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Atkinson v Trinity's Cleaning Services Limited (Christchurch) [2018] NZERA 1018; [2018] NZERA Christchurch 18 (19 February 2018)

New Zealand Employment Relations Authority

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Atkinson v Trinity's Cleaning Services Limited (Christchurch) [2018] NZERA 1018 (19 February 2018); [2018] NZERA Christchurch 18

Last Updated: 26 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 18
3010311

BETWEEN SHENEE ATKINSON Applicant

A N D TRINITY'S CLEANING SERVICES LIMITED Respondent

Member of Authority: David Appleton

Representatives: Eric Yu & Louise Taylor, Co-Counsel for Applicant

Vanessa Bainbridge, Advocate for Respondent

Investigation Meeting: 23 January 2018 at Christchurch

Submissions Received: 1 February 2018 from Applicant

9 February 2018 from Respondent

Date of Determination: 19 February 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ms Atkinson was unjustifiably dismissed and is awarded the

remedies set out in paragraph 62 of this determination.

B. I also order the respondent to pay a contribution towards Ms

Atkinson's costs in the sum of \$1,031.56.

Employment relationship problem

[1] Ms Atkinson claims that she was unjustifiably dismissed from her permanent part-time employment as a cleaner on 18 January 2017. The respondent denies that Ms Atkinson was unjustifiably dismissed.

[2] In her statement of problem Ms Atkinson also claimed that the respondent had failed to enrol her for KiwiSaver in breach of the [KiwiSaver Act 2006](#). However, in his submissions Mr Yu indicated that Ms Atkinson was withdrawing this claim after I sought legal precedent from him to show that the Authority had jurisdiction to determine such a complaint, no personal grievance having been raised.

Events leading to the termination of employment

[3] Ms Atkinson was employed by the respondent as a permanent part-time cleaner from

4 September 2016. She signed an individual employment agreement on 5 September 2016. Her duties were described as "To clean to a very high standard" and she was to report to Mr Wayne Fenner, the director and shareholder of the respondent company.

[4] Clause 5 of the individual employment agreement dealt with the hours of work and provided as follows:

5 Hours of work

(a) *(Delete if not applicable)* The parties agree that the employee is being employed to perform duties on a **part time** basis.

(b) The employee's usual hours of work shall be approx 10 hours per week with a degree of flexibility in order to meet the needs of the business, and with no minimum guaranteed hours. Such hours are to be worked on the days and times as detailed in *Schedule 1*, or *as advised* in the roster posted by the employer from time to time.

...

(d) From time to time the employer may vary the specified hours and meal and rest breaks to cover sickness, absence, sudden

busy periods or similar temporary situations.

(e) Permanent changes to the normal hours of work may be made by the employer following consultation with the employee.

[5] Ms Atkinson has suffered with epilepsy for several years, which is controlled by medication. Ms Atkinson says that it is not known what triggers her seizures or what makes them worse and that she can go two years or longer without having any seizures, to having them every week.

[6] Ms Atkinson was originally employed to clean for the respondent from Sunday to Friday evenings between 7.30pm and 9:00pm at the Kaiapoi Snap Fitness gym and, on Sundays, she also cleaned the Rangiora Snap Fitness gym for half an hour. She cleaned these gyms in the evening, when the staff had usually gone home, except that clients would often be using the gym while she was there. Ms Hawley-Smith, the owner of the two gyms, confirmed that she required the cleaning to be carried out during the evening because that was least disruptive to the clients.

[7] On 6 November 2016 Ms Atkinson had a small epileptic seizure while she was cleaning at the Kaiapoi gym and was given permission for her sister to sit with her in the gym while she finished her cleaning. Mr Fenner said in his oral evidence that Ms Atkinson had started to have time off sick for around four weeks running, which her parents told him was due to her seizures.

[8] Ms Atkinson says that, around mid-November 2016, she was offered additional day shifts cleaning at residential homes and businesses. Ms Atkinson says that she enjoyed this work. Mr Fenner says it was additional work, and was not regular, varying from week to week.

[9] On Sunday, 8 January 2017, whilst she was cleaning the Kaiapoi gym, Ms Atkinson had a tonic-clonic (grand mal) seizure at around 8:30pm. She fell down onto one of the workout machines but, fortunately, a client was present and she was taken to hospital. She said that she had never before experienced an episode of seizures that severe, and that she was told later that she had suffered five seizures that night.

[10] Ms Atkinson was discharged from hospital the following day and the house officer advised that she would be able to return to work on full duties on Thursday, 12 January. Ms Atkinson says that the hospital house officer also suggested that she should try to take Sundays off as well for a few weeks to ensure that she was getting an adequate break every week for two consecutive days. She says that she dropped her medical clearance certificate off at the gym in Kaiapoi and left it with the gym owner.

[11] Ms Atkinson says that, on the same day, she telephoned Mr Fenner to tell him that she could start back at work on 12 January and that the doctor suggested she have Sundays off for a few weeks. Ms Atkinson says that Mr Fenner said no to her having Sundays off and that he thought all she wanted was to have a "good weekend". She says that he then said that she could work either Sunday through to Friday, or Saturday through to Thursday. Ms Atkinson says that Mr Fenner also told her not to bother when she suggested dropping a copy of the discharge certificate off to him.

[12] Mr Fenner denies that Ms Atkinson offered to drop the discharge certificate off to him, and says that he asked for a medical certificate several times during the conversation. He also says that Ms Atkinson's mother took over the telephone conversation and said that Ms Atkinson wanted to have Sundays off so she could go out during the weekends. Mr Fenner said that he could not accommodate giving Ms Atkinson's request for Sundays off because the other members of staff who cleaned the gym did not work on Sundays and he was already working seven days a week. He also said, though, that 'if push came to shove' he would have covered the Sunday evening shift.

[13] Mrs Atkinson gave evidence to the Authority saying that Mr Fenner yelled at her on the phone, saying that her daughter just wanted to have a good weekend and that the doctors did not know about the history of her situation.

[14] On 10 January Ms Atkinson received some texts from Mr Fenner's partner, Kerrin Boyd. The Authority saw screenshots

of these texts. As these texts form an important background to the events that transpired, I shall replicate them in full:

Mr Boyd:

Hi it's Kerrin, from today onwards you are only going to be working at the gyms from either tues to Saturday or Sunday to Friday, there will no longer be extra work during the week, due to your condition, as we have told you a few times we are worried about the amount of seizures you are having. We are as well as other staff trying to work in with your Doctors wishes and giving you two days in a row.

Ms Atkinson:

I'll stick to Sunday to Friday.

So I only have 11 hours now don't i.

[15] It seems there was no reply to this text.

[16] On Thursday 12 January 2017 the following text exchange occurred between Ms

Atkinson and Mr Boyd:

Ms Atkinson:

Wen u rang today u said I couldn't go back until next wed because of a health and safety risk with my seizures. I'm never their on my own as theirs always people their I have a doctor's clearance certificate so y can't i work during the week with other people from work and am I getting paid for this time u have told me to have off.

Mr Boyd:

Wayne told you it is what Snap fitness said, and no you are not getting paid for this, as you have not been with us for 6mths to get sick days and you have no holidays and Wayne pays out leiu days.

Also Wayne did not tell you to have this time off, it came from the Owner of

Snap fitness.

Ms Atkinson:

Well since I have a clearance certificate do u have any other work for me today as its working with other ppl so it's no problem.

Mr Boyd:

Is that from the doctor or your release papers from hospital.

Ms Atkinson:

It's from the doctor from the hospital.

Mr Boyd:

So release papers.

So it's not a medical certificate at all so the gym needs you to get a medical certificate as Maxine [an assistant manager at the gym] would have told you by now as she was phoning you straight after she had called me.

[17] Ms Atkinson then obtained a medical certificate from her family GP dated 16 January

2017 which stated the following:

Shenee suffers from poorly controlled epilepsy and as such is not safe to work alone and is more prone to seizures during the evening and night.

I would be grateful if you would be able to change her working hours to daytime.

[18] Ms Atkinson says that she gave a copy of the certificate to the gym and read out the copy to Mr Fenner. Ms Atkinson says that she asked for the day shifts back but he said that they had been "given away". She also says that she asked if she could work ten hours a week, as was stated in her contract, but that Mr Fenner told her not to "throw the contract back in his face".

[19] Ms Atkinson says that she then received no further word from the respondent until

17 January when she was asked if she could work the following day to fill in for someone else.

[20] On 18 January Mr Fenner drove Ms Atkinson to the first job and then started to drive her to the second job site in Cust, North Canterbury. Ms Atkinson says that Mr Fenner started to talk to her about her seizures and, as his tone and manner was unpleasant, she turned her phone voice recorder on (but did not tell Mr Fenner she was doing so). The Authority heard a copy of the recording which lasted around five minutes. During the recording there were discussions between Mr Fenner and Ms Atkinson, primarily about why she wanted to take the Sundays off and whether she was entitled to 10 hours' work.

[21] Mr Fenner essentially stated during the recorded conversation that Ms Atkinson wanted to take Sundays off because it suited her life to do so and that her (hospital) doctors did not know her history. In addition, he suggested that she had misled him about the frequency of her seizures and also argued that the seizures were not being caused by her work. Because of what is alleged to have occurred immediately after this conversation I shall replicate below the last few sentences of the exchange between Mr Fenner and Ms Atkinson:

Mr Fenner:

You said the Sunday you had five seizures. Obviously it's not caused because of work.

Ms Atkinson:

No, because once I'd got into hospital, Dad could see I was still having big seizures. And no, it's probably not caused from the work, but my health comes first. And there's heaps of different epilepsies out there.

Mr Fenner:

It's not my problem if your doctors can't get yours under control.

Ms Atkinson:

What was that?

Mr Fenner:

It's not my problem if your doctors can't get yours under control.

Ms Atkinson:

They can get it under control.

Mr Fenner:

They obviously haven't, have they? We keep going over the same old shit every time we talk about it.

Ms Atkinson:

But they cannot put me on any more tablets because I'm up to the maximum they can give me.

Mr Fenner:

Let's just leave it there. I can't be bothered with it.

[22] Ms Atkinson said that Mr Fenner then stopped talking to her as they were travelling down the Oxford road and then

heavily accelerated the car. He passed two or three cars at a time while remaining silent. Ms Atkinson said that she felt very scared and turned off her voice recorder so she could ring home, but there was no reception in the area they were in. She said that she sat quietly as Mr Fenner's driving was scaring her and she thought that they were going to end up in an accident.

[23] Ms Atkinson's evidence is that Mr Fenner then put the brakes on and the car came to a sudden halt at the Cust end of Oxford Road. She says that Mr Fenner told her to get out of the car. Ms Atkinson says that she refused to get out of the car but Mr Fenner yelled "*Get the f*** out of my car, you have no work and you will not be getting paid for what work you have done*".

[24] Ms Atkinson says that she was too scared to stay sitting in his car so she did as she was told and got out on the side of the road and Mr Fenner put his foot down and left in a hurry. She was left standing on the side of the road by herself. She says that she started to walk back along the road towards Rangiora, and that the grass verge that she was left to walk on had a creek on the right side of her and a 100 kilometre road on the other side.

[25] Ms Atkinson said that she became very worried because she could have been seriously injured or drowned if she had suffered a seizure and fallen. Ms Atkinson said that, after about

20 minutes, she came upon her aunt's house. Her cousin was at home and she was able to use their home phone to ring her father to come and pick her up, as her mobile phone did not have reception.

[26] Ms Atkinson says that she received no further contact from Mr Fenner until four days later when he texted her asking for the work tops and the gym key to be returned. She says that she had already returned the gym key to the ladies at the gym.

[27] For his part, Mr Fenner's evidence is that, while they were in the car together on 18

January, after the recording stopped, Ms Atkinson stated that she was "quitting her job" and demanded to get out of the vehicle. He says that he told Ms Atkinson that they were on their way to a customer who needed servicing, to which she repeatedly responded "I don't give a f***, stop the car I want to get out". He says that, due to her increasingly angry manner he stopped the car as he did not want to be accused of holding her against her will.

[28] Mr Fenner says that, once the vehicle came to a stop, he advised Ms Atkinson that if she wished to resign from her position, she would need to submit a resignation in writing and that he grabbed a pad from the back of his car. He says that she responded "I won't write anything down, you can get f***ed" before getting out of the car and slamming the door. She then walked towards Rangiora where her aunt lived.

[29] Mr Fenner says that, taking into account these events, he assumed that Ms Atkinson had resigned from her position.

[30] A personal grievance was raised on behalf of Ms Atkinson on 6 March 2017 by Mr Yu, a solicitor working at Community Law Canterbury. It appears that a response was prepared by Employsure, on behalf of the respondent, but this did not reach Community Law.

The issues

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

(a) Whether Ms Atkinson was unjustifiably dismissed by the respondent on 18

January 2017;

(b) What remedies, if any, are due to Ms Atkinson.

Was Ms Atkinson unjustifiably dismissed?

[32] The material part of [s 4](#) of the [Employment Relations Act 2000](#) (the Act) imposes a duty of good faith upon the parties to an employment relationship, as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)— (a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other. (1A) The duty of good faith in subsection (1)—

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

confidence; and

(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.

[33] [Section 103A](#) sets out the test of justification that the Authority must apply when considering whether a dismissal was justified. [Section 103A](#) provides as follows:

[Section 103A](#) Test of justification

(1) For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

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

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

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

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

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

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

(a) minor; and

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

[34] The first question to determine in this matter is whether Ms Atkinson was dismissed or not. In the Employment Court case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*¹ the Court examined authorities on what constitutes a dismissal. His Honour Judge Ford stated the following (case citations omitted):

[67] In *Ramsbottom*, the Court of Appeal also considered the concept and definition of a dismissal. It adopted dicta from other reported cases to the effect, relevantly, that:

[19] ... On an ordinary use of language 'dismissal' is a unilateral act by the employer which terminates the employment contract. ...

[20] ... defined dismissal as **'the termination of employment at the initiative of the employer'**. ...

(emphasis added)

[68] In *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357, Fair Work Australia considered cases dealing with the concept of termination at the initiative of the employer. In my view, the principles discussed in those cases would have equal application in any consideration of the meaning

of the same expression in this jurisdiction. In *Sharpe*, it was noted:

1 [2015] NZEmpC 89

[24] ... Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. ...

[69] Reference was made in *Sharpe* to a particular passage by Justice Moore in the case of *Rheinberger v Huxley Marketing Pty Ltd*, which had subsequently been referred to with approval by the full Court of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*. Justice Moore stated:

However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[35] If the employment ended in the way that Ms Atkinson says, then there would be no doubt in my mind that the employment would have ended at the initiative of the respondent, as it would have been a significant act of "sending away" to abandon an employee on the side of a rural road knowing that she was prone to epilepsy. In addition, such an action

would undoubtedly have amounted to an unjustified dismissal, as it would be in breach of [ss 4](#) and

103 A of the Act.

[36] However, even if matters transpired the way that Mr Fenner says, Ms Atkinson would have had to have been clearly very upset, because a person in Ms Atkinson's position (a young woman having recently suffered a very serious episode of epilepsy) who was thinking rationally would not have demanded to have been left by the side of a rural road 20 minutes' walk away from her aunt's house, who may not even have been home at the time.

[37] In such a situation, where an employee angrily uses words that could be interpreted as a resignation in the heat of the moment, it is incumbent upon the employer to let a period of time pass (a cooling off period) and to then make enquiries about whether the angry outburst was intended to constitute a resignation. I refer to *Chicken and Food Distributors (1990) Ltd v Central Clerical Worker's Union*², *Boobyer v Good Health Wanganui Ltd*³ and *Kostic v*

*Dodd and Milligan*⁴ for example. However, Mr Fenner did not make any such attempts, and did not get in touch until two days later when he texted Ms Atkinson to ask her to return the gyms' access cards and the respondent's work tops.

[38] Therefore, on his own evidence, Mr Fenner simply accepted Ms Atkinson's angry words at face value. To use the words of Judge Couch in *Kostic*⁵, it was not safe or, to use the operative words of s 103A, "the action of a fair and reasonable employer" to insist on giving effect to what she said. Therefore, even on Mr Fenner's evidence, there would be a dismissal which would be unjustified.

[39] Whilst it would be easy to conclude that, given the above analysis, I do not have to make a finding of fact as to what transpired in the car on 18 January 2017, I believe that the parties deserve a finding. I will say that there is no obvious conclusion what transpired in the car, as both versions of the events are plausible. However, I have only to find what happened

on a balance of probabilities; that is, what is more likely than not to have happened.

² [\[1991\] 1 ERNZ 502](#), 507

³ 24/2/1994, WEC3/94, W17/94

⁴ [2007] CC 14/07, 11 July 2007

⁵ At [88].

[40] By a narrow margin, I believe that Ms Atkinson's evidence is correct. I say this for the following reasons:

- a. The recording of the exchange between Ms Atkinson and Mr Fenner transcribed above indicates that Mr Fenner had lost patience with Ms Atkinson at the end of the conversation, referring to "the same old shit" and that he could not be bothered;
- b. Although neither raised their voice during the exchange, Mr Fenner was the more assertive, and accused Ms Atkinson of having lied to him. He was also clearly frustrated, talking, for example, about Ms Atkinson "chucking the contract in his face";
- c. Ms Atkinson, on the other hand was largely trying to answer Mr Fenner, and explain her position.
- d. The recording clearly indicates that Mr Fenner suddenly accelerated, as Ms

Atkinson states.

e. Ms Atkinson turning the recording off is consistent with her trying to call her father when she became scared.

f. It is inherently unlikely that Ms Atkinson would have demanded that she be let out of the car, even if she was scared, 20 minutes' walk away from her aunt's house on a 100 km a hour road when she had had the most serious seizure of her life 10 days before.

g. Both Mrs Atkinson, Ms Atkinson's mother, and Mr Shawn Spencer, Ms Atkinson's cousin gave convincing evidence of how upset Ms Atkinson was after the incident, which is consistent with her being forced to get out of the car and being dismissed.

h. I am also mindful of the fact that the respondent had unilaterally removed Ms Atkinson's day shift work without any consultation six days' beforehand, which indicates that it was not concerned about her position.

[41] Ms Bainbridge submits that Ms Atkinson's evidence was inconsistent and that I should therefore prefer the respondent's. Ms Bainbridge points out that Ms Atkinson gave two different explanations for stopping the recording in the car (because she wanted to call her father, and because she and Mr Fenner had stopped talking). However, these explanations are not actually inconsistent. They can both be true. Certainly, the recording shows that they had both stopped talking when the recording ceased.

[42] In conclusion, I find on balance that Mr Fenner did make Ms Atkinson leave the car and did tell her she was dismissed. He then made no contact with her for two days, until he asked for the return of the respondent's and the gyms' property.

[43] As I have said, however, even if I am wrong about what happened in the car, and Mr Fenner's version of events is correct, there would still have been an unjustified dismissal due to the failure of the respondent to have let a period of time pass and to then make enquiries about whether the angry outburst was intended to constitute a resignation. Even on Mr Fenner's own evidence, the words purportedly used by Ms Atkinson do not unambiguously amount to a resignation. They could simply have been a manifestation of Ms Atkinson's urgent wish to get out of the car because she was very scared of Mr Fenner's driving.

[44] Clearly, whichever scenario obtained, the respondent's actions were not in any way the actions of a fair and reasonable employer in all the circumstances. Accordingly, I must find that the dismissal was unjustified.

Remedies

[45] Having been unjustifiably dismissed, Ms Atkinson is entitled to remedies. The material part of s 123 of the Act provides as follows:

123 Remedies

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

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

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

employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

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

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

[46] Section 128 of the Act provides:

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.

[47] In her amended statement of problem Ms Atkinson seeks six months' lost wages, which she says is less than her actual loss. She has calculated that she averaged \$290.52 gross per week during the 19 weeks she was employed, and that 26 weeks' loss therefore equates to the gross sum of \$7,553.48.

[48] However, after Ms Atkinson suffered her seizures on 8 January 2017 she was told, on

16 January, that it was not safe for her to work alone, and that she should not work in the evenings or at night. Ms Hawley-Smith gave evidence that she could only have the gyms cleaned at night to avoid disruption and that there was no guarantee that the gyms would have anyone in them in the evening. Therefore, this effectively means that, from 16 January, Ms Atkinson was unable to clean the gyms for medical reasons.

[49] This means that it is not appropriate to assume in calculating Ms Atkinson's loss of wages that she would have continued to have earned an average of \$290.52 per week. Ms Atkinson is entitled to the reimbursement of a sum equal to the whole or any part of the wages or other money lost by her as a result of the grievance. However, the loss of 11 hours' work a week cleaning the gyms was due to the medical restrictions upon her, not the dismissal. The loss of this work would have occurred in any event, even if Ms Atkinson had not been dismissed.

[50] Therefore, these 11 hours a week need to be excluded from the calculation of loss. The individual employment agreement stated that Ms Atkinson's usual hours of work would be approximately 10 hours per week. Mr Fenner said that these 10 hours were the hours that Ms Atkinson was originally employed to clean the gyms and that the day hours that Ms Atkinson was given to work were additional.

[51] I note, however, that clause 5 of the employment agreement does not state that the approximate 10 hours of work per week were specifically to clean the gyms. Ms Atkinson's role was described generically as "to clean". It is clear that day work

was available to be given to Ms Atkinson, and that it was taken away from her unilaterally, without any consultation or discussion at all. Whilst the employment agreement states that there was no

minimum guaranteed hours, Ms Atkinson was always given at least 11 hours work, and averaged 16.78 hours a week.

[52] In my view, a fair way to recompense Ms Atkinson for her loss of earnings arising as a direct result of her unjustified dismissal is to assume that the respondent would not have unilaterally removed her day hours, (which she was not medically restricted from doing) and that she would have worked at least six hours a week of day shifts.

[53] Should the Authority's discretion be exercised so that Ms Atkinson is reimbursed for more than three months' loss of earnings? I believe that it should. She is restricted from travelling far and wide to seek work because her epilepsy prevents her from having a driving licence. She is therefore restricted to the area around Rangiora. She is also restricted from working evenings, and nights. Therefore, Ms Atkinson is going to find it harder than many to find alternative employment. Whilst it is not the respondent's fault that Ms Atkinson has epilepsy and is restricted in this way, it must take her as it finds her. Her work with the respondent fitted in with her limitations, and that work was unjustifiably taken away from her.

[54] I find that six months' loss of earnings at six hours a week is appropriate.

[55] Ms Atkinson was paid \$15.50 an hour. From 18 January 2017 to 31 March 2017 (after which the minimum wage changed to \$15.75 an hour) Ms Atkinson would have earned

\$93 gross a week. During that period, she would therefore have earned \$969.86 gross.

[56] From 1 April 2017 to 19 July 2017 Ms Atkinson was entitled to receive \$15.75 a week. At six hours a week, that amounts to \$94.50 a week, and totals \$1,471.50. Over a six month period, Ms Atkinson would therefore have earned a total of \$2,441.36 gross adopting the above principles.

[57] Ms Atkinson seeks holiday pay in addition, which she is entitled to. At 8% of

\$2,441.36, that equates to the gross sum of \$195.31.

[58] Turning to compensation for humiliation, loss of dignity and injury to feelings under s

123(1)(c)(i) of the Act, there was evidence both from Ms Atkinson's mother and her cousin that Ms Atkinson was badly affected by the experience of being abandoned by the road on 18

January, and being dismissed. Mrs Atkinson said she hardly ate, and was very withdrawn for several days. Ms Atkinson said in her written evidence that she still feels heavy anxiety.

[59] Ms Atkinson seeks \$15,000 compensation. When I take into account the approach to the award of compensation taken by Her Honour Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald*⁶ I believe that this is an appropriate sum to award, given the level of the effects of the personal grievance on Ms Atkinson, which undoubtedly falls within the middle band discussed in *Archibald*.

[60] 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).

[61] There is no question in my mind that Ms Atkinson did not contribute in any blameworthy way to her dismissal. The recording of the last conversation between Ms Atkinson and Mr Fenner, before he told her to get out of the car shows that she was not being unreasonable in any way. Her main concern, as she kept on saying, was her health. I

therefore decline to reduce the awards.

6 [\[2017\] NZEmpC 132](#)

Orders

[62] The respondent is ordered to pay to Ms Atkinson the following sums within 14 days of the date of this determination:

- a. The gross sum of \$2,441.36 in respect of lost wages;
- b. The gross sum of \$195.31 in respect of holiday pay; and
- c. \$15,000 compensation under s 123(1)(c)(i) of the Act.

Costs

[63] In the statement of problem a claim for a contribution towards Ms Atkinson's costs was made on the basis that Community Law Canterbury is no longer fully funded and that Ms Atkinson will be invoiced the sum of \$960 in addition to the Authority's lodgement fee of

\$71.56. She seeks to recover these sums.

[64] Whilst the parties have not given submissions as to costs, given that Ms Atkinson has been successful, and she seeks a contribution which is less than the daily tariff would give, I believe that I am in a position to decide costs now.

[65] I therefore order the respondent to pay to Ms Atkinson the sum of \$1,031.56 as a contribution towards her costs.



David Appleton

Member of the Employment Relations Authority