

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 263  
5382619

BETWEEN                      KIRSTEN PETERSON  
Applicant

A N D                              THREE      TEN      DAIRIES  
LIMITED  
Respondent

Member of Authority:      David Appleton

Representatives:            Janet Copeland, Counsel for Applicant  
Mary-Jane Thomas, Counsel for Respondent

Investigation meeting:      27 November 2012 at Invercargill

Submissions Received:      At the investigation meeting

Date of Determination:      30 November 2012

---

**DETERMINATION OF THE AUTHORITY**

---

- A.      The applicant's claim for unjustified dismissal succeeds.**
- B.      The respondent's counterclaim is declined.**
- C.      Costs are reserved.**

**Employment relationship problem**

[1]      The applicant, Ms Peterson, claims that she was unjustifiably dismissed on 10 February 2012 and seeks lost wages, compensation for humiliation, loss of dignity and injury to her feelings, a penalty in relation to a breach of s.4A of the Employment Relations Act 2000 (the Act), interest and costs.

[2]      The respondent, through its counsel during submissions, accepts that the dismissal was procedurally unfair but states that it was substantially justified by

reason of redundancy and counterclaims the sum of \$3,500 in relation to a loan that it claims it made to Ms Peterson, which has not been repaid.

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

[3] Ms Peterson was employed as a farm worker assisting the respondent to manage a 650 unit dairy farm, Hopcroft Farm. Ms Peterson had previously worked with the owners of the respondent, Graeme and Annette Gallagher, and had got on well with them. Ms Peterson was an experienced dairy worker and was approached by the Gallaghers around March 2011 to ask whether she wished to work for them, when they took over as contract milkers on Hopcroft Farm, the following season (starting on 1 June). She agreed, but in the following months it transpired that the Gallaghers would not be in a position to employ Ms Peterson full time until 1 August 2011 and that Ms Peterson would not herself have full time employment during the first two months of the season, June and July. Ms Peterson has four children and, around that time, had split up with her husband and so needed a source of income to tide her over until she could start working full time for the respondent.

[4] As the Gallaghers were aware of Ms Peterson's situation, and in particular that she was in danger of losing her car as she was unable to keep up payments for it, they offered to pay her sums of money until they were in a position to employ her full time.

[5] Around this time, Ms Peterson had been offered two other positions in dairy farms but, according to her, she declined them both because she felt loyal to the Gallaghers and had already committed to work for them in August. Because of this, she accepted the money that was offered. This money consisted of a payment of \$1,000 to cover her car payments, a further \$1,000 to help her with her other expenses and three further payments made between mid-June and the end of July. The total amounted to \$3,500.

[6] The respondent claims that these sums were paid as loans which they intended would be paid back by Ms Peterson at some point in the future. Ms Peterson claims that at no time was any reference made to her having to pay the money back and her evidence is that Mr Gallagher said to her that he did not ever wish her to feel that she was indebted to them.

[7] Ms Peterson entered into an employment agreement with the respondent dated 29 July 2011 which provided that she would start working for it as a full time employee. The Authority understands that Ms Peterson started working full time on 1 August 2011. The employment agreement provided that either party could end the employment relationship by giving four weeks' notice.

[8] By all accounts, between August and mid December 2011, the working relationship went very well and it would seem that Mr and Mrs Gallagher treated Ms Peterson as a friend. Unfortunately, around mid-December 2011, Ms Peterson started to suffer a great deal of stress, primarily due to family problems which it is not necessary to repeat in this determination. The Gallaghers seemed to be very supportive of her during this time, and even paid her a *bonus* of \$1,000 to help her go on holiday.

[9] On 17 December 2011, while Mr and Mrs Gallagher were away on holiday, Ms Peterson was running the farm on her own (which she had offered to do in order to give the Gallaghers some time off together) and a cow slipped over on the entrance to a platform during morning milking. Unbeknown to Ms Peterson at the time, she injured her back trying to get the cow back on its feet. The extent of her back injury did not become evident until she herself was on holiday between 26 December 2011 and 9 January 2012, when it became very painful during extended driving. On 20 January 2012, Ms Peterson went to see her GP who told her to see a physiotherapist and only to perform light duties at work. Ms Peterson's evidence is that she was still able to carry out all of the normal duties (milking, farm walks, putting up breaks and shifting stock).

[10] It was shortly after 20 January that, it appears, the relationship between Ms Peterson and Mr Gallagher in particular began to sour. Having heard the evidence of Mr and Mrs Gallagher on the one hand and Ms Peterson on the other, it seems that souring occurred primarily due to both Mr Gallagher and Ms Peterson being stressed for their own reasons and misunderstanding each other's positions. In any event, an attempt was made at reconciliation between the parties when the Gallaghers invited Ms Peterson out to tea, which she accepted.

[11] It was during late January 2012, seemingly due to a combination of the stress that Ms Peterson was under caused by her family problems, her bad back and the difficulties she had recently been encountering in her professional relationship with

Mr Gallagher, that she decided that she wanted to leave the employment of the respondent and look for work in Invercargill. Ms Peterson says that, consequently, she told Mr Gallagher that:

*... for my own well-being and my childrens that I was thinking about considering looking for work in Invercargill to see what sort of work was out there, but I would be staying until the end of the season.*

[12] Ms Peterson's evidence is that Mr Gallagher became even more hostile to her when she told him that and that he said that, effectively, he could not run a business with that kind of uncertainty. Mr Gallagher's evidence is that Ms Peterson did not say she was *thinking about considering* looking for work, but that she would be looking for work.

[13] Ms Peterson's evidence is that, from that point, Mr Gallagher asked her more than once when she was going to be leaving. Her evidence is that she replied that she could not give him a date but that she would give him four weeks' notice if a suitable job arose before the end of the season.

[14] Mr Gallagher's evidence is that, around mid-December, as Southland was suffering a drought, work was drying up on the farm and they were scraping around trying to find things for Ms Peterson to do. His evidence is that they were trying to find a solution which would have worked for both parties; namely, one which provided Ms Peterson with enough work to enable her to support herself and her four children whilst at the same time reducing the hours that she worked. He states that he tried on more than one occasion to discuss the issue of her hours with her but that she refused to countenance reducing her hours, as she would be leaving in any event. Ms Peterson's evidence is that there was plenty of work for her to do and that the Gallaghers never talked to her about reducing her hours.

[15] I believe that neither party is deliberately misleading the Authority, but that there were clear misunderstandings and miscommunications between them which led them to view the situation from quite different perspectives.

[16] On 9 February 2012, Ms Peterson saw her doctor again who signed her off work completely for the following two weeks. Ms Peterson telephoned Mrs Gallagher to advise her of this and she says that Mr Gallagher took the phone over and again demanded that she provide a date when she would be going. She said that she could not do that and that his response was *well I can do it from this end, I'll*

*catch you up tomorrow.* It is my understanding from Mr Gallagher's evidence that this is an accurate report of his words.

[17] The following day, 10 February 2012, Mrs Gallagher handed to Ms Peterson a letter in the following terms:

*Dear Kirsten,*

*We are sorry to inform you that from this date, we no longer have a full time position available for you on the farm. Due to this, we have to let you go from your position. As per the contract (schedule A 4.1), you have four weeks to work out your employment with us. Two weeks of this being on leave with ACC.*

*We wish you all the best for your future.*

[18] A niece of the Gallaghers was employed by the respondent very shortly after Ms Peterson was dismissed. (An employment agreement was signed between the respondent and the Gallaghers' niece on 16 February 2012.)

### **Issues**

[19] The Authority must determine the following:

- (a) Whether Ms Peterson's dismissal was unjustified; and
- (b) Whether the respondent has a valid counterclaim against Ms Peterson.

### **Was the dismissal unjustified?**

[20] In determining whether a dismissal is justified, it must apply the test set out in s. 103A of the Act. This provides as follows:

- (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.*

[21] As counsel for the respondent conceded during her submissions to the Authority that the procedure followed by the respondent was flawed, it is not necessary to set out here in any great detail the law or the facts which lead me to agree with that concession. Suffice it to say, the respondent did not fully and properly consult with Ms Peterson about the possibility of her being dismissed if she did not agree to reduce her hours, it did not give her the opportunity to have a representative with her during the discussions, and it did not tell Ms Peterson exactly what hours would be offered to the Gallaghers' niece if Ms Peterson did not accept the reduced hours.

[22] However, having established that the dismissal was carried out in a procedurally unjustified way, it is also necessary to consider whether the reason for the dismissal, as given by the respondent (namely redundancy), was genuine or not.

[23] Having considered the evidence of Mr and Mrs Gallagher, I believe that, as submitted by Ms Copeland on behalf of Ms Peterson, their motives were mixed. That is to say, I find that Ms Peterson telling the Gallaghers that she was intending to look for other work but would give four weeks' notice when she found it, created uncertainty in the mind of the Gallaghers which caused them anxiety. Whilst that anxiety was understandable, they had employed Ms Peterson on an employment agreement which was terminable by her on four weeks' notice. In advising the

Gallaghers that she was intending to look for other employment, Ms Peterson believed that she was actually acting in good faith and doing the Gallaghers a favour by giving them as much notice as she could. Legally, of course, she was under no obligation to tell them of her intentions until she had actually found new work, when she could have terminated the employment by giving no more than four weeks' notice.

[24] Whilst I do not doubt that the farm was in need of fewer hours from Ms Peterson, as is evidenced from the fact that the Gallaghers' niece was employed on fewer hours than Ms Peterson was, I do not believe that this was the primary motive for terminating the employment. The catalyst for doing so was Ms Peterson telling the Gallaghers that she had been signed off sick for two weeks. This caused them even greater anxiety, Mr Gallagher said, because they believed they would not be able to discuss her intentions with them during those two weeks. This precipitated a dismissal which, as I have already found, was procedurally unjustified.

[25] Given that the reason for the dismissal was, in my view, primarily to dispel the uncertainty that was being caused by Ms Peterson's announcement that she intended to look for new employment, I cannot find that Ms Peterson's dismissal was by reason of redundancy. The employment agreement between Ms Peterson and the respondent defined *redundancy*, at clause 14.1, as follows:

*Redundancy is defined as a situation where an employee's employment with the employer is terminated by the employer, the termination being attributable wholly or mainly to the fact that the position filled by the employee is or will become superfluous to the needs of the employer.*

[26] I find that the reason for the dismissal was not *attributable wholly or mainly to the fact that the position filled by [Ms Peterson] [became] superfluous to the needs of the [respondent]*. Rather, I believe that the dismissal was mainly attributable to the fact that Ms Peterson had indicated that she would be looking for new work but had not told the Gallaghers when she would be leaving. I therefore find that the dismissal was substantively unjustified as well.

[27] In summary, I find that no fair and reasonable employer could have dismissed Ms Peterson in all the circumstances that prevailed at the time, either in the manner in which it did so, or for the predominant reason that it did.

**The respondent's counterclaim**

[28] In considering whether these payments were intended to be a loan to be paid back or some other payment, there appears to be arguments supporting both positions. In support of the respondent's position is the key point that, between June and July, when Ms Peterson received \$3,500, she carried out very few duties for the respondent. In total, they amounted to little more than a day's work. This does raise the argument that the payment was not made in return for any labour by Ms Peterson but was made in order to help Ms Peterson survive financially until they were able to employ her full time. It would have been a very generous gesture to have made payments to a future employee amounting to \$3,500 which was never intended to be repaid, especially when the respondent itself was not receiving any income from the farm at that point. (Evidence was given by Mr Hopcroft, the owner of the farm, that monies were advanced to the respondent which were to be set against the milk cheque when the respondent started fully to manage the operation.)

[29] On the other hand, both Mr and Mrs Gallagher admitted to the Authority that they had never expressly discussed with Ms Peterson that they expected her to repay the sums, nor that they themselves had any idea when she would be in a position to do so.

[30] In addition, it was clear from the evidence that Mr and Mrs Gallagher were keen to secure the employment of Ms Peterson as they were going to embark on being contract milkers for the first time and, as they acknowledged to the Authority, she was a very good worker.

[31] In addition, it was Ms Peterson's evidence, which I accept, that she would never have accepted the money if she had known that she would have had to have returned it because she had been offered two jobs elsewhere, one of which paid at least as much as she was going to be paid with the respondent (including the value of the accommodation that would be offered) but which started at the beginning of the season.

[32] Weighing up these two accounts, I believe that the correct legal analysis of the situation is that Mr and Mrs Gallagher intended primarily to assist Ms Peterson financially in June and July in order to secure her commitment to working for them. This was also Ms Peterson's understanding. Whilst the Gallaghers considered this an

advance, they did not agree with Ms Peterson either orally or in writing any terms by which she would be obliged to repay the moneys and, even when they terminated her employment, this money was not mentioned. It was first raised over three months later by the respondent's then counsel, I believe as a bargaining tactic to be used during negotiations which were ongoing at that time.

[33] I therefore determine that the \$3,500 paid to Ms Peterson in June and July 2011 were payments made to secure her loyalty and commitment to working for the respondent and that Ms Peterson kept her side of that bargain by commencing work for it in August 2011. That pre-employment agreement between the parties was therefore fully performed. Therefore, I reject the respondent's counterclaim.

### **Remedies**

[34] Section 123(1) of the Act provides:

- (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.*

### *Lost wages*

[35] I have found that the dismissal was both procedurally and substantively unjustified and that Ms Peterson has a personal grievance. Ms Peterson does not seek reinstatement and, accordingly, it is appropriate to consider first whether Ms Peterson has lost remuneration as a result of the personal grievance and, if so, how much she has lost.

[36] The following issues need to be taken into account when determining these questions:

- a. Ms Peterson indicated that she would be leaving the employment of the respondent by the end of the season in any event;
- b. Ms Peterson's replacement worked fewer hours for less remuneration than Ms Peterson; and
- c. Ms Peterson's back injury which, initially at least, prevented her from carrying out any more than light duties.

*Seeking new employment*

[37] Ms Peterson's evidence was that she had not even started looking for work on the day she was dismissed. In addition, she states that she was too badly affected by the dismissal and the upheaval it caused her, including her need to settle her children into new schools that she did not start to seek work until May 2012. It was not until September 2012 that she secured full time employment. Taking this into account, I believe that it is unlikely that Ms Peterson would have secured new work before the end of the season.

[38] Therefore, subject to the other questions in paragraph [36] above, I find that it is just to award Ms Peterson lost wages for a period ending on 31 May 2012, the end of that dairy season. (Ms Peterson concedes that she would have left the employment of the respondent by that date and so accepts that she cannot expect further loss of wages from it).

*What level of remuneration would Ms Peterson have earned?*

[39] The next question to consider is whether Ms Peterson would have continued to have worked the same hours on the same pay until 31 May 2012, or whether she would have accepted a reduction in hours and pay to avoid being made redundant. Ms Peterson's replacement, the Gallagher's niece, worked fewer hours each fortnight, for less pay. The respondent could not have forced a unilateral reduction in hours on Ms Peterson but, if it had consulted properly, it could have made it clear to her that it needed her hours to reduce, or make her redundant.

[40] Ms Peterson's replacement was contracted to work seven days a fortnight for a gross pay of \$200 a day, plus a \$30 a fortnight petrol allowance. This amounted to a total of \$1,430 a fortnight, or \$2,860 gross a month. The replacement did not

receive an accommodation allowance as she, being the Gallagher's niece, stayed in their house during her employment. Putting aside the accommodation allowance, therefore, which I shall assume the respondent would have continued to have paid, Ms Peterson received a gross salary of \$3,166 a month, a difference of \$306 a month. Although I heard no evidence on this, I believe that, if Ms Peterson had been told that she were to be made redundant if she did not reduce her hours to seven days a fortnight, she is more likely than not to have accepted that reduction. Therefore, I believe that the correct base pay upon which to calculate Ms Peterson's loss of wages until 31 May 2012 is \$2,860 gross a month, plus \$583 per month accommodation allowance. Given that Ms Peterson was entitled to have been consulted with properly, it is appropriate to assume that that process would have taken a week. However, that process could have occurred while Ms Peterson was away on sick leave because of her back, so I shall assume that the reduced pay and hours would have been payable from the date on which she would have resumed her duties.

*When would Ms Peterson have resumed her work?*

[41] The final question to consider is when the period of loss should begin, given that Ms Peterson had been signed off sick for two weeks due to her back injury with effect from 9 February. However it is important to consider whether she would have been able to return to work prior to 31 May 2012. As she was in receipt of ACC payments in respect of the period from the week after her injury until September 2012, it is arguable that she would not have been able to work on the farm in any event until after the end of the season, as ACC would not continue to make payments once a recipient was well enough to return to work.

[42] Of assistance is a copy of a letter sent by Ms Peterson's orthopaedic and spine surgeon, Mr Carstens, to Ms Peterson's GP dated 4 April 2012. Relevant extracts of this letter are as follows:

*At present, she has good and back [sic] days. She finds that travelling by car worsens her pain. She finds vacuuming, trying to mow lawns cause quite a lot of pain. The pain she describes is localised to the left lower back, occasionally across to the right side lower back. She denies any leg symptoms. She did previously have some pain into the buttock at the start but this settled down. She does not have any pins and needles or weakness in the leg, there is no bladder or bowel symptoms. She had some physiotherapy at the start which involved some acupuncture and manipulation but this was ceased on doctors advice. She has been off work from about 17 January. She has been undertaking minimal activity about her*

*home because of pain in the back but she is quite keen to get back into some form of job.*

...

*On clinical review today Kirsten gets about the room slowly but with no obvious distress. She has a normal gait. She has normal condition in the lower limb for muscle wasting. She has localised tenderness over the left lower back about the L4-5 area. She is able to forward flex her fingers through to knee joint. She is able to extend 10° and this exaggerates her lower back pain. Lateral flexion to the right aggravates her pain as well. She has normal assessment of the lower limbs for power, sensation, reflexes, tone and Babinski. She has free range of motion in the hips which does not cause any increase in pain. She has normal pulses in the feet.*

...

*Kirsten has had a significant injury to her lower back. It has settled to a degree and she has intermittent symptoms of disability. I told her that she is able to progress on to undertaking activity including return to suitable work. ... She does appear to be keen to get back to some form of vocation. I told her there was no role for surgical intervention in her case, occasionally patients can benefit from lumbar epidural steroid injection.*

[43] Ms Peterson argues that she would have been in a position to return to work from 4 April 2012 to carry out most of her normal duties, save for moving irrigation pods, which her bad back would have limited her ability to do. Evidence was heard from Mr Hopcroft, owner of the farm, who suggested that *you know you've done a day's work when you've milked 650 cows*. Mr Gallagher's evidence was that the normal duties that Ms Peterson carried out involved quite a lot of heavy lifting and Ms Peterson herself had said that she was restricted to lifting 15kgs, although it is not clear when that was.

[44] Ms Peterson's brief of evidence states that it was on 9 May 2012 that her GP recommended that she could undertake both light and medium duties, and that on 10 August 2012 he recommended she *could work normal working hours undertaking light duties*. Ms Peterson said that, on 17 September 2012, her GP gave her clearance to undertake *normal duties*. Ms Peterson was in receipt of ACC payment until September 2012 and it to be presumed that it was upon being certified as capable of working her normal duties that the ACC payments stopped.

[45] The Authority did not have the benefit of any further medical evidence and one can only speculate what duties Ms Peterson could have undertaken had she returned to work on 4 April, if any. I do note that Dr Carstens' letter states that

Ms Peterson was able *to progress onto undertaking activity including a return to suitable work*. This does not, however, suggest to me that she was immediately able to do so. In my view, this suggests that Ms Peterson was only just in a position to return to work on some form of restricted duties. It is not known what duties the respondent could have accommodated her to undertake, and it is possible that there would have been none.

[46] Taking all this evidence into account, and the fact that Ms Peterson was in receipt of ACC payments until September, I do not accept that Ms Peterson could have gone back to working her normal hours (or even reduced hours) on 4 April 2012. It is impossible to know whether she would have been able to work the hours that the Gallaghers' niece worked. The best that the Authority can do is to assume that, as she was in receipt of ACC payments until September, and that her own evidence is that, it was only on 17 September 2012 that her GP gave her clearance to undertake *normal duties*, Ms Peterson would not have been able to undertake her duties until after the end of the season. This is because I accept that the work was physically demanding and almost certainly more demanding than vacuuming and mowing lawns, which Mr Carstens' letter stated caused her *quite a lot of pain*. (Ms Peterson said that those activities used to cause her pain but did not by the time Mr Carstens wrote his letter. However, the letter refers to her difficulties in the present tense, so I do not accept that evidence from Ms Peterson).

[47] A further issue to take into account is that the respondent owed a duty to Ms Peterson not to allow her to undertake work that could have exacerbated her injury. Given that vacuuming and mowing the lawn caused Ms Peterson *quite a lot of pain*, it would not have been appropriate for Ms Peterson to have been exposed to the risk of pain and further injury by doing farm work. The employment agreement, at clause 11.6, gave the respondent a discretion to decide whether or not to require Ms Peterson to return to work to carry out alternative duties within her capabilities and level of fitness. Given that Mr Gallagher said that, by mid December, he was *scraping around* trying to find Ms Peterson work, and that his niece carried out fewer hours of duties from mid February, it is possible that the respondent would not have been able to find work in April and May that Ms Peterson' back would have allowed her to carry out.

[48] Accordingly, taking all this evidence into account, I do not find it just and equitable to award Ms Peterson any sum in respect of lost wages arising out of the dismissal. It follows that no interest can be awarded.

### *Compensation*

[49] I must now turn to Ms Peterson's claim for compensation for humiliation, loss of dignity and injury to her feelings pursuant to s.123(1)(c)(i) of the Act.

[50] Ms Peterson's evidence was that, after her dismissal, she had had to go back onto anti-depressants for the first time in four years, claiming that this was mostly due to the dismissal. For this reason, she asks for compensation in the region of \$12,000-15,000. Ms Peterson's counsel states that there were no genuine grounds for the redundancy and no regard at all has been paid to good faith obligations by the respondent. She submits that the respondent's disregard for its obligations are flagrant and substantial and that a significant compensatory award should be made.

[51] I accept that Ms Peterson's dismissal came as a shock to her and also accept that she would have found it another knock to her confidence following on from the stressful events in her personal life that she had been suffering up to that date (which were by no means the fault of the respondent). However, I believe it would be unsafe for me to accept at face value the simple assertion that, were it not for her dismissal, she would not have found herself back on anti-depressants. Ms Peterson's life was difficult around this time but that cannot be wholly or even mainly attributable to the respondent's actions I believe.

[52] Therefore, I do not accept that it is appropriate to award Ms Peterson compensation of the magnitude requested. I also take into account the fact that Ms Peterson had already decided to leave the respondent's employment in any event, and so cannot be said to have lost particularly congenial work which she was committed to and in which she felt she had a long future. I think a more appropriate sum to award would be \$5,000.

### **Contribution**

[53] S 124 of the Act requires me to consider the extent to which the actions of Ms Peterson contributed towards the situation that gave rise to the personal grievance

and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[54] I have found that the parties were not properly communicating with each other and, in that respect, Ms Peterson may be said to have contributed to some extent to the situation she found herself in. However, she did nothing blameworthy in telling the Gallaghers she was intending to leave the employment of the respondent when she had found alternative work and, as this was the driving motive behind her dismissal, it would not be just to reduce the award. I therefore decline to reduce the award of compensation.

### **Penalty**

[55] Ms Peterson asserts that the respondent should pay a penalty for the breach of good faith in the way that they dealt with her. Section 4A of the Act provides

*A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*

*(a) the failure was deliberate, serious, and sustained; or*

*(b) the failure was intended to undermine—*

*(i) bargaining for an individual employment agreement or a collective agreement; or*

*(ii) an individual employment agreement or a collective agreement; or*

*(iii) an employment relationship; or*

*(c) the failure was a breach of section 59B or section 59C.*

[56] Ms Peterson relies on s. 4A(b)(ii) and (iii). However, I do not believe that there was any intention on the part of the respondent to undermine Ms Peterson's employment agreement and the employment relationship. I believe that the relationship encountered problems because of communication problems on both sides. Whilst the respondent's actions in dismissing Ms Peterson were not the actions that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, I do not accept that they acted in bad faith at the time. I therefore decline to award a penalty against the respondent.

**Orders**

[57] I order the respondent to pay to Ms Peterson the compensatory sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act.

**Costs**

[58] Costs are reserved. The parties are to attempt to resolve the issue of how costs are to be dealt with between them. If they have failed to do so within 28 days of the date of this determination, Ms Peterson's counsel may serve and lodge a memorandum setting out what contribution she seeks from the respondent. The respondent's counsel shall have a further 14 days within which to serve and lodge a memorandum in response.

David Appleton  
Member of the Employment Relations Authority