

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 203  
5554214

BETWEEN SHAREE BURGESS  
Applicant

AND L & S BARTLEY LIMITED  
Respondent

Member of Authority: Christine Hickey  
Representatives: Michael McDonald, Advocate for the Applicant  
David Jackson, Counsel for the Respondent  
Investigation meeting: 6 October 2015 at Oamaru  
Submissions received: 20 October and 1 December 2015 from the Applicant  
29 October 2015 from the Respondent  
Determination: 21 December 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Sharee Burgess was unjustifiably disadvantaged and unjustifiably constructively dismissed.**
- B. L & S Bartley Limited must pay Sharee Burgess:**
- (i) \$5,372.25 gross in lost wages; and**
  - (ii) \$161.17 Kiwisaver contribution; and**
  - (iii) \$10,000 in compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Sharee Burgess worked at The Willows, one of two adjacent farms share-milked by L & S Bartley Limited (LSB), from 1 June 2014 until 24 October 2014 when she resigned, alleging that she was constructively dismissed. Ms Burgess says that the respondent unjustifiably unilaterally changed her place of work, her duties and her hourly rate, put her on a week's special leave without her applying for it, advertised her job and employed a new employee for her role while she remained employed. She says that all of these acts cumulatively led to her being constructively dismissed.

[2] Ms Burgess also claims that LSB did not pay her holiday pay in full. She also wishes to recover the amount of what she says was a unilateral lowering of her hourly rate.

[3] LSB says Ms Burgess was not constructively dismissed and instead resigned after a fair and reasonable process of consultation and a cooling off period. LSB denies unilaterally changing Ms Burgess's conditions of employment and says that it asked Ms Burgess to perform the ordinary tasks and duties of a farm assistant, which included working at both The Willows and The Poplars farms. LSB admits it deducted Ms Burgess's and Mr Bartley's moving costs from her wages and says that Ms Burgess authorised it to do so. LSB denies that it owes Ms Burgess anything further by way of wages.

[4] LSB counter-claims that Ms Burgess should repay it one week's special paid leave it says it granted Ms Burgess to allow her to make suitable childcare arrangements. A counter-claim for Ms Burgess's failure to work out two weeks' notice when she resigned was withdrawn at the investigation meeting.

**Issues**

[5] To resolve this matter I must determine the following:

- (a) Did the respondent breach any of its duties to Ms Burgess?
- (b) If so, were any of the breaches sufficiently serious to make it reasonably foreseeable to the employer that the employee would not want to continue working for the employer?

- (c) Was a course of conduct pursued with the dominant purpose of coercing Ms Burgess into resigning?
- (d) Were the actions of the employer how a fair and reasonable employer could have acted in all the circumstances at the time?
- (e) Was Ms Burgess unjustifiably disadvantaged in any of the ways she claims?
- (f) If Ms Burgess was unjustifiably constructively dismissed what remedies are due, taking into account contribution and mitigation of loss?
- (g) Should Ms Burgess pay back the week's pay she received for the week of special leave?

[6] Written witness statements from Sharee Burgess, Garrett Bartley and Simone Bartley were provided before the investigation meeting. At the investigation meeting I heard affirmed evidence from the three of them and heard oral affirmed evidence from Laurence Bartley.

[7] In line with s 174E(b) of the Employments Relations Act (the Act) I do not set out all of the evidence or all of the submissions in reaching my conclusion on the issues.

### **Factual background**

[8] Ms Burgess is the partner of Garrett Bartley who is Laurence Bartley's brother. Garrett and Ms Burgess both worked for L & S Bartley. The S Bartley in the company name is Laurence's wife, Simone. Laurence and Simone are the directors and shareholders of LSB.

[9] Ms Burgess and Garrett Bartley were working on a farm in the North Island when Laurence Bartley rang to ask if they were interested in moving to work for him and Simone in Otago. Initially they declined the offer. However, the two brothers kept talking about the opportunity and it was agreed that Garrett and Ms Burgess would move to Otago for a joint salary of \$90,000 per year and a house. It was agreed that LSB would pay their moving costs which they would pay back over time.

[10] There was also agreement that Garrett would manage The Willows and that Sharee would do calf rearing and later in the year assist with milking at The Willows.

Sharee says that was important to her so she could still look after her children. There was some discussion about Laurence and Simone hiring a nanny for their daughter, Sian, and that maybe Garrett and Sharee could use her services too.

[11] There was no mention at that time of whether Garrett and Sharee would have to pay for the nanny's services. I accept that there was some discussion about day care. However, although Laurence intended that no children should be in the milking sheds he did not convey that to Garrett and Sharee in advance of them moving down to work.

[12] About a week before they moved south Laurence rang and said Sharee would have to feed all the replacement calves for The Willows and The Poplars while Simone fed the bobby calves. Sharee agreed reluctantly.

[13] There were no written employment agreements before Sharee and Garrett moved to The Willows with their children Seth, Chloe, Payton and Jacob. Seth, Chloe and Payton were of school age but Jacob was not.

[14] As contextual background I mention that the brothers had not long overcome a disagreement that had seen them not communicating with one another for five years. However, Laurence and Simone had invited Garrett and Sharee to their wedding and that had helped to mend the situation.

[15] It was agreed that both Sharee and Garrett would get paid from 1 June 2014. Both parties agree that Sharee was not working anything like her full hours at the beginning. Sharee says she did not work every day nor for 8 hours a day but that she did do work on the farm leading up to her officially agreed start date of 28 July 2014. The respondent says Sharee was not working at all until the end of July/beginning of August. I am satisfied that Sharee assisted Garrett with work on the farm during June and July 2014 before her official duties began on 28 July 2014.

[16] The first written employment agreement was entered into and signed by the parties on 1 June 2014. It was for a fixed-term of one year until 31 May 2015, when the cows were dried off. Not all of the terms about payment or hours to be worked

were in writing, despite clause 15.3 being a ‘whole and entire agreement’ clause.<sup>1</sup> Sharee and Garrett asked the respondent to explain their effect especially in relation to their pay. The respondent produced a typed one page document which showed:

- That moving costs of \$4,257 had been lent to them by the respondent and would be taken out of their pay.
- That the respondents had bought Garrett and Sharee’s station wagon for \$2,500 and would take that off the amount owed for shifting leaving \$1,757 owed by Garrett and Sharee to LSB.
- Therefore Garrett and Sharee’s new salaries totalled \$88,243.00 per annum, or \$44,121.15 each, which when combined and paid weekly was:

Salary		\$1696.98
Rent		\$ 100.00
Clothes		\$ 19.23 (annual allowance of \$500.00)
PAYE	-	\$ 302.82
Kiwisaver	-	\$ 71.87
Rent	-	\$ 100.00
<b>Total in bank</b>		<b>\$1,341.52</b>

[17] The parties disagree whose initiative it was to split Garrett and Sharee’s total remuneration for tax advantage purposes to \$70,500 for Garrett and \$20,500 for Sharee. However, that is what happened initially despite the workings on the 15 July 2014 sheet referred to above.

[18] In the IEA Sharee is described as a farm assistant/calf rearer. There was no written job description with the IEA despite the IEA referring to one. The IEA recorded that Sharee reported to Laurence.

[19] I am satisfied that the agreement was that Sharee would work 8 hour days from 1 August 2014 (later changed by agreement to 28 July) feeding the heifer replacement calves at both farms and then from 21 November she would do morning and night milking at The Willows for 6 hours a day until the cows were dried off.

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<sup>1</sup> For example, Sharee’s hours were said to be 120 per fortnight in the IEA when the agreement was that she would work 88 hours per fortnight between 28 July 2014 until 20 November 2014 and then 66 hours per fortnight until 31 May 2015.

[20] Garrett and Sharee's evidence is that the day the IEA was signed they were told that they would have to negotiate separately with the nanny and pay her if they used her to care for their children. They say that was a disappointment so Sharee said she would take the kids with her on the farm, as she had done previously. She says Simone did not tell her that was unacceptable and instead said it was fine. Laurence and Simone deny ever having agreed that the children could accompany Sharee or Garrett when undertaking their farming duties.

[21] Garrett's evidence was that the two elder children helped with milking from time to time. There are photos of Sharee's children on the farm, and one of Sian and her cousins taken while Sharee was undertaking calf-rearing duties. The issue of whether the children could be on the farm with Sharee assumed great importance later.

[22] Tensions between Sharee and Simone and Laurence began to be apparent. On 2 September 2014 there was an exchange of texts between Sharee and Simone which ended with Sharee texting:

*I don't see him until tonight so you tell Garrett, after all you are the boss*

[23] Simone felt affronted and considered that Sharee had refused to follow a work direction she had given her to tell Garrett to pick up three bobby calves from The Poplars bobby shed. She spoke to Laurence. There is disputed evidence about the following encounter. I set out here what I am satisfied on the balance of probabilities happened. Laurence went to The Willows milking shed looking for Sharee. Garrett told him that she had gone to drop Jacob at day-care. Laurence asked why she was not at work and told Garrett that Sharee had been insubordinate to Simone.

[24] Sharee pulled up in her vehicle just as Laurence was calling her on her cell phone. Laurence told her in an angry tone that she should go to his house. Sharee tried to talk to Laurence who repeated that she needed to go to his house. She refused to do so and Laurence said *don't worry about coming back* to Sharee. Sharee has only recorded two hours of work on her timesheet being between 5 and 7 pm that day. Sharee was very upset. Garrett and Sharee believed they had been dismissed.

[25] I am satisfied that Laurence fed the calves that day using the ute that Sharee usually drove to do so.

[26] The next two days were Garrett and Sharee's rostered days off. The respondent organised independent mediation with Sharee and Garrett through its lawyer. The mediation took place on 5 September 2014. It was agreed that the parties would work on their communication, limiting text exchanges, and that regular meetings would be held to discuss the farm.

[27] Sharee says she understood those meetings were meant to include her but says she was never invited to one. Garrett attended a few.

*Claimed unilateral changes to Sharee's terms and conditions of employment.*

[28] On 7 September 2014 Sharee was given a document headed *Willows labour units*. It set out that she was to undertake the calf rearing at both farms from 8 am to 12 midday and then work at The Willows from 1.30 to 5.30 pm. A calf rearing procedure document was attached with detailed tasks to be completed. That document also included:

*We understand you have a later start time on Tue, Thurs and Fri to take Jacob to day care.*

[29] Sharee says that it was impossible to complete all her duties in the 8 hours allowed and she recorded her extra hours on her timesheets. She says the farm was understaffed and that the change in hours meant she had to change Jacob's day care hours to fit the new hours and duties.

[30] In late September/early October a Labour Inspector attended the farms to undertake an audit of the respondent's employment practices. Simone and Laurence believe that Sharee made a complaint to the Labour Inspectorate. Sharee denies that.

[31] On 8 October 2014 Laurence approached Garrett and asked him if he could take a pay cut of between \$5,000 and \$10,000. Laurence said that otherwise Sharee might have to be let go. Garrett told Sharee about the conversation and later asked Laurence to put his proposal into writing. They did not receive any proposal in writing. Simone and Laurence say they decided not to take it any further. However, they never conveyed that to Sharee or Garrett.

[32] The school holidays were from 27 September to 12 October and during that time Garrett and Sharee's children were with them on the farm except when they were milking when the children remained in the house.

[33] Simone says that when school began again she and Laurence noticed that Sharee would leave The Willows' cow shed at around 6.30 am and return at about 7.30 am once the kids were ready for school. They considered that was inappropriate because milking required two people and Sharee should have been working between 6.30 and 7.30 am. However, they did not discuss the issue with Sharee. In addition, they had concerns that Sharee was taking much longer to complete her duties than a former employee had. They did not raise that issue with her either although the concern was raised with Garrett who told Sharee.

[34] On 14 October 2014 the respondent wrote to Garrett and Sharee with a new labour schedule for the rest of October and all of November for The Willows which included a new part-time worker, who had started the previous day. Sharee was to undertake both morning and evening milking at The Willows. Garrett was freed up for more farm maintenance and pod moving. Sharee's hours were changed to 4.30 to 8 am, 11.00 to 12, and 2 pm to 5.30 pm<sup>2</sup>. I note that the new hours did not mention allowing flexibility for Sharee to take Jacob to day care as the previous schedule did.

[35] In the letter Laurence and Simone proposed to undertake random farm checks to ensure all jobs were getting completed *in a timely manner and at their allocated times*. Garrett and Sharee were reminded to fill in their timesheets every day. The respondent proposed to review the labour set up at the end of November.

[36] However, within a few days Laurence says he and Simone decided to move Sharee's place of work to The Poplars and to change her hours of work so she worked fewer hours but under Laurence's direct guidance. He says they intended that to give Sharee more training and direction.

[37] On 17 October 2014 Laurence told Garrett who told Sharee that as of the following Tuesday, 21 October, Laurence wanted her to work at The Poplars milking shed. Laurence came to talk to Sharee at the same time that one of the children broke a glass door in the house. Sharee raced off to clean up the glass and when she got back

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<sup>2</sup> 8 hours a day.

she told Laurence that she had not agreed to do milking at The Poplars and that they had agreed she would work in The Willows shed because of her children. She told Laurence that she thought he was breaking their agreement.

[38] Sharee phoned Laurence and asked whether there would be a place for Jacob to be while she worked in The Poplars cowshed. Laurence said that Jacob was not allowed there.

[39] On 20 October Sharee phoned Laurence again and asked for a job description for The Poplars and told him she needed time to organise child care for Jacob. She asked for annual leave. She said she wanted her confirmed hours as soon as possible to allow her to organise child care.

[40] Sharee had consulted her lawyer who wrote to the respondent that same day raising concerns about the changes in Sharee's hours and duties. Paragraph 8 of that letter reads:

*Sharee's employment agreement provides that her salary shall be \$20,000.00 per annum. Based on your proposed hours of work for Sharee, when compared to her annual salary, her hourly rate would be well below the minimum wage of \$14.25 per hour which is a breach of the Minimum Wage Act 1983. By our calculations, Sharee's hours of work should be limited to approximately five (5) hours per day which would allow her to work eleven (11) days out of fourteen (14) which would bring her in line with her annual salary. As indicated, Sharee is willing to work additional hours taking into account her childcare obligations. Any additional hours worked must be remunerated in accordance with her hourly rate of pay over and above her salary.*

[41] The lawyer's letter also asserted that the extra hours Ms Burgess had been required to work and the imposition of additional tasks had created an unhealthy work environment.

[42] On 21 October the respondent advertised on the farm website Fencepost for a casual relief milker to start immediately. The position was clearly for The Willows and was for 7 hours a day. Sharee saw the ad on 22 October and believed it was her role. Sharee went to her doctor reporting her symptoms of stress and was prescribed sleeping pills and a medical certificate for time off work from 22 October until 17 November.

[43] On 22 October the respondent wrote to Sharee:

*To better manage the labour on both farms. You are now required to work at Poplars Farm.  
Hours: 4am-7.30am and 2.30-5.00 pm  
We require you to start work on Tuesday 28<sup>th</sup> October.  
From Tuesday 21<sup>st</sup> October through to Monday 27<sup>th</sup> October you are on paid leave.  
Please find attached a job description as requested.*

[44] The number of hours Sharee was to work was reduced from 8 to 6 hours per day. Sharee says the hours made it impossible for her to work as she couldn't get suitable childcare. The parties had agreed Sharee would work 8 hours a day until 20 November. Sharee says the change of hours was an unjustified disadvantage to her. The respondent says that it thought it should reduce her hours in line with what her lawyer's letter had suggested otherwise it risked paying her less than the minimum wage.

[45] The appended job description was a generic Farm Assistant job description from Dairy NZ running to 7 pages. It was not restricted to milking or calf rearing.<sup>3</sup> The respondent says that it is a standard job description and Sharee must have known what a farm assistant's duties were as she had worked in farming before. Sharee says that she was not capable or experienced enough to undertake a number of the roles outlined in the job description many of which she had never done before.

[46] At the investigation meeting Simone said that she would not have expected Sharee to complete all the duties in the job description if only working 6 hours a day. However, that was not conveyed to Sharee when the job description was provided to her.

[47] I note that despite Sharee's position being described as a calf rearer/farm assistance in her IEA no job description was attached so the first time she saw the farm assistant's job description was on 22 October.

[48] On 23 October Sharee emailed her thanks for the job description and asked if Jacob could come on the farm with her and why she was on paid leave that she had not asked for. Simone replied the same day saying that as Sharee had instructed a lawyer who had raised a number of issues the respondent would get back to her

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<sup>3</sup> Although I appreciate calf rearing was over for the season.

through its lawyer soon. She emphasised that Sharee was on special leave, not annual leave, so that she could arrange childcare.

[49] The following day a new worker arrived to milk with Garrett at The Willows. Sharee says that seeing the new worker in her role confirmed for her that the respondent was trying to force her out of her job. The respondent says that the relief milker was just that and was there to help Garrett considering Sharee's place of work was to be The Poplars. Sharee felt she could not do the job at The Poplars and had no job to go to at The Willows as someone had been employed to replace her.

[50] Sharee says the arrival of the new milker at The Willows on 23 October, the change in her hours, duties and the location of her work combined to make her feel as if she was unable to keep working. On 24 October she tendered her written resignation, giving two weeks' notice with her last day being 7 November 2014:

*It was with regret that I am forced to resign due to the oppressive nature and unhealthy work environment which has caused me a great deal of stress and anxiety resulting in me feeling that I have no option but to resign.*

[51] The respondent did not immediately accept Sharee's resignation and gave her a chance to reconsider. The parties attended mediation on 30 October but were unable to resolve the matter. After mediation the respondent notified Sharee that it accepted her resignation.

[52] Sharee's hourly rate recorded in her payslips up to 5 October was \$15.4273 per hour. In her two subsequent pay slips her hourly rate has gone down to \$14.25, the applicable minimum wage at the time.

## **Determination**

*Was Ms Burgess constructively dismissed?*

[53] The very nature of a claim for constructive dismissal is dependent on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty.

[54] One type of constructive dismissal occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.<sup>4</sup> If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract.<sup>5</sup>

[55] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.<sup>6</sup>

[56] The test of justification under s 103A of the Employment Relations Act 2000 (the Act) applies to the claims of unjustified disadvantage and unjustified dismissal. The test is whether what the employer did, and how it did it, were actions that a fair and reasonable employer could have taken in all the circumstances at the time.

[57] In applying the test the Authority must consider a number of factors set out in s 103A(3) of the Act that relate to the process followed by the employer and any other factors it considers appropriate.

[58] However, the Authority must not find a dismissal to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[59] Both parties also have duties of good faith. Section 4 states good faith goes beyond the mutual obligations of trust and confidence and that parties must to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[60] The IEA states that Sharee Burgess's duties were to be performed at Island Stream Road, Maheno. Both farms were on Island Stream Road. The respondent says that means that Sharee could be required to work on either farm. The fact that

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<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372

<sup>5</sup> *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

<sup>6</sup> *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

clause 15.3 of the IEA states that the agreement contained the whole and entire agreement between the parties is not determinative because both parties agree that hours of work and rates of pay are not accurately represented by the agreement.

[61] I find that although the parties agreed that Sharee would undertake calf rearing duties on both farms they had also agreed that her milking work would be at The Willows.

[62] I consider that the respondent breached its duty of good faith to Ms Burgess a number of times. The first breach of its duty to be active and constructive in establishing and maintaining a productive employment relationship was the approach to Garrett asking him and Sharee to take a cut in pay and saying that unless they did so Sharee may have to be let go.

[63] Laurence characterised that as being a way of helping out Garrett and Sharee. I understand that he meant if they took a pay cut the respondent could afford to get a part-time worker in to help Garrett who Laurence said *constantly complained*. However, those details were not revealed to Garrett or Sharee and I cannot find that proposing a pay cut, or instead Sharee losing her employment, was in good faith. That proposal was never taken off the table as far as Garrett and Sharee knew. In all the circumstances I do not consider that the respondent acted as a fair and reasonable employer could have done. Therefore, I consider it also unjustifiably disadvantaged Sharee by making her feel less secure in her employment.

[64] In addition, Laurence and Simone did not discuss with Sharee their concerns about her not working the full hours she was recording in her timesheets or that she was taking longer to complete her duties than a former employee. Instead they decided to unilaterally rearrange her hours and duties so they *could make it work without too much fuss in the family*. Laurence said that he believed he could not communicate honestly about his concerns with Sharee and thought the employment relationship with her would have ended even earlier if they had told her of their concerns.

[65] However, that did not entitle the respondent to unilaterally change Sharee's place of work to The Poplars. In setting The Poplars as Sharee's sole place of work, especially with the hours required in the mornings, the respondent would have been

aware that she would not be able to arrange her family life to work, as well as care for her children, as she had done at The Willows.

[66] None of the steps set out in s 103A(3) of the Act were followed. The respondent did not investigate its concerns which would have involved talking to Sharee and Garrett about them, it did not raise its concerns directly with Sharee, and it did not give her a reasonable opportunity to explain and so it could not take her explanation into consideration before making the decision to change her location and hours of work. Those breaches were not minor and resulted in Sharee being treated unfairly. In all the circumstances I do not consider that the respondent acted as a fair and reasonable employer could have done. The unilateral change of location and hours was an unjustified disadvantage to Sharee. The respondent's action was also in breach of its duty of good faith.

[67] The lack of communication about the problems as the respondent saw them also meant that Sharee was denied the chance to propose another workable solution that could have suited both parties.

[68] The respondent says it still needed an employee to assist Garrett with milking at The Willows, which is what the casual milker employed on 22 October was employed to do. Although the respondent says that employee was not engaged to replace Sharee she did undertake duties that had previously been Sharee's duties. In all the circumstances I consider that in not telling Sharee why that milker had been engaged the respondent breached its duty of good faith communication to Sharee and did not act as a fair and reasonable employer could have acted.

[69] The respondent asks me to find that the change of Sharee's hours from 8 to 6 per day was justified and in line with what it understood Sharee's lawyer had requested. The respondent's evidence was that it had access to legal advice at the time but did not put its proposal that it change Sharee's hours to its lawyer. Nor did it respond to Sharee's lawyer's letter suggesting what it intended and try to seek agreement. I consider the change was not something a fair and reasonable employer could have made without further communication or discussion. The respondent very clearly had agreed to Sharee working 8 hour days until 20 November, as is evidenced by its letter to the Labour Inspector dated 3 December 2014.

[70] I consider that the cumulative effect of the respondent's breaches of its duty of good faith were serious enough to go to the heart of the trust and confidence Sharee ought to have been able to have in her employer. The breaches destroyed her trust and confidence in the respondent. The breaches were of a type that meant Sharee's resignation was reasonably foreseeable by the respondent.

[71] The respondent did not act in the way a fair and reasonable employer could have acted in all the circumstances at the time the decision was made to transfer Sharee's work to The Poplars and to change her hours.

*Underpaid wages and holiday pay claim*

[72] There were no submissions on this point from the applicant. If it is still an issue that she wishes to pursue the specifics of the amount claimed should be forwarded to the respondent and the parties should seek to resolve the matter between them. The applicant may come back to the Authority for resolution of the issue if the parties cannot agree.

*Respondent's counterclaim*

[73] The respondent claims that since Sharee did not use the week beginning Monday, 20 October to find childcare for Jacob being paid for that week was a windfall advantage to her in all the circumstances. The respondent wishes her pay for that week to be repaid to it.

[74] It was the respondent's decision to put Sharee on special leave. Until the respondent's letter of 22 October Sharee assumed she was on annual leave, for which she would have been paid. She queried the imposition of special leave the following day but did not receive an answer to her query. As of 22 October according to her medical certificate she was unfit for work and therefore was only on special leave for two days – 20 and 21 October. For the remainder of her employment up to 7 November she was on sick leave.

[75] Sharee did not ask to be put on special leave and in all the circumstances, which include my findings of unjustified constructive dismissal, I do not consider it equitable for the respondent to be repaid any wages. I dismiss this claim.

## **Remedies**

### *Lost remuneration*

[76] Section 123(1)(b) of the Act allows me to provide for the reimbursement by the respondent of a sum equal to the whole or any part of wages or other money Ms Burgess lost as a result of her grievance. Section 128(2) of the Act provides that I must order LSB to pay Ms Burgess the lesser of a sum equal to her lost remuneration or 3 months' ordinary time remuneration.

[77] Sharee (and Garrett) remained resident at The Willows until after Christmas 2014 when Garrett got another farm job working elsewhere in Otago. There was no work at that farm for Sharee. I am satisfied that Ms Burgess mitigated her loss by applying for jobs along with Garrett. Early in the New Year Sharee ceased looking for work and decided to undertake study during 2015.

[78] She claims lost wages of \$5,372.25 gross, for a period of nine weeks, and the employer's contribution to Kiwisaver of 3% being \$161.17. She has also claimed for working the statutory holidays over Christmas and New Year. The respondent says she would not have had to work those days had she remained employed.

[79] Sharee's last payslip shows that on 7 November she was paid to 26 October 2014. I consider that she has lost remuneration as a result of her personal grievance. I accept the applicant's figures as set out in the submissions. For the first 4 weeks after her dismissal I am satisfied that Sharee Burgess should have been paid \$14.25 per hour for 8 hours a day until 20 November. Then she would have worked for \$14.25 x 6 hours a day from 21 November for 5 weeks. It is not proved to me that she would necessarily have worked on the statutory holidays and I do not award time and a half or alternative holidays for those 4 days. The respondent must pay Sharee Burgess \$5,372.25 gross in lost wages and Kiwisaver of 3% being \$161.17.

### *Compensation*

[80] Ms Burgess has claimed \$15,000 by way of compensation for humiliation, loss of dignity and injury to her feelings. The unjustified disadvantage grievances and the unjustified dismissal took place within a short timeframe and I will consider a global award of compensation the personal grievances of unjustified disadvantage combined with the personal grievance of unjustified constructive dismissal.

[81] Sharee's evidence was that by the time she consulted her lawyer prior to his letter of 20 October she was feeling under stress and says:

*My health was dire and I was so stressed that every time I heard a motorbike I thought it was Laurence coming to see me and I would start dry retching from the anxiety it caused.*

[82] She had difficulty sleeping which continued even after she began taking the sleeping pills her doctor prescribed on 22 October. She says she felt she was treated very unfairly from 2 September and the respondent's treatment:

*caused me to lose sleep, be unable to eat, I became so depressed having to go to work every day. I felt targeted... It affected my self confidence in returning to the workplace. I felt intimidated and scared around Simone and Laurence and like I was always walking on egg shells. It was terrible time in my life.*

[83] After Sharee's dismissal she says she was:

*trying to work on my health and remaining on the farm was not helping that much.*

[84] She says her health improved significantly once they moved from The Willows.

[85] Garrett's evidence was that Sharee's depression began in August 2014. There is no claim of any breach of duty or unjustified disadvantage to Sharee prior to or in August for which the respondent is liable. Therefore, I must take into account that the full effect on Sharee for which she seeks compensation is not entirely due to the personal grievances I have found proved.

[86] I do not take into account the fact that Garrett and Sharee's family dog was shot due to attacking chickens. I accept that Garrett agreed that the dog should be put down and consider that the respondent acted in good faith and in the belief that the dog had killed at least one of their chickens.

[87] The respondent submits that both the applicant and the respondent share responsibility for the breakdown of the relationship. It considers that it is not appropriate to award compensation in such a case.

[88] Weighing all the relevant evidence and submissions I conclude Ms Burgess has established that she should be awarded compensation.

[89] I apply a formulation recently expressed by Judge Inglis in the Employment Court. I am mindful of the need not to keep compensatory payments artificially low and balancing that against the need for moderation I conclude \$10,000 is the appropriate award for the particular circumstances of Sharee Burgess's case.

#### *Contribution*

[90] Section 124 of the Act obliges me to consider the extent to which Ms Burgess's actions contributed towards the situation that gave rise to her personal grievance. If I consider her actions so require I must reduce her remedies accordingly.

[91] No doubt the respondent considers that Sharee taking an hour or so off starting at 6.30 am was behaviour which contributed to the situation that gave rise to her personal grievances. However, if an employer is dissatisfied with an employee's performance it is obliged to notify the employee of its concerns and to give the employee a chance to rectify or improve its performance. Ms Burgess was never given any reason specific to her performance why the terms of her employment were changed without consultation. I cannot find that she contributed to the situation giving rise to her grievances in a blameworthy way and no reduction will be made to the remedies awarded.

#### **Costs**

[92] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[93] The parties are invited to agree on the matter. In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted a full day.

[94] If no agreement is reached any party seeking costs shall have 60 days<sup>7</sup> from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply. The parties should identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>7</sup> Taking into account the holiday period