New Zealand Employment Relations Authority Decisions

Dryden v Mason Dairies Limited (Christchurch) [2016] NZERA 419; [2016] NZERA Christchurch 150 (6 September 2016)

Last Updated: 1 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 150
5607361

BETWEEN (1) BROOKE DRYDEN and (2) JAZMIN WATSON Applicants

A N D MASON DAIRIES LIMITED Respondent

Member of Authority: David Appleton

Representatives: Ben Nevell, Counsel for Applicants

Matthew Mason, Advocate for Respondent

Investigation Meeting: 5 August 2016 at Dunedin, with the respondent's

evidence by affidavit on 19 August 2016.

Submissions Received: 5 August 2016 from the Applicant

None from the Respondent

Date of Determination: 6 September 2016

DETERMINATION OF THE AUTHORITY

A. **Both applicants were unjustifiably dismissed, and are awarded remedies.**
B. **Neither applicant was unlawfully discriminated against by reason of their sex.**

C. Costs are reserved.

Employment relationship problem

[1] The applicants both claim that they were unjustifiably dismissed from the employment of the respondent on Friday 4 September 2015. They also claim that they were both discriminated against on the basis of their sex.

[2] Up to the date of the investigation meeting the respondent had not lodged a statement in reply or any evidence, despite having been directed to do so. The director of the respondent, Mr Matthew Mason, had also not taken part in the Authority's case management conference call, although he had been forewarned about it.

[3] However, the day before the Authority's Investigation Meeting, Mr Mason contacted the Authority to say he was going to appear to give evidence. Unfortunately, on the morning of the investigation meeting Mr Mason told the Authority that he was unable to attend the investigation meeting due to the state of the roads, inclement weather having occurred overnight. I decided to proceed with hearing the evidence of Ms Dryden and Ms Watson in the absence of Mr Mason as I had travelled to

Dunedin from Christchurch specifically to hear their evidence, at a significant cost to the Authority, and because the applicants themselves had incurred costs in attending the investigation meeting.

[4] As Mr Mason had indicated that he wanted to give evidence, I prepared a summary of the evidence I had heard from the applicants, and arranged for it to be sent to Mr Mason. Mr Mason was also sent a copy of Mr Nevell's written submissions, and documents relating to loss that Mr Nevell had lodged shortly after the investigation meeting. Mr Mason was then given the opportunity to serve and lodge a sworn affidavit in reply, which he did.

[5] Neither Mr Nevell, or separately, the Authority felt the need to ask Mr Mason any questions about the contents of his affidavit. Both parties were given the opportunity to add anything else they wished to prior to the Authority determining the matter. Mr Mason indicated to the Authority that he had consulted a lawyer, but he did not ask to question the applicants, add further evidence or make submissions. Mr Mason did ask in his affidavit to see texts which the applicants claim had been sent by him. I understand, though, that these texts are no longer available, and the Authority has certainly not seen them.

[6] This determination is therefore based upon the written and oral evidence of the applicants, Mr Nevell's submissions and the written evidence in affidavit form of Mr Mason.

Brief account of events leading to the dismissal

[7] Ms Dryden was looking for work in April 2015 and applied for the job of dairy worker at the respondent's farm. An initial interview by telephone took place with Mr Mason, which Ms Dryden described as "strange" because, she said, Mr Mason spoke to her about personal topics. Mr Mason responds that he did not discuss personal topics, and says that it was a former employee, Josh, who had told Ms Dryden and Ms Watson about Mr Mason's personal life.

[8] Ms Dryden said that she did not hear from Mr Mason for a few months so texted him, as she was still unemployed, and he asked her to come to the farm for an interview.

[9] Ms Dryden drove to the farm, taking Ms Watson with her, although Ms Watson was not being interviewed. Ms Dryden said that the interview took place at the kitchen table and that it was *all kind of weird and creepy* as Mr Mason did not really interview other than asking her if she had worked on a farm before. Ms Dryden's evidence is that *the whole vibe was weird* and so she asked if Ms Watson could also get a job at the same time. Mr Mason denies this, saying that he had discussed everything about the farm and the roles. He also denies that the interview took place after dark, as alleged by the applicants.

[10] Around a week later, Mr Mason called Ms Dryden and agreed that he would employ both her and Ms Watson. It seems that an arrangement was made for Ms Dryden and Ms Watson to drive to the farm on the evening of 31 August 2015 and that they were shown to a farm cottage which was empty and dirty, with no furniture.

[11] According to Ms Dryden, the following day, Mr Mason asked her and Ms Watson to meet him at the Inch-Clutha Bridge to sign the employment agreements. On the other hand, Mr Mason says that he got a call from Ms Dryden *demanding contracts which were in my ute at the time*.

[12] Ms Dryden and Ms Watson say that Ms Dryden was given a permanent employment agreement to sign, whereas Ms Watson was given a casual employment agreement. After some discussion, Mr Mason wrote *full-time relief milking* on top of the casual employment agreement and told Ms Watson that he would give her a permanent agreement to sign in due course. The applicants say they were not given an opportunity to seek independent advice in respect of the terms of the agreements.

[13] Ms Watson says that no mention was made of the rate of pay, and that she assumed she would be paid minimum wage. Mr Mason says that they had discussed wages at $17 an hour.

[14] Ms Dryden says that, during the signing of the employment agreements, she and Ms Watson told Mr Mason that they needed to go into Balclutha to seek a grant from WINZ in order to enable them to buy some essentials. They then needed to buy those essentials in town. Also, they needed to attend a funeral in Dunedin on the Thursday of that week and Ms Watson had *PD1* on Friday mornings.

[15] Ms Dryden says that Mr Mason agreed that they could take time off to obtain the WINZ grant and buy equipment for the house and that they could attend the funeral in Dunedin on Thursday. Ms Dryden says that it was clear that they would not be starting work that week and it would take them some time to get organised and ready to go. She says that Mr Mason never said anything to them about starting work that week.

[16] Mr Mason denies that this information was given to him, and says that they had discussed them starting work on the Wednesday so that Ms Dryden could be trained in the shed while he was there with his assistant, Rachel.

[17] Ms Dryden says that she had mentioned to Mr Mason that the house they were staying in was completely unfurnished and that they needed a washing machine, fridge freezer, and proper beds. She says that Mr Mason suggested that they should both move into his house, and that Ms Dryden could sleep in his bed, with him, and Ms Watson could have the single bed. Ms Dryden says that they *politely declined*. Ms Dryden said that she had felt vulnerable as a result of that suggestion.

[18] Mr Mason denies that he suggested this, saying that he had his partner and one year old son at home with him.

[19] After signing the employment agreements they drove straight into Balclutha and applied for their grants. They then had to return the following day (Wednesday,

2 September) in order to pick up the money and then went to the Warehouse to purchase some items. They spent that afternoon vacuuming and cleaning the house

and setting the place up to live in.

1 Police Diversion (community service)

[20] The following day, Thursday 3 September, they drove to Dunedin to attend

their friend's funeral.

[21] Ms Dryden said that, when they arrived back at the farm on Thursday evening, they received a text message from Mr Mason asking if she and Ms Watson wanted to go over to his house to drink Jamieson's whisky. Ms Dryden says the following in her brief of evidence:

We both had a pretty good idea that [Mr Mason's] intentions were to get us drunk and to see if he could sleep with either or both of us. For that reason I texted him back and said "no".

[22] Mr Mason says that he had asked Ms Dryden and Ms Watson to see him so as to find out why they had not started work; not to drink with him. He repeats that he had his son and partner at home with him.

[23] Ms Dryden says that, the following morning, Friday 4 September, Ms Dryden drove Ms Watson to the *PD* and returned to the house. Ms Watson stated in her written brief of evidence that Mr Mason had given them a friendly wave ("a farmer's wave" she said at the investigation meeting) on the morning of Friday 4 September. Ms Dryden said that she had not actually seen the wave, and that it was Ms Watson who had told her about it. When I asked her to confirm that, if Mr Mason had given a friendly wave, he could not have been angry about the refusal to drink whisky the night before, she said that she was not sure. Ms Dryden also could not explain what would have caused Mr Mason to have got angry between 8 o'clock that morning, when he gave the friendly wave, and 11 o'clock that morning when he dismissed her and Ms Watson.

[24] Ms Dryden said that, while she was in the house alone, Mr Mason turned up unannounced at about 11am, that he stormed into the house and yelled at her saying that they were both sacked and he wanted them both out. He said he would give them until 5pm to get out, and if they weren't gone by then *there would be trouble*. Ms Dryden said that Mr Mason did not give a reason for dismissing her. She says she did ask him but he did not reply, and did not give her any idea at all. She said that she was still unsure why he had fired her and Ms Watson, although this seems unlikely as her evidence was partially focussed on her having been dismissed for not turning up at the farm to work. She said that the meeting had lasted around 3 minutes and that she has had no further direct contact with Mr Mason of any kind since that time.

[25] Ms Dryden texted Ms Watson and told her that they had been dismissed. She collected her from PD and they packed up and left. However, they were unable to take Ms Dryden's bed which she had recently bought.

[26] Mr Mason's explanation for the dismissal was that he and Rachel had gone round to the house to explain that he could not employ someone who had made no effort to even turn up to work. He says they were "fed lie after lie" and so he and Rachel decided to dismiss them.

[27] Ms Dryden says that at no point had Mr Mason told her or Ms Watson that they had been required to have started work and that she had not even been to the milking shed, or been shown around the farm yet, nor told what her duties were. She had not been given any overalls, or other farm equipment. She had brought her own boots and that was all she had. She said that she had also not been given access to a motorbike to get from the house to the milking shed, which was some distance away.

The issues

[28] The following are the main issues that the Authority must determine: (a) Whether Ms Dryden was unjustifiably dismissed.

(b) Whether Ms Watson was unjustifiably dismissed.

(c) Whether Ms Dryden was subjected to unlawful discrimination by reason, directly or indirectly, of sex.

(d) Whether Ms Watson was subjected to unlawful discrimination by reason, directly or indirectly, of sex.

Was Ms Dryden unjustifiably dismissed?

[29] In order to determine this question, it is also necessary to consider whether the dismissal occurred in accordance with a valid trial period pursuant to ss.67A and 67B of the Employment Relations Act 2000 (the Act).

[30] The employment agreement entered into by Ms Dryden provides the following material terms:

4. **Trial Period**

• The parties agree that this employment will be subject to a trial period of 90 days, so that they can each assess the suitability of the position and the appointment.

• During this period, we will meet with you from time to time to discuss progress and any problems that might arise. Additional support will be given as required.

• If the employer decides not to continue the employment, the employee will be given at least one week's notice before the end of the trial period.

• As this is a trial period, the employee will not be asked to comment on the proposed termination in advance, and the employer does not have to give reasons for the dismissal. The employee may not bring personal grievance proceedings for anything relating to the dismissal, however the employee retains all other employment rights.

12. **Motor Bike**

You will be supplied with a motor bike to do your work. You are expected to look after it and check and top up the oil

regularly, and keep it maintained and in good running order.

You must wear a helmet when riding on the motor bike or 4- wheeler.

14. **Safe Work Environment**

...

We will provide you with the following safety equipment:

• rain jacket and overtrousers

• work boots

• bike helmet (which must be worn whenever you are on a motor bike or 4-wheeler bike).

[31] Ms Dryden's employment agreement also contained a schedule which set out the main duties of the job.

Was the trial period validly relied upon?

[32] Mr Nevell submits on behalf of Ms Dryden that the 90 day trial period contained in her individual employment agreement was not effective in law and that, therefore, Mason Dairies Limited could not rely on it to justifiably dismiss Ms Dryden. Mr Nevell submits that the trial period clause was invalid for three reasons:

(a) It was unfairly bargained for;

(b) Ms Dryden was dismissed while she was still an *intended employee*

prior to the trial period beginning;

(c) In dismissing Ms Dryden, Mr Mason did not comply with the trial period provision to give her one week's notice, and so cannot claim the protection of that trial period provision.

Unfair bargaining

[33] Mr Nevell relies on the Employment Court case of *Blackmore v. Honick Properties Ltd2*. In that case, the employer had not given Mr Blackmore the statutory opportunity under s.63A of the Employment Relations Act 2000 (the Act) to consider, take advice about, and then to discuss or negotiate the terms and conditions of the individual employment agreement, including the 90 day trial period. At para.[83] of *Blackmore* His Honour Chief Judge Colgan stated:

In the circumstances of this case, an employer's obligation is to provide the written agreement (including the 90-day trial period) a sufficiently reasonable time before the commencement of work if the employee is to have that opportunity. The opportunity will not exist as the statute requires it to, if there is pressure to sign immediately after the form of agreement is presented. The opportunity for consideration, advice and negotiation must be a real opportunity as opposed to a nominal or minimal opportunity ...

[34] The consequences of a conclusion that an employment agreement has been unfairly bargained for are set out in s.69 of the Act and they include the ability of the Authority to vary the individual employment agreement, including by deleting from it the 90 day trial provision.

[35] However, I am not convinced that there was unfair bargaining with respect to Ms Dryden's employment agreement. This is for two reasons. First, Mr Mason swore in his affidavit that it was the applicants who called him, asking him to bring to them the employment agreements for signature. This is contradicted by the applicants' evidence. However, the second and connected reason is due to a submission made by Mr Nevell that *there was time pressure on the applicants to sign*

the contracts in order to get a grant from WINZ that day.

2 [2011] NZEmpC 152

[36] Whilst I do not recall either Ms Dryden or Ms Watson saying that specifically in their evidence, it does make sense that this was the case given that they both needed to go to WINZ to get their grants in order to buy furniture. It is my understanding that they would only obtain those grants if they could prove that they had employment. Clearly, the signed employment agreements provided that proof.

[37] Therefore, I accept the evidence of Mr Mason that it was not he who put pressure on the two applicants to sign the employment agreement; rather, it was the applicants who were in a hurry to sign them because of their wish to obtain the grants from WINZ.

[38] Therefore, I reject the argument that there was unfair bargaining.

Ms Dryden was an intended employee prior to the trial period beginning

[39] This argument again derives from the *Blackmore* case. At paras.[52] and [53]

of *Blackmore*, the Chief Judge states:

[52] ... a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work. The phrase at section 67A(2)(a) "starting at the beginning of the employee's employment ..." means when the employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date.

[53] So the trial period agreed in these terms simply becomes one of a number of terms and conditions of employment that will take effect at a future date when the job starts.

[40] What *Blackmore* is saying is that it is not when the parties enter into an agreement, but when the employee actually commences working that the trial period starts. This is, according to the Chief Judge, to avoid a situation where parties could enter into an employment agreement several weeks before work starts, so that the 90 day period starts to run without the employer and the employee actually working together and testing their relationship. This would defeat the purpose of the trial period.

[41] There is obviously persuasive logic to this, although I would add that it also creates an anomalous situation where an employer is unable to rely on the trial period prior to work commencing even if that employee does something for which dismissal

might be appropriate prior to commencing work (such as, for example, making disparaging remarks about the employer).

[42] There is no way of reconciling this tension as it derives from the legislation which requires that, to be valid, a trial period must be incorporated into an employment agreement, as opposed to the situation in the UK, for example, where a statutorily defined period of work protects all employers against unfair dismissal claims from all employees, save in certain circumstances, regardless of whether an employment agreement has been entered into3).

[43] Notwithstanding this paradox, the Authority is bound by the decisions of the Employment Court and it is therefore bound to find that, given that Ms Dryden was actually dismissed for not having started work, the trial period cannot protect the respondent from an unjustified dismissal claim. This is an irony which, no doubt, will give the respondent little comfort.

[44] Having found that the respondent is not able to rely upon the trial period, I must go on to consider whether Ms Dryden was unjustifiably dismissed without needing to consider Mr Nevell's third argument.

Was Ms Dryden's dismissal unjustified?

[45] Section 103A of the Act sets out the requirements of a justified dismissal. It provides as follows:

103A Test of justification

(3) In applying the test in subsection (2), the Authority or the court must

consider-

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the

employee before dismissing or taking action against the employee;

and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's

explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition the factors described in subsection (3), the Authority or

the court may consider any other factors it thinks appropriate.

3 Many employers appear to erroneously believe this to be the case in New Zealand as well.

(5) The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) minor; and

(b) did not result in the employee being treated unfairly.

[46] The evidence given by Mr Mason in his affidavit makes it abundantly clear that he dismissed Ms Dryden without undertaking any kind of process. I therefore am bound to find that the dismissal was procedurally unjustified.

[47] It is perfectly possible that, had Mr Mason undertaken even a simple process contemplated by s.103A, he would have been satisfied that, for example, she had misunderstood his requirements. It is possible that she and he could have resolved their differences very easily and agreed that she and Ms Watson would work, for example, the following day.

[48] However, that did not occur. For this reason, I am unable to find that Ms Dryden's dismissal was substantially justified as Mr Mason did not give Ms Dryden the chance to explain why she and Ms Watson had not started work.

[49] In conclusion, I find that, in all the circumstances, no fair and reasonable employer could have failed to have followed the process required by s.103A of the Act prior to dismissal, and I am therefore bound to find that the dismissal was unjustified.

Was Ms Watson unjustifiably dismissed?

[50] Ms Watson's employment agreement was headed *Casual Employment Agreement,* and did not contain a trial period, but did contain terms which indicated that it was a casual agreement. However, it did have written across the top *Full Time Relief Milking,* which brings into doubt whether the intention in reality was for the arrangement between Ms Watson and the respondent to be a casual agreement.

[51] If Ms Watson's position was truly a casual one, Mr Mason could simply have

not provided her with any work.

[52] However, I am not satisfied that the agreement between Ms Watson and Mason Dairies Limited was a casual agreement. I reach this conclusion principally on the basis of the words *full time relief milking* which Mr Mason had written on the top of the casual agreement. (He does not deny this in his affidavit.) I accept the

evidence of Ms Watson that, after a discussion between her and Mr Mason, Mr Mason agreed that she would be employed as a full-time relief milker. The very words *full time* makes clear that it could not be a casual position.

[53] Having found that there was no valid trial period in Ms Watson's employment agreement, and that she was employed as a full-time relief milker, I am bound to find that her dismissal was also unjustifiable pursuant to s.103A of the Act. This is for

the same reasons that I have articulated above in respect to Ms Dryden's dismissal, save that the process followed in Ms Watson's case was even more flawed, as Mr Mason did not speak to her at all, but communicated her dismissal via Ms Dryden.

Was Ms Dryden subjected to unlawful discrimination by reason, directly or indirectly, of her sex?

[54] The basis of this assertion by Ms Dryden is that she was dismissed for not having agreed to go and drink whisky with Mr Mason on the evening of Thursday

4 September, as Mr Mason had wanted Ms Dryden and Ms Watson to get drunk and have sex with them.

[55] During the investigation meeting, Ms Dryden said that she based this assumption on the invitation made earlier by Mr Mason to share his bed.

[56] Section 103(1)(c) of the Act states that a personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee has been discriminated against in the employee's employment.

[57] Section 104 of the Act sets out the following:

104 Discrimination

(1) For the purposes of section 103(1)(c), an employee is **discriminated against in that employee's employment** if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107,—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

(2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

(3) This section is subject to the exceptions set out in section 106.

[58] Section 105 of the Act states that the prohibited grounds of discrimination referred to in s.104 are the prohibited grounds of discrimination set out in s.21(1) of the Human Rights Act 1993, including, at 105(1)(a), the ground of sex.

[59] I am not convinced on a balance of probabilities that Ms Dryden has made out her case of unlawful direct discrimination4 by the respondent through Mr Mason. This is because of two reasons:

(a) It is inherently unlikely that Ms Dryden would have continued to have worked (or planned to work) for the respondent after having received a text expressly stating that she could share Mr Mason's bed. She had only met Mr Mason a few days before and barely knew him. It is not known how old Mr Mason is, but Ms Dryden was, at that time, around

19. She says that this made her feel very vulnerable. While she said that she needed the work, on balance, it is unlikely that she would have put herself in a position of being subject to potentially serious sexual harassment or discrimination given, on the face of it, the extremely worrying invitation that she alleges Mr Mason made.

(b) The second reason I find this doubtful is that, in her written brief of evidence, Ms Dryden made very little of this alleged invitation to sleep in Mr Mason's bed with him. It also appeared from the brief of evidence that Mr Mason made this suggestion to her whilst she was discussing matters with him on Wednesday morning at the Inch-Clutha Bridge. However, during her oral evidence, in reply to questions from

the Authority, she said that Mr Mason had made this suggestion later,

4 Although it was not made clear in the statement of problem, it is assumed that the claims are for direct, rather than indirect sex discrimination.

and separately, by telephone. Then, under re-examination by Mr

Nevell, she stated that he had made this invitation by text.

[60] This is a serious allegation that has been made against Mr Mason and I need to be satisfied that the evidence is cogent

and convincing, even if the standard of proof is only on the balance of probabilities. Because of the inconsistencies in Ms Dryden's evidence, together with the unlikelihood that she would have continued to have intended to work for him, after such an invitation, I find that, on the balance of probabilities, the invitation to sleep with Mr Mason in his bed was never made.

[61] Furthermore, in the absence of the alleged context regarding sharing his bed, I see no evidence to suggest that an invitation to drink whisky with Mr Mason inevitably meant that he wanted to sleep with one or both of them.

[62] In addition, Ms Watson's evidence that Mr Mason had given them a friendly wave on the morning of Friday 1 September, after they had declined his invitation to drink whisky with him, makes it very unlikely that he was angry with them for that refusal and that he dismissed them because of it.

[63] In conclusion, I decline to find that Ms Dryden was unlawfully directly discriminated against by reason of her sex.

Was Ms Watson subjected to unlawful discrimination by reason of her sex?

[64] I decline to find that Ms Watson was discriminated directly against by reason of her sex for the same reasons I have articulated above in respect of Ms Dryden, given that her evidence in support of the discrimination claim was materially the same as Ms Dryden's.

Remedies

[65] Section 123 of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's

employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

(d) if the Authority or the court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—

(i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:

(ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

(2) When making an order under subsection (1)(b) or (c), the Authority or the court may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[66] Section 128 of the Act provides as follows:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration

lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Ms Dryden

[67] Ms Dryden claims five months' loss of wages at $35,000 per annum (the salary named in Ms Dryden's employment agreement), which amounts to $14,583.33. She says that she tried to find alternative employment after her dismissal but did not seek farm work because she had been put off farm work since her experience with the respondent. She says that the jobs she applied for included care giving jobs in Dunedin, retail work in Dunedin, dairy farming in Oamaru and retail jobs in Christchurch.

[68] Ms Dryden disclosed some documents showing jobs that she had applied for. However, I note one email dated 18 September 2015 that has been disclosed from Ms Dryden to an unknown recipient, but which appears to be an application to move into accommodation (as it states *My name is Brooke and me and my friend are very interested in moving in*). In the email, Ms Dryden states *Me and Jazmine are going back into study and also seeking part time jobs.* It is possible, however, that Ms Dryden stated this in order to get around possible prejudice from landlords in taking on unemployed people as tenants.

[69] The information given by Ms Dryden showed a number of different positions on her watch list in Trade Me over a range of dates. On balance, I am satisfied that Ms Dryden was making efforts to mitigate her loss and find new work.

[70] However, I am not satisfied that it is appropriate to exercise the Authority's discretion to award Ms Dryden more than three months' ordinary time remuneration, principally because I do not believe it was reasonable for her not to have sought other farming work on the basis of a bad experience with one farmer. I believe that there would have been a reasonable amount of farming work available in September which Ms Dryden could have done.

[71] I therefore award Ms Dryden three months' pay, which equates to $8,750

gross.

[72] Ms Dryden also claims the loss of accommodation which was valued in her employment agreement at $300 per fortnight. However, she was sharing this

accommodation with Ms Watson and so I do not accept that she was entitled to the full $300 per fortnight. $150 per fortnight for three months equates to $900 gross.

[73] Ms Dryden also claims the following losses as a result of her dismissal:

(a) lost course related costs of $1,000;

(b) work clothes of $500;

(c) travel costs of $230; and

(d) $100 for the cost of her bed that she bought. [74] I address each of these in turn:

Course related costs

[75] It is my understanding that Ms Dryden gave up a Polytech course in order to take up the job with the respondent. In so doing, I understand, she forfeited $1,000.

[76] I am not prepared to award this as a head of loss. It was Ms Dryden's choice to give up her course and she either would, or should, have known that she would have to forfeit the $1,000 fee by doing so. In addition, given that she had not started work before she was dismissed, and had presumably only been away from the Polytech a few days, it is possible she could have reapplied for the Polytech course. No evidence was given on that point.

Work clothes

[77] I do not accept that this is a loss that the respondent should have to bear. If Ms Dryden spent $500 on work clothes then she still had the benefit of those clothes after her dismissal. This is not therefore a "loss". In any event, the employment

agreement states that some work clothes would be provided, including boots, and I have seen no evidence that Ms Dryden actually purchased work clothes.

[78] I therefore decline to award damages under this head.

Travel costs

[79] No evidence was given that Ms Dryden actually incurred the $230 in travel costs that she claims. However, I do accept that Ms Dryden would have incurred

costs in driving between Dunedin and Balclutha and back, which were essentially wasted because she was dismissed so soon after arriving. However, she shared the cost with Ms Watson I understand, and so I shall award her the cost of one single trip. I do not believe that any other trips undertaken should be reimbursed by the respondent as these (such as attending a funeral, and Ms Watson's PD) were nothing to do with the respondent.

[80] Multiplying 80 kilometres by the IRD rate of 74c per kilometre, results in

$59.20.

Loss of bed

[81] I decline to award a sum in respect of this as, I understand, the bed was purchased with a grant from WINZ. Therefore, Ms Dryden has not made any loss with respect to the bed. In addition, her evidence was that she did not ask Mr Mason if she was able to recover the bed.

Humiliation, loss of dignity and injury to her feelings

[82] With respect to compensation under s.123(1)(c)(i), Ms Dryden said that she got very depressed after having been dismissed as she was unable to get any benefit for six weeks, having been dismissed. Whilst she spent some time in her parents' house and some time with friends, she says she also spent a number of nights sleeping in her car and not eating. She says she was not able to afford to go to a doctor so she could not get any prescription for anti-depressants.

[83] She said that, as well as being depressed, she was annoyed at how she and Ms Watson had been treated by Mr Mason. She said that it made them both feel like they would only ever have got the job if they had slept with the boss. She said that it made her lose trust in all male employers which affected her self-esteem and sense of self- worth.

[84] I accept that Mr Mason's sudden, and unexpected, dismissal of Ms Dryden would have caused her humiliation, loss of dignity and injury to her feelings. I have not found that there was any unlawful discrimination by reason of Ms Dryden's sex and so I do not take into account her evidence about having to *sleep with the boss*.

[85] I believe the effects suffered by Ms Dryden of her dismissal were moderate. I

am cautious of inferring from her evidence that her depression was a direct result of

the dismissal. Rather, it appears to have been a result of her lack of access to money and accommodation. This cannot be wholly attributed to the respondent, however, as that must partly be due to Ms Dryden's wider situation as well, in which the respondent played no part.

[86] I believe an award in the sum of $7,000 would be just.

Ms Watson

[87] Ms Watson claims five months' loss of wages at 40 hours a week at $14.75 per hour. Interestingly, Mr Mason's affidavit states that they discussed paying Ms Watson $17 per hour and I therefore take this as the basis upon which to calculate her lost wages.

[88] Ms Watson's evidence was that she became unwell after her dismissal because she suffers from anxiety, and this prevented her from presenting herself for interviews in the early stages after her dismissal. She needed to *settle down first* and that required her finding accommodation, which she was not able to do until she was able to receive the benefit. Like Ms Dryden, she had to wait six weeks before she could do so because she had been dismissed.

[89] I accept this evidence of Ms Watson and accept that her dismissal triggered her anxiety attack, which prevented her from being able to look for work for some weeks. For this reason, in Ms Watson's case, I am prepared to award her more than three months' loss of wages. Ms Watson eventually found a job in February 2016 in Dunedin, but has not said the date in February she started. I will therefore assume that she started this job on 1 February. Between the date of her dismissal by the

respondent and 1 February is 21 weeks. Therefore, at $680 gross per week5 for loss

of wages, she is entitled to $14,280 gross.

[90] Ms Watson also claims loss of value of accommodation. She would be entitled to the sum of $1,575, adopting the same principle in calculating as I have for Ms Dryden, but taking into account the longer period of loss awarded.

[91] For the same reasons as I have articulated above with respect to Ms Dryden, I

decline to award Ms Watson anything in respect of the lost Polytechnic cost, or the work clothes. She does not make any claim in respect of a bed.

5 Calculated at $17 an hour, for 40 hours per week.

[92] Adopting the same principle as for Ms Dryden, I award $59.20 for travel costs.

[93] Turning to Ms Watson's compensation for humiliation, loss of dignity and injury to feelings, Ms Watson says that she lost a lot of self-esteem and confidence and does not feel that she can trust people now. She does say, however, things have improved since she got her job at Subway.

[94] Ms Watson is entitled to compensation only in respect of the dismissal, and not unjustified discrimination by reason of her sex as I have found that claim has not been proven.

[95] I do accept that Ms Watson suffered a reoccurrence of her anxiety which had a debilitating effect on her ability to seek new employment. I attribute this reoccurrence directly to the sudden and unexpected nature of her dismissal.

[96] I believe that compensation in the sum of $10,000 is appropriate.

[97] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[98] I have seen no evidence to suggest that there was anything other than a misunderstanding between Ms Dryden and Ms Watson on the one hand and Mr Mason on the other as to when Ms Dryden and Ms Watson were due to start work. It is unlikely that Ms Dryden and Ms Watson, having just started their employment with the respondent, would have deliberately chosen not to turn up to work. I therefore decline to reduce the remedies of either applicant.

[99] Mr Nevell said in submissions that he is in the Authority's hands in respect to the imposition of penalties. However, penalties were not pleaded in the statement of problem and I decline to impose any.

Orders

[100] I order the respondent to make the following payments to Ms Dryden:

a. the gross sum of $8,750 in respect of lost wages;

b. the sum of $7,000 pursuant to s.123(1)(c)(i) of the Act;

c. the gross sum of $900 in respect of lost accommodation; and d. $59.20 in relation to wasted travel costs.

[101] I order the respondent to make the following payments to Ms Watson:

a. the gross sum of $14,280 in respect of lost wages;

b. the sum of $10,000 pursuant to s.123(1)(c)(i) of the Act;

c. the gross sum of $1,575 in respect of lost accommodation; and d. $59.20 in relation to wasted travel costs.

Costs

[102] Costs are reserved. If Ms Dryden and/or Ms Watson seek a contribution towards her legal costs she should first seek to agree those costs with the respondent. If the parties are unable to reach agreement within 14 days of the date of this determination, then Mr Nevell may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that Ms Dryden and/or Ms Watson seek. The respondent will then have a further 14 days within which to lodge and serve a reply.

David Appleton

Member of the Employment Relations Authority