is consistent with her email to Ms Davies on 15 December 2023 asking her to “plan the brunch and catering menu” and “provide some photos that I can use on our website”. Ms Davies agreed, adding: “I am happy for those hours...to be processed once [the] system is up and running”. When Ms Pan informed Ms Davies that she had processed the first payroll payment on 9 January 2024, she added: “if there is anything not right, please let me know”. However, Ms Davies did not respond to ask for any additional hours.

[53] Ms Pan estimated that Ms Davies would likely have taken approximately one day (8 hours) to perform the work and said she expected that Ms Davies having her own catering business would have assisted her to be more efficient, particularly in producing photos of the dishes.

20 hours catering menu development and costing, and 40 hours seasonal menu development and costing

[54] Ms Davies says she undertook 20 hours “catering menu development and costing”, and 40 hours “constant and ongoing seasonal main menu changes, menu development and costing”. Ms Pan acknowledged that some discussions may have occurred outside of standard hours but expected that the work would predominantly have been performed during her standard hours. Again, she considered that Ms Davies' experience with her own catering business would have assisted with efficiencies.

24 hours ordering from home

[55] Ms Davies initially estimated she spent 40 hours ordering from home and says she was hampered in putting together this assessment as she does not have access to the Café's supplier accounts. Her claim concluded: "let's just say at a minimum 15 minutes a day, 5 days a week over an eight-month period". Subsequently, Ms Davies' submissions revised the estimate to 24 hours, i.e. "15 minutes per day, 3 days per week, across 32 weeks".

[56] Ms Davies says she worked from home because she was not provided a dedicated office space in the Café, or given access to a laptop, adding that the screen on a mobile phone is too small. Ms Pan says she could have provided Ms Davies access to her laptop if Ms Davies had asked, and notes in any event that she would normally order on the relevant mobile phone app and would have expected Ms Davies to do the same. Ms Pan says further that she was not aware of Ms Davies ordering from home and did not expect her to do so.

6 hours for Matariki 28th June 2024

[57] Ms Davies performed some cleaning at the Café on the Matariki public holiday when it was closed. She was then paid for Matariki as if she hadn't worked that day, i.e. she was paid her usual hours as an otherwise working day, and remunerated an additional three hours for cleaning, recorded under Sunday 30 June 2024 (a day Ms Davies did not work).

[58] The parties dispute whose idea this was. Ms Davies says it was Ms Pan's idea to avoid paying time and a half; Ms Pan says it was Ms Davies' idea because she wanted to receive the same pay for the public holiday as she would have done if she had worked a standard working day. Irrespective of whose idea it was, Ms Davies recorded the hours in the Café's notebook as "28 Fri Public Hol 8 hrs" and inserted "plus 3 Hrs" underneath the rest of the week's hours.

[59] Ms Davies is claiming six hours at statutory entitlement, i.e. time-and-a-half. However, Ms Davies said at the Investigation Meeting she worked for 3-4 hours, and Ms Pan estimated that she worked 2-3 hours. Both accept that Ms Davies was paid for 3 hours, with those hours recorded on 30 June 2024 and not paid at time and a half.

Is Ms Davies owed unpaid wages, and if so, how much?

[60] Assessing whether the hours claimed should be paid for by the Café is not a straightforward task. In general, for a waged employee, hours of work outside an employee's

standard hours of work are payable if the employer required the additional work, authorised the additional work, or knowing the additional work was being performed accepted the benefit of it.

[61] However, the hours claimed must be consistent with those authorised or required by the employer. In other words, if an employee is asked (or permitted) to take home a task the employer envisages will take an additional 3-5 hours and the employee subsequently seeks to claim 30 hours having not previously discussed the basis for doing so, there may be no contractual basis for remunerating all 30 hours.

[62] An employment relationship is a two-way street founded on good faith. Employer and employee are both expected to be responsive and communicative. If parties meet this standard, no situation will arise where an employee claims following their employment that they were underpaid 140 hours, and the employer is surprised by the claim.

[63] In this case, the hours of work clause in Ms Davies' employment agreement says she will be rostered for 40 hours each week and the Café may offer more hours which Ms Davies can choose to accept or decline. Although this anticipates additional hours, it is clear the Café must first have offered them.

[64] Ms Pan was aware (or should reasonably have been aware) that Ms Davies would sometimes perform work from home. At the very least, there was a loose arrangement. Ms Pan often exchanged work-related text messages with Ms Davies in the evenings, occasionally included payment for additional hours outside her rostered hours, and was aware (or should reasonably have been aware) that during a busy working day it was not always easy to complete tasks such as menu development in the workplace.

[65] Nevertheless, Ms Davies' additional hours were not contemporaneously recorded and have not been corroborated by evidence. In addition, Ms Pan had informed Ms Davies that, where possible, Ms Davies was not to exceed 40 hours each week. There is also no evidence of Ms Davies having informed Ms Pan about (or sought payment for) the additional hours she worked from home, and any additional hours she did work appear to have been considerably fewer than those she now claims. Further, it appears Ms Davies did not reply to Ms Pan's 30 October 2024 email seeking clarification about her unpaid hours, and Ms Davies did not include a claim for unpaid hours in her original personal grievance letter.

[66] Ms Davies only set out a claim for additional hours when she lodged the Statement of Problem on 12 May 2025. Following the Investigation Meeting she also reduced the hours claimed for ordering from 40 to 24, indicating the broader claim around unpaid hours may be exaggerated.

34 hours pre-commencement of employment

[67] Both parties accept that pre-commencement work was directed and then performed, that there was a mutual expectation the work would be remunerated, and that for whatever reason no such hours were paid for. Ms Davies says the hours she requested were far fewer than 34 and as such she cannot now claim 34 as the total hours of work. I accept, however, that Ms Davies is likely to have performed at least 8 hours of work that were authorised by Ms Pan and which are yet to be paid.

20 hours catering menu development and costing and 40 hours seasonal menu changes, development and costing

[68] Ms Pan was aware (or should reasonably have been aware) that it was not always possible for Ms Davies to undertake menu development and costing work at the Café during standard hours. Nevertheless, the hours claimed are without evidence and appear excessive.

[69] I find that Ms Davies performed a minimum of eight hours' work that were authorised by Ms Pan and are yet to be paid.

40 hours ordering

[70] I am persuaded that Ms Davies should largely have been able to complete ordering on mobile phone apps during her standard hours and that any additional ordering from home would have been the exception rather than the norm.

[71] Even if I am wrong about this, it is clear Ms Pan was not aware of Ms Davies undertaking ordering work from home on a regular and consistent basis, albeit she should reasonably have been aware that Ms Davies would have needed to undertake such work from time to time given the competing demands on her workload during rostered hours.

[72] I find that Ms Davies performed a minimum of four hours' work that were authorised by Ms Pan and are yet to be paid.

Conclusion on hours worked from home

[73] Matariki aside (which I will come to shortly), I find that the Café owes Ms Davies 20 hours of unpaid wages for work undertaken from home, broken down into the above categories (i.e. 8 hours of pre-commencement work, 8 hours of menu development and costing, and 4 hours of ordering).

[74] A total of 20 hours is also consistent with the sum the Café offered (on-the-record) to Ms Davies at the time of her resignation. Although Ms Pan was careful to characterise this as something nice to maintain her relationship with Ms Davies, I consider the offer also amounts to a tacit acknowledgement that Ms Davies did perform additional hours from home that were never remunerated.

Matariki

[75] Although I consider the approach taken to Matariki hours was agreed between the parties and was not intended to circumvent the requirements of the Holidays Act 2003, I am nevertheless required to determine how it should have been handled. This is because the Holidays Act 2003 overrides any agreement between an employer and an employee.¹

[76] Ms Davies worked 3 hours on Matariki. She should therefore have been paid the equivalent of 4.5 hours of work at her standard hourly rate² and been provided an alternative holiday (i.e. a paid day off, which could have been exchanged for payment) because Matariki was an otherwise working day for Ms Davies.³ Ms Davies' shifts are ordinarily 8 hours and so an alternative holiday would have provided her the benefit of 8 hours pay for not working.

[77] If Ms Davies had been paid correctly, i.e. in accordance with the Holidays Act 2003, she would therefore have been remunerated for the equivalent of 12.5 hours.⁴ Instead, Ms Davies was wrongly paid 8 hours for not working Matariki, and 3 hours added to her payslip on Sunday 30 June 2024. In total she was remunerated for the equivalent of 11 hours and is therefore owed an additional 1.5 hours of pay.

¹ Holidays Act 2003, section 6.

² 3 hours' work performed at time-and-a-half on a public holiday is equivalent to 4.5 hours' work.

³ Holidays Act 2003, section 56.

⁴ If Ms Davies had been paid correctly, she would have received the equivalent of 4.5 hours for her work on a public holiday (three hours paid at time-and-a-half) and 8 hours for an alternative day, i.e. 12.5 hours in total.

Overall outcome regarding unpaid wages

[78] The Café is ordered to pay 21.5 hours of unpaid wages (inclusive of Matariki-related underpayment) at Ms Davies ordinary hourly rate of \$28.00. The Café is therefore required to pay \$602.00 (gross). As this is a taxable amount, the Café is required to deduct tax from this amount, which is then to be paid to Inland Revenue (as normal).

Was Ms Davies constructively dismissed?

The Law

[79] The law on constructive dismissal is well established. Specifically, when an employee resigns but the resignation was in fact the result of something the employer did that effectively caused the employee to resign, this may be considered a constructive dismissal.⁵

[80] There are three situations where a constructive dismissal can occur:⁶

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- (c) Where a breach of duty by the employer leads a worker to resign.

[81] Ms Davies initially sought to rely on (b) and (c) but in submissions refined this to only rely on (c). Although not specifically articulated in this way, it is clear Ms Davies considers the events around the time of her resignation were both a breach of duty and the final straw that precipitated her termination. I therefore focus my discussion on (c).

[82] The Court of Appeal has said in relation to (c) that to find a constructive dismissal it is necessary to find the breach of duty serious enough that a substantial risk of resignation was reasonably foreseeable to the employer.⁷

⁵ Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc [1994] 2 NZLR 415 (CA).

⁶ Auckland Shop Employees Union v Woolworths (New Zealand) Limited (1985) 2 NZLR372 (CA) at 374

⁷ Above n 6.

[83] Regarding (c), the Employment Court has established four key principles to consider in cases where a former employee submits a "final straw" event caused their resignation, therefore making it reasonably foreseeable they would resign. They are:⁸

- (a) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.
- (b) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
- (c) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
- (d) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's acts as destructive of the necessary trust and confidence."

[84] Before considering the act or acts alleged to be the "final straw", I will first consider whether any of the preceding acts amounted to breaches of duty.

Breaches of duty

[85] I find that prior to the alleged "final straw", Ms Pan did not breach any duty to Ms Davies.

[86] The health and safety issues raised on 6 September 2024 were addressed and resolved alongside other issues in a subsequent meeting on 10 September 2024.

[87] I do not have sufficient evidence to conclude that Ms Pan displayed anger or frustration on 20 September 2024 or that Ms Davies broke down in front of her. Even if this did happen, not every incident of anger or frustration will amount to a breach and Ms Davies failed to provide the necessary detail to enable an appropriate assessment of that behaviour.

⁸ *Spotless Facility Services NZ Ltd v Mackay* [2016] NZEmpC 153 at [72].

[88] I accept that there were disagreements at various times during the employment relationship and that this caused frustration for both parties. I also accept that Ms Davies found Ms Pan difficult to deal with due to Ms Pan regularly changing her mind about operational matters and her perception of the sometimes chaotic nature of the workplace. Nevertheless, hospitality can be inherently stressful. An employer changing its mind or expressing frustration to an employee does not in and of itself amount to a breach of duty.

[89] Ms Davies did not provide dates or sufficient detail around Ms Pan's alleged mean-spirited comments and so I am unable to conclude that Ms Pan made such comments or if she did, to assess them in the context they were made. For example, if Ms Pan had suggested Ms Davies ask her to use the ladder rather than Ms Davies use it herself, this could have been a show of concern rather than anything derogatory.

[90] The 5 October 2024 conversation in which Ms Pan both expressed concern about what might happen to the Café if Ms Davies were to leave and gave Ms Davies her blessing to move on to a role with better pay did not breach any duty to Ms Davies.

[91] Ms Pan only became aware of Ms Davies' claim for unpaid wages after Ms Davies' resignation. Accordingly, any failure to pay such wages cannot constitute a breach prior to the ending of Ms Davies' employment.

[92] In short, leading up to the events Ms Davies described as the final straw, the Café did not breach its duties to Ms Davies. Although Ms Pan could have handled some of the incidents more appropriately, there was no clear failure to comply with the Café's employment obligations.

Final straw

[93] Turning now to the "final straw" which Ms Davies alleged as the change to the menus Ms Pan emailed her on 15 October 2024.

Changes to menus

[94] Fundamentally, Ms Pan was entitled to make decisions about the menus. Although Ms Davies considered the kitchen her domain and responsibility, Ms Pan retained oversight and the ability to make commercial decisions.

[95] This is highlighted by Ms Davies' job description which required her to "oversee all aspects of the operation of Daydream Café kitchen". Although Ms Davies saw this as giving her full autonomy in the kitchen, it falls short of any real decision-making power. The job description also sets out that she is to understand and follow the recipes and does not require her to create them. Although Ms Davies may have taken on the responsibility of suggesting menu updates, the final decision always rested with Ms Pan.

[96] Furthermore, although Ms Davies described Ms Pan as having said at the job interview that she would have full responsibility in the kitchen, it is clear from the outset that Ms Davies understood that Ms Pan had the final say. Ms Davies did not produce menus Ms Pan had no ability to change; instead, there was a collaborative process in which Ms Pan would undertake any final review, including making any amendments she considered necessary.

[97] In short, although Ms Davies was able to propose menu changes, she should have had no expectation that these would be accepted without consideration. It was ultimately for Ms Pan to decide which items she considered would sell best and how they could best be marketed.

[98] In addition, it appears one of Ms Davies' key concerns about the menus Ms Pan emailed her on 15 October 2024 was that Ms Pan had not utilised her son's design changes. However, this should have been of no relevance to Ms Davies as it did not directly impact her employment relationship and was another commercial decision for Ms Pan to make. Having paid Ms Davies' son for his work, the Café was not obliged to use it; and nor should Ms Davies have had such expectation.

[99] Importantly, on 13 October 2024 Ms Pan informed Ms Davies she had finished the menus and asked to meet her to discuss the changes. Subsequently, when Ms Davies was insistent that Ms Pan send the menus to her in advance, Ms Pan promptly did so. Ms Pan then engaged in discussion regarding the changes and remained willing to meet with Ms Davies to discuss further. These are the actions of a communicative and responsive employer being active and constructive in maintaining a productive employment relationship.

[100] Ms Pan's actions regarding the menu were not therefore a breach of duty but were reasonable and justifiable. They also did not contribute to any earlier breach, as no such breach had occurred. In any event, even if I am wrong and there had been an earlier breach, her

actions were entirely innocuous, albeit likely genuinely misinterpreted by Ms Davies as destructive of trust and confidence.

21 October 2024 emails

[101] The final straw analysis, however, is incomplete without considering Ms Pan's emails on 21 October 2024, which (rather than the emailed menus) appear to have been the direct trigger for Ms Davies' resignation. The emails were sent the day prior to an arranged meeting between the pair; however, the meeting did not go ahead due to Ms Davies' resignation on the morning of the meeting.

[102] A key issue from the emails appears to have been Ms Pan's suggestion that Ms Davies' husband encouraged Ms Davies' colleague not to sign the offered employment agreement, to invalidate the trial period clause. As referred to in paragraph [37] above, Ms Davies stated in her resignation email that Ms Pan's involvement of her husband "crossed too many boundaries" and added further that "the trust is gone and the accusations have caused irreparable damage".

[103] At the Investigation Meeting, Ms Davies suggested that the purpose of Ms Pan's emails was to induce her resignation. This sentiment is consistent with her 21 October 2024 emails in which she stated: "all I want is to resolve issues, but you seem to be making more before we have had a chance to rectify anything. Making accusations is not conducive to resolving these problems and is only further exacerbating my anxiety and stress."

[104] The sentiment was expressed further in one of Ms Davies' emails post-resignation (on 23 October 2024), where she stated: "I believe you did this as a way to make me further upset and get my resignation, this was not the first time during my employment where I was made to feel this way".

[105] Ms Pan on the other hand says the purpose of her 21 October 2024 emails was to make things clear in advance of their meeting the next day, i.e. to help direct their discussion. This is consistent with her comments in one of those emails: "sorry if I make you anxious but I had to explain everything I thought, I worried about. Please believe me, I am the one who really wants to solve all problems and make things go well. I am the owner, not an outside person, why wouldn't I want to make things good?"

[106] I accept Ms Pan's intention was to put responses on the record to assist with the meeting the next day, and that it was reasonable for her to do so; however, her comments in relation to Ms Davies' husband were ill-advised and unnecessary. Ms Davies' feelings in response to this were therefore understandable. Nevertheless, Ms Pan's comments did not meet the threshold of a breach of duty.

[107] Ms Pan's email comments also do not amount to the final straw in a successful constructive dismissal claim. As referred to earlier, at no stage leading up to the ending of Ms Davies' employment did the Café breach its duties to Ms Davies, and it is notable that despite Ms Pan's ill-advised comments about Ms Davies' husband, Ms Pan was comfortable with Ms Davies' husband attending the scheduled meeting as her support person.

[108] For completeness, if it had been necessary for me to consider whether Ms Pan had followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign, I would have found that she did not.

[109] Ms Pan's various emails and text messages leading up to Ms Davies' resignation were clearly written to facilitate an ongoing employment relationship. Whilst Ms Pan often disagreed with Ms Davies, communications remained respectful and were directed towards addressing and rectifying issues rather than ignoring them.

Reasonable foreseeability

[110] Ms Davies' resignation was not reasonably foreseeable. Ms Pan's provision of the updated menu was entirely innocuous and although Ms Pan's comments regarding Ms Davies' husband may have been perceived as inflammatory, a meeting was scheduled the following day for the parties to work through their issues together.

[111] I conclude that Ms Davies was not constructively dismissed.

Was Ms Davies unjustifiably disadvantaged?

[112] Having found that the Café owed Ms Davies unpaid wages, I must now determine whether the failure to remunerate Ms Davies for the 20 additional hours identified above also amounted to an unjustified action causing disadvantage.

[113] I find that it was not a disadvantage.

[114] There is no record of Ms Davies having raised the issue of unpaid wages with the Café until after her employment ended. Ms Davies was clearly comfortable raising issues with her employer, as she had consistently done during her employment; however, it appears she did not raise the issue of unpaid wages prior to the termination of her employment.

[115] When Ms Davies finally did so, Ms Pan was open to considering the details should Ms Davies have provided them to her. Having not had a proper opportunity to rectify the issue during Ms Davies' employment, it would not be appropriate to now determine the Café's actions amounted to a disadvantage.

[116] Even if I am wrong on this, no compensation should be awarded. Ms Davies' humiliation and injury to feelings was intrinsically linked to the ending of her employment and Ms Pan's actions leading up to this, rather than in relation to the unpaid wages claim.

[117] I have also considered whether any of the actions leading to Ms Davies' constructive dismissal claim could alternatively be considered an unjustified disadvantage pursuant to section 122 of the Act.

[118] I find that none of these actions amount to an unjustified disadvantage. Just as the incidents that occurred are not breaches of duty in the context of a constructive dismissal claim, the Café's actions were not unjustified and did not disadvantage Ms Davies.

Overall Outcome

[119] Ms Davies was not constructively dismissed or unjustifiably disadvantaged. She is, however, owed unpaid wages of \$602.00 (gross), which the Café is ordered to pay within 28 days of this determination.

Costs

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

[121] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply

memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[122] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment.⁹

William Fussey
Member of the Employment Relations Authority

⁹ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1