

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 222
3004593

BETWEEN	CAROLINE HARRISON Applicant
A N D	ARTHUR BOYTE First Respondent
A N D	AG & DM BOYTE PARTNERSHIP Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Robert Davies and Susan-Jane Davies, Counsel for Applicant
Kate Ashcroft, Counsel for Respondents

Investigation Meeting: 20 and 21 June 2017 at Hamilton

Submissions Received: 23 June 2017 from Applicant
30 June 2017 from Respondents

Date of Determination: 28 July 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mrs Caroline Harrison was employed on a casual basis during the 2015/2016 (first season) and the 2016/2017 (second season) dairy seasons.**
- B. Mrs Harrison was employed by the AG&DM Boyte partnership (the Boyte partnership) during both the first and second seasons.**

- C. The Boyte partnership owes Mrs Harrison the sum of \$10,103.40 in unpaid wages, public holidays and holiday pay due in respect of her employment by it during the second season from 30 July 2016 to 17 November 2016. Payment of this amount is to be made by the Boyte partnership to Mrs Harrison within 21 days of the date of this determination**
- D. Mrs Harrison was dismissed by the Boyte partnership and the dismissal was both procedurally and substantively unjustified. Mrs Harrison did not contribute to her dismissal.**
- E. In order to settle Mrs Harrison's personal grievance claim, the Boyte partnership is to make payment of the following sums to her within 21 days of the date of this determination:**
- (a) \$8,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings in respect of her unjustifiable dismissal;**
 - (b) \$982.80 gross, being reimbursement of lost wages from 17 November 2016 to 30 November 2016 under s.128(2) of the Act;**
 - (c) \$303.10 in Kiwisaver contributions into Mrs Harrison's Kiwisaver account pursuant to s123(1)(b) of the Act.**
- F. The Boyte partnership failed to keep and provide wage and leave records and a written individual employment agreement for Mrs Harrison.**
- G. Within 21 days of the date of this determination, the Boyte partnership must pay to the Authority, for transfer to a Crown bank account, a total of \$1,000 as penalty for its breaches of the Act, in respect of Mrs Harrison.**
- H. The entire penalty is to be paid by the Authority to Mrs Harrison pursuant to s.136(2) of the Act.**
- I. Costs are reserved.**

Employment relationship problem

[1] The applicant is Mrs Caroline Harrison. The first respondent is Mr Arthur Boyte, a dairy farmer. Mr Boyte and his wife Mrs Dianne Boyte are partners in the second respondent, the AG & DM Boyte Partnership (the Boyte partnership).

[2] The Boyte partnership owns and operates a dairy farm at 1012 Tirohanga Road, Atiamuri (the Tirohanga farm).

[3] Following the departure of the farm manager on the Tirohanga farm in September 2015, the Boyte partnership employed Mrs Harrison's husband, Mr Kevin Harrison as the full time farm manager. Mr Harrison was the farm manager from September 2015 until 25 April 2017.

2015/2016 dairy season (the first season)

[4] As farm manager, Mr Harrison was provided accommodation on the Tirohanga farm. Mr and Mrs Harrison moved into the accommodation in October 2015. During the 2015/2016 dairy season (the first season), Mrs Harrison did a variety of work on the farm including painting the accommodation, farm maintenance, milking and similar duties. This work was paid for at the rate of \$20 gross an hour plus 8% holiday pay. Timesheets for this work were provided to Mr Boyte. The Boyte partnership made payment for this work into the Harrisons' joint bank account.

2016/2017 dairy season (the second season)

[5] Mrs Harrison says from 30 July 2016, she was re-employed by the Boyte partnership for the 2016/2017 dairy season (the second season) on the same terms and conditions as for the previous dairy season; as a casual employee at \$20 gross an hour plus holiday pay, doing a variety of duties on the farm, for which she submitted timesheets.

[6] Mrs Harrison says she sent timesheets by email to Mr Boyte for her work each fortnight for 6 weeks, but was not paid. On 17 November 2016,

Mrs Harrison says she received an email from Mr Boyte saying she had only been a “casual relief milker” and was not going to be paid for other work which she had not been employed to do. Mrs Harrison says she was shocked by the email and took it to mean she had been dismissed. Mrs Harrison says she was “gutted” by the email as she had worked so hard on the farm. She believed she had been unjustifiably dismissed.

[7] Mrs Harrison says she is owed wages for the second season, was unjustifiably dismissed and seeks remedies.

Reply to employment relationship problem

First season

[8] Mr Boyte says Mr Harrison was employed as the farm manager and he and Mrs Harrison moved into the farm accommodation. The accommodation required painting and the Harrisons offered to do the painting. Mr Boyte was not concerned whether Mr or Mrs Harrison did the painting. His view was that he was employing Mr Harrison and if Mr Harrison wanted his wife to undertake any work then it was for him to arrange. The rate agreed with the Harrisons to do the painting was \$20 gross an hour. Any relief milking and other work on the farm was paid at the rate of \$20 gross an hour. Mr Boyte says Mrs Harrison was not employed to do any other farm work.

[9] Payment for the painting and relief milking work during the first season was paid into Mr and Mrs Harrison’s joint bank account.

Second season

[10] Mr Boyte says he was confused when Mrs Harrison began sending timesheets to him during the second season for other work she had not been employed to do. Mrs Harrison continued to send timesheets and continued asking to be paid. So, Mr Boyte says he sent an email to Mrs Harrison on 17 November 2016 to make it clear to her that she was only employed as a casual relief milker and that her timesheets for other work were not going to be paid.

[11] Mr Boyte says Mrs Harrison was not unjustifiably disadvantaged or dismissed and is not owed wages or compensation.

Investigation meeting

[12] As permitted under s.174E of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[13] The investigation in the Authority took two full days. Mrs Caroline Harrison and Mr Kevin Harrison filed witness statements as did Mr Dylan Hilhorst, farm manager, on a nearby farm. For the respondents, Mr Arthur Boyte filed a witness statement as did his daughter Ms Rachel Hunt. Mrs Dianne Boyte and Mr Mark Macintosh, farm consultant from AgFirst Consultants NZ Limited, attended the investigation meeting to answer questions after being requested to do so by the Authority. Mr Alastair Flett, formerly an accountant at Crowe Horwath, and one of the accountants for the Boyte partnership at the time was connected by phone to the investigation meeting to answer questions from the Authority.

[14] Each witness confirmed by affirmation or on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

Non-publication order

[15] By preliminary determination dated 2 June 2017¹, the Authority made a permanent order for non-publication of all documents and other evidence which contains or identifies Mrs Harrison's financial information, including her tax summaries and KiwiSaver records and joint bank statements.

[16] The Authority also ordered the permanent prohibition from publication of all documents and other evidence which contains or identifies sensitive commercial information about Mr Boyte and the Boyte partnership financial affairs. The order was also made in respect of a supplementary bundle filed in the Authority by Mr Boyte and the Boyte partnership, on the basis that it is in the interests of justice to do so.

¹ [2017] NZERA Auckland 161

[17] The non-publication orders were made by the Authority pursuant to its powers under Schedule 2, clause 10(1) of the Act. The permanent non-publication orders continue to apply in relation to the financial information referred to in paras. [11] and [12] of this determination.

The issues

[18] The issues for the Authority to determine are as follows:

- Was Mrs Harrison employed: (a) during the 2015/2016 dairy season; and/or (b) 2016/2017 dairy season?
- If Mrs Harrison was employed, was she employed by Mr Boyte or the Boyte partnership?
- If the employment relationship was that of casual employment, is Mrs Harrison owed wages and if so what is the quantum owed to her?
- If Mrs Harrison was employed, was she dismissed from her employment and if so, was the dismissal unjustified?
- If Mrs Harrison was unjustifiably dismissed what remedies is she entitled to?
- If there was not a dismissal, was Mrs Harrison unjustifiably disadvantaged and if so what remedies are available to her?
- If Mrs Harrison was unjustifiably dismissed or disadvantaged did she contribute and if so should any compensation awards be reduced?
- Are penalties payable for failures to keep and maintain a wages and time record and an employment agreement for Mrs Harrison?

Background

[19] On 15 August 2015, the farm manager on the Tirohanga farm resigned and left on 25 September 2015. At about the same time, a complaint was made by a neighbouring farmer about the condition of the Tirohanga farm. As a result, DairyNZ Limited (DairyNZ) put together a team to visit the

Tirohanga farm. The team was tasked with investigating the complaint, reporting on the farm and ensuring it was taken out of a state of “*high risk non-compliance*”. The team consisted of Mark Macintosh, farm management consultant, and representatives from DairyNZ, Fonterra Limited (Fonterra) and a vet from Vetora Limited (Vetora).

[20] Mr Macintosh has more than 30 years’ experience in farm consultancy. Mr Macintosh was a founding director of AgFirst Consultants NZ Limited (AgFirst)².

AgFirst Consultants NZ Limited was formed in January 1995 to provide farmer, grower and agri-business clients access to experienced consultants who were able to offer sound and unbiased advice ... with ... skills in Sheep and Beef, Dairying, Engineering, Horticulture and Valuation.

[21] Mr Macintosh says that he was primarily involved with the team put together by DairyNZ because of concerns about animal welfare on the Tirohanga farm. Mr Macintosh says the Boytes’ bank, ASB Bank Limited (ASB), also required that a farm adviser be engaged to assist with the issues concerning the Tirohanga farm. Mr Macintosh was appointed accordingly. At the time of his engagement to the team, Mr Macintosh described the Tirohanga farm as being in very poor condition. Stock were emaciated, the herd was stressed, the farmhouse was rundown and in need of significant repair.

[22] Mr Macintosh met with Mr Boyte on 3 September 2015 to discuss the Tirohanga farm. Part of the discussion was about the need to recruit a farm manager to replace the farm manager who was about to leave.

[23] On 4 September 2015, Mr Macintosh provided Mr Boyte with an initial report about the Tirohanga farm and what needed to be done quickly.

[24] Mr Macintosh visited the Tirohanga farm on a number of occasions and was instrumental in the recruitment of the Harrisons in September 2015 to manage and work on the farm.

First issue

Was Mrs Harrison employed: (a) during the 2015/2016 dairy season?

15 September 2015 - interview for farm manager position

[25] Mr Macintosh was the person who advertised the farm manager role for the Tirohanga farm, vetted applicants and set up interviews. On 15 September 2015, Mr Harrison met with Mr Boyte for a job interview for the farm manager role. Mr Macintosh who had set up the interview attended as did Mrs Harrison.

[26] After the meeting, the Harrisons discussed concerns between themselves about the state of the farm and how much work would be needed for it to become productive. Mr Macintosh says the Harrisons were concerned about the state of the farm.

23 September 2015 - 2 meetings to discuss the farm manager position

[27] **First meeting:** Mr Macintosh, Mr Boyte and Mr and Mrs Harrison met again at the farm on 23 September 2015 to talk further about the job. After the meeting, Mr Harrison decided not to go ahead with the role because of the poor condition of the farm and the farm house and the amount of work involved. However, Mr Macintosh asked Mr Harrison to have a further discussion with Mr Boyte as the existing farm manager was about to leave and Mr Boyte would be left without a manager.

[28] **Second meeting:** Mr Macintosh and Mr Boyte met with the Harrisons at the Harrisons' home later on 23 September 2015 to talk further about the Tirohanga farm, the farm accommodation and the farm manager's position. Mr Macintosh, Mr Boyte and the Harrisons sat around the Harrisons' dining table to talk. The Harrisons were not prepared to move into the house in the state it was in. Improvements to the farm accommodation were discussed. Mr Harrison also told Mr Boyte there was too much work on the farm for one person. Mr Boyte said that Mrs Harrison could help whenever needed.

[29] The Harrisons say they agreed to begin work straight away on a casual basis until the accommodation was improved and they could move in. The

Harrisons say they agreed at the meeting that Mrs Harrison would be paid \$20 an hour for work she undertook and that she would send regular timesheets to Mr Boyte recording her time.

[30] Mr Harrison says the agreement reached with Mr Boyte regarding his salary was that he would be paid the farm manager's salary of \$60,000 a year, split into fortnightly payments and was to be given a written employment agreement. At the meeting Mr Macintosh gave Mr Boyte and Mr Harrison a template for an Individual Employment Agreement from Federated Farmers and filled in some of the basic information. The agreement was not signed until approximately 10 June 2016 and was backdated to 1 June 2016.

[31] Mr Boyte denies this arrangement. Mr Boyte says in his time farming he had only ever employed one farm manager, he did not require another employee. Mr Boyte says the arrangement was that in the first season, Mrs Harrison was to do relief milking on a casual basis at the rate of \$20 an hour and she was to paint the farm accommodation at the same rate. That was the only work she was engaged to do.

Mark Macintosh's email correspondence and report – September 2015

[32] I prefer the Harrisons' version of events regarding the agreement reached between Mr Boyte and the Harrisons in September 2015 about their employment on the Tirohanga farm. Their account is supported by Mr Macintosh.

[33] Mr Macintosh gave a clear and unbiased account of what he says occurred. Email correspondence from Mr Macintosh at the time also supports the Harrisons' version of events.

[34] Mr Macintosh provided the Authority with an email sent by him to the Boytes' bank manager on 24 September 2015. The email was an update on the Boytes' situation. It states:

... Just to confirm the Farm Managers job was offered to Kevin and Caroline Harrison yesterday. They balked at it after viewing the house which in their mind was filthy and required some work to bring it up to standard. I also view the house and tended to agree with them. Arthur didn't think it was too bad except for the bathroom which was

pokey and dirty. Arthur and I then spent some time with them and asked them to re-consider on condition the house would be brought up to standard. They then accepted the job. The plan is for them to continue residing at 860 Tirohanga Rd and start as Manager on a casual basis from this Saturday until such time the house has been brought up to scratch at which time they will move in ...

[35] In Mr Macintosh's report on the Tirohanga farm dated 29 September 2015, he states:

A new Farm Manager had been appointed (Kevin and Caroline Harrison) who were currently residing only 2km down the road. They were not happy to move in to the house until it had been ... significantly cleaned and upgraded (carpets, wallpaper, bathroom) ... The Farm Manager was currently working on casual wages until such time it was clearly determined how the farm is to be managed. They would be keen to continue working on the farm on the condition the house is improved and they have control over management decisions in conjunction with a consultant OR have the opportunity to lease the farm.

[36] The report goes on to state that the "new managers" had made quite a difference within 3 days of being on the farm.

[37] On 7 October 2015, Mr Macintosh emailed the Boytes and attached his reports on the Tirohanga farm and on the Pukeatua farm, the farm on which the Boytes lived.

[38] Mr Macintosh stated:

... I understand you will be frustrated with the current attention you are getting however this situation is serious and how you react will determine your outcome. It is my intention to help you to keep the authorities away and carry on farming with dignity.

[39] On 18 October 2015, Mr Boyte replied by email and stated that he was meeting the Harrisons at the Tirohanga farm to discuss the house and that:

They are both keen to do the job.

[40] This email exchange is important because, in contrast to what Mr Boyte told the Authority, it confirms the Harrisons' and Mr Macintosh's understanding that both the Harrisons had been employed during the first season. It also confirms in my view, Mr Boyte's understanding of this arrangement at the time.

[41] The email exchange also describes the very serious state of the Tirohanga farm in the first season, a situation subsequently denied by Mr Boyte during the Authority's investigation meeting.

Mrs Harrison's timesheets - 26 September 2015 - 2 December 2015

[42] During the first season Mrs Harrison painted the farmhouse accommodation, attended to relief milking work and performed other farm duties on a casual basis. Mrs Harrison submitted timesheets for this work, which were produced to the Authority.

[43] Some of the timesheets contained a narrative of work that was performed. Work included painting the laundry and bathroom of the accommodation, water blasting, spraying, lawn work and thistles. Payment for this work was made by the Boyte partnership into the Harrisons' joint bank account. Mr Boyte did not query the work being done by Mrs Harrison; he received her timesheets and paid them accordingly.

Payslips

[44] Copies of payslips for the work performed by Mr and Mrs Harrison during the first season were in the bundle of documents produced to the Authority by the Boytes. The payslips are headed up "Wage Receipts" and cover the period from 26 September 2015 to 2 December 2015. The records are in the name of Kevin Harrison. However, there are 2 columns on each page, one is for work performed by Mr Harrison and the other is for work performed by Mrs Harrison. Mrs Harrison's hours of work are recorded and correlate with her timesheets for the same period. The rate on the payslip is recorded at \$20 an hour. These payslips were prepared by the Boytes' daughter, Ms Rachel Hunt after Mrs Harrison had filed her proceedings in the Authority.

[45] On 16 March 2016, Mr Boyte asked the Harrisons for their IRD details as he had misplaced them. Mrs Harrison sent IRD details to Mr Boyte the same day. Mrs Harrison's IRD records for the dairy season 2015/2016 which runs from 1 June 2015 to 31 May 2016 record the Boyte partnership as her employer for the period and details income received and PAYE deducted. Mr

Boyte claimed not to know about this or how the IRD records could show the Boyte partnership as Mrs Harrison's employer.

[46] The timesheets, payslips, the request by Mr Boyte for Mrs Harrison's IRD details and the IRD records all support, in my view, the arrangement reached by the parties at the Harrisons house on 23 September 2015 regarding Mrs Harrison. She was employed on a casual basis from 29 September to 2 December 2015 to work on the farm with Mr Harrison. Mrs Harrison's pay rate was \$20 an hour and she was to submit regular timesheets to Mr Boyte.

(b) Was Mrs Harrison employed during the 2016/2017 dairy season?

Bike accident - 9 June 2016

[47] Mr Harrison had a motor bike accident while working on the farm on 9 June 2016. Mrs Harrison took Mr Harrison for urgent medical treatment and ACC was notified. On 10 June 2016, Mrs Harrison overheard Mr Harrison's telephone conversation with Mr Boyte about the bike accident. Shortly after the accident, Mr Boyte visited Mr and Mrs Harrison in order to pick up the motor bike and have it repaired. Mr Boyte and the Harrisons had a cup of tea and discussed what was to happen while Mr Harrison was unable to work.

Arrangements to cover Mr Harrison's workload

[48] It was at this meeting, that the Harrisons and Mr Boyte agreed that Mrs Harrison would stand in for Mr Harrison as farm manager while he recovered and Mr Harrison would do what he could to assist her. Mr Harrison says he also asked Mr Boyte at that time about Mrs Harrison continuing to work with him once he was over his injury. Mr Harrison says he told Mr Boyte that a bigger herd would need more work and Mr Boyte agreed that Mrs Harrison would be re-employed to rear calves and help with milking and other duties. Both Mr and Mrs Harrison say Mr Boyte told Mrs Harrison exactly how he wanted the calves to be reared. At the meeting, Mr Boyte gave Mr Harrison the Federated Farmers individual employment agreement which he had signed. Mr Harrison signed and backdated it to 1 June 2016, being the start of the dairy season.

[49] Mr Boyte denies knowing that Mr Harrison had a motor bike accident and denies that he ever reached an arrangement that Mrs Harrison would be reemployed to work on the farm on a casual basis.

[50] I prefer the Harrisons' evidence. Mr Harrison provided the Authority with a letter from ACC dated 10 June 2016 confirming that he had notified it of his injury on 9 June 2016. Mrs Harrison overheard Mr Harrison telling Mr Boyte of his accident in a phone call on 10 June 2016. Mr Boyte went to the farm to collect the motor bike for repair after the accident and spoke to the Harrisons, including to Mrs Harrison about how she was to rear the calves.

Lease of heifers

[51] Later in June, the Harrisons purchased 65 heifers to lease to Mr Boyte. Mr Harrison says he phoned Mr Boyte to tell him that he had acquired the heifers, they were on the farm and that he wished to use a Federated Farmers lease agreement. Mr Boyte felt the Federated Farmers lease agreement was too wordy but told Mr Harrison that he would visit the farm in July with something for him to look at.

18 July 2016 - arrangement for Mrs Harrison's "reemployment" for second season

[52] On 18 July 2016, Mr Boyte arrived at the farm. Mr Harrison was not aware that he was coming. Mr Boyte gave Mr Harrison a piece of A4 lined paper headed up "Lease of cows" and dated 18 July 2016. The note was in Mr Boyte's handwriting and related to the lease by Mr Boyte of 65 cows from Mr Harrison. Before Mr Harrison signed the "lease", he told Mr Boyte that he wanted Mrs Harrison to begin work again in the 2016/17 dairy season at the end of July and that he would want her until late November when mating would be finished. Mr Harrison says Mr Boyte agreed to that arrangement and asked that Mrs Harrison send in timesheets. Mr Harrison told Mrs Harrison about the discussion with Mr Boyte later in the day.

[53] In accordance with the arrangement reached between Mr Harrison and Mr Boyte, Mrs Harrison began working with Mr Harrison on the farm. The first timesheet was submitted by her on 11 August 2016, for the previous 2 weeks work. Mr and Mrs Boyte acknowledged receiving the timesheets. In my

view the Boytes were aware that the timesheets were for work being performed by Mrs Harrison in accordance with the arrangement Mr Boyte had made with Mr Harrison following his motorbike accident, in June 2016, and on 18 July 2016, when the lease document for the heifers was signed.

[54] It is my view that Mrs Harrison conducted herself in accordance with the agreement reached with Mr Boyte in June and July 2016, that she undertake farm work for the second season on a casual basis and submit timesheets. The Boytes knew Mrs Harrison was working and expected to be paid. The Boytes took no steps to inform Mrs Harrison to stop work and to stop submitting timesheets until the email on 17 November 2016.

[55] Mrs Harrison was employed on a casual basis in the first season. This was confirmed by Mr Macintosh who was involved in the employment process.

[56] Mrs Harrison was reemployed for the second season as a casual employee. This agreement arose out of discussions between the Harrisons and Mr Boyte after the motorbike accident, and on 18 July 2016 when Mr Boyte visited Mr Harrison for the purposes of signing the lease document in relation to the heifers.

[57] I find that Mrs Harrison was employed on a casual basis during the second season.

Second Issue

If Mrs Harrison was employed, was she employed by Mr Boyte or the Boyte partnership?

[58] The meetings about the job and the work to be undertaken were always between the Harrisons and Mr Boyte, with Mr Macintosh being present in his role as a consultant. Mr Boyte issued instructions and was responsible for the day-to-day running of the farm.

[59] However, Mr Macintosh's report on the Tirohanga farm on 29 September 2015 was addressed to "*A&D Boyte*". Mrs Harrison's Inland

Revenue Department records for the period 1 October 2015 to 31 December 2015 refer to AG & DM Boyte as her employers.

[60] Similarly, payments to the Harrisons, in the bank records produced to the Authority are in the name of AG & DM Boyte. The financial records prepared in respect of the Tirohanga farm by Crowe Horwath, the accountants for AG & DM Boyte, specify in a special purpose annual report for the year ended 31 May 2016 that the entity running the firm is a partnership, the nature of the business is farming and rental and the partners are AG Boyte and DM Boyte.

[61] Both AG and DM Boyte have signed the statement of financial position. Under the statement of accounting policies, the reporting entity is referred to as “*AG & DM Boyte as governed by the Partnership Act 1908*”.

[62] The Tirohanga farm is owned and operated by the AG & DM Boyte Partnership. The Harrisons were paid by the Boyte partnership. Mr Boyte accepted at the Authority’s Investigation Meeting that employees were employed by the Boyte partnership.

[63] I find the Boyte partnership employed Mrs Harrison during both the 2015/2016 and 2016/2017 dairy seasons, on a casual basis to assist Mr Harrison on the farm.

Third Issue

If the employment relationship was that of casual employment, is Mrs Harrison owed wages and if so what is the quantum owed to her?

Mrs Harrisons’ timesheets – July to November 2016

[64] Mrs Boyte says when she received the first timesheet from Mrs Harrison, she rang their bank manager about it and was told by him that it “looked like a timesheet for a fortnight’s work”. Both Mr and Mrs Boyte admitted that they had received Mrs Harrison’s timesheets and emails, had ignored them and had made no effort to contact her about them. When more timesheets were sent in by Mrs Harrison along with emails asking to be paid, the Boytes

still did not contact Mrs Harrison about them, they let Mrs Harrison continue to work and continue to send the timesheets to them for her work.

[65] It would have been very simple for Mr Boyte to contact Mrs Harrison about the timesheets, ask why she was sending them and to discuss the situation. He did not. Mrs Harrison kept working, submitting timesheets and asking for payment.

[66] I find that the Boyte partnership employed Mrs Harrison on a casual basis to undertake farm work during the second season. Mrs Harrison worked a total of 466 hours of work between 30 July 2016 and the morning of 17 November 2016, including Labour Day, 24 October 2016 at the rate of \$20 an hour. This amounts to \$9,355. Holiday pay on this amount totals \$748.40.

[67] The Boyte partnership owes Mrs Harrison the sum of \$10,103.40 gross in wages and holiday pay for the 16 week period worked by her from 30 July 2016 until 17 November 2016 and for which timesheets were submitted by her.

Order in respect of wages and holiday pay

[68] I order the Boyte partnership to pay Mrs Harrison the sum of \$10,103.40 within 21 days of the date of this determination.

Fourth Issue

If Mrs Harrison was employed, was she dismissed from her employment and if so, was the dismissal unjustified?

17 November 2016 email from Mr Boyte to Mrs Harrison

[69] On 17 November 2016, Mrs Boyte sent an email signed by Mr Boyte claiming that Mrs Harrison was a casual relief milker, and that she was not entitled to payment for any other work by the Boyte partnership. The email stated:

... As you know you are employed only as casual relief milker to preform [sic] relief milking where necessary and as notified to us by Kevin. You are not otherwise employed by or entitled to any payment from us. We have not been notified by Kevin of any relief milking work preformed [sic] by you of late and therefore do not agree that

any wages or entitlements are due and owing to you. Kevin is not entitled to employ or engage you for any other work and is expected to complete the duties of his role himself except where we expressly agree otherwise.”

[70] I have found that there was an agreement to employ Mrs Harrison on a casual basis. At that time, Mrs Harrison says she was owed wages amounting to \$10,103.40 in respect of farm work from 30 July 2016, for which she had not been paid, despite making numerous requests.

[71] After allowing Mrs Harrison to keep working and submitting time sheets, the Boytes sent her an email denying her right to be paid for the work. This was a serious and deliberate breach of Mrs Harrison’s employment and was not the action of a fair and reasonable employer in the circumstances. Mrs Harrison expected to continue her employment until the end of the mating season in late November as had been agreed between Mr Harrison and Mr Boyte. The action by the Boyte partnership in sending the email on 17 November 2016 amounted to a termination by the Boyte partnership of its employment relationship with Mrs Harrison.

[72] Mrs Harrison was dismissed and the dismissal was, in the circumstances unjustified both substantively and procedurally.

Fifth Issue

If Mrs Harrison was unjustifiably dismissed what remedies is she entitled to?

Compensation for hurt and humiliation – s.123(1)(c)(i) of the Act

[73] The Harrisons had taken on a big project when they accepted employment by the Boyte partnership. The Tirohanga farm was in a very poor condition and their hard work resulted in immediate improvements.

[74] Mrs Harrison says after she received the email from the Boytes on 17 November 2016, she was angry and felt she had been taken advantage of. After the anger had subsided she says she was “gutted” and embarrassed. Mrs Harrison says she tried to put on a brave face but was at an “absolutely low point” in her life.

[75] I consider an award of \$8,500 compensation for hurt and humiliation under s.123(1)(c)(i) of the Act appropriate in the circumstances.

[76] I order the Boyte partnership to pay Mrs Harrison the sum of \$8,500 within 21 days of the date of this determination.

Reimbursement of lost remuneration under s.128(2) of the Act

[77] Mrs Harrison seeks reimbursement of lost remuneration for the period from 17 November to 30 November 2016, the finish of the dairy season, as had been agreed. I accept the submission that Mrs Harrison would most likely have worked an average of 3.5 hours for each of those 13 days. This amounts to 45.5 hours at \$20 an hour which totals \$910. Mrs Harrison is owed holiday pay on that amount totalling \$72.80.

[78] I order Boyte Partnership to pay Mrs Harrison the sum of \$982.80 gross in lost remuneration within 21 days of the date of this determination.

KiwiSaver contributions

[79] Mrs Harrison was enrolled into Kiwisaver at the time of her employment by the Boyte partnership. As a casual employee, not a “temporary” employee as defined by the KiwiSaver Act 2006³, the Boyte partnership was required to make deductions of her contributions from her wages and pay them to her chosen KiwiSaver scheme. This was not done.

[80] Further, the Boyte partnership was required to pay a compulsory employer contribution. I accept that the Boyte partnership did not make the necessary deductions or contributions in respect of Mrs Harrison.

[81] Mrs Harrison seeks the contributions which amount to \$303.10 based on the rate of 3% of wages owing to her for the period worked by her in the second season.

[82] I order the Boyte partnership to pay the sum of \$303.10 into Mrs Harrison’s KiwiSaver account within 21 days of the date of this determination.

³ Sections 60 and 64

Sixth Issue

If there was not a dismissal, was Mrs Harrison unjustifiably disadvantaged and if so what remedies are available to her?

[83] I have made a finding of unjustifiable dismissal and so this issue does not require an answer.

Seventh Issue

If Mrs Harrison was unjustifiably dismissed or disadvantaged did she contribute and if so should any compensation awards be reduced?

[84] The Authority is bound under s.124 of the Act to consider whether Mrs Harrison contributed to her dismissal and if so to reduce remedies awarded. I do not accept Mrs Harrison contributed to her dismissal. Accordingly, remedies awarded will not be reduced.

Eighth Issue

Are penalties payable for failures to keep and maintain a wages and time record and an employment agreement for Mrs Harrison?

[85] Mrs Harrison seeks penalties in respect of the Boyte partnership's failure to keep and provide a wages and leave record and its failure to keep and provide her with a written individual employment agreement.

[86] Section 64 of the Act imposes an obligation on an employer to retain a copy of an individual employment agreement or individual terms and conditions of employment. The Boyte partnership has denied that there was an employment relationship with Mrs Harrison.

[87] Section 130 of the Act imposes an obligation on an employer to keep a wages and time record for each of its employees.

[88] Section 135 of the Act provides for the recovery of penalties which in the case of an individual is a penalty not exceeding \$10,000 and in the case of a company not exceeding \$20,000.

[89] The Boyte partnership comprises two individuals and therefore is liable in my view to penalties not exceeding \$10,000 in respect of each of these breaches of the Act.

[90] The Full Bench of the Employment Court set out a four step process which is to be adopted when a penalty is being assessed by the Authority to ensure that there is a consistent and reasonably predictable result with penalties across the board⁴.

[91] These factors have been taken into account by me when assessing penalties in this matter.

[92] The Boyte partnership was struggling with the upkeep of the Tirohanga farm and its management. DairyNZ put together a team to recover the serious condition of the farm. This may have contributed to the poor employment records.

[93] The wages and time records in respect of Mr Harrison were in complete disarray and almost impossible to decipher. The lease agreement regarding the heifers comprised a scribbled note prepared by Mr Boyte and Mr Harrison's written employment agreement was a Federated Farmers Template which Mr Boyte failed to have signed for almost 10 months after Mr Harrison began work in the first season.

[94] The Boyte partnership was forced to work with the team put together by DairyNZ to recover the Tirohanga Farm from a situation in which the Authorities were going to become more involved.

[95] It is of concern that at the Authority's investigation, Mr Boyte seemed to be in denial, including denying the state of the farm when the Harrisons were employed. Mr Boyte described the Tirohanga as a "*dream farm*" and spoke of its high productivity. This was in stark contrast to the evidence of Mr Macintosh who had been brought in as the farm adviser.

⁴ *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143

[96] Employers failing to comply with statutory requirements are liable to a penalty⁵. Much of the current dispute could have been easily resolved if the Boyte partnership had retained a written employment agreement for Mrs Harrison and kept appropriate wages and time records.

[97] The breaches both relate to the keeping of employment records. The breaches are similar in my view and should be treated globally.

[98] Standing back and assessing the proportionality of the outcome for the Boyte partnership, I conclude an appropriate global figure for all penalties in the circumstances to be a penalty of \$1,000.

[99] I order the penalty of \$1,000 to be paid by the Boyte partnership to the Authority, for transfer to a Crown bank account within 21 days of the date of this determination. The entire penalty is to be paid by the Authority to Mrs Harrison pursuant to s.136(2) of the Act.

Costs

[100] Costs are reserved. Mrs Harrison has 14 days from the date of this determination to file memorandum as to costs. The Boyte partnership has 14 days from receiving the memorandum as to costs to file its memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁵ Section 133A of the Act