IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 6A/07
CRC 30/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	OTAGO TAXIS LIMITED Plaintiff
AND	CHRISTINA STRONG Defendant

Hearing: 18 and 19 July 2007
(Heard at Dunedin)

Appearances: Samuel Guest, Counsel and Michael Guest, Advocate for Plaintiff
Janie Kilkelly, Counsel for Defendant

Judgment: 4 September 2007

JUDGMENT OF JUDGE B S TRAVIS

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[1] The defendant claimed she was unjustifiably dismissed from her part-time position as a taxi dispatcher by the plaintiff's manager, Ms Katherine Ritchie, who, she says, ordered her off the job. Ms Ritchie claimed the defendant abandoned her job or resigned. The resolution of this conflict will determine this challenge.

[2] The Employment Relations Authority, in a determination dated 3 November 2005 (CA 143/05), resolved this conflict in favour of the defendant who had acted for herself. The defendant only sought compensation for lost wages for 3 months and an apology. The Authority observed that an apology was not a remedy that can be awarded under the Employment Relations Act 2000. The plaintiff was ordered to pay compensation for loss of wages of 12 hours per week for 13 weeks, reduced by

10 percent for contributory conduct. Leave was reserved if there were any difficulty in calculating that sum.

[3] The plaintiff challenged the determination and elected to have a full hearing of the entire matter. At that stage the amount in dispute amounted to a little more than $1,000. As Judge Couch observed in his interlocutory judgment *Otago Taxis Limited v Strong* unreported, 2 March 2007, CC 6/07, from that point on the proceedings generated an increasingly complex series of procedural and interlocutory issues which no doubt have resulted in legal expenses far in excess of the amount originally in dispute. In the course of those interlocutory applications Ms Ritchie deposed that the plaintiff was a small company with limited resources which could not "*absorb*" the cost of the defended hearing of the challenge. Judge Couch later directed the parties to further mediation, the defendant at this stage being represented by counsel. The mediation was unsuccessful. The matter then proceeded to a hearing before me, with the defendant presenting her case first.

Background

[4] The defendant commenced employment with the plaintiff in early 2003. Her hours of work were Wednesdays and Thursdays from 6pm until midnight, and Fridays and Saturdays from 6pm until finish time, which could be between 2am and 5am. There was no written employment agreement provided by the plaintiff. The defendant had in excess of 20 years' experience as a taxi dispatcher prior to commencing work with the plaintiff. In her evidence the defendant complained of confusion as to who was in charge and made adverse comments as to the way in which the plaintiff company arranged its taxi business, but these are not particularly relevant to the present dispute and need not be set out in any detail.

[5] The defendant was concerned about abuse she received from customers on the Friday and Saturday night shifts, some of whom were affected by alcohol, and the defendant said she became increasingly unhappy working these shifts. The following is the defendant's evidence of subsequent events.

The defendant's version of events

[6] The defendant and Ms Ritchie were working together on New Year's Eve 2004. The defendant was aware that a day shift worker was leaving and she asked Ms Ritchie if she could take over those day shifts and give up her Friday and Saturday night shifts. Ms Ritchie told her that she would get back to the defendant about it. The defendant then told Ms Ritchie that even if she did not get those daytime shifts, in any event she was not prepared to continue with the Friday and Saturday night shifts and that Ms Ritchie would have to get someone else to cover them. Ms Ritchie replied "*that was fine with her.*" Time then passed but Ms Ritchie made no approach to the defendant about the day shifts or cover for the two night shifts she wanted to relinquish.

[7] On Wednesday 12 January 2005, while she was working the night shift, the defendant checked her bank account and found that her pay was short by around $200. She rang Ms Ritchie at about 9.30pm, the phone initially being answered by her daughter, Jessica Ritchie. When Ms Katherine Ritchie came on to the phone the defendant thought, by the sound of her voice, she might have woken her and so she apologised but Ms Ritchie said that it was fine. The defendant referred to her short pay and Ms Ritchie responded that the defendant had not filled out a timesheet. The defendant said she had filled out a timesheet and had given it to one of the taxi drivers to hand in. Ms Ritchie responded by saying "*are you calling me a liar?*" The defendant repeated that she had sent it in and Ms Ritchie said that she would sort it out and the defendant thanked her.

[8] The defendant then asked Ms Ritchie if she had found a replacement for the defendant's weekend shifts and Ms Ritchie replied in an aggressive tone "*what are you talking about?*" The defendant reminded Ms Ritchie of their New Year's Eve conversation. After setting out again her reasons for wanting to relinquish those shifts, the defendant said she would work the Friday and Saturday nights for the next two weekends, then work just the Wednesday and Thursday nights. Ms Ritchie responded that it was short notice. The defendant responded that she thought she had given enough notice already. Ms Ritchie then yelled through the phone "*If*

you're not going to do your week end shifts you can forget about the bloody lot and just get out!" and then hung up.

[9] The defendant rang back and Ms Ritchie answered with "*what the hell do you want?*" The defendant said she did not "*think it's very mature for the boss to hang up on a staff member like that*". Ms Ritchie yelled in reply "*I told you to get out*" and hung the phone up again.

[10] Another taxi driver employed by the plaintiff who I will call Ms A, a friend of the defendant, came in and sat next to her while she carried on working in the dispatch office. About 20 minutes later Ms Ritchie came into the office, put her hands on her hips and yelled "*what are you still doing here I told you to get out!*" The defendant said in a raised voice that was "*fine*", and she wanted what was owing to her made up and put in her account. Ms Ritchie responded that she would be paying nothing and accused the defendant of not being reliable. There was an angry exchange. When another taxi driver came into the depot the defendant asked her to take her home and she left.

[11] The defendant waited the next night to see if the taxi she had booked as usual to take her to her Thursday night shift would arrive, but it did not. The defendant had not cancelled it so it was obvious to her that someone from work had cancelled it and she therefore thought she was still dismissed.

[12] The following day, Friday 14 January 2005, Barry Gow, the sole director of the plaintiff, came to her house. He told her that he was there because Ms Ritchie had sent him to "*sort out* [the defendant] *coming back to work.*" Mr Gow apologised for Ms Ritchie's behaviour and said the defendant had caught Ms Ritchie at a bad moment as she had taken some medication for a headache and the defendant had rung and woken her up. Mr Gow asked if she would return to work and what she would need to make that possible. He suggested that she take a week and then write saying what she wanted to get her job back. The defendant said an apology from Ms Ritchie would be a good start. Mr Gow replied that Ms Ritchie had been under a lot of pressure, had marital problems, and was clearing a backlog of debts. Mr Gow

left. Both the defendant and Mr Gow agreed in evidence that their meeting was amicable.

[13] On Monday 17 January the defendant received a letter from Ms Ritchie in the post, dated 15 January 2005 which read:

> …
>
> **Re: Your resignation**
>
> *I refer to our telephone discussion on Wednesday 12 January 2005, at the conclusion of which you tendered your resignation.*
>
> *On Friday 14 January 2005, the company's director, Mr Barry Gow visited you to ascertain whether the resignation stood. You advised Mr Gow that you were unsure and that you needed time to think about it. Mr Gow advised you that you could have a week to come to your decision, and he asked that you record your decision in writing.*
>
> *Please therefore ensure that you advise me of your decision no later than 5pm on Thursday 20 January 2005. If I do not receive your decision by then, I will assume that the resignation you tendered on 12 January 2005 stands.*

[14] The defendant's evidence was that she was shocked and distressed when the letter claimed she had resigned and said its account of her conversation with Mr Gow was incorrect. She wrote to Ms Ritchie on 18 January, setting out a brief account of what she said had happened, and stated unless an apology was given she would have no other alternative than to look at the matter as an unfair dismissal. She sought the balance of the monies owing to her. She also stated that she was prepared to commence a personal grievance.

Ms Ritchie's version of events

[15] Ms Ritchie replied on 26 January giving her account. Her evidence to the Court was as follows. She received the telephone call at 9.30pm and the defendant was sarcastic and aggressive from the moment Ms Ritchie answered the phone. The initial discussion was about the defendant's pay and there was an issue as to the payment of wages for lieu days. Ms Ritchie's brief of evidence largely consisted of the telephone conversations in the form of a transcript. It opened with the defendant saying in a "*sneering tone*", "*Did I wake you?*" and then dealing with the question of the pay. After that the defendant asked what Ms Ritchie was doing about Friday and

Saturday nights and then said "*I told you, I …fucking told you, I told you 3 fucking weeks ago*", to which Ms Ritchie responded, "*Please don't shout at me, and don't swear at me*". After a similar exchange Ms Ritchie said, "*Are you saying that you do not intend to work the Friday & Saturday nights of your shift?*" The defendant responded, using the same swear words, that she was not working those nights. Ms Ritchie said "*Do you not consider this as issuing short notice?*" The defendant responded "*Probably, but I fucking well told you*", to which Ms Ritchie replied "*Well if you can't be reliable with your current Shift, then you can forget about the Day Shift. I'll come in now*".

[16] Ms Ritchie said she did not swear once during the conversation but the defendant also used the words "*bloody*" and "*shit*". Ms Ritchie asked that the Court not require her to read the actual swear words used by the defendant.

[17] At the end of the conversation she said she hung up the phone and the defendant rang back immediately and asked her to make up her pay. Ms Ritchie responded that she was coming into work.

[18] Ms Ritchie came into work and when the defendant saw her the defendant gathered up her belongings and met her in the passageway. Ms Ritchie said she did not fire the defendant or give any impression that her employment was being terminated. Her brief of evidence again set out what purported to be the actual exchange between them. Ms Ritchie said she was coming to relieve the defendant. There was an exchange in which she says the defendant continued to use the foul language referred to above, to which Ms Ritchie responded that she did not want to be shouted at or spoken to in that manner. The defendant said that she would not be "*spoken to like that by any Manager*" and stated "*you couldn't manage any fucking thing.*" The defendant demanded that Ms Ritchie make up her pay and make sure it was in her account tomorrow. Ms Ritchie told the defendant that if she walked off the job she would have to wait until pay day, to which the defendant responded "*You sacked me, you sacked me on the phone.*" Ms Ritchie replied "*At no point did I fire you*" and then asked the defendant to "*Please leave the premises now.*" She said this quietly to try and calm the defendant down, as customers were walking in the door

and were within hearing. The defendant left screaming very loudly "*Make sure my bloody money is in my account tomorrow.*"

[19] After the defendant left Ms Ritchie spoke to Ms A who was sitting in the dispatch area reading a book, and asked her if she had anything further to add or anything to say. Ms A said she did not and that she would go and sit in her car. When the next dispatcher arrived at midnight Ms Ritchie went home.

[20] The next day she discussed it with Mr Gow. Ms Ritchie had no discussions with Mr Gow concerning any marital problems, stress or debt management problems nor about her own behaviour on that night. They decided a cool off period was the best way to proceed and they would wait to see whether or not the defendant turned up to her shift that evening. A taxi was dispatched to pick up the defendant to enable her to attend her shift but it came back without her. After Mr Gow visited the defendant Ms Ritchie was still unsure what the defendant's intentions were and therefore sent the letter of 15 January. She claims to have genuinely believed that the defendant had resigned. She denied using the words "*get out*" and had only asked the defendant to "*Please leave the premises now*" because she was concerned about people coming to the door. She was not sure if they were actual or potential taxi customers.

Cross-examination of the defendant

[21] The defendant was subjected to a lengthy and searching cross-examination by the plaintiff's very experienced advocate, Mr Michael Guest. She conceded her evidence contained some mistakes, for example about the level of her earnings by understating them. She also accepted that she had sued the wrong person in the Authority, but on the understanding that Ms Ritchie was her employer. She was also cross-examined at some length about the timesheets and her claim for lieu days but I did not find that her responses to these peripheral issues undermined her credibility. On the key issue of what was said on the night of 12 January, she remained unshaken. She also confirmed, as had Mr Gow in his evidence-in-chief, that nothing was said about dismissal or resignation during their meeting.

[22] She accepted that she had become annoyed during the conversation and used the word "*bloody*". She also accepted that she used words like "*crap*" and when commenting on Ms Ritchie's managerial qualities she admitted saying Ms Ritchie "*wouldn't be able to actually manage a piss-up in a brewery*." She strenuously denied using the word "fuck" in any of its forms as claimed by Ms Ritchie, but said she called her a "*fat bitch*", an appellation that even Ms Ritchie had not referred to. When this was put to Ms Ritchie she readily accepted that it had been said. From these concessions I conclude that the defendant accepted the telephone conversations did get somewhat heated and I find it is more likely than not that she did use some swear words but, for the reasons I will give, not to the extent that Ms Ritchie claimed.

Cross-examination of Ms Ritchie

[23] Ms Ritchie was subjected to an effective and thorough cross-examination by Ms Kilkelly. Her first question of Ms Ritchie was whether it was correct to say that, up until what had happened on 12 January 2005, Ms Ritchie's relationship with the defendant "*had been fine.*" Ms Ritchie responded "*I think so.*" Ms Ritchie then claimed the defendant frequently lost her temper, although she had never said that in her evidence before, but she accepted she had never been directly sworn at before by the defendant. She claimed that the defendant's use of obscene language, screaming and shouting over a payslip would not be completely out of character. She was then asked "*and that she had a fine relationship with you.*" Her response was "*No, I didn't say that either.*" As Ms Kilkelly pointed out to Ms Ritchie in cross-examination, that was precisely what her answer had been to Ms Kilkelly's first question only a few minutes earlier.

[24] This is the first, but not the only example of Ms Ritchie not making any concession about the defendant. She continued to maintain an extreme position about the defendant's conduct later calling her "*demented*" on the telephone. Ms Ritchie continued to describe the defendant as "*demented*" in response to uncomfortable cross-examination questions, a word she had not previously used in her evidence-in-chief before the Court or in the Authority. Ms Ritchie throughout continued to deny that any agreement had been reached between them on New

Year's Eve concerning the defendant's shifts. She refused to accept that the defendant had come to her house to be employed and maintained that her brother had employed the defendant. She accepted that it was a very strange thing for the defendant to have contended if it had not occurred.

[25] In Ms Ritchie's written brief of evidence, she states she asked the defendant to leave the premises because customers were walking in the door and were within hearing of what was being said. That was inconsistent with her oral evidence where she said there were only three people present, herself, the defendant, and Ms A. Ms Ritchie refused to accept that when she came to the office the defendant appeared to be sitting calmly at her dispatch desk carrying out her duties and was not throwing herself around in any "*demented*" way. She finally accepted that the defendant was sitting at her desk doing what she would have expected a dispatcher to do.

[26] Because of these matters I found, at the conclusion of Ms Ritchie's evidence, that her credibility was shaken and that she was not an entirely reliable witness.

The defendant's supporting evidence

[27] The defendant called Ms A, who both the defendant and Ms Ritchie agree was present in the dispatch office when Ms Ritchie came in on the night of 12 January. Ms A said she was not busy so she went into the office and sat down beside the defendant. She had just sat down when Ms Ritchie stormed in and immediately yelled at the defendant to "*get out.*" She could not recall exactly all that was said in the short time Ms Ritchie and the defendant yelled at each other before the defendant left, but confirmed that was the first thing Ms Ritchie said and that Ms Ritchie yelled the same thing repeatedly.

[28] Ms A's way out of the office was blocked because Ms Ritchie was standing in the doorway and Ms A felt very awkward about being there but could not leave. She had seen Ms Ritchie angry and unpleasant before but never like she was on this occasion. The defendant was also really yelling and, although she could not remember exactly what was said, it was to the effect that she was going to take some action against Ms Ritchie for firing her and they both called each other "*a bloody*

bitch". She said the defendant made some disparaging comment about Ms Ritchie's weight and that neither had previously used any bad language against the other.

[29] When the other taxi driver came in and the defendant asked her to drive her home Ms A said Ms Ritchie screamed at the defendant to "*get out*" and added "*good riddance*". Ms Ritchie then took over the defendant's dispatch work. She then turned to Ms A and said "*if you've got something to say, say it*". Because Ms A did not want anything to do with the matter she said "*No*", and went and sat in the other room until she got her next job.

[30] Ms A also confirmed there were no customers present anywhere at the time of the exchange of the defendant and Ms Ritchie in the office.

[31] Ms A claimed that in the Authority's investigation the lawyer for the plaintiff made a lot of references to the fact that she was the defendant's friend and that Ms A had convictions for dishonesty. Ms A said although she did not advertise these convictions she has made no secret of them, because she was not proud of what she had done, but has to live with it. She also claimed that she was gaining nothing from telling the Court what happened except to have her past brought up again, and to have to live with the embarrassment again. She claimed that she was not being paid and did not even have her airfares from the North Island paid for to come and give this evidence. Because she had sufficient notice of the hearing date she was able to arrange a few weeks' work in Dunedin while she was down there.

[32] Mr Michael Guest cross-examined Ms A, asserting that no one knew anything about her convictions in the Authority until she raised them. Ms A denied this and said that Mr Gow knew about the convictions at the last hearing. Mr Guest then cross-examined her at some length about those convictions and her outstanding fines. It appears there were some ten charges of theft as a servant relating to the same time and the same employer. In answers to Mr Guest she frankly admitted to having received 9 months of periodic detention, 9 months' counselling, and 9 months' supervision. She accepted without any hesitation that she was a very good friend of the defendant, had boarded with her for some time and that they went out socially together.

[33] Ms A's evidence before the Authority was put to her by Mr Guest. There she had said she was unaware of what was going on, did not remember clearly what was said and, at the time, was unaware of what was going on between Ms Ritchie and the defendant or what the argument was about.

[34] In spite of a very searching and frank cross-examination Ms A's credibility was not shaken and, notwithstanding her admitted convictions for theft as a servant, I have no reservations about her veracity. I found her to be a credible witness who gave full and frank admissions and made proper and reasonable concessions. Because Ms A voluntarily came forward to give evidence and was forced to face the embarrassment of her previous convictions, I decided, without objection from counsel, to ensure that she did not suffer any further embarrassment by directing the suppression of her name.

Witnesses for the plaintiff

[35] The plaintiff's next witness after Ms Ritchie was her daughter Jessica, who, for clarity, I will refer to only by her first name. Jessica was a full-time university student and also a part-time dispatcher for the plaintiff. She did not reside with her mother, but was present when the defendant rang. Her brief of evidence was prepared and signed on 22 September 2005, for the hearing before the Authority. In that brief she states that her recollection of the conversation between her mother and the defendant was as follows. She heard her mother say several times "*if there is a mistake with the timesheet it is no problem to sort it out*" she would "*sort it out tomorrow.*" She heard her mother state "*I don't know what you are talking about, you certainly did not discuss this with me*". She then said her mother stated "*Do you mean that you are not doing this weekend?*" and her mother asked *"Don't you think that is short notice?*" Several times her mother seemed to be trying to say something but it seemed like she could not get the opportunity. Jessica then stated:

> *What ever the reply was my mother said a couple of times "please do not speak to me like that", and "don't shout at me".*
>
> *My Mother said that she was coming in and then hung up the telephone. The telephone rang again straight away, and my mother answered it. After*

> *saying hello, she didn't say anything else straight away and she appeared to be listening to someone talk to her. Then my mother said "I am coming in to work". At that point my mother left.*

[36] In cross-examination Jessica confirmed that her mother was in the living room having a nap on the couch, when the phone rang. She was cross-examined whether there were additional things her mother may have said that she did not either hear or recall. She initially claimed that what she had quoted in her brief was meant to convey the whole of her mother's side of the conversation. Although she was only a little more than an arm's length away from her mother, she did not hear anything of what was being said on the other end of the phone. Ms Kilkelly put to her the following finding made by the Authority in its determination:

> *Jessica Ritchie told me in evidence that she did not recall everything that was said by her mother during the telephone call. Her mother telling Ms Strong to* get out *must be one of the things she is unable to recall.*

[37] Jessica said she thought the Authority was incorrect and that, to the best of her understanding, she was certain that what she had said was a complete record, although her mother may have used different words to those she had used in the quotations. When her mother's account in her brief of evidence of what took place in the telephone conversation was put to Jessica, it became clear that her mother was claiming to have said things which did not appear in Jessica's brief. Jessica also indicated that if she had remembered some of those items she would have put them in her brief.

[38] I find therefore, as did the Authority, that Jessica's recollection was not complete. Her mother had said far more than Jessica had recorded in her brief of evidence, prepared 8 months later. It is therefore possible that her mother telling the defendant to get out may have been one of the things that Jessica was unable to recall. She was adamant, however, that her mother did say that she was coming in and had said that in both telephone conversations.

[39] I find it more likely than not that Ms Ritchie did say to the defendant that she was coming in. The defendant's denial that Ms Ritchie said she was coming in was

against the defendant's own interests. If, as the defendant claimed, she had been told to get out, it was likely that this would have been followed by Ms Ritchie telling her that Ms Ritchie was coming in to take over the defendant's work as a dispatcher. On this aspect I find that the defendant was mistaken and, supported by Jessica's evidence, I find that Ms Ritchie did tell the defendant twice, during each of the conversations, that she was coming in.

[40] The plaintiff then called Mr Gow. He confirmed Ms Ritchie's evidence as to their conversation about giving the defendant time to cool off if she did not turn up for her next shift. He went to the defendant's house, where the conversation was pleasant. He says that he was there to see if she was going to return to work. Her response was that she was unsure and she needed time to think about it. They agreed that she needed at least a week and he told her that this would be fine. He then stated "*It was quite clear from our conversation that she did not believe she had been fired.*"

[41] Mr Gow's brief stated that he mentioned to the defendant that Ms Ritchie did not like being yelled at and the defendant responded by saying that she did not like being yelled at either. The conversation was civilised at all times and he left on what he believed to be good terms. He claimed that he did not apologise for Ms Ritchie's alleged behaviour as he had only talked to Ms Ritchie who had never said she had behaved badly or asked him to apologise.

[42] Mr Gow was cross-examined closely on these particular aspects. He could not point to anything in the conversation from which he could have drawn the conclusion that the defendant did not believe that she had been fired. He said his understanding that she had not been fired came from what he had been told by Ms Ritchie.

[43] In answers to questions from the Court, however, he said, for the very first time in either the Court or the Authority, that he had gained that impression because the defendant had said to him "*she hadn't been fired.*" I place no weight on this statement which was resiled from by Mr Gow as a result of supplementary questions from Ms Kilkelly, who pointed out that Mr Gow was changing what he was saying.

He then accepted that in the Authority neither he nor the defendant in the conversation had said anything about resignation or being fired. I find that in his answer to me Mr Gow was desperately trying to protect the plaintiff's position and this evidence was not to be relied on.

[44] I also find, from the answers Mr Gow gave to me, this was a very pleasant conversation, that the defendant offered him coffee and that he told the defendant Ms Ritchie was under medication and was about to go to sleep when the phone call had come through. He had the clear feeling that something had taken place between the two ladies. He accepted he said something to the effect that there had been a disagreement between the two women, that they would like her to come back to work, and he accepted that this in effect was an apology, because he was trying to be pleasant.

[45] That evidence effectively corroborates the impression the defendant got from her conversation with Mr Gow who I find was trying to act as a peacemaker between the two women and may have said things to placate each of them. It was to the plaintiff's advantage to have the defendant back with them as she was a very experienced dispatcher, who, I find, was well regarded in the taxi industry in Dunedin.

[46] The plaintiff then called three taxi drivers to rebut ancillary evidence given by the defendant as to subsequent events. The defendant gave evidence that she suffered emotionally much more than financially, because the taxi industry is very gossip orientated. She claimed that she was approached by several of the plaintiff's drivers following her dismissal, with comments that made it obvious they thought she had just walked out and left them in the lurch. She said that John Bain told her that he thought it was "*rank that you just walked out leaving them in the lurch like you did*". Mr John Forde, another driver, told her "*we thought a bit more of you than to leave like that*" and the driver she knew simply as "*Dave*" said that she was making a fool of herself taking Ms Ritchie through an employment dispute because no one would employ her knowing that.

[47] When cross-examined on this evidence she said that she had taken Mr Bain off the list of drivers to whom work would be allocated on one night because he had refused to take a particular passenger. She claimed that that would have given him some motivation against her.

[48] All three drivers denied knowing the actual circumstances of the defendant's departure from the plaintiff and claimed that they had not been told anything about the circumstances by Ms Ritchie. Mr Bain said he was not troubled by having been taken off the board and not allocated any work, because a week later the defendant was dispatching him again. He claimed to have had good will towards the defendant and wished her well in her new business. He said what she had recorded him as having said was inaccurate. What he had expressed to her was that it was a shame she was no longer with the plaintiff as she would be difficult to replace. I gained the impression that he did feel somewhat aggrieved that the plaintiff had lost a good dispatcher. That impression may have been conveyed to the defendant, although, I find, not in precisely the terms in which she described her conversation with Mr Bain.

[49] Mr Forde claimed that he did not approach the defendant showing concern and indicating his abhorrence for her dismissal from the plaintiff. He did not know whether she had resigned or was dismissed and had never heard anyone in management discuss the matter. In fact the defendant never claimed that he had shown concern and indicated abhorrence for her dismissal. These words appear to have been put to him by someone from the plaintiff. This somewhat undercut the reliability of Mr Forde's evidence. He accepted that he should not have used the word "*dismissal*". In the end he simply said he could not recall making the statement that they thought a little bit more of her than for her to have left like that. He had found her to be a very good dispatcher and he was sorry that the plaintiff had lost her.

[50] Mr David Lelliott confirmed that the defendant had told him that there was a dispute between herself and Ms Ritchie, but Ms Ritchie had never discussed the incident with him. He accepted that he had told her something to the effect that without grounds she was being pretty silly doing something like that because it is a

pretty small taxi industry in Dunedin. He believed she had walked out and accepted that he did not know otherwise. I find that his evidence is not entirely inconsistent with that of the defendant.

[51] These ancillary matters I find did not further undermine the defendant's credibility and indeed, in some respects, enhanced it by confirming some aspects of her evidence.

Finding on credibility

[52] I have not been assisted by any contemporary documents in resolving the credibility issue which must turn on the evidence given.

[53] In addition to the matters to which I have referred there was also a conflict between Mr Gow's account of what he said to the defendant and Ms Ritchie's account of his report to her after his meeting. Ms Ritchie claimed Mr Gow told her after the interview that he had discussed with the defendant whether her resignation still stood and told her that Ms Ritchie viewed her behaviour as seriously inappropriate. That is not what Mr Gow and the defendant agreed was said during the interview or subsequently what Mr Gow told the Authority or the Court. It may be, however, that Mr Gow gave Ms Ritchie an account that she wanted to hear at the time.

[54] For the reasons I have given, I prefer the evidence of the defendant on the essential elements of the two telephone conversations and the exchange in the dispatch office on the night of 12 January. I find that both the defendant and Ms Ritchie exaggerated their evidence and it is unlikely there was the yelling and screaming over the telephone that both described. If this had taken place, Jessica would have heard it. However, the evidence of the defendant as to the demeanour of Ms Ritchie when she came into the dispatch office was supported by Ms A, who I have found to be a witness of truth.

Conclusions

[55] The totality of the evidence I have accepted satisfies me that the defendant had given notice of her intention to resign from the Friday and Saturday shifts in the hope of obtaining day time shifts and Ms Ritchie had accepted that notice. That had taken place on 1 January but the defendant had not heard any more about it, particularly about the availability of the day time shifts. This finding disposes of Mr Guest's submission that her conduct relating to these shifts on 12 January amounted to repudiatory conduct.

[56] It was unfortunate that the defendant chose the evening of 12 January to raise the matter when Ms Ritchie had not been feeling well, had taken some medication, and was sleeping at the time of the defendant's phone call. This may have led to Ms Ritchie's reaction to being told that the defendant was confirming her notice about the Friday and Saturday shifts. It was also clear that the defendant was not abandoning her employment because, even on Ms Ritchie's evidence, nothing was said about the Wednesday and Thursday shifts which it was clear that the defendant was happy to continue to perform.

[57] On the issue of the timesheet it was also common ground that Ms Ritchie was going to deal with it the following day. Therefore, as Ms Kilkelly put to Ms Ritchie in cross-examination, it was totally illogical for the defendant to have behaved in a "*demented*" fashion, as Ms Ritchie described it, when it was clear that the plaintiff was going to fix the matter up. I note in this regard that Mr Gow did not say he was told by Ms Ritchie that the defendant had been acting in a "*demented*" manner. If the defendant had been acting in that manner it is more likely than not to have been something that Ms Ritchie would have told to Mr Gow. In such circumstances it is unlikely that Ms Ritchie would have been prepared to have accepted the defendant back. I find it is more likely than not that the letter the defendant wrote on 15 January, claiming that the defendant had resigned, was an attempt to protect the plaintiff against the defendant's threat of a personal grievance claim.

[58] It is also clear even from Ms Ritchie's evidence that it was in the dispatch office that she told the defendant to leave. This in itself was a sending away or a

dismissal. Further, Ms A's evidence confirms the defendant's evidence that Ms Ritchie told her repeatedly to get out.

[59] It follows from these conclusions that the defendant has discharged the burden of showing that she was dismissed. This was most probably because Ms Ritchie thought the notice she was getting was too short and that she was not prepared to continue the defendant's employment if the defendant was not prepared to work the Friday and Saturday shifts.

[60] I did not understand the plaintiff to attempt to justify what it was all the time claiming was a resignation. It therefore must follow that the dismissal was unjustified.

Remedies

[61] The defendant cross-challenged on the basis that the remedies granted by the Authority were insufficient and should be set aside and instead the following remedies be granted to the defendant:

a) Three months' wages without reduction;

b) $5,000 compensation for humiliation, loss of dignity, and hurt feelings for the fact and manner of the unjustified dismissal without reduction;

c) $70 filing fee in the Employment Relations Authority; and

d) the full costs incurred by the defendant as a result of the plaintiff's election and in relation to all interlocutory matters before the Court.

[62] The defendant's evidence as to the loss of income was that she needed to go to WINZ for support as she had a dependent child. She had received an Enterprise allowance, which allowed her to set up a small business, but her income was still having to be subsidised. Her work, other than as a taxi dispatcher for 20 years, has been bar work or waitressing, and she claimed that the dismissal has prevented her

from working in the industry that she loved. These matters were also called on to support her claim for humiliation.

[63] As to the lost earnings claim, she observed that the Authority only awarded her lost wages for the Wednesday and Thursday nights and nothing for the Fridays and Saturdays. She accepted that had she stayed with the plaintiff she would not have been working the Friday and Saturday nights after the 2 weeks' notice she gave on 12 January.

[64] I agree with her view that she would have worked the Friday and Saturday nights for those 2 weeks. The defendant is therefore entitled to an award under this head for 3 months working the Wednesday and Thursday night shifts and for two sets of Friday and Saturday night shifts. These awards should be based on the average earnings for those shifts over the 3 weeks prior to her dismissal. I reserve leave to the parties to refer the matter back to the Court if they cannot agree on the quantification of this award.

[65] Turning to the claim for distress and humiliation, the award sought is a modest one in the circumstances. The plaintiff has given compelling evidence of the distress and embarrassment she has suffered as a result of the dismissal. It caused her to leave the field she had worked in for the last 20 years and which she thoroughly enjoyed. She was obviously held in high regard by taxi drivers when she had acted as a dispatcher. The evidence supports it being awarded in its totality of $5,000.

Contributory conduct

[66] Section 124 of the Employment Relations Act 2000 requires the Court in deciding both the nature and extent of the remedies to be provided in respect of a personal grievance to:

> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[67] The Authority found that the defendant did contribute to the situation in a blameworthy way by her rude manner and swearing over the telephone to Ms Ritchie. The Authority found there was no basis for any complaint about the defendant's behaviour during the exchange at the office because she naturally became upset, angry, and critical of Ms Ritchie after she was dismissed. The Authority assessed the defendant's contribution as relatively minor in the order of 10 percent. I agree.

[68] The defendant's concession that she did use strong language from time to time has convinced me that she did use it to Ms Ritchie during the phone conversation. That would account for Ms Ritchie's response in the manner described by Jessica. It was also unfortunate and somewhat blameworthy for the defendant to have persisted on the issue of the notice over the Friday and Saturday nightshifts when the parties had already had a somewhat acrimonious discussion over who was responsible for the timesheet and the payment for days in lieu.

[69] Based largely on the evidence of Ms A, I find that the defendant's responses to Ms Ritchie in the office were to be expected and her acrimonious statements were made after she had been told to get out. These statements therefore did not contribute to the circumstances giving rise to the dismissal. For all these reasons I conclude that the awards, including the wages award, should be reduced by 10 percent, and so order. Again if there is any difficulty with the calculations, leave is reserved to refer the matter back to the Court.

Costs

[70] In a supplementary memorandum to the Court, counsel for the defendant observed that she had previously advised the Court that the costs incurred by the defendant in this matter, including interlocutories, amounted to the grant of aid by legal services of $6,650. Since then counsel for the defendant has applied to the Legal Services Agency for an extension to the grant of aid to cover the extra preparation and hearing time occasioned by the three extra witnesses for the plaintiff.

It has granted this increase of the defendant's costs to the amount of $7,200 in total. This is the amount which is claimed by the defendant in costs against the plaintiff.

[71] Mr Michael Guest, at the hearing, submitted that, whether or not there had been a grant of legal aid, the claim for total costs was too simplistic and all the costs should not be sheeted home to the unsuccessful plaintiff. He submitted that the two-thirds contribution would normally apply, although in this case costs should lie where they fall.

[72] I accept Mr Guest's submission that the normal approach approved by the trilogy of the Court of Appeal cases including *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 should apply. Considering the hearing was accommodated efficiently within one and a half days and taking into account the interlocutories in respect of which costs were reserved, two-thirds of the total of $7,200 would be an appropriate contribution towards the defendant's costs. The defendant is therefore awarded the sum of $4,795.20 which I round up to $4,800, together with the $70 filing fee awarded by the Authority.

[73] In terms of s183(2) the orders of this Court stand in place of the awards made in the Authority.

B S Travis
Judge

Judgment signed at 2.15pm on 4 September 2007