**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2015] NZERA Christchurch 186
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| BETWEEN | VICTORIA SELF<br>Applicant |
| AND | RECEIVABLES MANAGEMENT LIMITED<br>Respondent |

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| Member of Authority: | Christine Hickey |
| Representatives: | Linda Ryder and Carolyn Davies, Counsel for the Applicant<br>Ashley-Jane Lodge and Glenn Cooper, Counsel for the Respondent |
| Submissions received: | 26 August 2015 from the Applicant and 2 September 2015 from the Respondent |
| Determination: | 30 November 2015 |

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**DETERMINATION OF THE AUTHORITY**

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**A. Victoria Self was unjustifiably dismissed. The 90-day trial period provision in Ms Self's employment agreement was not valid.**

**B. Receivables Management Limited must pay Victoria Self:**

**(i) $8,000.00 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000, and**

**(ii) $5,236.95 gross in lost remuneration.**

**Employment relationship problem**

[1] Victoria Self was employed by Receivables Management Limited (RML) from 2 July 2014 until she was dismissed on 20 August 2014 in reliance on a 90-day trial period provision. Ms Self says that she was unjustifiably dismissed and that the trial

period clause cannot be relied on to protect RML from her claim of unjustified dismissal.

[2] Ms Self also claims that she was unjustifiably disadvantaged because RML failed to comply with its 'Human Resources Policy – Disciplinary Procedures' or alternatively that RML breached its contract with her by failing to implement the performance review processes set out in the Human Resources Policy.

[3] RML says that Ms Self is prevented from bringing a claim for unjustified dismissal because clause 3 of her employment agreement (IEA) expressly excludes the right to bring a personal grievance or other legal proceedings arising out of the termination of her employment. It also says that Ms Self could only accept the offer of employment by signing and returning one copy of the IEA when she started work on 2 July 2014. RML says that is what Ms Self did.

[4] RML denies that it failed to use its Policy in relation to a disciplinary or performance management process and says it was not required to use either of those processes as Ms Self was dismissed pursuant to the 90-day trial period provision. RML also denies that it has breached any contractual provision. In addition, it says that Ms Self cannot bring any claim for disadvantage on the basis of how her employment was terminated, as those are claims arising out of the termination of her employment.

[5] RML also says that if it is found to have unjustifiably dismissed Ms Self because of the process used there is such significant contribution from her to mean her remedies should be reduced 100%.

**Issues**

[6] The issues are:

(i) The first issue is whether the Authority has jurisdiction to hear Ms Self's claim for unjustified dismissal. That relies on whether or not she was dismissed under a valid 90-day trial period provision.

(ii) Did clause 3.1 of the employment agreement contained a valid 90-day trial period? If it did not, the Authority's enquiry moves directly to whether or not the dismissal was justified.

(iii) If clause 3.1 contained a valid 90-day trial period provision when did Ms Self accept the offer of employment and therefore become an employee?

(iv) When did Ms Self sign her employment agreement?

(v) Was Ms Self disadvantaged or did RML breach its contract with her?

(vi) What remedies are due?

(vii) Costs.

**Determination**

[7] Ms Self was interviewed for a role as a client services representative on 11 June 2014. On 18 June 2014 Joanne Cameron, RML's human resources adviser, rang and left a message on Ms Self's phone saying that RML would like to offer her the role, she followed that up with an email to Ms Self. The email set out the start date of 2 July 2014 and informed Ms Self of the salary. It said that the *official offer letter, employment agreement and position description* would be sent to Ms Self the next day. Ms Self rang Ms Cameron back to let her know she was pleased to hear she had got the job. Ms Self says that she verbally accepted the offered role over the phone.

[8] On 19 June 2014 Ms Cameron emailed Ms Self the offer letter, the IEA and position description and notified Ms Self that copies signed by Ross Fleming, the business development manager, would be posted to her but may take a couple of days to arrive.

[9] The offer letter stated:

> *If you are happy with the proposed terms and wish to accept this offer of employment please sign both copies and return one copy to me when you start employment on the Wednesday, the 2nd of July, 2014.*

[10] Clause 3 of the IEA was headed *Trial Period* and read:

> *3.1 The Employee's employment is subject to a trial period of 90 days. This means that notwithstanding clause 11[1] during or at the end of the trial period the Employer may give the Employee 1 weeks' notice termination of the employment. The Employer may require the Employee to work that notice period or may, at the Employer's option, to pay the Employee in lieu.* ***The Employee acknowledges and agrees that if their employment***

[1] Entitled *Termination*.

> ***is terminated under this clause they will have no right to pursue a personal grievance or other legal proceedings in relation to the termination of their employment, except for in the limited circumstances set out in Section 103(1) of the Employment Relations Act***. (emphasis added)

[11] Sections 67A and 67B of the Act govern the 90-day trial period and set out how and when it can be used and what the implications of that are:

> ***67A When employment agreement may contain provision for trial period for 90 days or less***
>
> *(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*
>
> *(2)* ***Trial provision*** *means a written provision in an employment agreement that states, or is to the effect, that—*
>
> *(a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and*
>
> *(b) during that period the employer may dismiss the employee; and*
>
> ***(c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal***. (emphasis added)
>
> *(3)* ***Employee*** *means an employee who has not been previously employed by the employer…*
>
> ***67B Effect of trial provision under section 67A***
>
> *(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.*
>
> *(2)* ***An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.*** (emphasis added)
>
> *(3)* ***Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).*** (emphasis added)
>
> *(4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.*
>
> *(5) Subsection (4) applies subject to the following provisions:*
>
> *(a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and*
>
> *(b) the employer is not required to comply with a request under section 120 that relates to terminating an*

> *employment agreement under this section.* (emphasis added)

*Does clause 3.1 of the employment agreement contain a valid 90-day trial period?*

[12] An employer's IEA must comply with the provisions of s 67A which are:

- The trial provision must be in writing. RML's clause is in writing.
- State that it is for a specified period, not exceeding 90 days. RML's clause states that it is for a specified period of 90 days.
- The 90 day period must start at the beginning of the employee's employment. Whether or not the clause was drawn to Ms Self's attention and agreed to in writing before she became an employee (specifically a person intend to work under s 6(1)(b)(ii) of the Act) is disputed.
- During the 90 days the employer may dismiss the employee and the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. Whether clause 3.1 clearly states this is disputed.

[13] If s 67A is complied with s 67B operates to mean that an employee whose employment is terminated under a trial provision by the giving of notice within the 90 day period may not bring a personal grievance or other legal proceedings in respect of the dismissal.

[14] However, an employee whose employment is terminated under a valid 90 day trial period provision may still bring a personal grievance or legal proceedings on any of the grounds specified in s 103(1)(b) to (g).

[15] Section 103(1) of the Act states:

> *(1) For the purposes of this Act,* ***personal grievance*** *means any grievance that an employee may have against the employee's employer or former employer because of a claim—*
> *(a)* ***that the employee has been unjustifiably dismissed****;* (emphasis added) *or*
> *(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or*
> *(c) that the employee has been discriminated against in the employee's employment; or*

> *(d) that the employee has been sexually harassed in the employee's employment; or*
> *(e) that the employee has been racially harassed in the employee's employment; or*
> *(f) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation; or*
> *(g) that the employee's employer has failed to comply with a requirement of Part 6A*

[16] The first issue I need to consider is whether clause 3.1 of the IEA complies with the requirements set out in s 67A, specifically whether it clearly outlined to Ms Self that if she was dismissed under the 90 day trial period provision she was precluded from bringing a personal grievance for unjustified dismissal.

[17] Clause 28 of the IEA reads:

> *The Employee acknowledges that:*
> *28.1.1 Before entering into this Agreement they were given a copy of the Agreement in draft, was advised of the right to seek independent advice on its terms and was given a reasonable opportunity to take such advice.*

[18] Ms Self was also advised in Ms Cameron's cover letter of 19 June 2014:

> *Please note that you are entitled to discuss this offer and to seek advice on the attached proposed agreement with your family, a union, a lawyer, or someone else you trust.*

[19] Ms Self and her father, Christopher Self, a business consultant, gave evidence that they had discussed the employment agreement. Mr Self's evidence was that in relation to clause 3.1 of the IEA he told Ms Self that it appeared to be a standard provision and that all employment agreements contained such a provision these days. Ms Self did not seek legal advice and did not refer to a copy of the Act to check what s 103(1) provides.

[20] Ms Self was aware that there was a 90-day trial period in the agreement and that it meant that for the first 90 days her employment could be terminated by RML. She said that she had no issue with a trial period being in her IEA. However, she did not go so far as to say she was aware that she was agreeing to give up her right to pursue a personal grievance of unjustified dismissal.

[21] Ms Ryder submits that the agreement does not comply with the requirement to notify the employee that she was losing her right to bring a personal grievance for unjustified dismissal and, instead, it expressly includes the right to bring a personal grievance for unjustified dismissal under s 103(1)(a). That is because although the clause purports to limited Ms Self's right to bring a personal grievance or legal proceedings in respect of the dismissal, the words *except for in the limited circumstances set out in Section 103(1) of the Employment Relations Act* expressly include s 103(1)(a) - *that the employee has been unjustifiably dismissed*, which is a personal grievance of unjustified dismissal.

[22] Ms Lodge submits that clause 3.1 of the IEA contains a valid 90-day trial period clause that prevents Ms Self from having her personal grievance claim of unjustified dismissal dealt with. She submits that the exception set out in clause 3.1 of the IEA does not invalidate it, for the following reasons:

- Having a stated exception to the statement an employee cannot bring a personal grievance in respect of the dismissal does not mean the clause has not met the s 67A requirements. The clause states that an employee cannot bring a grievance or other legal proceedings in respect of the dismissal, which is all s 67A requires.
- The stated exception is in line with s 67B(3), which retains the right for an employee to bring grievances for the other types of personal grievance set out in s 103(1) of the Act.

[23] In *Smith v Stokes Valley Pharmacy Limited*[2] Chief Judge Colgan considered the interpretation and application of ss 67A and 67B:

> *Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissal from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.*

[2] [2010] ERNZ 253

[24] In all contracts, including contacts of employment, the purpose of interpretation is to ascertain the meaning of a contractual provision in line with the true intentions of the parties.[3]

[25] It is also the case that:

> *… an exclusion clause should be construed narrowly, but that does not mean a strained interpretation should be adopted. The overall objective is to ascertain the presumed mutual intention of the parties*.[4]

[26] There is also a rule of construction that any ambiguity in a term of a contract that excludes or limits a party's rights should be resolved against the interests of the party that inserted the term and seeks to rely on it.[5] RML inserted the 90-day trial period term and seeks to rely on it to exclude its liability for an unjustified dismissal claim.

[27] I consider that the way clause 3.1 of the IEA is drafted makes it ambiguous, particularly for a layperson like Ms Self. However, I need to consider whether such ambiguity negates its effectiveness in the way that Ms Self argues.

[28] It is difficult to ascertain any **mutual** intention of the parties in relation to clause 3.1 of the IEA. On the face of it, the natural and ordinary meaning of the words used is that while Ms Self was to be prohibited from bringing a personal grievance or other legal proceedings in respect of any dismissal she was simultaneously told she had the right to bring the kinds of legal proceedings in the circumstances set out in s 103(1) of the Act, which includes s 103(1)(a) – a claim that she has been unjustifiably dismissed. That is precisely the claim that RML sought to disallow. I consider that there is no way to read the clause in its entirety that makes it compliant with the aim of RML, which was to allow it to dismiss a new employee without the prospect of facing a personal grievance of unjustified dismissal.

[29] I am required to strictly apply the requirements of s 67A. The fact that the clause is ill-expressed and ambiguous means that it cannot be interpreted to exclude the right to bring a personal grievance of unjustified dismissal. When I apply the rule

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[3] *Vector Gas Limited v Bay of Plenty Energy Limited*, [2010] NZLR 444, Supreme Court.
[4] Law of Contract in New Zealand, Burrows, Finn and Todd, 4th edition, 7.3.1.
[5] The *contra proferentum* rule.

of contra proferentum I reach the same result. Clause 3.1 of the IEA is ineffective to create a defence to a claim of unjustified dismissal.

[30] Given my decision about the effect of clause 3.1 of the IEA, I do not need to consider Ms Self's alternative arguments that she was already a new employee either before she began work on 2 July 2014 or in the first few minutes of the day before she signed and handed over her IEA, or her argument that the way the notice period and payment in lieu was handled in contravention of s 67B(1) negates RML's ability to rely on the trial period clause to exempt it from an unjustified dismissal claim.

[31] The Authority has the jurisdiction to consider Ms Self's personal grievance claim of unjustified dismissal.

**RML's reasons for Ms Self's dismissal and the way it was carried out**

[32] Ms Self and her colleagues worked in an open plan office. Ms Cameron worked on the other side of a partition from Ms Self. During the first few weeks of Ms Self's employment concerns were raised with Mr Fleming and Ms Cameron about Ms Self although not all the concerns were reported back to Ms Self.

[33] Mr Fleming's evidence was that in the week of 21 to 25 July 2014 he twice observed Ms Self using the internet and when he walked past her desk she quickly minimised the screen. He assumed that was because she was on non-work related sites.

[34] He also observed what he considered a lot of non-work related activity including social discussion with members of the other teams and lengthy breaks away from her desk in the staff room or out into the foyer, where the toilets were.

[35] He says that other managers raised with him that Ms Self seemed to be on the internet for personal use a large amount of the time during her work day.

[36] On 29 July 2014, Mr Fleming requested a meeting with Ms Self. He documented what had been discussed in the meeting in a file note. He says he thought there were warning signs and he:

> *... focussed this meeting on allowing her to raise areas where she felt she needed support and assistance and reiterating where Vicky needed to direct her attention.*

[37] The file note records that Ms Self asked for more training or coaching on the Centrix Credit Reports and that Mr Fleming asked the team leader of Creditnet to undertake some one-on-one training.[6]

[38] Mr Fleming also discussed the three areas of focus he expected from Ms Self, being; industry group letters, customer calls and proactive leads. He said Ms Self indicated that she had not yet commenced customer calls.

[39] Mr Fleming told Ms Self that clear key performance indicators (KPI) would be developed:

> *but in the meantime she should focus her attention on making sure she made as many calls related to the three areas outlined above as possible – in this respect I reiterated a minimum of 20 per day was expected (as discussed last week when we met with Dee).*
> *I also took the opportunity to discuss with Vicky that she had been observed in social discussion with various staff members including the legal team opposite her and, in particular, on Friday afternoon with some of the Purchase Debt team. I asked her to desist this behaviour – as she was not only indicating a lack of focus of the expectations of her own role but was also disrupting other staff members who had expectations around their roles. Vicky acknowledged this and indicated she would be more conscious of this going forward.*

[40] Mr Fleming says that after that meeting he noticed continued social discussion with the legal team *albeit at a lower level but still very noticeable by myself and throughout the office* and *breaks away from her desk continued*.

[41] Mr Fleming's evidence is that on 11 August he held a meeting with Ms Hetzel and Ms Self and asked them how many calls they had made to prospective and existing customers over the previous week. Regarding Ms Self:

> *I received a response that indicated that calls were well below the expectation of 20 per day. I felt at this point that Vicky had not taken any opportunity to understand the expectations of the role and she continued to show no commitment to wanting to change her behaviour.*
>
> *A further meeting was held on Wednesday, 13 August 2014. This meeting was for the purpose of Vicky and Dee seeking clarity on the task of calling existing clients who had had a*

[6] I do not accept Ms Self's suggestion that the file note was not contemporaneous but prepared for the purpose of these proceedings. However, I do accept it must have been prepared later in the day as it notes that Mr Fleming had arranged more Creditnet training.

> *June Invoice – calls of between 250 and 300 to be made seeking repeat business. At this meeting Dee suggested splitting the list between them so that ownership and accountability could be apportioned.*
>
> *Later in the week Dee approached me to ask for further work as she had completed the calls to existing clients seeking repeat business. In addition to asking her how she went I also asked her how Vicky had progressed. Dee explained that Vicky had not started this work. This comment was subsequently verified by reviewing the telephone call logs.*

[42] At the investigation meeting Mr Fleming clarified that he checked the telephone call logs before he made the decision to dismiss Ms Self.

[43] Ms Cameron says that in Ms Self's first week she was surprised that Ms Self was quite loud and made inappropriate remarks and jokes. When asked to be more specific Ms Cameron could not recall any particular instances or give examples.

[44] Ms Cameron also reported two meetings that she had with other staff about Ms Self's behaviour. On 13 August Dee Hetzel, who was in the newly formed team with Ms Self and in the same role, and Ashleigh Curtis, customer consultant, brought up what they considered were frequent conversations, both verbal and via email, between Ms Self and another female employee. They had become uncomfortable with the content of the conversations and had seen various gifts being given to the female colleague by Ms Self. They considered what was happening was sexual harassment. Ms Cameron told them that unless either Ms Self or the other colleague complained about what was happening between them she would not act, but would tell Mr Fleming about the situation.

[45] In addition, Ms Hetzel and Ms Curtis reported their view that Ms Self was *continuously on Trademe, on personal phone calls, and not doing her work.*

[46] Ms Cameron talked to Mr Fleming on 13 August about Ms Hetzel's and Ms Curtis' concerns about Ms Self's behaviour towards the other staff member. They agreed that the staff member herself, would need to make a complaint before any action could be taken *but that we would remain vigilant to any possible activity in this respect towards* [that staff member] *in the future.*[7]

[7] Mr Fleming's written statement.

[47] There was no complaint from the staff member and I am satisfied that Ms Self's sexuality had no bearing on her dismissal.

[48] On 15 August at 12.20 pm Ms Hetzel emailed Ms Cameron:

> *Can you please speak with Ross/Vicky and get something done about her current work habits. I am not sure if you have noticed but this is becoming ridiculous.*

[49] Again on 15 August at 1.21 pm Ms Hetzel emailed Ms Cameron with the subject line *look now*. Ms Hetzel explained that was because she noticed that Ms Self was on Trade Me.

[50] On 15 August 2014, Mr Fleming says Ms Cameron discussed Dee Hetzel's increased frustration at:

> *Vicky's continued use of company time for personal reasons – specifically the high use of unauthorised Internet usage. Joanne explained that she had witnessed Vicky using "Trade Me" after being alerted by Dee. Joanne and I further discussed the option of dismissing Vicky under the Trial Period clause in her contract, and I agreed to consider this over the week end.*

[51] Ms Self was absent from work due to illness on Monday, 18 August. The following day, 19 August, Mr Fleming noticed Ms Self asleep on the sofa in the staff room and later was approached by Ms Curtis who reported Ms Self had been asleep in the staff room but that Ms Curtis had woken her because she had slept past her lunch break. Mr Fleming says that Ms Self did not emerge from the staff room until sometime later.

[52] Mr Fleming asked the IT department to provide him with details of Ms Self's email history and:

> *this supported a level of non-work related activity – namely a high level of social chit chat with* [the previously identified staff member] *(who sat to the side of Vicky).*
> *While I did not read the content of the emails in details I did note they were not work related and the thread was consistent and ongoing daily. I concluded that Vicky had chosen to reduce her verbal social communication (that I had asked her to discontinue on 29 July) and instead continue her social communication via email to conceal in some way her socialising.*

[53] Mr Fleming says later that day he made the decision to dismiss Ms Self and the following day he invited her in to the meeting room and discussed his disappointment with her level of work and with her work ethic.

[54] He handed Ms Self a letter of termination of her employment which was stated to be in accordance with the trial period clause in her IEA.

[55] Mr Fleming and Ms Self disagree over what happened next. Mr Fleming says that Ms Self became confrontational in her tone and asked Mr Fleming to get Ms Cameron so Ms Self could check her dismissal was legal; told him that he needed to consult with her before terminating her employment; said that she could only remember one discussion with him about her loud talking and told him he would look inadequate in front of the Employment Court.

[56] Mr Fleming told Ms Self the decision had been made and there was no need to discuss it with Ms Cameron. He says he reiterated his earlier comment about lack of commitment from Ms Self and asked her to gather her possessions and leave the premises. He says he got up and held the door open and again asked Ms Self to gather her possessions and leave the premises. He followed her to her desk where she sat down. He was worried that she would not leave and went to get Jamie McLauchlan who he asked to provide support if Ms Self became aggressive. He says Ms Self eventually gathered her belongings and left.

[57] Ms Self says that the way Mr Fleming undertook her dismissal was humiliating. She says the meeting room was not private but had a glass wall to the office. She says she asked if there was any way to avoid her dismissal and was told there was not. She says she told Mr Fleming she did not believe the 90 day law allowed for outright dismissal without first attempting to address any issues with the employee. She says that she:

> *cautioned Ross to choose his words carefully as I was unsure how this would look if brought before the Employment Court. At this point Ross raised his voice and pitch and said "don't you threaten me"…*
> *Ross stood up and opened the door … and told me in a raised voice to "get out"…*
> *I noted due to Ross' raised voice and violent opening of the door, other staff members were now looking into the meeting room. Ross then shouted at me to "get out, get out".*

[58] Ms Self says that Mr Fleming then went and asked Mr McLauchlan to help sort her out and that the two of them stood over her. As she attempted to shut down her computer Mr Fleming became impatient and leaned over and turned her monitor

off. She also says that when she was attempting to remove her site access card from its bungee, Mr Fleming snatched them both out of her hands. She explained the bungee belonged to her and he handed them back and she took the card off and handed it to Mr Fleming.

[59] She says that Mr Fleming's:

> *behaviour denied me a dignified exit and humiliated me in front of the other staff members.*

[60] Mr Fleming denies ever raising his voice or saying "don't threaten me" and denies standing over Ms Self with Mr McLauchlan or snatching the bungee and access card.

*Was Ms Self unjustifiably dismissed?*

[61] Under the test of justification in s 103A of the Act, the Authority needs to consider both the decision made by RML, and how that decision was arrived at. In this case there was effectively no process at all. Ms Self was called in to a meeting and handed a letter terminating her employment. She had no idea prior to that, that her employment was imminently in jeopardy.

[62] In applying the s 103A test I need to consider:

- With regard to the resources RML had whether it sufficiently investigated the allegations or concerns it had about Ms Self before dismissing her.
- Whether RML raised the concerns it had about Ms Self with her before deciding to dismiss her.
- Whether RML gave Ms Self a reasonable opportunity to respond to its concerns before dismissing her.
- Whether RML genuinely considered Ms Self's explanation before dismissing her.[8]

[63] In addition to those four factors, the Authority can consider any other factors it considers appropriate.[9] However, it must not determine a dismissal or action to be

[8] Section 103A(3) of the Act.
[9] Section 103A(4) of the Act.

unjustifiable 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.[10]

[64] RML had concerns about Ms Self's dedication to her work tasks, partly based on how much time she appeared to be spending on non-work related internet sites and in chatting to colleagues. It was also concerned about what it considered inappropriate emails sent during work time and inappropriate conduct towards a colleague. The colleague concerned did not complain about Ms Self's actions but two other colleagues complained to Ms Cameron. RML did not carry out any investigation about the issue of inappropriate emails and other behaviour towards a colleague. For example, that colleague was not asked for her view of Ms Self's emails and behaviour towards her.

[65] RML has a human resources adviser, Ms Cameron, and I am satisfied it could have carried out an investigation into the concerns about Ms Self's apparent lack of work focus as well as her overtures to a colleague but it did not do so. I accept that the lack of an investigation was most likely because RML believed it was entitled to dismiss Ms Self under the 90 day trial period provision and would not face any scrutiny of its process or decision if it did so.

[66] Ms Self was not asked for her explanation and therefore was not give a reasonable opportunity to answer any of RML's allegations against her. As RML's concerns were not put to her for her explanation it follows that no consideration at all could have been given to her explanations before a decision to dismiss her was made.

[67] There was no compliance with the minimum standard required for a fair process under the s 103A(3) test. The defects in the process were not minor and resulted in Ms Self being treated unfairly.

[68] The decision to dismiss was not a decision that a fair and reasonable employer could have made in all the circumstances at the time. Therefore, Ms Self was unjustifiably dismissed.

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[10] Section 103A(5) of the Act.

*Was Ms Self disadvantaged or did RML breach the employment agreement?*

[69] These claims are also about alleged deficiencies in the process used to reach and implement the decision to dismiss Ms Self. They rely on the same facts that have resulted in a finding of unjustified dismissal on procedural grounds.

[70] I decline to consider and determine these claims separately as they are duplicative and would not lead to any greater remedies being awarded. In other words, when deciding what compensation Ms Self is entitled to I will already be considering the procedural shortcomings of RML in dismissing Ms Self.

**Remedies**

[71] Section 123 of the Act provides that when the Authority determines that an employee has a personal grievance it *may* in settling the grievance provide for one or more of certain listed remedies, including lost remuneration and compensation for humiliation, loss of dignity and injury to her feelings.

*Lost remuneration*

[72] Ms Self claims her total lost wages from RML between 27 August 2014, (the day after the week's paid notice period ended) until 20 October 2014, (the day she got a new job). She claims $6,546.19 gross.

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

[74] I am satisfied that Ms Self adequately mitigated her loss by seeking replacement work as soon as possible.

[75] Since Ms Self obtained work within the three months after her dismissal I need to award her actual lost remuneration for the thirteen weeks after her dismissal. Therefore, subject to consideration of contribution, RML must pay Ms Self lost remuneration of $6,546.19 gross.

*Compensation*

[76] Ms Self claims compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to her feelings. She says that the fact of being dismissed

with no warning that her job was at risk and the way Mr Fleming dismissed her added to her distress and humiliation.

[77] Ms Self's evidence is that she was in shock when Mr Fleming dismissed her. She immediately thought about the financial impact being dismissed would have on her. She drove to her parents' house immediately and when she got there she *broke down* and *was inconsolable.*

[78] She says her confidence had been shaken somewhat while at RML by how she had been treated by her colleagues. She says there were homophobic behaviour and comments directed at her. She says she considered that she had been getting progressively better at the job and being dismissed was a heavy blow.

[79] Ms Self says, and her father confirms, that she became depressed and anxious. She says she found it difficult to leave the house and cried constantly. She says she fought with her fiancé because she found it hard to control her anger and the stress of her financial situation took a toll on their relationship.

[80] Ms Self and her father say that her confidence suffered. Ms Self says she felt worthless after being dismissed in so callous a manner. She says that discovering notes on her file about the way her sexuality was discussed she felt a lot of shame and embarrassment. She said she was still suffering feelings of anger, injustice and anxiety.

[81] I do not accept Ms Self's evidence that Mr Fleming shouted at her or snatched the card and bungee off her as part of the process of dismissal. However, I accept that due to the open plan nature of the premises other employees must have been aware that Ms Self was being dismissed immediately.

[82] Ms Self's evidence establishes that she has suffered humiliation, injury to her feelings and a loss of dignity warranting an award of compensation under s 123(1)(c)(i) of the Act.

[83] Subject to consideration of contribution but mindful of the need not to keep compensatory payments artificially low and balanced against the need for moderation – applying a formulation for exercising the discretion to award compensation recently

expressed by the Employment Court in *Hall v Dionex Pty Limited*[11] – I conclude $10,000 is the appropriate award for the particular circumstances of Ms Self's case.

*Contribution*

[84] RML submits that given Ms Self's poor performance and her failure to modify her behaviour or improve her performance despite issues being raised with her the termination was substantively justified.

[85] Ms Lodge submits that had a different process been undertaken by RML, which would have occurred in the absence of a 90-day trial period, dismissal would still have been the outcome. Therefore, no lost remuneration should be awarded because the cause of Ms Self losing her job was her own behaviour and not RML's failure of process; that is, the loss does not follow from the grievance which has been established only by procedural failings.

[86] Another way of assessing the issue leading to RML's argued position of negation of remedy for Ms Self is to consider whether she so contributed to her dismissal in a blameworthy way that her remedies should be reduced.

[87] Ms Ryder submits that Mr Fleming had ample opportunity to raise his apparent number of concerns about Ms Self's performance but did not do so, except for the matter about her discussions with other staff distracting both them and her from their work tasks. Ms Ryder submits that in failing to do so RML breached its duty of good faith to Ms Self in that it was not adequately communicative and not active and constructive in establishing and maintaining a productive employment relationship. Ms Self was never told that her job was at risk if she carried on in the way she was going.

[88] Ms Ryder says that the 20 calls per day were merely a target and that there had not been sufficient emphasis on the importance of the number of calls a day. Ms Ryder submits that Ms Self did not contribute to her dismissal.

[89] I disagree with Ms Ryder over the significance of the required 20 calls a day. I agree that 20 calls per day had not been officially made into a KPI by the time that Ms Self was dismissed. However, I accept that it was discussed with Ms Self and Ms Hetzel on 21 July that Mr Fleming would like them to make 20 calls a day as of the

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[11] NZEmpC 29, at paragraph [87]

following week. Ms Self says this was referred to as a *call quota* or a *round about target*.

[90] Again on 29 July Mr Fleming reiterated to Ms Self that she should be making a minimum of 20 calls per day. Ms Self should have been well aware that was a minimal expectation. Ms Self did not make 20 calls per day, even on average. Mr Fleming's pre-dismissal analysis of her telephone logs showed she was persistently under the target and only making about 20% of the target calls a day.

[91] Ms Self says that Ms Hetzel made call after call and terminated the calls at the first sign of resistance whereas she used sales techniques to draw clients into a discussion. I take her to mean that although she made fewer calls they were more productive then Ms Hetzel's calls. She also says she was given conflicting directives from Mr Fleming and Mr Garters.

[92] However, Ms Self did not raise with Mr Fleming that she was not meeting her target of 20 calls a day because she was spending so much time on each call or that conflicting instructions were hampering her work.

[93] Ms Self says that personal use of the internet during work time was common amongst her colleagues and she had been told that "we all do it". Ms Self does not deny that she used RML's computer system for her own personal purposes during her employment. On 2 July 2015, Ms Self signed RML's Human Resources Electronic Usage Policy. It stated that no use of social media was allowed, unless you had specific permission to use such sites for work purposes and that personal email or recreational use of the internet could only be during break time and had to be kept to a minimum. I consider that any employee should be aware that a formal, signed policy is to be complied with over a colleague's informal comment about how things worked.

[94] Mr Fleming only obtained a report on Ms Self's internet usage and a report on her daily activity after her dismissal. For these proceedings Ms Self provided her own written analysis of her internet usage and on her assessment she was on the internet for personal use for a number of hours. However, a number of other sites not identified by her were clearly for personal use, as Ms Self admitted at the investigation meeting.

[95] Ms Self's email traffic to her colleague was significant and came after Mr Fleming's warning about not talking to other staff members so as to keep the focus on work. I consider Ms Self understood that same reasoning applied to non-work related email conversations with work mates, yet she continued to devote an unprofessional amount of time to personal discussions with one colleague by email.

[96] I accept that usually an employee may not be found to have contributed to a dismissal for poor performance or incompetence without an earlier fair process. That is generally because an employer has the ability to performance manage an employee using a proper process. There is always a possibility that an employee will improve their performance if they are properly managed and are aware of the consequences of non-performance.

[97] Ms Self was given the opportunity to improve in two areas of performance[12], although admittedly she was not expressly told that a failure to do so could result in her dismissal. However, Ms Self understood herself to be on a valid 90-day trial period and believed she could be dismissed within that time for any reason.

[98] I do not consider the content of the emails between Ms Self and Ms X themselves, apart from their clearly personal content in work time, to have been the kind of blameworthy behaviour for which remedies could be reduced. In other words, there is no work related problem in flirting with a colleague, so long as it does not amount to sexual harassment, unless your advances are unwelcome.

[99] Even if I leave aside allegations that Ms Self was often late to work, late back from her breaks and took too many toilet breaks as being insufficiently investigated, the amount of personal use of the internet and email while at work was blameworthy behaviour of a kind that any employee would know was unacceptable.

[100] I consider that it was the kind of blameworthy conduct that contributed to the situation giving rise to Ms Self's personal grievance. Without those contributing factors, even if Ms Self had not yet reached the daily target of calls, it is unlikely that she would have been dismissed within the first 90 days. Her contribution should result in a reduction in remedies of both her wages and her compensation. Overall I consider that the remedies otherwise due to Ms Self should be reduced by 20%.

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[12] Non-work conversations and number of calls per day.

***After-discovered conduct?***

[101] In its statement in reply RML says that details of behaviour discovered after Ms Self's dismissal should be taken into account to reduce her remedies. It suggested that following *Salt v Fell*[13] Ms Self should not receive any remedies.

[102] The Court of Appeal case of *Salt v Fell* decided that behaviour discovered subsequent to an unjustified dismissal can be relevant to remedies on the basis that a wrongdoer cannot be allowed to profit from their wrongdoing. However, the subsequently acquired evidence relied on for a deduction in remedies must be reasonably connected to the reason for dismissal. In addition, the after discovered conduct must be deliberate and serious misconduct.

[103] Ms Ryder submits that most of the conduct relied upon by RML does not fall into the category of after discovered conduct as it was known about before Ms Self's dismissal. I agree. Although perhaps further details were discovered, such as the actual sites Ms Self accessed that were non-work related. The only two behaviours listed in the Statement in Reply which were not identified as specific concerns by or to Mr Fleming before Ms Self's dismissal were an allegation that she was regularly late for work and that she took longer breaks than she was entitled to. However, I note that Mr Fleming had observed one late return from a lunch break.

[104] I agree that RML knew before dismissal of the other matters that it refers to in the list of behaviours which it says prove that Ms Self did not devote all of her efforts to discharging her duty to her employer. I have already taken most of those allegations into account, so far as I was satisfied that they were related to Ms Self's contribution to the situation leading to her personal grievance, and I decline to make any further reduction to Ms Self's remedies.

**Costs**

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

[13] [2008] ERNZ 155

[106] 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 hearing took one day.

[107] If no agreement is reached any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 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