

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 572  
3095952

BETWEEN PHILLIP EVANS  
Applicant

AND MANUKA MOUNTAIN  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Jo Baguley, counsel for the Applicant  
Martin Nicholls, counsel for the Respondent

Investigation Meeting: 20 and 21 May 2021 in Kerikeri

Submissions: 26 May and 4 June 2021 from the Applicant and 31  
May 2021 from the Respondent

Determination: 21 December 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Phillip Evans was unjustifiably disadvantaged and unjustifiably dismissed.**
- B. In settlement of his personal grievance and within 28 days of the date of this determination Manuka Mountain Limited must pay \$18,000 to Mr Evans as compensation for humiliation, loss of dignity and injury to his feelings.**

**Employment Relationship Problem**

[1] Manuka Mountain Apiaries Limited (MMAL) dismissed Phillip Evans from his job as its site relations manager on 29 April 2019.

[2] At the time the company operated a honey production business based in Kerikeri, using honey from hives placed on rural properties with abundant stands of manuka throughout Northland. Mr Evans had initially worked for two months as a shed hand in the honey processing business of an associated company, Manuka Mountain Limited. He was then appointed as MMAL's field relations manager in November 2017. His job title was changed to site relations manager in late 2018.

[3] Sometime after Mr Evans was dismissed the two companies were amalgamated under the name Manuka Mountain Limited. The amalgamated company inherited any liabilities MMAL had in respect Mr Evans' employment and how it came to end. For most purposes this determination refers to the employing entity simply as Manuka Mountain.

[4] The primary purpose of Mr Evans's role was to liaise with landowners and residents of properties about the placement of Manuka Mountain bee hives on their properties. This included dealing with people who already had agreements to host Manuka Mountain hives, scouting out other suitable prospective locations, making contact with the landowners or residents and securing signed agreements for hive placement.

[5] This work occurred in a competitive environment. Other beekeepers were also seeking suitable sites for the production of high quality manuka. Manuka Mountain wished to secure access to good sites but also to ensure areas where its hives were placed were not overstocked with bees competing for a limited amount of pollen. Limiting hive numbers in an area helped maintain high productivity per hive but was sometimes at odds with the interests of landowners. As honey producers paid a fixed price for each hive placed on a property, some landowners wanted to have more hives in order to generate more revenue.

[6] Manuka Mountain dismissed Mr Evans on the grounds of serious misconduct. During a disciplinary meeting on 29 April 2019 Manuka Mountain's managing director Paul Whitehead read to Mr Evans, and later signed and handed to him, a letter headed: "Termination of your employment – dismissal without notice". The letter was dated 30 April 2019 but all witnesses, in their evidence in the Authority, agreed the meeting was held on 29 April. Manukau Mountain's field relations manager James Schmidt had

prepared the typed dismissal letter for Mr Whitehead before the meeting began. It gave this description of the reasons for Mr Evans' dismissal without notice that day:

As discussed during our meeting with you ...

- You are unable to meet requirements laid out in your job description.
- Consistently written inaccurate start and finish time on your timesheet to your benefit.
- Often hard to contact both from the landowners and the management's perspective.
- Secretly running All Terrain Solutions Ltd for the purpose of soliciting hive placements in competition with Manuka Mountain Apiaries Ltd.
- Exhibited continued dishonesty towards the management at Manuka Mountain Apiaries Ltd and in the circumstances your continued employment during a notice period would be unreasonable.

I have taken your feedback into account and have decided that it is appropriate to dismiss you without notice on the basis of your serious misconduct. This letter is formal notice that your employment is terminated as of the date of this letter.

...

As per your contract clause 21. Non-Solicitation of Clients prevents you having any contact with any of Manuka Mountain Apiaries landowners, any breach of your contract will result in legal action from Manuka Mountain Apiaries Ltd.

[7] Mr Schmidt had called in to Mr Evans' residence on 28 April and told him that Mr Whitehead wanted to talk to him the next day. Mr Schmidt did not tell Mr Evans that the meeting was of a disciplinary nature or could result in a decision to dismiss him. The meeting took place on the morning of 29 April without Mr Evans being told he could be accompanied by a representative or a support person. Once he was told of Manuka Mountain's concerns, Mr Evans was not given an opportunity to get advice before responding to those concerns.

[8] Following his dismissal Mr Evans raised a personal grievance claiming his dismissal, and how it was decided and carried out, was unjustified. He said his employer failed to fairly investigate its concerns, failed to give him a fair opportunity to respond, had treated him differently from Mr Schmidt over carrying out personal business activities, and had not identified any breach amounting to serious misconduct before dismissing him in the meeting on 29 April 2019.

[9] Manuka Mountain, in reply, said Mr Evans was given a fair opportunity to respond to its concerns, denied any disparate treatment of him and said he had engaged in activities competing with its business so it was justified in dismissing him for serious misconduct. It also said information discovered after dismissing Mr Evans, about

activities before his employment ended, supported its conclusions and should be taken into account in assessing its actions and any remedies that might be awarded to him.

### **Issues for resolution**

[10] The following issues required investigation and determination:

- (a) Was the decision of Manuka Mountain to dismiss Mr Evans, and how it reached that decision, what a fair and reasonable employer could have done in all the circumstances at the time, including consideration of:
  - Whether Manuka Mountain's actions met the procedural standards set in s 103A(3) of the Employment Relations Act 2000 (the Act);
  - Whether Manuka Mountain could have reasonably come to its conclusion that Mr Evans had committed serious misconduct; and
  - Whether Manuka Mountain treated Mr Evans differently from James Schmidt over similar concerns?
- (b) If Manuka Mountain is found to have acted unjustifiably (in disadvantaging and/or dismissing Mr Evans), what remedies should be awarded to him, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
  - Compensation for humiliation, loss of dignity and injury to his feelings?
- (c) Was there any blameworthy conduct by Mr Evans, including some not discovered until after his employment ended, that contributed to the situation giving rise to his grievance and, if so, should any remedies awarded be reduced accordingly?
- (d) If any award for reimbursement of lost wages is made, should interest be awarded on that amount?
- (e) Should either party contribute to the costs of representation of the other party?

### **The Authority's investigation**

[11] The following people provided written and oral evidence that has been considered in the Authority's investigation:

- Mr Evans;
- Mr Whitehead;

- Mr Schmidt;
- Carmel Norman, who is Manuka Mountain’s office manager and Mr Whitehead’s daughter;
- Amy Wilcox, who is Manuka Mountain’s administrative co-ordinator and attended the 29 April meeting to take notes, later preparing the only available written record of the meeting, a two-page typed document headed “Phillip Evans Dismissal meeting 29<sup>th</sup> April 2019”; and
- Simon Tomlins, a former plant manager for Manuka Mountain who had worked with Mr Evans when he first started work for the business in 2017 and gave evidence about whether Mr Evans had been given permission to take some buckets of ‘burnt honey’ from the premises.

[12] Mr Tomlins gave evidence by telephone. The other witnesses each attended the investigation meeting in person. All witnesses gave their evidence, confirming their written statements and giving further oral evidence, under oath or affirmation.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. This qualification is important in this case as the written and oral evidence given ranged widely over many events and interactions and some of the accounts and descriptions given by witnesses were vague and speculative. The evaluation of all the evidence, including relevant documents, has been made on the civil standard of what is more likely than not to have occurred, that is on the balance of probabilities. While it has all been considered carefully, only what was necessary for the findings made has been referred to specifically.

### **Relevant legal principles**

[14] In responding to a personal grievance application alleging unjustified dismissal or unjustified disadvantage, the employer must satisfy the statutory test of justification.<sup>1</sup> The test considers whether Manuka Mountain’s actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that the dismissal or other action occurred. This includes assessing whether, before dismissing Mr Evans, Manuka Mountain:

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<sup>1</sup> Employment Relations Act 2000, s 103A.

- sufficiently investigated the allegations against him;
- raised its concerns with him;
- gave him a reasonable opportunity to respond to those concerns; and
- genuinely considered any explanation he gave.

[15] Flaws in the process Manuka Mountain followed may only be determined to have made the dismissal or other actions unjustifiable if those defects were more than minor and resulted in Mr Evans being treated unfairly.<sup>2</sup>

[16] The good faith duty of employers and employees to be active and constructive in establishing and maintaining a productive employment relationship supports the long-standing principle that an employer, acting fairly, will address performance and other concerns reasonably promptly with the employee as they arise.<sup>3</sup> Otherwise, and as expressed in one Employment Court decision:<sup>4</sup>

To store them up and then to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

[17] The statutory test of justification expressly requires the assessment of the fairness and reasonableness of the employer's actions to be made on the basis of "all the circumstances at the time". For example, this considers whether the employer's actions were justified by the facts as they knew of them at the time. An employer who acted on the basis of only what it suspected might have happened, but had not sufficiently investigated its concerns and made a decision to dismiss anyway, will not have met the standard set by the test. However where misconduct by the employee that is of a truly significant nature and reasonably connected to the reasons for the dismissal is not discovered until after the dismissal, that misconduct may be taken account of in setting any remedies awarded to that employee.<sup>5</sup> Remedies may also be reduced where blameworthy conduct by the employee contributed to the situation giving rise to the employee's grievance.<sup>6</sup>

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<sup>2</sup> Employment Relations Act 2000, s 103A(5).

<sup>3</sup> Employment Relations Act 2000, s 4

<sup>4</sup> *Donaldson & Youngman t/a Law Courts Hotel v Dickson* [1994] 1 ERNZ 920 at 928.

<sup>5</sup> *Salt v Fell* 2008] NZCA 128 at [104].

<sup>6</sup> Employment Relations Act 2000, s 124.

### **Calling Mr Evans to a disciplinary meeting**

[18] Mr Schmidt said he began making inquiries in early April 2019 about two concerns regarding Mr Evans. The first arose from a report Mr Evans made to Police about a gun being discharged by a person he was talking to while visiting a remote rural site where some Manuka Mountain hives were hosted. The other concern was about the working hours Mr Evans recorded on his timesheet. Mr Schmidt compared the hours on time sheets between 13 March and 23 April 2019 against GPS records for the work car Mr Evans drove. Mr Schmidt reached the view that Mr Evans was recording hours for some times and days that he was not actually carrying out any work for Manuka Mountain.

[19] Mr Evans had made a verbal report to Police on 26 March 2019 after he left a property in the hinterland between Kaitaia and Kerikeri. Mr Evans account was that a member of the family who owned the land he was visiting was unhappy with some aspect of the company's arrangement for having hives there and had approached him when he arrived at the property. Mr Evans said the family member became "verbally abusive" and took out a firearm which he discharged into the air. On his return journey from the property to Kerikeri Mr Evans saw a Police car parked on the road side and stopped to report the incident. When Mr Evans got back to the Manuka Mountain office in Kerikeri he also told staff there what had happened.

[20] In the following days Mr Schmidt got in touch with a local Police officer about the incident. As a result of his inquiries an officer from a local Police station sent Mr Schmidt a detailed email. The officer's email said armed Police had visited the property after Mr Evans' report but found no firearm and "the suspect" denied a firearm had been presented or discharged. The email also said neighbours on a nearby property told Police they had not heard any gunshots that day. The officer's email also noted Mr Evans had waited for a beekeeper to arrive on the property before leaving and had not told the beekeeper about the incident with the family member. The officer said Mr Evans told the Police he had not called them at the time of the incident as there was no mobile phone coverage at the property but the officer understood there was excellent strength and signal there. The officer concluded his email by stating he had no doubt "a verbal altercation" had taken place but did not believe a firearm was presented or discharged.

[21] Mr Schmidt received the Police officer's email on 3 April and showed it to Mr Whitehead that day. However he did not show it to Mr Evans or ask him about what it said. Mr Evans did not know, until 29 April, that there was any doubt about his report of the 26 March incident.

[22] Mr Schmidt told Mr Whitehead about his analysis comparing Mr Evans' timesheets and what his vehicle GPS records showed of starting and finishing times. They agreed that Mr Whitehead would hold a disciplinary meeting with Mr Evans to discuss the issue. While assembling information for that meeting, including Mr Evans' timesheets and the GPS records, Mr Evans found a beehive placement contract for an entity called All Terrain Solutions Limited (ATS).

[23] Mr Schmidt said he had "accidentally printed" the ATS contract on 26 April because it came out of the office printer when he turned it on. After looking at the printed document, he also looked for and found it on Mr Evans' work laptop computer.

[24] The ATS contract was a very similar format and wording to the land lease contract Manuka Mountain completed with landowners who agreed to placement of its hives. Mr Evans name was printed in the signature section of the ATS contract as the Lessee.

[25] Mr Schmidt immediately told Mr Whitehead, who was in the office, of his discovery. During their conversation about it, they formed the view that the ATS contract, bearing Mr Evans' name as lessee, explained why some land owners had recently terminated long standing contracts and had Manuka Mountain hives removed from their properties. Mr Schmidt said "it was now obvious to me that Mr Evans [was] using Manuka Mountain customer lists to trade in competition with Manuka Mountain". He said he and Mr Whitehead then spent time over the weekend of 27 and 28 April considering the information and they concluded Mr Evans "was probably guilty of gross misconduct".

[26] Mr Schmidt and Mr Whitehead agreed to call Mr Evans to a disciplinary meeting on Monday 29 April. When Mr Schmidt conveyed that information to Mr Evans he did not tell him the purpose of the meeting. Mr Schmidt said this was because he and Mr Whitehead "did not want Mr Evans to try to cover his tracks or steal more confidential information before the meeting".

### **What happened at the meeting – an unjustified action?**

[27] Mr Evans, Mr Schmidt and Mr Whitehead each accepted the typed note prepared by Ms Wilcox as an accurate description of the 29 April meeting. Her note recorded the meeting as lasting 31 minutes.

[28] At the meeting Mr Schmidt and Mr Whitehead talked about each topic listed in the dismissal letter later given to Mr Evans, providing some more detail on each topic. These included the alleged discrepancy between time sheets and GPS records, an allegation that Mr Evans was “only doing half of the role” because he did not complete some tasks listed on his job description, saying he was difficult for landowners and the Manuka Mountain office to contact and did not turn up to meetings on time. Mr Whitehead read out the 3 April email from the Police officer about Mr Evans’ report of a firearm incident on 26 March. Mr Whitehead also referred to a previous disciplinary warning given to Mr Evans in January 2018. The warning, which Mr Evans had signed, referred to a delay in him paying back an amount used to purchase alcohol on a company account and not being honest with Mr Schmidt about arrangements to reimburse the purchase amount.

[29] At the end of each of those topics Mr Schmidt and Mr Whitehead paused to wait for a comment or response from Mr Evans. When Mr Evans did not respond, they moved to the next topic.

[30] Mr Whitehead then read out clauses in Mr Evans’ employment agreement prohibiting unauthorised use of confidential information acquired through working for the business and prohibiting him from soliciting clients for up to two years after his employment with Manuka Mountain ended. Mr Evans responded by asking: “You say I’ve gone against all that?”. Mr Whitehead is recorded as saying “yes, you have gone against some of that” and referring to Mr Evans starting his own business and using the Manuka Mountain contract. Mr Evans responded: “That’s the way you look at it”. He also said he had only completed his own business contract the previous week.

[31] At this point Mr Whitehead told Mr Evans: “We are going to terminate you today”. He read out the prepared letter of dismissal. He then said Mr Evans had an opportunity to speak. Mr Evans is recorded as saying that he could explain some of the queries about his hours and asking about Mr Schmidt’s allegation that he could not be contacted by landowners.

[32] Mr Whitehead told Mr Evans there were “too many grey areas” and he could not go on with the employment relationship. He signed the letter of dismissal and gave it to Mr Evans. Before he left the meeting Mr Evans was also given at least some of the other documents referred to, including the Police officer’s email of 3 April.

[33] Even on the most sympathetic reading of the actions of Mr Schmidt and Mr Whitehead in arranging and carrying out the 29 April disciplinary meeting, they fell well short of the statutory threshold of fairness in their treatment of Mr Evans that day. The extent to which the information they relied on that day was sufficient to establish serious misconduct, at least on what they reasonably knew or could fairly infer, is considered in more detail later in this determination.

[34] For Mr Whitehead, as clear from his oral evidence, his decision to dismiss Mr Evans was based on the firm conclusion he reached in the meeting that Mr Evans had embarked on a clandestine personal business project which competed with and undermined Manuka Mountain’s business. While both Mr Whitehead and Mr Schmidt said Mr Evans had admitted, before being dismissed that day that he was already actively competing with Manuka Mountain, no such concession on that crucial point was noted in what they said was an accurate written record of the meeting. Mr Whitehead also accepted that he had no information in his knowledge at the time of the meeting that Mr Evans had, in fact, used the ATS contract to enter into a commercial arrangement with any land owners who had hive placement leases with Manuka Mountain.

[35] Measured against the procedural steps set in s 103(3) of the Act, Manuka Mountain had not sufficiently investigated the allegations made and gained clear evidence on which it could safely rely for Mr Whitehead to dismiss Mr Evans that day.<sup>7</sup> Mr Evans’ silence in response to a number of the allegations was unfairly taken as acceptance rather than an expectation that he would get some time to consider the concern raised and respond before any final decision was made. Contrary to Manuka Mountain’s closing submissions, relying on “a long pause” after each topic as an opportunity to respond was not sufficient to meet the procedural requirements of the test of justification. This was particularly so where Mr Evans suddenly found himself in an unexpected meeting with no opportunity to seek and get any advice. In that

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<sup>7</sup> *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14 at [27].

context it could not be said that Manuka Mountain then genuinely considered any explanations he gave before making its decision because he was dismissed before getting a reasonable opportunity to consider and make any such explanations.

[36] These were more than minor defects in the process. Mr Evans was treated unfairly because he could not, in the 31 minutes that the whole meeting took, reasonably have been expected to consider and respond to the raft of allegations made. The elements regarding performance, for example, concerned details about many days and weeks that he could not fairly have been expected to recall and comment on without some time and access to his own diary or other records of his activities on various days. On their own, those points may not have been relevant, ultimately, to a decision on the serious misconduct allegation of “secretly running” his own business. They did, however, form part of an overall critique of his performance and honesty which contributed to that decision and to which he should have had a reasonable opportunity to respond before it was made.

[37] On those grounds alone Manuka Mountain’s decision, reached and declared that day was not one that a fair and reasonable employer could have made in all the circumstances at the time, if based only on what reliable or corroborated information Mr Whitehead had available to him on that day. For that reason the decision was an unjustified action and Mr Evans had a personal grievance for, at least, an unjustified disadvantage.

### **Serious misconduct – reasonably and fairly established?**

[38] The prepared dismissal letter signed and handed to Mr Evans by Mr Whitehead on 29 April set out five bulleted conclusions on his performance and conduct which were said to make it appropriate to dismiss him for serious misconduct. Each conclusion required further scrutiny to consider the factual rationale for Mr Whitehead’s belief, as expressed in the letter Mr Schmidt drafted for him, and whether it was based on reasonable enquiries providing clear evidence on which Mr Whitehead could have safely relied at the time of making his decision.

[39] The phrase “at the time”, drawn from the test set by the statute, is important in relation to each conclusion expressed in the letter. Much of Manuka Mountain’s defence of Mr Evans grievance in the Authority investigation relied on evidence or information gathered or discovered later which, it submitted, substantiated the decisions

made earlier. The effect of after discovered evidence is considered later in this determination.

*Performance concerns – stored up and not properly addressed earlier*

[40] Three of the bulleted reasons given for Mr Evans' dismissal were, on the evidence available for the Authority investigation, really performance concerns. A fair and reasonable employer could not have dismissed him, at that time and in the way that Manuka Mountain did, without having done more to address those concerns earlier.<sup>8</sup> They were instances of what, in the circumstances, amounted to storing up concerns and unfairly delivering them in one large instalment to bolster other allegations.

[41] The first was the allegation Mr Evans was unable to meet the requirements laid out in his job description. Mr Schmidt said Mr Evans did not carry out his responsibilities for registration of all beehive sites with the appropriate government agency, keeping site payments to land lessors up to date, maintaining records of contracts with land lessors, completing monthly field reports, keeping the company's site register up to date, maintaining GPS locations for all sites and keeping up to date with any other records required. Mr Schmidt said he and Ms Norman did some of those tasks themselves.

[42] However there was no evidence Mr Schmidt or Mr Whitehead had previously addressed those performance concerns in a consistent or regular way with Mr Evans. Rather, as Mr Evans said, the tasks were dealt with by him and Mr Schmidt on a day-to-day basis. If there were shortcomings in what Mr Evans did, this had occurred over an extended period and he had not had any formal performance review or improvement process put in place to address them.

[43] Manuka Mountain submitted that it had addressed performance concerns with Mr Evans at the time of issuing two formal written warnings to him – the one in January 2018 about repayment of a purchase and another in August 2018. The latter warning was for speeding while driving a company vehicle and for taking another employee to a site without approval and allowing that employee to use a chain saw without proper prior training. Neither warning concerned performance of the requirements of Mr

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<sup>8</sup> *Trotter v Telecom Corporation* [1993] 2 ERNZ 659 at 681.

Evans' job description that were identified in the 29 April letter as a reason for his dismissal.

[44] The second concern bullet-pointed in the dismissal letter referred to the accuracy of the start and finish times Mr Evans recorded on his timesheet. This was a matter of performance rather than, as Mr Schmidt and Mr Whitehead suggested, necessarily one of honesty. Mr Evans did not have a proper opportunity to address the concern in the curtailed disciplinary process. Mr Evans usually put the same start and finish time on his timesheet every day. He said this was what he was told to do when he started the job. However this did not appear to be consistent with a term in his employment agreement. It provided for a standard 40 hours' pay each week but recognised that in the honey industry's busy season more hours would be worked and in the quiet season fewer hours were required. Timesheets with actual hours worked were still required so "a running total of hours" could be kept and any "excess" hours remaining unpaid at the end of the employment could still be paid.

[45] While Mr Evans may not have complied with that expectation, the evidence of Ms Wilcox established that he would tell her or Ms Norman if he was leaving early or starting late. She was involved in payroll administration so was aware that his timesheet still showed the standard hours. If there was an issue about the accuracy of his timesheet, instances were known or obvious to his managers and those involved in payroll administration, so could have been addressed earlier.

[46] Mr Evans also did not have the opportunity to address alleged discrepancies between his timesheet and the GPS records for his work vehicle. He knew his work vehicle was GPS tracked and that information was available to the company. Some examples raised by Mr Schmidt did not really seem to need explanation. One concerned a day when Mr Evans' vehicle was shown to be stopped at his doctor's surgery in the mid-afternoon. The pay records show he took the following day as sick leave. Other examples did need some further inquiry and explanation. In his evidence Mr Evans said there were times when his vehicle may have been stopped for a long period at a landowner's property because he had travelled around the property in the landowner's vehicle to view prospective sites. On another example, about why the GPS information showed he was in Whangarei rather than at a rural site, Mr Evans said he had visited the city to meet with landowners about sites on properties they owned further north.

[47] Manuka Mountain submitted Mr Schmidt's analysis of the timesheet and GPS records established Mr Evans was "deliberately misrecording" his hours. The evidence, based on the limited extent of Manuka Mountain's investigation and Mr Evans' opportunity to explain about the details of what happened on particular days, did not establish any discrepancies were deliberate or intended to get more pay than he was entitled to. It was certainly not sufficient to reach a firm conclusion of serious misconduct at the time and in that way that Manuka Mountain did.

[48] The third performance concern related to what were said to be difficulties contacting him and sometimes missing appointments with landowners in Manuka Mountain's offices. Ms Wilcox said that in the five months she had worked for Manuka Mountain before Mr Evans was dismissed she had dealt with two or three calls a week to the office from landowners trying to contact Mr Evans. She said that "most of the time" she could not then contact Mr Evans by phone herself and would leave him a voice message. The one example Mr Schmidt was able to identify concerned an instance where Mr Evans said Mr Schmidt had got the time of a meeting wrong. In his evidence Mr Evans said making contact with landowners and getting to meetings was sometimes affected by the unpredictability of time needed to visit remote rural sites and having to travel to some parts of the region that had no or unreliable mobile coverage. Again there was no evidence that this issue, although said to be ongoing over an extended period, had ever been addressed with Mr Evans as a matter of performance.

[49] In the absence of having made reasonable efforts to address those performance concerns with Mr Evans, none could fairly have been said to amount to serious misconduct at the time of the 29 April meeting with him.

#### *Continued dishonesty*

[50] The reference to "continued dishonesty" in the dismissal letter was related to the view that Mr Schmidt and Mr Whitehead had formed about the 26 March incident Mr Evans had reported to Police, particularly in light of the 3 April email in which a Police officer said he did not believe a firearm was presented or discharged. The reference to continuation related to the January 2018 warning, referred to earlier, in which Mr Evans' honesty over repaying a personal purchase had been questioned and the allegations about discrepancies between hours recorded on his time sheets compared with GPS records.

[51] The contents of the Police officer's email did not give sufficient grounds for an employer, acting fairly and reasonably, to conclude Mr Evans had committed serious misconduct by falsely reporting a firearm incident. He did not have the opportunity, before Mr Whitehead drew that conclusion, to address what the officer had expressed only as a belief that a gun was not presented or discharged. The officer's belief relied on some inferences or conclusions that were, at best, speculation. No gun was found in a search of the property but there was nothing to discount the prospect that it could have been successfully hidden or removed elsewhere before Police arrived. The officer also relied on the neighbours saying they had not heard anything, assuming they must have heard a shot if fired and that, if so, they would then have frankly reported this to the Police when asked.

*Secret business activity*

[52] On Mr Whitehead's evidence the decisive point in proceeding to dismiss Mr Evans was when he reached a firm conclusion that Manuka Mountain had discovered Mr Evans was "secretly running" a business to solicit hive placements in competition with its own business.

[53] If Mr Whitehead had clear evidence available to him on 29 April, on which he could have safely relied, that Mr Evans was in fact already seeking or obtaining business in competition with Manuka Mountain without prior permission to do so, it was within the range of responses open to a reasonable employer to conclude serious misconduct had occurred.

[54] For the following reasons, however, there was not sufficient information available to Mr Whitehead on the day of that decision to have fairly reached such a conclusion.

[55] There was no information available to Mr Whitehead at that time that Mr Evans had in fact used the ATS contract to approach anyone and particularly to gain agreement from anyone who was an actual or potential land lessor for Manuka Mountain hives. He and Mr Schmidt speculated that the loss of some recent sites might be connected but had not adequately explored with Mr Evans, or anyone else, whether there was in fact a causal link. They had the means to do so by, for example, checking text messages and telephone calls that may have been sent to or from Mr Evans' work phone but, at the time of the decision to dismiss him, had not carried out that investigation.

[56] There was some dispute over whether the wording of the Manuka Mountain's contract with land lessors, on which the ATS contract was clearly based, amounted to the company's confidential business information or the result of work done for it. The evidence overall was not sufficient to draw a firm conclusion on that point, either at the time of the dismissal or by the time of the Authority investigation meeting.

[57] If Mr Evans was using contacts he made with landowners through his work for Manuka Mountain, including information about sites that might be available for lease, to secure agreements for his own benefit with the ATS contract, this could amount to serious misconduct. It would have been in breach of a term in his employment agreement, on conflict of interest, and a term prohibiting use of confidential information acquired through his work "without the prior express approval of the employer". While Mr Evans was hired in his role as site relations manager because of existing connections with a range of people throughout Northland, including Maori whanau who owned land suitable for hives, the terms of his employment agreement with Manuka Mountain secured the benefit of his work for the company rather than himself for at least as long as he remained employed. It was part of his duty of fidelity as an employee, referred to expressly in the term on conflict of interest.

[58] The discovery that the ATS document had been prepared and was on Mr Evans' work laptop was certainly sufficient grounds to begin inquiries. However the extent to which Mr Evan had in fact yet done anything was an important factor for assessment by an employer acting fairly and reasonably in that situation. There were elements of what Mr Schmidt had discovered that suggested the project was, at that stage, only a draft for future activity. The contract Mr Evans had prepared referred to the lessee as All Terrain Solutions Limited but no company with that name was registered at that time, or has been since. It can also not have been clear that Mr Evans would not have asked for permission for some independent activity, whether or not in light of subsequent events Mr Whitehead would have been persuaded to agree to such a request.

[59] Lastly, Manuka Mountain submitted Mr Whitehead had only decided to dismiss Mr Evans at the 29 April meeting after Mr Evans "admitted at that meeting that he had been directly competing with [Manuka Mountain] without authorisation". Evaluation of the evidence of all witnesses did not support a finding that any such unequivocal admission was made.

[60] Mr Evans's written witness statement said he had admitted starting a small business. He also referred to having negotiated some bee hive placements between land owners and some small bee keepers on sites that Manuka Mountain had rejected. However I doubt those sentences accurately recalled and reflected what he said in the meeting on 29 April. If any such stark admissions had been made they would have been recorded more clearly in the meeting notes on which Manuka Mountain relied as an accurate record of the meeting. Those notes showed Mr Evans questioned Mr Whitehead's suggestion that he had breached the terms about confidential information and conflict of interest in his employment agreement. The notes also showed he responded to Mr Whitehead's statement that Mr Evans had started his own business outside of Manuka Mountain by saying: "That's the way you look at it". It was not an admission.

[61] The notes do record this comment said to have been made by Mr Evans after he was dismissed and before the meeting ended: "Thanks, I have done wrong by you". What that phrase referred to was unclear. It was, however, a comment made after he had been dismissed, not an admission that could have been taken into account before the act of dismissal occurred.

[62] Accordingly, the decision Manukau Mountain made on 29 April was not based on clear evidence sufficient to support a conclusion that serious misconduct had occurred. As a result the dismissal, on the grounds and in the way it was made that day, was not justified. Mr Evans had established a personal grievance for unjustified dismissal.

### **No disparity of treatment**

[63] One other aspect of Mr Evans grievance can be dealt with shortly. He said Manuka Mountain treated him differently from Mr Schmidt over the issue of leasing sites for hives for personal business. Mr Schmidt operated hives of his own which were placed on family land. The evidence of Mr Whitehead and Mr Schmidt established this was done with Mr Whitehead's knowledge and prior approval. Mr Evans, by contrast, had not sought any such approval to carry out his activities that might be in conflict with Manuka Mountain's interests. He therefore could not have been said to have been treated differently in any unfair way on that account.

### **After discovered conduct**

[64] Following Mr Evans' dismissal, and in response to his personal grievance application, Manuka Mountain investigated and provided additional documents and information about various activities by him during his employment. Some of this concerned how he carried out some of his work for Manuka Mountain. Some of it concerned activities said to be advancing his personal or business interests. It was provided as evidence in support of the conclusions about Mr Evans that Manuka Mountain had reached in deciding to dismiss him.

[65] I note too, as part of the context, that Manuka Mountain also pursued proceedings in the District Court on commercial matters against Mr Evans, initially obtaining an *ex parte* interim order against him in June 2019. Those proceedings were still on foot at the time of the Authority's investigation meeting but, as I understood it, were adjourned pending an outcome on employment issues in the Authority.<sup>9</sup>

[66] Manuka Mountain also made a complaint to the Police alleging Mr Evans had fraudulently obtained money from the company by submitting invoices in the names of other people with payments made to his own bank account. On learning of the complaint Mr Evans had contacted the Kerikeri Police Station to provide his contact details so officers could speak to him if they wished. As I understood matters at the time of the Authority investigation meeting the Police had not interviewed Mr Evans about that complaint by Manuka Mountain and no charges had been laid against him. As Mr Evans' counsel submitted, the mere existence of a Police complaint added no weight to the evidence relevant to resolution of his application in the Authority.

[67] The following allegations about conduct of Mr Evans identified after his dismissal were relevant for consideration in this proceeding:

- (i) Mr Evans had taken honey from Manuka Mountain which he gave away or sold privately without authority to do so;
- (ii) Mr Evans took drums of 'burnt honey' without permission;
- (iii) Mr Evans had provided to other beekeeping businesses information he had gained through his employment with Manuka Mountain, that was not in the interests of Manuka Mountain to have disclosed and he had obtained a private benefit from doing so.

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<sup>9</sup> See *Manuka Mountains Apiaries Limited v Evans* [2021] NZDC 3520.

- (iv) Mr Evans had provided land lease agreements from three landowners and invoices for paying them fees for hives placed on their properties which used his own bank account number for the payment of fees but had not disclosed that arrangement to Manuka Mountain.

*Taking honey to give away or sell*

[68] Mr Schmidt found a café selling a box of Manuka Mountain honey. The café owner told Mr Schmidt that Mr Evans gave him the honey. In his evidence to the Authority Mr Evans agreed he gave the owner the honey and said he did so in appreciation of some contacts with landowners that the café owner had provided. Mr Evans said giving such gifts was an approved activity. Mr Schmidt agreed Mr Whitehead had approved giving “the odd jar” for such connections but not a box of honey. The difference was not sufficient for a finding of serious misconduct.

[69] Another instance of concern to Manuka Mountain was a text message exchange on 9 September 2018 found on Mr Evans’ mobile phone. He had responded to a personal query about whether he had “any more of those honey pots available” by saying he had 10 pots left at \$20 each. Mr Evans accepted he had sold some honey but said this was either from an allocation Manuka Mountain allowed staff or was honey another bee keeper had given him. Again this evidence was not sufficient to conclude Mr Evans was selling honey taken improperly from Manuka Mountain.

[70] Mr Schmidt also said honey was inadequately accounted for in its tally of honey pots given to landowners who hosted Manuka Mountain hives as part of their return on the arrangement. His evidence on this point was not sufficient to establish there was a shortfall or, if there was, that Mr Evans was responsible for it.

*Taking drums of ‘burnt honey’*

[71] Manuka Mountain had some drums of honey that had been spoiled in the production process leaving what was described as ‘burnt honey’ that was not palatable for human consumption. Mr Tomlinson’s evidence established the drums were a waste product. He recalled talking to Mr Whitehead about Mr Evans looking for a suitable way to dispose or repurpose it, possibly for use as a weed spray. Mr Whitehead, in his oral evidence, did not recall that discussion but accepted Mr Tomlinson’s account. In that light Mr Evans could not be found to have taken burnt honey without authorisation.

*Providing information to other beekeepers*

[72] Mr Evans' evidence confirmed he had provided information to two other beekeeping operations. Those operations were competitors with Manuka Mountain for finding good sites to place hives. In this determination those operations need only be identified as H and B. Manuka Mountain identified one such instance from a text Mr Evans sent on 28 November 2018 advising an H employee of a hive site that Manuka Mountain had stopped using. It also located an agreement between H and a landowner for placement of hives on eight sites. The agreement was dated 13 November 2018, when Mr Evans was an employee of Manuka Mountain. It included a fee totalling \$2,000 for the "site finder". It also provided for H to pay Mr Evans the landowners' fee of \$8,000 and for him to then distribute that amount to those landowners. Mr Evans accepted he was the site finder, was paid that fee and also received the \$8,000 fee for distribution to those landowners. He said he had distributed their fee to them.

[73] In his oral evidence Mr Evans accepted he had also negotiated "a few" hive site placements for B. In some instances those sites had been rejected by Manuka Mountain as unsuitable for their needs at that time. In others this was because landowners wanted more hives than Manuka Mountain wanted to put in the area. While Manuka Mountain might for example want only five, for hive productivity reasons, the landowners wanted ten to increase their revenue from the activity. He said those arrangements were sometimes necessary to keep Manuka Mountain hives in that area but also to appease the landowners.

[74] While Mr Evans considered balancing those interests might be better long term for Manuka Mountain, what he did was inconsistent with its immediate need to limit bee numbers feeding on manuka in a particular area.

[75] There was also the risk that his approach of helping landowners get other operators' hives on their properties served their interests at the expense of his employer. He had also, in the case of the H transaction described above, personally benefited by providing information he gained through his work for Manuka Mountain. Both activities conflicted with his duty to his employer. While it was possible some of what he did could have been approved for strategic commercial reasons, such as maintaining long term relations with landowners on productive properties, he had not directly discussed the details with Mr Whitehead or Mr Schmidt and got their approval. It was

activity that, if known to his employer before the decision to dismiss him, could legitimately have been identified as serious misconduct.

*Arranging for some landowners' lease fees to be paid to his personal bank account*

[76] Manuka Mountain's investigations after his dismissal identified three instances where Mr Evans had made arrangements for the hire placement fees for three landowners to be paid to his personal bank account number. This was identified from the lease agreements he had provided and invoices provided for payment of those fees.

[77] Manuka Mountain disputed whether one of those landowners even existed as it could not locate any information about him. Mr Evans insisted the agreement was genuine and made with an elderly man living in a remote property with whom he had made contact through other connections. Neither party provided sufficient evidence to resolve that dispute. However, even taking Mr Evans's own account as correct did not assist him on the real point in issue. He said those landowners had asked him to collect their fees for them and for him to then pay that money to them. It was not an arrangement he told Manuka Mountain about or for which he got its approval. Even accepting Mr Evans' account that these were genuine arrangements with landowners who lived in remote areas without ready access to facilities for financial transactions or who were keen for some 'off the books' revenue, it was unlikely Manuka Mountain would have approved such arrangements if it had known of them. It was also likely, on the balance of probabilities, that Mr Evans must have known they would not be approved if he had asked. Such arrangements would be outside standard commercial practice, bore risks for the tax and accounting obligations of the company and, as came to pass, also carried the risk of suspicion that they were not genuine but a means of Mr Evans getting money to which he was not entitled. Again, even accepting Mr Evans' account that any such money received had been paid to those lessors, it would be difficult for him to prove the payments had been made to them.

[78] If Manuka Mountain had known of the arrangements made with those three landowners before it dismissed Mr Evans, it was information that could legitimately have been identified as serious misconduct.

*Conclusion on after discovered activity*

[79] Contrary to Manuka Mountain's closing submissions, the evidence available for the Authority investigation and weighed in the balance of probabilities did not establish

Mr Evans had taken honey or money which he was not entitled to or that he had admitted forging documents or acting fraudulently.

[80] What was established on that evidence, however, was that Mr Evans had acted at times in conflict with his duties to his employer, specifically by providing information to other beekeeping businesses, arranging a site finding fee for himself from one of those businesses and making arrangements for payments to some landowners in a way that did not accord with standard commercial practice.

[81] Evidence of that conduct was not identified until after his dismissal. It was conduct of a truly significant nature, being inconsistent with his duties of good faith and fidelity to his employer. It was misconduct reasonably connected to at least the main reason for his dismissal, that is the prospect that he was involved in business activity that competed with the business and interests of Manuka Mountain. It was, therefore, subsequently discovered conduct that could and should be taken into account in setting remedies for his grievances of unjustified disadvantage and unjustified dismissal that had resulted from how and why Manuka Mountain dismissed him on 29 April 2019.<sup>10</sup>

### **Remedies**

[82] For his personal grievances Mr Evans sought remedies of reimbursement for lost remuneration from the date of his dismissal and payment of compensation for humiliation, loss of dignity and injury to his feelings.

#### *Lost remuneration*

[83] An award for lost remuneration was not available in Mr Evans' particular circumstances. Mr Evans injured his leg in the weekend before he was dismissed. He said this happened while walking "up in the hills" as part of his work of scouting locations for Manuka Mountain hives. ACC accepted the injury was work-related. He attended the disciplinary meeting on 29 April 2019 on crutches. He has remained on ACC support since his dismissal. He has not recovered sufficiently to re-enter the paid workforce.

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<sup>10</sup> *Salt*, above n 5, at [104].

[84] Mr Evans suggested Manuka Mountain should be ordered pay the 20 percent difference between his former wage and what he received in earnings related compensation from ACC. It was not an award that could be made in his case for two reasons. Firstly, an award of lost wages is intended to put the employee in the position that they would have been but for the unjustified action of their employer. In Mr Evans case that position would have been that he was on ACC and, presumably, would have continued to receive earnings related compensation at the 80 per cent level. There was therefore no loss of wages. Secondly, some employment agreements do provide for ACC payments to be ‘topped up’ to the 100 per cent level by the employer. Manuka Mountain’s employment agreement with Mr Evans did not include such a term. His reduction of income related to his accident, not his dismissal, so an award of lost wages could not be made.

### **Compensation for humiliation, loss of dignity and injury to feelings**

[85] Mr Evans had a long and varied working career up to his dismissal by Manuka Mountain. He had qualifications and experience as a chef, marine engineer and fitter and turner. He had worked overseas for more than 30 years and then for many years in Northland in transport and public service roles. Originally from the eastern Bay of Plenty, he had many connections through family, work and friends with Maori whānau and community throughout Te Tai Tokerau. He was employed by Manuka Mountain to use those connections with Maori communities to secure hive sites on properties held by those Maori whānau.

[86] He was deeply affected by the suddenness of his dismissal and the sting of the accusations Manuka Mountain made about his integrity in making that decision. He understood news of those allegations became widespread among people he knew. He believed Mr Whitehead was responsible for doing so. Mr Whitehead, in his oral evidence, said he could not be sure who he had told in the community about Mr Evans’ dismissal or the reasons for it. He made no arrangements and gave no instructions for staff members to keep news of Mr Evans’ dismissal or the reasons for it confidential.

[87] Mr Evans described his upset at his dismissal being made worse by Manuka Mountain beginning proceedings against him in the District Court, to stop any potential commercial activity by him, and by making a criminal complaint to the Police about him.

[88] He described the circumstances of his dismissal and the reasons given for it as causing embarrassment and a loss of mana. He withdrew from church and other community activities in which he had previously been closely involved. He and his wife subsequently moved to Wellington, where he has lived since.

[89] An award of \$25,000 would have been an appropriate level of compensation for the humiliation, loss of dignity and injury to the feelings of Mr Evans caused by the shock of his dismissal, the way it was carried out and what he experienced as the retaliatory conduct towards him from Manuka Mountain afterwards.

[90] However the setting of that remedy also had to be calibrated to allow for the after discovered conduct of Mr Evans relating to how he had conducted some of his work in a way that was contrary to the interests of Manuka Mountain and which, if known at the time of his dismissal, would have strengthened its conclusion that he had engaged in some serious misconduct. What was subsequently revealed were not isolated actions of minor misconduct. This is an assessment made under s 123 of the Act and not a reduction for contributory conduct under s 124 of the Act. A reduction is, as explained by the Court of Appeal in *Salt v Fell*, appropriate because an employee should not benefit from a wrong by him or her that was unknown to the employer at the time of the dismissal. However such subsequently discovered conduct will not often be so bad that no remedy should then be given at all for the actions by the employer that amounted to a personal grievance:<sup>11</sup>

After all, the employer has also committed a wrong, namely an unjustified dismissal based on what he or she knew at the time. He or she did not act as a fair and reasonable employer [could] have acted in all the circumstances at the time.

[91] In Mr Evans' case, allowing for that subsequently discovered conduct in the setting of the remedy, \$18,000 was the appropriate amount to award as distress compensation for the unjustified disadvantage and unjustified dismissal he experienced due to how Manuka Mountain acted towards him in ending his employment.

[92] No further adjustment to remedies is required in this case under s 124 of the Act. Mr Evans did not contribute to the procedural defects by Manuka Mountain that resulted in his personal grievance application succeeding.

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<sup>11</sup> *Salt*, above n 5, at [96].

## **Costs**

[93] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Evans may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Manuka Mountain would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[94] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>12</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>12</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].