

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 160  
5509106

BETWEEN            MANU GREER  
                                 Applicant

A N D                    TEMPLE BASIN SKI CLUB  
                                 INCORPORATED  
                                 Respondent

Member of Authority:     David Appleton

Representatives:         Applicant in person  
                                 Timothy Mackenzie, Counsel for the Respondent

Investigation Meeting:    23 June 2015 at Christchurch

Further information received    8 July and 20 August 2015

Submissions Received:    30 September and 16 October 2015 from the Applicant  
                                 9 October 2015 from the Respondent

Date of Determination:    27 October 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Greer was unjustifiably disadvantaged in his employment and unjustifiably dismissed.**
- B.     Mr Greer is awarded the remedies set out in this determination, subject to reductions to reflect his contribution.**
- C.     Costs are reserved in the event that Mr Greer incurred any legal costs.**

**Employment relationship problem**

[1] Mr Greer claims that he was unjustifiably dismissed by the respondent on or around 12 August 2014 and claims various remedies in respect of that alleged unjustified dismissal.

[2] The respondent denies that Mr Greer was unjustifiably dismissed and asserts that he was dismissed at the conclusion of a disciplinary inquiry having committed serious misconduct as an employee.

**Brief account of the events leading to the dismissal**

[3] The respondent operates the Temple Basin ski area located in Arthurs Pass. According to the respondent, the ski area is administered by an unpaid committee and a club made up of paying members. Staff are employed to operate the ski area during each winter season. Due to the physical location of the ski area, its operations are highly weather dependent and so opening dates are not usually known until shortly before the ski area can open.

[4] Mr Greer had worked at Temple Basin in 2011 as a ski patroller under the previous manager, Todd Windle. On or around 18 May 2014 Mr Greer agreed with the new mountain manager, Charlotte Berry, that he would work as a senior ski patroller once the season commenced. The terms of a simple individual employment agreement were agreed between Mr Greer and the respondent, which provided, inter alia, that Mr Greer would be employed on a casual basis and would receive \$124 a day of employment, together with 8% in respect of annual holiday pay and the provision of accommodation and food.

[5] Clause 2 of the agreement specifically provided as follows:

*Employment is casual. The working day is 8 hours and the specific hours of the day and the specific days of the week to be worked shall be determined by the Employer.*

[6] It is Mr Greer's evidence that he agreed with Ms Berry that he would work six days on/one day off, although Ms Berry asserts that this was only when the ski field was fully operational. My finding is that Mr Greer was to be paid on a daily, not hourly basis, and that his job description refers to tasks to be undertaken on a daily basis. Therefore, Mr Greer had an expectation, despite his employment being referred to as casual, to be paid for each day that he worked while the ski field was open.

[7] During the early winter period of 2014 the weather conditions led to some false starts at Temple Basin, and Ms Berry kept in touch with Mr Greer and other potential staff by email over the ensuing weeks as to a potential start date. After several weeks, Ms Berry became hopeful that a storm which started around Thursday 31 July would bring sufficient snow to be able to open the ski field that following weekend.

[8] Whilst it is agreed between the parties that Mr Greer went up to Temple Basin on Friday 1 August 2014, it is disputed as to the reason for him doing so. Mr Greer says it was because he had agreed with Ms Berry that the passing storm could result in a large dump of snow and that he should therefore be up the mountain ready to assist in getting the ski field operational in the event that the snow eventuated.

[9] Ms Berry's evidence is that Mr Greer had been allowed to come up to Temple Basin on 1 August 2014 so that he could get some experience in respect of an advanced course he was undertaking in avalanche control (known as an Avi2 course). Mr Greer says that, whilst it is true that he was enrolled on the Avi2 course, he did not go up the mountain on 1 August for that reason.

[10] This matter is in contention because of what happened on the morning of Sunday, 3 August, by which time it had become clear that not enough snow had fallen to enable the ski field to open. Whilst he had been up the mountain on 1, 2 and 3 August waiting to see whether the storm would result in enough snow, Mr Greer was not in receipt of any pay, as the ski field was not yet operational. Mr Greer had carried out some volunteer work tidying up the lodge but, as the hoped-for snow had not eventuated, it was his intention to descend the mountain on Sunday 3 August. He also believed that it was the intention of Ms Berry to do so.

[11] However, while Mr Greer was in the lodge preparing to leave, he received a call over the radio from Ms Berry asking him to assist her in digging out a track between the top of the first tow rope and the bottom of the second. Mr Greer said he was surprised to have received this request, but agreed to go and help. At some point (possibly after he had reached the track) he found out that Ms Berry wanted to dig the track because some snow craft students (who would be practising snow caving) would be using it the following day.

[12] A dispute arose between Mr Greer and Ms Berry as she wished him to dig the track deep and wide, whereas Mr Greer believed that that was *an exercise in futility* as it would only get filled in again when it next snowed. According to Mr Greer, Ms Berry told him to *carry on*, and started to re-dig the track that he had dug. He understood this to mean that he was to go down back to the lodge, which he did.

[13] There are some disagreements between the parties as to how much of the track Mr Greer dug and whether or not a volunteer was already up digging the track when Mr Greer ascended or not, although I do not believe that these areas of contention are particularly material.

[14] What is material, however, is the conversation that took place between Ms Berry and Mr Greer an hour or two later when she descended to the lodge after having finished on the track. Essentially, Ms Berry took issue with Mr Greer not having done what she had asked and told him to pack up and leave.

[15] Whilst Mr Greer and Ms Berry disagreed over the content of the conversation between them, it does appear to be the case that Mr Greer took exception at being told that he had not dug the track deeply and widely enough, to Ms Berry's satisfaction, when he was not at that point being paid. His evidence was that he effectively said to Ms Berry that, once he was being paid, he would do whatever she wanted him to. He maintained, however, that the track he had dug was safe enough for the snow craft students, who would be equipped with crampons and ice axes.

[16] Ms Berry's attitude to the matter was that Mr Greer was being provided with free accommodation so that he could get some experience for his Avi2 course and was expected to take part in volunteer work in return.

[17] There is also a disagreement between the parties as to whether Mr Greer questioned Ms Berry's competency as a mountain manager, whether he said that she was letting her management position go to her head and whether she was abusing her position of authority. Mr Greer denies ever saying that Ms Berry was incompetent as a mountain manager and denies that he ever abused her, saying that he had remained professional at all times.

[18] It is Mr Greer's evidence that, during this conversation in the lodge, Ms Berry said that he needed to pack up all his things and leave the mountain that day and that she would let him know if she still needed his help after the next snowfall.

[19] Mr Greer accordingly returned to the Arthurs Pass village and waited to hear from Ms Berry over the following few days. Mr Greer believes that avalanche control operations started to be carried out in the Temple Basin area on 5 August<sup>1</sup>, and that it was definitely carried out on 8 August<sup>2</sup>. Mr Greer noted on the internet that Temple Basin ski field was advertising that they would be opening that weekend, on Saturday 9 August, (which it did, having a record number of skiers according to Mr Greer, which is not denied by the respondent).

[20] By the evening of Thursday 7 August Mr Greer had still not heard from Ms Berry and so telephoned her. He says that, because at that point he did not trust Ms Berry, and he wanted to be able to confirm her earlier statement about the potential withdrawal of the job offer, he decided to make an audio recording to document the conversation.

[21] The recording was made without Ms Berry's knowledge or consent but Mr Greer lodged a copy of the recording, together with a verbatim transcript, for the Authority to consider. As the content of the telephone conversation is the subject of disagreement between Ms Berry and Mr Greer, I admit the audio recording in reliance on s.160(2) of the Employment Relations Act 2000 (the Act) which provides that the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[22] It is clear from listening to the audio recording that Ms Berry was taken by surprise by Mr Greer's telephone call, although she answered *yeah* to Mr Greer's statement near the beginning of the conversation:

*Okay, so basically on Sunday you suggested that you might be wanting to cancel my employment contract.*

[23] Ms Berry then stated that she did not need Mr Greer because the ski field was not busy enough at that stage. She said that she did not say that she was cancelling his contract, but that the situation was not working out with him staying there if he did not want to volunteer the work that she needed from him.

[24] It is also reasonably clear from the audio recording that Ms Berry was put on the defensive by Mr Greer asking her questions about whether or not it was

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<sup>1</sup> This has since been confirmed by the respondent.

<sup>2</sup> The respondent says that the Department of Conservation records show that explosives were used on 12 August for avalanche control.

reasonable to leave him waiting to hear from her about when he would be needed. Not unreasonably, Mr Greer was asking Ms Berry whether he would be called to work at Temple Basin that season or not. At one point Ms Berry stated:

*yeah, yeah, look if I wanted you to head off and do your own thing, um, I can't probably just break your contract like that. I'd actually have to just give you probably ... I don't know whether I have to give you seven days' notice or not, so um I'll look into it and I'll get back to you and we'll go from there, if that's what you want to know.*

[25] Mr Greer heard nothing more from Ms Berry, although he did email her on 8 August, and stated that Ms Berry had breached the terms of the employment agreement by not communicating with him about the commencement of the winter season at Temple Basin. Ms Berry did not reply to that email.

[26] During her evidence to the Authority, Ms Berry mentioned that she had laid a complaint with the police at Arthur's Pass Village about Mr Greer. This appeared to be relevant to the conduct that Ms Berry had accused Mr Greer of exhibiting towards her, and so the Authority sought information from the Arthur's Pass Police Station about Ms Berry's complaint. A response from the police was received several weeks later, which disclosed that, by the time the senior constable had spoken to Ms Berry, she told him that Mr Greer had left the ski field and was no longer of concern. The senior constable confirmed to the Authority that no criminal offending had been brought to his attention and that no police file had been generated.

[27] On 9 August 2014 Mr Greer emailed Martin Toon, a committee member of the respondent with the responsibility of management supervisor. In his email Mr Greer set out succinctly the situation as he saw it, which essentially was that he had been left in limbo about whether he was to be employed for the winter season at Temple Basin or not and that it appeared that Ms Berry was either intending to terminate his contract of employment or had already done so. In this email Mr Greer stated, inter alia:

*I take these actions to be a breach of my employment agreement, and an unjustified withdrawal of the position offered. I would expect the Employment Relations Authority to agree with this assessment.*

*My only course of action now, it seems (as Charlotte has still not got back to me, as she said she would) to take up an action through the relevant legal channels.*

*Your manager has displayed a high level of incompetence, a terrible attitude towards employment relations, and an unfair cruelty in her treatment to me.*

*I want to let you know all this in case Charlotte has not already contacted you. I feel sad that an incompetent and unreasonable person like Charlotte is managing Temple Basin, and that you have lost a skilled, clever and experienced (not to mention nice) person like me.*

*Sincerely,  
Manu Greer*

[28] After Mr Greer had sent another email to Mr Toon on 11 August chasing a response, Mr Toon responded substantially, later on that date, in which he stated the following:

*Hi Manu,*

*Thank you for your email.*

*I will be dealing with this issue from now on so please direct any further contact to me.*

*Firstly you are not terminated. You remain an employee of Temple Basin. No one has fired you.*

*I am going to investigate this situation and will make any ultimate decisions about it.*

*The first thing I need to do is to deal with your current situation.*

*It is unrealistic for you to be on the hill at the moment. As you know, the environment is close quarters in regard to working, accommodation, dining, etc. Also it is a fairly dangerous area at times with serious weather patterns and all the alpine risks that go with that – it requires a functional and operating chain of command and given the way things are, it would be risky to have you both working on the hill together.*

*Therefore I wish to discuss whether you are on paid leave at present (“garden leave”). I proposed that you are paid from Saturday morning onwards and each day from then on that the mountain is open. Given the employment/paid hours are casual and depends on the mountain being open, I think the fairest situation is for you to be paid for the same hours that the current on-mountain patroller Marcus is being and has been paid. Therefore can you firstly let me know your thoughts about being on garden leave, however, the final decision will be mine to make.*

*Once I have sorted out your current status, I then intend to immediately investigate the situation that has occurred on the hill. I will firstly obtain a statement/report from Charlotte and any other relevant staff about what has happened on the hill. At present I know*

*very little but understand there was some sort of falling out. I will then provide a copy of the statement to you and invite your response. Once I have your response I will then consider what issues are raised on the information available to me and go from there.*

*Please reply to this email or give me a call to discuss the first issue about being on leave.*

[29] Mr Greer responded the same day stating that he believed that the contract had now been breached. He then stated:

*I agree that it would not be feasible for me to return to the hill now, as Charlotte and I are unlikely to be comfortable working together.*

*Taken together, I think that all of this amounts to an effective termination. Even were the contract still able to be considered functional, I would still have grounds for a serious grievance.*

*At this point the contract seems to have been invalidated, insofar as very basic terms and conditions have not been met. Also, the employment relationship is now untenable due to the serious breaches of trust and goodwill.*

[30] Mr Greer declined the leave arrangement offered by Mr Toon until he had taken further advice as he did not believe he was functionally an employee.

[31] Mr Toon responded shortly afterwards saying that he did not accept that Mr Greer's employment had been terminated by Temple Basin.

[32] Mr Greer responded by email saying:

*Martin, I do not think there is any possible, practical way I could now be an employee this season.*

[33] It is clear from the tenor of Mr Greer's email that, at that point, he considered himself to no longer be bound by his employment agreement. However, the following day, on 12 August, Mr Toon sent an email to Mr Greer in the following terms:

*Dear Manu,*

*As matters stand we still consider you an employee. If the lack of work had come out of the blue then your views would be fair enough, but you are well aware of why you weren't contacted. You have not been fired and nor have you resigned. We consider you an employee on leave and have offered to pay you, and as an employer we are obligated to work through this process and will be doing so.*

*Attached is a report from Charlotte. On the face of it, it raises some real concerns that I want to address. I appreciate that in my earlier email I said I would report back to you for your response and then go on from there, however, given the contents of her report I have been left with some serious concerns that I now want to address. Therefore it would not be fair to ask you to respond without appropriately warning you and I am therefore now approaching this as a disciplinary enquiry and considering whether your actions on the mountain damaged the relationship beyond repair.*

*It is now formally alleged by Temple Basin that you:*

- 1. Were begrudging when asked to assist with some volunteer work. This, if proven, is a concern given the "all in" style of employment at a club field. There can be no airs or graces.*
- 2. Questioned Charlottes desires to have a wider path for safety reasons. If proven this is a concern that you may have been indifferent to safety considerations. That pathway is a precarious spot and at times has inexperienced alpine customers going in both directions on it, with arms full of ski gear. The ski field has health and safety considerations and it is a concern to heard that this may have been your attitude to them.*
- 4. Did little work on the path and then left. Again if proven this would be a concern in terms of the above.*
- 5. In the lodge you then questioned Charlottes ability to manage the ski field, her mountain experience and decision making. If proven this would be a serious concern as it would show a complete incompatibility for the upcoming season, considering the working environment.*
- 6. That after you had left the mountain, you made threatening and abusive calls to Charlotte. Again, if proven, this would cause major issues in keeping you on.*

*Overall the allegations, if proven, may amount to a complete loss of trust and confidence in you as an employee. You need to be aware that if found proven these allegations could result in termination of your employment.*

*I appreciate there are two sides to every story. The above are the issues that are raised on a preliminary basis after seeing one side of the story. To help me reach a decision I now wish to give you an opportunity to respond to the allegations above. I am happy to meet with you in person to hear those, or you may find it more practical to respond in writing/email to the issues above and in the attached report.*

*If you wish to respond in writing, please do so as soon as possible but in any event I would like to hear from you by the end of tomorrow, 13 August. If you would prefer to meet I would like to arrange a meeting this week.*

*I am also obligated to remind you that you are entitled to seek advice or representation.*

*Once I have your response I will then come to a decision and advise you of it. If you do not wish to respond I will make my decision on a consideration of the information available to me.*

*I look forward to hearing from you.*

*Regards.*

[34] Attached to Mr Toon's email was the report written by Ms Berry. It is not necessary to replicate the whole of this written report but I replicate the following as it is particularly contentious between the parties:

*He [Mr Greer] also mentioned that he didn't think I knew what I was doing when it came to making decisions to do with the mountain or ski field.*

*I then said "As the situation stands with you staying at the lodge for free and not agreeing to help me as I think it reasonable I think you should leave the accommodation". Manu asked me if I had fired him and I said "no as I am talking about the situation as it stands at this very moment that you cannot stay at the lodge at this time."*

*He started to abuse me and my fit as a manager, I walked away, he followed me and I told him to pack his things and get out of the building as soon as possible. I did not see him for the rest of the day until we goods lifted his gear down for him in the afternoon.*

*Since then I have had an abusive phone call from him and two emails. The phone call consisted of a personal attack on both my personality, mountain experience or lack of in his eyes and that I was an unfit person for the position with mental issues and a complex.*

[35] Mr Greer responded to Mr Toon's email on the same day stating that he totally refuted Ms Berry's statements and that many of them were completely false. He said in the email that he had email records and an audio recording of the phone call he took which, he said, proved that Ms Berry had lied to try and protect herself. He finished his email by stating that he intended to pursue the matter to the full extent available and that it would probably prove to be very expensive for the respondent.

[36] Mr Toon responded the same day with a lengthy email which addressed the different allegations contained in his earlier email. Relevant parts of the email are as follows:

*... Therefore in terms of the first allegation [that Mr Greer was begrudging when asked to assist with some volunteer work and that*

he questioned Ms Berry's desires to have a wider path for safety reasons] *I find that your actions seriously undermined the employment relationship as they showed an indifference to health and safety, an insubordinate attitude and an incompatibility with the close knit mountain working environment.*

...  
*I find therefore that you did respond to Charlotte's approach in the lodge in a way that questioned her decision to create the wider path and that this then led to you asserting that she was not suitable for the management role. I think that you were probably overtaken by your own sense of importance as a senior patroller and were not happy being directed about things that you thought were more your area.*

*My view is that your actions in the lodge further eroded the relationship required between you and Charlotte and the dynamic required to work together in the Temple environment.*

... [in respect of the allegation that after he had left the mountain he made threatening and abusive calls to Ms Berry]

*Your response is that you have taped these calls and that they weren't threatening or abusive. You have not provided them and I do not need to hear them. I am not particularly concerned as to whether the discussions were heated, abusive, threatening or simply tense. Given all that I have already found, I am putting little weight on what was said or not said in terms of actual words. However, what seems obvious to me is that whatever the nature of the call, it doesn't alleviate any of the concerns about the erosion of the relationship and it certainly wasn't conciliatory. Moreover, that you taped a call with your manager, without telling them, is a real concern and leads me to conclude that there are serious trust issues with you.*

### **Conclusion**

*Overall I find that Temple Basin can no longer have any trust or confidence in you. Your actions, although not strictly employed, occurred in an identical environment – both physically and in the fact that you were supposed to undertake some volunteer work in return for the accommodation and meals. The way you acted in that context therefore cannot have provided a better indication of your suitability for employment and they cannot be ignored or written off as not counting.*

*I have found*

- *that you have an indifferent attitude to safety concerns;*
- *that you were insubordinate to your manager;*
- *that you displayed a poor and incompatible attitude to the working style and culture of a small club field; and*
- *that you have subsequently been combative to such a degree that there can no longer be any trust or confidence in you as an employee, for the role you were employed in, in the environment that goes with it.*

*Therefore I have concluded that I must now terminate the relationship as of today's date. You will be paid from Saturday to today inclusive on the terms previously mentioned, with 8% holiday pay accrued.*

[37] Despite the final sentence of Mr Toon's email, it was Mr Greer's evidence, which is not contested by the respondent, that he was not paid anything by the respondent.

[38] Mr Greer raised a personal grievance by way of an email to Mr Toon on Tuesday 12 August, which appears to have preceded the email terminating his employment, in which Mr Greer complained that he had not been given work for the season when he should have reasonably been able to have expected that he would be needed to work, and that there was no formal communication with him about the opening of the ski field, or about any changes to the expected hours of work and roster.

[39] In this email Mr Greer also said that he felt that the relationship between him and Ms Berry was beyond salvage and that they would not be able to work together effectively or safely. He stated that he felt that there was effectively no functional employment agreement and that it seemed like a very remote possibility that he would go to work up on the mountain that season. Mr Greer sought various remedies in his email.

[40] Mr Greer raised a second personal grievance by way of email in respect of his dismissal on 12 August 2014.

### **The issues**

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

- (a) whether Ms Berry's actions amounted to an unjustified disadvantage in Mr Greer's employment;
- (b) how the employment relationship terminated;
- (c) whether the termination amounted to a dismissal, and if so, whether that dismissal was unjustified; and
- (d) if Mr Greer was unjustifiably dismissed, what remedies he is entitled to.

**Did Ms Berry's actions amount to an unjustified disadvantage in Mr Greer's employment?**

[42] Sub-sections 103(1)(a) and (b) of the Act provide:

***103 Personal grievance***

*(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—*

*(a) that the employee has been unjustifiably dismissed; or*

*(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[43] Section 103A of the Act 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.*

[44] It is also germane to refer to the duty of good faith set out in s.4 of the Act, which provides 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.*

[45] My factual findings which are relevant to this question, are as follows:

- a. Mr Greer became an employee of the respondent on or around 18 May 2014;
- b. There was an oral agreement between Mr Greer and Ms Berry that he would come up the mountain on 1 August 2014 to be ready to help open the ski field if there was sufficient snow. It may be that Mr Greer also mentioned *getting his head in snow*, as Ms Berry put it, so he could advance his Avi2 course, but I do not believe that that was his dominant purpose for ascending the mountain that day;
- c. Mr Greer was not being paid during that waiting period;
- d. Mr Greer would only start to receive pay once the ski field became operational;

- e. Mr Greer had a reasonable expectation based on an express agreement with the respondent via Ms Berry on or around 18 May 2014 that he would be contacted and could commence paid work once the ski field was about to become operational;
- f. Ms Berry decided not to contact Mr Greer even when the ski field was about to become operational because she did not want to work with him anymore after they had had a difference of opinion about the digging of the track.

[46] I am satisfied that Ms Berry's decision to not contact Mr Greer once she knew that the ski field was going to open, which she did by 8 August 2014 at the latest, comprised a disadvantage in Mr Greer employment. He was not only expecting to commence paid work with the respondent but had travelled from Wanaka to Arthur's Pass, and was paying for accommodation in Arthur's Pass, solely in order to be ready when called.

[47] As to whether the disadvantage was unjustified, it is necessary to consider whether Ms Berry's actions on behalf of the respondent were those of a fair and reasonable employer in all the circumstances at the time.

[48] First, I am satisfied that Ms Berry was justified in wanting to dig the track in the way she indicated to Mr Greer. Although she may not have explained this to Mr Greer at the time, the Authority heard evidence that snow that becomes compacted through being trodden on, and which then freezes, is harder to dig out later on. Therefore, Ms Berry's desire to dig the track to the ground was not irrational.

[49] Second, although Mr Greer was not being paid, and so could have refused to have dug the track at all, he did agree to do so, and walked to the start of the track and started digging. Having so agreed, Ms Berry was not unreasonable in expecting him to do the digging the way she required. She was also not unreasonable in sending him away back down to the lodge when it became clear that he was not going to do so.

[50] Third, I agree with Mr Mackenzie's submission that Ms Berry was also justified in becoming concerned at the way that Mr Greer had argued with her. Whilst I prefer his evidence as to what he said to Ms Berry, and how he said it, both on the track and later in the lodge, Ms Berry was about to become Mr Greer's manager, and they were to work in a small team in a safety critical environment. Mr Greer may

have not agreed with Ms Berry's assessment as to how the track was to be dug, but affecting a non comprising stance over the matter understandably gave Ms Berry concerns about how they would be able to work together later once paid employment started. It would not be reasonable to have expected her to have simply compartmentalised Mr Greer's refusal prior to him starting paid work from how he would be likely to conduct himself once he did.

[51] What I find to have been unreasonable, however, was Ms Berry's unilateral decision not to utilise Mr Greer once the ski field opened. Mr Greer had entered into an employment relationship with the respondent by this time (as is acknowledged by Mr Mackenzie in his submissions) and, just as Mr Greer owed duties to the respondent under the Act, it owed him duties under the Act in return. Ms Berry's unilateral decision was a breach of the respondent's statutory duties in several ways:

- a. The duty at s.4(1A)(b) of the Act to be active and constructive in establishing and maintaining a productive employment relationship;
- b. The duty at s.103A(3)(a) to sufficiently investigate Ms Berry's concerns about her ability to work with Mr Greer;
- c. The duty at s.103A(3)(b) to raise Ms Berry's concerns with Mr Greer about her ability to work with him before deciding not to contact him;
- d. The duty at s.103A(3)(c) to give Mr Greer a reasonable opportunity to respond to Ms Berry's concerns about her ability to work with Mr Greer; and
- e. The duty at s.103A(3)(d) to genuinely consider Mr Greer's responses to Ms Berry's concerns.

[52] Although the ski club is a small employer with limited resources, Ms Berry could easily have told Mr Greer expressly that she had concerns about her ability to work with him following their disagreement and given him a chance to respond. She could have asked Mr Toon to assist if necessary.

[53] In other words, Ms Berry's actions towards Mr Greer in not contacting him when she knew the ski field was about to open, so he could commence his paid work,

was not the action of a fair and reasonable employer in all the circumstances. Therefore, the disadvantage suffered by Mr Greer in his employment was unjustified.

### **How the employment relationship came to an end**

[54] This is a live issue because of the stance taken by Mr Greer as early as 8 August that his employment agreement had been breached by the respondent. Mr Greer made this assertion many times and stated more than once that he felt that there was no feasible way that he could work with Ms Berry again.

[55] Analysing this situation in terms of basic contract law, it would appear that Mr Greer regarded the respondent as having breached his employment agreement in a fundamental way which, if he has chosen to do so, would have entitled him to have, in legal terms, accepted the breach (as opposed to affirming it) and then resigned and claimed unjustified constructive dismissal. By accepting the breach, I refer to the legal concept of the victim of the breach choosing to treat the contract as having been fundamentally repudiated by the actions or omissions of the other party and then seeking compensation for any losses that flow from that breach.

[56] However, Mr Greer never took the final step of actually accepting the alleged breach and then resigning. He continued to communicate with Mr Toon and, significantly, did not object to Mr Toon initiating an investigation into the matter in a disciplinary sense. Indeed, Mr Greer actually responded to the report written by Ms Berry, which he would not have been obliged to do had he viewed his employment as at an end.

[57] Therefore, I conclude that Mr Greer's employment did not end by way of a fundamental breach of contract by the respondent which the applicant accepted, but that it ended on 12 August 2014 by way of the email of dismissal from Mr Toon.

### **Was the dismissal by the respondent unjustified?**

[58] This question also needs to be considered against the context of ss.4(1A) and 103A of the Act.

[59] Whilst I am satisfied that it was reasonable, under these particular circumstances, for Mr Toon to have investigated the matter and communicated with Mr Greer by email, as this appears to have been Mr Greer's preference, I am not

satisfied that all of the essential elements of the test of justification set out at s.103A(3) were complied with by the respondent.

[60] I accept that the respondent is a small club with very limited resources. However, notwithstanding this, I do not accept that it was fair and reasonable for Mr Toon to have failed to have considered the audio recording made by Mr Greer to which he alluded in his response to Ms Berry's written report.

[61] In her report, Ms Berry stated that the phone call she received from Mr Greer was *abusive and consisted of a personal attack on both my personality, mountain experience or lack of in his eyes and that I was a unfit person for the position with mental issues and a complex.*

[62] Mr Greer stated expressly that he believed that several statements by Ms Berry were fabrications, which could be proven by the audio recording. Whilst Mr Greer did not send Mr Toon the audio recording, no fair and reasonable employer could have failed to have been alerted to the possibility that there were inaccuracies, or even deliberate fabrications contained in Ms Berry's report by Mr Greer's assertions and reference to an audio recording.

[63] In other words, Mr Greer's assertions about fabrications needed to have been investigated pursuant to s.103A(3)(a) and (d) of the Act, and by not doing so Mr Toon deprived himself of the opportunity to satisfy himself genuinely that all aspects of Ms Berry's report were true and accurate. Whilst Mr Toon stated that he did not believe that he needed to hear the audio recordings (he seemed to believe that there were more than one), if he had done so he would have found that Ms Berry's statement about the contents of Mr Greer's call to her was not true.

[64] Mr Toon relied heavily on Ms Berry's report in reaching the conclusion that Mr Greer had an indifferent attitude to safety concerns, that he was insubordinate to his manager, that he displayed a poor and incompatible attitude to the working style and culture of the club and that he had subsequently been combative to such a degree that there could no longer be any trust and confidence in him as an employee.

[65] If Mr Toon had listened to the audio recording and come to his own conclusion as to whether Ms Berry was telling the truth about the call, it could well have led him to question the credibility of the rest of Ms Berry's statement. That, in

turn, should have led him to have requested a far fuller account of matters from Ms Berry and Mr Greer.

[66] Therefore, although the resources of the respondent are minimal, I do not consider that Mr Toon, acting on behalf of the respondent, sufficiently investigated the allegations against Mr Greer before dismissing him, nor genuinely considered Mr Greer's explanation in relation to the allegations.

[67] All in all, I am satisfied that the defects in the process followed by the respondent were not minor and that they did result in Mr Greer being treated unfairly. Accordingly, I find that the respondent's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[68] Having established that Mr Greer was unjustifiably dismissed, it is now necessary to consider what remedies he may be entitled to.

### **What remedies are Mr Greer entitled to?**

[69] Section 123 of the Act provides:

#### ***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:*

[70] 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.*

[71] Mr Greer asserts that, had he not been unjustifiably dismissed, he would have been paid the gross sum of \$124 per day for 55 days for the whole of the 2014 ski season at Temple Basin. This amounts to the gross sum of \$6,820 which, together with 8% holiday pay totals the gross sum of \$7,365.60.

[72] Mr Greer also estimates that, had he not been dismissed, he would have been provided with food and accommodation to the value of \$40 per day. Over 55 days, this would have amounted to \$2,200. He states that, as he was dismissed, he had to meet the costs of his food and accommodation himself for the rest of the winter.

[73] Mr Greer also argues that he should be reimbursed for the cost of purchases that were essential to his job. This amounted to heavy work pants and an avalanche rescue kit.

[74] In addition, Mr Greer states that he had to renew his approved handler trainer and controlled substance licence qualifications in respect of the avalanche clearance work that he would had to have carried out.

[75] In addition, Mr Greer claims relocation costs, which consisted of a car journey from Golden Bay, where he was living before the winter, to Arthurs Pass; a journey from Arthurs Pass to Wanaka for the snow safety course and then a return journey to Arthurs Pass, after speaking with Ms Berry, to be ready to work. He claims that this is a total distance of 910 kilometres which, at the Inland Revenue Department's then rate of .77c per km, amounts to \$708.40.

[76] Mr Greer also claims compensation under s.123(1)(c)(i) of the Act.

***Would Mr Greer have been employed for 55 days?***

[77] The respondent disputes that Mr Greer would have been employed for the full 55 days as the season was very lean in 2014 for Temple Basin and they managed to operate with just two paid outside staff (a snow safety manager and a junior patroller), together with Club volunteers. Ms Berry suggested that, if Mr Greer had continued to work, he probably would only have worked for around half of the time that the ski season was open, sharing the work equally with the junior patroller. She suggested that, when the paid staff members were not working, they could have been skiing but would not have been paid. They would still have received accommodation and food.

[78] In response, Mr Greer asserts that it was the custom and practice of the respondent to always pay for six days on, one day off throughout the ski season. This was confirmed by Mr Windle and was not contested by Mr Toon in his evidence.

[79] It is my finding that Mr Greer had a contractual right to be paid on a daily basis whenever he worked while the ski field was operational. I further find that, had he not been dismissed, he would have worked, and been paid for a total of 55 days in 2014.

[80] However, there is one other issue that the Authority must take into account, and that is the likelihood that Mr Greer would not have been able to have worked at all during the 2014 ski season because of his falling out with Ms Berry. If I find that Ms Berry and Mr Greer had fallen out irreconcilably by the end of Sunday 3 August 2014, when they had their discussion in the lodge about the digging of the track but before the ski season – and paid work - started, then this would not have been due to any blameworthy actions by Ms Berry at that point, and so it would be arguable that the employment would have terminated due to irreconcilable differences for which the respondent could not be held responsible and from which no loss flows.

[81] However, I am unable to make this finding because of the failure of Ms Berry to have given Mr Greer a chance to show that he could work with her under her direction. If Ms Berry had followed a fair process, there is no reason, on a balance of probabilities, not to believe that each would have been able to have put their differences behind them and to have worked safely and productively together. Mr Greer should not be penalised by the failure of the respondent to have given him that opportunity.

[82] I find that Mr Greer should have been paid from 5 August 2014, when avalanche control work first started. He was dismissed on 12 August, and he should have been paid for seven of those eight days. Had he not been unjustifiably dismissed, he would have continued to have worked, and I find that he would have been paid for the entirety of the remainder of the season, amounting to another 48 days.

[83] In terms of mitigation of loss, I accept Mr Greer's evidence that it was too late in the season for him to have found alternative employment in other ski fields, and that he had committed himself to avalanche training, at a substantial cost, so he was not able to take up other temporary work as he needed to have access to snow, or waste the training fee.

[84] In conclusion, I find that Mr Greer is likely to have lost wages for a total of 55 days which, at \$124 a day, equates to a total loss of \$6,820 gross. In addition, he is entitled to unpaid holiday pay in the gross sum of \$545.60.

[85] Mr Greer would also have been up the mountain receiving free accommodation and food for 55 days. I believe that the estimate of \$40 a day is eminently reasonable, and so I award a further gross sum of \$2,200 in respect of the loss of this benefit.

[86] I decline to award Mr Greer any sum in respect of the purchase of his work pants, and avalanche gear as he has retained these items and could easily use or sell them.

[87] I also decline to award any sum in respect of his CSL Licence application and approved handler revalidation, as these qualifications are valid for five years and can clearly be used by Mr Greer in the future.

[88] In respect to Mr Greer's travel expenses, I accept that he only incurred these travel expenses as a result of him making himself available to work for the respondent. I therefore award Mr Greer the gross sum of \$708.40 in respect of those travel expenses.

*Compensation for humiliation, loss of dignity and injury to the feelings*

[89] Having found that there were unjustifiable actions by the employer, I must consider whether they gave rise to humiliation, loss of dignity and injury to the feelings of Mr Greer pursuant to s.123(1)(c)(i) of the Act.

[90] There are two aspects that I must consider; the unjustified disadvantage caused by Ms Berry not contacting Mr Greer, and the unjustified dismissal.

*Unjustified disadvantage*

[91] Mr Greer's telephone call with and email to Ms Berry and his emails to Mr Toon show some of the effects on him of not having been contacted about when he should start work. He referred to being subject to unfair cruelty, and being treated in a mean spirited and literally inhumane way. He also referred in his first personal grievance to having been caused hurt and humiliation.

[92] I am satisfied that Mr Greer suffered humiliation, loss of dignity and injury to his feelings during the time when he was waiting to be called by Ms Berry, knowing that others had been called to work by her. I assess that an appropriate award would be \$3,000.

*Unjustified dismissal*

[93] I am also satisfied that Mr Greer suffered humiliation, loss of dignity and injury to his feelings by his dismissal, especially knowing that Ms Berry had made untrue statements in her report to Mr Toon, but not having been given the opportunity to prove as such to him. In particular, Mr Greer makes reference to Ms Berry lying about the ways that he spoke and behaved towards her in his first personal grievance email to Mr Toon.

[94] Mr Greer also gave evidence in his written brief of the aftermath of the events which, he said, significantly affected his emotional wellbeing and caused him months of ongoing stress, which was not contested by the respondent. I believe that it would be appropriate to fix compensation under s123(1)(c)(i) for the unjustified dismissal at \$8,000.

### *Contribution*

[95] 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).

[96] There are two incidents in which I consider Mr Greer contributed in a blameworthy way to the situations giving rise to his personal grievances. The first relates to his conversations with Ms Berry on 3 August, about digging the track. Although I do not believe that he was abusive to her, I do believe that he was uncompromising, and that he did not acknowledge that Ms Berry had a right to determine how the track should be dug, given that she was the mountain manager. This manner clearly upset Ms Berry, and led to her deciding she could not work with him.

[97] Whilst Ms Berry should have given him a chance to rectify the situation, he did partially create it, and I consider that it is appropriate to reduce his award under s.123(1)(c)(i) in respect of his unjustified disadvantage personal grievance by 50%.

[98] The second situation is Mr Greer's references in his emails to Mr Toon as being an incompetent and unreasonable person, before Mr Toon considered whether Mr Greer should be dismissed. This is likely to have resulted in Mr Toon's conclusion that Mr Greer had been *combative to such a degree that there can no longer be any trust or confidence in you as an employee, for the role you were employed in, and the environment that goes with it.*

[99] Mr Greer was obviously upset at that point, and believed that there was no future in his relationship with Ms Berry and the respondent. Nonetheless, it was a statement which clearly formed part of the factors that led to a decision to dismiss Mr Greer. I believe, therefore, that it is appropriate to reduce Mr Greer's awards under s.123(1)(b) and s.123(1)(c)(i) of the Act, by 25%.

### **Orders**

[100] I order the respondent to make the following payments to Mr Greer:

- a. Lost wages in the gross sum of \$5,115;
- b. Holiday pay in the gross sum of \$545.60;
- c. The value of lost benefits to the value of \$2,200;
- d. Travel expenses in the sum of \$708.40;
- e. Compensation for unjustified disadvantage in the sum of \$1,500; and
- f. Compensation for unjustified dismissal in the sum of \$6,000.

**Costs**

[101] Mr Greer was unrepresented throughout the Authority's proceedings, and so is unlikely to have incurred any legal costs. If this is incorrect, and if he wishes to seek a contribution towards those legal costs from the respondent, he must advise the Authority and the respondent in writing within 14 days of the date of this determination, setting out the nature of the legal costs he has incurred, the amount, and what contribution he is seeking from the respondent. The respondent would then have a further 14 days within which to lodge and serve a reply.

[102] Mr Greer did incur the Authority's lodgement fee of \$71.56, and I order that the respondent reimburses this sum to Mr Greer.

**David Appleton**  
**Member of the Employment Relations Authority**