

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 10
5556633

BETWEEN BARBARA SHAKESHAFT
 Applicant

AND ALL SEASONS PET RESORT
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Mark Nutsford, Advocate for the Applicant
 Eva Kuo, Counsel for the Respondent

Investigation Meeting: 9 November 2015

Further submissions: 23 November 2015 from the Respondent and 26
 November 2016 from the Applicant

Determination: 11 January 2016

DETERMINATION OF THE AUTHORITY

- A. Barbara Shakeshaft was unjustifiably disadvantaged and unjustifiably dismissed by All Seasons Pet Resort Limited (ASPRL).**
- B. In settlement of her personal grievance ASPRL must pay Ms Shakeshaft the following sums by no later than 31 days from the date of this determination:**
- (i) \$4608 as lost wages; and**
 - (ii) \$8500 as compensation for humiliation, loss of dignity and injury to her feelings; and**
 - (iii) \$576 as wages arrears for notice not paid to her at the end of her employment.**

- C. ASPRL must also pay Ms Shakeshaft the sum of \$3000 as a contribution to her costs of representation and a further \$71.56 in reimbursement of the fee paid to lodge her application to the Authority.**

Employment Relationship Problem

[1] Barbara Shakeshaft worked for All Seasons Pet Resort Limited (ASPRL) from 13 January to 13 April 2015. ASPRL operates a cattery and dog boarding kennel business in Drury.

[2] Ms Shakeshaft was given written notice of the end of her employment in a letter signed by ASPRL director Alan Gilder and headed “Termination of Employment Contract April 1st 2015”.

[3] Ms Shakeshaft said she was given the letter on 13 April 2015 after she had refused to sign a new employment agreement which would have confirmed a demotion from the position of supervisor to one as a kennel attendant only, on a lower pay rate with fewer hours of work each week. The agreement offered to her included a term with the heading “Fixed term contract” to run from 5 April to 10 May 2015.

[4] Mr Gilder and his mother Maureen Gilder (who was also a director of ASPRL) said Ms Shakeshaft’s employment as a supervisor was terminated by verbal notice earlier than 13 April, within a 90-day trial period, because of their concerns Ms Shakeshaft was not performing her duties adequately. Although Ms Shakeshaft had continued to work at the business until 13 April Mr Gilder and Mrs Gilder claimed her employment then ended by virtue of her own decision not to accept a new and different position as a kennel attendant and not by a decision by ASPRL to dismiss her from that position.

[5] In her application to the Authority Ms Shakeshaft alleged she was unjustifiably disadvantaged and then unjustifiably dismissed by ASPRL. She sought remedies of 13 weeks’ lost wages and \$8500 distress compensation.

Issues

[6] Issues of fact and law for determination by the Authority as a result of Ms Shakeshaft's personal grievance application, and ASPRL's response to it, were:

- (i) When did Ms Shakeshaft's employment by ASPRL end?
- (ii) Was that within the 90-day trial period or after it?
- (iii) Was the offer of a kennel attendant's position, a demotion (within existing and on-going employment) or new employment in a different position following her dismissal from a supervisor's position?
- (iv) Was the termination of Ms Shakeshaft's employment, whenever it occurred, justified?
- (v) Was Ms Shakeshaft unjustifiably disadvantaged before the end of her employment by how ASPRL had dealt with its concerns about her performance?
- (vi) If ASPRL's actions towards Ms Shakeshaft were unjustified, should she be awarded remedies of:
 - (a) Lost wages; and/or
 - (b) Compensation for humiliation, loss of dignity and injury to feelings?
- (vii) Should remedies awarded (if any) be reduced due to blameworthy conduct by Ms Shakeshaft that contributed to the situation giving rise to her grievance?
- (viii) Should either party contribute to the costs of representation of the other party?

[7] In investigating those issues I received written and oral evidence – under oath or affirmation – from Ms Shakeshaft, Mr Gilder and Mrs Gilder. Witness statements from two other former employees, lodged by ASPRL, were set aside and their contents not considered because neither attended the investigation meeting to confirm their truthfulness and answer questions about them. Mr Gilder and Mrs Gilder had lodged one joint witness statement which, although irregular and slightly awkward from an evidential point of view, formed part of the evidence given Authority investigations have some latitude not to be unduly technical.

[8] At the investigation meeting each witness present answered questions from me and then from the parties' representatives. The representatives gave closing submissions about the facts and legal issues. Arrangements were also made for ASPRL to provide additional submissions on two points – firstly on Ms Shakeshaft's evidence in support of her lost wages claim (as she produced documents in the investigation meeting about her mitigation efforts which ASPRL had not had a proper prior opportunity to consider) and secondly on whether the kennel attendant agreement offered to her was a variation of existing terms of employment or represented the start of a new (and different) employment relationship. Ms Shakeshaft had the opportunity to respond to those additional submissions.

[9] As permitted under s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has stated findings of fact and law, expressed conclusions on the issues requiring determination to dispose of the matter and specified orders made as a result.

[10] The Act requires the actions of ASPRL, in how it dealt with Ms Shakeshaft during her employment and its decision to dismiss her, to meet a defined test of justification. In determining Ms Shakeshaft's application the Authority must objectively assess whether ASPRL's actions were what a fair and reasonable employer could have done in all the circumstances at the time of those actions.¹

[11] Those obligations, in this case, included complying with the statutory provisions for ending an employee's employment under a 90-day trial period (if they were to be effective in barring Ms Shakeshaft from bringing a personal grievance for unjustified dismissal),² and acting in good faith. The good faith obligation included the requirement to give an employee access to information and an opportunity to comment on that information before making a decision that had an adverse effect on the continuation of the employee's employment.³

¹ Employment Relations Act 2000, s 103A.

² Section 67A of the Act.

³ Section 4(1A)(c) of the Act.

[12] In reaching conclusions on the issues for determination in an investigation, the Authority applies the civil standard of proof, that is the balance of probabilities or what is more likely than not to have happened.

When did Ms Shakeshaft's employment by ASPRL end?

[13] Mr Gilder, Mrs Gilder and Ms Shakeshaft all agreed Ms Shakeshaft was given written notice of the termination of her employment on the morning of 13 April 2015 although the letter had the date of 1 April in its subject heading and Mr Gilder had written "01/4/15" beside his signature.

[14] At issue was whether Ms Shakeshaft was given earlier verbal notice of the termination of her employment, and if so when. Her employment agreement, signed on 18 December 2014, had a term allowing termination of the trial period "by providing 24 hours' notice to the employee within the trial period". The term did not state the notice need be in writing, unlike the agreement's term for what was labelled "general termination" which required seven days' notice in writing to the employee. The statutory provisions on trial period do not require notice in writing. An Employment Court decision on operation of those provisions has confirmed notice given must be in accordance with the term in the agreement.⁴ In the case of ASPRL's employment agreement with Ms Shakeshaft the prospect of verbal notice was left open by the silence in the wording of the term about the form that such notice of termination during a trial period should take.

[15] Mr Gilder and Ms Gilder insisted Ms Shakeshaft was, in fact, given verbal notice of the termination of her employment as early as 23 March during a meeting held with her to discuss her performance. They also said she was given the same or a similar message in discussions that Mr Gilder had with Ms Shakeshaft on 30 March and 1 April.

[16] However, for two reasons, I have not accepted their evidence that Ms Shakeshaft got verbal notice of the termination of her employment on any of those days in the clear and unequivocal manner necessary to be effective.

⁴ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [107].

[17] Firstly their own written witness statement demonstrated (even by their own account) what they said about the future of Ms Shakeshaft's employment in discussions with her was equivocal or subject to conditions that she could meet and result in continued employment. One paragraph, for example, said Ms Shakeshaft's "dismissal was communicated to her since the meeting of 23 March [and] [w]e made her aware that the consequences of not meeting our expectations during the trial period would be dismissal".

[18] Another paragraph described a conversation with Ms Shakeshaft on 30 March when Mr Gilder was said to have "offered her another position as a kennel attendant and explained the hours and again that her previous contract would be terminating and if she wanted to keep working for us, she would need to make a decision as soon as possible".

[19] At best what Mr Gilder and Mrs Gilder reported were conversations where Ms Shakeshaft was told what *might* happen – indicating a consequence dependent on future and possible events – rather than clear notice her employment had ended or a clear statement of the date on which they had decided such a dismissal was to take effect.⁵

[20] The oral evidence from Mr Gilder and Mrs Gilder on this point, in response to questions from me and the parties' representatives, confirmed the impression formed from their written witness statement.

[21] A second reason to doubt the Gilders' evidence that Ms Shakeshaft had legally effective verbal notice of the termination of her employment from 23 March was the content of the only allegedly contemporaneous record of the meeting held that day - a document bearing the heading "Workplace Performance Assessment Minutes".

[22] ASPRL provided two documents that it referred to as minutes from meetings held with Ms Shakeshaft on 19 February and 23 March. Ms Shakeshaft had seen neither document prior to raising her grievance and did not accept either accurately reflected their discussions. The contents of those documents are best described as one

⁵ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [61].

party's file note, and point of view, rather than something that could be relied on as having been accepted by all participants at the time as truly recording or summarising the content of their conversations on those days. However the 23 March 'minute' – given that it is ASPRL's own record – was remarkable for an important omission. It made no reference to any discussion of dismissal or Ms Shakeshaft being advised of the termination of her employment, either then or a future date.

[23] The Gilders' witness statement said ASPRL's common practice was to record each meeting with each employee in a meeting minute. Taking them at their word about their practice, and assessed on the balance of probabilities, it was highly unlikely Mr Gilder and Mrs Gilder would not have recorded in such a minute that Ms Shakeshaft was given the verbal notice they have later asserted she was given in the 23 March meeting.

[24] In that light I was not persuaded they had correctly recalled such verbal notice was given on other occasions either. More likely was that Ms Shakeshaft was told such notice was a prospect should she not sign the employment agreement she was given for a lesser position on lower pay for fewer hours and for a fixed period. Being told that something might happen or be decided is quite different in its legal effect from being told – that is being notified or given notice – of a decision made. In terms of the requirements of s 103A of the Act, when called upon to justify its actions, ASPRL was not able to meet its positive obligation to provide sufficient evidence that, assessed objectively, could confirm it had provided such verbal notice on the dates or times alleged.

[25] As a result I concluded Ms Shakeshaft got no proper and legally effective notice of the termination of her employment until she was given the letter on 13 April. The letter, although dated 1 April, was – according to Mr Gilder's oral evidence – written by him on 13 April. He accepted that the "01/4/15" date he had handwritten alongside his signature might appear misleading but confirmed he had done so on 13 April, not earlier.

[26] Significantly the letter handed over on 13 April made no reference to any earlier verbal notice being given to Ms Shakeshaft. Rather the letter referred only to Ms Shakeshaft herself suggesting she might resign if she was removed from her

supervisor position. The act of termination of the employment relationship by ASPRL expressed in the letter was however unequivocal:

Please accept this letter as termination of the employment contract which you entered in agreement to on January 13th 2015. Under clause 3.3 Trial Periods we hereby exercise (*sic*) the right to terminate the contract within the 90 day period under the Employment Relations Act 2000.

Reasons for this termination are due to the lack of ability to consistently carry out expected duties to the standard which is expected. Having tried repeatedly to assist with learning and giving additional training we have come to terms that these duties are seemingly beyond your capabilities. We took the opportunity to offer you another role within our company with less duty, responsibility and relevant pay to which you have not accepted, nor completely declined.

You have stated to us in the last workplace assessment meeting we had with you on Thursday March 26th (*sic*) to review your performance that you would be looking for another job and have said that you would have to resign if the supervisor position was no longer available. Resignation from this position will not be necessary as this letter is notice of termination of the employment contract.

[27] Consequently I have concluded Ms Shakeshaft's employment relationship ended, without effective prior notice, on 13 April 2015.

Was notice of dismissal given within the 90-day trial period or after it?

[28] The employment agreement Ms Shakeshaft signed on 18 December 2014 included a 90-day trial period as allowed for by the Act. She started work at ASPRL's business premises on the morning of 13 January 2015 so her trial period ended on 12 April because that was the ninetieth day from and including her first day of work.

[29] In light of the finding about the date on which Ms Shakeshaft was actually given notice of the termination of her employment – that is 13 April – ASPRL had not complied with the statutory requirement for notice to be given before the end of the trial period.⁶ Consequently ASPRL could not rely on the statutory bar against bringing a personal grievance in respect of dismissals notified during a trial period. The dismissal – occurring after the end of the trial period without effective notice being given during the trial period – had to be done in a way that met the statutory test of justification. Because Ms Shakeshaft was dismissed after the end of the trial period

⁶ Employment Relations Act 2000, s 67B(1).

she was entitled to pursue her personal grievance to test whether ASPRL had acted justifiably in doing so.

Was the offer of a kennel attendant's position, a demotion or a new job?

[30] On 2 April Mr Gilder gave Ms Shakeshaft a proposed employment agreement to consider. It provided for employment in the position of kennel attendant on an hourly rate of \$15.75 for 24 hours a week under a fixed term from 5 April to 10 May 2015. (Her supervisor position was paid at \$18 an hour for 32 hours a week.) The document he gave her did not meet the statutory requirements for such an agreement to state the reason for the proposed fixed term.⁷

[31] In his oral evidence, in answer to a question from Ms Shakeshaft's representative, Mr Gilder said he told Ms Shakeshaft he would extend her employment beyond the fixed term she was offered as a kennel attendant if she did not find another job and wanted to keep working for ASPRL.

[32] In ASPRL's submission the proposed kennel attendant position represented the start of a new employment relationship (evidenced by a new employment agreement) because the previous employment relationship with Ms Shakeshaft as a supervisor (under the terms of her earlier employment agreement) was terminated by verbal notice on 23 March and confirmed by the offer of the kennel attendant position given to her on 2 April.

[33] It was an analysis of the situation that was neither factually nor legally correct.

[34] In her evidence about her discussion with Mr Gilder on 2 April Ms Shakeshaft said she was told the effect of being offered the kennel attendant position was that "[i]t would be finishing on one contract as a supervisor and going on to another contract he wanted me to sign for one month." She said she asked "does it mean I'm fired" and Mr Gilder replied no.

[35] ASPRL's written submissions referred to Mr Gilder having said at the Authority investigation meeting that he had told Ms Shakeshaft on 2 April: "I have to

⁷ Employment Relations Act 2000, s 66.

let you go if you do not sign the new contract”. The submission referred to Mr Gilder’s response to Ms Shakeshaft’s question about whether she was fired as being: “No, I am offering you another job”.

[36] When Ms Shakeshaft went to work on 5 April Mrs Gilder asked her to hand over her keys for the premises and Ms Shakeshaft did so. The keys were necessary for carrying out supervisor duties including opening and closing the premises. Ms Shakeshaft took the request to hand over the keys as removal of her supervisory role.

[37] On 5, 6, 7, 8 and 12 April Ms Shakeshaft carried out only kennel attendant duties while at work. On 10 April she delivered a letter to Mrs Gilder in which she declined to work under the proposed terms, said the terms had already been implemented by ASPRL and said she had advice that action was unlawful. Ms Shakeshaft’s letter asked for her former terms to be reinstated, said she would otherwise “consider resigning”, and said she hoped the situation could be remedied amicably. Mr Gilder saw the 10 April letter on 13 April and called Ms Shakeshaft to a meeting where, after a brief discussion, he gave her the letter of termination.

[38] ASPRL submitted Ms Shakeshaft’s attendance and work as a kennel attendant from 5 April indicated she had accepted, or would accept, employment in that position on the terms offered.

[39] Because Ms Shakeshaft continued to work for ASPRL throughout this period, although duties associated with the position of supervisor were removed from her, her employment relationship with ASPRL was not ended by its unilateral action. The proposed agreement for the kennel attendant position was not new employment but sought variation of the terms and conditions on which she was initially employed. The proposal was made during an employment relationship that continued unabated. While she had ample opportunity to seek advice on the proposal (and did so), the subsequent termination of her employment for refusing to accept the variation was an unjustified action.

Was the dismissal of Ms Shakeshaft justified?

[40] Ms Shakeshaft was dismissed on 13 April because she had not agreed to continuing her employment in the position of kennel attendant on lower pay, fewer

hours and for a fixed period. That conclusion was clear from the oral evidence of Mrs Gilder about part of the meeting on 13 April after Ms Shakeshaft was given the letter of dismissal. Ms Shakeshaft was in tears and Mrs Gilder told her to take the letter home and think about it. Asked in the Authority investigation what Ms Shakeshaft was supposed to think about Mrs Gilder said it was to “go through what had been offered as a kennel attendant [for the fixed period] and look for a job from there rather than be unemployed”. Asked if she thought Ms Shakeshaft would have then said that she might as well take the kennel attendant job Mrs Gilder replied: “I thought so”.

[41] Because it had already continued Ms Shakeshaft’s employment after demoting her to the kennel attendant role and the trial period had expired, ASPRL had to follow a fair process in making the decision to dismiss her of which she was notified on 13 April. There was no suggestion she had committed serious misconduct. The dismissal related to allegations about her performance in the role of supervisor, not as a kennel attendant. Although ASPRL had raised concerns with Ms Shakeshaft in performance meetings in February and March, and undertaken some additional training measures following that, her subsequent dismissal was incorrectly made in reliance on trial period provisions that had expired and because she would not accept a lesser position, on lower pay for fewer hours. It was, in all the circumstances, not what a fair and reasonable employer could have done. The dismissal was, therefore, unjustified and Ms Shakeshaft was entitled to consideration of remedies.

Prior unjustified disadvantage?

[42] Ms Shakeshaft alleged that, prior to her dismissal, she was also unjustifiably disadvantaged by how ASPRL addressed performance concerns with her.

[43] Concerns about how she was carrying out her duties were raised with Ms Shakeshaft in meetings on 19 February and 23 March. According to the minutes that Mr Gilder prepared specific items raised in February were that Ms Shakeshaft had worn a bright tee shirt to work and not a supplied shirt, had left gates open in the kennels, had left bowls in the cattery in the wrong place, made some booking errors that then required calling customers back, and had left work early twice due to a migraine and once due to a bowel disorder. Additional training was provided and by the time of the 23 March meeting Mr Gilder’s minute recorded that Ms Shakeshaft’s work in the facility had improved significantly and “she seemed to now know the

procedure through the kennels and cattery without any major issues and in good time”. However the minute noted that her “office work has not improved” and she was “still making lots of errors in bookings and administration”.

[44] Ms Shakeshaft’s evidence was that when Mr Gilder talked to her on 2 April (and gave her the proposed employment agreement for the kennel attendant role) he said “he was happy with my dog handling and customer service skills but it was just my computer skills letting me down”.

[45] At issue in the parties’ respective evidence was the extent of training provided to Ms Shakeshaft in her use of ASPRL’s computer booking system. Mr Gilder said Ms Shakeshaft was given two hours of additional training and assistance each day. Ms Shakeshaft denied that was so saying she received only five to ten minutes extra training which involved standing behind Mrs Gilder and trying to follow what she was doing on the computer. Ms Shakeshaft did accept she had poor computer use skills and had made mistakes with bookings recording the names of pets and customers. Asked in the Authority investigation Mr Gilder agreed there “appeared to be” a problem with Ms Shakeshaft hearing callers properly but said that was unavoidable in the busy reception area. There was no evidence the potential hearing issue, as a contributor to her admitted errors, was ever raised or addressed directly with Ms Shakeshaft prior to her dismissal.

[46] Overall ASPRL’s evidence did not establish that it had fairly dealt with its concerns about Ms Shakeshaft’s performance. She was not provided with full information about the basis for some concerns. Mrs Gilder, for example, said some concerns were the result of what she called “bullets from other staff members who said this or that”. Consequently Ms Shakeshaft did not have the full information about the source of the concerns in order to respond to them properly. Neither did ASPRL’s evidence sufficiently establish that it gave Ms Shakeshaft adequate training in the use of the computer booking system or an adequate opportunity to improve between 30 March – when the issue was the subject of the supposed performance assessment meeting conducted that day – and the decisions to firstly change her position (communicated on 2 April) and to dismiss her (communicated on 13 April).⁸

⁸ *Trotter v Telecom* [1993] 2 ERNZ 659, 681.

Those decisions, however, established that ASPRL had acted to her disadvantage in a way that a fair and reasonable employer could not have done in all the circumstances. However, as submitted by Ms Shakeshaft, “the priority of the disadvantage” was overridden by the subsequent circumstances of her dismissal which became her primary personal grievance. The disadvantage suffered in the handling of the performance concerns formed part of a chain of actions resulting in her dismissal and could be addressed in the remedies for that ultimate unjustified action.

Remedies

Lost wages

[47] Ms Shakeshaft’s statement of problem, lodged on 18 May 2015, sought an award of \$7488 in lost wages under s 123(1)(b) and s 128(2) of the Act, based on an hourly rate of \$18 and guaranteed weekly hours of 32 as provided by her signed employment agreement. The amount sought equated to 13 weeks’ wages being claimed as a loss resulting from her grievance. Ms Shakeshaft did, in fact, not find further work until 5 October so her actual period of being without income from employment was more than 24 weeks. She received an unemployment benefit for some of that time.

[48] In seeking the remedy of lost wages, Ms Shakeshaft was obliged to show what she had done to seek other work and income during that 13 week period (being from 14 April, if it started from her dismissal, to 13 July 2015) because:⁹

... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[49] The need for evidence of her job search and earnings in the period claimed for lost wages was discussed in the Authority’s case management conference held on 24 August. An Authority Minute issued after that call noted that a Common Bundle of Documents, to be lodged under the timetable directions by 23 September, “should include Ms Shakeshaft’s mitigation evidence in support of her lost wages claim”. The bundle lodged did not include any evidence of job search activities (such as

⁹ *Allen v Transpacific Industries Group Ltd (t/a Medismart Ltd)* AC20/09, 4 May 2009 at [78].

applications made or interviews offered and held) or of any earnings. Ms Shakeshaft's written witness statement, also lodged on 23 September, provided no evidence on the topic.

[50] At the start of the investigation meeting Ms Shakeshaft produced an account of her job search efforts following her dismissal. It provided details of job applications made for five jobs in April and May 2015, three jobs in June, one job in July, three jobs in August, and some other jobs about which she had made inquiries but were not suitable or for which she was not qualified. Most of the jobs she applied for involved working with animals although she provided evidence of one inquiry about a hairdressing job, an area of work in which she had previously had 20 years' experience.

[51] ASPRL, in supplementary written submissions, requested the Authority not to consider Ms Shakeshaft's evidence of her mitigation efforts because it did not have the opportunity to properly test it by questioning at the investigation meeting. Given the additional time ASPRL got to consider that evidence and make written submissions on it I have not accepted Ms Shakeshaft's mitigation evidence could fairly be put aside. Rather I took account of ASPRL's alternative submission (and additional evidence) about a range of other potential employers in similar pet care businesses to which Ms Shakeshaft could have applied. It said Ms Shakeshaft's evidence showed she had applied to only one of 11 such identified facilities. It also identified a further 35 businesses in the equine industry and hairdressing services to which it considered Ms Shakeshaft could have applied for work but said her evidence showed she had applied to only four of them. It submitted Ms Shakeshaft's evidence of applications made did not meet the required level of detail.

[52] ASPRL's submission set too high a threshold for reasonable endeavours by a dismissed worker to mitigate his or her loss. Its schedule of potential employers was too wide – for example including seven businesses operating 25 or more kilometres from her home. Failing to have 'door knocked' all such businesses did not amount to a failure to have made reasonable endeavours particularly because, as noted in Ms Shakeshaft's reply submission, there was no evidence any such businesses even had any employees or potential positions. Neither was there specific evidence of actual

vacant or advertised positions that were or might have been suitable and for which Ms Shakeshaft had not applied.

[53] Ms Shakeshaft's own evidence established she had made reasonable endeavours to find new employment in her chosen field of experience and interest involving pet care or animal welfare as well as at least one attempt to explore the use of earlier experience in hairdressing. While those efforts supported her claim for lost wages, some other factors also required assessment in setting the period for which the award was granted. Account must be made for what have been described as the 'contingencies of life' that might otherwise have affected Ms Shakeshaft's earnings from ASPRL in the period claimed.¹⁰ In Ms Shakeshaft's case this counter-factual analysis included the prospect that she might have resigned for a job elsewhere, she might have resigned for health reasons, or the prospect that further performance management could have resulted in her lawful dismissal later. Ms Shakeshaft's evidence was that she would have preferred to stay at the ASPRL supervisor's job, particularly because it required less travel to and from work. However, other evidence of Ms Shakeshaft making inquiries about employment elsewhere, some health problems, difficulty in her working relationship with Mrs Gilder, and the on-going issue about her computer skills established some reasonable prospect that – but for the unjustifiable dismissal – Ms Shakeshaft's employment would not have lasted through the 13 weeks claimed anyway.

[54] On that assessment I concluded an award of lost wages should be made for the period of eight weeks. On her gross weekly pay of \$576 that award totalled \$4608.

[55] ASPRL submitted that a reduction should be made in any lost wages award to account for unemployment benefit payments Ms Shakeshaft received during some or all of the period for which lost wages was awarded. Because Ms Shakeshaft was also entitled to (as explained later in this determination) a week's paid notice, the eight week period of lost wages awarded ran from 22 April. The question of whether Ms Shakeshaft, after payment of the award by ASPRL, must reimburse WINZ for any benefit payments received in that period is a matter for her to address with WINZ. It

¹⁰ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36] and [37] and *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81].

was not a matter requiring any adjustment in the amount of lost wages that ASPRL had to pay to her.

Wage arrears

[56] ASPRL paid Ms Shakeshaft for her work up to 13 April and her holiday pay entitlements however the “General Termination” clause of her employment agreement required seven days’ notice. As she was dismissed, nominally, for reasons of performance not serious misconduct but was not required to work out her notice, ASPRL should have paid her for that week of notice.¹¹ Accordingly ASPRL must pay Ms Shakeshaft a further \$576, for notice, as wages arrears under s 131 of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[57] Ms Shakeshaft’s written witness statement provided no evidence in support of her claim for \$8500 compensation under s 123(1)(c)(i) of the Act. In her oral evidence she described feeling tearful and upset by her dismissal. She attributed migraines and weight loss in the following weeks to that experience. She found it upsetting to tell family members and friends about her dismissal. She also felt humiliated that Mr Gilder’s seven year old son was present when she was dismissed on 13 April. The evidence of Mr Gilder and Mrs Gilder confirmed that Ms Shakeshaft was crying and upset during the meeting in which she was told of her dismissal.

[58] Mr Gilder’s oral evidence was that he was about to leave work on a family holiday during the school term break and his son was present at the business premises and sitting in the office with him and Mrs Gilder on the morning he met with Ms Shakeshaft for the purpose of dismissing her. Although Mr Gilder said he did not want to leave his seven year old son alone in the reception area, it was plainly inappropriate not to have made better arrangements for the news of Ms Shakeshaft’s dismissal to be communicated to her in a private and proper business setting. She began crying after being told of her dismissal and the presence of the child added to her sense of humiliation.

[59] On the basis that Ms Shakeshaft’s evidence on her distress could be accepted *in toto* without corroborating evidence, the grounds for an award of compensation

¹¹ *The Cabinet Place Limited v Kubesch* [2015] NZ EmpC 193 at [25].

were established.¹² The sum of \$8500 was an appropriate level of award under s 123(1)(c)(i) of the Act to compensate Ms Shakeshaft for loss of dignity and injury to her feelings resulting from her dismissal and how it was carried out. It was a relatively modest sum but set mindful of the need not to keep compensatory payments artificially low.¹³

Any reduction of remedies for contributing behaviour by Ms Shakeshaft?

[60] ASPRL sought a 25 per cent reduction, under s 124 of the Act, of any remedies awarded to Ms Shakeshaft due to actions by her contributing to the situation giving rise to her grievance.

[61] While Ms Shakeshaft accepted she was at fault in making mistakes in bookings and her computer skills were inadequate, the extent of that fault could not be established to the degree appropriate for a consequent reduction of remedies. Because ASPRL's evidence did not establish it had fairly carried out a proper performance improvement programme before making its decision to demote and then dismiss Ms Shakeshaft, her degree of blameworthiness (if any) for the situation giving rise to the dismissal grievance was not sufficiently clear that a reduction of remedies could fairly be imposed.

Conditions in relation to payment of remedies

[62] In the event that it was required to pay remedies ASPRL sought an order allowing it a period of one month to make arrangements to do so. The orders made at the head of this determination have accommodated that request by requiring payments to be made 31 days from the date of the determination.

Costs

[63] Having succeeded in her application Ms Shakeshaft was entitled to a contribution to her costs of representation. The usual daily rate that would presently apply for costs for a one-day investigation meeting was \$3500.¹⁴ However Ms Shakeshaft did not provide important evidence in support of her lost wages claim until she was at the investigation meeting (despite inclusion of a requirement for it being

¹² *Maharaj v Recon Professional Services Limited* [2015] NZEmpC 61 at [11].

¹³ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

¹⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

noted in the Authority's case management conference that set directions for the investigation meeting). ASPRL reasonably sought further time, and incurred further legal expense, in order to have the opportunity to make submissions on that late evidence. It was also then reasonable for Ms Shakeshaft to contribute to that additional cost for ASPRL in responding to part of her personal grievance application that would not have been necessary if that part of her evidence had been lodged earlier in accordance with the timetable directions. Mr Nutsford, properly and fairly, took responsibility for the omission and accepted a reduction in the tariff should apply to account for it. Accordingly I concluded the reasonable level of costs to be awarded to Ms Shakeshaft was \$3000. She was also entitled to have ASPRL reimburse her for the \$71.56 fee paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority