Employment Court of New Zealand

Glenmavis Farm Partnership (2007) v Todd [2012] NZEmpC 137 (10 August 2012)

Last Updated: 21 August 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 137

CRC 32/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN GLENMAVIS FARM PARTNERSHIP (2007)

Plaintiff

AND ANDREW ALAN TODD Defendant

Hearing: 10-12 July 2012 (Heard at Gore)

Appearances: Len Andersen, counsel for plaintiff

Jim Guest and Chanel Gardner, counsel for defendant

Judgment: 10 August 2012

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The issues for decision on this challenge by hearing de novo to a

determination[1] of the Employment Relations Authority are:

- Whether Andrew Todd was dismissed justifiably by Linley Walker, James Budge and the Glenmavis Trust who and which together constitute the plaintiff, Glenmavis Farm Partnership (2007)

(Glenmavis);

- if so, the remedies to which Mr Todd may be entitled for unjustified

dismissal;

the extent to which Mr Todd was overpaid at the time of his dismissal

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- whether what is to happen to a loan to Mr Todd secured by a mortgage over real property is justiciable in these proceedings in the

Employment Relations Authority and/or the Employment Court;

- if so, what is the status of the loan and what should happen to the

mortgage securing it.

The Employment Relations Authority's determinations

[2] The substantive determination of the Authority was issued on 21 November

2011 following its investigation meeting earlier that month and subsequent receipt of written submissions. The Authority concluded that the present plaintiff was Mr Todd's employer (there is now no dispute about this) and that Mr Todd had been dismissed unjustifiably. Although his dismissal had been purportedly for reasons of his redundancy, the Authority found that this was a charade and that the employer's real reasons were its concerns about his work performance and/or his health. The Authority concluded that neither of the two tests of justification under the then applicable s 103A of the Employment Relations Act 2000 (the Act) was met by the employer.

[3] The Authority awarded Mr Todd arrears of holiday pay, and compensation of

$15,000 under s 123(1)(c)(i) of the Act. It concluded, however, that he had been overpaid by about eight weeks' remuneration in his final pay for which amount a credit would have to be given by him.

[4] The Authority determined that, as an inducement to Mr Todd to remain working for it, Glenmavis arranged that he should be lent a sum of money to purchase land and that the loan would be secured by a mortgage over the land for the purchase price. In resolution of a dispute about the terms of repayment of the loan and the identity of the lender, the Authority determined that it was a term of his employment with Glenmavis and that if he performed his work satisfactorily for three years, the loan would be forgiven after that period. The Authority did not determine what was to become of the balance owing under the loan secured by the mortgage but suggested that because the lenders were not the same persons as the

employer, a compliance order might be the appropriate way of releasing Mr Todd from his obligations to the lenders under the mortgage.

[5] It only came to the Court's notice in the course of the hearing that the Authority delivered a subsequent (and third) determination[2] finalising proceedings in that forum. Its first determination,[3] with which this challenge is not concerned, decided a recusal application made by the plaintiff.

[6] The Authority's third determination, issued on 29 February 2012, dealt first with costs. It awarded Mr Todd the sum of $7,500 together with disbursements of

$71.56. It then dealt with the precise amount of the overpayment made by Glenmavis to Mr Todd, calculated by reference to the Authority's conclusions on statutory holidays and contractual days off that he had worked. The Authority determined that Mr Todd owed Glenmavis the sum of $7,346.91 and directed that this be deducted from his payment of compensation for unjustified dismissal. I will return to this conclusion when dealing with this aspect of the cross challenge.

[7] Finally, the Authority's third determination of 29 February 2012 dealt with Mr Todd's claims relating to the mortgage. It declined again to make any orders, leaving the question to this Court in view of the fact that its substantive determination had been challenged by then.

[8] The plaintiff challenges the Authority's determination that Mr Todd's dismissal was unjustified, the amount of compensation awarded, and its liability in respect of the loan to Mr Todd.

[9] Mr Todd has cross challenged the determination of the Authority. He claims that he was entitled to a bonus of $150,000 net of tax payable at the rate of $50,000 per year if he remained in employment for three years, and says that the loan ($136,054.46) secured by mortgage to purchase land was the part-performance by

the employer of its bonus obligations to him. He claims an unpaid balance of

$13,945.54, increased compensation under s 123(1)(c)(i) ($20,000) and to a remedy which will effect the discharge of the mortgage securing the loan.

Relevant facts

[10] A limited liability company, Glenmavis Limited, owns a farm (which I will call the farm) the subject of these proceedings at Wendon in Southland. The company's directors include James (Jim) Budge, his wife Linley Walker (Dr Walker), and Dr Walker's brother, Brian Walker. The plaintiff, Glenmavis Farm Partnership (2007), trades as Glenmavis Farm. The partners in the Glenmavis Farm Partnership (2007) are Mr Budge, Dr Walker, and the Glenmavis Trust, a family trust associated with the family of Mr Walker. Dr Walker is the trustee of the Glenmavis Trust. These entities are closely held interests of Mr Budge, Dr Walker and Mr Walker.

[11] Glenmavis Farm operates the farm but without owning any assets. It leases the farm, stock, and plant from Glenmavis Limited and the partnership employs the farm's staff. The farm was purchased as a retirement investment for the

shareholders of Glenmavis Limited. All the owners in their various capacities are absentee owners: Mr Budge and Dr Walker reside at Paihia in the Bay of Islands and Brian Walker resides in Ashburton. Although they were able to and did visit the farm from time to time, the responsibility for its day to day running rested with the resident manager.

[12] Before 2006 the owners had not enjoyed an entirely good farm management relationship with the defendant's predecessors. The plaintiff was, therefore, keen to establish and maintain a good working relationship with Mr Todd who was appointed to that role in 2006. At the time, also, the plaintiff used the services of a farm adviser (Gordon Platfoot) although this was not continued in 2007 and 2008. In late 2008, however, Mr Platfoot was re-engaged at the plaintiff's bankers' insistence.

[13] It is not really in dispute that all relevant times Mr Todd worked very hard and assiduously to convert the farm from a run-down and under-performing enterprise into a productive dairy farm which, at the time of high dairying returns,

both increased its production significantly and generated a substantial gross income for its owners. This was achieved, however, at some personal cost to Mr Todd: he worked very long hours and only sometimes took his entitlement to days off (on average three per 11 days worked) and annual holidays.

[14] On 22 July 2008 Mr Todd's bank account was credited with the sum of

$13,500. The payer of this sum was the plaintiff, Glenmavis. It was notated as being "remuneration". It was used by Mr Todd to pay the deposit on the purchase by him of a piece of neighbouring land. On 29 August 2008 Mr Todd's bank account was credited with a further $122,854.46. This time, the evidence now establishes, the payers were Mr Budge and Dr Walker, the monies being transferred from their personal account although the monies' origin was not apparent to Mr Todd at the time. This sum was used by Mr Todd to pay the balance of the monies owing on the land purchase and for associated fees and disbursements. After the transfer of this farmland to Mr Todd, there was also registered a mortgage to Mr Budge and Dr Walker for the full amount of the two advances. The mortgagee was originally recorded as "Glenmavis Limited" and the relevant solicitors' statement sent to Mr Todd showed that the funds had been advanced by "Glenmavis Limited".

[15] During 2010 Mr Todd became increasingly dissatisfied, not with his employment as such but, rather, with its documentation and with what he considered to be his entitlements under the loan arrangement. By early October 2010 he had gone so far as to consult a solicitor about the position and a letter was written on

8 October 2010 to the plaintiff. The content and tone of this letter are important because the plaintiff's response to it led in part to Mr Todd's dismissal. The solicitors' letter was written more in sadness than in anger and asked the plaintiff to address these issues for Mr Todd's peace of mind. There was no suggestion, nor could any reasonably be inferred from the solicitors' letter, that Mr Todd was contemplating bringing formal proceedings against his employer. Rather, in the defendant's view, having failed to make progress on these issues by direct discussion, he sought to bring them to the plaintiff's attention in a more salutary way.

[16] Unfortunately, and as was tacitly conceded in cross-examination at the hearing, the plaintiff 's representatives misinterpreted the solicitors' letter although,

on any objective analysis, there could really have been no reasonable basis for doing so. Mr Budge and Dr Walker inferred that Mr Todd was so dissatisfied with his employment that the plaintiff was at risk of a formal claim by him. This overly defensive reaction to the solicitors' letter was reflected in the plaintiff's formal written reply to the solicitors by letter dated 28 October 2010 but which the evidence establishes was not sent until several days later. I deal with the contents of this letter further in relation to the issue of interpreting the terms of the loan. The important point is that by early November 2010, the plaintiff apprehended erroneously that it was both at risk of losing Mr Todd as its manager and that he was intending to bring proceedings against it.

[17] Although a possible reorganisation of the farm's operations had been discussed from time to time between Mr Todd and the owners, this was to explore alternative ownership and/or management arrangements to allow Mr Todd a greater degree of involvement and interest in the enterprise. It was neither the same as, nor related to, the subsequent termination of his employment, allegedly for redundancy.

[18] In mid 2010, Mr Todd's health deteriorated and although the cause of this is not crucial to the outcome of the case, it appears that it was likely to have been a result of the hard work he was undertaking on the farm. By late October/early November Mr Todd was unable to work and a doctor's certificate confirming this temporary incapacity was sent to the plaintiff.

[19] Mr Budge and Dr Walker became concerned about the effect of Mr Todd's illness and his consequent absence from farm management duties. All that they knew was that he was significantly unwell and that his doctor had certified that he should not return to work until at least 22 November 2010. They decided to end his employment and to say that this was a consequence of his redundancy. They decided that Mr Budge would take over temporarily the role of farm manager so that it might be said that the position was redundant to the plaintiff's needs. There was no consultation or other discussion with Mr

Todd about the termination of his employment for this reason before this decision was announced to him, orally at first and then subsequently in writing. No inquiry was made about his health or prognosis.

[20] Mr Budge was not qualified or experienced as a farm manager. Although he stayed on at the farm for a number of months after Mr Todd's dismissal, a replacement manager was eventually appointed because one was needed. The plaintiff even invited Mr Todd, indirectly, to indicate whether he might be prepared to resume the role, but he had moved elsewhere, obtained other employment and was not interested.

Who was the employee?

[21] This unusual question needs to be addressed because of the remuneration arrangements made between the parties. To avoid child care payments in respect of a child from a former relationship, and to reduce his income tax liability, Mr Todd persuaded the plaintiff to pay one-half of his salary and housing allowance to his partner, Tara Malota, although she did not perform any share of his work as manager. The position was complicated somewhat because Ms Malota was a part-time or casual employee of the plaintiff in her own right, principally relating to calf rearing, for which she was paid separately by the partnership but in respect of which there is no issue in this case.

[22] Whilst on the topic of dubious remuneration practices, the evidence also establishes that the plaintiff paid Mr Todd substantial sums of untaxed cash from time to time, principally from the proceeds of cash sales of stock that did not go through its books. These payments were for untaken holidays and contributed in one case to the purchase of Mr Todd's farm motorbike. These informal tax and child support avoidance arrangements have made difficult calculating, by lawful criteria, amounts due to Mr Todd.

[23] In respect of the salary splitting scheme, I consider this was no more than a device to avoid tax and child maintenance payments. Mr Todd was the sole employee whose dispute is now before the Court. His benefits and liabilities as employee are his alone and not shared with Ms Malota.

Unjustified dismissal?

[24] Having reviewed the evidence, I have reached the same conclusion as did the Authority that Mr Todd was dismissed unjustifiably. In these circumstances, I adopt the Authority's reasoning and add only this.

[25] Not only did the plaintiff fail to act in the way that a fair and reasonable employer would have done in all the relevant circumstances before dismissing Mr Todd, but he and/or his position was not genuinely redundant as the plaintiff claimed in justification for the dismissal. Mr Todd was unwell and, thereby, unable temporarily to undertake the duties required of him as farm manager. The plaintiff also had concerns about Mr Todd's future intentions as outlined above. The combination of Mr Todd's unwellness and their concerns that he was intending to bring legal claims against them, caused Mr Budge and Dr Walker to respond proactively.

[26] Instead of addressing these concerns, of which it was aware, as a fair and reasonable employer would have done in all the circumstances, the plaintiff decided to deal with the issues by dismissing Mr Todd from his employment and claiming that he and/or his position was redundant to its needs. There was, however, no suggestion that Mr Todd would not have returned, when well again, to fulfil his role in due course. The farm required a farm manager and the need for this is best illustrated by the appointment of a replacement after Mr Todd's departure, albeit with an interregnum during which Mr Budge fulfilled the role temporarily.

[27] The Authority found correctly that the plaintiff had failed to satisfy either of the twin statutory tests of justification contained in s 103A of the Act, applicable in this case in its pre-1 April 2011 version. I confirm that Mr Todd was dismissed unjustifiably.

Cross challenge to remedies for unjustified dismissal

[28] The Authority determined that because he promptly found alternative employment, Mr Todd suffered no remuneration loss as a result of his unjustified

dismissal. There is no challenge to this finding. The Authority awarded Mr Todd

$15,000 (of $20,000 claimed) for compensation under s 123(1)(c)(i) of the Act. Mr

Todd now reiterates his claim to distress compensation of $20,000.

[29] This case is a good example of the particular considerations going to remedies for unjustified dismissal in farming. Ignoring additional expenditure or other quantifiable monetary losses as a result of an unjustified dismissal from a farming position, the less tangible but nevertheless real consequences also differ from other employments. In the case of urban employment, generally, an employee and the employee's family are not deprived of their housing and often their links to a locality as a direct result of a dismissal. In farming cases such as this, however, accommodation (including for family

members) comes and goes with the job. So, to use Mr Todd as an example, not only did he have to find another employment position in his area of expertise, farming, but also he and his family were turned out of their rental accommodation on the farm as a result of his dismissal.

[30] There was and is additional uncertainty and anxiety generated in these circumstances. Children often have to change schools and there are the associated stresses of home relocation and the disjunction of social networks. Although this is not to say that there should always be a greater level of compensation for unjustified farm dismissals, employees dismissed unjustifiably may establish these additional adverse consequences of their unjustified dismissal for which they should be compensated.

[31] Although it might be argued that these life disruptions go with the territory of being a farming employee and also occur for reasons other than dismissal, moving to a new and better job voluntarily after careful consideration of all the implications is quite a different experience from suddenly and unwillingly relocating, even if another position with accommodation can be found.

[32] Having reconsidered Mr Todd's claim to distress compensation, I have concluded that the Authority's award of $15,000 was correct in all the circumstances. These included that Mr Todd (and his family whose reaction to their enforced relocation he experienced) obtained another position within a short time of his

dismissal and there is no evidence, as I imagine there would have been had this occurred, of accommodation or other social hardship to him and his family.

[33] Accordingly, that aspect of the cross challenge is disallowed and, pursuant to s 183(2) of the Act, I confirm the Authority's compensation award of $15,000.

Deduction for overpayment

[34] There is no dispute that Mr Todd was overpaid remuneration due to the date of the end of his employment. The parties do not, however, agree now on the extent of that overpayment: Mr Todd claims that it was slightly less than the Authority concluded.

[35] These matters were dealt with in the Authority's second determination between [30] and [36] and at [63] where it noted succinctly:

There may be issues about the calculation of Mr Todd's final pay. I will reserve that in case the parties cannot agree quantum after applying the following findings. Mr Todd was overpaid 8 weeks salary and it must be accounted for. Mr Todd must be paid 18.5 days for alternative holidays. Mr Todd must be paid 8 weeks holiday pay less 12 days taken in July 2010 which must be treated as annual leave. Finally Mr Todd is entitled to 8% of his gross earnings from 1 July 2010.

Wage and time records

[36] The case raises an interesting and possibly unique question about an employer's liability to maintain working time and holiday records and the consequences of not doing so, at least to a sufficient standard.

[37] The plaintiff's case is that Mr Todd should not be permitted to take advantage of the absence of any or at least adequate records because, it says, he was responsible for their maintenance but failed to do so. There is no question that the holiday records were not complete or otherwise accurate. That is so, too, in respect of records of days worked when these were on statutory holidays or otherwise on rostered days off. The position is less important in respect of ordinary working hours because Mr Todd, and it would seem most other employees on the farm, were on

annual salaries so that a record of the hours they worked each day was not crucial to the calculation of their periodic pay.

[38] I do not accept the plaintiff's contention in this regard for two reasons. First, there was no job description of Mr Todd's particular managerial responsibilities. Although his 2006 employment agreement, which was the only such agreement executed by him and produced at the hearing, spoke of an attached job description, this was absent and was probably never completed. It follows that in the absence of proven agreement by Mr Todd that his responsibilities included these statutory record keeping ones, I am not satisfied that this was his obligation delegated to him specifically by the employer which is required by law to maintain these records. This responsibility remained with the plaintiff as employer.

[39] Second, and not unassociated with the first reason above, the evidence establishes that the plaintiff engaged a business consultant to maintain these records among a number of similar administrative and accounting tasks. Whilst it was incumbent on Mr Todd to supply information to the consultant (Camille Earl) to enable her to maintain those records and, thereby, to generate regular salary payments to him and other employees, the responsibility for the maintenance of the records was delegated by the employer to the consultant. The evidence of Ms Earl, who was called by the plaintiff, confirmed that Mr Todd supplied her with sufficient information on a regular basis for her to compile the records required.

[40] In these circumstances, the plaintiff cannot absolve itself of the responsibility of doing so. If Mr Todd had been deficient in his reporting obligations (and there is only one instance of such a failure by him to complete records which would not have ensured the maintenance of those which are absent in this case), then this was properly a matter for the employer to have taken up with him but it did not do so.

[41] As to the matter of accurate recording of holidays taken, the evidence establishes the following. In respect of some annual holidays to which Mr Todd was entitled but which he did not take, these were dealt with by payments in cash made by Mr Budge to Mr Todd which were not recorded either in the partnership's accounts or in its employee holiday records. This was a practice engaged in

willingly by both Mr Budge and Mr Todd. The partnership had some cash income which did not go through its books and was the source, from time to time, for cash payments made by Mr Budge, such as those to compensate Mr Todd for holidays not taken. However, and perhaps unsurprisingly, neither Mr Budge nor Mr Todd advised the partnership's business consultant, Ms Earl, about these settlements of the defendant's entitlements to untaken leave. There is simply no evidence about how often such transactions took place or the amounts paid to enable the Court to ascertain the extent to which Mr Todd's holiday entitlements may have been so negated. In these unfortunate circumstances of almost total absence of corroborative evidence, the Court can only do its best to assess the probabilities.

Decision – overpayment

[42] This was calculated, by the plaintiff at least, on the basis of separate overpayments to Mr Todd and Ms Malota. For reasons already set out, Mr Todd was, in reality and in law, the only employee who received an annual salary and to whom the overpayments relate although, in the end, the amounts may be the same.

[43] I have already determined that any inadequacies in the plaintiff's wage, time and holiday records were not attributable to Mr Todd even although he was the farm manager and the most senior employee on site. That was because the responsibility in law for keeping these records rested with the plaintiff and it had appointed an administrator to undertake these and similar tasks.

[44] It follows that, in respect of holiday records, s 83 of the Holidays Act 2003 is engaged. Subsection (3) provides that if, after hearing evidence, the Authority (or this Court on a challenge) is satisfied that the employer failed to comply with the record keeping requirements of ss 81 or 82 of that Act, and that the failure prevented the claimant from bringing an accurate claim, the Authority (or this Court) may make a finding to that effect. Despite Mr Todd having contributed to that position by seeking and accepting cash payments in lieu of untaken holidays, I am satisfied that the employer failed to comply with its s 81 record keeping obligations.

[45] Section 83(4) then provides that upon the making of such a finding, the Authority (or the Court on challenge) may accept as proved, in the absence of evidence to the contrary, statements made by the employee about the holiday pay or leave pay actually paid to the employee and about annual holidays, public holidays (and other entitlements not in issue in this case) actually taken by the employee. This does not require the Court to find all such statements made by the employee to be credible, but is a rebuttable presumption of correctness.

[46] In view of Mr Todd's acknowledgement that he was, on occasions, paid cash to compensate for untaken holidays and other leave, which transactions were not recorded by the employer, I have scrutinised to a level of care that might not otherwise be applicable under s 83 of the Act, the amounts claimed.

[47] On balance, I accept that in aggregate, Mr Todd was overpaid by the plaintiff in the sum of $7,346.91 net, that is after deduction for income tax. I am reinforced in that conclusion by the Authority's third determination which also found that this was the extent of the overpayment and confirms that this was a figure finally agreed by the parties before the Authority. I am not persuaded to make any alteration to that figure. The subsequent inflation of it by the plaintiff for the purpose of this challenge is not sustained on the evidence and by application of the statutory presumption. It follows that the compensatory payment to Mr Todd of $15,000 under s 123(1)(c)(i) should be reduced by this net debt of $7,346.91 as was directed by the Authority.

[48] For clarity, I confirm that this reduction is not affected by my finding that all remuneration rights and obligations were those of Mr Todd and not shared equally with Ms Malota.

The loan issue - background

[49] There is no dispute that Mr Todd was advanced the sum of $136,054.46 with which he purchased land adjacent to the farm. There is no dispute that there was no interest to be charged on this loan. Nor is there any dispute that the loan was secured by a registered mortgage to Dr Walker and Mr Budge over the purchased land. The disputed elements of this transaction include by whom this loan was advanced to

him, whether it was a term, condition or other incident of his employment, and the terms of forgiveness of the capital sum.

[50] The Authority's findings in the matter of this loan are contained between [14] and [29] of its determination. It recorded that there was no written loan agreement or, other than some later correspondence, written material generated at the time by the parties which might assist in clarifying its status. No further probative material has been produced to the Court on these questions than was before the Authority.

[51] The Authority found that Mr Budge had committed to forgiving the loan although not when this would occur. It found that the loan was a term of Mr Todd's employment. It said it related to his satisfactory performance of work, his continuation of employment for a minimum of three years, and its forgiveness was intended to be a form of financial compensation to him for a greater than usual workload. The Authority, however, rejected Mr Todd's contention that the monies advanced, represented a bonus of up to $50,000 per annum for three years. The Authority likewise rejected the plaintiff's contention that the advance was a gift from the outset.

[52] The Authority concluded that Mr Todd, having worked for the period of three years, was entitled to forgiveness of the loan and a release of the mortgage. It rejected the plaintiff's contention that this outcome was conditional on Mr Todd not making any other financial claims against the plaintiff.

[53] By way of remedy (at [61]-[62] of its second determination) the Authority rejected Mr Todd's claim for lump sum compensation equivalent to the amount of the loan. It preferred the alternative of making an order for compliance under s 137 of the Act because "Dr Walker's and Mr Budge's refusal to discharge the mortgage (except subject to conditions) amounts to a failure to comply with a provision of an employment agreement entitling the Authority to order them to do a specified thing

(discharge the mortgage) to prevent further non-compliance."[4] An application for a

compliance order having only been made by Mr Todd during the final submissions and the Authority considering that it might be unnecessary to make a formal

compliance order, it reserved the issue of an appropriate remedy for this claim. It has not done so, however, because this challenge has overtaken it.

Identity of lenders/justiciability of loan questions

[54] The first element of the plaintiff's challenge on this issue is that it was Mr Budge and Dr Walker, in their personal capacities and not as partners in the plaintiff, who lent money to Mr Todd. They emphasise that this reflected the almost familial relationship they had with Mr Todd. They say, therefore, that it is not the partners as such and therefore the partnership who or which can be liable in respect of these advances.

[55] This issue is connected with another in the case: whether the loan was a term or condition of Mr Todd's employment. If the plaintiff is successful in establishing that the monies advanced were by Mr Budge and Dr Walker in their personal capacities, and not as partners of Glenmavis, then this will strengthen (but not necessarily determine) its associated contention that the advance was not a term or condition of the employment. Only if the loan was a term or condition or other incident of Mr Todd's employment can this Court (or the Employment Relations Authority) determine its contents and provide the remedies sought by the defendant. Otherwise, this would be an ordinary civil dispute to be determined in the courts of ordinary jurisdiction.

[56] The contemporaneous documentation does not point unequivocally or even helpfully to one position or the other. Had the advances been a remuneration bonus and therefore a term or condition of Mr Todd's employment as he claims, the Court might have expected to have seen this recorded in the draft form of employment agreement, exchanged between the parties after the payments of the monies to Mr Todd, but which was never finally executed. I accept that Mr Todd's detailed addressing of his employer's proposed form of new employment agreement was such that he could be expected to have included reference to what he now asserts was a bonus payment arrangement that was tied to his employment. But, for independent reasons, I reject Mr Todd's claim that the advances were part-payment

of bonuses totalling $150,000 calculated at the rate of $50,000 per year for three years.

[57] On the other hand, it does not mean that the advances were not a term and condition of the employment because they were made from the joint bank account of two of the three partners in the employing partnership.

[58] Mr Budge and Dr Walker struck me as generous owners who both liked Mr Todd personally and wished to see him get ahead financially through property investment. They respected his farm managerial skills although less so his general business administrative abilities. I do not think that this relationship could have been described as a close personal friendship or especially as quasi-filial as was asserted by the plaintiff.

[59] By the time it appointed Mr Todd in 2006, the plaintiff partnership and its partners individually needed both certainty and stability in the management of their asset and wished to be rid of High Court litigation with the previous owners of the farm which had dogged their purchase from the outset. Two previously and relatively short term managers had proved to be

unsatisfactory and they wanted to avoid a repetition of this. All three trustees lived at substantial distances from the farm and none had a relevant farming background: Mr Budge's was in a refrigeration engineering business, Dr Walker's in academia, and her brother (Mr Walker of Ashburton) was a former solicitor.

[60] In these circumstances a combination of the plaintiff's wish for stability and a genuine desire to help Mr Todd "get on the property ladder" as it was described, makes an interest free loan of about $136,000 to be forgiven after three years of employment, not so incredible that it must be discounted. Indeed, it is a probability.

[61] As already noted, the plaintiff's case was that the loan was made as a commercial transaction but for reasons of personal admiration and friendship. Although I accept that Mr Budge and Dr Walker related well to Mr Todd and were concerned for his vocational advancement, this was as their employee rather than as a friend or arising out of any similar non-contractual relationship of the sort that may

have generated such a loan. Whilst those elements of the parties' personal relationship were present, so too was the plaintiff's commercial wish to retain a stable and competent farm manager in circumstances where this had been absent previously. I have concluded that this was the principal reason for the loan arrangement that was significantly beneficial to Mr Todd. It recognised, also, that Mr Todd worked harder and longer than a manager of that farm might reasonably have been expected to work for the specified salary, largely because of the absence from the region of the owners.

[62] If acting in that capacity, one or more partners can bind all of them in relation to partnership business. It is not determinative of the question, therefore, that the second and more substantial tranche of the monies advanced originated from the joint personal account held by Mr Budge and Dr Walker, even though the first tranche was from the plaintiff's partnership account. Mr Todd was not aware of the sources of these monies at the time they were paid to him and the summary of facts illustrates the considerable confusion about their sources, even by those responsible for their payment.

[63] For the foregoing reasons, I conclude that the loan was advanced by the partnership, Mr Budge and Dr Walker doing so in their capacities as partners and employer and not personally as friends and that it was a term or condition or other incident of the defendant's employment.

Forgiveness of the loan

[64] There is no dispute that monies were advanced to the defendant under an oral loan agreement, that there was no interest payable on the loan or that it, or at least some portion of it, would be forgiven by the lender at a future date. The issue now is the circumstances in which the loan was to be forgiven.

[65] The accounts in the evidence of the parties concerning their agreement tended to reflect what I find they would have wished the agreement to have been with the benefits of hindsight. In some cases these wishes were the subject of disclosure to the other party and discussion at the relevant time. It is understandable that each

side now believes that its wishes represent their agreement, but clearly not everyone can be correct. The Court's task is to ascertain, as well as it is able to in the circumstances and on the balance of probabilities, what was agreed between them.

[66] The defendant, who alleges an entitlement under the agreement, bears the onus of establishing his case to the balance of probabilities standard. There are no independent witnesses to the negotiations and settlement of the agreement. Even as between Mr Budge and Dr Walker, these important evidential elements of the contract formation process were left principally to Mr Budge to discuss, negotiate and settle.

[67] There is no relevant contemporaneous documentary evidence before the Court except the mortgage document securing the loan. This records that the maximum sum secured is $180,000 but counsel were agreed that this was a liberally determined figure, probably decided upon by the solicitor drafting the mortgage to allow for subsequent advances and other contingencies, bringing the total potential indebtedness to substantially more than was actually advanced to Mr Todd. The amount of the advance is not in dispute and was in the region of $136,000.

[68] Sometimes, in such cases, the Court is able to accept entirely the relevant evidence of one party and reject, also entirely, that of the other. In other cases, the truth appears to lie somewhere between the two and perhaps not even in a way that was put forward, at least comprehensively, by either. This is just such a case.

[69] I am assisted crucially in determining this difficult question by Dr Walker's letter to Mr Todd's solicitors dated 28 October 2010. This was not sent until about

31 October 2010 or, in any event, until after the telephone conversations between Mr Todd on the one hand and Mr Budge and Dr Walker on the other, on the early evening of Sunday 31 October 2010. I have already referred to this letter (and that to which it replied) in relation to the plaintiff's motivation in dismissing Mr Todd.

[70] This was a formal and considered response to a letter from solicitors setting out Mr Todd's several concerns about the state of the employment relationship between the parties. These included his concern that there was no executed

employment agreement. It addressed also his request for certainty and peace of mind about the land that he had purchased but which was the subject of a registered mortgage securing the loan. Dr Walker and Mr Budge took time to consider their position after receipt of the lawyer's letter. Mr Budge contributed to their written response although this was ultimately given and signed off by Dr Walker.

[71] Dr Walker responded to Mr Todd's solicitors' letter materially as follows:[5]

The [Charlton] real estate [the property purchased by Mr Todd using the monies advanced to him] was acquired by and for Andrew on the following basis: to provide both parties with a form of security – for Andrew it was to be an asset when he left our employment and for us it gave the stability of long-term planning. There was to be a *minimum period* of 3 years of satisfactory performance and this gift was to financially compensate for difficulty factors in the job such as shortage of labour that increased his workload. He has now completed the three years but our intention was to remove the mortgage at the completion of his employment, not after the minimum period was completed.

...

We are agreeable to releasing the mortgage on the 31st May, 2011 or when he leaves our employment if before that date with the condition that we have

a written agreement from Andrew that this will satisfy all of his financial

claims against Glenmavis other than his salary and any holiday pay owing under the conditions of his most recent contract.

[72] The content of this letter tends to confirm that the loan was to be forgiven after mid 2009 and, by irresistible implication, that the mortgage securing it would then be discharged. There was a proposal by Dr Walker in that letter to discharge the mortgage although on condition that Mr Todd would not bring any claim against his employer arising out of his employment except as to salary and holiday pay. That was not, I find however, a condition attaching to the original terms of the loan. I cannot accept the subsequent denial of the plaintiff's witnesses that Dr Walker's letter on behalf of the plaintiff dated 28 October 2010 does not correctly describe their position at that time or must otherwise be interpreted differently to its plain meaning. This letter confirms what I find to have been the parties' agreement that the loan was to be forgiven after 3 years' employment, that is in mid-2009.

[73] It is important, also, to consider the inherent probability, in all the

circumstances, of the plaintiff's assertions about the details of the loan agreement.

The property purchased by Mr Todd (or indeed any other farmland in the area able to be purchased for a similar amount of money) was not an independent viable farming unit. Its significance lay in its potential as leased pasture for other dairying operations, principally in its anticipated capital value growth and, therefore, its sale or possibly amalgamation with neighbouring farmland to be purchased by Mr Todd. It is unlikely that the defendant would have agreed to such an arrangement on the terms now claimed by the plaintiff, that is that his loan would be forgiven no earlier than December 2013 and only then to the extent that the plaintiff, in its unfettered discretion, would allow, based on its own capital gain from the sale of its farm.

[74] I find that these monies were advanced to Mr Todd in appreciation of the initially good working relationship between the parties and in an attempt to secure his tenure as farm manager. I do not accept Mr Todd's contention that the advances were part of an agreed bonus of $50,000 per year for three years.

[75] Nor do I accept the plaintiff's case that the loan would be forgiven either upon the sale by the plaintiff of the farm property or, if Mr Todd became incapacitated, then after three years beginning with the advance of these monies in

2008. Nor do I accept the plaintiff's claims that the amount to be forgiven would be at the unfettered discretion of the employer.

[76] In my assessment, the truth lies in a combination of the parties' assertions as

follows.

[77] The monies were advanced to Mr Todd for the purchase of the Charlton Road property. The loan was interest free. At the expiry of the period of three years from the commencement of his employment in 2006, the loan would be forgiven and, by necessary implication, Mr Todd would be entitled to a discharge of the mortgage securing it to enable him to borrow against the property that he had purchased for the development of his own farming enterprise.

[78] So, by 2009 no money was owed by Mr Todd to the plaintiff or any of the partners of the plaintiff and he was, by necessary implication, entitled to a discharge of the mortgage which had secured the loan. That is consistent with Mr Todd's

growing concern that this had not occurred and the steps he took in an effort to both finalise a new employment agreement

and to release the mortgage to enable him to borrow from his bank to develop his Charlton Road property.

The loan and mortgage – remedy

[79] I also agree with the Authority that, the loan having been a term or condition of Mr Todd's employment, he is entitled to an order for compliance under s 137 of the Act. This will require the plaintiff and the partners jointly or severally to now take steps to cease their ongoing breach of the employment agreement by refusing to discharge the mortgage which purports to secure a loan that has been forgiven. The plaintiff and the individual partners, James Budge, Linley Walker and Brian Walker must, within 28 days of the date of this judgment, discharge the mortgage number

7903454.3 registered against certificate of title number Lot 2 Deposited Plan 367961 and I make an order pursuant to s 137 of the Act accordingly.

Summary of judgment

Mr Todd was dismissed unjustifiably.

I confirm the Authority's award of $15,000 as compensation under s 123(1)(c)(i) of the Act.

That sum is to be reduced by $7,346.91 to reflect overpayments received by Mr Todd on termination of his employment, taking into

account unpaid leave and holiday pay.

The loan to Mr Todd was a term or condition of his employment

agreement and, by its terms, has been forgiven by the plaintiff.

To make effective the implied term of the loan that the mortgage securing it would be discharged upon its forgiveness, there is a compliance order made under s 137 of the Act requiring the plaintiff and the partners in the plaintiff, jointly or severally, to now take steps

to cease their ongoing breach of the employment agreement and that they must, within 28 days of the date of this judgment, discharge the mortgage number 7903454.3 registered against Certificate of Title Lot

2 Deposited Plan 367961.

The defendant is entitled to an order for costs which, if the parties cannot agree, may be the subject of a written memorandum filed by the defendant within two calendar months of the date of this judgment, with the plaintiff having the period of one month within which to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 10 August 2012

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[1] [2011] NZERA Christchurch 181.
[2] [2012] NZERA Christchurch 37.
[3] [2011] NZERA Christchurch 161.

[4] At [62].

[5] Emphasis original.
