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Bazley v Country Hospitality Management (NZ) Limited (Christchurch) [2016] NZERA 340; [2016] NZERA Christchurch 129 (2 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 129

5560316

BETWEEN STEVEN PHILLIP BAZLEY AND BRENDAN EPHIA TUUTA, THE EXECUTORS OF THE ESTATE OF MARY BAZLEY

Applicant

AND COUNTRY HOSPITALITY MANAGEMENT (NZ) LIMITED

Respondent

Member of Authority: Christine Hickey

Representatives: Jannah Stringer, Counsel for the Applicant

Guy Herbert, Advocate for the Respondent

Investigation meeting: 5 April and 16 May 2016

Submissions: At the investigation meeting on 16 May 2016

Determination: 2 August 2016

DETERMINATION OF THE AUTHORITY

A. Mary Bazley was an employee of Country Hospitality

Management (NZ) Limited before she signed her individual employment agreement. Therefore, the 90-day trial period clause in the agreement does not operate to prevent her estate's right to bring a claim for unjustified dismissal.

B. Country Hospitality Management (NZ) Limited unjustifiably dismissed Mary Bazley.

C. Country Hospitality Management (NZ) Limited must pay Steven Phillip Bazley and Brendan Ephia Tuuta, the executors of the Estate of Mary Bazley \$3,971.06 gross in lost wages and \$6,000 in compensation, without deduction.

Employment relationship problem

[1] By letter dated 30 March 2015, Mary Bazley raised a personal grievance of unjustified dismissal with Country Hospitality Management (NZ) Limited (CHM). Mrs Bazley claims that CHM unjustifiably dismissed her from a role as receptionist at the Equestrian Hotel (the hotel) on 16 January 2015 during a telephone call with the then operations manager, Kevin Smith. She

says there were clear procedural defects in the process and a lack of substantive reasons for her dismissal.

[2] By way of remedy, Mrs Bazley claimed lost wages for at least three months, compensation for humiliation, loss of dignity and injury to her feelings of between

\$10,000 to \$15,000, and legal costs.

[3] CHM denies that it unjustifiably dismissed Ms Bazley and says that she resigned. However, if I determine that she was dismissed CHM says she was dismissed under a valid 90-day trial period provision in her individual employment agreement (IEA). Therefore, she has no ability to bring a claim for unjustified dismissal.

Procedural background

[4] On 9 June 2015, Ms Stringer wrote to CHM on Mrs Bazley's behalf. She wrote that "as a part of her personal grievance claim, Mary will be seeking" legal costs, compensation for distress, humiliation and injury to feelings of \$7,000 to

\$10,000, loss of wages for an "extended period" and payment for the two week notice period in her IEA.

[5] Mediation took place on 24 July 2015. On 27 July 2015, Ms Stringer sent Mrs Bazley a letter confirming her instructions to continue with her claim by lodging an application in the Authority. Ms Stringer advised she would be able to draft the

application in the next 2-3 weeks. Unfortunately, Mrs Bazley died suddenly on

4 August, before the application was lodged.

[6] These proceedings began with the lodgement of a statement of problem on

25 September 2015 by the executors of Mrs Bazley's estate, which include her

husband, as the applicant.

[7] [Section 3](#) of the [Law Reform Act 1936](#) provides that certain causes of action survive death:

Subject to the provisions of this Part, on the death of any person after the passing of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate

[8] The exceptions set out in [s 3](#) do not apply to Mrs Bazley's case. The claimed cause of action arose during Mrs Bazley's lifetime. Therefore, her estate has the right to bring these proceedings.

The investigation meeting

[9] The investigation meeting took place on 5 April and 16 May 2016. On

5 April, I heard from witnesses Tanya Bazley, Mrs Bazley's daughter, Guy Herbert, CHM's sole director and Theresa Cavanagh, a long-standing and very experienced receptionist from the hotel. On 16 May, I heard from Kevin Smith, the hotel's former operations manager.

[10] All witnesses lodged written witness statements before the meetings. Under oath or affirmation, they each confirmed their own statement and answered questions from the parties' representatives and me. The representatives also had the opportunity to provide closing submissions on the facts and legal issues.

[11] As permitted by s 174 of the Act I do not record all the evidence and submissions received but express my findings of fact and law and conclusions on the issues for determination.

Issues

[12] In order to determine this matter I need to ask the following questions: (a) Was Mrs Bazley dismissed?

(b) Was Mrs Bazley a new employee at the time she signed her IEA? To determine that question I will need to ask when she became an employee.

(c) Did CHM unjustifiably dismiss Mrs Bazley? (d) What, if any, remedies are due?

Background facts

[13] Mrs Bazley approached the hotel, which is run by CHM, in November 2014 seeking work. Mr Herbert considered she might be suitable for a casual, part-time receptionist's position. He asked her in for a discussion about potential work. However, he says that meeting was not a job interview. He wished to identify her skills and assess her suitability for a reception role. He says that the reception work structure was being reviewed and there was not a fulltime position available. However, he could foresee there may be a need for an on-call, part-time position.

[14] Mr Herbert says Mrs Bazley suggested that she could observe the receptionists at work to assess whether she thought she would be able to do the job. He says he did not ask her to do this and that he made it clear to her while she was observing she was not employed. He says the reception position is a complex one and he made sure Mrs Bazley understood it might take some time to understand the nature of the job.

[15] In CHM's statement in reply Mr Herbert wrote that:

... the hotel was not prepared to offer a job entailing considerable training incurring cost without a clear commitment on the part of the applicant to work for a reasonable period for the hotel.

[16] Mr Herbert's written evidence is that when CHM employed any new receptionist she needed to undergo "fulltime training before taking up their new position".

[17] At the investigation meeting, Mr Herbert was clear that he did not intend Mrs Bazley's observation to be a trial to assess her suitability. However, he agreed that it was an indirect opportunity for CHM to make up its mind whether to proceed to offer her a job.

[18] Mrs Bazley kept notes of the time she worked observing the various receptionists undertaking their duties and notes of the duties and procedures she observed. I am satisfied she began on 24 November 2014 and observed for a total of

41.75 hours from Monday to Friday that week.

[19] Although CHM apparently did not intend to pay Mrs Bazley for this period, she submitted a timesheet and was paid. She was not immediately informed she had been paid in error and she was not asked to repay that week's pay. Although, it is possible Mr Smith may have mentioned the payment had been made in error during his last phone call with Mrs Bazley.

[20] Probably towards the end of Mrs Bazley's observation week, Mr Smith decided to interview Mrs Bazley. It is not clear what day that was. He says that he explained the position available was an on-call one to cover when receptionists were on leave or were sick. He told her that as time went on there would be more work.

[21] Mrs Bazley had pre-planned a holiday to visit family in Australia from

23 December to 4 January 2015. She made Mr Smith aware of this.

[22] Mr Smith offered Mrs Bazley a job on reception on an as rostered basis. It is not clear what day Mr Smith made the offer, but it appears more likely than not that it was at the end of Mrs Bazley's observation week. It was certainly after Mr Smith had sought and received feedback from the receptionists Mrs Bazley had been observing at work about her suitability and aptitude for the role.

[23] Probably on either 3 or 5 December 2014¹ Mr Smith and Mrs Bazley signed her individual employment agreement (IEA). For the week ending 7 December 2014, Mrs Bazley worked 29.5 hours, from Wednesday to Friday and on Sunday. The following week she worked 39 hours until 14 December 2014.

[24] CHM approved of Mrs Bazley's trip to Australia. Although her trip was not

until 23 December it appears she did not have any rostered work from 15 to

23 December inclusive. That appears to have been by mutual consent.

[25] On 4 January 2015, the day she returned from Australia, Mrs Bazley rang the hotel a number of times trying to get hold of Mr Smith. She did not hear back from

¹ The date has been altered in pen on the IEA.

him so went to the hotel to get Mr Smith's cell phone number. Mrs Bazley's notes

state that when she got hold of him he told her:

... he was hiring a previous employee back and did not think my

services were required as I was not fully trained yet.

I replied that this seemed rather unfair and I have been out of work not altogether 3 weeks.

He then said maybe I will get back to you after speaking with girls.

Another 2 days pass and no communication. I again rang him yesterday and he wants me to give him more time.

[26] Both parties agree that Mr Smith and Mrs Bazley spoke over the phone again. That was likely to have been on 16 January 2015. The result of that call was that Mrs Bazley considered herself to have been dismissed and CHM prepared her final pay.

[27] On 18 January 2015, CHM sent Mrs Bazley her final pay slip, recording that it had paid her 8% holiday pay. In response, Mrs Bazley emailed CHM's payroll person twice on 22 January 2015 pointing out that she had not been paid for her two week notice period:

Please pay 2 weeks owing for the breaking of my contract

and

As my Employment contract states you have ended my Employment as to no hours rostered for work and broke our contract. Please ensure this is paid immediately as it has now been 4 weeks without pay and I have been more than reasonable with you.

Was Mrs Bazley dismissed?

[28] A dismissal, in its simplest form, is the ending of the employment relationship by the employer.

[29] CHM says Mrs Bazley was not dismissed but chose not to continue waiting to be assigned any on-call, or "as rostered" hours. CHM says that Mrs Bazley demanded to be given a guarantee of full-time hours and when Mr Smith could not give her that she resigned.

[30] Mr Smith no longer works for CHM and was summoned to give evidence. I am grateful to him for giving evidence in the face of his own difficult family situation. He provided a written witness statement in advance, which he confirmed and expanded on at the investigation meeting.

[31] Mr Smith says before Mrs Bazley began work he told her she would work with another receptionist and be trained on one shift and then the other. By Christmas, she was unable to do the job on her own and would have needed a lot more training. However, he needed her to be able to work on her own on either shift.

[32] He says that the feedback he had after Mrs Bazley had worked for two weeks was that she was unable to do the job on her own and was struggling. He said that he was seriously concerned that she required a considerable amount of further training.

[33] Mr Smith says that he waited for Mrs Bazley to get in touch with him after her holiday. He denies that at that stage Mrs Bazley's services were not wanted but that he needed to discuss with her the further training he thought was necessary and "needed to know her point of view". He says, "It was too early to determine whether she would make the grade or not although the signs were bad. ... I did not have confidence or faith in her ability to reach the level of competency necessary for the position but it was still early days."

[34] Mr Smith was unable to accurately recall whether in Mrs Bazley's absence he had reengaged a previous receptionist but agreed that some staff changes had happened over that time.

[35] He further says in his final conversation with her, "Mary ... demanded either a permanent position with guaranteed hours or to be released from her contract. I had no choice but to release her from her contract. If she didn't want to wait any longer I wouldn't hold her to the job."

[36] Mr Smith says that in the previous two or three phone conversations he had with Mrs Bazley he was not in a position to roster her on her own. He says he was "holding Mary in the wings". However, in the 16 January 2015 call, "I made it clear that I couldn't offer her a full-time job and if she didn't want to wait she was free to move on."

[37] Mr Smith says that Mrs Bazley did not tell him then she wanted to move on. He cannot recall if he told her that it was still possible she would be rostered on for some hours.

[38] Mr Smith did not contact Mrs Bazley again to offer her any work. Mr Smith told me he expected to hear from Mrs Bazley again with her decision, but they never spoke again. I asked Mr Smith why, if he did not dismiss her and Mrs Bazley did not say she no longer wished to work for CHM, he caused her final pay to be prepared and paid to her two days later. Mr Smith was not sure why he did that.

[39] This is a sad and difficult case. Mrs Bazley is not able to give oral evidence and be questioned.

[40] Although CHM may have intended Mrs Bazley to be a casual employee that is not spelled out in her IEA and I find that was not her understanding, although she did not expect to be a full-time employee. The IEA does not state Mrs Bazley was a casual employee and the fact she agreed her hours were to be "as rostered" does not make her one. That could equally connote that while actual hours might vary from roster to roster Mrs Bazley could expect to be rostered in each roster period for some hours.

[41] Mr Herbert says, and Ms Cavanagh confirmed, that reception work is complex and a very responsible job requiring "considerable" and "full time training". It is more likely than not that Mrs Bazley understood that at least until she was fully trained she would be rostered on for a number of hours per week alongside a more experienced receptionist. I consider that was CHM's intention before Mrs Bazley's holiday to Australia. However, something changed while she was away. Mr Smith says by 14 December she was not yet competent to be rostered on her own. Despite her not being fully trained Mr Smith was

reluctant to roster her on for more training in January 2015.

[42] If CHM believed Mrs Bazley to be a casual employee Mr Smith had no need to release her from her contract.

[43] Despite my inability to test Mrs Bazley's evidence I am satisfied that her contemporaneous notes are more likely to be a reliable indication than Mr Smith's memory, approximately 18 months later, of what happened during the 16 January

2015 phone call. Mrs Bazley's notes from that time contain what appears to be a draft of a letter to Mr Smith or CHM:

It certainly isn't my intention to bring disregard or in no circumstance to any harm or have ... disrespect or disharmony to any employees. My one and only fact to this day is being dismissed without reasonable doubt, and disregard for my own situation.

[44] That draft letter combined with the fact Mr Smith organised Mrs Bazley's final pay for 18 January 2015 make it more likely than not that both she and Mr Smith understood she was never going to be offered any more hours of work by CHM. Tanya Bazley's evidence also tends to support the conclusion Mrs Bazley had been dismissed. She says that her mother reported to her that she had been dismissed and was very upset by that. Mr Smith may not have intended to summarily dismiss Mrs Bazley. However, that is what happened.

[45] The next issue I need to determine is whether there was a valid 90-day trial period provision. If there is, I cannot consider the claim that Mrs Bazley was unjustifiably dismissed.

Was there a valid 90-day trial period provision?

What is the effect of a valid 90-day trial period provision?

[46] Section 67A of the Employment Relations Act provides that an employee and an employer may enter into an employment agreement containing a trial provision. If a trial period provision for a period not exceeding 90 days is included in the written individual employment agreement, which starts at the beginning of the employment of an employee who has not previously been employed by the employer:

- during that trial period the employer may dismiss the employee, and
 - if the employer does so the employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

[47] Section 67B(1) and (2) provide that if an employer terminates an employment agreement containing a trial period provision the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[48] The Employment Court has considered the application of s 67A and s 67B trial periods and said that the provisions:

remove longstanding employee's protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally ... legislation that removes previously available access to courts and tribunals should be strictly interpreted and as

having that consequence only to the extent that this is clearly articulated.²

[49] Chief Judge Colgan went on to say:

The ... sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.³

[50] Also in the *Smith* case Chief Judge Colgan said that passages from Hansard of

the Bill's reading in the House:

...confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties **at the commencement of the employment relationship** and not retrospectively or otherwise settled during its course. Employees affected are to be new employees....⁴ [my emphasis]

[51] In *Blackmore v Honick Properties Ltd*⁵ Chief Judge Colgan considered whether it was unreasonable to require employers to ensure that a written employment agreement containing a s 67A provision is signed before the new employee begins working. He concluded:

Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential pre-condition of a trial period.

It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. ...For

those reasons, I do not think it could be said that the requirements on an employer seeking to have those advantages are either impractical or onerous. ... Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. ...

What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee.⁶

[52] A key issue decided in the *Smith* case was the effect of s 67A(3); that is, who is an *employee who has not been previously employed by an employer*? In

Ms Smith's case she worked for the employer before signing an employment

² *Smith v Stokes Valley Pharmacy (2009)Limited* [2010]ERNZ 253, page 265

³ *Smith*, page 271

⁴ *Ibid*, page 265

⁵ [\[2011\] NZEmpC 152](#); [\[2011\] ERNZ 445](#)

⁶ *Ibid*, paragraphs [65] – [70]

agreement containing ss 67A and 67B provisions. The Chief Judge decided that she did not meet the statutory definition of a new 'employee' set out in s 67A(3).

Was Mrs Bazley a new employee when the IEA was signed?

[53] There are two relevant issues I need to determine. The first is what date the employment agreement was signed. The second is whether or not Mrs Bazley was a new employee when she signed the IEA, even if I find it was signed on 3 December 2014.

[54] CHM says that it is clear that Mrs Bazley was first employed by it on

3 December 2014. It provided in-house emails to and from the payroll administrator beginning 1 December 2014 that Mrs Bazley had "not yet been contracted by Kevin". On 3 December 2014, another receptionist sent the payroll administrator details for Mrs Bazley "new receptionist from 03/12/14".

[55] Ms Stringer submits that it is more likely than not that Mrs Bazley signed the

IEA on 5 December 2014 but that the date was later changed to appear to be

3 December by CHM.

[56] Mr Herbert pointed out that Mrs Bazley's IRD Kiwisaver opt-out request form was signed by her on 3 December 2014. I accept that Mrs Bazley signed that document on 3 December 2014 because the date has not been altered. Mr Herbert submits that makes it more likely the IEA was also signed that day.

[57] I accept Mr Smith's evidence that he gave Mrs Bazley the IEA to read and seek advice on at the same time as he gave her a new employee details form, an IRD tax code form and the Kiwisaver form for completion. He says he instructed Mrs Bazley that "all documentation was to be completed and handed in before

commencement of work on Wednesday, 3rd December 2014".

[58] However, the fact that the Kiwisaver form is dated 3 December 2014 does not make it more likely the other forms and the IEA were also signed that day. All it means is that it is likely Mrs Bazley was given that form and the other documents on or before 3 December 2014.

[59] On 4 December, a receptionist sent through Mrs Bazley's pay rate to the

payroll administrator. On 5 December, the payroll administrator emailed that

Mrs Bazley's bank account and IRD details were incorrect. The receptionist emailed back that Mrs Bazley would check the details at home and the receptionist would let him know.

[60] Mr Smith says that Mrs Bazley handed him all the signed documentation before she began work on 3 December 2014. I am not comfortable in accepting that evidence at face value. The IEA, the new employee details form and the IRD form all have a number 5 and a number 3 on them in the day place, written in a day/month/year order. It is not entirely clear which number was written first although the number 3 is written in darker ink. That may be due to it being written over more than once.

[61] Mr Herbert invites me to conclude that Mrs Bazley filled in the Kiwisaver form with the correct date but incorrectly dated the other documents 5 December. He submits that when she came in to work on 3 December either she or Mr Smith noticed the dates were incorrect. He suggests Mrs Bazley or Mr Smith amended the dates when they were together. However, Mr Smith was unable to remember how and when the dates came to be changed and so gave no evidence on this point.

[62] Page 16 of the IEA contains the "Execution of Agreement". It originally read "dated the 5th day of December 2014". Below that are Mrs Bazley's and Mr Smith's signatures. However, the date now reads "3th day of December 2014". That alteration does not make sense. If the date was changed by or in the presence of both Mrs Bazley and Mr Smith I would expect it to have been changed to "3rd day of December 2014".

[63] Ms Stringer submits that the date has been changed deliberately by CHM, in contemplation of these proceedings, so that it can argue that Mrs Bazley was a new employee as at 3 December. I am not prepared to find that there has been a deliberate deception by CHM changing the dates after the fact.

[64] It is possible that neither scenario contended for by the parties is what happened. It is equally likely that it was agreed verbally that Mrs Bazley would start work on 3 December 2014 and that she provided her new employee details, Kiwisaver form and IRD number to the receptionist before then but did not see Mr Smith and hand him her IEA until 5 December when either they both signed the IEA or he signed it on that date.

When did Mrs Bazley become an employee?

[65] Examining the second relevant issue, whether Mrs Bazley was already an employee before 3 December 2014 may prove more conclusive. During her observation week and before the IEA was signed what was Mrs Bazley if she was not an employee?

[66] Mr Herbert and Mr Smith are adamant Mrs Bazley was not an employee when she was observing the receptionists. Mr Herbert says it was not his idea but Mrs Bazley's idea to observe. He suggests she observed voluntarily more for her benefit than for that of CHM. She was free to observe for as few or as many hours she wished, according to Mr Herbert. If Mrs Bazley was not an employee then, was she a "volunteer"?

[67] Section 6 of the Act defines the term "employee". A "volunteer" is not an employee. A volunteer is someone who "does not expect any reward for work to be performed as a volunteer; and ... receives no reward for work performed as a volunteer ...".

[68] Mr Herbert and Mr Smith say they intended Mrs Bazley to simply observe and decide whether she thought she could handle the job in case they wished to offer her a job in the future.

[69] Mrs Bazley took the task very seriously and made notes related to necessary tasks in a notebook. She asked questions. According to Ms Cavanagh, Mrs Bazley undertook some tasks such as answering the phone and checking-in guests. Ms Cavanagh did not think Mrs Bazley was there strictly for observation and thought it was natural to include her in some of the things that were done. Ms Cavanagh believed Mr Smith was aware that Mrs Bazley was undertaking a few tasks. However, she did not expect Mrs Bazley to undertake all the receptionist's duties while she was working with her that week.

[70] Ms Cavanagh says that Mrs Bazley filled in a timesheet for the observation week as she said she had been working. However, Mr Smith instructed Ms Cavanagh that Mrs Bazley should not be paid for that week. Ms Cavanagh passed that on to the

payroll administrator. However, no-one communicated to Mrs Bazley she would not be paid and she was paid, as she expected. CHM says that was in error.

[71] The Employment Court case of *Salad Bowl Limited v Howe-Thornley*⁷ examined whether Ms Howe-Thornley was an employee during a work trial. It determined that she was not a volunteer and was an employee during a brief work trial. That meant that the Salad Bowl owed her obligations under the Act as its employee when it dismissed her immediately after the work trial.

[72] CHM did not expect to pay Mrs Bazley for her observation time. However, the definition of a volunteer under s 6 of the Act means I must concentrate on Mrs Bazley's expectation of the trial period; not on CHM's expectation. It is clear from her submission of the timesheet that Mrs Bazley expected to be paid. And she was paid.

[73] Mrs Bazley undertook some tasks that benefitted CHM, such as answering the phone and checking-in guests. I am satisfied that Mrs Bazley's observation was in reality a trial period for her benefit; to see if she thought she could do the job. It was also for CHM's benefit; also to see if it thought she could do the job. I find that Mr Smith would not have offered her the role if the feedback he received had not been positive.

[74] CHM says the wages were paid in error. However, Mrs Bazley worked for two more weeks and was still in NZ for a further week before going to Australia. At no time during that period did CHM claim that she should not have been paid or tell her it had paid her in error.

[75] I conclude that Mrs Bazley was not a volunteer but was an employee of CHM

during the week she observed at reception.

[76] That means that Mrs Bazley had already been employed by CHM when she and Mr Smith entered into the written IEA, whether that was on 3 or 5 December. Therefore, she was not a new employee when she purportedly agreed to the 90-day trial period provision. That provision was not legally valid and does not protect CHM

from a personal grievance claim of unjustified dismissal.

7 [\[2013\] NZEmpC 152](#); [\[2013\] ERNZ 326](#)

Was Mrs Bazley unjustifiably dismissed?

[77] In deciding whether Mrs Bazley was unjustifiably dismissed I need to apply the test in [s 103A](#) of the [Employment Relations Act 2000](#). It requires me to assess whether CHM's decision to dismiss her, and how it reached its decision, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[78] In particular I need to assess whether, before deciding to dismiss Mrs Bazley, CHM:

- sufficiently investigated any allegation/s against her,
- raised its concerns with her,
- gave her a reasonable opportunity to respond to the concerns,
- and genuinely considered any explanation regarding the allegations.

[79] I may also examine any other relevant factors. However, I must not find the dismissal to be unjustified solely because of procedural errors if those errors were minor and did not result in Mrs Bazley being treated unfairly.

[80] The full Court of the Employment Court in *Angus & McKean v. Ports of Auckland Ltd*⁸ held that failure to meet all four tests set out under [section 103A\(3\)](#) would result in a dismissal being unjustified.

[81] It appears CHM developed performance concerns about Mrs Bazley's ability to learn the job and manage shifts on her own. However, since CHM did not start out intending to dismiss Mrs Bazley it did not adequately investigate its concerns. Nor did it put them to Mrs Bazley in a fair way allowing her a reasonable opportunity to respond to those concerns. Even at the investigation meeting the specific areas of alleged incompetence were not able to be articulated. This was unfair because CHM also considered that the receptionist's role was a complex and difficult one that would require considerable training. However, it became reluctant to continue with Mrs Bazley's training.

[82] I consider that the dismissal was not a decision a fair and reasonable employer could have made in all the circumstances. Therefore, CHM unjustifiably dismissed

Mrs Bazley.

8 [\[2011\] NZEmpC 160](#).

Remedies

Two week's paid notice and lost wages

[83] The applicant claims that Mrs Bazley should be paid lost wages for three months; which is until 17 April 2015. When the Authority finds that an employee has a personal grievance [s 128\(2\)](#) of the Act requires the Authority to order the employer to pay the lesser of the sum equal to lost remuneration, or three months' ordinary time remuneration.

[84] Ms Stringer submits that since Mrs Bazley was only rostered on for three weeks the best way of assessing what her lost remuneration over three months would have been is to average the hours worked over the three weeks. Therefore, she submits that Mrs Bazley would have worked for 36.75 hours per week.

[85] However, I do not consider Mrs Bazley would have had that many hours per week once she was fully trained. I estimate that she would have needed a further three weeks of intensive training, after which her hours were likely to decrease because the hotel had a full complement of receptionists.

[86] I consider it reasonable to estimate Mrs Bazley should be paid for 36.75 hours for two weeks; at \$13.53 per hour = \$497.23 per week x 2 = \$994.46. I consider it likely that Mrs Bazley would have been rostered for an average of 20 hours per week for the further eleven weeks; at \$13.53 per hour = \$270.60 x 11 = \$2,976.60. Therefore, I consider Mrs Bazley lost a total of \$3,971.06 because of her unjustified dismissal.

[87] I am satisfied that Mrs Bazley did not have any other paid work in January and at least early February 2015. She then earned \$4,814 in other part-time work over the three months after she was dismissed by CHM. I find that if she had not been dismissed Mrs Bazley would have been able to undertake both the CHM part-time hours and other work in the three months

after 16 January 2015. Therefore, CHM must pay Mrs Bazley's estate her actual lost remuneration of \$3,971.06. That amount includes the two weeks' notice of termination of her employment Mrs Bazley had asked CHM to pay.

Compensation

[88] The applicant seeks \$10,000 compensation for humiliation, loss of dignity and injury to Mrs Bazley's feelings. The sad circumstances of this case meaning that Mrs Bazley has been unable to give evidence mean I need to rely on her handwritten notes and her daughter's evidence of conversations with her mother after the dismissal.

[89] Ms Bazley's evidence is that her mother rang her frequently and in different

calls after she had been dismissed Mrs Bazley:

... began crying stating she felt humiliated, was treated 'like crap' and that she did not understand how people could get away with it (terminating her employment for no reason).

Mum was devastated by the implication made by Equestrian Management that her employment was terminated due to low work ethics and/or that she was not able to fulfil her role adequately. ...

The Equestrian Hotel destroyed my Mum's self esteem. Mum began questioning herself on things she never had before ... Mum also described difficulty sleeping and weight loss ...

My mother told me in approximately March during a phone call that she was continuing to feel very hurt, anxious, suffering from self doubt and that she continued to be extremely embarrassed at what she perceived as an unfair attack on her character by Equestrian Hotel management.

[90] I accept Ms Bazley's evidence and have considered that, along with Mrs Bazley's handwritten notes, to conclude that CHM should pay Mrs Bazley's estate the sum of \$6,000 in compensation.

Contribution

[91] There is no evidence that Mrs Bazley contributed towards the situation that gave rise to her dismissal in any blameworthy way. There is no reduction to the remedies due to her estate.

Costs

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

[93] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting took place over two days and in total lasted almost a full day.

[94] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the daily tariff.

Christine Hickey

Member of the Employment Relations Authority