New Zealand Employment Relations Authority Decisions

Smith v McCreanor (Christchurch) [2017] NZERA 1210; [2017] NZERA Christchurch 210 (4 December 2017)

Last Updated: 15 December 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 210
5644447

BETWEEN KAREN SMITH Applicant

AND SCOTT McCREANOR trading as SWEET AS A NUT Respondent

Member of Authority: Andrew Dallas

Representatives: John Cuttance, Advocate for the Applicant

David Browne, Counsel for the Respondent

Investigation Meeting: 14 February 2017 at Dunedin

Submissions 27 February 2017 and 21 March 2017 for the Applicant and 15 March 2017 for the Respondent with further material received up to, and including, 29 March 2017

Determination: 4 December 2017

DETERMINATION OF THE AUTHORITY

A. Karen Smith was unjustifiably dismissed by Scott McCreanor

trading as Sweet as a Nut.

B. Mr McCreanor must settle Ms Smith's personal grievance by

paying her the following amounts:

(i) $2,688.99 gross as reimbursement for lost wages;

(ii) $7,000 as compensation for humiliation, loss of dignity and injury to feelings.

C. Costs are reserved

Employment relationship problem

[1] Scott McCreanor trading as Sweet as a Nut employed Karen Smith as a kitchen hand/café assistant. Sweet as a Nut operates a café located in the Dunedin Central Police Station and a catering business servicing the Otago region. Ms Smith worked for Mr McCreanor from 16 March 2015 until 22 July 2016, when she was summarily dismissed. Ms Smith said her dismissal was

unjustified. She sought monetary and non-monetary compensation to remedy her personal grievance.

The Authority's Investigation

[2] During the investigation meeting, I heard evidence from Ms Smith, Mr

McCreanor and another employee at the café, Jo Bray.

[3] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[4] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The following are the issues for investigation and determination:

(i) Was Ms Smith's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;

(ii) Was Ms Smith subject to an unjustifiable action to her disadvantage when she was suspended by Mr McCreanor?;

(iii) If Mr McCreanor's actions were not justified what remedies should be

awarded, considering:

(a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;

(b) compensation for lost wages under s 123(1)(b) of the Act?

(iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Smith that contributed to the situation giving rise to her grievances?

Was Ms Smith unjustifiably dismissed by Mr McCreanor?

Events on 6 July 2016

[6] On 6 July 2016, Mr McCreanor said he observed Ms Smith chopping parsley in an unsafe manner. He said she was using a 16 inch knife to cut parsley on a chopping block positioned between two benches in such a way there was no solid surface supporting a majority of the block.

[7] Mr McCreanor said he was concerned about this and, on his account, he said:

"Karen can you please stop and tell me what you are doing?"

(to which Ms Smith replied): "Chopping parsley".

[8] Mr McCreanor said Ms Smith, when asked, was unable to explain or justify her actions in respect of the parsley. However, Mr McCreanor said Ms Smith did stop chopping the parsley in the manner he regarded as unsafe.

[9] Ms Smith would say that she remembered Mr McCreanor asking her what she was doing and she said, "making a cheese ball". Ms Smith said she could not remember chopping parsley or using the chopping block. Ms Smith did, however, suggest she may have placed the chopping block in the way described by Mr McCreanor.

[10] Mr McCreanor said he did not ask Ms Smith to make a cheese ball nor was he aware she was making a cheese ball.

[11] Mr McCreanor said he noted the incident in his diary. He said he then sought advice from his solicitor (Mr Browne) about it.

Events on 7 July 2016

[12] On 7 July 2016, Ms Smith performed her normal duties. However, as she was preparing to leave work, Mr McCreanor gave her a letter. Mr McCreanor said the letter, which was not in an envelope but Ms Smith suggested it may have been, was headed "Disciplinary Meeting – allegation of Serious Misconduct – Proposal to Stand You Down on Pay". Mr McCreanor said he told Ms Smith what the letter was and that it was a confidential employment matter. Mr McCreanor said Ms Smith did not make any

comment.

[13] Mr Smith said she did not recall exactly what Mr McCreanor said when handing her the letter but suggested he used words to the effect of "take this home and read it" and did not use the term, "confidential".

[14] The letter set out the allegation of serious misconduct as a failure to observe health and safety guidelines and deliberate disregard of health and safety policy. The letter did not particularise what these "guidelines" or the "policy" was.

[15] Mr McCreanor did not appear to have health and safety "guidelines" or a "policy" for the café. Instead he sought to rely on a contractor safety induction promulgated by the New Zealand Police which Ms Smith signed on 5 March 2015.

[16] The letter did, however, refer to the health and safety clause in Ms Smith's employment agreement. A review of the clause discloses that it predominately deals with accident reporting requirements and accident compensation. However, the clause did contain the following overarching statement:

15. HEALTH AND SAFETY AND ALTERNATIVE DUTIES

15.1 The parties to this Agreement express their commitment to the pursuit of Health and Safety in employment. The parties *shall endeavour to meet their obligations* under the Health and Safety in Employment Act 1992, the 2002 amendments and all other health and safety legislation promulgated (emphasis added).

[17] The definition of, and description of conduct for, "serious misconduct" which may result in summary dismissal in the disciplinary procedure relied on by Mr McCreanor did not specifically refer to health and safety. In his evidence, Mr McCreanor said he relied on the part of the disciplinary clause dealing with "refusal to carry out proper work instructions".

[18] The letter advised Ms Smith that should the allegation be established, disciplinary action, including dismissal, might result. Finally, the letter asked Ms Smith to keep the contents of the letter confidential or not to approach other staff members or customers about it.

[19] The letter asked to meet with Ms Smith on 11 July 2016 to discuss the allegation and proposed she be stood down from 7 July 2016 until then. Ms Smith was asked to provide comment on her proposed stand down and an email address was provided for that purpose.

[20] For reasons that were never properly explained, Ms Smith's employment agreement contained two different disciplinary procedures. Both procedures afforded Mr McCreanor the power to suspend Ms Smith. The first procedure contained a relatively detailed suspension process, which provided:

Where the employer considers it appropriate, it may require the employee to undertake reduced or alternative duties or remain away from work on suspension but on full pay while it conducts an investigation into the employee's actions or conduct. If suspension is being considered, the employer will, where possible, discuss this with the employee and consider the employee's comments before a final decision on whether to suspend is made. Where any suspension extends beyond two weeks due to matters beyond the employer's control (such as a criminal investigation) the suspension may continue without pay.

[21] However, Mr McCreanor would say in his oral evidence he was relying on the second procedure. The suspension process in that procedure relevantly stated:

Where the Employer believes it has cause, the Employer shall have the right to suspend the Employees from its (sic) employment on pay for such period as the Employer shall, at its sole discretion, determine.

[22] On 7 July 2016, Ms Smith left the café at the same time as another employee, Ms Jo Bray and they rode the lift to the ground floor together. Ms Smith said she looked at the letter in the lift and was quite shocked. She said she may have verbalised some of this shock, but did not discuss the contents of the letter with Ms Bray.

[23] Ms Bray said Ms Smith discussed the letter with her in the lift and as they walked to their parked cars. Ms Bray said Ms Smith referred to the letter in an excited manner and suggested "getting the sack was better for her than having another job to go to". There also appeared to be a discussion about the different stand-down that applied for the unemployment benefit post dismissal and resignation. Ms Bray then said that once inside her car – Ms Bray was parked in an adjacent car park – Ms Smith rang someone on the phone and she heard her say words, or words to the effect of, "you will never guess what just happened". Ms Bray subsequently informed Mr McCreanor via text message what Ms Smith had said. Ms Smith denied she spoke to anyone while sitting in her car in the car park.

[24] The interaction with Ms Bray would result in a further allegation of serious misconduct levelled at Ms Smith by Mr McCreanor, which is discussed below.

The employment investigation

[25] On Friday 8 July 2016, Ms Smith said she was feeling very stressed because of the allegation of serious misconduct and her

suspension, so she arranged to see her doctor on Monday 11 July 2017. Ms Smith's doctor provided her with a medical certificate saying she was unwell and unfit for work for one week. This was subsequently provided to Mr McCreanor.

[26] Also on 11 July 2017, after discussing the situation with a friend, Ms Smith contacted an employment advocate (Mr Cuttance) to represent her. Mr Cuttance wrote Mr McCreanor a letter advising that Ms Smith would not available to attend a disciplinary meeting until the expiry of her medical certificate.

[27] On 15 July 2016, Mr Cuttance advised Ms Smith he had received a letter from Mr McCreanor raising two further allegations of serious misconduct. The first of these new allegations related to an alleged breach of confidentiality on 7 July 2016 when Ms Bray claimed Ms Smith had discussed the contents of Mr McCreanor's first letter with her. The letter enclosed a statement from Ms Bray. The second new allegation, which was interconnected with the first, was that Ms Smith had cut the parsley in an unsafe manner with the intention of getting dismissed. The letter also said a disciplinary meeting would take place on 19 July 2016.

[28] After reviewing Ms Bray's statement, Ms Smith contacted her mobile phone

provider to request her phone records for 7 July 2017.

Disciplinary meeting on 19 July 2017

[29] The disciplinary meeting was held at the café. In attendance were Mr

McCreanor, his solicitor, Mr Browne, Ms Smith and her advocate, Mr Cuttance.

[30] The meeting appeared to be chaired by Mr Browne who outlined the purpose of the meeting and read out the allegations.

[31] Ms Smith would say the meeting "was quite short, only about 20 minutes". Mr McCreanor disputed this and stated in response: "I believe [the meeting] lasted as long as it could considering [Ms Smith] said almost nothing".

[32] Prior to the meeting, Mr McCreanor had provided a photograph of the chopping block and the parsley. However, this was a reconstruction based on his view of the facts and was provided to Ms Smith and Mr Cuttance (and, subsequently, the Authority) for illustrative purposes. During the meeting, an inspection of the kitchen area was undertaken. During this inspection Mr McCreanor said Ms Smith acknowledged she may have moved the chopping block into the position as illustrated in the photograph (to get it out of the way) but denied chopping parsley on it in the manner described by Mr McCreanor on 7 July 2016. She said she was making a cheese ball.

[33] In response to the second allegation about breach of confidentiality, Mr Cuttance questioned Mr McCreanor's legal authority to give such an instruction. Mr Cuttance said Mr McCreanor's recommendation to Ms Smith to bring a support person to the disciplinary meeting was contrary to the requirement that she not discuss the matter with anybody else. Mr Cuttance also said Ms Smith had not approached Ms Bray about the contents of the letter and was merely reacting to it in the lift. Mr Cuttance also said Ms Smith had not spoken to anyone on the phone in the carpark as contended by Ms Bray and was waiting on her phone records to demonstrate this.

[34] In response to the third allegation that Ms Smith had deliberately chopped the parsley in an unsafe manner to get dismissed, Ms Smith said she had not spoken to anyone at Work and Income about leaving her job or about what the effect of resigning or being dismissed would have on the "stand-down" for the unemployment benefit. Ms Smith did say she had an appointment at Work and Income the day before the disciplinary meeting to discuss her single parent support payments, which she said was unrelated to the disciplinary process.

Preliminary decision to dismiss

[35] After the meeting, Mr McCreanor discussed the options available to him with Mr Brown. Mr McCreanor said because Ms Smith had said very little during the meeting, he wrote her a letter dated 20 July 2016 advising her of a preliminary decision to summarily terminate her employment for serious misconduct.

[36] The letter offered Ms Smith an opportunity to provide written feedback by

4pm, 21 July 2016. Ms Smith did not provide written feedback but Mr Cuttance did have a conversation with Mr Browne about the letter. Mr McCreanor said he was disappointed that Ms Smith did not provide written feedback because "she didn't give me anything I could go on". Ms Smith, in contrast, said Mr McCreanor did not really listen to what was being said during the disciplinary meeting and had already made up his mind that he was going to dismiss her.

Decision to dismiss

[37] Mr McCreanor said the decision to dismiss Ms Smith was not an easy one to make. Mr McCreanor rejected Ms Smith's assertions her dismissal was pre- determined and said he had lost trust and confidence in her because he saw her chopping the parsley in an unsafe manner, because she had denied doing so and because she discussed a confidential employment issue with Ms Bray, a co-worker, contrary to express instruction not to.

[38] On 22 July 2016, Mr McCreanor issued a letter confirming Ms Smith's summary dismissal. The letter found all three allegations of serious misconduct made against Ms Smith by Mr McCreanor had been established.

[39] On 15 August 2016, Mr Cuttance raised personal grievances on behalf of Ms Smith for unjustifiable dismissal and unjustified disadvantage (suspension). Mr Browne on behalf of Mr McCreanor wrote to Mr Cuttance on 2 September 2016 denying Ms Smith's personal grievances.

Evaluation

Procedure

[40] Unfortunately, there were several defects in Mr McCreanor's employment investigation into Ms Smith's alleged serious misconduct. These procedural deficiencies were not minor and they resulted in Ms Smith being treated unfairly.1

[41] Ms Smith alleged she was subject to an unjustified disadvantage by Mr McCreanor through the imposition of a procedurally defective suspension. However, as this was intrinsically bound up in the procedural dynamics of Ms Smith's dismissal, it was effectively subsumed by it. Even if I am wrong about that, the substantive employment relationship problem between the parties was one of

dismissal.2

1 Employment Relations Act, s 103(A)(5)

2 Employment Relations Act, s 160(3)

[42] Advocate for Ms Smith submitted that despite Mr McCreanor saying he relied on the suspension clause set out in the second disciplinary procedure in Ms Smith's employment agreement, he was bound by the whole document including the suspension clause set out in the first disciplinary procedure, which, as noted above, was more detailed. Advocate for Ms Smith said the suspension clause contained in the first disciplinary procedure more accurately reflected the established law in relation to suspension. Counsel for Mr McCreanor said the two clauses were not incompatible but more important than what procedure was followed, was whether a fair process was followed.

[43] In many ways, this submission misses the point. The purpose of a suspension clause in an employment agreement is to provide a mechanism by which a suspension can be lawfully carried out and, also, an objective starting point for considering the bona fides of such a suspension. I accept the submission of Advocate for Ms Smith that Mr McCreanor (and, it follows, Ms Smith) were bound by the whole agreement and not just provisions that were temporarily convenient.

[44] Counsel for Mr McCreanor submitted that neither Ms Smith nor her representative took issue with her suspension at the time. In support of this submission, reference was made to several emails that passed between the parties' representatives in the immediate aftermath of Ms Smith's suspension. Advocate for Ms Smith said this "interpretation" of events had not be previously raised by Mr McCreanor during the disciplinary meeting or in response to the submission of Ms Smith's personal grievances. I find nothing turns on this.

[45] I accept the evidence of Ms Smith that Mr McCreanor did not advise her of the proposal to suspend her when he handed her the letter on 8 July 2016. Indeed, this was his evidence during the investigation meeting. While an opportunity was afforded to Ms Smith in the body of the letter to comment on the proposal, the timeframe was very short. Having given Ms Smith the letter at or about 2.15pm, Mr McCreanor required Ms Smith to provide comment on the proposed suspension by 4pm (less than

2 hours later). Plainly this was done without any regard for Ms Smith's ability to obtain appropriate advice and formulate a response. Indeed, Ms Smith said by the time she reviewed the letter fully once she got home that day, the timeframe for providing comment had passed.

[46] Within this context, the method of communicating comment (via email) was unusual in the circumstances of the employment. On Ms Smith's evidence, Mr McCreanor never enquired whether she had a computer or access to email. She said she did not. I find this was unsatisfactory and unfair to Ms Smith. Counsel for Mr McCreanor suggested there was, in effect, some elasticity within the concept of providing comment via email and that Ms Smith could have, for instance, telephoned him. The problem, of course, with such a submission is that taking a strict approach to the interpretation of a letter where it is convenient, and a liberal approach to interpretation where it isinconvenient, could not be the actions of a fair and reasonable employer. In other words, Mr McCreanor must own the whole letter or disavow it entirely (and particularly so, in circumstances where the letter has been prepared with the assistance of expert third-party advice).

[47] Of further concern given how serious the incident with the parsley was regarded by Mr McCreanor, the delay in seeking to suspend Ms Smith, including allowing her to work an entire shift the day after the incident, was not satisfactorily explained. In addition, there was no evidence Mr McCreanor considered whether it was appropriate for Ms Smith to undertake reduced or alternative duties as an alternative to suspension as set out in the employment agreement's first disciplinary procedure.

[48] Counsel for Mr McCreanor said Ms Smith was not disadvantaged by the suspension because she was being paid, it was for a

short-time and, on Ms Bray's evidence, Ms Smith was "excited to be off work for a few days". I find contrary to these submissions, Ms Smith's suspension did cause her disadvantage. Wages are part, but not all, of the world of work. As a result of her suspension, Ms Smith was denied the opportunity to earn wages based on the fruits of her own labour and to engage meaningfully in the workplace including with new and regular customers of the café. Further, it is clear from Ms Smith's evidence, her suspension and how Mr McCreanor carried it out added to her stress and contributed to her need to seek medical assistance.

Failure to properly investigate

[49] At the first and only disciplinary meeting to discuss the allegations on 19 July

2016, Ms Smith said in response to the third allegation she had not spoken to anyone at Work and Income about what her "stand down" for the unemployment might be in the event she was terminated from her employment. Further, Mr McCreanor was advised during this meeting that Ms Smith had requested her phone records from her phone provider for 7 July 2017. Advocate for Ms Smith said these matters, which he said he also raised in his oral response to the preliminary decision to dismiss Ms Smith on 20 July 2016, were never investigated by Mr McCreanor.

[50] In response, Counsel for Mr McCreanor said Mr McCreanor preferred the evidence of Ms Bray about what Ms Smith said about the unemployment benefit stand-down on 7 July 2016. Further, counsel said the evidence from the phone provider was irrelevant because Ms Smith's phone use on 7 July 2016 did not form part of Mr McCreanor's decision to dismiss Ms Smith.

[51] Contrary to Counsel's submission, I find Mr McCreanor failed to properly investigate Ms Smith's responses to the second and third allegations, having raised both subsequent to the commencement of the disciplinary process. Ms Bray's evidence was essential to both allegations and her suggestion Ms Smith made a excited phone call which included the statement "you will never guess what just happened" immediately upon entering her car was entirely relevant context to the disciplinary investigation. Relied on or not by Mr McCreanor, it must have cast Ms Smith in a bad light and undermined her credibility in the eyes of her employer. Further, if Mr McCreanor had investigated the phone records, they may have served to undermine Ms Bray's evidence and thereby call into question the foundations of the second and third allegation. A fair and reasonable employer could not have discounted this evidence out of hand.

[52] This scenario is equally applicable in my view to Ms Smith's statement about the Work and Income stand-down. A fair and reasonable employer could not have also discounted Ms Smith's statement out of hand. Neither line of enquiry would have been particularly arduous nor resource-intensive and Mr McCreanor was represented throughout the disciplinary process. There was no practical impediment to Mr McCreanor pursuing these enquires, holding a further meeting with Ms Smith and her representative to discuss the outcome and then moving to the next stage of the disciplinary process if, after having regard to those enquires, that was warranted.

[53] I find Mr McCreanor's actions in suspending Ms Smith the way he did, were not those of a fair and reasonable employer. I find Mr MCreanor carried out an unfair and inadequate employment investigation.3

Substance

The first allegation

[54] The first allegation made against Ms Smith was failure to observe health and safety guidelines and deliberate disregard of health and safety policy. As stated above, Mr McCreanor relied on a contractor safety induction checklist promulgated by the New Zealand Police and completed for Ms Smith. A review of this document discloses it is a very general document directed at safety within police facilities, the use of hazardous substances by contractors, the provision of personal protective equipment by contractors to employees as necessary and the reporting of accidents and hazards to the police.

[55] The document contains a provision for the police to review the "company health and safety policy" and a "safe work plan and agreed (as appropriate)". The yes/no boxes in the document corresponding with these items were not ticked on Ms Smith's checklist. Nor were these documents otherwise provided by Mr McCreanor to Ms Smith, his representative, the Authority or relied on as justifying the basis of Ms

Smith's dismissal.

3 Employment Relations Act, s 103(A)(3)(a)

[56] As stated above, Ms Smith's employment agreement did provide the parties: "shall endeavour to meet their obligations under the Health and Safety in Employment Act 1992". However, in my view, this is simultaneously an overarching and qualified statement. During the investigation meeting, Mr McCreanor said the Health and Safety in Work Act 2015 placed additional obligations on himself and his employees. The evidence was very general and did not specify which obligations or provisions of the Act he was referring to. In any event, there was no evidence Mr McCreanor had advised his employees about such obligations or provided any training about these.

[57] I find Mr McCreanor did not have and, therefore, cannot rely on, any health and safety guidelines or a health and safety

policy in justifying Ms Smith's dismissal. Further, there is nothing in the general language of Ms Smith's employment agreement or from Mr McCreanor's evidence at the investigation meeting about his state of mind at the time of Ms Smith's dismissal that can assist Mr McCreanor given the specific framing of the first allegation.

[58] Setting aside for a moment the characterisation or basis upon which the alleged conduct occurred, the essence of Mr McCreanor's first allegation against Ms Smith was she was chopping parsley in an unsafe manner. This allegation comes down to a contest of evidence between Mr McCreanor and Ms Smith. If Mr McCreanor is to be believed, Ms Smith engaged, effectively, in a single negligent act that so impaired the employment relationship, it justified her dismissal. If Ms Smith is to be believed, she had no case to answer.

[59] Certainly a single act of negligence, if that is what this was, can justify dismissal if the conduct is sufficiently serious to impair trust and confidence.4

However, a wilful or deliberate act rather than an inadvertent or carelessness act is more

likely to destroy or seriously undermine trust and confidence.5

4 *W & H Newspapers v Oram* [2001] NZCA 142; [2000] 2 ERNZ 448 (CA)

5 For example, *Click Clack International Ltd v James5* [1994] 1 ERNZ 15 and *Health Waikato v Tebbutt*

[2003] 2 ERNZ 398.

[60] On Mr McCreanor's evidence, when he asked Ms Smith what she doing with the parsley, she stopped chopping it in the manner that caused him so much concern and did not recommence. Consequently, the act is, on Mr McCreanor's evidence, a single act. Even if his evidence is to be believed such a single act would, in my view, be insufficient to justify dismissal.

[61] Having raised the second and third allegations against Ms Smith during the course of the investigation, I find that Mr McCreanor failed to properly investigate these and consequently he failed to yield a proper basis to substantiate the allegations against Ms Smith. Consequently, I find that neither allegation can relied on as justifying Ms Smith's summary dismissal. This is particularly so, given the finding about the first, and primary, allegation made against Ms Smith.

Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss Ms Smith?

[62] I have found Mr MCreanor carried out an unfair and inadequate employment investigation.6 A fair and reasonable employer could not have concluded Ms Smith's actions in this matter amounted to misconduct that was so serious so as to deeply impair or destroy trust and confidence and justify dismissal.

[63] I find that the decision to dismiss Ms Smith was not one a fair and reasonable employer could have reached in all the circumstances at the time. Having found Mr McCreanor was not justified in dismissing Ms Smith, she is entitled to an assessment of remedies to settle her personal grievance.

What remedies should Ms Smith be awarded?

Reimbursement for lost wages

[64] Having found Ms Smith was subject to an unjustified action and unjustifiable dismissal by Mr McCreanor, the Authority must, even if it awards no other remedies, order payment of the lesser of a sum equal to actual lost wages or three months

ordinary time wages.

6 Employment Relations Act, s 103(A)(3)(a)

[65] Ms Smith obtained part-time work shortly after her dismissal. She said she earned $2,348.31 gross between 27 July 2016 and 30 October 2016. Ms Smith said if she remained employed by Mr McCreanor for the same period she would have earned

$5,037.50. Consequently, she sought $2,688.99 gross as reimbursement for lost wages for the three month period immediately after her dismissal.

[66] Subject to contribution, I find that an award of $2,688.99 gross as reimbursement for lost wages under s 123(1)(b) of the Act is appropriate.

Compensation for humiliation, loss of dignity and injury to feelings

[67] Ms Smith sought $7,000 compensation for humiliation, loss of dignity and injury to feelings. This was a modest amount when having regard to the recent upward trend of awards in the Authority and the Court.7 It is, however, not possible to award an amount greater than claimed.8

[68] Mr Smith said the loss of her employment was very stressful to her. She said in the course of her 20 year career in the

hospitality industry, she had never been accused of misconduct or faced a disciplinary process before. Mr Smith said she was a single parent who lives in rented accommodation. She worried about the impact the loss of her job would have on her and her son.

[69] I accept that Ms Smith suffered humiliation, loss of dignity and injury to feelings because of her procedurally defective suspension and subsequent unjustifiable dismissal.

[70] Subject to any consideration of contribution under s 124 of the Act, I find

$7,000 as compensation for that humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act.

7 See, for example, *Stormont v Pebble Thorpaitken Limited* [2017] NZEmpC 71

8 *McIver v Saad* [2015] NZEmpC 145 at [56]

Contributory behaviour by Ms Smith?

[71] Having found that Ms Smith is entitled to remedies for her personal grievances, I am required by s 124 of the Act to consider whether Ms Smith's actions were causative and blameworthy of the situation she found herself in.

[72] The parties' representatives advance two irreconcilable submissions in respect of contribution. Advocate for Ms Smith said there should be no deduction for contribution. Counsel for Mr McCreanor said Ms Smith's conduct was such that even if she had a valid personal grievance, she should be disentitled to any remedies.

[73] Having found Ms Smith had a valid personal grievance against Mr McCreanor I find, on balance, Ms Smith's actions did not contribute to the situation that led to her personal grievance and I decline to reduce remedies as a consequence.

Summary

[74] The orders made are for Mr McCreanor to settle Ms Smith's personal

grievance by paying her the following amounts:

(i) $2,688.99 gross as reimbursement for lost wages;

(ii) $7,000 as compensation for humiliation, loss of dignity and injury to feelings

Costs

[75] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Ms Smith has 28 days from the date of this determination in which to file and serve a memorandum on costs. Mr McCreanor has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[76] If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, $4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.9

Andrew Dallas

Member of the Employment Relations Authority

9 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.
