

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 34  
5379611

BETWEEN

MELISSA SPENCE  
Applicant

A N D

LAKE OHAU HOLDINGS  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Anna Oberndorfer, representative for the Applicant  
Tim Jackson, representative for the Respondent

Investigation meeting: 24 October 2012 at Timaru

Submissions Received In writing from the Applicant on the day  
In writing from Respondent on the day

Date of Determination: 14 February 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Melissa Spence was unjustifiably disadvantaged and unjustifiably dismissed.**
- B. Lake Ohau Holdings Limited must pay Melissa Spence \$7,500.00 in compensation.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Melissa Spence was employed by Lake Ohau Holdings Ltd to work as a cook at the Musterer's Hut Café in Twizel with a guaranteed 15 hours of work per week. She began work on 24 August 2010.

[2] The business is subject to seasonal fluctuations in demand. Summer is its busiest period and it is quieter in winter. On 16 February 2012 Ms Spence approached Mrs Schaar to clarify how many hours a week she could expect coming up since the hours she had been working over the summer were decreasing. Mrs Schaar told Ms Spence that she was difficult to work with when she was under pressure. She told Ms Spence that other staff had said that they were reluctant to work with her.

[3] On 19 February 2012 Mrs Schaar asked Ms Spence to come to her office at 4 p.m. for a private meeting. At that meeting Mrs Schaar told Ms Spence that Lake Ohau Holdings had been advised by its accountant that it could not continue to sustain its current wage costs. She told Ms Spence that she regretted that she would have to make some cuts in staff and considered that Ms Spence's employment would have to end. Mrs Schaar told Ms Spence that she could ask her about anything in relation to her redundancy.

[4] Ms Spence's employment agreement provided that in the case of redundancy she would be given two weeks notice. Mrs Schaar offered Ms Spence six weeks notice and then suggested that she may wish to have seven weeks notice which would bring her last day of employment up to the end of the school term. Ms Spence declined and accepted the six weeks notice.

[5] The following day Mrs Schaar gave Ms Spence written notice of her redundancy by way of a letter:

*After analysing the trading for The Musterers Hut over the past 12 months, it has become clear that in order for this business to succeed I have to make some very difficult decisions. As part of that it has been necessary to review the level of staff I am employing.*

*Therefore it is with regret that I am informing you that I am terminating your employment with The Musterer's Hut Café and Gift Shop.*

*Your final day of work will be 31st March 2012.*

*I have been pleased with the work you have accomplished during your time at The Musterer's Hut Café, and I wish you all the best for your future endeavours.*

[6] Ms Spence continued working her shifts for the next four weeks. She was asked to fill in for another employee for the breakfast and lunch shift on Sunday

18 March. Mrs Schaar and Carla McKenzie worked *out front*. Ms Spence worked in the kitchen as the cook.

[7] At around 12 noon the breakfast rush had finished. Ms Spence had just prepared two chickens wraps which were the first of the lunch orders. She took the opportunity to eat some lunch. Her shift was due to finish in approximately two and a half hours. She was in the kitchen when Mr Pieter Schaar came in. Mr Schaar and Ms Spence's evidence of what he said differs. However, it is agreed that Mr Schaar asked or directed Ms Spence to finish working and leave immediately.

[8] Ms Spence asked why she had to leave. Mr Schaar told Ms Spence that she should go home and that they would sort out any money that was owing to her to the end of her notice period of 31 March 2012. It is highly likely that both Ms Spence and Mr Schaar were speaking to one another with raised voices.

[9] Mrs Schaar came into the kitchen. Ms Spence then asked Mrs Schaar why she was being sent home. Ms Spence walked towards Mrs Schaar whilst she was asking this question. Mrs Schaar put out both of her hands and pushed Ms Spence backwards with her hands on the top of Ms Spence's arms.

[10] There is a conflict of evidence about what happened next. Ms Spence says that she reacted by pushing back. Mr and Mrs Schaar say that Ms Spence punched Mrs Schaar on the shoulder.

[11] Ms Spence left the kitchen and went to the gift shop where she called her husband. She told him that she had been assaulted and *suddenly fired in the middle of my shift ... I just told my husband to come because I had been abused and needed help.*

[12] Randy Wadman, Ms Spence's husband arrived a few minutes later. Both Mr Wadman and Mrs Schaar say that they called the Police. By the time the Police arrived Ms Spence was waiting outside the premises. Ms Spence never returned to work at the Musterer's Hut Café.

[13] Ms Spence claims that she was unjustifiably dismissed, unjustifiably disadvantaged and that Lake Ohau Holdings breached its duty of good faith. She claims remedies of lost wages, compensation for humiliation, loss of dignity and injury to her feelings and legal costs.

[14] At the investigation meeting Ms Spence also said she was seeking the payment of a penalty for Lake Ohau Holdings' breach of its duty of good faith to her. The penalty had not been claimed previously. I have not considered the imposition of a penalty as it was unfair to expect Lake Ohau Holdings to answer the claim for a penalty at such short notice.

[15] Lake Ohau Holdings' position is that Ms Spence was dismissed in a genuine redundancy through a fair process and that it was within its rights under her contract to ask her to leave on 18 March 2012 and be paid in lieu of working out her notice period. Mrs Schaar denies having assaulted Ms Spence except to the extent that she touched her in self-defence.

[16] Lake Ohau Holdings counter-claims that Ms Spence's behaviour on 18 March 2012 caused it to close the café early and therefore to lose revenue. Ms Spence denies that she is responsible for any loss in revenue and says that Lake Ohau Holdings is unable to prove what its takings may have been that day if it had remained open.

### **Issues**

[17] The issues for the Authority's determination are whether:

- (a) Ms Spence was made lawfully redundant or was unjustifiably dismissed -
  - (i) was there a genuine redundancy?
  - (ii) was the process fair?
  - (iii) did Lake Ohau Holdings breach its duty of good faith to Ms Spence?
- (b) Ms Spence was unjustifiably dismissed by being sent home on 18 March 2012; and
- (c) Ms Spence was unjustifiably disadvantaged by being assaulted by Mrs Schaar; and
- (d) Ms Spence is entitled to any monetary remedies;
- (e) Ms Spence is liable for Lake Ohau Holdings loss of profit;

(f) costs are reserved.

## Determination

Was there a genuine redundancy?

[18] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>1</sup> clarified that:

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.*

[19] When assessing an employer's decision to make an employee redundant, historically the approach of the Authority and the Court has been to consider two factors; the genuineness of the redundancy and whether the redundancy was carried out in a procedurally fair way. That approach was endorsed relatively recently in *Simpsons Farms Ltd v Aberhart*<sup>2</sup> where Colgan CJ noted that:

*I do not consider that the recent statutory changes were intended to revisit long standing principle about substantive justification for redundancy exemplified by judgements such as Hale...*

*So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make...*<sup>3</sup>

[20] As with any allegation of unjustified dismissal, the employer's actions, and how it acted, needed to be what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred<sup>4</sup>.

[21] Ms Spence says that the advice about the necessity to reduce staff wage costs was given in September yet Mrs Schaar did not approach Ms Spence about redundancy until February 2012. Ms Spence submits that it was more than a coincidence that she was dismissed by way of a claimed redundancy within one or two days after she had been told by Mrs Schaar that some staff found her moody and difficult to work with. Ms Spence submits that Lake Ohau Holdings had mixed

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<sup>1</sup> (1990) ERNZ Sel Cas 1024

<sup>2</sup> [2006] ERNZ 825. Although this case was decided under the previous 103A test – the “would” test.

<sup>3</sup> Above 2, page 842

<sup>4</sup> Section 103A Employment Relations Act 2000

motives for deciding to make her redundant, which means that it was not a genuine redundancy.

[22] Lake Ohau Holdings submits that it had sound reasons for reducing its number of staff based on what its accountant had suggested. Tony McCleary, the company's accountant, advised Mrs Schaar in September 2011 that the cost of staff wages was too high and the business was probably over-staffed, especially in the winter months. Mrs Schaar says that was the reason that she decided to make Ms Spence redundant.

[23] Mr and Mrs Schaar both say that over the summer they discussed the possibility of making Ms Spence and the other employee redundant. Mrs Schaar denies that the decision to make Ms Spence redundant was a convenient way to *solve staff gripes*.

[24] Mrs Schaar says that she had also intended to make another employee redundant but by the time she needed to communicate her decisions about redundancy that other employee had resigned anyway. Therefore, Ms Spence was the only employee made redundant.

[25] Mrs Schaar said she considered the roles that would need to be filled over the winter months. She concluded the full-time cook role was necessary as the full-time cook did the ordering and discussed menus with her. Also a full-time cook was needed over winter, but if Mrs Schaar increased her own hours the business would not need a part-time cook as well.

[26] For an employee to be made redundant requires her position to become superfluous to the business. Clearly the position of cook was never going to be superfluous to a café. However, Ms McKenzie was the full-time cook and I accept that the business did not need a full-time and a part-time cook during its quieter period over the winter months. Once a *position* is identified as being superfluous the employer must consider whether an employee's employment might need to be terminated, and then to identify which employee may need to be made redundant.

[27] Whilst Mr McCleary's advice that staff wages needed to be reduced was given in September 2011 his advice was particularly about staff costs in the winter months. During the winter of 2011 the business had made a loss.

[28] Mrs Schaar says that the busiest time for the business is from late December to the end of January. Despite Mr McCleary's advice in September she did not consider that she needed to address staff wage costs until the busiest period had finished.

[29] It is understandable that Mrs Schaar wished to retain her staff over the busier summer months. However, the genuineness of needing to save on staff costs does not make Ms Spence's dismissal on the grounds of redundancy, without more, justified.

[30] If Lake Ohau Holdings had mixed motives for choosing Ms Spence personally as the person who had to leave, rather than making a decision that the position of part-time cook was superfluous, the dismissal may not have been a genuine redundancy. There is a lack of evidence that the process of deciding to make Ms Spence was carried out objectively and fairly; there is no paper-trail for example. However, I acknowledge that Lake Ohau Holdings is a small business and would not necessarily have the kinds of documentation about the decision-making process that larger organisations might reasonably be expected to have.

[31] In light of the fact that Lake Ohau Holdings was proposing to make Ms Spence redundant it is unfortunate that Mrs Schaar felt it necessary to raise issues about Ms Spence's ability to work in harmony with other staff three days before she told Ms Spence of her proposed redundancy. That muddied the waters and led Ms Spence to consider that the real reason she was being let go was her employer's concern about her relationships with other staff.

[32] However, in this case I give Lake Ohau Holdings the benefit of the doubt. I am satisfied that Mrs Schaar had genuine business reasons for making Ms Spence redundant. But I also need to consider whether the decision to make Ms Spence redundant was made fairly.

Was the process fair? Did Lake Ohau Holdings breach its duty of good faith to Ms Spence?

[33] Lake Ohau Holdings says that there was adequate consultation with Ms Spence, although the period between raising the prospect of her redundancy and giving her a letter confirming her redundancy was short.

[34] Lake Ohau Holdings says that it acted reasonably in that it offered Ms Spence up to seven weeks of notice instead of the contractual period of two weeks.

[35] Section 103A(3) sets out the minimum considerations of fairness the Authority must consider when applying the test for justification of dismissal. The wording of section 103A(3) does not make it clear that the procedural considerations must be taken into account when considering whether a dismissal is justified on the grounds of redundancy. However, they offer a guide to what constitutes a fair process. The Employment Court has concluded that *the Authority and the Court should try to give a sensible interpretation to subs (3)*<sup>5</sup>.

[36] The s.103A(3) requirements are whether the employer:

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

[37] Section 103A(5) says that the Authority may not determine a dismissal to be unjustifiable solely because of defects in the process of dismissal if the defects were minor and did not result in the employee being treated unfairly.

[38] The process used by Lake Ohau Holdings in deciding to dismiss Ms Spence on the grounds of redundancy was inadequate. I do not accept that there was any consultation with Ms Spence about the proposal to make her redundant. In the meeting on 19 February 2012 Ms Spence was presented orally with the decision Mrs Schaar had already made. I do not accept that Mrs Schaar telling Ms Spence that she could ask her about anything to do with the redundancy amounts to consultation. The decision had been made before the meeting. The letter dated 20 February 2012 was confirmation of the decision to make Ms Spence redundant.

[39] Section 4(1A)(c) of the Act requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on an employee's continuation of employment:

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<sup>5</sup> *Angus and McKean v Ports of Auckland Limited* [2011] NZEmpC 160, at paragraph 52. Although this case was not a redundancy case.

- to provide the employee with access to information relevant to the continuation of employment, about the decision, and
- an opportunity for the employee to comment on the information before a decision is made.

[40] Ms Spence was not given access to information about the proposal to make her redundant, such as Mr McCleary's advice, and she was not given a reasonable opportunity to comment on the information before a decision was made. Therefore Lake Ohau Holdings breached its duty of good faith under s.4(1A)(c) of the Act.

[41] Clause 14(c)(i) of Ms Spence's employment agreement provides that in the event of a proposed redundancy:

*...the Employer shall, where practicable, consult with those employees affected ...*

[42] Lake Ohau Holdings also breached its obligation under clause 14 of Ms Spence's employment agreement to consult with her *where practicable*. Lake Ohau Holdings is a small business but the requirement to consult with Ms Spence did not require any greater or different resources than it had. Mrs Schaar could have taken professional employment law advice on the process for making staff redundant in the period between September 2011 and February 2012. However, in the main what was required was taking more time over the process and considering any feedback from Ms Spence with an open mind. I consider that it was practicable for Lake Ohau Holdings to consult with Ms Spence but that it did not do so.

[43] The fact that Lake Ohau Holdings offered Ms Spence six weeks notice of the termination of her employment, rather than the contractually required two weeks, does not compensate for the basic procedural failures that affected the decision to make her redundant.

[44] The lack of a fair process which would have allowed Ms Spence to comment and give feedback to her employer on her proposed redundancy means the decision to make Ms Spence redundant was not one a fair and reasonable employer could have made in all the circumstances at the time.

[45] However, I consider that even had Lake Ohau Holdings consulted Ms Spence about options open to it to save on staff costs and overall used a fairer process the

outcome of Ms Spence being made redundant was highly likely. Ms Spence was the part-time cook. Winter was a quieter period and the business did not need a full-time and a part-time cook over winter. Therefore, although Lake Ohau Holdings used a less than adequate process to decide to make Ms Spence redundant it is likely to have made her redundant anyway even if it had used a fairer process.

Was Ms Spence unjustifiably dismissed by being sent home on 18 March 2012?

[46] The full Court of the Employment Court in *Angus & McKean v. Ports of Auckland Ltd*<sup>6</sup> held that failure to meet all four tests set out under section 103A(3) would result in a dismissal being unjustified. The same considerations apply to an action which disadvantages an employee.

[47] Lake Ohau Holdings submits that its decision to send Ms Spence home and not require her to work the balance of her notice period was a reasonable one in all the circumstances at the time. The circumstances included the fact that it was a Sunday so Lake Ohau Holdings was unable to obtain any legal advice that day about how to deal with its concerns about Ms Spence's work.

[48] Mrs Schaar says that she was concerned that Ms Spence had been rude to Ms McKenzie on 18 March 2012. She also believed that Ms Spence was deliberately working slowly because she was so annoyed at having been made redundant and wanted to get back at her employer.

[49] Lake Ohau Holdings submits that it was entitled to ask Ms Spence to stop working and not to work out the remainder of her notice period. Clause 14(c)(ii) of Ms Spence's individual employment agreement allowed Lake Ohau Holdings to elect to pay Ms Spence her notice period in lieu of her working out her notice period. Lake Ohau Holdings says that in all the circumstances it was entitled to change its mind and to decide to stop Ms Spence working until 31 March 2012.

[50] Generally speaking a dismissal occurs on the day that the employment ceases<sup>7</sup>. Ms Spence was working although she was on notice that her employment would cease on 31 March 2012. Therefore, the dismissal by way of redundancy was due to occur on 31 March 2012.

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<sup>6</sup> [2011] NZEmpC 160.

<sup>7</sup> *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413, at 418

[51] On 18 March 2012 Mr and Mrs Schaar told Ms Spence that she must leave work in the middle of her shift. She asked why but she was not given all the reasons that were later contained in the Statement in Reply or relied on in the investigation meeting.

[52] The decision to send Ms Spence home and prevent her from carrying on working out her notice period was a summary dismissal because although she was on notice that her employment was to end it was not due to end until 31 March 2012<sup>8</sup>.

[53] None of the four procedural tests set out in s.103A(3) were met:

- Lake Ohau Holdings did not fully investigate its allegation that Ms Spence was deliberately working slowly in order to disadvantage it. For example, Lake Ohau Holdings did not ask Ms Spence why her service was slower than usual that day or whether she had spoken rudely to Ms McKenzie. Lake Ohau Holdings did not fully inform Ms Spence of the allegations against her before deciding to send her home in the middle of her shift;
- Lake Ohau Holdings did not give Ms Spence a reasonable opportunity to respond to its concerns;
- It follows that because Lake Ohau Holdings' concerns were not raised with Ms Spence and she had no opportunity to respond to them that her explanation could not have been taken into account by Mr and Mrs Schaar before they reached the decision to send her home;

[54] I have taken into account that Lake Ohau Holdings is a small business with relatively few employees.

[55] The decision to send Ms Spence home and prevent her from carrying on working out her notice period was not one a fair and reasonable employer could have made in all the circumstances at the time and so was unjustified.

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<sup>8</sup> *GFW AgriProducts Ltd v Gibson* [1995] 2 ERNZ 323 at 329. The Court of Appeal decided that it is a mixed question of fact and law when a contract of employment comes to an end and payment in lieu of notice is equivocal.

Was Ms Spence unjustifiably disadvantaged by being assaulted by Mrs Schaar?

[56] In the investigation meeting Mrs Schaar said she pushed Ms Spence backwards with her two hands in front of Ms Spence's shoulders. She says she did so because she was afraid that Ms Spence was going to assault her. Mrs Schaar says that when she pushed Ms Spence backwards Ms Spence responded by punching her.

[57] Senior Constable Les Andrew's report on the incident states that Mrs Schaar said:

*Melissa became confrontational and said she would not leave I asked her four or five times to leave she went to grab the phone I grabbed the top of her arms and started to push her out the back door she swung at me and hit me in the shoulder...*

[58] The claim I need to determine is whether Ms Spence was unjustifiably disadvantaged in her employment when Mrs Schaar grabbed and pushed her. I do not have to decide at this point whether or not Ms Spence reacted by hitting Mrs Schaar.

[59] In the absence of justification such as self defence, a physical assault on an employee by an employer must always be an unfair action. In this case, I do not accept that Mrs Schaar's perception that Ms Spence was moving towards her to assault her excuses Mrs Schaar in instigating hostile physical conduct. I consider it more likely that Mrs Schaar was frustrated and angry that Ms Spence would not leave and moved to push her out of the café because of that and not because she was afraid Ms Spence would assault her. Mrs Schaar had other options, such as calling the police earlier to assist her to eject Ms Spence from the premises.

[60] I consider that Mrs Schaar's action was not what a fair and reasonable employer could have done in all the circumstances and so was unjustifiable. I also consider that Mrs Schaar's action was disadvantageous to Ms Spence.

Is Ms Spence liable to Lake Ohau Holdings for its loss of profit?

[61] Lake Ohau Holdings says once Ms Spence had left and as a result of her behaviour on 18 March 2012 it had to close the café and refund money to the customers that were present at that time.

[62] Both Mrs Schaar and Randy Wadman, Ms Spence's husband, called the police to the café. Lake Ohau Holdings says that was necessary because Ms Spence would

not leave the premises and was being loud and disruptive to the business. It says that the events escalated and culminated in the police being called and advising Ms Spence to go home purely because Ms Spence would not leave when she had been told to do so. Once Ms Spence and Senior Constable Andrew had left Mrs Schaar says that she decided to shut the café because:

*Every one was incredibly upset and distraught and I didn't feel I could ask Carla to keep working*

[63] Lake Ohau Holdings says that there is a sufficient link between Ms Spence's behaviour in not leaving the premises and the loss suffered by Lake Ohau Holdings to make Ms Spence liable to reimburse her former employer for the loss.

[64] Ms Spence says that the decision to shut the café for the rest of the day was solely that of Lake Ohau Holdings and not one that she had any influence over. She does not consider that she is liable for any financial loss consequent on Lake Ohau Holdings' decision to close the café.

[65] I have decided that Lake Ohau Holdings' actions on 18 March 2012 were such as to unjustifiably disadvantage Ms Spence and amounted to her unjustified dismissal. Therefore Ms Spence should not be liable for any loss of profit that flowed from Lake Ohau Holdings' actions.

[66] In addition, I consider that the decision to shut the café for the remainder of the day was not one that inevitably followed from the events between the Schaars and Ms Spence that day. There may have been circumstances in which such a decision was inevitable, such as if Ms Spence had damaged any vital café or cooking equipment or supplies, or injured Mrs Schaar so much that she was incapacitated. However, I do not consider that the circumstances that led to the police being called and any disruption caused by those events led inevitably to a decision that the café could not operate for the next few hours. The Schaars could have decided to keep operating for the remainder of the day as usual, but they decided not to.

[67] I dismiss the counter-claim. Ms Spence did not breach any term of her employment agreement leading to the café's loss. Ms Spence is not liable to reimburse Lake Ohau Holdings for any financial loss consequent on its closing the café on 18 March 2012.

Is Ms Spence is entitled to any monetary remedies?

*Lost remuneration*

[68] Ms Spence was paid until 31 March 2012. It was her evidence that her dismissal meant that she and her family left Twizel sooner than they had intended to. She has claimed for 6 weeks lost remuneration until she got her first job in Canterbury.

[69] However, I consider that Ms Spence would have finished working for Lake Ohau Holdings on 31 March 2012 as a result of redundancy. Although she was effectively summarily dismissed on 18 March 2012 by being sent home she was still paid up to 31 March 2012. Therefore, she has not lost any remuneration as a result of the dismissal on 18 March 2012 as she was due to finish work, because of her redundancy on 31 March 2012 anyway.

*Compensation*

[70] Ms Spence has also applied for compensation for humiliation, loss of dignity and injury to her feelings. Section 123(c)(i) gives the Authority the jurisdiction to award such compensation.

[71] Up to 18 March 2012 Ms Spence was disappointed that she had been made redundant. But the very nature of a dismissal on the grounds of redundancy is that there is no fault or blame attached to the worker. The fact that initially Lake Ohau Holdings was prepared to allow Ms Spence to work for a further six weeks underscores that she was entitled to believe that there were no serious concerns about her work. The fact that she was able to work out her notice period gave a certain dignity to her leaving her work, although she was leaving against her will.

[72] The summary decision to send Ms Spence home on 18 March 2012 and telling her not to work out the balance of her notice period took away any dignity in the process of her finishing her employment and was at the very least confusing and frustrating for Ms Spence.

[73] Ms Spence says that she was upset and angry when her son came home from school and said that Mrs Schaar's daughter had told their class that Ms Spence had hit

Mrs Schaar. She says she was *so humiliated I could not go to school to pick our child up.*

[74] She also says that she was *crushed* and:

*went through a real self-doubting period ...I couldn't eat. I lost weight, I didn't want to go out anywhere with my family.*

[75] I consider Lake Ohau Holdings should pay Ms Spence compensation of \$7,500.00. I have assessed the compensation as being for the unjustified disadvantage and the unjustified dismissal.

#### *Contribution*

[76] As part of my consideration of remedies s.124 of the Act requires me to consider the extent to which Ms Spence's behaviour contributed towards the situation that gave rise to the personal grievance.

[77] Lake Ohau Holdings submits that any remedies that Ms Spence might be entitled to should be reduced because of her *close to 100%* contribution to the situation giving rise to her personal grievance.

[78] I do not consider that Ms Spence contributed in any way to the situation leading to her unjustified dismissal by the way the redundancy decision was reached.

[79] Ms Spence was understandably upset to have been told with no warning to leave and not to come back. She was asking for an explanation and walking towards the telephone when she was grabbed and pushed backwards by Mrs Schaar. Senior Constable Andrew's advised Ms Spence that she should have left the premises when instructed to do so by Mrs Schaar as the legal occupier of the premises:

*...and once she had asked you to leave she could escort you off the property with such force as necessary.*

[80] I consider that Senior Constable Andrews may have meant that Mrs Schaar could use such *reasonable* force as necessary to escort Ms Spence from the premises.

[81] However, although that may reflect the criminal law position I do not accept that reflects the employment law position. Mrs Schaar's assault on Ms Spence was not justified by the fact that Ms Spence did not leave when Mrs Schaar instructed her

to do so. I do not consider that Ms Spence's contributed to the situation giving rise to the personal grievance insofar as it is related to the assault.

[82] I also consider that Ms Spence's failure to leave the premises when repeatedly asked to and her retaliation, or self defence, when assaulted by Mrs Schaar could not have contributed in any way to the situation leading to the personal grievance of being sent home. That is because the decision had already been made before she refused to leave.

[83] Ms Spence denies deliberately working slowly and says that things were a little slower than usual because the kitchen had not be prepared correctly for the very busy breakfast period they had that day. I do not conclude that Ms Spence was deliberately working slowly.

[84] However, Ms Spence admits that she spoke to Ms McKenzie rudely and unprofessionally on 18 March 2012. That was one of the reasons Mrs Schaar decided to send Ms Spence home. I do consider that Ms Spence contributed, although in a minor way, to the circumstances leading to the personal grievance of being unjustifiably dismissed and not able to work out her leave period. However, I do not consider that her contribution was such that it requires the remedies to be reduced.

### **Costs**

[85] The successful party is generally entitled to a reasonable contribution to its costs from the other party. I reserve my decision on the issue of costs. The parties are invited to settle the matter of costs between themselves. If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey  
Member of the Employment Relations Authority