



# New Zealand Employment Relations Authority Decisions

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## Venekamp v Southern Farms NZ Limited (Christchurch) [2018] NZERA 1150; [2018] NZERA Christchurch 150 (15 October 2018)

Last Updated: 24 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 150

3027492

BETWEEN MARIANNE VENEKAMP

Applicant

A N D SOUTHERN FARMS NZ LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Damien Pine and Giovanna Martin, Co-Counsel for Applicant

Sarah McKenzie and William Chapman, Co-Counsel for Respondent

Investigation Meeting: 8 August 2018 at Invercargill

Submissions Received: 31 August and 5 October 2018 from Applicant

21 September 2018 from Respondent

Date of Determination: 15 October 2018

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. **The applicant was unjustifiably constructively dismissed, and is awarded the remedies set out in this determination.**
- B. **The respondent cannot rely upon the statutory trial period in the individual employment agreement between the parties.**
- C. **Costs are reserved.**

### Employment relationship problem

[1] Ms Venekamp claims that she was unjustifiably dismissed from her employment as a farm manager on or around 19 September 2017. The respondent initially maintained in its statement in reply that Ms Venekamp was employed pursuant to a statutory 90 day trial period contained in her employment agreement and that her employment was validly terminated in accordance with that provision. However, during the investigation meeting,

its key witness said that Ms Venekamp's employment ended by mutual agreement, or that she resigned. It still wishes to rely upon the trial period if the Authority finds that Ms Venekamp was dismissed, however.

[2] Ms Venekamp argues that the trial period provision had no effect because she worked for the respondent prior to signing the employment agreement. Alternatively, she argues that the respondent did not comply with its notice obligations under the clause and so cannot rely on it to justify dismissal. Alternatively, if she was not directly dismissed by the respondent, she was constructively dismissed.

### **The key events leading to the dismissal**

#### *The interview*

[3] Following an unsolicited call from one of the directors of the respondent company, Philipp Haas, Ms Venekamp met with Mr Haas on Thursday 24 August 2017 to discuss her urgently taking up the position of farm manager on one of the respondent's farms, known as Fairfax Farm. During the meeting, the respondent's employment lawyer arrived and handed a draft employment agreement to Ms Venekamp.

[4] The employment lawyer explained the terms of the agreement to Ms Venekamp, and added in, by hand, details relating to the employment. Ms Venekamp agreed in her oral evidence that the lawyer expressly referred to the 90 day trial period contained in this employment agreement during their conversation. She also said that she was familiar with how trial periods operated because she had been an employer before.

[5] Later that day Mr Haas took Ms Venekamp to the farm as well as the manager's house and a vacant cottage that she could stay in until the then acting manager vacated the main house. Mr Haas says that, after that inspection, Ms Venekamp indicated that she was pleased with what she saw but still required some more time to make her decision. Ms Venekamp agrees with this account.

#### *Friday 25 August 2017*

[6] According to Ms Venekamp, Mr Haas telephoned her on the morning of Friday 25 August 2017 asking if she had yet made her decision in relation to the offer of employment. Ms Venekamp says that she told him that she would accept the job. Mr Haas says he has no recollection of the telephone call, but also later said in his oral evidence that he got "a positive indication" from Ms Venekamp about the job offer that day.

#### *Saturday 26 August 2017*

[7] It is common ground that Mr Haas contacted Ms Venekamp on Saturday 26 August 2017 asking if she wanted to join him and other farm managers to go over the run-offs and to view the young stock, assess their condition and see where they were grazing. However, the parties do not agree what the nature of that visit was. According to Ms Venekamp, she regarded this as work, as she had already accepted the offer.

[8] Ms Venekamp says that, later that day, they returned to the farm where they had initially met and she and Mr Haas signed the individual employment agreement. She then later submitted a time sheet to the person responsible for payroll in relation to the week ended 27 August 2017. In the time sheet Ms Venekamp had written that she had worked four hours on Saturday 26 August, 1 p.m. to 5 p.m., and had stated in the "remarks" column the words "going around run-offs". It is accepted by the respondent that she was paid for those four hours.

[9] According to Mr Haas' written evidence, he invited Ms Venekamp back to the farm on Saturday 26 August for a further inspection prior to her accepting the offer because he wanted her to get a better idea of how the organisation ran and to meet other employees so that she could make a fully informed decision on whether she wanted to accept the offer.

[10] Mr Haas says in his written evidence that it was clear to him that this was not a work day but just a second inspection. He says that it was not until the second inspection finished at the end of the day that Ms Venekamp told him that she was pleased with what she had seen and wanted to accept the offer of farm manager. After that, he and she signed the employment agreement and it was agreed that she would commence work the following day, Sunday 27 August.

[11] Mr Haas says in his written evidence that he was not aware that Ms Venekamp had requested that she be paid

for 26 August, that he never approved payment and that, if he had been asked, he would not have approved payment. He says that he only became aware of this after Ms Venekamp had raised her grievance. Whether Ms Venekamp worked or not on Saturday 26 August is relevant if the trial period is relied on, and if Ms Venekamp did not accept the offer until after she had worked, as that would mean that the trial period was not valid.

*18 September 2017*

[12] It is accepted by both parties that Ms Venekamp found her job difficult, although the reasons are disputed. According to Ms Venekamp, it was because the farm was overstocked and the condition of the stock was poor, causing many problems. According to Mr Haas, the farming operation was not overstocked and the calves were not in bad condition and the reason that Ms Venekamp was struggling was because she had never managed a farm operation on her own before.

[13] Both Ms Venekamp and Mr Haas agree that, on 18 September 2017, they had a discussion about Ms Venekamp's concerns. However, Ms Venekamp says that she told Mr

Haas that she was not happy with her workload, the condition of the stock and the stress she was under and that these were as a result of the poor structures that the respondent had in place. She says that Mr Haas assured her that he would arrange for additional help on the farm.

[14] Mr Haas says in his written evidence that Ms Venekamp stated that she felt that she had been "dumped into a hole" and that she was not up to the farm manager role, and did not mention the issues that she had with the stock or the farm operation in general. He says that he asked Ms Venekamp to think of ideas of about how they could support her more and to let him know.

[15] In his oral evidence he says that he had also heard that Ms Venekamp had suffered from depression and was concerned that she was struggling with stress and could become suicidal. He says that he was worried about health and safety matters.

*19 September 2017*

[16] Ms Venekamp says that, the following day, Mr Haas rang her to inform her that she was "not up to it" (meaning the manager's role) and offered her the 2IC position on the farm instead. She says that she told Mr Haas that she would not accept that position, and that she wanted to stay in her current position. She says that Mr Haas then asked her whether she could stay for at least another two to three weeks until a replacement was found. Ms Venekamp said she initially agreed but then later called the company's lawyer who told her she should leave the farm immediately. She decided that she could not do that for animal welfare reasons, and because there were only two young inexperienced staff members at the farm, so told Mr Haas that she would instead work for the rest of the day, with 20 September being her last day.

[17] Mr Haas says in his written evidence that, when he spoke to Ms Venekamp on 19 September, she did not present him with any ideas of how they could help her overcome her management concerns and then asked her whether it would be better for her to take a step

down to the 2IC position and to work under a more experienced manager so that she could fill a manager position in the future. Mr Haas says that Ms Venekamp asked whether there would be a pay cut and that he told that there would be as he could not pay a manager the same as the 2IC.

[18] Mr Haas says that Ms Venekamp replied that she was not interested and would rather leave the position of farm manager. Mr Haas said that this would not be his preference, but he would respect her decision, and asked her to continue to work as farm manager for another three to four weeks until a replacement was found. He says that Ms Venekamp initially agreed to work for another two weeks but then later changed her mind to say that the following day would be her last day.

[19] Ms Venekamp says that, during the conversation with Mr Haas, he never referred to her employment or the trial period. In his written evidence Mr Haas says that he never used the exact words that Ms Venekamp was dismissed but that, as she was subject to a 90 day trial period, he believed he had the ability to dismiss her. He says

he sought to achieve a mutual agreement and that he believed that, at the end of the telephone conversation on 19 September, they had achieved a mutual agreement which he confirmed with her in an email the same day.

[20] A copy of the email was shown to the Authority and it stated as follows: Dear Marianne,

This is to confirm our telephone conversation that you will leave the manager position at Fairfax as of 2 weeks from today, being the 2 October 2017.

I am very sorry that things did not work out in the way we had both hoped and I understand your position, not to accept the 2ic position.

I would like to thank you for agreeing to continue in your position for the next 2 weeks.

I wish you all the best, Best regards,

Phillip Haas.

[21] Ms Venekamp's reply was sent the same day in the following terms:

Phillip, I will not be working out my notice as its not viable. I will work today and tomorrow (20-9-17 being my last day). You will need to find someone for thursday onwards.

Regards Marianne.

[22] In his oral evidence Mr Haas said that he had called Ms Venekamp on 18 September because he had heard concerns about her management from the rural services manager, but could not recall what those concerns were. He also agreed in cross examination that, on 19 September, he had had the intention of relieving Ms Venekamp of the stress of her management duties and to offer her a 2IC position instead, on less money. At the same time, he said that he believed that Ms Venekamp resigned from her position as farm manager. Ms Venekamp denies this.

[23] Ms Venekamp's last day of employment was 20 September 2017. A personal grievance was raised on behalf of Ms Venekamp by Mr Pine by way of a letter dated 29 September 2017 addressed to the respondent's lawyers.

## **The issues**

[24] The following issues need to be determined by the Authority:

- (a) How did Ms Venekamp's employment terminate?
- (b) If Ms Venekamp resigned, was that an unjustified constructive dismissal?
- (c) If Ms Venekamp was constructively dismissed, can the respondent avail itself of the 90 day trial period contained in her individual employment agreement?
- (d) If Ms Venekamp was dismissed, was it under the terms of a valid 90 day trial period?
- (e) If Ms Venekamp was dismissed but not under the terms of a valid 90 day trial period, was the dismissal unjustified?

## **How did Ms Venekamp's employment terminate?**

[25] This question is relevant because, if the employment did not end by way of dismissal, then the terms of the trial period are irrelevant, as it only applies when an employer terminates an employment agreement containing a trial provision by giving the employee notice of the termination before the end of the trial period ([s 67B\(1\)](#) of the [Employment Relations Act 2000](#) ("the Act")).

[26] In the Employment Court case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*<sup>1</sup> His Honour Judge Ford reviewed New Zealand and Australian case law in respect of what constitutes a 'dismissal'. The Court of Appeal subsequently found<sup>2</sup> that the Employment Court had not erred in adopting the dicta from the earlier New Zealand Court of Appeal case of *E N Ramsbottom Ltd v Chambers*<sup>3</sup>, to the effect that, on an ordinary use of language, 'dismissal' is a unilateral act by the employer which terminates the employment contract, and that a dismissal was 'the termination of employment at the initiative of the employer'.

[27] When I review the evidence that has been presented by both parties, I conclude that the sequence of events

that is most likely to have occurred is as follows:

- a. Mr Haas had heard a report from the rural services manager that Ms Venekamp was struggling in her role, as he said in evidence.
- b. Mr Haas rang up Ms Venekamp on 18 September to ask how she was coping. She told him she was stressed and needed more staff. He told her he would look into getting her more staff.

1 [\[2015\] NZEmpC 89](#), at [67] et seq.

2 *Porirua Whanau Centre Trust v Ngawarau* [\[2015\] NZCA 585](#), [\[2015\] ERNZ 93](#) at [7]–[8]

3 [\[2007\] NZCA 183](#), [2000] ERNZ 97, at [19]–[20]

- c. Between that conversation and the one on the next day, Mr Haas decided that Ms Venekamp was not fit for the role of farm manager, either temporarily or permanently, and needed to be removed from that role.
- d. Mr Haas conveyed that conclusion to Ms Venekamp on 19 September and offered her the 2IC position instead, confirming that, if she took it, she would receive a pay cut.
- e. Ms Venekamp decided that she was not willing to be demoted and declined the 2IC position. With no further alternative role available to her, her employment had to come to an end.
- f. It was initially agreed between the parties that Ms Venekamp would work for a further two weeks, but Ms Venekamp was then told by the company's lawyer that she had to leave the farm immediately, so she told Mr Haas she would finish work the following day, 20 September.

[28] Mr Haas said in his oral evidence that it was never his intention to dismiss Ms Venekamp, and that she resigned. I believe that this is true, but it is clear that Ms Venekamp was left in the position of either leaving, or taking a lesser role in terms of status and pay which she did not want. Even though Mr Haas says he believed that Ms Venekamp was employed under a valid trial period, that did not relieve the respondent of the duty of good faith set out in [s 4](#) of the Act, save for the duty set out in [section 4\(1A\)](#) (c) of the Act in making a decision whether to terminate an employment agreement under [s 67B4](#). [Section 4\(1A\)](#) provides as follows:

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

4 Section 67B(4) and (5) of the Act.

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.

[29] The respondent failed in several respects on 19 September when Mr Haas spoke to Ms Venekamp. In breach of the duty of good faith, and express terms of the individual employment agreement he did not;

- a. advise her what his concerns were about her performance as farm manager;
- b. tell her he was concerned that she may be depressed and could therefore present a health and safety risk;
- c. discuss ways with her to alleviate her stress and improve her performance;
- d. put in place measures to assist her; or
- e. give her a reasonable opportunity to improve her performance.

[30] If Mr Haas had been intending to dismiss Ms Venekamp, then he would not have been obliged to have taken these measures, as [s 67B\(5\)\(a\)](#) would have expressly relieved him of that obligation, if the trial period clause was valid. However, on his own evidence, he was not making a decision whether to terminate Ms Venekamp. He was, instead, deciding whether to demote her. Therefore, the carve out envisaged in [s 67B\(5\)\(a\)](#) did not relieve the respondent of its obligations of good faith.

[31] Instead Mr Haas unilaterally varied fundamental terms of her individual employment agreement relating to her role, and pay. These unilateral variations constituted a repudiatory breach of the agreement and Ms

Venekamp chose to treat the agreement as fundamentally breached and terminated it. Therefore, Ms Venekamp's employment ended by way of resignation. I disagree with Ms McKenzie's submission that Mr Haas actually dismissed Ms Venekamp from her employment; what he did was attempt to demote her.

### **Was Ms Venekamp unjustifiably constructively dismissed?**

[32] The law in relation to constructive dismissals in New Zealand is well settled and the principles have been explored in a number of cases. A constructive dismissal has been described as follows:

A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.

...

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.<sup>5</sup>

[33] In the first Court of Appeal decision considering constructive dismissal, the Court enunciated three (non-exhaustive) situations in which a constructive dismissal may occur:

- a. where the employee is given a choice of resignation or dismissal;
- b. where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c. where a breach of duty by the employer leads a worker to resign.<sup>6</sup>

[34] I find that the third category of constructive dismissal is relevant here. The leading case dealing with this category of constructive dismissal is *Auckland Electric Power Board v*

*5 Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ SEL Cas 95 (AC) at [104]

*6 Auckland Shop Employees Union v Woolworths (NZ) Limited* [\[1985\] 2 NZLR 372](#)

*Auckland Provincial Local Authorities Officers IUOW*. The first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances have to be examined, including the communication in which the resignation was tendered. If it is found that the breach of duty has caused the resignation, the next question is whether the breach was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing, that is whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[35] I am satisfied that the resignation of Ms Venekamp was caused by a breach of the duty of good faith, and breaches of the express terms of Ms Venekamp's employment agreement.

[36] I am also satisfied that the breaches were of sufficient seriousness to make it reasonably foreseeable by the respondent that Ms Venekamp would not be prepared to work as 2IC, having been told that she was not up to the job without any formal performance improvement process having been followed (in breach of the employment agreement) and that she could take a demotion on less pay. No fair and reasonable employer could have been surprised that Ms Venekamp would resign under such circumstances. Indeed, Mr Haas' email dated 19 September says that he understood her position not to take the 2IC position.

[37] Having found both that Ms Venekamp resigned as a result of breaches by the respondent, and that these breaches were sufficiently serious to make it reasonably foreseeable by the respondent that Ms Venekamp would not be prepared to continue to work, I must find that she was constructively dismissed.

[38] I must in turn find that that constructive dismissal was unjustified, as no fair and reasonable employer could have taken the steps that the respondent did in all the circumstances to cause the constructive dismissal.

### **Does the trial period assist the respondent?**

[39] Ms McKenzie argued that, if the Authority found that Ms Venekamp was dismissed by the respondent, it should be able to rely upon the trial period to protect itself from a personal grievance action pursuant to s 67B(2) of the Act.

[40] The statutory provisions relating to trial periods are set out in s 67A and [s 67B](#) of the [Employment Relations Act 2000](#) (“the Act”). These provide as follows:

#### **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.

(3) **Employee** means an employee who has not been previously employed by the employer.

(4) [Repealed]

(5) To avoid doubt, a trial provision may be included in an employment agreement under [section 61\(1\)\(a\)](#), but subject to [section 61\(1\)\(b\)](#).

#### **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.

(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 (j).

(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.

[41] [Section 67B](#) makes clear that, for the section to apply, the employer must have terminated the employment agreement containing the trial provision by giving the employee notice of the termination before the end of the trial period. However, Mr Haas said he did not terminate Ms Venekamp’s employment. He says that Ms Venekamp resigned and that they then agreed the effective termination date of two weeks later. I have also found that Ms Venekamp did resign, albeit by way of constructive dismissal.

[42] In *Smith v Stokes Valley Pharmacy*, at paragraph [48] the then Chief Judge Colgan stated the following:

[Section 67A](#) and [67B](#) remove long standing 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 dismissals from, employment. Legislation that removes previously available access to courts and

tribunals should be strictly interpreted as having that consequence only to the extent that it is clearly articulated.

[43] The requirement in [s 67B\(1\)](#) for the respondent to give notice must be interpreted strictly. Mr Haas did not give Ms Venekamp notice of termination, on his own evidence. Therefore, the respondent cannot avail itself of the protection of the trial period provision.

[44] In any event, I do not accept that it was the intention of Parliament to deprive an employee of the protections of the Act in circumstances where the employee has been constructively dismissed. This is made clear by the provision at [s 67B\(4\)](#) that the employee is to continue to have available the protections of [s 4](#) save for [s 4\(1A\)\(c\)](#) in making a decision whether to terminate an employment agreement under [s 67B](#).

[45] If I am wrong in that regard, then I also find that Ms Venekamp was unjustifiably disadvantaged in her employment by the actions of the respondent which led to her resignation. [Section 67B\(3\)](#) makes clear that a trial period does not prevent an employee from bringing a personal grievance under [s 103\(1\)\(b\)](#) of the Act. That is, that her employment was affected to her disadvantage by an unjustifiable action of the respondent.

[46] Having reached these conclusions, I do not have to consider otherwise the validity of the trial period, when it was agreed by the parties, and whether or not the inspection tour on 26 August 2017 was work.

## Remedies

[47] [Sections 123](#) and [128](#) of the Act provide 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.

### 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.

[48] Ms Venekamp was employed by the respondent on an annual salary of \$80,000. Ms Venekamp is seeking reimbursement of lost wages for the period from 20 September 2017 to 30 April 2018. She disclosed copies of IRD records showing her gross earnings during that period. I note that between September 2017 and April 2018 Ms Venekamp earned \$26,288. During the same period, had she remained employed by the respondent, she would have earned \$48,791.21. That means she sustained a loss of \$22,503.21. Three months' ordinary time remuneration equals \$20,000. Therefore, applying [s 123\(2\)](#) of the Act, Ms Venekamp is entitled to an award of \$20,000.

[49] Should the Authority exercise its discretion and award to Ms Venekamp her entire loss during the 31 weeks and 5 days for which she claims? On balance I believe not. This is because there is the chance that she would have been dismissed lawfully after the respondent had followed a fair performance improvement programme. I do not reach any firm conclusions that this is what would have happened, but I cannot wholly discount the possibility. I therefore limit Ms Venekamp's award of lost wages to three months' pay.

[50] Ms McKenzie argues that Ms Venekamp failed to mitigate her loss by not accepting the 2IC role offered by Mr Haas. However, it was the demotion to 2IC that resulted in the constructive dismissal. Ms Venekamp cannot therefore be penalised for not taking on that role. She clearly did mitigate her losses by finding work in an alternative enterprise in October, November and December 2017.

[51] I also do not agree that Ms Venekamp contracted an illness preventing her from working shortly after her leaving the respondent. The IRD income record put before the

Authority shows that Ms Venekamp worked each month from 20 September 2017 until the IRD records stop, at March 2018.

[52] In his submissions, Mr Pine also seeks an award in respect of an accommodation allowance which Ms Venekamp says was not paid. Mr Pine says this was \$300 a week, although I note that the employment agreement refers to \$300 a fortnight. However, this claim was not included in the statement of problem, although Ms Venekamp did state she was not paid the allowance in her brief of evidence. The respondent did not address this in its evidence, however, and I note that Ms McKenzie did not address it in her submissions. I believe that it would not be just to allow this claim when it was not expressly pleaded in the statement of problem. I do not even know whether the respondent denies that Ms Venekamp was not paid the allowance. I therefore dismiss this claim.

[53] Mr Pine also asks in his submissions for interest on the award of lost wages. Again, this was not pleaded in the statement of problem. I have a concern about awarding interest on an award of lost wages from the date of dismissal as the period of time that elapsed until determination was not wholly, or even largely in the hands of the respondent. It was largely a function of the time it took for the applicant to lodge her claim, the time it took for the Authority to set the matter down for investigation, the time it took for the parties to make their submissions, and the time it took for me to issue the determination.

[54] However, I am prepared to order that interest should run on the award of lost wages from the date when payment is due under this determination until payment of the award to Ms Venekamp in full. If relevant, that interest is to be calculated in accordance with the [Interest on Money Claims Act 2016](#).

[55] Turning to compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act, Ms Venekamp says that she suffered a recurrence of depression when she left the employment for the respondent, which caused her to be prescribed anti-depressants. She stayed on these for around two months. She says that she also lost her confidence as a result of the respondent's actions, and had to

turn down the opportunity to be a grazing manager because of her depression and lack of confidence. She says she was second guessing herself too much.

[56] I am satisfied that Ms Venekamp suffered these effects as a direct result of being told that she was not up to being manager, and that they amount to feelings of humiliation, loss of dignity and injury to her feelings. Accordingly, Ms Venekamp is entitled to receive compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act.

[57] I assess that Ms Venekamp's effects can be characterised as falling in the upper half of a moderate range and, as such, would attract an award of between \$20,000 to \$25,000. In the statement of problem she asks for an award

of \$20,000. In accordance with the case of *McIver v Saad*<sup>7</sup> I am unable to award more than has been requested, so I limit Ms Venekamp's compensation to that sum.

[58] Whilst I have found that Ms Venekamp also suffered an unjustified disadvantage in her employment, the actions of the respondent causing that disadvantage are the same ones that led to Ms Venekamp's unjustified constructive dismissal so they do not attract separate remedies.

[59] 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).

[60] I am satisfied that Ms Venekamp did not contribute to the unjustified disadvantage and unjustified constructive dismissal in any blameworthy way. Whilst she may have been struggling, I am unable to say that this was due to her fault or that of the respondent, as no investigation was carried out by the respondent. I therefore decline to reduce the awards.

7 [\[2015\] NZEmpC 145](#), at [56]

## Orders

[61] I order the respondent to pay to Ms Venekamp the following sums within 7 days of the date of this determination:

- a. The gross sum of \$20,000 by way of lost wages, together with interest on that sum, or any balance thereof, running from the date when payment falls due under this determination until payment of the sum to Ms Venekamp is made in full. If relevant, that interest is to be calculated in accordance with the [Interest on Money Claims Act 2016](#); and
- b. The further sum of \$20,000 pursuant to s 123(1)(c)(i) of the Act.

## Costs

[62] I reserve costs. I invite the parties to seek to agree how costs are to be dealt with. However, if they are unable to agree within 14 days of the date of this determination, Mr Pine is to serve and lodge a memorandum setting out what contribution towards her costs his client seeks, and the basis for that. Ms McKenzie shall then have a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton

Member of the Employment Relations Authority

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