

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 8
5499644 and 5528330

BETWEEN EUGENE LOWE AND
 MARGARET LOWE
 Applicants

AND WAIMAPU STATION
 PARTNERSHIP
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Jills Angus Burney, Counsel for Applicants
 Susan Hornsby-Geluk, Counsel for Respondent

Investigation Meeting: 18 – 20 March 2015 at Masterton

Submissions Received: 8 April and 4 May from the Applicant
 21 April from the Respondent

Determination: 18 January 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problems

[1] Eugene Lowe was employed from June/July 1969 to manage Waimapu Station. His employment ended on 24 October 2014. Mr Lowe claims he was constructively dismissed and seeks remedies from his former employer. He also claims that his employer unjustifiably disadvantaged him in his employment in August and September 2014 when it refused to pay him his monthly wages. He says this was a breach of his employer's duty of good faith.

[2] Mr Lowe has an arrears of wages claim in respect of those matters as well as unpaid holiday pay over the last six years of his employment plus interest.

[3] His other claims include his employer's failure to pay him a promised 5% share of the productive value of Waimapu Station; compensation for use of his private vehicle for the respondent's business over the last six years; and reimbursement of annual leave used to pay him for sick leave taken in September 2014. He says he had no employment agreement and seeks a penalty for non-compliance by his employer with the provisions of the Employment Relations Act 2000 (the Act), the Holidays Act 2003, and the Wages Protection Act 1983. Mr Lowe also seeks recovery of any wages paid at a lower rather than legally payable.

[4] Margaret Lowe claims holiday pay for her "permanent casual" employment of ten hours per week from May 2012 until 14 August 2014. She seeks payment of that amount plus interest. She also seeks payment for unpaid wages from July to August 2014, plus interest. Mrs Lowe sought to have her claim joined to that of Mr Lowe and the Authority has accommodated that request in accordance with s. 221 of the Act.

[5] Waimapu Station Partnership (Waimapu), which employed Mr Lowe, denies all claims made by him. It says he was responsible for managing his own leave and had an obligation to do so. If any holiday pay claim exists, Waimapu says it can be at most for nine weeks as Mr Lowe had accepted that he took 50% of leave due to him, and as he had been paid for three weeks of annual leave in September 2014.

[6] Waimapu counterclaims that Mr Lowe made unauthorised payments to himself during his employment which should be repaid. It denies constructively dismissing Mr Lowe and seeks a penalty against him for unauthorised increases to his salary since 2005.

[7] Waimapu also counterclaims that Mr Lowe hired out equipment owned by him, or by a company of which he was a director and shareholder, to Waimapu at excessive rates for use on the farm. It says he sold Waimapu equipment to himself at rates below fair market value causing a loss to the respondent. It seeks reimbursement of the losses it has incurred.

[8] Waimapu denies that Mrs Lowe is owed any holiday pay and claims Mr Lowe was not authorised to employ her on a permanent casual basis. It says it did not know she had been employed in any capacity other than as a casual seasonal worker as required by the needs of the farm.

Background to the employment relationship and events leading up to Mr Lowe's resignation

[9] Waimapu Station is a hill country breeding farm some 35 km from Masterton. The land is owned by Waimapu Land Developments Limited, the sole director of which is John Martin. The major shareholders are the Martin Family Trust and the Tamariki Trust. Waimapu Land Developments Limited and Waimapu Station Partnership are different and distinct legal entities.

[10] Mr Martin, who is the sole surviving partner of Waimapu Station Partnership, undertook at the outset of the investigation meeting to honour any awards the Authority may make to Mr and/or Mrs Lowe. He reserved the right to limit that undertaking to the period from 2005.

[11] Mr Lowe was 22 when he was appointed as Farm Manager at Waimapu Station in May 1969. He and Mrs Lowe have lived most of their adult lives at the farm. Their two children were born during this time and grew up there. The Lowes say they were encouraged by the owners to treat the farm as their home and they did so.

[12] There was no written employment agreement in place when Mr Lowe's employment commenced. Mr Martin verbally offered Mr Lowe the position and Mr Lowe accepted. There was no detailed discussion about terms and conditions that would apply to the employment and they both described their agreement as a *gentlemen's agreement*.

[13] Their agreement included salary and the payment of a bonus. Mr Lowe and Mr Martin disagree on the terms of the bonus although both agree it was based on a percentage of the farm's total gross annual turnover. Mr Martin says that percentage was 2% and the bonus payment was discretionary. Mr Lowe says the percentage was 2.5% and the bonus was not discretionary.

[14] In the early years of Mr Lowe's employment he had regular contact with Mr Martin and Mr Martin's brother in law, James Dearden, who was a trustee of the Tamariki Trust. Mr Dearden died in 1981. Over the years the regularity of contact declined, particularly since 2009 when Mr Martin experienced significant health issues. Visits to the farm decreased and the contact between Mr Lowe and Mr Martin was more by way of telephone. Mr Martin's evidence was that he trusted Mr Lowe

implicitly and that, although Mr Lowe had a high degree of autonomy in farm matters, there was a clear expectation that he would report any matters of significance to Mr Martin.

[15] Mr Lowe was responsible for the day to day operation of the farm and paid all the farm bills by cheque. Waimapu's accountants would prepare the GST reports from documentation provided by Mr Lowe. They also prepared annual financial reports which would be sent to Mr Martin. Mr Lowe kept a wages book, in accordance with instructions given to him in 1969. Over the years of his employment he employed a number of casual employees at different times as the demands of the farm required. Mrs Lowe was one of those employees.

[16] Mr Lowe's evidence is that in the early years of his employment Mr Martin would tell him to increase his salary from time to time. He says that over the years he began adjusting his own salary, often in response to how the farm was performing. He believed he had the autonomy to do that and did not inform Mr Martin when he was increasing his salary or by how much.

[17] Mr Martin's evidence is that he directed the increases to Mr Lowe's salary from time to time following a discussion of the farm's performance with him. The discretionary bonus payment was made irregularly and was intended to reward Mr Lowe for his efforts in developing the property. Mr Lowe received bonus payments sporadically until 1979 when payments ceased.

[18] According to Mr Martin, the discretionary bonus arrangement was replaced in 1980 in favour of a higher salary level. This was at the same time that development work ceased on the farm due to a manuka beetle infestation. Mr Martin's evidence is that from 1969 until 2005 Mr Lowe's salary was increased from time to time at his direction based on his knowledge of other farm managers' salaries and his awareness of the industry generally.

[19] There were some discussions between Mr Lowe and Mr Martin between 2003 and 2005 about the possibility of Mr Lowe purchasing a stake in the farm, with a suggestion that he might acquire the 50% shareholding of the Tamariki Trust. The beneficiaries of the trust (the three daughters of James and Mary Dearden) lived overseas and had little involvement in the farm apart from the occasional visit. Mr

Martin wrote a letter/memorandum to them in January 2005 in which he set out a number of facts about Waimapu Station's history and current situation.

[20] In the document Mr Martin referred to Mr Lowe as being an "*incredible worker*" who had been underpaid. He said he and his late sister (Mary Dearden) had agreed to give Mr Lowe some shares in the Land Company¹, noting that his figure was 5%, although the matter was being worked on by the accountant and there were some complications.

[21] Mr Martin expressed the hope that his nieces would agree to that arrangement. He said Mr Lowe, together with his daughter and son in law, would like to buy out the Tamariki Trust's share, subject to a valuation and finance and their agreement. Mr Lowe made an offer for the Tamariki Trust's shares in 2006 but that offer was rejected.

[22] Mr Martin's evidence is that the farm was not profitable and he was frequently called upon to provide further funding. He felt obliged to retain the farm until such time as Mr Lowe retired after which it could be sold. He said that after Mr Lowe's unsuccessful attempt to buy into the farm he proposed an arrangement to him whereby his salary would remain at its current level, which was then \$45,000, and that any future salary increases would be substituted with an award of up to 5% of the farm's land value. This would be paid out as a bonus when Mr Lowe retired.

[23] Mr Martin says he had no discussions over salary with Mr Lowe from 2006 onwards as he believed they had an agreement on these terms. He believed Mr Lowe's salary had remained at that level until he discovered otherwise in May 2014 when he received financial data prepared by Mr Lowe's accountant, Alistair McLennan. This showed Mr Lowe had been awarding himself regular salary increases from 2006 onwards and that his salary at that point was \$75,000. I note Mr McLennan's data was incorrect and that Mr Lowe had increased his salary to \$78,000 from 1 April 2013. I shall return to this later.

[24] Mr Lowe rejects any knowledge of an agreement that his salary would remain on \$45,000 from 2006 until his retirement. He also rejects knowledge of the bonus being abandoned 1980. In 2009 Mr Lowe began paying himself a bonus, without informing Mr Martin or discussing it with him.

¹ Waimapu Land Developments Limited.

[25] During his employment Mr Lowe personally, or through a company of which he was a director and shareholder, purchased bulldozers. He used these for work on the farm and charged Waimapu for the hire of them. The hire charge for the bulldozers included the cost of his labour. Mr Lowe's evidence was that he undertook such work in his own time, not during his paid employment.

[26] From time to time Mr Lowe also purchased equipment and stock that he had bought for the farm from his employer. Mr Martin says he was unaware of the range and extent of all of these transactions until his son, Tim Martin, undertook a financial analysis in 2014. He says he then realised that Waimapu had been charged more than \$130,000 over 12 years for bulldozer hire.

[27] Mr Lowe disputes this and says the payments were over a 15 year period and that Mr Martin would have known from reading the farm's financial reports what the annual expenditure on plant hire was for the farm.

[28] Mr Martin says he had been advised several years earlier by Mr Lowe that he intended to purchase tail end lambs from Waimapu which he would graze on a lifestyle property he owned. Mr Martin's evidence is that he had complete trust in Mr Lowe to "do the right thing by the farm and ensure that all transactions were carried out at arm's length". He says he was entirely unaware of the regularity of stock purchase from Waimapu by a company owned by Mr and Mrs Lowe.

[29] In 2013 Mr Lowe sought advice from his accountant, Alastair McLennan, over matters he wished to be concluded before he could plan for his retirement. These matters included the 5% shareholding. His accountant raised with him the matter of holiday pay throughout the years of his employment and advised Mr Lowe he was entitled to be paid out for any holidays he had not taken over those years. Mr Lowe says he had only infrequently taken holidays during his 45 years of employment and had not kept a record of when he had taken them.

[30] A meeting was held between Mr Martin, Mr McLennan and Waimapu's accountant, Sharon Parker, in September 2013 at which these matters were discussed. At that time Mr Martin had no knowledge that Mr Lowe had been increasing his salary over several years and paying himself a bonus. Nor was he aware that Mrs Lowe was employed on an arrangement described as "permanent casual" for the past two years at a set monthly remuneration.

[31] Following the September 2013 meeting, there was some correspondence between Mr McLennan and Mr Martin, much of which concerned Mr McLennan's proposal to review Mr Martin's and his wife's wills as a starting point for future discussions around Waimapu and succession planning.

[32] On 2 May 2014 Mr McLennan wrote to Mr Martin saying he had been asked to advance the arrangements between Mr Lowe and the farm owners "*with regards the pending departure by Eugene and Margaret after 45 years service.*" Enclosed with the letter was an updated version of a spreadsheet Mr McLennan had prepared for Mr Lowe in March 2013. Mr McLennan's letter highlighted some of the figures from the spreadsheet, in particular, the holiday pay amount of \$109,500 and the "*land value payment*" of \$106,250. These amounts which totalled \$215,750 were stated as being "*due for payment 31 July 2014 if current thinking ends up being the departure date*".

[33] The letter also referred to the discrepancy between the land value payment and the wages Mr Lowe had forgone during his employment, which Mr McLennan calculated to be \$481,754. He noted the land value payment was intended to compensate Mr Lowe for those forgone wages. As there was a considerable deficit, Mr McLennan suggested Mr Martin might consider extending the "compensation" he was prepared to pay Mr Lowe.

[34] Mr Martin responded by noting he was "*somewhat staggered*" by Mr McLennan's calculations and advising that Mr Tim Martin would be helping him with the situation.

[35] Mr Martin and Mr Tim Martin, acting partly on the reference in Mr McLennan's letter to an intended retirement date for Mr Lowe of 31 July 2014, and partly on a conversation in April 2014 between Mr Lowe and Mr Martin, interviewed at least two prospective employees and took them to Waimapu to view the property on 30 June and 3 July 2014 respectively. Mr Lowe claims he was misled by the Martins over the purpose of these visits, and says he was told they were related to a valuation of the property. He claims to have been hurt and humiliated when he discovered the true purpose of the visits.

[36] Some email correspondence between the parties followed in which Mr McLennan conveyed the Lowes' concern over the farm visits and Mr Tim Martin

responded with his view that Mr and Mrs Lowe had been given advance warning of the Martins' intention "*to show various parties around the property*".

[37] His reference to the urgency of organising a replacement manager in view of Mr Lowe's 31 July departure date led to more correspondence in which Mr McLennan clarified that Mr Lowe had put his retirement plans on hold pending resolution of the issues raised in his (Mr McLennan's) letter of 2 May 2014.

[38] A meeting was held between Mr McLennan, and Mr Tim Martin and Mr Lowe's son, Hamish, on 25 July 2014, apparently on a "*without prejudice*" basis. Following the meeting Mr Tim Martin wrote to Mr McLennan on 4 August 2014 (not on a "*without prejudice*" basis), stating it was now accepted that Mr Lowe had not resigned.

[39] The letter expressed astonishment at the claims made on behalf of Mr Lowe in Mr McLennan's correspondence; and alarm at the "*unauthorised*" salary increases and bonuses Mr Lowe had awarded himself in recent years. The Martins' view was that Mr Lowe had been well compensated at Waimapu, referring to salary information obtained from various rural sector advisors. The claim for a "*voluntary exit payment*" (the 5%) was rejected.

[40] The holidays claim was also disputed, with Mr Tim Martin noting it had been made without reference to holiday records, and was based on an assumption, disputed by the Martins, that Mr Lowe had taken only 50% of holidays due each year.

[41] Information was requested from Mr McLennan and Mr Lowe regarding interparty transactions for equipment hire and stock between Waimapu and Mitre View Partnership, a company owned by the Lowes. Mr Tim Martin concluded his letter by noting that they (he and Mr Martin) had been advised "*it would be prudent to resume responsibility for the payment of all creditors for Waimapu. Accordingly you are instructed to ensure that no cheques are issued by EL and all invoices, once authorised for payment, be forwarded to myself...*".

[42] On 10 August Mr Tim Martin wrote to Mr Lowe confirming that Waimapu accepted his decision to withdraw his resignation. He said he and his father had been looking at various options for the farm and were considering a proposal that would result in a restructuring of responsibilities, with a goal of getting the farm back to a

sound financial footing. He stated his role was to oversee that part of the business and he would also be responsible for managing the farm's finances.

[43] Mr Tim Martin's letter referred to the changes in employment legislation since 1969, "*including the requirement to provide an Employment Agreement*". He had drafted such an agreement which he attached for Mr Lowe's perusal. It included a Job Description and a salary calculation sheet, and stated the proposed salary for the position would be \$60,000 plus the provision of accommodation and power. Mr Lowe was asked to read the proposed Agreement carefully and provide comments on the draft. He was also informed of his right to take advice on it. The letter concluded with a list of the documents Mr Tim Martin wished to collect from Mr Lowe by the end of the week in order to "*enable a seamless transition of the financial responsibilities*".

[44] Mr Lowe obtained a medical certificate the following day and did not return to work at Waimapu Station. In his hand written letter of 24 September 2014 to Mr Martin, Mr Lowe said he could "*no longer mentally and physically return to Waimapu after what your son Tim has dealt to us over the last few months*".

[45] A copy of the resignation letter was forwarded to Waimapu's legal representative the same day by counsel for Mr Lowe, stating that he was giving four weeks' notice of resignation from 24 September 2014. Ms Angus Burney's letter noted Mr Lowe would be available from Monday 29 September 2014 to participate in an investigation into allegations made by Mr Tim Martin since 4 August 2014. She also asked whether Mr Lowe would be required to work on the farm on a daily basis through his notice period and sought confirmation that he would be paid wages on 26 September.

[46] Wage records show that Mr Lowe was paid on the basis of an annual salary of \$60,000 for the month of August 2014 and \$45,000 for 7 to 29 September 2014. He was not paid beyond 29 September as he had indicated through Ms Angus Burney that he was not prepared to work under the conditions imposed upon him.

[47] Mr and Mrs Lowe left Waimapu Station on 14 August 2014.

Issues

[48] A number of claims and counterclaims require determination. These are:

(a) In respect of Mr Lowe:

- Whether he was constructively dismissed from his employment;
- Whether he is owed holiday pay from 2008 to 2014 and, if so, in what amount;
- Whether he is entitled to a payment representing 5% of the productive value of Waimapu;
- Whether he was underpaid wages from July to 22 October 2014 inclusive;
- Whether he is owed wages for the unpaid period of his notice;
- Whether he is entitled to be reimbursed for annual leave deducted during the period of his sick leave between 7 and 29 September 2014;
- Whether he was paid wages a rate lower than legally payable.
- Whether Mr Lowe is entitled to compensation for six years use of his private vehicle for Waimapu business;

(b) In respect of Mrs Lowe:

- Whether she is owed holiday pay from May 2012 until 13 August 2014; and
- Whether she is owed wages from July to August 2014.

(c) In respect of the counterclaims by Waimapu:

- Whether Mr Lowe has been unjustly enriched by unauthorised salary payments and, if so:
 - Whether the respondent is entitled to recover those payments from him.
- Whether Mr Lowe has been unjustifiably enriched by unauthorised bonus payments made to himself and, if so:
 - Whether Waimapu is entitled to recover those amounts by an award of special damages.
- Whether Mr Lowe paid himself a non-taxable monthly incidentals allowances and, if so:

- Whether Waimapu is entitled to recover the amount of those payments.
 - Whether Mr Lowe invoiced Waimapu at excessive rates for the hire of equipment he, or a company he owned, used on the farm and, if so:
 - Whether Waimapu is entitled to recover the value of those overpayments.
 - Whether he has sold equipment belonging to Waimapu for a price below fair market value and, if so:
 - Whether Waimapu is entitled to claim the value of the overpayments and the losses it incurred.
 - Whether Waimapu is entitled to recover salary payments made to Mrs Lowe from May 2012 to July 2014 which it claims to be unauthorised and to Mr Edward Foley; and
 - Whether Waimapu is entitled to recover salary paid to Mrs Lowe for the month of July 2014 when it claims Mrs Lowe did not work.
- (d) Whether penalties should be awarded against Waimapu and/or Mr Lowe for breaches of good faith.

Was Mr Lowe constructively dismissed?

[49] It is well established that an employee may be constructively dismissed by the employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*² held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[50] By Mr Lowe's evidence, his claim to have been constructively dismissed arises from the stripping from him of administrative functions and cheque signing rights on 4 August 2014; the introduction and implementation of a draft employment agreement on 10 August 2014; and his employer's treatment of him as intending to retire on 31

² [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

July 2014. The advertising of his position, and his employer's actions in showing potential replacement farm managers around the farm and farm house in June and July are further factors.

[51] Ms Angus Burney submits Waimapu embarked on a course of conduct with the deliberate and dominant purpose of coercing Mr Lowe to resign. Among the actions she listed which constituted that course of conduct were the employer's failure to meet with Mr Lowe after 2 May 2014; avoiding Mr Lowe while on farm visits; failure to raise concerns with him in June and July 2014; unilaterally demoting him on 4 August 2014; reducing his salary on 10 August 2014; harassment of Mr Lowe while he was on sick leave; and surveillance of him by parking outside, and flying over, his two properties on 21 September 2014.

[52] Additionally she cites Waimapu's lodging of an application in the Authority on 29 August 2014 and its repeated threats to go to the Police over the removal of items from the farm.

[53] In Ms Angus Burney's submission these were instances of the "*wilful blindness*" of Mr Martin to his responsibilities. She described the actions of Mr Tim Martin as being calculated to destroy or at least seriously damage the relationship between the employer and Mr Lowe. In her submission Waimapu was under a duty to carry out, fairly and reasonably, an inquiry into the many allegations it had made against Mr Lowe.

[54] With regard to the demotion, I agree with the submission made by Ms Hornsby-Geluk on behalf of Waimapu that the removal of financial responsibilities on 4 August 2014 was not as dramatic an action as Mr Lowe portrayed. I note that the main import was, as is clear from Mr Tim Martin's letter of that date to Mr McLennan, the removal of cheque signing ability for paying creditors of Waimapu.

[55] In the circumstances, which were that the employer had become aware of a number of equipment hire and stock transactions between Waimapu and Mr Lowe, or between Waimapu and a company of which Mr Lowe was a director, that was a prudent step to take and did not constitute the demotion claimed by Mr Lowe. I note this was also in the context of the employer having recently ascertained from information provided by Mr Lowe's accountant that the farm manager's was being paid a salary \$30,000 more than the employer believed to be authorised.

[56] With regard to the failure to meet Mr Lowe after 2 May 2014, I find the delay in meeting after that date was reasonable in the circumstances. Mr McLennan's letter of that date enclosed the spreadsheet of financial data Mr McLennan had prepared for Mr Lowe more than a year earlier. This revealed to Mr Martin that Mr Lowe had been increasing his own salary for several years and that he had awarded himself bonuses from 2009. Also that he had a large claim for holiday pay based on the assumption he had only ever taken 50% of his entitlement.

[57] It is clear that Mr Lowe was looking to retire and that he wished to be paid out all entitlements due to him when he left his employment. Mr Lowe wanted the payment he considered he had been promised, which was the 5% shareholding which has been referred to above. He also wanted any wage and holiday pay entitlements paid out although he acknowledged under cross examination that he did not know he might have a claim for holiday pay until his accountant, Mr McLennan, informed him of this in 2013.

[58] It is also clear that the claims made by Mr McLennan on Mr Lowe's behalf to Mr Martin were unexpected and astonishing to him. It was not helpful that a copy of the spreadsheet of financial data prepared for Mr Lowe in March 2013 was not made available to Mr Martin until May 2014. I accept Mr Martin's evidence that he did not know Mr Lowe had been increasing his own salary regularly for several years or that he had paid himself a bonus since 2009. I also accept he was unaware of any dissatisfaction on Mr Lowe's part regarding his salary or terms and conditions of employment. These are pertinent factors to be considered in the delay that followed receipt by Mr Martin of the 2 May letter and spreadsheet.

[59] As already noted, Mr Martin responded to Mr McLennan in a timely manner noting that he was "*somewhat staggered*" by the calculations. He also informed Mr McLennan that Mr Tim Martin, who was going to help him with the situation, had just come out of hospital and was recuperating from an operation. I find it reasonable that the Martins needed time to consider the situation, take advice, and make inquiries about the claims Mr McLennan had made on Mr Lowe's behalf. While a meeting between the parties did not happen until July, there is evidence of considerable correspondence, mainly by way of email, in the intervening period.

[60] Mr McLennan's letter had alluded to a payment in excess of \$215,000 that "*will be due for payment 31 July 2014 if current thinking ends up being the departure*

date". This confirmed to the Martins that Mr Lowe intended retiring from his employment on that date and that they needed to make arrangements for the farm's management from 1 August. They were wrong about that but I accept their actions were the result of a genuine misapprehension. Once informed that Mr Lowe did not intend to retire on 31 July, they stopped taking prospective managers to the farm or the farm house.

[61] Two occasions on which they had taken people to the farm led to the allegation that the employer avoided Mr Lowe. I am not persuaded that this occurred or, if it did, that there was any sinister intent. The applicant's evidence includes notes made by Mrs Lowe about telephone contact and visits to the farm in 2014. These include a note that Mr Tim Martin telephoned on 24 June to advise that he planned to visit on Monday 30 June. His purpose was "*to bring someone to look at the house*".

[62] Mrs Lowe's notes for 30 June record that, when the Martins and a couple arrived, Mr Lowe was out shifting stock. Mr Tim Martin took the man around the farm and, according to Mrs Lowe's notes, passed Mr Lowe without stopping. She noted that Mr Lowe was counting sheep through a gate at the time. Mrs Lowe's notes further record that the Martins and their guests left soon after 12 and Mr Lowe arrived back at the house before 12.30 p.m.

[63] I do not discern any intended offence, or even discourtesy, in not interrupting Mr Lowe for the purpose of having a chat while he was counting stock. Nor do I regard the Martins' decision not to linger in the farmhouse until Mr Lowe arrived back as offensive or discourteous.

[64] Another farm visit took place on 3 July. Mrs Lowe's notes record that she was informed in advance of the visit and that she was away from the property that morning. Mr Tim Martin's evidence is that Mr Lowe confronted them aggressively over whether they intended to attend a meeting Mr McLennan was organising later in the month. Mr Martin's evidence of the meeting accords with his son's, although his memory of the date of the incident differs. However, I am satisfied their evidence referred to the same event. Mr Lowe's evidence has Mr Tim Martin as the aggressive party. In his response to Mr Martin's account, Mr Lowe denied being hostile, but acknowledged he was cross.

[65] While it is clear that the relationship between employer and employee was under strain at this time I do not find there was any "*avoiding*" of Mr Lowe or offensive conduct towards him such that would cause him to resign.

[66] I do not accept Ms Angus Burney's submissions that Mr Tim Martin refused to meet with Mr Lowe until he had resigned or nominated a date for doing so. While one email from Mr Tim Martin appeared to give that impression, he corrected that when it was brought to his attention. It is clear that the Martins wanted certainty over Mr Lowe's intentions in order that the farm and its stock was not at risk. It is equally clear from the evidence that Mr Lowe was unwilling to specify a date for his retirement until he had certainty over the matters he regarded as entitlements from his employers.

[67] With regard to Waimapu's failure to raise concerns with Mr Lowe in June and July 2014, I am satisfied that during this time the Martins and their advisers were in the process of analysing financial data and seeking further information. It is not known whether or not concerns were raised in the course of the 25 July 2014 meeting held apparently on a "*without prejudice*" basis. It is likely they were as Mr Lowe has claimed to have suffered hurt and humiliation as a result of the meeting. I am unwilling to make any finding that no concerns were raised with Mr Lowe in the timeframe referred to in Mr Lowe's claim in light of this.

[68] It is clear, however, that on 4 August 2014, concerns were raised in Mr Tim Martin's letter to Mr McLennan regarding Mr Lowe's unauthorised salary increases and bonus payments. The issue of inter-related party transactions between Waimapu and Mitre View Partnership was also identified as a matter the employer wished to obtain further information about "*to ensure that no party has been disadvantaged by these transactions*".

[69] I find no evidence of harassment of Mr Lowe while he was on sick leave or of "*repeated threats*" to go to the Police over items missing from the farm. The employer was entitled to raise issues of concern and did so through Mr Lowe's representative. The allegation regarding surveillance was not established. I do not view the lodging of proceedings in the Authority by Waimapu as being part of a strategy to force Mr Lowe to resign. In short I find no support for the claim that the employer had embarked on a course of action designed to obtain Mr Lowe's resignation.

[70] I do find, however, that the unilateral reduction of Mr Lowe's salary in August and September 2014 was not the action of a fair and reasonable employer. It was reasonable for the employer to send a draft employment agreement to Mr Lowe on 10 August 2014 for his comments. No date was specified by which those comments had to be received. Ms Angus Burney acknowledged receipt of the draft employment agreement in her letter of 11 August 2014 to Mr Martin, making it clear that the proposed agreement had not yet been considered but that a response would be sent "*at our earliest convenience*".

[71] Mr Lowe was on sick leave from 12 August 2014 and had made no response directly, or through his legal representative, before he resigned on 24 September 2014. Nonetheless, Mr Tim Martin made it clear in correspondence to Ms Angus Burney of 24 August 2014 that the salary specified in his letter of 10 August (\$60,000 per annum) would be used for Mr Lowe's salary payments from August 2014. This was premature in my view and, regardless of the employer's view of Mr Lowe's current salary being at an unauthorised level, should not have been implemented until Mr Lowe's views on this had been obtained as well as his explanations for the salary increases.

[72] It was open to the employer to specify a date by which those views were required and notify Mr Lowe that, if no comments were received by then, the employer would implement the proposed salary reduction. It did not do that. A letter dated 9 September 2014 was sent to Mr Lowe's representative by an advocate acting for Waimapu in which information was requested as to whether Mr Lowe intended to respond to the draft employment agreement "*submitted to him for his perusal and comment on 10 August.*" No time frame was specified for a response.

[73] In any event Mr Lowe's salary for August had been paid by this time and the salary reduction had already been imposed. Evidence presented to the Authority reveals that Mr Lowe's remuneration for August 2014 was based on an annual salary of \$60,000. I note that for September 2014 his remuneration was based on an annual salary of \$45,000. Although Mr Lowe had not received the September payment when he resigned on 24 September 2014, his employer had that day signalled its intention to pay at that rate.

[74] I find the unilateral reduction of Mr Lowe's salary constituted a breach of a significant term of the (unwritten) employment agreement between the parties and constituted constructive dismissal.

Is Holiday Pay owing to Mr Lowe?

[75] Mr Lowe's evidence is that, because of the nature of farming, he was unable to take his holidays in full throughout his employment. He said that, although Mr Martin had offered to look after the farm while he took holidays, his employer "*never arranged this or ever arrived to help*". I note there was no evidence that Mr Lowe had ever asked Mr Martin to make good on his offer.

[76] Mr Lowe & Mr Martin agreed that Mr Lowe had the autonomy to manage his leave and to take his leave as he wished. Mr Martin says his expectation was that Mr Lowe would take his entitlement in full during his employment. His trust in Mr Lowe to act in the best interests of the farm included expecting him to take the leave due to him and to ensure there were no unforeseen contingent liabilities such as that represented by the leave claim put to him by Mr Lowe's accountant in September 2013. At that time Mr Lowe's claim for holiday pay extended back to 1969 but he subsequently amended it.

[77] Mr Martin said he was aware of a number of out-of-work activities Mr Lowe had pursued over the years and this led him to believe there was no issue over untaken annual holidays. Those activities had included competitive horse riding, jet boating, building projects, construction of car trailers, horse trucks and a boat, family time at their holiday home and developing two lifestyle blocks.

[78] Mr Lowe's evidence was that many of these activities had been done in his own time and had not entailed the taking of annual leave. The holiday accommodation had been sold as the family could not get away often enough to make it worthwhile retaining and, until recently, he had owned only one lifestyle block upon which he said he had carried out little development. He said he was required to work only 40 hours a week and his outdoor pursuits were in his own time, at the weekends and sometimes over a long weekend.

[79] Mr Lowe also said he operated a "*give or take system or time in lieu*". He would consider the additional day or days taken to be "*lieu*" days to compensate for days he had worked over a weekend rather than annual leave. From their evidence it

was clear that neither Mr Lowe nor Mr Martin were aware of the legal requirement to maintain holiday and other leave records.

[80] Mr Lowe acknowledged under cross examination that he purchased farm diaries on the farm account but said he did not ever use them, either to record the leave he took, or for any other purpose. Those diaries were unavailable to the Authority. Mr Lowe said they were never used and he had thrown them away when clearing out the farm house. He said he did not ask Mr Martin for leave, and he acknowledged his employer would not have been able to record when he took holidays as he did not always inform him.

[81] Mr Lowe managed the leave of other employees on the farm, most of whom were casuals who were paid a rate that included holiday pay. For other employees who were not casuals, he did not keep written records but said he was aware when they were due for holidays and he told them to take their leave.

[82] Mr Lowe says it was the employer's responsibility to inform him of legal requirements relating to holidays and leave. He had not been provided with the information and training to enable him to comply. Counsel for Mr Lowe submits that, in the absence of records, Mr Lowe's evidence regarding the amount of holidays he had taken should be accepted by the Authority.

[83] Waimapu says Mr Lowe had the autonomy to manage his own leave. Mr Lowe claimed complete control over the farm and day to day decision making. In Waimapu's submission the responsibility for maintaining wage, holiday and leave records was delegated to him as farm manager and sole charge employee.

[84] Counsel for Waimapu also submits that, once Mr Lowe became aware, from discussions with his accountant, he could have a significant claim for accrued holiday pay, he was in breach of his duty of good faith not to inform his employer of the accrued liability this created for Waimapu, and to manage the leave. He did not inform Mr Martin until September 2013 when his accountant raised the matter in a meeting with Mr Martin.

[85] Counsel notes that Mr Lowe had no written record of leave he had taken. He and Mr McLennan had simply made an assumption that he had taken only 50% of his annual holidays. This was not a reliable basis for calculating a holiday entitlement

particularly as Mr Lowe appeared to consider as holidays only time spent away from the farm, and not time spent at home but not working.

[86] The responsibility for maintaining holiday and leave records rests with the employer.³ That obligation existed in 1969 when Mr Lowe commenced his employment at Waimapu farm.⁴ By Mr Martin's acknowledgement, he did not know this and he always relied on Mr Lowe to ensure he took all leave due to him.

[87] Counsel for Waimapu submits this is a situation similar to that in *Rainbow Falls Organic Farm Limited v Rockell*⁵ in which the Employment Court dismissed a farm manager's claim to have worked weekends and to have accrued ten weeks of annual holidays which were untaken at the date of termination of his employment.

[88] In that case the Court referred to "*..the reality of the relationship between the parties, involving a largely autonomous farm manager and a largely absentee employer, and the relevant contractual framework the parties operated under.*"⁶ The Court also noted:

It is clear that Mr McKenzie relied on Mr Rockell to take responsibility for managing his own leave and keeping track of his entitlements. This was based on the fact that Mr Rockell was the only person in a position to know what days were worked or not worked, having regard to his role as sole farm manager and Mr McKenzie's absence overseas.⁷

[89] I accept there are some similarities between this situation and that in the current case although there are also differences. One difference is that the parties in the *Rainbow Falls* case had discussed terms and conditions of employment, including holidays and leave and how they should be taken, although they had not signed an employment agreement. Mr Martin and Mr Lowe agree they did not discuss this matter as part of their *gentlemen's agreement* in 1969. Mr Martin referred during the Authority's investigation to his understanding that "*whatever the law was*" would apply.

[90] In *Rainbow Falls* the Court held that, even if it was accepted that "*the realities of the parties' arrangements did not have the effect of shifting the record keeping responsibilities*", that was not the end of the inquiry. The Court or Authority is not required to accept as proved statements made by the employee about wages paid and

³ Section 81 Holidays Act 2003.

⁴ Section 10 Annual Holidays Act 1944.

⁵ [2014] NZEmpC 136.

⁶ n5 at [23].

⁷ n5 at [27].

days and times worked although it may do so.⁸ In that case the Court was not satisfied that Mr Rockell had worked the weekends and public holidays he had claimed, or that he had the outstanding annual leave entitlements he asserted.

[91] In the current situation, I am not persuaded by Mr Lowe's evidence as to the amount of annual holidays he has outstanding. He has provided no documentary evidence to support his claim to have taken no more than 50% of his holiday entitlement other than a page of undated, handwritten notes made by Mrs Lowe.

[92] These referred to a weekend in Tauranga in May 2014; weekends (away Friday back Monday) in Picton in January 2013 and June 2011; a weekend in Taupo (Friday to Sunday) in October 2013; a weekend in Picton in June 2010; a trip to Hawkes Bay in December 2011; and 2 nights away in Auckland in March 2013.

[93] Other periods away Mrs Lowe had listed included 3 days in the South Island; 3 long weekends in Taupo and one long weekend in Rotorua. As no dates were ascribed to these latter breaks I am unable to discern whether they occurred before or after October 2008, which is the starting date for Mr Lowe's claim. In her written evidence Mrs Lowe said her husband had not accompanied her on two long weekends she spent in Picton in 2014. Mr Lowe did not refer to this in written or oral evidence.

[94] I am not persuaded by Mr Lowe's evidence of having taking no more than 50% of his annual holidays. His claim lacked sufficient detail particularly in relation to time spent at home when he was not working. He acknowledged there were times (approximately four months each year) when he could have taken holidays but chose not to and remained on the farm. As Mr Lowe appeared to regard any time spent on the farm as working time, and time spent as holidays applying only to relaxation time away from the farm, that is problematic.

[95] As I noted earlier, Mr Lowe had been asked by his employer to regard Waimapu farm as his home and he had done so for several decades. In that situation it is difficult to ascribe distinct lines between working and holiday time. I find it likely that Mr Lowe's estimate of having taken only 50% of holidays due to him is inflated. Taking into account his informal system for treating occasional days off during the week, and his acknowledgements of the times he spent at the farm when he was not working, I find a closer estimate to be 30% between 2008 and 2013. The

⁸ n5 at [29].

situation in 2014 is different because of the annual leave that was deducted after Mr Lowe's employer considered his sick leave entitlement had been exhausted. I shall return to this later.

Is Mr Lowe entitled to 5% of the value of Waimapu?

[96] Mr Lowe's evidence is that in 2003 Mr Martin made an offer "*out of the blue*" to give him 5% of the value of the Waimapu property. In making the offer he said it was an acknowledgement of Mr Lowe's hard work and the fact he had received a low salary over the years. Mr Lowe says he accepted the offer and thanked Mr Martin for it.

[97] Mr Martin disputes Mr Lowe's version of events. He says he and his sister, Mary Dearden, who was the other owner of Waimapu, discussed giving Mr Lowe a share in the farm in 2003. They had not quantified a figure at that time and Mr Martin said their agreement was in relation to helping Mr Lowe to buy into the farm in which he had expressed an interest.

[98] Mr Martin says he first proposed the figure of 5% of the value of the farm in 2005. In advocating for this to the other owner/beneficiaries Mr Martin said he had reinforced the hard work and loyalty Mr Lowe had shown during his (then) more than 30 years of employment. He had also referred to Mr Lowe being underpaid.

[99] I do not accept Mr Lowe's evidence that Mr Martin offered him 5% of the value of the farm in 2003. For that to have happened Mr Martin would have required the agreement of Mrs Dearden to the 5% figure, if the purported offer to Mr Lowe had been made before she died that year. If the offer was made after her death, Mr Martin would have needed the agreement of her daughters, who were the other beneficial owners of the property through the Tamariki Trust.

[100] Mr Martin's evidence is that he and Mrs Dearden had not agreed a figure in 2003. That evidence is supported by the wording in the letter/memo he sent in May 2005 to his late sister's daughters. In that document Mr Martin wrote:

Mary and I had agreed to give him some shares in the Land Co. and my figure is 5%.I hope you would agree to that. [underlining added]

[101] If 5% had been agreed between Mr Martin and Mrs Dearden, it would have been more logical for Mr Martin to have said "*Mary and I had agreed to give him 5% of the shares in the Land Co.*" It is clear from the May 2005 document that Mr Martin was seeking the agreement of his nieces to the 5% that he was proposing. I find it unlikely that Mr Martin, as part owner of the farm, would have made an offer in 2003 of a 5% shareholding in the absence agreement to that percentage by the other part owner(s).

[102] I find it more likely that Mr Martin's discussion with Mr Lowe about the 5% took place after agreement had been obtained from the Tamariki Trust to 5% being discounted from the value of the farm if Mr Lowe put in an offer for the Trust's 50% share.

[103] Once Mr Lowe's offer to purchase the Tamariki Trust's share of the farm was rejected by the Trust, Mr Martin said he took the view that the 5% was no longer relevant as it had been premised on Mr Lowe buying into the farm. His evidence, as noted earlier, was that he then reached an agreement with Mr Lowe that his salary would remain at the level it then was of \$45,000 and that future salary increases would be substituted with the award of 5% of the land value of Waimapu Station. This would be paid out on Mr Lowe's retirement.

[104] When Mr Martin met with Mr McLennan in September 2013, he says it was his intention to discuss options with Mr Lowe regarding payment of the 5% as there would be no funds to pay out that amount until after the farm was sold. Mr Martin, at that time, was under the impression Mr Lowe had kept to their agreement to remain on his 2005 salary of \$45,000 per annum. When he later (May 2014) realised that had not occurred, Mr Martin's view regarding the 5% changed. He now says that Waimapu has no obligation to pay the 5% as Mr Lowe did not keep to the agreement upon which the 5% payment was premised.

[105] Mr Lowe disavows any knowledge of the agreement to freeze his wages and denies that such a conversation took place. He says he would never have agreed to such a proposal. He remains firmly of the view he is entitled to the 5% of the farm's value and asserts that the offer from Mr Martin related solely to the low wages he had received from the commencement of his employment until 2003.

[106] Mr Martin acknowledged in the course of the investigation that he could not be certain he had put the proposal to Mr Lowe although it had been in his mind. He said he would have raised it if Mr Lowe had sought salary increases after 2006 as he was clear in his mind that the condition for Mr Lowe receiving the payment on retirement was the foregoing of salary increases until that time.

[107] I find it more likely than not that Mr Martin did not put the proposal to Mr Lowe, although that was the basis on which he was prepared to offer the 5% payment. I also find the original offer was premised on Mr Lowe buying into Waimapu Station and lapsed when his offer was rejected. While Mr Martin had the intention of putting a different offer to Mr Lowe, he did not do so.

[108] I find there is no obligation on Waimapu to pay Mr Lowe 5% of the value of the farm.

Was Mr Lowe underpaid wages from July to 22 Oct 2014?

[109] Mr Lowe says his gross monthly salary was reduced from \$6,586.34 to \$3,461.53 from 10 August 2014. This is the date from which he says his employer applied the terms of the draft employment agreement it had sent to him on 11 August.

[110] Waimapu denies any wages are outstanding. It says wages were paid on 25 August 2014 including sick leave through to 7 September 2014. Payment for the period from 7 September to 29 September was made on 30 September 2014, and was treated as annual leave in accordance with an agreement reached in a telephone conference between the Authority and the parties.

[111] It says no further payment was made for Mr Lowe's notice period as he had informed the employer he was not willing to work out his notice period from 24 September to 22 October 2014.

[112] I have already found Waimapu's action in unilaterally reducing Mr Lowe's salary to have amounted to a constructive dismissal. It follows that the reduced amount should not have been applied to the salary and annual leave payments made in August and September 2014.

[113] Mr Lowe's salary payment for August was based on an annual salary of \$60,000 and that for September was based on a \$45,000 annual salary. I find

Waimapu liable to pay the difference between the wages and annual leave it paid to Mr Lowe in August and September 2014 and what would have been paid if the reduction in salary had not been applied.

Is Mr Lowe entitled to wages for the unpaid period of his notice?

[114] Mr Lowe claims an entitlement to wages for the period of his notice which was unpaid from 30 September to 22 October 2014. Ms Angus Burney submits he could not work out his notice because he had been constructively dismissed.

[115] Mr Lowe's handwritten letter of resignation of 24 September 2014, which was addressed to Mr Martin and mailed to him that day, did not provide for a period of notice. In it Mr Lowe stated that he "*can no longer mentally and physically return to 'Waimapu'..*".

[116] Ms Angus Burney sent a letter and a scanned copy of Mr Lowe's resignation to counsel for Waimapu the same day. Her letter states that Mr Lowe "*does not have sufficient trust and confidence in the Martin family for him to continue his employment at Waimapu Station*" and that reiterates that "*physically and mentally he can no longer return to work*". The letter then says that Mr Lowe is giving "*four weeks' notice of resignation as of today*" and would be available from 29 September "*to participate in a proper investigation..*" It goes on to say "*We will also require a response from your client by Friday 26 September as to whether they require my client to work on the farm on a daily basis through his notice period*".

[117] Waimapu's response of 25 September 2014 noted that, as its concern and issues now formed part of proceedings in the Authority⁹ it did not intend to pre-empt the Authority's decision by taking further action at that time. It asked Mr Lowe to confirm by midday on 26 September that he was willing to work during his notice period and that he would meet Mr Tim Martin at the farm on 29 September. Ms Angus Burney emailed counsel for Waimapu on the morning of 26 September to notify that Mr Lowe was not prepared to work out his notice period.

[118] I am not convinced that Mr Lowe ever intended to work out a notice period, given the statements made in his letter of resignation which record his physical and mental inability to return to the farm. I note that Mr Lowe's evidence was that he was

⁹ Both parties had commenced proceedings against the other by this time.

not prepared to report to Mr Tim Martin in light of the counterclaims made by Waimapu against him. Under those circumstances I find Mr Lowe does not have an entitlement to wages for the period from 30 September to 22 October 2014.

Is Mr Lowe entitled to be reimbursed for annual leave deducted during the period of his sick leave between 7 and 29 September 2014?

[119] Mr Lowe went on sick leave from 12 August 2014 and had medical certificates for his absence to 29 September 2014. He notified his employer, through Ms Angus Burney, that he had an accrued entitlement to sick leave in excess of 30 days.

[120] Waimapu responded that his sick leave entitlement was limited to 20 days in accordance with s.66(2) of the Holidays Act 2003 and that by its calculations that would expire on 7 September 2014. As noted earlier, Mr Lowe was paid annual leave for the period from 7 to 29 September 2014. This had been agreed to by the parties in a telephone conference with the Authority with the parties reserving their positions regarding claims over that period of leave. I understand that Mr Lowe's concern at the time was to ensure he continued to receive remuneration.

[121] Mr Lowe's claim to have accrued more than 30 days was made by Mr Lowe's representative in the following terms in an email to Mr Martin dated 20 August 2014:

As to my client's wages while he is on sick leave, under the Holidays Act an employee is entitled to the statutory minimum of five days per annum as a fully paid entitlement. My client has an accrued entitlement in excess of 30 days of sick leave.

[122] This claim was repeated in submissions without explanation as to why s.66(2) of the Holidays Act should not apply. This section provides that an employee may carry over up to 15 days' sick leave to a maximum of 20 days' current entitlement in any year. While it does not prevent an employer from allowing an employee to carry over any enhanced or additional sick leave entitlement,¹⁰ it is not mandatory for an employer to do so.

[123] It has already been established that Mr Lowe did not have a written employment agreement when he commenced his employment and there had been no detailed discussion about the terms and conditions that would apply. He had been

¹⁰ Section 66(3) Holidays Act.

offered a draft employment agreement for his comments on 10 August 2014, which he had not accepted. In any event that agreement contains reference to the Holidays Act provisions, although it does not specifically refer to the issue of accrual.

[124] I find Mr Lowe had an accrued sick leave entitlement of 20 days in accordance with the provisions of the Holidays Act. There was no evidence that he had taken any sick leave earlier in the current year before commencing his sick leave on 12 August 2014. By my calculation his entitlement to paid sick leave expired on 8 September 2014. The period from 9 to 29 Sept (15 days) is to be deducted from his outstanding annual leave entitlement.

Was Mr Lowe paid wages less than legally payable?

[125] No evidence was provided to support this claim and I have no reason to conclude that Mr Lowe's wages were at any stage less than those payable under minimum wage legislation.

Is Mr Lowe entitled to compensation for six years use of his private vehicle for Waimapu business

[126] Mr Lowe claims \$29,652.48 plus interest as the value of "*unpaid vehicle compensation...for six years use of private vehicle for the Respondent's business..*". He has estimated at this on the basis of 132 km per week at \$0.72/km for 52 weeks a year over the last 6 years of his employment.

[127] No evidence, other than oral, was provided to support the claim. Mr Lowe said there was no farm road vehicle and he and Mrs Lowe had always used their own private vehicles and never before sought reimbursement. He said Waimapu finances were such that they could not have afforded to pay for a work vehicle or to pay for deliveries. It was "*practical and obvious*" for them to use their own vehicles for deliveries.

[128] Mr Martin questions this claim and says, if Mr Lowe believed he was entitled to expenses over and above those already paid by the farm, he had ample opportunity to raise this with him over the 45 years of his employment. He had not done so. Further, Mr Martin says the farm has no need for a personal farm vehicle: vehicles for use on the farm are provided, and a review of the farm accounts show that the bulk of the farm's supplies were delivered by freight companies. Mr Martin also calculates

that the 132 km per week claimed by Mr Lowe would amount to approximately two return trips to Masterton every week.

[129] He also noted evidence showing that Mr Lowe charged Waimapu's Farmlands account for some private vehicle expenses. These included puncture repair and "*starting issues*". Additionally he said Mr Lowe had been paid a \$208 per month non-taxable allowance to cover incidental expenses.

[130] Mr Lowe dismissed Mr Martin's responses to his claims. He said the monthly allowance was never intended to cover vehicle expenses, and he listed the uses to which his personal vehicles and trailers were put. He said they had always tried to keep their accounts separate from Waimapu's but mistakes sometimes happened and when they did the Lowes would pay the organisation concerned, which would then reimburse the Waimapu account.

[131] Most of the activities Mr Lowe listed, for which he said his private vehicles were used, were sporadic, rather than regular, such as buying bulls annually, buying and transporting rams annually, and attending stock sales four or five times a year. It seems incongruous that Mr Lowe, who claimed the authority to award himself salary increases and bonuses, would not have instigated a vehicle allowance during his employment if he had believed one to be appropriate.

[132] The claim is for the six year period from October 2008 to October 2014. However, in Mr Lowe's written evidence to the Authority he referred to having adjusted his salary to \$78,000 in 2013 "*to put the remuneration into a straight up and down package providing for everything*". A file note from Mr McLennan which was included in Mr Lowe's bundle of evidence, confirms Mr Lowe's salary had increased to \$78,000 from 1 April 2013. There appears therefore to be an element of double dipping in his claim, at least for 18 months of the 6 years for which the vehicle allowance is sought.

[133] In Mr Lowe's written evidence he said he had "*spent years (since 2004) attempting to discuss in a professional manner with JM¹¹ (through a meeting facilitated by AM¹²) the issues of my salary, the vehicle allowance, any prospect of the farm affording me Kiwisaver...*". However, in answer to questions at the investigation

¹¹ Mr Martin.

¹² Mr McLennan.

of his claims, Mr Lowe said he had not raised the issue of his seeking reimbursement for use of his vehicles with Mr Martin.

[134] Mr Martin's evidence was that he was always available to talk with Mr Lowe but that Mr Lowe did not approach him to discuss such issues. The matter was not raised in the meeting Mr Martin attended with Mr McLennan in September 2013. Nor was it raised as a claim in Mr McLennan's letter of 2 May 2014 in which he referred to the outstanding holiday pay and the exit payment based on 5% of the farm's land value as being "*due for payment 31 July 2014 if current thinking ends up being the departure date*". Vehicles were referred to in that letter only in the context of other contributions made by the Lowes to the farm which Mr Martin was invited to consider in raising the "*compensation*" to be paid to Mr Lowe.

[135] I do not accept Mr Lowe's evidence that he had tried for years to discuss the issue of a vehicle allowance (or his salary or KiwiSaver) with his employer. It was clear from the evidence of both Mr Lowe and Mr Martin they both considered they had a respectful relationship. There was nothing to prevent Mr Lowe communicating with Mr Martin by telephone or email if personal contact was not available.

[136] On balance I find no merit to the claim for compensation for use of his vehicle(s) for the last six years.

Is Mrs Lowe owed holiday pay?

[137] In a statement of problem dated 6 November 2014 that was lodged for Mrs Lowe, it is claimed that holiday pay for working at Waimapu Station is owed to Mrs Lowe from May 2012 to 12 August 2014.

[138] Mr Lowe's evidence is that, until the last two years of his employment at Waimapu, Mrs Lowe was "on call" like any other casual employee and paid accordingly. That changed when he decided to pay her a fixed rate per week for the work she did, based on 10 hours per week. By his estimate she worked between 9 and 12 hours per week.

[139] Mrs Lowe's evidence was that she had full-time nursing employment off the farm for many years while living at Waimapu Station. During that time she had undertaken casual work on the farm as well but had only been paid for lamb docking.

[140] After she retired from nursing, Mrs Lowe said she did more farm work and was paid a fixed rate of \$800 per month instead of being paid by the hour. She thought she was owed holiday pay from that time. Mrs Lowe acknowledged she had the opportunity to take holidays in the time for which she was claiming holiday pay.

[141] Mrs Lowe provided a list of duties she undertook, or had undertaken, in her 45 years on the farm. Along with yard work, drafting, opening and shutting gates, help with tagging cattle, docking/tailing lambs, she included in the list the establishment of a garden and interior painting in the farm house, delivering GST records to the accountant's office, driving the tractor when required and assisting Mr Lowe if he "ever got stuck", and being a "general dogsbody" .

[142] Waimapu says Mr Lowe had no authority to pay a fixed regular salary to Mrs Lowe. It says he was authorised to engage her for seasonal work only and it only latterly became apprised of the arrangement Mr Lowe had made regarding her salary. It has a counterclaim for the payments made to her. Waimapu also claims the nature of her work was casual employment and the \$20 hourly rate included payment for holidays, as occurred with all other casual employees who worked on the farm from time to time.

[143] A summary sheet provided by counsel for Mrs Lowe during the investigation has calculated the amount of holiday pay owing as \$2,076.80. This is based on 8% of the gross remuneration received by Mrs Lowe from Waimapu from December 2011 to July 2014. Inland Revenue documentation provided by Mrs Lowe reveals that the \$800 per month payments to Mrs Lowe commenced in December 2011 and ended in July 2014, although her claim refers to a commencement date of May 2012.

[144] No explanation has been provided for the additional 5 months in which the \$800 monthly payment was made and no amendment was made to the statement of problem which claims holiday pay commencing from May 2012.

[145] The employment was arranged by Mr Lowe who did not provide Mrs Lowe with a written employment agreement. His oral evidence was that it was "*better and fairer she be paid on a regular basis*" once she retired from her other work. Mrs Lowe had always undertaken a lot of farm work and, after she retired from nursing, he thought she should be paid for it. He said he told her she would be paid \$20 an hour

and confirmed that Mrs Lowe's pay continued on the same basis at times when she was away from the farm. He said she had to "balance things out".

[146] Waimapu submits that both Mr and Mrs Lowe accepted in cross examination that Mrs Lowe did not expect to receive an 8% loading on top of the hourly rate. I do not accept that submission. Mr Lowe initially said Mrs Lowe was not expecting holiday pay but because she was classed as permanent, he thought she was eligible for holidays. He then said he did not know whether Mrs Lowe expected 8% on top of her pay.

[147] Mrs Lowe under cross examination initially agreed she presumed her pay to be an "all up" rate but withdrew that immediately. She distinguished her situation from that of other casual employees who had been employed at Waimapu from time to time on the basis that she was a permanent employee. I find on balance it is more likely than not that neither Mr nor Mrs Lowe turned their minds to the matter of whether holiday pay was, or was not, included in the hourly rate at the time they agreed that Mrs Lowe would be employed on a regular basis from May 2012.

[148] Mr Lowe's evidence was somewhat inconsistent as to whether there was any change in the duties Mrs Lowe performed before and after he employed her as a "permanent casual" on \$200 per week. Under cross examination he said the work she did on the farm had not changed from before she retired. The difference was that, before he employed her, he had to ask her nicely to do things. After he employed her, he could tell her to do them.

[149] However, under further questioning Mr Lowe said Mrs Lowe was undertaking more duties after he had employed her. He referred to there always being things for Mrs Lowe to do, including "fetching gear". He also referred to bee contracts and the Genesis wind farm issue creating more work.

[150] I will address the issue of Mr Lowe's authority, or lack thereof, to employ Mrs Lowe on the basis that he did when I turn to Waimapu's counterclaims. At present I will focus on the fact that she was employed to provide an average of 10 hours of work on a weekly basis, and did provide such services.

[151] I am satisfied from Mrs Lowe's evidence that she did provide at least ten hours of work a week from May 2012. The work was not undertaken at set hours on a daily or weekly basis, but it was regular to the extent that she always performed at least ten

hours on average a week. This was not a situation where Mrs Lowe could refuse an offer of casual work made to her, as she had undertaken to be available for ten hours per week on average.

[152] The Holidays Act provides that an employer may regularly pay annual holiday pay with the employee's pay if the employee's work is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks' annual holiday. The employee must agree to this and the annual holiday pay must be paid as an identifiable component of the employee's pay.¹³ Where these conditions are not met the employee is entitled to holiday pay in accordance with the Holidays Act. This applies where an employee has worked 12 months or more, regardless of whether the employer considers it has already included holiday pay in the employee's payment rate.

[153] In Mrs Lowe's situation, the work was regular, although the times for performing it were not, and it was practicable to provide her with annual holidays. However, although she did take some long weekends, she was still required to perform her 10 hours a week and to "balance it out" as Mr Lowe said. The regularity of her work was reflected in the regular remuneration paid to her on a monthly basis. She had no written employment agreement and I have found it more likely than not that there was no discussion about holiday pay being included in her hourly rate. There was no evidence that the holiday pay was an identifiable component of Mrs Lowe's pay.

[154] I find this in this situation, Mrs Lowe is entitled to receive holiday pay calculated at 8% of her earnings from 1 May 2012 to 31 July 2014.

Is Mrs Lowe is owed wages from July to August 2014?

[155] Mrs Lowe claims she worked at Waimapu Station up to 13 August 2014. She and Mr Lowe left the farm on 14 August and did not return, other than to collect some possessions.

[156] Waimapu denies the claim and points to evidence that Mrs Lowe performed no work during July and August 2014. Part of that evidence is a letter from counsel for the Lowes dated 13 August 2014 to Mr Martin in which Mr Lowe is described as

¹³ Section 28 Holidays Act.

being "*both physically and mentally exhausted*". The previous day his medical practitioner had written a medical certificate stating that Mr Lowe was unfit for work for 30 days. Counsel's letter included the following:

Given that Margaret is also unavailable for this month while our client is recuperating, we emphasise that there is no expectation of her wages being paid.

[157] The other evidence Waimapu cites is a one-page hand written document which formed part of the Applicants' bundle prepared for the investigation. The document was written by Mrs Lowe and consists of a list of the work she performed on Waimapu Station throughout the years she lived there. Towards the end of the document Mrs Lowe recorded some of the gardening work on the property she had recently started and noted:

Came to a halt after I had shown lady around house – future manager's wife!!

[158] This comment refers to the visit Mr Martin and Mr Tim Martin made to the farm on 30 June 2014 in which Mr Tim Martin showed a prospective farm manager around the farm and Mrs Lowe showed that person's wife around the farm house at Mr Martin's request.

[159] Waimapu's evidence is that Mrs Lowe's last monthly wage payment was made on 15 July 2014. It says the wages book shows that the payment made on that date was for the month of July.

[160] I was not persuaded by Mrs Lowe's evidence that she continued to perform duties up to 13 August 2014. However, I consider it likely, notwithstanding the note she made regarding ceasing gardening tasks, that she did continue to work her 10 hours a week throughout July. On balance I find she is not entitled to remuneration for the period from 1-13 August 2014.

Waimapu counterclaims

Has Mr Lowe has been unjustly enriched by unauthorised salary and bonus payments and, if so, should he repay them?

Salary

[161] Waimapu claims Mr Lowe was unjustly enriched from unauthorised salary increases between 2006 and 2014. It refers to the agreement that was reached

between Mr Martin and Mr Lowe in 2005 that Mr Lowe's annual salary would remain at its then level of \$45,000 (plus benefits¹⁴). In exchange for the sacrifice of future salary increases, Mr Lowe would be paid, on retirement, a sum equal to 5% of the value of the land value of Waimapu Station.

[162] Mr Lowe denies the salary increases he awarded himself were unauthorised and claims he had sole authority from 1969 to make wage payments, including initiating pay rises for himself. He denies all knowledge of the arrangement Mr Martin gave evidence about that he had agreed to a wage freeze in 2005 in exchange for a share of the farm on retirement. He described Mr Martin's offer of the 5%, which he says was made in 2003, as being "*to right the wrongs of the past*" and as being to remedy the low wages he had received from 1969 to 2003.

[163] Mr Martin acknowledged during the investigation he could not be sure he had put the proposal to Mr Lowe, although it had been in his mind. He was sure that, if Mr Lowe had asked him for a salary increase after 2006, he would have raised it then. This is because he was quite clear in his mind that the condition for Mr Lowe receiving a 5% share of the farm's land value on retirement was his foregoing of salary increases until that time. As Mr Lowe did not discuss salary increases with him after 2005, he had no reason to query whether he had or had not reached that agreement with Mr Lowe.

[164] I have already found it more likely than not that Mr Martin did not put the proposal to Mr Lowe, although I accept he intended to and thought he had done so. I also accept that Mr Martin did not learn until May 2014, when Mr McLennan sent him a spreadsheet of financial information, that his farm manager had increased his salary to \$75,000 per annum between 2006 and 2013. In fact Mr McLennan's information was incorrect and Mr Lowe's actual salary had increased to \$78,000 from 1 April 2013.

[165] Counsel for Waimapu has submitted that, if the Authority were to find the employer was liable to pay Mr Lowe 5% of the land value of Waimapu Station, the Mr Lowe's salary "overpayments" should be offset against that amount.

[166] I have found Waimapu is not liable to make that 5% payment to Mr Lowe. That raises the question of whether it is reasonable for the employer to seek

¹⁴ Accommodation and power.

repayment from Mr Lowe of the sums he received as salary increases over a nine year period to 2014. If those salary increases were unauthorised, and Mr Lowe were ordered to repay them, he would effectively have worked for the last eight to nine years of his working life on Waimapu Station without an increase in salary.

[167] Mr Tim Martin informed Mr Lowe in August 2014 that an appropriate value for his farm manager's position was \$60,000 per annum plus free accommodation and phone. That is a tacit acknowledgement that the \$45,000 salary Mr Martin had believed, until May 2014, Mr Lowe was being paid, was too low for the work Mr Lowe was undertaking.

[168] Mr Lowe's situation on Waimapu Station was largely unsupervised. On the evidence presented it appears there was little contact with his employer from year to year in the last decade of his employment. I consider it likely that Mr Lowe was encouraged by this to assume he had greater autonomy than he did.

[169] From his evidence he believed he was not obliged to discuss the salary increases he awarded himself with his employer, or even to inform his employer about them. Under questioning he said he did not think it was relevant to do so. His view was that Mr Martin could have asked to see the wages book at any time and he had access, via the accountants, to financial records for the farm.

[170] For his part, Mr Martin says he was operating under a belief of complete confidence in Mr Lowe to act in the best interests of the farm. He did not ask Mr Lowe for the wages book to check the payments that were made. Waimapu says the financial reports did not identify individual salary information, but contained a one amount for all wages paid in a year which included and all casual employees and contractors employed or engaged through the year as well as Mr Lowe.

[171] I am sceptical of Mr Lowe's claim that he had the authority to initiate salary increases for himself without authorisation from his employer. He acknowledged under questioning that, earlier in his employment, Mr Martin would tell him to increase his salary from time to time. I prefer Mr Martin's evidence that between 1969 and 2003 Mr Lowe's periodic salary increases were at his (Mr Martin's) behest, based on his knowledge of the salaries of other farm managers under his supervision and his knowledge of the industry in general. While Mr Lowe may have been the

person to put the salary increase into effect, it was done with his employer's authorisation.

[172] After 2003 Mr Lowe's salary remained static for three years until April 2006 when it increased by \$3,000 per annum. This is the start of the salary increases Waimapu says it had no knowledge of until May 2014. In 2008 Mr Lowe's salary increased by \$2,400 to \$50,400 per annum. According to the handwritten wage book records, it remained at that level until April 2013 when it rose by \$27,600 to \$78,000 per annum.

[173] Mr Lowe's evidence is that he increased his salary to this level following discussions with his accountant, Mr McLennan. He said in oral evidence that it was a remuneration package that covered everything including KiwiSaver, and an allowance for use of his own vehicles, trailers and tools on the farm. It also covered the greater responsibilities he considered he had assumed over the years of his employment.

[174] Mr McLennan's oral evidence was that he knew from Mr Lowe that, historically, he had increased his own salary. He advised Mr Lowe in a letter dated 3 April 2013:

You definitely need to negotiate a market related salary which given the scale of the property will be in the range \$80-90,000.00.
[underlining added]

[175] Mr Lowe did not take the advice to negotiate his salary but simply implemented a salary he considered appropriate for the duties he performed.

[176] The duty of good faith is a reciprocal one in an employment relationship.¹⁵ Mr Lowe breached that duty by failing to be responsive and communicative in his dealings with his employer and, specifically, by failing to discuss salary matters with his employer if and when he was dissatisfied with the level of his salary or with any of the terms and conditions of his employment.

[177] The fault, however, does not lie completely with Mr Lowe. Mr Martin, as sole surviving partner of the Waimapu Station Partnership, had a duty of good faith to Mr Lowe. He was uncertain whether he had discussed his proposed salary arrangement with Mr Lowe but did not check with Mr Lowe whether they had had such a discussion or not. That was unreasonable. His assumption that, because Mr Lowe

¹⁵ Section 4 of the Employment Relations Act.

had not asked for a salary increase over the following years, he and Mr Lowe must have reached agreement over his forgoing future salary increases in exchange for the 5%, was also unreasonable.

[178] In *New Zealand Fire Service Commission v Warner*¹⁶ the Court referred to the test for unjust enrichment. First, there must be proof of the recipient's enrichment by receipt of a benefit. Second, there must be a corresponding deprivation to the donor. Third, there must be an absence of any juristic reason for the enrichment.

[179] In the current situation, Mr Lowe was enriched by the salary payments he awarded himself. Those payments were at Waimapu's expense. However, the employer's tacit acknowledgement that the 2005 salary of \$45,000 was inappropriately low in 2014 when it offered an employment agreement with a salary of \$60,000, suggests the deprivation suffered by Waimapu did not correspond to the enrichment gained by Mr Lowe.

[180] Mr Lowe's salary had been \$45,000 from April 2003. If it had not been for the agreement Mr Martin believed he had made with Mr Lowe, it is unlikely he would have expected his farm manager to remain on the same salary for 11 years. The pattern of Mr Lowe's salary increases from 1969, which Mr Martin says he directed until 2005, indicates Mr Lowe would have had five further salary increases between 2005 and 2014.¹⁷

[181] That needs to be taken into account in assessing whether Waimapu suffered a corresponding deprivation to the benefit Mr Lowe received from his unauthorised salary increases. Not to do so would be to ignore the benefit Waimapu gained from having its farm manager remain on the same salary for over a decade.

[182] For this reason, and while not condoning Mr Lowe's actions in raising his salary during the years 2006 to 2014, I find he was not unjustly enriched as a result and should not have to repay the amount of those salary increases.

Bonus payments

[183] Mr Lowe received a bonus in 4 of the first 11 years of his employment at Waimapu Station: in his 5th, 7th, 10th and 11th years, according to the spreadsheet of

¹⁶ [2012] ERNZ 290 NZEmpC.

¹⁷ Based on an analysis of Mr Lowe's 23 salary increases over the 36 years between 1969 and 2005.

financial data compiled by Mr McLennan. He received no further bonuses until his 41st year of employment in the 2009-2010 tax year when he awarded himself a bonus of \$4,250. He awarded himself further bonuses in each of the following years to, and including, 2013 according to the handwritten wage records kept by Mr Lowe, and evidence compiled by Mr McLennan from IRD records.

[184] Mr Martin's evidence is that the payment of a bonus was discretionary and was intended to recognise the anticipated success arising from development activity on the farm. This entailed an intensive program of scrub removal, fencing and the establishment of new pastures. That work, initially successful, ceased around 1980 because of a manuka beetle infestation which destroyed pasture growth.

[185] Mr Martin says the discretionary bonus was then abandoned in favour of a higher salary level. Mr Lowe's salary increased by approximately 22% in 1981. As his previous years' salary increases had varied between 0% and over 30%, that is not necessarily an indication that Mr Martin's recollection is correct. Mr Lowe denies any knowledge of the bonus being abandoned and claims it was not discretionary and remained a term of his employment, and therefore an entitlement, from the outset.

[186] I do not find Mr Lowe's claim that he viewed the bonus as an entitlement to be credible. If it had been an entitlement, Mr Lowe is likely to have claimed it for the first four years of his employment and for those years of his first decade at Waimapu Station when he did not receive a bonus. There is no evidence to suggest that he did.

[187] Also Mr Lowe's claim that the bonus was an entitlement conflicts with his claim to have had the authority to initiate his own salary increases. If he viewed the bonus as an entitlement rather than a discretionary payment, it is likely he would have awarded himself bonuses annually from earlier in his employment, particularly as he claims to have been underpaid for much of that time.

[188] Mr Lowe provided no credible explanation for not claiming a bonus he viewed as an entitlement after 1979 until he began paying annual bonuses to himself from 2009. When I asked him why he did not discuss the issue of a bonus with Mr Martin if he believed himself entitled to one, Mr Lowe's response was that it was up to his employer to talk to him. I find that to be disingenuous. Mr Martin had no reason to discuss the payment of a bonus with Mr Lowe in 2009 when there had been no discussion of bonuses, and no payment of them, for 30 years.

[189] Mr Martin's evidence that the bonus was a discretionary payment, abandoned in 1980 when development work ceased, is more credible and is preferred. I find Mr Lowe was not authorised to pay himself bonuses for the tax years 2009/2010 to 2013/2014 inclusive. The bonuses totalled \$26,325 gross.

[190] Counsel for Mr Lowe, in making submissions on the salary and bonus payments, submits that the matter of the employer's acquiescence, and Mr Lowe's change of position in reliance on the payments should be considered as defences in relation to the claims of unjust enrichment.

[191] Ms Angus Burney submits that Mr Martin received Statements of Financial Accounts and raised no objections to the salaries figure in them. That in her view constitutes acquiescence and Waimapu is now estopped from claiming such payments were unjust or unauthorised.

[192] I have already found, on different grounds, that Mr Lowe was not unjustly enriched by the salary increases he awarded himself. I do not accept counsel's submission in relation to the bonus payments. Those payments were not identified in the financial statements Mr Martin received annually. Waimapu's evidence, supported by financial statements for Waimapu Station included in the bundle of documents compiled for the Authority's investigation by Mr Lowe, show a single figure for salaries paid throughout a financial year, including those for casual employees employed when seasonal demand warranted. There was nothing in the financial statements to alert Mr Martin to Mr Lowe's awarding of bonuses to himself.

[193] The second defence Ms Angus Burney has raised is that Mr Lowe changed his position in reliance on the monies he awarded himself. She has cited s. 94B of the Judicature Act 1908 in support of this submission. That section provides that payments made under mistake of law or fact are not always recoverable. Where a person has:

...received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be. [underlining added]

[194] It is not sufficient that a person has altered his position in reliance on the validity of the payment as he must first have received the payment in good faith. Mr Lowe's actions in paying himself bonuses from 2009/10 onwards were not authorised

by his employer. I do not accept that he acted in good faith in paying those amounts to himself after a 30 year period in which no such payments had been made and during which time he had not raised the issue of bonuses with his employer. I find the s.94B defence to have no application in this situation.

[195] I find the test for unjustifiable enrichment has been met with regard to the bonuses. There is evidence of Mr Lowe having received \$26,325 in bonus payments awarded to himself without his employer's authorisation. Waimapu has suffered a corresponding monetary deprivation and, as there was no contractual entitlement to the payments, there was no juristic reason for Mr Lowe's enrichment.

[196] I agree with counsel for Waimapu's submission that this is an instance where an award of special damages is justified. Accordingly I find Mr Lowe liable to pay special damages in the sum of \$26,325 to Waimapu.

Did Mr Lowe pay himself a non-taxable monthly incidentals allowance and, if so, is Waimapu entitled to recover the amount of those payments?

[197] Mr Lowe's evidence is that the non-taxable allowance of \$208 per month has been paid to him since the early 1970's and arose from discussions with the farm's accountant. He says it was to replace an *ad hoc* system of reimbursing him for incidental costs.

[198] There is scant evidence about this allowance and the farm's accountants have changed in the intervening period. It is not clear whether or not the allowance was authorised by the employer. Even if Mr Martin did not approve the payment, it is possible Mr Dearden did, as he was actively involved in the farm in the 1970's. It is also likely that memories, including those of Mr Martin and Mr Lowe, are likely to be unreliable over whether the allowance was discussed and agreed more than 40 years ago.

[199] In any event, Mr Martin has referred to the allowance in his written evidence in the context of rejecting Mr Lowe's claim for unpaid personal vehicle expenses. In his view any such expenses "*should have fallen within this allowance*". Mr Martin has also cited a file note prepared by Mr McLennan in June 2013 supporting that view. This suggests Mr Martin views the allowance as being legitimate, at least for some purposes.

[200] I also note that if, as Mr Lowe recalls, the allowance was to replace *ad hoc* reimbursements made to him by his employer, it must have been obvious to Waimapu when such reimbursements were no longer being made. There was no evidence that Mr Martin had made inquiries about the reason for this or that he had reason to believe incidental expenses were no longer being incurred.

[201] I find it more likely than not that the monthly non-taxable payment was authorised by the employer. It follows that Waimapu is not entitled to reclaim the payments made to Mr Lowe.

Did Mr Lowe invoice Waimapu at excessive rates for the hire of equipment he, or a company he owned, used on the farm?

[202] Waimapu claims that Mr Lowe overcharged it for the hire of equipment he personally owned. In particular it says Mr Lowe invoiced Waimapu for the hourly hire of a bulldozer for amounts which were disproportionate to the amount of work that was in evidence on the farm. Waimapu says it was invoiced at a rate which included labour and running expenses, despite Mr Lowe being paid for his labour through the wages it paid him. It seeks the value of the overpayments, which it calculates to be \$30,480.

[203] Mr Lowe denies that he overcharged Waimapu and rejects the claim for repayment. He says he carried out the work in his own time, not during his paid employment. He normally did it after 5 p.m. or in the weekends. He acknowledged he probably also did some work on "lieu" days for which he charged Waimapu. Mr Lowe says that Mr Martin knew he was using a bulldozer on the farm to clear and clean tracks and the farm benefitted from the work that was carried out. Mr Martin had never raised concerns with him over the use of the equipment or queried his judgement over that use.

[204] Waimapu provided a number of invoices for bulldozer use from 2004 to 2013. The invoices originate from Mitre View Partnership and not from Mr Lowe personally. I have reservations about the propriety of Mr Lowe's actions in charging his employer for the use of the bulldozers he owned and operated on the farm at different times during his employment. It would have been prudent, if he had wished to undertake such work using his own equipment, to have the explicit prior agreement of his employer including agreement on the charge out rate to be applied. It also seems surprising to me that, if the work needed to be carried out as part of normal

farm work, it was not undertaken during working hours instead of in Mr Lowe's own time.

[205] Notwithstanding those reservations, I note I am unable, on the evidence before me, to determine whether or not the work invoiced to Waimapu fairly reflected the amount of work carried out on the property. In any event, as the work was invoiced by Mitre View Partnership I have no jurisdiction to award the remedies sought by Waimapu. Any claims it may have will need to be pursued in a different forum.

Has Mr Lowe sold equipment belonging to Waimapu for a price below fair market value?

[206] As both the pieces of equipment referred to in Waimapu's counterclaims have been returned, I find no need to consider this issue further.

Is Waimapu is entitled to recover salary payments made to Mrs Lowe from May 2012 to July 2014 which it claims to be unauthorised and payments made to Mr Foley?

[207] Mr Lowe acknowledged that he did not discuss the employment of Mrs Lowe on a "*permanent casual*" basis from May 2012 with Mr Martin. In his view he was authorised to manage the farm including the employment of staff as required.

[208] Mr Martin's evidence was that Mr Lowe was authorised to hire casual staff during busy times on the farm. He said he was never privy to the details of whom was being employed. He considered that Mr Lowe had managed the farm with only the assistance of casual employees during busy seasonal periods throughout the years in which Mrs Lowe worked off farm as a nurse.

[209] He did not consider that changes had been made to the farm's operation that would require the engagement of an assistant to work regularly throughout the year. Mr Martin had not authorised Mr Lowe to employ Mrs Lowe on that basis and did not consider the work she claimed to do justified the payment of a regular salary.

[210] Submissions for Waimapu did not address the repayment of salary payments made to Mrs Lowe, but focussed on Mrs Lowe's holiday pay claim, which I have already dealt with above.

[211] Ms Hornsby-Geluk submits that Mr Lowe's decision to employ his wife following her retirement from nursing seemed extremely convenient. She suggests

that Mrs Lowe undertook duties on the farm that made Mr Lowe's life easier, but were not required. In counsel's submission, Mr Lowe acted unjustifiably in employing Mrs Lowe on an ongoing basis.

[212] I find it would not have been sufficiently clear to Mr Lowe that he did not have the authority to employ Mrs Lowe. He had authorisation to employ casual labour as the demands of the farm required. He considered Mrs Lowe to be casual to the extent that her duties were not regular and fixed but varied from day to day as the requirements of the farm dictated.

[213] As she consistently worked between 10 and 12 hours a week, he referred to her as being a "permanent casual" and arranged payment on a regular basis. It would have been prudent of Mr Lowe to consult Mr Martin about the appointment of Mrs Lowe, to avoid any suspicion of nepotism, or of unauthorised employment.

[214] I do not doubt that Mrs Lowe performed at least 10 hours of work per week and that Mr Lowe directed the duties she was required to undertake. It may be that she had previously undertaken many similar duties without payment. There was an inference from counsel's cross examination of Mrs Lowe that there was an expectation of such unpaid work from a farm manager's wife. I would be loath to make a finding to that effect. I find, while Mr Lowe was unwise to employ Mrs Lowe on a permanent casual basis without explicit authorisation from Mr Martin, he did so under the impression that he had the authority to do so.

[215] Evidence relating to the employment of Mr Foley, who was described as being Mr Lowe's brother in law, was scant. However, for similar reasons as those relating to Mrs Lowe's employment, I find Mr Lowe employed Mr Foley in the belief he was authorised to do so.

[216] Waimapu gained the benefit of Mrs Lowe's work on the farm and no question of repayment of her wages from May 2012 to July 2014 arises. The same situation applies to Mr Foley.

Is Waimapu is entitled to recover salary paid to Mrs Lowe for the month of July 2014 when it claims Mrs Lowe did not work?

[217] I have already found Mrs Lowe did work during the month of July 2014. Therefore Waimapu is not entitled to recover salary paid to her for that month.

Is it appropriate to award penalties against Mr Lowe and/or against Waimapu?

[218] Mr Lowe claims a penalty for Waimapu's unreasonable non-compliance with the provisions of the Employment Relations Act 2000, the Holidays Act and the Wages Protection Act 1983.

[219] A number of factors were cited as relevant to this claim. Most of these also form part of the factual matrix relied on by Mr Lowe to support his claim to have been constructively dismissed. I have already found Mr Lowe was constructively dismissed and will consider the issue of remedies appropriate to that finding later. It would not be appropriate to award remedies separately for factors relating to the constructive dismissal as that would entail a doubling up of remedies. I will therefore not consider those factors further.

[220] One matter, not directly related to the constructive dismissal, is the claimed refusal by Waimapu in August and September 2014 to pay Mr Lowe's monthly wages. Although this claim was not amended, it became evident during the investigation that salary was paid in those months, albeit at a lower rate. The salary was paid at a later date than Mr Lowe considered appropriate.

[221] In a letter sent on 13 August 2014 by his representative to Mr Martin, Ms Angus Burney requested that Mr Lowe's wages be paid to his bank account the following day. She asserted that Mr Lowe's monthly salary was "*paid in arrears; that is at the end of the month previously worked.*" She noted that sometimes "*the salary was accrued and paid bi-monthly*" and that his last salary payment had been made on 14 July 2014.

[222] Ms Angus Burney made a further request by email on 20 August 2014 stating that an urgent recovery action would be lodged in the Authority under the Wages Protection Act if the salary payment was not made within 24 hours and confirmed to her office by 9.00 a.m. on 22 August 2014.

[223] Waimapu responded on 24 August that it had "*reviewed the wage records that have been made available and advise that there is nothing to suggest that the wages for August should be paid in advance.*" I understand the August salary payment was made on 25 August 2014 and the September payment was made on 29 September 2014.

[224] No evidence was provided that wages should be paid in the middle of the month for which they were due. Ms Angus Burney's letter of 13 August specifically notes that the salary payment was due at the end of the month for that month. Why a salary payment was made on 14 July 2014 remains unclear but I do not regard that as having changed the date salary payments were due. I do not regard this as a breach of good faith by Waimapu.

[225] Another matter relevant to the claim for a penalty concerns assertions regarding Waimapu's failure to be responsive and communicative and not to mislead or deceive. I find no evidence of misleading or deceiving conduct. As I have already noted in respect of Mr Lowe's actions, the obligation to be responsive and communicative is on both parties to an employment relationship. I find no evidence to support Mr Lowe's claim in respect of Waimapu.

[226] A third matter relates to the failure to pay holiday pay. As Mr Lowe acknowledged, his employer had no way of knowing whether he had taken the holidays due to him. I find no penalty appropriate in respect of Mr Lowe's claims for holiday pay. As Mrs Lowe's employment was not known to Waimapu, and her claim was disputed, it would be inappropriate to award a penalty relating to her claims.

[227] Waimapu claims a penalty should be awarded against Mr Lowe for his awarding of salary increases to himself without authorisation. I have already found Mr Lowe to have breached good faith in failing to discuss salary matters with his employer if and when he was dissatisfied with the remuneration he was receiving, or with any of the other terms and conditions of his employment. However, I also found fault lay with the employer in Mr Martin's not checking with Mr Lowe that his understanding of the \$45,000 salary freeze was a shared understanding. In light of this, I do not find it appropriate to award a penalty against Mr Lowe.

Remedies and contribution

[228] Mr Lowe seeks compensation in the sum of \$35,000 for his personal grievance for constructive dismissal. Counsel for Mr Lowe submits a high award is merited because of the emotional toll on Mr Lowe arising from the breakdown in his employment relationship with Mr Martin and his "*distress, anger and emotional breakdown as a result of leaving the farm in the way that he did whilst on sick leave.*"

A psychological assessment was included in the documents produced for the investigation.

[229] Counsel for Waimapu submits that the overriding cause of the hurt and humiliation Mr Lowe claims to have suffered has been the breakdown of the relationship with the Martin family and having to go through the stress and cost of these proceedings to progress his claims.

[230] I have no doubt that Mr Lowe was deeply affected by the acrimony that developed in the latter stages of his long employment relationship with Waimapu, and his even longer relationship with Mr Martin. The imposition of a lower salary was also a cause for humiliation and hurt. In the circumstances I find an appropriate starting point for an award of compensation to be \$18,000.

[231] However, having found that Mr Lowe was constructively dismissed, I am obliged to consider whether and if so, to what extent, his actions contributed to the situation that gave rise to his personal grievance.¹⁸ If I find there was contribution by Mr Lowe, any remedies awarded for his personal grievance must be reduced accordingly.

[232] I have not found Mr Lowe to be blameless in the events that led to his constructive dismissal. I consider his actions in increasing his salary between 2006 and 2014 without gaining the agreement of Mr Martin influenced Waimapu's decision to implement a decrease in his salary from August 2014. While I have found Mr Lowe's salary increases did not constitute unjustifiable enrichment, I have found his actions breached his duty of good faith to his employer. I also find his actions contributed to the situation that led to his personal grievance. I assess that contribution at 30% and the compensation award will be reduced accordingly.

[233] Mr Lowe has made it clear he was not prepared to report to Mr Tim Martin or work out his period of notice at Waimapu once his employer had lodged counterclaims in the Authority relating to the financial transactions that have been referred to above. I find he has not lost remuneration as a result of his personal grievance, other than the reduced wage payments made to him in the months of July and August 2014 which I have already dealt with above. Accordingly, no additional award of wages will be made.

¹⁸ Section 124 of the Act.

Summary of findings

[234] The unilateral reduction of Mr Lowe's salary in August 2014 constituted a breach of a significant term of the (unwritten) employment agreement between the parties and constituted constructive dismissal.

[235] Mr Lowe is owed holiday pay based on 30% of his holiday entitlement for 2008–2014 less the 15 days taken during his notice period (15 days).

[236] There is no obligation on Waimapu to pay Mr Lowe 5% of the value of the farm.

[237] Mr Lowe was not underpaid wages in July 2014 but was underpaid in August and September 2014.

[238] Mr Lowe does not have an entitlement to wages for the period from 30 September to 22 October 2014.

[239] Mr Lowe's entitlement to paid sick leave expired on 8 September 2014. The period from 9 to 29 September 2014 (15 days) is to be deducted from his annual leave entitlement.

[240] There is no evidence that Mr Lowe was at any time paid wages at a rate lower than legally payable.

[241] Mr Lowe is not entitled to compensation for six years' use of his private motor vehicle.

[242] Mrs Lowe is entitled to holiday pay calculated at 8% of her earnings from 1 May 2012 to 31 July 2014 inclusive, plus interest.

[243] Mrs Lowe is not owed wages from 1 - 13 August 2014.

[244] Waimapu is not entitled to recover unauthorised salary payments made by Mr Lowe to himself but is entitled to special damages in respect of the unauthorised bonuses paid by Mr Lowe to himself.

[245] It is not entitled to recover the payments made by way of a non-taxable allowance to Mr Lowe.

[246] The Authority does not have jurisdiction to award the remedies sought by Waimapu in respect of hire equipment, even if its claims were upheld.

[247] Waimapu is not entitled to recover salary payments made to Mrs Lowe between May 2012 and July 2014 or payments made to Mr Foley.

[248] It is not appropriate to award penalties against Mr Lowe or against Waimapu.

Determination

[249] Waimapu Station Partnership is ordered:

- a. to pay compensation under s. 123(1)(c)(i) of the Employment Relations Act 2000 to Mr Lowe in the sum of \$12,600 (being \$18,000 less 30%);
- b. to pay Mr Lowe salary arrears in the sum of \$4,539 gross for the months of August and September 2014;
- c. to pay holiday pay arrears totalling \$10,500 gross to Mr Lowe;
- d. to pay holiday pay to Mrs Lowe in the sum of \$1,728 gross.

[250] Mr Lowe is ordered to pay special damages to Waimapu Station Partnership in the sum of \$26,325.

Costs

[251] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority