

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 71
5516219

BETWEEN TESSA ROW
 Applicant

A N D WEST VENTURES LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Robert Thompson, Advocate for Applicant
 Anjela Sharma, Counsel for Respondent

Investigation Meeting: 26 February 2016 at Greymouth

Submissions Received: Written submissions for the Applicant and Respondent
 on 29 February 2016
 Oral submissions by teleconference on 2 March 2016
 Further evidence received from both parties in March
 and April 2016
 Last evidence, from a third party, received on 19 May
 2016

Date of Determination: 3 June 2016

DETERMINATION OF THE AUTHORITY

- A. West Ventures Limited unjustifiably disadvantaged Tessa Row on 19 April 2014.**
- B. West Ventures Limited unjustifiably constructively dismissed Tessa Row on 24 April 2014.**
- C. Tessa Row is not owed any wages as a result of the unjustified dismissal.**
- D. West Ventures Limited must pay Tessa Row \$4,000.00 in compensation for hurt, humiliation and loss of dignity.**
- E. I have reserved the issue of costs and set a timetable for submissions on costs, failing agreement.**

Employment relationship problem

[1] Tessa Row is the daughter of Doug Row and the stepdaughter of Alison Row. Mr and Mrs Row are the directors and shareholders of West Ventures Limited (WVL). WVL ran a dairy farm on the West Coast.

[2] Ms Row began working for WVL on 7 February 2014 as a farm assistant. She lived in a cottage on the farm separate from Mr and Mrs Row's home.

[3] Ms Row claims WVL unjustifiably dismissed her on 19 April 2014 by text message. She says Mr and Mrs Row verbally abused and physically intimidated her when she came back to work her two week notice period.

[4] WVL denies that it unjustifiably dismissed Ms Row. It says she left of her own volition and began a new job very quickly after leaving the farm.

[5] Ms Row claims lost wages for five weeks and compensation of \$20,000 for humiliation, loss of dignity and injury to her feelings.

Background facts

[6] Ms Row's rostered days off were 17, 18 and 19 April 2014. She travelled from the farm, near Hokitika, down to Fox Glacier where her boyfriend had recently started a new job.

[7] During 17 to 19 April 2014, ex-tropical Cyclone Ita moved down over the South Island. The worst affected area was the West Coast. The Met Service issued severe weather warnings on 18 and 19 April 2014. The warning on 18 April 2014 was for heavy rain for Westland on 19 and possibly into 20 April 2014.

[8] On 19 April 2014 at 7.54am, a severe weather warning indicated heavy rain that day for the ranges of Westland. The roads around Fox Glacier had been closed because of the weather. However, the roads were open again by the afternoon of 19 April 2014.

[9] In the late afternoon of 19 April 2014, Ms Row telephoned her father and told him that she wished to stay in Fox Glacier the following day for an after-funeral function. She says that she knew the daughter of the man who had died. She asked Mr Row if she could take 20 April 2014 off. Mr Row told her that she was required

to work on 20 April 2014. He expressed surprise she wanted to stay for the function, as he did not consider that she knew the family particularly well.

[10] Mr Row also told her he could not work for her the next day because he was sick. He hung up on Ms Row when it became clear to him she did not intend to return.

[11] In subsequent text exchanges with Mrs Row, Ms Row wrote:

- She had asked her father if he would milk for her the following day;
- She thought he was only hungover;
- She did not want to drive back after having had a beer;
- Her friend Lauren was coming over for the after-funeral event;
- She was going to have to tell Mr Row she was not going to work anymore and he was going to hate her for it either way;
- She did not think it was safe to drive because although the roads had been reopened, the weather had been so bad; and
- It was important for her to stay and support her friend.

[12] Mrs Row then sent Ms Row a text which read:

Well man up and come back and milk as he is sick you knew you had 2 drive so shouldn't have been drinking. Tess you asked us for this job least you can do is finish off the season.

[13] Ms Row replied:

I haven't had a single sick day or day off since I started except for wildfoods so I'm taking one tomorrow and if Dad's not okay with it then he can fire me so can you please pass this on. I am willing to maby [sic] finish the season but he'll have to be okay with this ... He hung up on me, so yea. I wouldn't of asked I know I have to but I already need to tell him I'm not going work there anymore.

[14] Mrs Row telephoned Mr Row to inform him of the situation. She then sent this text:

Ok Tes its your call, if you don't come back 2 nite and milk in the morning you are fired immediately. Your stuff will be put out of the house and your horse will be put out on the road. And dad is sick. Hangover don't last a week.

[15] Ms Row replied:

ARE YOU FUCKING CRAZY WHY THE FUCK WOULD I WANT TO WORK FOR SOMEONE WHO WOULD DO THAT TO ME AND AN INNOCENT HORSE!!!??? JUST BECOS I HAD ONE DAY OFF FOR A FUNERAL!!!???

[16] Ms Row did not return to undertake her farm duties on 20 April 2014. She says she considered that she had been dismissed and was very upset about the threat to her belongings and her horse.

[17] Mrs Row says that Mr Row did not ask her to send the text or know what she sent until after it was sent. She says she did not intend to dismiss Ms Row but hoped that the text would show her how seriously WVL took her intention not to come back to work the next day and spur her into returning.

[18] On 22 April 2014, Ms Row telephoned Mr Row to say that she was unable to get petrol to drive back because of the power outages at Fox Glacier. She also explained that she was very upset because her boyfriend had broken up with her and she was trying to repair the relationship.

[19] On 22 April 2014, Ms Row and Mr Row had a text exchange when she asked if he would like a hand for the next few days or not. He texted that he would not like a hand, he would like her to do the job she was contracted to do. He wrote that power had been restored to Fox Glacier the previous evening so he wondered what her excuse for not being back at work was this time.

[20] Ms Row replied that she did not think he wanted her back at work because he kept hanging up on her and did not say he wanted her back. She indicated that she would like to be home that evening for work the following day but that she still needed to talk to her ex-boyfriend. She said that she was still planning to leave at the end of the season and that her new job did not need her yet. She wrote she was still going to try and work out two weeks' notice on the farm.

[21] Ms Row says she understood WVL had to give her two weeks' notice since it had dismissed her.

[22] On 23 April 2014, Mrs Row contacted Ms Row to try and encourage her to return to the farm. Ms Row returned for the afternoon milking on 23 April 2014. The next morning, 24 April 2014, Ms Row and Mrs Row were working together during morning milking.

[23] Mr and Mrs Row had decided to take a few days away from the farm. They hoped that that would assist Ms Row to settle back into her farm duties and they hoped that she would then consider working until the end of the season. They engaged two workers to replace them while they were away.

[24] Having finished the morning milking, Ms Row went back to her home for a shower. Mrs Row was walking past her cottage and decided she needed to speak to Ms Row. She knocked on the door and either put her head in or stepped inside. She told Ms Row that she and Mr Row were going away for a few days and they told her to stay and work on the farm. Ms Row was still in the shower in the bathroom and Mrs Row was aware of that because the bathroom door was open.

[25] There is significant disagreement about what was said next and what happened when Mrs Row brought Mr Row back to Ms Row's cottage. I deal with this below at paragraphs [46] to [62].

[26] Over the next few days, Ms Row did the morning and evening milkings. She says that on about the fourth morning she noticed that Mr and Mrs Row had returned to the farm. She says she panicked and got in her car and left with boxes of her belongings she had packed over the previous days. Ms Row says that later that day she called and left a message to say that she had left but would come back sometime for her horse.

The issues

[27] The issues that need to be resolved are:

- (a) Was Ms Row unjustifiably dismissed on 19 April 2014 by text message?
- (b) If not, was Ms Row constructively dismissed?
- (c) Was Ms Row unjustifiably disadvantaged in her employment?

- (d) What if any remedies, after considering mitigation and contribution, are due to Ms Row?

Was Ms Row unjustifiably dismissed on 19 April 2014?

[28] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test I need to apply to determine whether WVL justifiably dismissed Ms Row. 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.

[29] Section 103A(3) of the Act requires me to consider a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. These factors include whether the employer:

- sufficiently investigated the allegations, having regard to its available resources;
- raised its concerns with the employee before dismissal;
- gave the employee a reasonable opportunity to respond to the its concerns before dismissal; and
- genuinely considered the employee's explanation before dismissal.

[30] Section 103A(4) of the Act allows me to consider any other procedural factors I think are appropriate. However, I cannot determine Ms Row's dismissal to be unjustified solely because of procedural defects if they were minor and did not result in her being treated unfairly.¹

[31] WVL submits that Ms Row was not dismissed on 19 April 2014 but rather resigned because she had work in Fox Glacier to go to. WVL does not accept that Ms Row intended to remain working for it until the end of the season in any event. It says she told Mr Row she had a new job in Fox Glacier and her texts to Mrs Row show she was waiting to tell her father she could not keep working for WVL.

¹ Section 103A(5) of the Act.

[32] Ms Row says all she had was the possibility of a job in Fox Glacier for a parachuting company. Once she left WVL she worked voluntarily for two weeks for that company but did not gain any paid employment there.

[33] The key issue is whether a fair and reasonable employer could give an ultimatum that included summary dismissal and instant eviction from an employee's tenanted home, and dealing with the employee's belongings and horse in the way threatened by WVL?

[34] A fair and reasonable employer could have warned Ms Row that if she did not return to do her job on 20 April 2014 it would consider her absence to be serious and it might mean that she could be dismissed. If Ms Row failed to return to work on the morning of 20 April 2014, a fair and reasonable employer could have begun an investigation and a disciplinary process.

[35] Ms Row had mentioned the weather and the state of the roads as one factor in her reluctance to return. Mr and Mrs Row considered that was not a real problem because by then the weather in Hokitika was clear. However, they did not investigate the state of the weather in Fox Glacier or the state of the roads between Fox Glacier and Hokitika before Mrs Row sent the text. Fox Glacier is 157 kilometres south of Hokitika. It takes over two hours to drive between the two places in good weather.

[36] There was no attempt to follow a basic fair process before WVL made the decision to dismiss Ms Row. I accept Mrs Row's text was a conditional one; that is, it was only if Ms Row did not return to work the next day that she would be dismissed. However, Mrs Row's text was not an action of a fair and reasonable employer. The breaches of process were more than minor and disadvantaged Ms Row.

[37] Given that Ms Row did not return for milking on 20 April 2014 it was reasonable for her to assume that she had been summarily dismissed.²

[38] However, a dismissal occurs when the employment actually ceases and subsequent events overtook the 19 April 2014 text.

[39] It appears WVL later attempted to resile from the threatened summary dismissal and asked Ms Row to come back for the rest of the season. I note there was

² I consider Ms Row's contribution to the situation giving rise to her dismissal below under Remedies.

no text or phone call from Mr or Mrs Row withdrawing what was written in the 19 April 2014 text. WVL made no apology for the text. Instead, Mr Row told Ms Row she would have to apologise to Mrs Row.

[40] I hasten to note that Mr and Mrs Row did not treat Ms Row's goods or horse in the way WVL had threatened.

[41] Ms Row says she decided that she would go back and work until WVL found a replacement for her. The contemporaneous texts show she offered to go back for a couple of days or a couple of weeks *if I can*. Ms Row needed to go back to pack and to find somewhere else for her horse to go. I also accept that Ms Row only intended to go back and work for the next 2 weeks or so if the relationship between her and Mr and Mrs Row improved. I am confident that Ms Row only returned to work for a few days because Mr and Mrs Row are her family. If they had not been she would have simply gone back to pack and remove her belongings.

[42] Clause 15.8 of Ms Row's IEA entitled her to 14 days' notice for termination of her tenancy. Clause 23.2 allowed WVL to give Ms Row two weeks' notice if dismissing her for misconduct or breach of her employment agreement, amongst other things. Clause 23.3 allowed WVL to dismiss her without such a period of notice for serious misconduct or a serious breach of the IEA.

[43] Ms Row understood she had been dismissed with two weeks' notice. Later, WVL asked her to stay for a longer period but she was not obliged to do so.

[44] Section 122 of the Act allows me to find that a claimed personal grievance is of a type other than that alleged by the applicant. I consider Ms Row was not unjustifiably dismissed on 19 April 2014 but was unjustifiably disadvantaged by the text Mrs Row sent her.

[45] I consider Ms Row's contribution to the situation giving rise to the disadvantage, at paragraphs [98] to [101].

What was the effect of the incident in Ms Row's cottage on 24 April 2014?

What happened on 24 April 2014?

[46] It is not possible for me to resolve all of the disparities in the parties' reports of the events on 24 April 2014 in Ms Row's cottage when Mrs Row came back with

Mr Row. There are not only differences in the evidence between the parties but some difference between the written evidence submitted before the investigation meeting and oral evidence given at the investigation meeting.

[47] I make some findings of fact necessary to resolve the claim. However, in doing so there is no implication that anyone has lied or attempted to mislead my investigation. Memories are unreliable. At times of high stress and emotions they are even more unreliable. I accept that this day was a period of high stress and emotion for all three people involved.

[48] Both parties agree there was a heated exchange. Both parties allege the other was rude, abusive and acted inappropriately, even violently. Even the topic of the heated conversation is disputed.

[49] Ms Row says that Mr and Mrs Row expected her to work for free during the next few days that they were to be off the farm. She refused to do that, which made them angry.

[50] Mr and Mrs Row say that they intended to pay her for the days she worked but told her that she would not be paid for the days she was off work from 20 to 23 April 2014. They say Ms Row lost her temper over this.

[51] Ms Row says she never expected to be paid for the days she had off from 20 April 2014 but did expect to be paid for the work WVL expected her to do while Mr and Mrs Row were away.

[52] Ms Row says she remained wrapped in her shower towel only when Mr and Mrs Row arrived and entered her cottage, which made the confrontation all the more distressing. Mr and Mrs Row say she was already dressed.

[53] Mr Row alleges that Ms Row threw an empty can in Mrs Row's direction. Mrs Row did not give any evidence of that but wrote that Ms Row picked up an object and held it above her head in a threatening manner. Ms Row denies it.

[54] Ms Row alleges that Mrs Row picked up a porcelain candleholder and went as if to throw it at her, or hit her with it. Mrs Row denies that she picked it up but under cross-examination agreed she put her hands on it.

[55] Mr Row also says that Mrs Row moved to pick up the candleholder and put her hands on it. He intervened and told both women to stop. I consider Mr Row's evidence that both women picked up objects they intended to use against the other is the most accurate about what probably happened. Mr Row was the only witness who made admissions against his own and WVL's interest.

[56] Mr Row says that Ms Row was very angry and came very close to him and said a number of nasty and hurtful things to him. Mrs Row agrees. Ms Row denies it.

[57] Mr Row denies most of the unpleasant and insulting things Ms Row alleges he said to her. However, he agrees that he reacted angrily to her and said something to the effect of:

...of course [the ex-boyfriend] broke up with you, why would anyone want to go out with you? The only reason guys get with you is to fuck you

[58] Ms Row says that she felt very intimidated. She says Mr and Mrs Row told her to get out and to leave a number of times. Ms Row says she felt the only way to get them out of her cottage was to agree to work, for free, on the days they intended to be away. Therefore, she did that and they left.

[59] Mr and Mrs Row both say that all three of them had calmed down by the end of the cottage incident. They left the cottage and shortly afterwards left the farm. They say that the calming down only happened because they agreed to pay Ms Row for the unauthorised days she had off. They say that when they left the farm that day they withdrew some money and paid it to Ms Row as wages for the days she had been in Fox Glacier when they say she should have been at work.

[60] In contrast, Ms Row says she felt so upset and intimidated by the events that as soon as Mr and Mrs Row left her cottage she went to the police station to report what happened. At the investigation meeting, Ms Row said that her complaint had been written down. There is no written record of her complaint at the Hokitika or Greymouth police stations. WVL submit that this shows Ms Row's tendency not to be truthful.

[61] I have considered the issue of Ms Row's credibility on this issue. However, I do not have to decide whether a formal written complaint was made to the police. Ms Row did not ever couch her evidence in such terms and it may be that the police

officer she spoke to simply made notes in an informal way. The key issue for me is whether Ms Row was scared. I conclude that she was because that is backed up by Mr Bilson's evidence.

[62] One day after 24 April 2014, while doing the milking with Mr Bilson, he says that she told him Mrs Row had been really angry and that she was scared she might hit her. Mr Bilson told her that arguments happened but that Mr and Mrs Row would get over it *as they usually did*.

[63] Ms Row says that over the next few days, between milkings, she packed her belongings. She intended to leave as soon as Mr and Mrs Row returned. She remained scared of what might happen when they came back.

[64] On or about 28 April 2014, after the morning milking, Ms Row noticed Mr and Mrs Row's car was back. She immediately went to her cottage and packed her car up and left. She later rang and left a message that she would be back for her horse.

[65] Mr and Mrs Row say they were annoyed that Ms Row left without notice. They say they assumed she went to Fox Glacier to start her new job.

The law on constructive dismissal

[66] Section 122 of the Act allows me to consider whether the events of 24 April 2014 were an unjustified dismissal as opposed to an unjustified disadvantage.

[67] A constructive dismissal is one where the employee resigns but does so effectively because the employer has caused them to do so. I will consider whether Ms Row leaving the farm on 28 April 2014 was in reality a dismissal.

[68] The legal principles applying to constructive dismissals are well established. In *Auckland Shop Employees Union v Woolworths (NZ) Limited*³ the Court of Appeal decided there are three main circumstances where a constructive dismissal may arise:

- (a) When an employer gives an employee an option of resigning or being dismissed;

³ 4 [1985] ACJ 963

- (b) When an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) When a breach of an implied or express duty, or duties, by the employer leads an employee to resign.

[69] Ms Row's claim fits within the third of these categories. That is what I will examine to decide whether WVL constructively dismissed her.

Did WVL breach a duty or duties it owed to Ms Row?

Did that breach seriously damage the trust and confidence that Ms Row needed to have in WVL?

[70] The most significant implied duty in an employment relationship is to maintain a relationship of trust and confidence.

[71] While working out her notice period WVL and Ms Row continued to owe each other the fundamental implied duty of trust and confidence.

[72] I need to examine whether the confrontation in Ms Row's cottage amounted to WVL breaching that duty. If Mr and Mrs Row intended to have a serious discussion or start a disciplinary process with Ms Row about her failure to return to work on 20 April 2014 they should have told her that is what they wanted to do and made an appointment to do that. Instead, they effectively ambushed her in her own home.

[73] The combination of Mrs Row's 19 April 2014 text, threatening to put Ms Row's belongings and horse out, and the confrontation in Ms Row's cottage, which included Mr Row's appalling comment and Mr and Mrs Row's very angry reaction to her, destroyed her trust and confidence in her employer.

Was WVL's breach so serious it ought to have foreseen that Ms Row might resign?

[74] I consider WVL's breaches to have been so serious it ought to foresee that Ms Row might resign immediately. It would always be a possibility that any employee would feel they could not work with Mr Row again given what he admits having said. However, it should be even more obvious that a daughter would feel she could no longer work for a father who said such a thing to her.

Did the breach cause Ms Row's resignation?

[75] I accept Ms Row's evidence that even before Mrs Row's text on 19 April 2014 she was considering leaving to work in Fox Glacier. However, she did not have a job to go to and intended to leave if she got the one she wanted. She agrees that she was thinking of leaving but had not finally decided as at 19 April 2014 whether she would leave before the season ended in May.

[76] I also accept that Ms Row, all going well, intended to only work a further two weeks or at most five weeks until the end of the season.

[77] Mr and Mrs Row had acted so angrily towards Ms Row that she felt scared. She told Mr Bilson that the next morning. Ms Row intended to leave either before or as soon as Mr and Mrs Row returned so she did not encounter them again. She left as soon as she realised they were back. I consider WVL's breach caused Ms Row to leave at that time. I do not agree with WVL that she resigned of her own free will to take up new employment, although there was the potential for new employment at that time.

[78] Ms Row did not acquiesce in the breach by WVL by staying on to work for up to four days after 24 April 2014 as she needed time to pack her belongings up.

Conclusion on constructive dismissal

[79] WVL constructively dismissed Ms Row.

Was Ms Row unjustifiably disadvantaged in her employment?

[80] WVL's actions in Ms Row's cottage could also been seen as an unjustifiable action causing disadvantage to Ms Row. However, she made this claim in the alternative and I do not need to consider it.

Remedies*Wage arrears?*

[81] At the investigation meeting, Mr Thompson said that because of the lack of time and wages records it was not possible for Ms Row to tell whether she had been appropriately paid. Ms Row and WVL have supplied records of payments since the

investigation meeting and I have examined them to check whether Ms Row has been paid appropriately.

[82] Mr and Mrs Row submit that they have appropriately paid Ms Row and that they paid her paid for 20-23 April 2014, the time she did not work. At the investigation meeting they said that they paid cash into her bank account for that period before they left the farm on 24 April 2014 in order to ensure she stayed on to work while they were away.

[83] Mr Thompson submitted, after the investigation meeting, that in the absence of proper time and wages records I should apply s 132 of the Act because WVL's failure to keep such records prejudiced Ms Row's ability to bring an accurate claim for unpaid wages.

[84] Ms Sharma objected to this claim being raised so late in the piece, and I agree it was inappropriate.

[85] If a claim had been made under s 131 of the Act for wage arrears, s 132 of the Act would have allowed me to accept as proved all claims made by Ms Row in respect of her wages, unless WVL proved those claims were incorrect.

[86] However, no claim for unpaid wages was made before the investigation meeting. Therefore, it is not appropriate for me to use s 132 of the Act to find Ms Row is owed anything by WVL.

Wages lost due to unjustified dismissal

[87] Ms Row claims 5 weeks wages, which would have taken her to the end of the season at the end of May 2014. WVL submits that Ms Row is not due any lost wages. It submits that she did not adequately mitigate her loss.

[88] Mrs Row says she made enquiries of a skydiving business at Fox Glacier and gave indirect evidence of him telling her that the company had offered Ms Row a job, which she had not accepted.

[89] Ms Row's evidence at the investigation meeting was that there had been the possibility of a job with the skydiving business but ultimately they did not want to employ her.

[90] After the investigation meeting, I wrote to the director and chief executive officer of that business and asked him to submit a sworn written statement. I received the statement on 19 May 2016:

In January 2014, Tessa Row approached our company looking for a position as a Manifestor/Ground Crew person. At this time Ms Row spent a few days on site, assessing the operation to see if the position was to her liking. Following this assessment, a verbal offer was made to Ms Row, subject to successful completion of pre-employment tests ...

Ms Row was not cleared during one test and was given the opportunity to return in three weeks to try again. At the end of this period, Ms Row declined to complete the testing and the employment procedure was terminated. ...

[91] For a reason known only to Ms Row she chose not resubmit to the test. In addition, there is no objective evidence of any other efforts to obtain new employment after her dismissal. In the few weeks for which she seeks lost wages, Ms Row did not adequately mitigate her loss. I decline to award any lost wages.

Compensation

[92] Ms Row claims a total of \$20,000.00 for humiliation, loss of dignity and injury to her feelings.

[93] I have found that Mrs Row's text of 19 April 2014 was an unjustified disadvantage. It contained threats to put Ms Row's belongings out of her cottage and to put her horse onto the road. Ms Row says she was hurt by the text, which was horrible to receive. She felt it was unfair and was convinced she could not have driven back safely. The threat to put her horse on the road was very distressing and she believed at the time that WVL would make good its threats.

[94] Ms Row also says that further communication by phone also made her upset and embarrassed because she felt Mr and Mrs Row were not able to discuss the situation calmly and reasonably with her.

[95] Ms Row also says that when Mrs Row came into her home while she was in the shower and started talking to her about work issues she was mortified and felt vulnerable and was very uncomfortable. She felt the situation was uncomfortable, embarrassing and belittling.

[96] Ms Row also gave evidence about being scared during and after the confrontation in her cottage. She gave verbal evidence at the investigation meeting of the effect on her of what Mr Row admitted saying to her.

[97] Subject to contribution, I consider that a reasonable amount of compensation for WVL to pay Ms Row is \$7,000.00.

Contribution

[98] Section 124 of the Act requires me to consider whether Ms Row contributed to the situation giving rise to her personal grievances.

[99] I consider she contributed to the situation leading to the unjustified disadvantage. She wrote that if her father did not like her taking a day off on 20 April 2014, he could fire her. She drank a beer before ringing WVL to tell them she thought the roads were too unsafe to drive on. She did that knowing that she was due back at work early the next morning and believing road conditions remained dangerous. She insisted on taking leave that she was not entitled to as of right. She had not worked for 6 months and so was not entitled to sick leave or annual leave. The relationship she bore to the deceased was a very distant one and one not covered by her employment agreement or by the s 67 of the Holidays Act 2003 definition of the categories of people for which an employer must grant such leave. She contributed significantly to the fact that Mrs Row said she would be summarily dismissed if she did not return to work the next day.

[100] The other aspect of WVL's unjustified action causing disadvantage to Ms Row was the threat about eviction from the cottage and how her goods and horse would be treated. I do not consider Ms Row contributed in any way to the threat to put her horse and her belongings out.

[101] Despite the heated nature of the exchange in the cottage going both ways I do not consider Ms Row contributed to the situation leading to her dismissal in a way that should be reflected in reducing the remedy. It is impossible to know who picked up an object first, whether it was Ms or Mrs Row. Nothing Ms Row could have said invited the comment that Mr Row made and the level of anger and poor judgment he demonstrated in saying it.

[102] Considering contribution, I reduce Ms Row's compensation to \$4,000.00.

Costs

[103] Costs are reserved. Considerations I am unaware of aside, such as Calderbank offers, the unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[104] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500.00. The meeting took most of a day.

[105] Failing agreement being reached about costs the party claiming costs has 28 days after the issue of this determination to lodge and serve submissions as to costs and the other party has 14 days to lodge and serve submissions in reply. Submissions should cover any factors claimed to reduce or increase the daily tariff.

Christine Hickey
Member of the Employment Relations Authority