

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 74
5565294

BETWEEN DEANE THOMAS HARPER
Applicant

A N D BROOMFIELD ESTATE
PARTNERSHIP
Respondent

Member of Authority: Peter van Keulen

Representatives: Timothy Twomey, Counsel for Applicant
Fiona McMillan, Counsel for Respondent

Investigation Meeting: 1, 2 and 3 March 2016 at Christchurch

Submissions Received: Orally from both counsel on 3 March 2016
3 March and 18 March 2016 for Applicant
15 March and 29 March 2016 for Respondent

Date of Determination: 8 June 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Harper raised his personal grievance for unjustified action causing disadvantage within the requisite 90-day period.**
- B. Broomfield Estate Partnership carried out an unjustifiable action that has caused disadvantage to Mr Harper by suspending him on 20 March 2015.**
- C. Broomfield Estate Partnership unjustifiably dismissed Mr Harper.**
- D. Broomfield Estate Partnership has not acted in a manner that justifies the imposition of penalties for the breach of the Wages Protection Act 1983 or the Employment Relations Act 2000.**

- E. Broomfield Estate Partnership is to pay Mr Harper the following sums (which includes the deduction for 30% contribution) by way of remedies:**
- (a) \$11,200, without deduction, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and**
 - (b) \$21,000 gross, pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000;**
- F. Broomfield Estate Partnership has not established that Mr Harper has breached the terms of his employment in a way that caused loss to it and its counterclaim fails.**
- G. Costs are reserved with a timetable set for submissions if required.**

Employment relationship problem

[1] Broomfield Estate Partnership (Broomfield) employed Deane Harper as a Farm Manager from 21 November 2013.

[2] Jeffrey McKenzie, Financial Manager of Broomfield, suspended Mr Harper on 20 March 2015.

[3] Following an investigation and disciplinary process Mr McKenzie dismissed Mr Harper without notice on 16 April 2015.

[4] Mr Harper claims that he was unjustifiably disadvantaged in respect of his suspension and he claims that his dismissal was unjustified. He says that dismissal is unjustified in terms of both process and the substantive decision to dismiss.

[5] Mr Harper also claims that Broomfield's actions in not paying him holiday pay amounts to a breach of the Wages Protection Act 1983 (the WP Act) and I should award a penalty against Broomfield payable to him. In a similar vein, Mr Harper contends that Broomfield's actions in dismissing him amount to various breaches of his employment agreement and this behaviour justifies the imposition of a penalty payable to him.

[6] Broomfield denies the claims for unjustified action causing disadvantage and unjustified dismissal. It claims that Mr Harper did not raise the personal grievance for

unjustified action causing disadvantage within the 90-day period and therefore the Authority cannot determine it. In the alternative, it says that if the Authority determines that Mr Harper raised his grievance in time, the suspension was justified.

[7] In connection with the unjustified dismissal grievance, Broomfield claims that it conducted Mr Harper's dismissal in a procedurally fair manner and the dismissal was substantively justified based on the results of that fair process. Broomfield also says that after Mr Harper's dismissal it discovered matters relating to Mr Harper's performance during his employment that would make the award of any remedies contrary to equity and good conscience¹.

[8] Broomfield claims that it was entitled to withhold Mr Harper's holiday pay and that it acted fairly in respect of the disciplinary process and for both reasons I should not impose a penalty against it.

[9] Broomfield also raises a counterclaim against Mr Harper claiming various losses arising out of Mr Harper's conduct whilst employed including the carrying out of duties and additional actions that he undertook.

[10] Mr Harper denies the breach of any obligations and says there is no basis for the counterclaim as alleged.

The Authority investigation

[11] There are a number of issues raised in this matter. I received numerous witness statements and a large bundle of documents. All of the witness evidence was confirmed either under oath or by affirmation and there was further oral evidence given. The course of the evidence took two days of the investigation meeting.

[12] There was then a half day of oral submission by both counsel and significant written submissions lodged after those oral submissions.

[13] There is a large amount of factual material, including witness evidence and documentary material, which I have considered. There are a number of complicated issues raised in the disciplinary process, including some detailed analysis of matters pertaining to farming such as the ordering, purchase and application of fertiliser, stock grazing and stock counts and other related issues.

¹ Relying on the principles in *Salt v Fell* [2008] ERNZ 155

[14] This determination has taken some time to formulate and because of the complex issues and the volume of material, I have not recorded all of the evidence and submissions that I have received and considered. As permitted by s.174E of the Employment Relations Act 2000 (the Act), I have stated findings of fact and law, expressed conclusions on issues necessary to dispose of this matter and specified the orders I make as a result.

The issues

Unjustified action causing disadvantage

[15] The issues pertaining to Mr Harper's personal grievance of unjustified action causing disadvantage arising out of his suspension include:

- (a) Was the personal grievance raised within the requisite 90-day timeframe;
- (b) If the personal grievance was raised within the 90-day timeframe was the action of suspending Mr Harper unjustified;
- (c) If the action of suspending Mr Harper was not justified, then has that unjustified action caused disadvantage to Mr Harper's employment or a condition of it;
- (d) If there has been an unjustified action causing disadvantage, what remedies should I award to Mr Harper?

Unjustified dismissal

[16] The issues pertaining to Mr Harper's personal grievance for unjustified dismissal include:

- (a) Did Broomfield carry out a fair process when it conducted its disciplinary process which gave rise to the dismissal;
- (b) Was Broomfield's decision to dismiss Mr Harper substantively justified;

- (c) If Mr Harper is successful with his unjustified dismissal personal grievance, what remedies should I award taking account of any contribution and the question of subsequently discovered misconduct?

Penalties

[17] The issues pertaining to the request for penalties include:

- (a) Do the actions of Broomfield amount to a breach of the WP Act and/or a breach of the Act such that I should impose a penalty;
- (b) If so, what is the quantum of any penalty and should this be paid to Mr Harper?

Counterclaims

[18] The issues pertaining to Broomfield's counterclaim include:

- (a) Has there been a breach of contract by Mr Harper as alleged;
- (b) If so, is the breach of a kind that can support a claim against an employee – this raises the question of whether an employer can claim against an employee for losses arising out of poor performance or negligence or whether something more is required;
- (c) If so, what loss is caused by the breach of contract?

Events

[19] Broomfield employed Mr Harper as a Farm Manager from 21 November 2013 on the farm owned by Broomfield (the Farm).

[20] When Broomfield employed Mr Harper, it did not give him an employment agreement. Broomfield employed Mr Harper when it was considering selling the Farm. The farm manager was to get the Farm ready for sale by 30 June 2014.

[21] Geoff Dunham on behalf of Broomfield interviewed Mr Harper. Mr Dunham was a farm consultant engaged by Broomfield to advise it on the Farm. Mr Dunham told Mr Harper he would have a wide discretion to manage the Farm with the objective of returning it to profitability in terms of the pending sale.

[22] In February 2014 Mr McKenzie became involved in the Farm. Broomfield decided it needed to be more directly involved in the business and so engaged Mr McKenzie to take over the financial management of the Farm. At that stage the financial manager was David Young.

[23] Because of this reorganisation of the management by Broomfield, a management board was established. Broomfield appointed Mr McKenzie as financial manager and John Ryan as a farm consultant. Mr Dunham and Mr Young ceased having any dealings with Broomfield and the Farm in March 2014.

[24] Mr McKenzie met with Mr Harper on the Farm on 17 March 2014 to explain the changes in relation to Broomfield's involvement in the Farm and in particular, his appointment as financial manager and Mr Ryan's role as the Farm consultant.

[25] On 14 April 2014, Mr McKenzie again met Mr Harper at the Farm. This time Mr Ryan attended the meeting. Peter Shanks was also present at this meeting although he had no formal role with the Farm or the Broomfield board.

[26] There was conflicting evidence from Mr Harper and Mr McKenzie and Mr Ryan regarding the conversations that took place at the 17 March 2014 meeting and the 14 April 2014 meeting. I am satisfied that Mr Harper knew about the appointments of Mr McKenzie and Mr Ryan. I am not convinced that the reporting structure and expectations of him as the Farm manager, vis-à-vis his interaction with Mr Ryan and Mr McKenzie was explained sufficiently. Mr Harper did not understand Broomfield's expectation and in particular, Mr McKenzie's expectation of the reporting line and the steps that he might take in managing the Farm before he made any decisions that impacted on day-to-day management or financial matters.

[27] It was Mr McKenzie's expectation at that time that Mr Harper would confirm any financial matters with him and any Farm management matters with Mr Ryan before implementing them. However, Mr Harper's understanding was that he had a wide discretion to manage the Farm in order to ensure that it was profitable. He understood there might be monthly reporting or some other irregular cycle of reporting required via Mr McKenzie and Mr Ryan, but he was not obliged to have all management and financial decisions approved by them.

[28] Following this meeting, Mr McKenzie became aware that Mr Harper did not have a written employment agreement with Broomfield. He therefore sent Mr Harper

a draft employment agreement that, he says, set out the specific requirements for Mr Harper about his duties. These duties required Mr Harper to manage the Farm on a day-to-day basis within the cashflow and budgets established by Broomfield.

[29] From April 2014 Mr Harper, Mr McKenzie and Mr Ryan had meetings to discuss Farm management and financial matters. Mr McKenzie states that these meetings were formal meetings for which agendas were produced and meeting notes were drafted and circulated. There is limited information to support this, but I accept there were meetings held and in some cases, an agenda and minutes were produced.

[30] From November 2014, Mr McKenzie started to have concerns about the way in which Mr Harper managed the Farm. In particular, he was concerned about a lack of reporting and obtaining authorisation for expenditure on the Farm. Mr McKenzie raised these issues with Mr Harper informally throughout the end of 2014 and there is email correspondence that records this.

[31] These concerns continued into January and February 2015. Mr McKenzie had occasion in both January and February to speak to Mr Harper regarding decisions he was making over matters including fertiliser purchasing and overall financial matters.

[32] In late February Mr McKenzie became aware from one of the Farm workers that some barley had been sold by Mr Harper. Mr McKenzie took steps to investigate this including speaking to Mr Harper about the possible sale of barley. Mr McKenzie thought this was contrary to his instruction in relation to reporting on and/or seeking authorisation for financial transactions, particularly where financial matters were of concern and there was a severe drought affecting the Farm.

[33] These matters came to a head on 20 March 2015 when Mr McKenzie had a discussion with Mr Harper. Mr McKenzie was concerned that Mr Harper had sold barley contrary to what would have been the Farm practice at that time and without authorisation or, at the very least, without reporting to him. Further, Mr McKenzie's concern was that Mr Harper had denied selling the barley when they spoke about it previously in February.

[34] Mr Harper offered to meet Mr McKenzie at the Farm in order to talk through the issue to see if it could be resolved. Mr McKenzie refused and stated he would contact him later that day.

[35] Later that day Mr McKenzie sent an email to Mr Harper. Attached to the email was a letter that set out concerns that Mr McKenzie had regarding four issues:

- (a) The first issue was the barley sale and the conflicting versions Mr McKenzie had received about whether barley had in fact been sold.
- (b) The second issue was a stock grazing issue where Mr McKenzie alleged that he had become aware that there was stock being grazed on the Farm which did not belong to Broomfield.
- (c) The third issue related to fertiliser. Mr McKenzie's concern was that he had discussed with Mr Harper on several occasions about overspending on the purchase of fertiliser and had told him not to spend more money on fertiliser. However, it appeared that Mr Harper had, contrary to that instruction, continued to purchase fertiliser. Mr McKenzie was also concerned about the lack of documentation, particularly invoices for payment, from the fertiliser company and he was concerned that there may have been some financial benefit arising from the purchase either for Mr Harper or for a third party.
- (d) The fourth issue that Mr McKenzie was concerned about was trust and confidence. Mr McKenzie concluded that if the allegations about Mr Harper's conduct were justified, this could lead to a loss of trust and confidence.

[36] Mr McKenzie then concluded the letter by outlining his concern about Mr Harper's conduct while he investigated these matters. In particular Mr McKenzie's concern was that the investigation might be prejudiced by actions of Mr Harper if he had access to the Farm. Mr McKenzie instructed Mr Harper not to enter onto the Farm or to arrange for anyone to do so on his behalf. Mr McKenzie then stated that because Mr Harper could not enter the Farm and therefore discharge his duties properly, he was suspended on pay whilst an investigation into the four issues was carried out. Mr Harper was advised that if he did not accept that suspension was reasonable, then Mr McKenzie was prepared to consider any arguments that Mr Harper might raise to support his view and if the arguments were appropriate he would withdraw the suspension.

[37] Mr McKenzie requested a response to the matters raised by close of business Thursday 26 March 2015.

[38] Mr Harper was concerned at receiving this letter and shocked by the action of being suspended. He took some legal advice.

[39] Mr Harper's counsel wrote to the lawyers acting for Broomfield by email on 25 March 2015. That email stated, "*(w)e attach Notice raising our client's personal grievance*".

[40] Attached to that email was an undated letter (the Grievance Letter) that referred to the letter of 20 March 2015 from Mr McKenzie. It outlined the short conversation that occurred in the morning of 20 March 2015 in relation to Mr McKenzie raising the issue of the barley sale. The Grievance Letter then went on to record matters in relation to the suspension. In particular, the Grievance Letter states:

We have advised our client that he has a personal grievance for your unjustified action. You did not inform our client as to the reasons for his suspension and you denied him a proper opportunity to be heard on the issue before you made an decision to suspend. The nature of the allegations made against our client does not justify suspension and the reasons given in your email confirm your predetermination of the issues and your attitude towards our client.

Whilst you are entitled as an employer to carry out a thorough and objective investigation, there is no reasonable basis on which you were entitled to suspend our client pending the completion of your investigation. It appears that your investigation had already been completed by 20 March 2015. We note that you have not been in contact with our client since last Friday and you have not provided him with any further additional information regarding the matters raised in your email.

[41] The Grievance Letter then addressed other matters raised in the 20 March letter and then recorded:

We have advised our client as to his remedies under the Employment Relations Act.

[42] The Grievance Letter concluded by suggesting that an urgent mediation was necessary.

[43] Broomfield did not take up the offer to attend mediation at that point.

[44] What followed on 26 March 2015 was a further letter written by Mr McKenzie on behalf of Broomfield that outlined further information in relation to the four issues already raised and additional issues that had come to light. The 26 March 2015 letter was followed up with a further letter on 30 March 2015 that contained more information in relation to the issues.

[45] The correspondence outlined Broomfield's concerns and included various relevant documents.

[46] The concerns that Broomfield had arose in nine parts:

- (a) The barley sale;
- (b) The barley straw issue;
- (c) Stock grazing;
- (d) Stock reconciliation;
- (e) Harris Meats;
- (f) Fertiliser purchased;
- (g) AFFCO contract;
- (h) Unauthorised leave; and
- (i) Trust and confidence.

[47] *Barley sale* - Broomfield was concerned about the sale of barley to another farm at a time when financial transactions were being scrutinised and when a drought was affecting the feed supplies for cattle at Broomfield. Broomfield had evidence of the sale of the barley yet there was no documentation confirming it, no evidence of payment being received and when Mr Harper was first asked about the sale of barley, Broomfield believed that he had denied that to Mr McKenzie. Broomfield's concerns were to receive an explanation as to why barley was sold at all to another farmer, why the matter was not discussed with either Mr Ryan or Mr McKenzie, why Mr Harper denied selling the barley when he was first confronted about it and finally why Mr Harper appeared to then provide inconsistent explanations for the transaction.

[48] *Barley straw* - The barley straw issues related to the sale of barley straw to another farm, One Tree Hill. Broomfield's concern was that Mr Harper did not disclose this sale to Mr McKenzie and Mr Ryan, in particular the payment terms agreed with the purchaser of the barley straw.

[49] *Stock grazing* - The stock grazing issue pertained to a stock count on 20 March 2015. This stock count indicated that there was additional stock of approximately 35 head on Broomfield and Mr McKenzie believed from advice from other Farm workers that that stock had been on Broomfield for approximately one year. The concern for Broomfield was that there was stock from other farms being grazed on the Farm and this had not been authorised.

[50] *Stock reconciliation* - The stock reconciliation issue arose out of a comparison of stock figures provided by Mr Harper on 31 January 2015 and a subsequent stock take. There were discrepancies in the stock numbers that appeared to be significant to Broomfield. The particular discrepancies listed in the 30 March letter were 5 cattle and approximately 200 more breeding ewes. The figures also indicated discrepancies in the numbers of ewes, rams and lambs but the letter recorded that Broomfield was still investigating the reconciliation numbers.

[51] Broomfield sought an explanation for this including why, on the face of it, it appeared that the numbers that had been advised to Mr McKenzie and Mr Ryan by Mr Harper had only been estimates and not accurate figures, leaving some doubt as to the actual numbers.

[52] In the letter of 30 March, Broomfield raised concerns about the numbers of Speckle Park heifers and steers that had been purchased.

[53] *Harris Meats* - The Harris Meats issue related to 30 mixed age rams sent to Harris Meats on 20 February 2015 to be slaughtered and manufactured into dog rolls. Mr McKenzie was unable to find any receipts for the rams being processed by Harris Meats and there was no indication that dog rolls had been provided to Broomfield. Broomfield was concerned as to what had happened with the rams, if any dog rolls had been produced, and if so how they had been accounted for.

[54] *Fertiliser* - The fertiliser issue pertained to additional purchases of fertiliser after a period of time in which Mr McKenzie had advised that no further fertiliser was to be ordered as had been expressed in the letter of 20 March 2015. Broomfield was

also concerned that invoices had not been provided for payment. The 26 March letter also referred to specific invoices that had been amended and sought an explanation for why Mr Harper had arranged for the invoices to be amended. It listed other invoices and asked for an explanation as to why the invoices had not been presented to Mr McKenzie or Mr Ryan for payment.

[55] Further particulars of the fertiliser issue were provided in the letter of 30 March 2015. In summary, the additional information suggested that delivery of fertiliser in November and December 2014 some 9 months after it was ordered and paid for suggested that the delivery was only made because Mr McKenzie had enquired about fertiliser at that time. Further the letter recorded:

- (a) The total lime purchased from January 2014 to June 2014 was 552.38 tonnes, yet receipts indicated that only 213 tonnes had been delivered.
- (b) From 1 July 2014 lime additive purchased was 236.25 tonnes, yet transport receipts showed 643.25 tonnes had been delivered.
- (c) Conway River Lime and Soil Matters (two companies dealing with the ordering and delivery of fertiliser for Broomfield) had invoiced Broomfield for \$72,572.00 up until 30 June 2014, yet only \$27,984.06 worth of lime and additives had been received.
- (d) From 1 July 2014 Conway River Lime and Soil Matters had rendered additional invoices for \$48,320.25.
- (e) Invoices indicated that transport had been paid for delivery of lime yet it appeared the lime had not been delivered.

[56] Mr Harper was asked to explain why Broomfield was billed for lime and additives not received and why he had presented the bills for payment when the lime had not been delivered.

[57] *AFFCO contract* - The AFFCO contract issue pertained to a contract signed by Mr Harper with AFFCO. Broomfield was concerned to understand why the AFFCO contract had been signed without formal approval being obtained from Mr McKenzie and the board of Broomfield, why it had never been disclosed to Mr McKenzie or Mr Ryan, particularly in circumstances where Mr McKenzie and

Mr Harper subsequently attended a meeting with Alliance Group regarding a similar contract. Broomfield was concerned that it had been misled in relation to a contract that represented a significant portion of income for the Farm.

[58] *Un-notified leave* - Taking un-notified leave related to leave that Mr Harper appeared to have taken without notifying Mr McKenzie or Mr Ryan. This allegation extended to Farm workers suggesting that Mr Harper did not always work full days and would leave the workers without necessary supervision making it difficult for them to complete their work.

[59] *Trust and confidence* - Trust and confidence was raised by the concern that overall the various allegations suggested that Mr Harper had breached his employment agreement and had not followed instructions, he was incurring unauthorised expenditure and debt and had not honestly and diligently performed his duties. Broomfield was also concerned about the inconsistencies in his explanations and that he may have misled Broomfield and other parties. Mr McKenzie noted that Broomfield was concerned that it may not be able to rely on Mr Harper to give it accurate and timely information.

[60] On 1 April 2015, Mr Harper through his counsel responded to the letter of 26 March 2015 only and dealt with each of the issues.

[61] *Barley sale response* – Mr Harper confirmed that barley had been sold and provided a statement from Peter Mills (who had purchased the barley) to confirm this and the terms of sale being \$370 per tonne to be invoiced in April 2015 and paid in May 2015.

[62] Mr Harper reconciled the sale because he had calculated there was sufficient barley to cover the winter feed. It was Mr Ryan who had concluded that Broomfield would need to sell barley at some stage. Mr Harper was intending to raise the sale in the meeting scheduled for April. Mr Harper had no recollection of Mr McKenzie asking about the barley sale on 26 February 2015 and confirmed that he had not denied selling the barley.

[63] *Barley straw sale response* – Mr Harper advised there had been two sales of barley straw, 219 bales to One Tree Hill and 150 bales to Robbie Clarke. The sales were agreed on terms as per the previous year. Mr Harper did not raise it with Mr McKenzie as “*everything was in hand.*” Mr Harper was not aware that he needed

authority to agree the sale of barley straw, particularly when he had completed similar sales the year before.

[64] *Stock grazing response* – Mr Harper had provided his own rams to join with the Broomfield ewes in March as he had done the previous year. The lamb grazing was simply the same arrangement as in 2014, it was beneficial to Broomfield, and Mr Ryan was aware of the arrangements.

[65] *Stock reconciliation response* – Mr Harper believed his numbers were accurate and suggested that it be discussed further in a meeting.

[66] *Harris Meats response* – Mr Harper explained that the rams had been delivered to Harris Meats and there was a credit for the dog rolls. Mr Harper provided an invoice from Harris Meats confirming this.

[67] *Fertiliser response* – Mr Harper confirmed that all invoices had been presented for payment. There had been a delay in delivery of lime because of weather conditions.

[68] *AFFCO response* – Mr Harper believed he had authority to agree this contract as Farm manager. It was a lucrative contract and beneficial to Broomfield. This just evidenced that Mr Harper acted in the best interests of Broomfield.

[69] *Un-notified leave response* – Mr Harper admitted to leaving the Farm but advised that he kept in regular contact with the employees and he denied abandoning the Farm or his job. In contrast he worked whatever hours were required, more than other employees, in order to get his job done.

[70] *Trust and confidence response* – Mr Harper concluded his response by stating he was in charge of the Farm and he always put the Farm first. He was hugely upset by the allegations.

[71] The parties then met for a disciplinary meeting on 8 April 2015. Immediately prior to the meeting Mr Harper was presented with additional information. Mr McKenzie claims that information was nothing more than the information already provided but set out in a more readily understandable format.

[72] In the meeting Mr McKenzie advised Mr Harper that he had spoken to the police about some of the issues on 23 March 2015 and that he had arranged to meet with a detective in the fraud squad to discuss some of the issues on 7 April 2015.

[73] Mr Harper and his support person, Andrew Harris, described Mr McKenzie's demeanour in the meeting as aggressive and dismissive of any explanations provided to him. Mr Harris says he believed the questions were designed to trip up or trap Mr Harper. He says Mr McKenzie was unreasonable in his questioning and his expectation that Mr Harper be able to answer matters that included reference to numerous documents and analysis of figures and invoices.

[74] On 16 April 2015, having considered the responses given in the disciplinary meeting, Mr McKenzie came to a conclusion regarding the outcome and served notice of termination for serious misconduct on Mr Harper. Mr McKenzie said he investigated the matters further but the evidence shows he spoke to Peter Shanks who had been present at the meeting 14 April 2014 when Mr Ryan had been introduced to Mr Harper and attempted to contact others but did not speak to them. The further investigation was really just a further analysis of the information Mr McKenzie already had.

[75] On 17 April 2015, Mr Harper raised a personal grievance for unjustified dismissal.

[76] On 24 April 2015, Mr Harper did not receive his final pay. Broomfield withheld this, as it believed Mr Harper owed it money.

[77] On 12 May 2015, Broomfield sent an invoice to Mr Harper claiming that he owed it \$86,277.10. Broomfield claimed Mr Harper owed this amount because of various breaches of his employment obligations.

[78] After the termination of Mr Harper's employment Broomfield discovered that five unidentified cattle on the Farm had torn ear tags. It appeared these tags had been forcibly removed. Broomfield also discovered that Mr Harper had failed to pass on insurance documents for payment and it says this failure could have put the Farm's insurance at risk.

Unjustified action causing disadvantage

Did Mr Harper raise his personal grievance within the requisite 90-day timeframe?

[79] Section 114 of the Employment Relations Act 2000 (the Act) provides:

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer with the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[80] Broomfield claims that Mr Harper failed to raise his personal grievance for unjustified action within the 90-day time frame. It says this is because the Grievance Letter that purports to raise the personal grievance does not do so. Counsel for Broomfield says that the Grievance Letter states that Mr Harper's "*representative says that he had advised his client that he had a personal grievance ... and advised his client as to his remedies under the Act ..., which it is submitted does not amount to raising a grievance with the employer.*" Counsel also says, "*not only must a grievance be properly identified, the employer must be able to respond meaningfully to any remedies sought so as to properly deal with the grievance.*"

[81] It appears that counsel for Broomfield has three possible arguments in relation to any alleged failing of the Grievance Letter:

- (a) Stating that counsel has advised Mr Harper that he has a personal grievance is not raising that grievance;
- (b) In any event there is insufficient information setting out the grievance such that Broomfield is not able to respond;

- (c) In particular, the letter fails to specify how the grievance can be resolved and this means Broomfield cannot address the grievance and rectify it².

[82] I do not accept that the words “(w)e have advised our client that he has a personal grievance for your unjustified action” fails to raise a grievance under s 114 of the Act. This is particularly so in circumstances where the email that sent this letter states “(w)e attach Notice raising our client’s personal grievance.” And where the letter itself states, in the concluding paragraphs “we suggest that you contact your lawyer to respond to our client’s grievances” and “(w)e further suggest that an urgent mediation is necessary to resolve the employment issues.”

[83] I am satisfied that the Grievance Letter had enough information in it that sufficiently specified the grievance for Broomfield to be able to respond to it³.

[84] In *Idea Services Limited (In Statutory Management) v Valerie Barker*⁴ the Employment Court held that the requirement of specificity pertains to identifying the employment relationship issues but this does not extend to a requirement to particularise the remedies sought. Judge Inglis stated⁵:

The underlying purpose of the personal grievance procedures is to identify and address employment relationship issues expeditiously and by direct communication between the parties to it. It is evident too that the grievance process is designed to be informal and accessible. Section 114 is to be read consistently with those purposes. While particularisation of the remedies sought may assist an employer in understanding what the employee wants addressed, and may accordingly bolster an argument that the thresholds requirements of s 114(2) have been met, it will not always be necessary.

[85] Applying *Idea Services* I conclude that Mr Harper has raised his personal grievance for unjustified action causing disadvantage by the Grievance Letter and this is within the requisite 90-day period.

Was the action of suspending Mr Harper unjustified?

[86] The question of whether a suspension is justified requires a consideration of procedural fairness and the circumstances of the employment including the

² Relying on *New Zealand Post Primary Teachers’ Association and Webb v The Board of Trustees of Okaihau College* [2015] NZERA Auckland 262 at [48].

³ *Creedy v Commissioner of Police* [2006] ERNZ 517

⁴ [2012] NZEmpC 112

⁵ At [40]

consequences of suspending or not suspending for both the employee and the employer. Not every instance of suspension requires the employee be told of the pending suspension with a view to the employee commenting on the proposal before a decision is made to effect a suspension or not⁶.

[87] The simple point is, if there is some credible reason why the employee's view on a proposed suspension should not be sought before a decision is made then an employer cannot be said to have acted unfairly. The weighing up of the circumstances indicates that a fair and reasonable employer in that position could have acted as the employer did, in not seeking input before suspending.

[88] I am not satisfied that the circumstances of this case warranted immediate suspension without consultation with Mr Harper. The concern complained of was that if Mr Harper was not supervised on a daily basis he might take an opportunity to rectify one of the complaints by, for example, having stock removed from the Farm. That presented a financial risk and potential for interference with the investigation that was too great to allow Mr Harper to remain on the Farm.

[89] Putting aside the question of whether that was a credible concern the obvious point is that concern does not require immediate suspension. From my understanding of the circumstances on the Farm I doubt very much that if Mr Harper was forewarned of a suspension and asked to comment on it, he would have sufficient time to arrange transportation of stock from the Farm before he provided that response and a decision was made.

[90] This is not one of those case contemplated by the Court in *Graham v Airways Corporation of New Zealand Ltd*, and suspension without consultation was not justified.

[91] In addition, it is not, in my view, sufficient to say that an employee could have responded after the decision was made to suspend and the employer would have considered that. I do not accept that this opportunity remedies a failing to consult if the circumstances dictate that consultation should have taken place.

⁶ *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587

Has the suspension caused any disadvantage to Mr Harper's employment or a condition of it?

[92] I accept that the unjustified suspension caused disadvantage to Mr Harper's employment. At the very least, it impacted his ability to prepare for the disciplinary meeting and impacted on the perception of guilt in respect of the allegations.⁷

[93] I find that Broomfield acted unjustifiably toward Mr Harper by suspending him and this caused disadvantage to his employment.

Unjustified dismissal

Did Broomfield carry out a fair process when it conducted the disciplinary process that gave rise to the dismissal?

[94] In order for the disciplinary process to be fair, the actions of Broomfield, in conducting that process, must be justifiable. Section 103A(2) of the Act establishes the test for justification and s 103A(3) of the Act sets out the factors I must consider when applying that test. The Employment Court has discussed and elaborated on these requirements⁸.

[95] In addition to applying the factors set out in s 103A(3) of the Act I can consider any other relevant factors⁹. The other factors that I think are appropriate for the test of justification are the obligations imposed on Broomfield by s 4(1A) of the Act¹⁰ and the issue of bias by Broomfield. Mr Harper says the issue of bias arises because Mr McKenzie, who investigated the issues, conducted the disciplinary process and made the decision for Broomfield, was the complainant for many of the issues raised and was directly involved in some aspects that gave rise to Broomfield's complaints. Mr Harper says that Broomfield's bias is evidenced in the unjust dismissal and by other actions such as reporting issues that were subject to the Broomfield investigation to the police before Mr Harper had an opportunity to properly respond to the allegations.

[96] The question of whether Broomfield carried out a fair disciplinary process requires me to consider:

⁷ *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943

⁸ *Angus v Ports of Auckland* [2011] NZEmpC 160

⁹ Section 103A(4) of the Act

¹⁰ See *Jinkinson v Oceania Gold (NZ) (No. 2)* [2010] NZEmpC 102

- (a) Did Broomfield investigate the misconduct and perceived failings sufficiently including, in particular, any further investigation it may have been obliged to undertake as the process developed;
- (b) Did Broomfield outline the allegations, explain the possible implications of a finding of misconduct and give all of the information it had that was relevant to the misconduct, to Mr Harper for him to consider and respond to;
- (c) Did Broomfield give Mr Harper a reasonable opportunity to respond to the information provided and the allegations, before it made its decision to dismiss;
- (d) Did Broomfield consider properly any explanation given by Mr Harper before it made its decision to dismiss;
- (e) Did Broomfield give Mr Harper an opportunity to respond to the decision to dismiss him, and if so, did it consider this response;
- (f) Where there any other actions or omissions by Broomfield in the course of the disciplinary process which rendered the process unjust such as bias and/or predetermination;
- (g) If there was a failing by Broomfield in any of the steps above, does that render the disciplinary process unfair?

[97] I am satisfied that Broomfield investigated the initial concerns it had regarding Mr Harper's performance and conduct. However, I am not satisfied that it carried out an investigation with an open mind nor did it do enough. The failings in the process of investigating included:

- (a) Mr McKenzie was in many aspects of the issues raised the complainant. For example for the sale of barley part of the concern was that Mr Harper did not tell the truth about the barley sale when first questioned about it. The conversation that raised this concern was between Mr McKenzie and Mr Harper. Mr McKenzie had firm views about what occurred, as he is entitled to have, but for him to investigate

that creates a problem as he would be unlikely to be persuaded that what happened was anything other than what he recalled.

- (b) Broomfield reported its concerns regarding Mr Harper's conduct to the police during its investigation and immediately before the disciplinary meeting. This suggests it had formed a view about culpability for dishonest behaviour by Mr Harper during its investigation and certainly before it had heard from Mr Harper on the allegations.
- (c) Broomfield did not speak to relevant and important people involved in some of the issues. Given Mr Harper's responses, I can identify several people Broomfield should have spoken to. These include Peter Mills regarding the terms of the sale of barley; Robbie Clarke regarding the sale of barley straw; Mr Ryan regarding the grazing of Mr Harper's own stock in previous years; Bryan Harris of Harris Meats regarding the dog roll; and Robert Flynn of Conway Lime regarding the ordering, invoicing and delivery of the lime.

If Broomfield did speak to these individuals then I believe that many of the issues would have been clarified. For example, Bryan Harris of Harris Meats gave evidence in the investigation meeting of how his business operated the processing and delivery of dog roll. That indicated that the non-delivery Broomfield complained of was standard and in fact Broomfield's allocation of dog roll was available to be collected when required. He also confirmed that Harris Meats had failed to produce an invoice at the time and he took responsibility for this. It is clear to me that if Broomfield had accepted that explanation (which it did accept in the investigation meeting) prior to the decision to terminate Mr Harper's employment then it could not have made the conclusion that it did regarding this issue.

- (d) It appears that Broomfield stopped looking for any information that might explain the issue with the dog roll once it believed that Mr Harper was at fault.

[98] Broomfield did provide all of the information that it had to Mr Harper and it did so comprehensively. I cannot fault this aspect of its disciplinary process. I am satisfied that Mr Harper knew the allegations and understood what he was responding to.

[99] Mr Harper did have a reasonable opportunity to respond to the information presented to him. The only criticism that I might have is there was only a short space of time to deal with additional information provided to Mr Harper before the disciplinary meeting. However, I accept what Broomfield says about that information; it was only a restatement of the figures and the information that Mr Harper already had.

[100] Broomfield did not properly consider any response from Mr Harper. This is best evidenced by the failure to investigate further after the disciplinary meeting. This supports the allegation that Broomfield had predetermined this matter and on balance, I accept that was the case. I believe Broomfield had investigated, formed a view about Mr Harper's culpability and acted on that regardless of what Mr Harper explained to it.

[101] The other procedural failing was that Broomfield came to various conclusions about Mr Harper's conduct on which it relied to decide that it should dismiss Mr Harper because he was guilty of serious misconduct. However, these conclusions, which were crucial to the decision to dismiss, were not put to Mr Harper for comment. Applying s 4(1A) of the Act in this case means Broomfield should have presented the key conclusions and its preliminary decision to dismiss for serious misconduct to Mr Harper for comment.

[102] The key conclusions that were expressed in the notice of termination included:

- (a) *Barley sale* – a conclusion that the evidence led Mr McKenzie to doubt that payment for the sale of barley was ever intended to be made and this meant Broomfield could no longer have trust and confidence in Mr Harper as Farm manager.
- (b) *Barley straw* – a conclusion that a verbal contract is unacceptable as it is not transparent or readily enforceable and the non-disclosure of this sale formed part of a pattern of conduct that justified dismissal.
- (c) *Stock grazing* – a conclusion that by grazing his own stock Mr Harper obtained a personal benefit, this with the failure to disclose it to Mr McKenzie or Mr Ryan justified dismissal.

- (d) *Stock reconciliation* – a conclusion that the quantity of under reported stock and an inability to explain suggested deliberate underreporting of stock to enable Mr Harper to benefit personally and a further conclusion that Mr Harper had conducted transactions at a cost to Broomfield that benefitted Mr Harper personally.
- (e) *Harris Meats* – a conclusion that as there was no reasonable explanation the transaction may have been for personal gain and the failure to obtain documentation at the time of the transaction was seriously negligent and this justified dismissal.
- (f) *Fertiliser* – a conclusion that Mr Harper could not or would not explain what had happened with the fertiliser expenditure and a further conclusion that, as a result, Mr Harper had benefitted personally from the fertiliser purchase.
- (g) *AFFCO contract* – a conclusion that Mr Harper had failed to recognise that there was an issue which meant Mr McKenzie could no longer have trust and confidence in Mr Harper to be honest with Broomfield, its suppliers or its customers.

[103] In summary, Broomfield had concluded that there was a pattern of deliberate non-reporting, a failure to document transactions properly including suspicious amended and post-dated invoices and an inability or reluctance to explain events. This led to a further conclusion that Mr Harper had something to hide; that he was getting some personal gain from the various transactions or events.

[104] None of these specific conclusions or even the general one that I have expressed were put to Mr Harper for comment before Broomfield decided to dismiss.

[105] I do accept that Broomfield considered the allegations carefully and the information it had uncovered in its investigation. It expressed its views based on this in a comprehensive fashion. Its analysis is logical but the conclusions are flawed because of the failings in its process.

[106] I conclude that Broomfield failed to carry out a fair process:

- (a) Broomfield failed to investigate fully and with an open mind;

- (b) Broomfield failed to consider Mr Harper's responses properly and with an open mind;
- (c) Broomfield's investigation, disciplinary process and decision were tainted by bias due in part to Mr McKenzie's involvement as a complainant in many aspects of the concerns; and
- (d) Broomfield failed to put relevant information and conclusions to Mr Harper to comment on before it made its decision to terminate his employment.

[107] This finding is compounded by two factors.

[108] First, in *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd*¹¹ the Labour Court held that where there are serious allegations such as theft or dishonesty that are the basis for serious misconduct and a subsequent dismissal then "*the evidence in support of it must be as convincing in its nature as the charge is grave.*" The Court went on to explain the rationale for this, being "*the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.*"¹²

[109] It should have been clear to Broomfield that these were serious allegations and therefore it needed to be satisfied on the basis of evidence that was convincing. This emphasized an obvious necessity for Broomfield to ensure the investigation was full and free from any bias and highlighted the need to revisit the allegations and conclusions it had reached with Mr Harper before it made its final decision.

[110] Second, given the nature of the allegations this was a matter where it was unwise for Mr McKenzie as the complainant to fulfil the role of investigator and decision maker. Whilst the Employment Court has said that "*(t)here is no hard and fast rule that a person involved in a disciplinary decision may not rely on his own observations of the conduct in question*" it must not be the case that the "*decision maker's involvement in the events in question was such that an objective observer*

¹¹ [1989] 3 NZILR 82

¹² At 85

*would conclude that he or she had not brought an unbiased mind to the decision to dismiss.*¹³ In this case, the latter cannot be said thus tainting the process conducted.

Was Broomfield's decision to dismiss Mr Harper substantively justified?

[111] Given the procedural failings, I cannot find there is a basis for Broomfield to conclude that Mr Harper was guilty of dishonest acts amounting to serious misconduct. Therefore, the decision to dismiss Mr Harper is not substantively justifiable.

Remedies

Hurt and humiliation

[112] As Mr Harper has been successful with both of his grievances I will award compensation for injury to feelings pursuant s 123(1)(c)(i) of the Act for both grievances.

[113] Mr Harper gave evidence of the impact of the suspension and dismissal as did his wife, Lynne Harper.

[114] Mr Harper described farming as all he knows and his reputation for having a hard work ethic and being honest had been destroyed by his dismissal. In his own words he had "*been fair kicked in the guts.*" Mr Harper was in many respects the classic stoic kiwi farmer, playing down the hurt he had suffered but he was emotional when discussing the effect of the dismissal on his family.

[115] Mrs Harper's evidence of the suffering Mr Harper had been through was more candid and raw. It painted a picture of a man destroyed by the allegations and distraught by being left with nothing and no recognisable way out of the financial implications of being without work. Her concern was that Mr Harper might commit suicide as a result of the dismissal. She described him as being depressed and withdrawn. She recounted often waking in the night to find Mr Harper not sleeping.

[116] Whilst there was no medical evidence to support a conclusion of actual depression or the manifestation of suicidal tendencies, I am satisfied by Mrs Harper's

¹³ *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Ltd* [2014] NZEmpC 60 at [45]

evidence that the suffering Mr Harper experienced was well within the mid-range of suffering and it attracts a payment of \$13,000.

[117] There was little evidence directed solely toward the impact that the suspension had on Mr Harper. In the circumstances, I award only a modest, if not small amount for this of \$3,000.

Lost remuneration

[118] Mr Harper has claimed lost remuneration for a period exceeding three months. This requires me to exercise my discretion under s 128 of the Act to award lost remuneration for a period greater than three months.

[119] Mr Harper gave evidence about his attempts to mitigate his loss and the fact that he has only been able to secure work away from home. He obtained employment three months after his dismissal and was paid \$40,000 per annum. I am satisfied on the evidence I heard that Mr Harper did attempt to mitigate his loss and has accounted for any earnings he received during the time for which he claims to be reimbursed.

[120] In awarding compensation for financial loss I must have regard to all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of Mr Harper's employment.¹⁴

[121] I am prepared to award lost remuneration for a period of six months. I conclude that given the difference in opinion between Mr Harper and Mr McKenzie as to how the Farm should be run, particularly in regard to reporting and obtaining approval for transactions and operational decisions, I believe Mr Harper would have resigned or would have been dismissed within a six month period.

[122] I will award six months lost remuneration. I calculate this to be \$20,000 for the first three months and then \$10,000 for the additional three months (i.e. a reduction based on Mr Harper's earnings during this period of \$10,000) so, a total of \$30,000.

Contribution

[123] Pursuant to s 124 of the Act I must consider whether Mr Harper contributed to his grievances in such a way that the remedies I have awarded should be reduced.

¹⁴ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [37]–[38].

[124] I accept that Mr Harper did contribute to his grievances. Mr Harper failed to report to Mr McKenzie adequately both in respect of regular financial and operational matters on the Farm particularly in respect of the matters that gave rise to Broomfield's concerns and the subsequent investigation. I am not satisfied that Mr Harper knew the extent of reporting obligations that Mr McKenzie expected of him but he could have done more in terms of reporting and recording what he was doing.

[125] Mr Harper was running the Farm as he saw appropriate but that was not without obligation to report to Broomfield more fully than he did. I calculate his failure to report contributed to his grievances such that his remedies should be reduced by 30%.

Subsequently discovered misconduct

[126] Broomfield have not persuaded me that the subsequently discovered misconduct occurred, in relation to the ear tags being forcibly removed, or that it would have justified dismissal, in connection with the insurance documents not being passed on for payment. There is no basis to apply *Salt v Fell* and therefore no change to the remedies I have awarded.

Penalties

Breach of the Wages Protection Act 1983

[127] Whilst the disciplinary process undertaken by Broomfield was flawed and there was not substantive justification I am satisfied that it believed Mr Harper had committed acts either deliberately or negligently that had cost it money. And it believed it was entitled to recoup payment from his holiday pay. Once it accepted it could not withhold payment it then paid the money owing to Mr Harper. So whilst there was a breach of the WP Act I am not satisfied that in the circumstances a penalty should be awarded.¹⁵

Breach of the Employment Relations Act 2000

[128] Similarly, I do not accept that Broomfield's actions amount to anything other than steps taken by an employer in carrying out a disciplinary process. It was a

¹⁵ Applying the principles set out in *Tan v Yang* [2014] NZEmpC 65

flawed process but this does not amount to breaches of Mr Harper's employment agreement such that a penalty should be imposed. Therefore I will not award a penalty against Broomfield for breaches of Mr Harper's employment agreement.

Broomfield's counterclaim

[129] Broomfield's counterclaim against Mr Harper is expressed as:

By way of counter-claim, the respondent seeks payment from the applicant of all expenditure he arranged to have paid by the respondent which was wholly or in part for his own benefit contrary to the implied term in his employment agreement of honesty and fidelity to his employer.

[130] Broomfield calculates the sum owing to it for this alleged breach of honesty and fidelity as \$86,277.10 as detailed in the invoice dated 12 May 2015 and \$712.77 being the amount of personal expenditure incurred by Mr Harper on a work credit card paid by Broomfield.

[131] It is important to note that the basis of the counterclaim is not a claim for losses arising out of failings by Mr Harper to fulfil his employment tasks adequately. If this were the case then I would have concerns about my ability to determine the counterclaim. In its decision in *Lister v Romford Ice & Cold Storage Co Ltd*¹⁶ the House of Lords concluded that employers might sue employees for damages arising out of an employee's failure to exercise skill and care in performing his/her duties, this being an implied term. However, the Employment Court has expressed doubts about the application of this stating it is strongly arguable that an employer may not recover damages from an employee arising from negligence in performing their duties¹⁷:

... [I]t is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair

¹⁶ [1957] 1 All ER 125

¹⁷ *George v Auckland Council* [2013] NZEmpC 179 at [147].

allocation of risk and which party is best placed to mitigate potential liability.

[132] As I said to counsel in the course of oral submissions, Judge Inglis' observations in *George* suggest that I cannot find a breach of contract claim against Mr Harper where the losses are the result of negligence committed by Mr Harper in the course of performing his duties. At the very least, a cautious approach is required¹⁸.

[133] Based on my concerns about the limitations raised in *George* and the way in which the counterclaim is pleaded, I am satisfied that I should consider only a narrow counterclaim. I need to determine whether the breaches of contract that give rise to the losses sought are deliberate acts designed for Mr Harper's own benefit i.e. not simply negligent acts by Mr Harper.

[134] This limited counterclaim, however, raises other concerns over jurisdiction. Counsel for Mr Harper submits that a counterclaim that essentially amounts to an employer seeking recovery of money allegedly stolen by an employee is not a claim that the Authority has jurisdiction to hear, applying *JP Morgan Chase Bank NA v Lewis*¹⁹.

[135] That submission has merit but in this case, the counterclaim pleads a breach of the duty of honesty and fidelity and is not limited to mere allegations of theft. Rather the factual basis for the various parts of the counterclaim suggest that the events may not manifest as simply theft but rather some other personal gain arising out of a breach of duty in the course of employment. By its very nature that claim could be employment related as it considers distinct employment obligations. It may be therefore that I do have jurisdiction to hear the counterclaim.

[136] It is this analysis regarding the basis for jurisdiction that reveals the failing of the counterclaim. I have already determined that there is insufficient basis for Broomfield to draw the conclusions that it did, that Mr Harper was guilty of conduct giving rise to personal gain or benefit, such that the dismissal was unjustified. The same problem arises with the counterclaim. I am not satisfied that there is evidence to establish that Mr Harper was guilty of conduct giving rise to personal gain or benefit; so there is no evidential basis for the counterclaim.

¹⁸ See discussion on this in *Henderson v The Flooring Centre Ltd t/a The Flooring Centre South Ltd* [2015] NZERA Christchurch 41.

¹⁹ [2015] NZ CA 255

[137] By way of example there is no evidence that Mr Harper benefitted from an alleged over ordering of fertiliser himself either by direct receipt of payment or some other benefit from the supplier or distributor. Yet, Broomfield claims it is owed \$17,632 for lime ordered by Mr Harper that it alleges was not delivered. In the absence of any evidence to show that Mr Harper benefitted from this I am left with other possible conclusions about what may have occurred. The lime may have been delivered and Broomfield's analysis of it not being delivered is flawed. The lime may have been delivered but an amount was lost through waste, delivery, or some other cause. The lime may not have been delivered but is scheduled to be delivered later.

[138] Another example is Broomfield claims it should be paid for a cattle beast killed by Mr Harper. Mr Harper says he believed he was entitled to do this as part of the benefits he was to receive as Farm manager; this was described by him as standard practice for farm managers. In any event, he believed he was entitled to make a decision about such things as Farm manager, and a cattle beast had been killed previously for other staff.

[139] The evidence therefore does support some dishonest action in killing the cattle beast but this is, at best, a performance issue in terms of authorising the killing of cattle where that was not his decision; but Mr Harper did not know he was not entitled to make that decision.

[140] I have considered all of the elements of Broomfield's counterclaim based on the evidence. The result is I am not satisfied that Broomfield's counterclaim is established on the evidence.

Determination

[141] Mr Harper raised his personal grievance for unjustified action causing disadvantage within the requisite 90-day period.

[142] Broomfield carried out an unjustifiable action that has caused disadvantage to Mr Harper by suspending him on 20 March 2015.

[143] Broomfield unjustifiably dismissed Mr Harper.

[144] Broomfield has not acted in a manner that justifies the imposition of penalties for the breach of the Wages Protection Act 1983 or the Employment Relations Act 2000.

[145] Broomfield is to pay Mr Harper the following sums (which includes the deduction for 30% contribution) by way of remedies:

- (a) \$11,200, without deduction, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$21,000 gross, pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000;

[146] Broomfield has not established that Mr Harper has breached the terms of his employment in a way that caused loss to it and its counterclaim fails.

Costs

[147] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[148] If they are not able to do so and a determination on costs is needed Mr Harper may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. Broomfield will have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

[149] If I am to determine costs, the parties should expect me to apply the usual ‘daily tariff’ adjusted upwards or downwards to account for particular circumstances or factors of the case.²⁰

Peter van Keulen
Member of the Employment Relations Authority

²⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].