

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 346
3030670

BETWEEN	BARBARA HENDERSON First Applicant
	ALAN THORN Second Applicant
	SUSAN STOWELL Third Applicant
AND	EUROFINS BAY OF PLENTY LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Kerry Single for Applicants Mark Beech for Respondent
Investigation Meeting:	29 August 2018
Submissions received:	29 and 31 August 2018 from Applicants 29 August and 4 September 2018 from Respondent
Determination:	9 November 2018

DETERMINATION OF THE AUTHORITY

- A. Ms Henderson, Mr Thorn and Ms Stowell were unjustifiably dismissed.**
- B. Eurofins Bay of Plenty Limited is ordered to pay Ms Henderson the following sums within 28 days of the date of this determination:**

a) **\$4,265.85 gross being reimbursement of lost wages under section 123(1)(b) of the Employment Relations Act; and**

b) **\$10,000 compensation under section 123(1)(c)(i) of the Employment Relations Act.**

C. Eurofins Bay of Plenty Limited is ordered to pay Mr Thorn the following sums within 28 days of the date of this determination:

c) **\$2,126.82 gross being reimbursement of lost wages under section 123(1)(b) of the Employment Relations Act; and**

d) **\$5,000 compensation under section 123(1)(c)(i) of the Employment Relations Act.**

D. Eurofins Bay of Plenty Limited is ordered to pay Ms Stowell the following sums within 28 days of the date of this determination:

e) **\$4,791.90 gross being reimbursement of lost wages under section 123(1)(b) of the Employment Relations Act; and**

f) **\$5,000 compensation under section 123(1)(c)(i) of the Employment Relations Act.**

Employment relationship problem

[1] Eurofins Bay of Plenty Limited operates a laboratory and sampling company. The company is contracted by Zespri International to process orchard maturity clearance samples of kiwifruit. This enables Zespri and pack houses to determine when fruit has reached the correct maturity for picking during the kiwifruit season from March to early June.

[2] Zespri notifies Eurofins by about 7.30 pm the night before the samples are to be collected of the number of samples required. The number of samples required each day can vary greatly due to factors such as weather, shipping schedules, seasonal peaks, and pack house requirements.

[3] Prior to and during the kiwifruit season Eurofins engages a pool of employees to conduct the sampling. Each of the three applicants was engaged during the 2018 season. Each had signed a written employment agreement setting out the terms of employment.

[4] In early April 2018 each of the applicants were advised by text and/or telephone that they were not going to be offered further work and that they should return their equipment to the office.

[5] The applicants claim that the action of not providing any further work during the season constituted a dismissal which they claim was unjustified because they were engaged to work to the end of the 2018 season. In their statement of problem the applicants also claimed disadvantage grievances and that Eurofins had breached their employment agreements. Both of the latter claims were withdrawn at the investigation meeting.

Issues

[6] In order to resolve the employment relationship problems between the applicants and Eurofins I must determine:

- a) Whether the employment relationship was casual or whether the applicants held a reasonable belief based on reasonable grounds that they were employed to work on an ongoing basis throughout the season; and
- b) If there was an expectation of ongoing employment to the end of the season whether any one of the applicants was unjustifiably dismissed and if so what if any remedies should be awarded.

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

Casual employment

[8] There is no dispute that each of the applicants was informed in early April 2018 that they would not be offered any further work for the remainder of the season.

Eurofins says each of the applicants was engaged as a casual employee and it had no obligation to continue offering them work.

[9] There is no definition in the Act of a “casual” employee. Cases on casual employment turn on their facts although the Court has identified some principles that may be applied:¹

- a) The substance of the employment relationship should prevail over the form of any agreement;
- b) The distinction between casual and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work;
- c) If those obligations only exist during periods of work, the employment will be regarded as casual;
- d) If there are mutual obligations that continue between periods of work, there will be an ongoing employment relationship;
- e) Regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment;
- f) Where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[10] Eurofins says the applicants were employed on a day to day basis. The applicants each assert that their employment was not just one day at a time but there was a reasonable expectation that they would be engaged for the whole of the kiwifruit season.

¹ *Bay of Plenty District Health Board v Rahiri* [2016] NZEmpC 67 at [46]; *Jinkinson v Oceana Gold* [2009] ERNZ 225.

Relevant terms of the employment agreement

[11] The individual employment agreements signed by each of the three applicants were of an identical form. The relevant terms from the employment agreements include:

2 CASUAL EMPLOYMENT

- (a) It is acknowledged that the employer's need for the type of work to be carried out by the employee can vary from day to day due to the nature of the work involved and operational requirements of the employer.
- (b) On this basis it is agreed that the employment shall be on a casual day to day basis under which the term of the employment shall be for a fixed term of one day.
- (c) If at the completion of each day's work the parties have agreed that the employee should be employed for a further day's work then that will constitute a separate contract of employment on the same terms as set out in this agreement.

6 HOURS OF WORK

- (a) The employee agrees that the employer does not undertake to provide the employees with any set minimum number of hours, and does not undertake to pay the employee for any set minimum number of hours. Hours of work shall be on an "as required" basis.
- (b) Any hours of work shall be offered and arranged by the employer to suit the needs of the business. This may include weekend work. There are no regular or set hours of employment. The employer operates a draft work plan for casual and seasonal employees. However, any specific work is offered via the employer's automated phone message system and notice board, both of which are updated daily. The employee is able to accept any specific work offered by the employer by turning up to work at the date and time advised by the employer. The employee may decline any work offered.
- ...
- (e) The employee may advise the employer at any time that he or she is no longer available to be offered any casual work for that season or part of the season. The employer may advise the employee at any time that there is no longer the prospect of any casual work being offered for that season. In either case, the employee will then be removed from the list of casual employees for that season.

[12] An addendum was attached to the employment agreements providing for the payment for work carried out on public holidays, payment for annual holidays, payment of a bonus and reimbursing allowances for use of private vehicles.

[13] Clause 2(b) and Schedule A of the employment agreement states the relationship is on a casual day by day basis for a fixed term of one day. Fixed term employment agreements are covered under s 66 of the Act which requires the employment agreement to state in writing the way in which the employment will end

and the reasons for ending the employment in that way.² If these requirements are not met the employee may elect to treat the fixed term as ineffective.³

How the relationship worked in practice

[14] Schedule A states that if, at the completion of each day's work there is an agreement that the employee would be employed for a further day's work, then that will constitute a separate contract of employment. Clearly the parties intended that each new engagement would be agreed at the completion of a working day.

[15] That did not happen in practice. Zespri notified Eurofins about or after 7.30 pm each night of its requirements for the next day's sampling. Eurofins would then schedule the work. Once the work schedule was completed a text would be sent to each of the applicants requesting them to log into the Eurofins system to check their work requirements for the following day.

[16] If the employee was not available to work they were expected to text Eurofins by return. If the employee did not text back Eurofins proceeded on the basis that the employee had accepted the work. The evidence at the investigation meeting was that texts would regularly be received at or after 9 pm in the evening making it difficult for employees to refuse the work.

[17] The applicants do not deny that their work was notified on a day to day basis. What they told me was that they had a reasonable expectation that they would work for the entire season. Their view is supported by the promise set out in an addendum to the employment agreement that Eurofins would pay a bonus for sampling during the main season from March to the beginning of June each year as part of an incentive system to retain staff through the kiwifruit sampling season.

[18] The promise of a bonus was also reflected in the wording used by Eurofins in the advertisement it used when recruiting for the 2018 kiwifruit season. The advertisement confirms an extra payment will be paid at the end of the season based on a number of factors including the person being available for the duration of the season.

² Employment Relations Act 2000, s 66(4).

³ Ibid, s 66(6).

[19] It was common ground that the applicants were expected to identify one day during the week that they would not be available for work. This day was then taken into account when scheduling the work each evening.

[20] I have analysed the 2017 and 2018 time records provided by Eurofins for each of the applicants. Those records show:

- a) Although Ms Henderson accepts she was engaged to work during the peak season the records provided by Eurofins show Ms Henderson worked consistently and regularly for Eurofins throughout 2017 and up to April 2018. With the exception of three weeks in July, 2 weeks in August and two weeks in December 2017 Ms Henderson worked each week from 8 January 2017 until 12 April 2018. During the peak season of March to June in 2017 and from March to April 2018 Ms Henderson worked on average six days every week. The records also show Ms Henderson worked regularly every week from 7 January to 28 February 2018. Ms Henderson had identified Tuesday as her preferred day off and consistently with that the records show she did not work on a Tuesday during the season.
- b) Mr Thorn accepts he was engaged to work during the peak season and the records provided by Eurofins show that in the 2017 season Mr Thorn worked from 26 February until 18 June working an average of 5 – 6 days each week. For the 2018 season Mr Thorn worked from 25 February to 12 April working an average of six days each week. He worked four days in his final week from 8 April to 11 April inclusive.
- c) Ms Stowell's first season working as a sampler was 2018. Between 13 March and 11 April Ms Stowell worked every week on a total of 23 days out of a possible 30 days.

[21] The three applicants all had regular work during the season. Ms Henderson took only one day off each week, while Mr Thorn took one sometimes two days off. Ms Stowell confirmed that during the season she had indicated she was not available to work over the Easter period, but other than that worked regularly every week including one week where she worked seven days without a break.

Mutual obligations

[22] I find the parties had mutual obligations to each other which had to be satisfied. The applicants had an obligation to be available to work through the whole season. This was set out in the advertisement published on Eurofins website. Eurofins had an obligation to reward those who remained available to work for the season through the payment of a bonus. These obligations continued throughout the whole of the season and not just during periods of work.

[23] It was common ground that Eurofins had created an obligation that it would share the number of samples to be collected on days where there were low volumes. This was to encourage Samplers to remain available for the whole season.

Conclusion

[24] Standing back and considering substance over form I find on balance that all three employees were regularly employed during the season. The mutual obligations gave rise to a legitimate expectation based on reasonable grounds that their employment would continue from the beginning to the end of the season.

[25] The employees were engaged to work the 2018 season which was from March to early June. There was nothing intermittent about the work undertaken by the three applicants during the 2018 season leading up to the ending of the employment relationship. I find the applicants were not casual employees as they had an expectation of ongoing opportunities for work although the amount of work to be undertaken by each of the Applicant's was set each evening before work started the following day.

The Dismissals

[26] Mr Van Ryn, Managing Director, told me it was decided to reduce the pool of Samplers because the sample numbers were about 20% down. Ms Henderson, Mr Thorn and Ms Stowell were selected because of issues with the behaviour of all three of them.

[27] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Eurofins' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[28] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in any of the three applicants being treated unfairly.⁴ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

Lone worker system

[29] The operation of the lone worker system implemented by Eurofins in 2017 became central to the employment relationship problems I have investigated. I have set out information on the system and its operation by Eurofins because each of the applicants raised concerns about the operation of the system prior to being dismissed.

[30] Until 2016 the sampling operations were managed and organised by AgFirst Ltd. The business was sold to Eurofins during 2016. After the sale of the business Samplers who had previously been engaged by AgFirst Ltd continued to be offered seasonal work with Eurofins for the 2017 and 2018 seasons.

[31] Sampling is undertaken by Samplers using a quad bike and/or on foot. A “lone worker” system was implemented for use by all Samplers following the death of a quad sampler in 2017.

[32] The lone worker system consists of a Bridge unit which is hard-wired into a vehicle and a M900 device worn on the outside of a sampler’s clothing. If a sampler does not make any movements for more than five minutes or there is an accelerating fall, a wireless alert is sent from the M900 device to the Bridge unit in the vehicle. This then sends a cell or satellite alert to a portal at the Eurofins office. There is a red tab on the M900 device which when pulled will also send an alert. When the device worn by the worker is more than 2 km away from the bridge unit connectivity is lost and an alert is activated.

[33] The lone worker device tracks the location of a worker and sends a signal to the worker when they are out of range of the Bridge unit. While in range workers can be assured their movements are being tracked in case of an emergency event.

⁴ Employment Relations Act 2000 (the Act), s 103A(5).

[34] Mr Piers Zajac-Wiggett, Operations Manager, told me there was an issue with the alarm on the units. He said in a number of cases the alarms were activating sometimes continuously. Mr Zajac-Wiggett told me feedback received from the Samplers indicated that in some instances the alerts were activating within the 2 km range which was frustrating and distracting for the Samplers.

[35] Because of these issues Samplers were turning off their units and consequently they were unable to be located. Based on this feedback and after instigating additional safe work processes for lone workers Eurofins deactivated the alarm. Mr Zajac-Wiggett told me no motion, manual activation and fall detection alerts on the devices were switched off. He told me the devices were still in connection with the Bridge unit and in the event of an out of range alert Eurofins' was able to track the worker from its office.

[36] The additional safe work process required Samplers to log a trip report and to report in and out of each orchard and to close off the trip at the end of each day.

[37] Each of the three applicants discovered for themselves separately while out working remotely that the lone worker device was not activating. They each became concerned that disabling the devices meant that if anyone had an accident no notification would be made through the system to the office. Each of them raised their concerns separately with Eurofins.

[38] Mr Zajac-Wiggett told me in his written evidence that an email had been sent out to all Samplers in April advising them of the changes to the safe work systems. Each of the applicants disputed receiving an email and Eurofins has not been able to produce the email to the Authority.

Ms Henderson

[39] Ms Henderson has been employed by Eurofins since 2016. Prior to that she worked for AgFirst undertaking the same role as for Eurofins for about eight years. As set out above Ms Henderson worked consistently throughout 2017 and 2018 up to 12 April.

[40] Ms Henderson held growing concerns that she was being required to work unsafely. By way of example Ms Henderson told me she had completed a sample in

one orchard and as she was moving to start the next one the grower had started to spray the blocks. In accordance with the health and safety policy Ms Henderson stopped sampling. She then discussed the matter with the grower. Ms Henderson received a call from Eurofins and was asked to tell the grower to stop spraying and was instructed to complete the sampling. Alternatively she was to complete the sampling on rows that had not been sprayed. Ms Henderson refused to continue the sampling on that block.

[41] Later that evening Ms Henderson checked Eurofin's health and safety manual instructions which reinforced her view that if there was spraying they should not undertake sampling.

[42] In early April when Ms Henderson discovered her lone worker device was not working as it normally would she made enquiries and was told the units had been turned off.

[43] Ms Henderson received her final instructions on sampling on 12 April. When no further instructions were received Ms Henderson contacted Mr Zajac-Wiggett and asked him why she had not received any instructions. He told her there were very few samples needed and that Eurofins were only receiving requests for about 200 samples each day. At the investigation meeting Mr Zajac-Wiggett reiterated this as a reason for telling Ms Henderson she would not receive any further work. That evidence is not credible. The data provided by Eurofins shows Eurofins collected about seven percent more samples in April 2018 than it had for the same month in 2017.

[44] On 19 April Mr Zajac-Wiggett text then rang Ms Henderson and told her that Eurofins would not be using her for sampling in the future because issues had arisen in the office with the way Ms Henderson had addressed the office staff.

[45] Ms Henderson had never been made aware of or received any complaints about her work during the tenure of her employment. Because of her experience, first with Agfirst Ltd and then with Eurofins, she was relied on to deal with most situations and was familiar with most of the orchards in the Auckland, Coromandel, Waikato and Te Puke regions. She told me she was often the "go to" person to help out when and where needed.

[46] I have found earlier that Ms Henderson had a reasonable expectation that she would work through to the end of the season. The end of her employment before the end of the season constitutes a dismissal.

[47] On balance I find it is more likely than not that the predominant reason for ending Ms Henderson's employment was as explained to her during the telephone conversation on 19 April. That is, that there were issues about the way Ms Henderson had addressed staff.

[48] There is no evidence that Eurofins met any of the mandatory considerations set out in s 103A(3) of the Act. Eurofins had not raised its concerns about Ms Henderson's conduct prior to removing her from the pool of samples. There was no opportunity for Ms Henderson to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. These defects were not minor and resulted in Ms Henderson being treated unfairly.

[49] The actions of Eurofins and how it acted were not the actions an employer acting fairly and reasonably could take. Ms Henderson's dismissal was unjustified and she is entitled to remedies.

[50] Ms Henderson seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings. The lost wages has not been quantified by Ms Henderson. Instead I have taken her average weekly earnings for the time she worked (excluding overtime payments) from January to 12 April 2018 which amounts to \$677.12 gross.

[51] The sample numbers for April 2018 were higher than April 2017 when Ms Henderson worked regular hours. On that basis there was a reasonable expectation that Ms Henderson would continue to work regular hours for the remainder of April 2018. She is entitled to reimbursement for lost wages for the two weeks of April at her average weekly rate which amounts to \$1,354.24 gross.

[52] I have calculated the average number of samples collected for each of the months of March and April and the number of samples taken in May. The difference is a reduction of 14%. It was common ground that the season ended at the beginning of June. For the five weeks wages lost in May 2018 Ms Henderson is entitled to reimbursement of \$2,911.61 gross. I have used the averaging process to calculate the

lost wages on the basis that Eurofins had promised its seasonal employees it would distribute the work evenly among all Samplers where there was a reduction in the number of samples to be taken.

[53] Ms Henderson gave evidence of the impact of the dismissal on her. She told me she was hurt that she was not provided with an opportunity to defend herself against allegations that she had been rude to office staff and was embarrassed that after working in the industry for over 11 seasons she was abruptly dismissed.

[54] The evidence shows that Ms Henderson worked not just during the peak season but also throughout the year. In dismissing her Eurofins removed the possibility that she could obtain further income. This has also impacted on Ms Henderson.

[55] In all the circumstances of this case an appropriate award under s 123(1)(c)(i) is \$10,000.

[56] Eurofins Bay of Plenty Limited is ordered to pay to Ms Henderson the following sums within 28 days of the date of this determination:

- a) \$4,265.85 gross being reimbursement of lost wages under s 123(1)(b) of the Act; and
- b) \$10,000 compensation under s 123(1)(c)(i) of the Act.

Mr Thorn

[57] Mr Thorn is a retiree. He has retired from the horticulture industry after many years as a scientist and business manager. Mr Thorn had previously been employed during the kiwifruit season for AgFirst. While the management structures in place in 2017 remained largely intact, by 2018 Mr Thorn had noticed that many of the experienced managers had left and in his view the field operations were haphazard and poorly managed.

[58] Mr Thorn signed his employment agreement for the 2018 season on 22 February. He started his first sampling work on 13 March. He continued to receive regular daily assignments until 11 April.

[59] On 9 April Mr Thorn notified the office about concerns he had with the lone worker device he was using. He was told to bring the device into the office for testing. The unit was tested and Mr Thorn was told it passed the test. At that time Mr Thorn was also advised of the disabling of the out of range signal and that notification had been sent out via email. Mr Thorn could not recall receiving the email and on checking his inbox confirmed he had not received it.

[60] On 10 April Mr Thorn emailed the office about the deactivating of the lone worker device. He was invited to attend a meeting to discuss the content of his email. Mr Thorn rang the office to clarify that a meeting was not necessary as it was specific and required a management response. Mr Thorn was told off for not texting or phoning when out of range. Mr Thorn says this was the crux of the problem. He told me the lone worker device had been disabled and he was unaware he was out of range because the notification signal did not work.

[61] Mr Thorn received a further call from Mr Van Rhyn who requested a meeting. After completing his assigned samples Mr Thorn returned to the office and met with Mr Van Rhyn. At the start of the meeting Mr Van Rhyn put his phone on the table. Mr Thorn asked if he was recording the conversation, something Mr Van Rhyn denied.

[62] The two had a frank discussion about the lone worker devices. Mr Thorn was concerned that the workers were not aware when they were working out of range because the signal had been disabled. He was concerned about the safety of the workers in that situation.

[63] During the meeting Mr Thorn disclosed to Mr Van Rhyn that he had worked previously with Mr Zajac-Wiggett and that there was some history between them. Mr Thorn disclosed that he had little to no respect for Mr Zajac-Wiggett but was prepared to act in a professional manner toward him during his employment.

[64] The meeting ended after Mr Van Ryn requested information about Ms Stowell and Mr Thorn refused to enter into any discussions about her. Mr Van Rhyn accused Mr Thorn of being aggressive which he denied. As Mr Thorn left the meeting Mr Van Rhyn told him he needed to learn to listen to which Mr Thorn responded that he

was old, wise, educated and wealthy enough not to have to listen to him. Mr Thorn acknowledges his comment may have been rude.

[65] Mr Thorn received no further instructions for work. On 16 April he received a text from Mr Zajac-Wiggett asking for a good time to call. Mr Thorn responded immediately by ringing Mr Zajac-Wiggett. Mr Thorn was advised there would be no further work for him because of the way he had spoken to Mr Van Rhyn and that he had been rude to another staff member. He was asked to return all of his equipment.

[66] By its actions Eurofins dismissed Mr Thorn. The onus is on Eurofins to justify its decision to dismiss him. There is no evidence that Eurofins met any of the mandatory considerations set out in s 103A(3) of the Act. Eurofins had not raised its concerns about Mr Thorn's conduct prior to making the decision that he would be offered no further work. There was no opportunity for Mr Thorn to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. These defects were not minor and resulted in Mr Thorn being treated unfairly.

[67] The actions of Eurofins and how it acted were not the actions an employer acting fairly and reasonably could take. Mr Thorn's dismissal was unjustified and he is entitled to remedies.

[68] Mr Thorn seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings. The lost wages has not been quantified by Mr Thorn. As with Ms Henderson I have taken his average weekly earnings for the time he worked (excluding overtime payments) from February to April 2018 which amounts to \$337.59 gross.

[69] The sample numbers for April 2018 were higher than April 2017 when Mr Thorn worked regular hours. On that basis there was a reasonable expectation that Mr Thorn would continue to work regular hours for the remainder of April 2018. He is entitled to reimbursement for lost wages for the two weeks of April at his average weekly rate which amounts to \$675.18 gross.

[70] I have calculated the average number of samples collected for each of the months of March and April and the number of samples taken in May. The difference is a reduction of 14%. It was common ground that the season ended at the beginning of June. For the five weeks wages lost in May 2018 Mr Thorn is entitled to

reimbursement of \$1,451.63 gross. I have used the averaging process to calculate the lost wages on the basis that Eurofins had promised its seasonal employees it would distribute the work evenly among all Samplers where there was a reduction in the number of samples to be taken.

[71] Mr Thorn gave little evidence of the impact of the dismissal on him except to tell me that he found it embarrassing.

[72] In all the circumstances of this case an appropriate award under s 123(1)(c)(i) is \$5,000.

[73] Eurofins Bay of Plenty Limited is ordered to pay to Ms Henderson the following sums within 28 days of the date of this determination:

- a) \$2,126.82 gross being reimbursement of lost wages under s 123(1)(b) of the Act; and
- b) \$5,000 compensation under s 123(1)(c)(i) of the Act.

Ms Stowell

[74] Ms Stowell had been previously employed by AgFrist from September 2011 until 2016 and then for Eurofins from 2016 until 16 April 2018.

[75] From 2016 until December 2017 Ms Stowell was employed in an ongoing role as the Field Team Leader and managed the on-orchard work. Part of her role was to hire the Samplers for the kiwifruit and avocardo sampling. The geographic area covered Kerikeri to Whanganui. The season went from November to June. She was aware that Samplers were expected to be available to work for the entire season.

[76] Ms Stowell was responsible for drafting all manuals relating to the field operations. She trained employees in theory and practical aspects of their work and was responsible for arranging for all Samplers to be audited.

[77] In December 2017 Ms Stowell resigned from her role and at her request it was agreed she would work in the field as a Sampler and the training of new staff.

[78] Ms Stowell was engaged for the 2018 sampling season to complete kiwifruit sampling. In addition she undertook field work doing Smart Monitoring in the

Tauranga, Katikati and South Auckland regions. Smart Monitoring is an ongoing research project Ms Stowell had been involved with since 2011.

[79] In late January Ms Stowell took four new Samplers out for practical training. That day a number of things went wrong or were not working:

- a) The main tracking app was not working;
- b) A phone had not been assigned to one of the new Samplers;
- c) The time clock on Ms Stowell's phone did not work;
- d) Samplers had not been assigned samples for the day;
- e) The orchard had not been notified the Samplers were coming to the orchard; and
- f) Three of the quad bikes would not start.

[80] In March Mr Zajac-Wiggett raised issues about this training with Ms Stowell. She set out a full explanation of what had occurred in an email to Mr Zajac-Wiggett and asked to speak with him about his concerns. Ms Stowell received no response to her email and subsequently was not used for the training of new employees.

[81] In April Ms Stowell became concerned that her lone worker device did not appear to be working properly. On 12 April she spoke to the Health and Safety Officer for Eurofins and complained about the alerts on the devices being disabled. Ms Stowell had previously worked closely with the Health and Safety Officer when drafting manuals when in her full time capacity.

[82] Ms Stowell did not receive any instructions for work on 13 April. The following day was her usual day off. Ms Stowell emailed Eurofins and reminded Eurofin of its policy that where there were fewer samples to be collected, the Samplers should be put on a roster so the numbers could be shared evenly. She received no reply to her email.

[83] Ms Stowell received no instructions on the Sunday and on Monday only carried out her normal Smart Monitoring duties in Tauranga. Ms Stowell attempted to make contact with a number of people but was unsuccessful.

[84] On 16 April Ms Stowell received a text message from Mr Zajac-Wiggett asking her to advise him of a good time to call. Prior to Mr Zajac-Wiggett contacting her Ms Stowell rang the person responsible for the Smart Monitoring in Te Puke.

[85] On enquiry Ms Stowell was told that the person had been requested to complete Ms Stowell's Smart Monitoring in Tauranga and Katikati and had been instructed to teach another person how to complete the Smart Monitoring collections and libraries. The person advised Ms Stowell that she had refused to complete these tasks as she understood it was Ms Stowell's job.

[86] Mr Zajac-Wiggett then made contact with Ms Stowell and advised her she would not be receiving any further sample work. When she asked why Mr Zajac-Wiggett told her that Mr Van Rhyn was angry with her and a primary contact (a grower or a pack house representative) had complained about her.

[87] Ms Stowell advised Mr Zajac-Wiggett that she did not speak to primary contacts unless it is to tell them she would be coming onto the orchard to sample. Mr Zajac-Wiggett then advised Ms Stowell it was a pack house that had complained about her. Ms Stowell told Mr Zajac-Wiggett she did not deal with pack houses when she was in the field and asked Mr Zajac-Wiggett to tell her who it was and what had been said. Mr Zajac-Wiggett refused to provide that information on the basis that it would breach the Privacy Act and the primary contact would not feel comfortable making complaints in the future if their name was disclosed.

[88] This was followed by further allegations that Ms Stowell had been rude to staff on the phone. When asked for further details Mr Zajac-Wiggett once again referred to the Privacy Act.

[89] Ms Stowell was instructed to return all her equipment which she did.

[90] By its actions Eurofins dismissed Ms Stowell. The onus is on Eurofins to justify its decision to dismiss her. There is no evidence that Eurofins met any of the mandatory considerations set out in s 103A(3) of the Act. Eurofins had not raised its

concerns about Ms Stowell's conduct prior to removing her from the pool of Samplers. There was no opportunity for Ms Stowell to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. These defects were not minor and resulted in Ms Stowell being treated unfairly.

[91] The actions of Eurofins and how it acted were not the actions an employer acting fairly and reasonably could take. Ms Stowell's dismissal was unjustified and she is entitled to remedies.

[92] Ms Stowell seeks reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings. The lost wages has not been quantified by Ms Stowell. As with Ms Henderson and Mr Thorn I have taken her average weekly earnings for the time she worked (excluding overtime payments) during the peak season from 28 January to 12 April 2018 which amounts to \$760.62 gross.

[93] The sample numbers for April 2018 were higher than April 2017 when Ms Stowell worked regular hours. On that basis there was a reasonable expectation that Ms Stowell would continue to work regular hours for the remainder of April 2018. She is entitled to reimbursement for lost wages for the two weeks of April at her average weekly rate which amounts to \$1,521.24 gross.

[94] I have calculated the average number of samples collected for each of the months of March and April and the number of samples taken in May. The difference is a reduction of 14%. It was common ground that the season ended at the beginning of June. For the five weeks wages lost in May 2018 Ms Stowell is entitled to reimbursement of \$3,270.66 gross. I have used the averaging process to calculate the lost wages on the basis that Eurofins had promised its seasonal employees it would distribute the work evenly among all Samplers where there was a reduction in the number of samples to be taken.

[95] Ms Stowell gave little evidence of the impact of the dismissal on her. In all the circumstances of this case an appropriate award under s 123(1)(c)(i) is \$5,000.

[96] Eurofins Bay of Plenty Limited is ordered to pay to Ms Stowell the following sums within 28 days of the date of this determination:

- a) \$4,791.90 gross being reimbursement of lost wages under s 123(1)(b) of the Act; and
- b) \$5,000 compensation under s 123(1)(c)(i) of the Act.

Costs

[97] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the applicants shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Eurofins shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[98] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority