

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 281  
5347544

BETWEEN            BOB MCGOWAN  
                                 Applicant  
  
AND                    MINERVA FARMS LIMITED  
                                 Respondent

Member of Authority:    David Appleton  
  
Representatives:        Paul Brown, Counsel for Applicant  
                                 Jeff Goldstein, Counsel for Respondent  
  
Investigation Meeting:    10 and 11 December 2012 at Christchurch  
  
Submissions received:    11 December 2012 from Applicant and Respondent  
  
Determination:            21 December 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.    The applicant was unjustifiably dismissed and is awarded remedies as set out in this determination. The applicant's other claims are partially successful, as set out in this determination. The respondent must pay a penalty of \$1,000 to the applicant for failing to provide a written employment agreement.**
- B.    Two of the respondent's counterclaims against the applicant are successful.**
- C.    Costs are reserved**

**Employment relationship problem**

[1] Mr McGowan claims that he was unjustifiably dismissed from his employment on 25 February 2011. He also has a number of other claims, detailed below. He also claims a penalty for the respondent's failure to provide an employment agreement. The respondent denies that Mr McGowan was dismissed,

claiming that he resigned. It resists a number of Mr McGowan's other claims and also counterclaims against Mr McGowan in respect of sums it asserts are owed.

### **Detail of Mr McGowan's other claims**

- [2] Mr McGowan claims that he is owed money in respect of the following:
- (a) Holiday pay. The Respondent gave Mr McGowan a cheque in the sum of \$6,396.05 during the investigation meeting in respect of holiday pay, which it originally believed had been paid. However, Mr McGowan states that his holiday pay has been incorrectly calculated, as it fails to take into account the cash value of lodgings provided to him by the employer and the value of personal use of the farm vehicle. The respondent denies that the accommodation provided was free, and counterclaims for rent, and denies that Mr McGowan was allowed personal use of the farm vehicle;
  - (b) Pay owed in respect of two days' public holidays on which Mr McGowan worked. The respondent undertook during the investigation meeting to pay Mr McGowan in respect of this claim. Until the Authority's investigation meeting the respondent had not seen proof of Mr McGowan having worked on the days claimed;
  - (c) Unpaid petrol expenses. Although the respondent accepts that it owes Mr McGowan in respect of petrol purchased by him for business purposes, Mr McGowan claims he is also owed in respect of reasonable personal use. The respondent denies he was entitled to personal use of the farm vehicle;
  - (d) The purchase of supplies on behalf of the respondent. Having seen receipts in respect of the supplies purchased during the Authority's investigation meeting for the first time, the respondent gave Mr McGowan a cheque for the amount claimed;
  - (e) Time off in lieu in relation to work carried out on Sundays and/or periods of work undertaken without a break;

- (f) Work carried out by Mr McGowan on a potato farm in 2009 which, although not owned by the respondent company, was owned by a partnership in which Mr Alan Pye, who owns the respondent company, was a partner.

### **The respondent's counterclaim**

[3] The respondent counterclaims as follows:

- a. The sum of \$4,600 in respect of rent for Mr McGowan's occupation of the farm house. Mr McGowan denies that there was ever an agreement to pay rent.
- b. The sum of \$14,141.38 in respect of the grazing fee that Mr McGowan agreed he would pay to the respondent for the respondent allowing him to graze his own calves on its property. Mr McGowan does not deny this sum is owed, but has withheld it pending resolution of his claims.
- c. The sum of \$914.31 in relation to personal telephone calls made by Mr McGowan. Mr McGowan does not deny this sum is owed, but has withheld it pending resolution of his claims.

### **Brief account of events leading up to the dismissal**

[4] Mr McGowan was first employed by the respondent company in June 2008 as a farm manager, managing Minerva Farm. He had previously carried out work for Mr Pye on his potato farm as a contractor.

[5] No employment agreement was provided to Mr McGowan by the respondent when he commenced work but Mr McGowan's evidence is that he told Mr Pye that he did not intend to work for less than the remuneration he had been receiving from his previous employment. That was, a salary of \$50,000 per annum, plus a company vehicle for which he would be allowed to claim petrol for reasonable personal use. It was agreed, accordingly to Mr McGowan, that he would pay his own telephone and power bills. He said it was also agreed that he would be able to live in the farm house for free. Mr McGowan was paid a salary of \$50,000 per annum.

[6] Mr Pye's evidence to the Authority was that, at the beginning of the employment, he told Mr McGowan that he would allow only a *small amount – very*

*minimal* - of personal use of the company vehicle, and that he would charge a token \$100 a week rent. Mr Pye owns a number of farms and he said he wanted to ensure that all farm managers were on the same terms and conditions in respect of rent and personal use of farm vehicles. Other farm managers do not get personal use of farm vehicles and do pay rent for their accommodation according to Mr Pye.

[7] Mr Pye employed an assistant, Ms Palmer, to deal with the administrative and financial aspects of his businesses and the Authority saw copies of letters written by Ms Palmer in Mr Pye's name to Mr McGowan dealing with issues such as payment of electricity, gas bottles and telephone bills.

[8] By way of a letter dated 14 October 2009 Mr Pye wrote a letter to Mr McGowan saying, amongst other things, the following:

*Dear Bob*

*Further to our meeting this morning I list below the points we discussed; ...*

*Rent           \$100 per week. This payment to be on an Automatic payment from your Bank and to commence asap.*

*Vehicle       Log Book to be completed daily and a copy to be sent to the office fortnightly with mileage information filled in. A charge for personal mileage to be billed to you when the Log book is reconciled.*

*Fuel           No Jerry cans to be filled. Only fill the vehicle up when necessary.*

[9] Mr McGowan responded to Mr Pye's letter the following day in the following terms:

*Dear Alan*

*I have today received your letter outlining various changes to my terms of employment.*

*As these conditions will have a severe impact on my earnings I cannot accept them as they have been presented. I feel it unfair and indeed unreasonable to be told of these changes and then expected to accept them without some form of compensation.*

*I understand there may be an issue with fringe benefit tax and also a need to bring terms and conditions into alignment amongst your farm managers but I am more than happy to discuss these needs.*

*All of these conditions, whether by design or default, have been an inclusive part of my salary package since I commenced employment in May 2008.*

*In order that these negotiations proceed in an orderly and prompt manner can you please get an employment contract drawn up for you and I to discuss, negotiate and indeed agree upon.*

*Alan, you are fully aware of my commitment to my job and indeed yourself.*

*I do not see this as a long and drawn out process, however I think we need some formality and for our relationship to proceed in a positive manner we should endeavour to reach a mutual agreement as soon as possible.*

*Until discussions are complete you can be assured of my unconditional support and effort.*

*Regards*

*Bob McGowan*

[10] Mr McGowan's evidence is that there was no response to that letter either in writing or orally. As far as he was concerned, he said, he was waiting for an employment agreement to be provided. Ms Palmer's evidence is that an employment agreement had been prepared just after Mr McGowan's start date but she did not know why it had not been given to him.

[11] By way of letter dated 22 February 2010 Mr Pye wrote to Mr McGowan in the following terms:

*... Regarding approval of the petrol claim, Bob this is excessive to say the least. Approximately \$128.00 per week for petrol is just not acceptable and as you are sending faxes to have supplies delivered to you, plus I am dropping things off for you, you obviously are not even travelling to and from Darfield. My weekly travels to Highfield [the potato farm] from Christchurch do not come to that amount and as you are not travelling for the business, I am not prepared to cover that amount. Can you please provide the Log Book you have been issued with so we can see how this figure is calculated and see the distances you are travelling.*

[12] By way of a letter dated 2 June 2010 Mr Pye wrote to Mr McGowan which contained the following passage:

*...Regarding the fuel claim, again in the previous letter we asked that your Log Book needs to be sighted before future fuel bills are paid. Until the Log Book is sighted, no payment will be forthcoming.*

[13] It is Mr McGowan's evidence that he was concerned about filling in the Log Book because he did not know how much detail he should put. He also stated that, when he said to Mr Pye on one occasion that he would start filling in the Log Book the following week, Mr Pye laughed and Mr McGowan took this to mean that he was *setting himself up*. He therefore decided that he would not fill out the Log Book.

[14] By way of a faxed letter dated 28 June 2010 Mr McGowan wrote to Mr Pye, which contained the following passages:

*Alan, on Thursday last week you and I discussed among other things compensation for extra work done at the potato shed.*

*This is my understanding of this discussion.*

- *Bob does not want extra money (wages) for working at Highfield and is very happy to do this as part of his work at Minerva.*
- *There were 3 things Bob asked for instead of extra money.*
  1. *That a fire be installed in the house at Seatons [The farmhouse at Minerva Farm].*
  2. *That Bob was allowed to raise calves in the sheds and house paddocks free of charge. Bob agreed to pay grazing at the going rate once these calves went out to paddocks. All rearing costs are to be met by Bob.*
  3. *Reimbursements were to be paid without a logbook and Bob suggested a figure be agreed in advance and if this was going to be exceeded Bob would seek approval from Alan. Bob also said he would put \$20 petrol in Ute if it was taken to ChCh for personal use or any other appropriate amount and that these receipts would be attached and stated personal use. The figure of \$400 per month was mentioned. However I think 220 litres would be a better way which equates to about 3 tanks of petrol per month.*

*Alan with the cheque today was another letter signed by Annabelle [Ms Palmer].*

*The Meridian part I can understand and hopefully the previous paragraph will say that.*

*The part relating to fuel contradicts my interpretation of our discussions.*

*There is at present the following outstanding amounts.*

*\$169.93 – Meridian*

*\$894.09 – Fuel*

*If you agree with my record of this meeting please have this matter dealt with. If not please advise where I got it wrong.*

[15] The letter referred to by Mr McGowan in this letter to Mr Pye was one dated 25 June 2010 from Mr Pye to Mr McGowan which included the words *the fuel claim will be considered when a Log Book is sighted.*

[16] It is Mr McGowan's evidence that the first two conditions contained in his letter were fulfilled; namely a fire was installed in the farmhouse and he was allowed to raise calves as indicated. However, from April 2010 until his employment terminated, no fuel claims were paid by the respondent.

[17] Mr McGowan's evidence is that, on 25 February 2011, Mr Pye telephoned him to ask him how things were (this being three days after the significant earthquake that had occurred on 22 February 2011 in Christchurch). Mr McGowan's evidence is that Mr Pye asked him how much spraying he had done. Mr McGowan had not done any spraying at that point and Mr McGowan's evidence is that Mr Pye stated quite angrily, *I am sick of this, I have had enough of this, you are messing me around, how many calves have you got at the tree block [another farm owned by Mr Pye] and Minerva?*

[18] There was shown to the Authority a note which Mr McGowan says that he dictated around ten minutes after this telephone conversation and the note states, amongst other things, the following:

*He [Mr Pye] then said "I was ripping him off and I am getting paid my salary just to look after my own stock because he doesn't have any stock on the farm". He said that "I've probably had my last pay, in fact I think you have because the bank won't honour it anymore". He said "there is possibly a job down at High Field but I am not too sure about that by the way you are treating me. You have been ripping me off and done nothing for the last 6 months and I have been paying you a good wage". At that point he said "he needed to catch up with me urgently" then under his breath he said "I will be at the farm tomorrow morning, can't do it then". I said "I would ring him at lunch time tomorrow, being Saturday and that if necessary we would catch up". It is my opinion that after today's discussion my employment has been terminated.*

[19] Mr McGowan's note then goes on to say the following:

*I understand that there is a fair bit of stress at the moment, I also understand that Alan is under pressure, I suspect that his property*

*where he lives has been severely damaged, however, we are all going through that and this has been ongoing for the last month, not just the last 3 days. It is my belief that he has been doing his damndest to get rid of me, I have had no instruction since Christmas as of what I am supposed to be doing and what I am not supposed to be doing. If I do anything, I am wasting money and if I don't do anything, I am getting paid a salary for doing nothing.*

[20] By way of a letter dated 26 February 2011, Mr McGowan wrote to Mr Pye in the following terms:

*Dear Alan*

*Based on the contents of a conversation you had with me on Friday the 25th of February 2011, I feel I have no option but to move on from my position with Minerva Farms Ltd.*

*The comments of concern were received during the phone call you made to me at 4:10pm on Friday the 25th of February. You said among other things "the bank will probably no longer honour your wages, in fact you may have had your last pay".*

*This statement was preceded by accusations that I have done no worthwhile work for you in the last six months. You followed on by saying you were sick of this. I object to these comments and wish to remind you that on numerous occasions you have been invited to meet me and explain your visions and intentions for this property. I have had no direction in recent times despite asking constantly what I should be doing. In fact as recently as Friday the 11th of February you were asked what I could do to help and your reply was, as usual "I don't know".*

*These remarks, along with other allegations, and comments made during this conversation have lead [sic] me to believe my employment has been terminated by you.*

*In other words I have been dismissed. This has been done without consultation, without reasonable explanation and without justification. I am therefore claiming that this dismissal is unfair and I will take advice accordingly.*

*On Monday 28th February I will begin gathering up my personal possessions at 1329 Wards Road. [Minerva Farm]. These possessions will be packed into my container at this address and removed from the property on or before Friday 4th of March depending on the availability of suitable transport.*

*On Friday the 4th of March I will remove my padlock from the front gates at this address and will no longer be responsible for any duties normally done for Minerva Farms.*

*This letter is not to be read as a resignation, merely my recollection of the contents and tone of the conversation we had on Friday the 25th of February.*

*I am available to discuss this issue should you require, however this discussion will only take place by appointment and at a time that both myself and my support person are available jointly.*

*Yours sincerely*

*Bob McGowan.*

[21] By way of a letter dated 28 February 2011 Mr Pye responded to Mr McGowan in the following terms:

*Dear Bob*

*At 4.00pm today I received your letter dated 26 February 2011 via Jim Parkinson and I accept the resignation you appear to be forwarding.*

*I understand you will be leaving Minerva Farm on 4th March 2011 and removing your possessions at the same time.*

*Regarding the stock currently grazing at the farm, as there is money owed to me for that grazing, please leave them at the farm until those charges have been finalised. Perhaps we can discuss this early next week.*

*Yours sincerely*

*Alan Pye*

[22] By way of a letter dated 10 May 2011 Mr Pye wrote to Mr McGowan requesting payment of the sum of \$914.31 in relation to telephone use, \$4,600.00 in relation to rent for the period 14 October 2009 until 4 September 2010, and the sum of \$14,141.38 in relation to Mr McGowan grazing his calves on Minerva Farm property.

**Was Mr McGowan dismissed or did he resign voluntarily?**

[23] Mr McGowan's counsel stated at the start of the Authority's investigation meeting that his client was not claiming constructive dismissal. He therefore argues that the words allegedly used by Mr Pye on 25 February 2011 constituted an actual dismissal in themselves. This is strenuously denied by Mr Pye.

[24] Mr Pye's evidence is that his conversation with Mr McGowan on 25 February was intended to convey that the farm had been costing more and more to run while making less and less income. The reference to the bank was to indicate that costs were exceeding income and that the bank would not honour any more cheques. He

did not intend to dismiss him, however, he says. In his view, Mr McGowan had decided to leave himself.

[25] Mr Pye told the Authority how, shortly after the earthquake, he arranged to pick up the farm vehicle for a job he needed to do and that Mr McGowan told him that he did not want it back, which Mr Pye took to understand meant that Mr McGowan had decided to leave. However, Mr McGowan was hazy about the date when this occurred and it is quite possible that it post dates the conversation on 25 February 2011 when Mr McGowan understood himself to have been dismissed.

[26] Mr McGowan's letter of 26 February was sent to Mr Pye via another staff member, as he says he was not sure when Mr Pye would see it otherwise. Mr Pye was angry that Mr McGowan chose to communicate via another staff member, and telephoned Mr McGowan on the evening of 27 February to convey this annoyance. Mr McGowan produced a handwritten note of the telephone conversation which included the following words:

*I said that after Friday's phone call I felt I had been dismissed and he said you might as well finish up then.....On two or three occasions I asked Alan to read the email and we would take it from there. He was not interested in a sensible discussion just abuse.*

[27] Mr Pye's telephone call occurred before he had seen Mr McGowan's emailed letter, which he had heard about from the staff member via whom it had been routed. Mr Pye did not dispute the contents of the note recording the telephone call, save that he denied being abusive. Mr Pye says that, when he eventually saw the letter, he was surprised to see that Mr McGowan appeared to be resigning but he was not disappointed.

[28] In considering whether Mr McGowan was dismissed or resigned voluntarily, I cannot find the latter view is supported by the facts. Although Mr Pye reiterated in his evidence that he was convinced that Mr McGowan intended to leave, because he did not want the farm Ute back shortly after the earthquake, I believe that this was because of the conversation the two men had had on 25 February, at the end of which Mr McGowan believed he had been dismissed. At that point, Mr Pye did not know that Mr McGowan had regarded himself as dismissed.

[29] I must also say that Mr Pye was disingenuous in his evidence to the Authority when he refused to see how Mr McGowan's letter dated 26 February was not a

resignation. He conceded that the words *This letter is not to be read as a resignation* contradicted his view that Mr McGowan had resigned, but he saw that as an inexplicable aberration in the letter. However, Mr Pye ignores the following statements in Mr McGowan's letter:

*These remarks, along with other allegations, and comments made during this conversation have lead [sic] me to believe my employment has been terminated by you. In other words I have been dismissed. This has been done without consultation, without reasonable explanation and without justification. I am therefore claiming that this dismissal is unfair and I will take advice accordingly.*

[30] Mr Pye's letter in reply to Mr McGowan dated 28 February 2011 also seems to be disingenuous. It completely ignores the statements in Mr McGowan's letter dated 26 February about being dismissed, but simply states that he accepted the resignation that Mr McGowan appeared to be forwarding.

[31] I also cannot find that the termination of the employment was by mutual agreement. Mr McGowan and Mr Pye had no sensible conversation about the ending of the relationship and could not even agree about how it had ended, or was about to end.

[32] It is relevant that Mr McGowan had recorded in his notebook an earlier conversation with Mr Pye on 21 February 2011 in which Mr McGowan states:

*He then said he had been paying me for the last 6 months good money to do nothing except look after my own calves on his farm and that was not good enough.*

*Alan said we had to get together and sort out where things were going and if I didn't have any really good answers he might pull the pin on everything and there would be no job for me.*

*He said there was plenty happening at Highfield and there was spraying to be done so he wasn't going to pay me to do nothing.*

*I said to him I was more than willing to help and all it needed was someone to ring me and I would be there.....*

*I then said "Alan all I want is this sorted and I have been shitting myself because I haven't been doing much and all want is some direction so I can get on with my job"*

*Not once have been rung re Highfield or spraying since Christmas.*

[33] My conclusion is that the dismissal ended through Mr Pye's words to Mr McGowan on 25 February 2011. In particular, in the context of the conversation on 21 February 2011 Mr Pye's words on 25 February, as recorded in Mr McGowan's note:

*I was ripping him off and I am getting paid my salary just to look after my own stock because he doesn't have any stock on the farm'. He said that "I've probably had my last pay, in fact I think you have because the Bank won't honour it anymore"*

and the words:

*You have been ripping me off and done nothing for the last 6 months and I have been paying you a good wage'*

lead me to conclude that McGowan reasonably apprehended that he was being viewed as dishonest by Mr Pye and that he was not going to be paid anymore.

[34] Mr McGowan's counsel stated that Mr McGowan was not claiming unjustified dismissal arising out of a constructive dismissal. It is not clear why Mr McGowan's counsel took that position, but I am bound to say that this case appears to be a classic constructive dismissal claim. The Authority is not obligated to accept counsel's characterisation of the nature of his client's termination. It is submitted by counsel for Mr McGowan and by Mr McGowan himself that his employment was terminated by the respondent and the exact mechanism of that termination is for the Authority to determine.

[35] Mr Goldstein for the respondent asserts that the Authority may not rely on s. 122 of the Employment Relations Act 2000 (the Act) to accept jurisdiction for a constructive dismissal when a dismissal effected by a different mechanism has been claimed. (Section 122 of the Act states that nothing in Part 9 of the Act or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged). However, I find that Mr McGowan did already raise a personal grievance for dismissal in his letter dated 26 February 2011 in which he spelled out why he regarded himself as dismissed. Therefore, the Authority does not have to rely on s.122 to accept this personal grievance. The exact mechanism by which the dismissal was effected is not of relevance for this purpose.

[36] In order to prove a successful constructive dismissal claim there must have been a course of conduct by the respondent which either had the dominant purpose of forcing the employee to resign or which amounted to a breach of duty sufficiently

serious that it would be reasonably foreseeable that the employee would have no choice but to resign. In the Employment Court case of *Hawkins v Commissioner of Police* [2007] ERNZ 762 (EmpC) it was held, at [30], that the very nature of a claim for constructive dismissal is dependent on the events that preceded it and that the focus of such claims is on the employee's motivation for the decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer.

[37] In this case, I find that, in the context of the earlier conversation on 21 February, being accused on 25 February of *ripping off* his employer by raising his own stock (which the respondent had allowed him to do in any event) and by being told that the bank would not honour his pay cheque so that he had probably had his last pay, cumulatively amount to a clear repudiation by the respondent. I believe that the words used by Mr Pye to Mr McGowan were such a strong indication that the respondent no longer intended to honour its contractual obligations of good faith towards Mr McGowan that it was reasonably foreseeable that Mr McGowan would have no choice but to resign.

[38] It may be argued that the termination of Mr McGowan's employment cannot be a constructive dismissal because he says expressly in his letter dated 26 February that it was not a letter of resignation. Legally, by definition, a constructive dismissal requires the employee to resign in order to accept a repudiatory action by the employer which breaches the employment agreement. However, in this case, Mr McGowan did accept the respondent's repudiatory breach by saying that he felt he had been dismissed and by leaving. I believe that Mr McGowan's statement that his letter was not a letter of resignation was meant to convey that he was not leaving voluntarily.

[39] Mr McGowan did leave open an avenue for reconciliation when he stated in his letter of 26 February *I am available to discuss this issue should you require*. However, when Mr Pye said to him on 27 February, *you might as well finish up then* I believe the door had closed. No attempt was made by Mr Pye to rescue the relationship. He was, perhaps understandably, upset that Mr McGowan had chosen to send his letter of 26 February via another employee, but this should not have blinded Mr Pye to his obligations as an employer to try to maintain a productive employment relationship, as is required by s. 4(1A)(b) of the Act.

[40] Having found that Mr McGowan was constructively dismissed by the respondent, I must consider whether that dismissal was justified, applying the pre-April 2011 test in s.103A of the Act. However, Mr Pye's words to Mr McGowan, both on 25 February and 27 February were not ones which a fair and reasonable employer would have uttered. Whilst I do not doubt the genuineness of Mr Pye's concerns about the profitability of the farm, and can understand his frustrations, the better approach would have been for Mr Pye to have worked out a proper business plan with his farm manager to help get the farm back on track. If he had felt Mr McGowan was not capable of implementing such a plan (and I make no findings that this was the case) then Mr Pye should have followed a fair performance improvement process. He did neither of these things.

[41] In conclusion, I find that Mr McGowan was unjustifiably constructively dismissed by the respondent.

#### **What holiday pay is owed?**

[42] Mr McGowan claims that the holiday pay which was calculated and paid to him on the second day of the investigation meeting was not properly calculated as it did not take into account the cash value of the property he stayed in between June 2008 and September 2010 and does not take into account the value of the personal use of the farm vehicle he says he was entitled to.

[43] For the reasons I expand upon below when I consider the issue of rent and petrol, I accept that the cash value of the property should have been taken into account, but that the value of the personal use of the farm vehicle should not, as I do not accept that Mr McGowan was entitled to the personal use of the farm vehicle other than occasionally.

[44] However, I also find that the Authority does not have the jurisdiction to determine the cash value of the farm accommodation. This is because of the wording of s. 10(1) of the Holidays Act 2003, which states:

*For the purposes of section 8 and section 9, the ordinary weekly pay or relevant daily pay (as the case may be) of an employee includes the cash value of any board or lodgings provided by an employer to an employee*

(a) *as agreed by the employer and employee; or*

(b) *as determined by a Labour Inspector if the employer and employee cannot agree on the cash value.*

[45] This section is exclusively expressed and does not envisage the Authority determining the matter. Therefore, I am unable to make an order for the respondent to pay Mr McGowan any further sum for holiday pay until either the parties have agreed as to the cash value of the accommodation or it has been determined by a Labour Inspector.

**What petrol expenses are due to Mr McGowan?**

[46] Mr McGowan asserts that he was allowed reasonable personal use of the farm ute, whereas Mr Pye asserts that he was only allowed minimal personal use of the vehicle. Accordingly, the respondent has not paid Mr McGowan's claim for petrol amounting to \$6,064.18 for the period April 2010 to February 2011.

[47] It is my view that Mr McGowan and Mr Pye did not establish at the start of the employment relationship exactly what the arrangement was between them in respect of personal use of the farm vehicle. However, there is one important factor which persuades me that Mr McGowan is not entitled to any reimbursement of petrol for personal use. That is the fact that Mr Pye made clear to Mr McGowan on several occasions that he required Mr McGowan to fill in a log book to justify his fuel expenses claims. Mr McGowan foresaw problems with doing so, but never attempted to fill in the log book so that any problems that may have emerged could have been discussed and ironed out.

[48] I do not believe that it was unreasonable for the respondent to require Mr McGowan to fill out a log book. Even if Mr Pye had agreed that Mr McGowan was entitled to reasonable personal use of the vehicle, in circumstances where Mr Pye reasonably believed that too much fuel was being used by Mr McGowan, and where Mr McGowan expected the respondent to pay for that fuel, the respondent was entitled to require proof of usage by way of a completed log book. The requirement by the respondent for Mr McGowan to fill out a log book was not a variation of the terms of employment, but the putting in place of a mechanism to satisfy itself that the claimed use of the fuel was justifiable.

[49] As Mr McGowan was told more than once in unambiguous terms that fuel expenses reimbursement depended on the sight of log book entries, his refusal to

co-operate means he is not entitled to the reimbursement of anything but properly incurred expenses for business use.

[50] Unfortunately, it is impossible for the Authority to determine exactly which expenses were incurred during business and which during private use of the farm vehicle as Mr McGowan would often undertake journeys to fulfil both purposes. As Mr Goldstein said during his submissions, I am going to have to play King Solomon in respect of this issue.

[51] The most efficient and fair methodology in my view is to estimate what fuel would have been used for business purposes by accepting Mr Pye's evidence that he expected a tank of fuel to last between seven to ten days. As petrol use for business purposes would have fluctuated according to the seasons, I shall adopt the midway point, namely, 8.5 days. On the understanding that the vehicle (a Toyota Hilux Petrol ute) held about 70 litres of petrol, that equates to 70 litres of petrol every 8.5 days. The period over which Mr McGowan's petrol claim extends, 1 April 2010 to 28 February 2011 is 333 days which, divided by 8.5, equals 39 refuellings. That number, multiplied by 70 litres, equals 2,730 litres. Adopting a price of \$1.87, which is a rough average price of 91 Octane petrol during 2010, produces a figure of \$5,105.

#### **Is Mr McGowan owed time off in lieu?**

[52] Mr McGowan claims that he had an understanding from Mr Pye that he was to receive time off in lieu if he had to work on a Sunday. Mr Pye's position is that at no time did he agree that Mr McGowan would be paid for working on a Sunday, and that his salary was to cover all work. Mr Pye also stated in his oral evidence that Mr McGowan should have been able to organise his work so that he did not have to work on a Sunday.

[53] On balance, I do not believe that an express agreement was reached in respect of how Mr McGowan's Sunday working was to be remunerated. The provision of an annual salary does usually indicate that it is to cover all work done. If such an agreement had been reached, I would have expected Mr McGowan to have written to the respondent in respect of such a matter, as Mr McGowan was perfectly prepared, admirably, to write in respect of other issues that were troubling him.

[54] I am prepared to accept that usual farm practice is that time off in lieu is granted when extended periods of work have been carried out by a farm manager with

no break, and that Mr McGowan had an expectation of time off in lieu when he worked extended periods. However, regrettably, I am not able to ascertain on a balance of probabilities that Mr McGowan did work such extended periods. He has lodged copies of diary entries which show some of his Sunday work, but he did not keep a detailed record of the work he carried out during the week. This is a case where it would not have been reasonable for the respondent to have known the hours Mr McGowan worked on a daily basis unless he himself had advised the respondent of them, as he worked alone on the farm most of the time. Mr McGowan admitted that he had not kept detailed records of his daily hours worked.

[55] As a result of this, and given that Mr McGowan had his own calves on the farm for part of 2010 and 2011, Mr McGowan has not satisfied me that he can prove on a balance of probabilities that he worked extended periods without any time off. In the absence of such evidence, it would not be just to order the respondent to pay a sum to Mr McGowan in respect of time off in lieu, as it would be based on guesswork, and Mr McGowan's unsubstantiated assertions.

**Is Mr McGowan due remuneration in relation to his work on the potato farm?**

[56] Mr McGowan's evidence to the Authority was that, when he and Mr Pye were discussing him starting work at Minerva Farm as farm manager, there had been an express mention of Mr McGowan doing extra work on the potato farm, but that there had been no mention of him being paid extra money. He said that Mr Pye had raised the possibility of paying him an extra sum for the work, although no express sum had been mentioned. Mr Pye's evidence was that he could not recall what had been agreed about Mr McGowan working on the potato farm.

[57] It is noteworthy that a payment was due to be made to Mr McGowan on 11 September 2009 in the sum of \$1,888 gross, which the parties agreed was probably to compensate Mr McGowan for having worked *excessive hours* on the potato farm. As it turned out, the payment was never actually paid to Mr McGowan and this was rectified at the Authority's investigation meeting when a cheque was given to Mr McGowan in respect of that payment. Mr Pye said in evidence that he decided to pay Mr McGowan the \$1,888 in September 2009 for having worked long hours on the potato farm because he had felt sorry for him.

[58] Mr McGowan does not claim for his work on the potato farm in 2010 and no potato work was carried out by him in 2011. Mr McGowan's counsel argues, however, that the sum of \$1,888 to Mr McGowan would have been a part payment only for the hours worked on the potato farm in 2009 because Mr McGowan's records show he worked there for 550 hours. At \$22.46 an hour that amounts to \$12,353.

[59] However, Mr McGowan says that no agreement was ever reached as to what rate he would be paid for working on Mr Pye's potato farm while he was employed by the respondent as a farm manager. In addition, Mr McGowan was paid an annual salary which is usually accepted as remuneration for all work carried out, and it was accepted by both parties that the 2009 payment of \$1,888 was for *excessive hours* worked. For these reasons, I believe that it is more likely than not that no agreement was ever reached between the parties as to what Mr McGowan would be paid for his work on the potato farm.

[60] I believe that, on the basis of Mr Pye's evidence, the \$1,888 payment was a discretionary payment which was intended to compensate Mr McGowan fully for his work on the potato farm in 2009, and do not believe that it was the first instalment of payment for his work on the potato farm. I therefore believe that Mr McGowan's claim for extra payment for his work on the potato farm in 2009 must be declined.

**Is the respondent owed rent in relation to Mr McGowan's occupation of the farmhouse?**

[61] I am not satisfied that there was ever a binding agreement between the parties that rent would be paid for Mr McGowan's occupation of the farm house. I am satisfied that Mr McGowan's letter dated 15 October 2009 demonstrates that no agreement about rent was ever reached. This is supported by the fact that the respondent's counterclaim is limited to the period 14 October 2009, when the respondent first made a demand for the rent, to 4 September 2010, when Mr McGowan left the property due to the Darfield earthquake. If an agreement had been reached at the start of the relationship, as was asserted by Mr Pye, I would have expected that the claim would have extended back to that point.

[62] Accordingly, this counterclaim is dismissed.

**Does the Authority have the jurisdiction to order Mr McGowan to pay the grazing fee?**

[63] The Act defines an employment relationship problem as including *a personal grievance, a dispute, and other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.*

[64] The term *relating to or arising out of* is very wide. The arrangement that Mr McGowan and Mr Pye entered into was not one *relating to* the employment of Mr McGowan by the respondent, which must be read in a limited way to mean any cause of action of which the essential character is found entirely within the employment relationship itself. (*Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001 and [BDM Grange Ltd v Parker](#) [2006] 1 NZLR 353, [\[2005\] ERNZ 343](#) (HC)).

[65] However, I am satisfied that the arrangement arose out of the employment, as it is not likely that the arrangement would have arisen at all if Mr McGowan had not been employed by the respondent. I am therefore satisfied that the Authority has the jurisdiction to order that Mr McGowan, who does not deny the debt is owed, pay the outstanding amount.

**Remedies for unjustified dismissal**

[66] Having succeeded in his personal grievance that he had been unjustifiably dismissed, I must now consider what remedies Mr McGowan is entitled to. He claims for lost wages for 12 weeks at an average weekly pay of \$1,261, totalling a gross sum of \$15,138.46. However, wages records provided by the respondent indicate that Mr McGowan was paid a regular fortnightly payment of \$1,923.08 throughout his employment. That equates to \$961.54 a week. That figure multiplied by 12 totals \$11,538.48.

[67] Mr McGowan states that he received a total of \$5,602 (plus GST) in casual work payments during the 12 weeks for which he was unemployed. My calculation of the sums in the invoices disclosed by Mr McGowan indicate a total of \$5,611 plus GST, and it is that sum that must be deducted from the \$11,538.48 that Mr McGowan

would have received had he not been unjustifiably dismissed. That results in a total gross loss of wages of \$5,927.48.

[68] The next issue to consider is whether Mr McGowan should receive compensation for humiliation, loss of dignity and injury to his feelings pursuant to s123(1)(c)(i) of the Act. Mr McGowan said he had been *gutted* when the employment ended the way it did. He had also been worried in case he had done something wrong. He had never before been dismissed or reprimanded he said.

[69] I believe that Mr McGowan did suffer moderate humiliation, loss of dignity and injury to his feelings as a result of his dismissal. I believe that an award in the sum of \$5,000 is just compensation.

[70] I must now consider, pursuant to s 124 of the Act, whether the actions of Mr McGowan contributed to the situation that gave rise to the personal grievance and, if so, whether I should reduce the remedies accordingly.

[71] There is little doubt that Mr Pye's annoyance and frustration prior to 25 February was due to the farm not making enough money for him when the outgoings were taken into account. Mr Pye believed that the fault for this lies with Mr McGowan. However, I have not heard any cogent evidence to show that, on the balance of probabilities, Mr McGowan was failing in a blameworthy way in his duties towards the respondent. If Mr Pye had had concerns about Mr McGowan's performance, he should have met with him formally and detailed how he believed Mr McGowan was failing and what he expected him to do to rectify the faults.

[72] In the light of this, I do not believe that it would be just to reduce the awards to Mr McGowan.

### **Penalty**

[73] Mr McGowan seeks a penalty from the respondent for having failed to provide an employment agreement to him, pursuant to s. 63A(3) of the Act. Mr Pye and Ms Palmer accepted that no employment agreement had been provided, saying this was due to an oversight. In addition, Mr Pye accepted that some of the problems that have ended up before the Authority may have been resolved had an employment agreement been provided.

[74] I accept that there was no intention to not provide an employment agreement. However, the respondent is part of a large network of farms in which Mr Pye has interests, and better processes should have been put in place to prevent such an oversight occurring. This is a case where a modest penalty is appropriate, and I impose a penalty of \$1,000, all of which is to be paid to Mr McGowan.

### **Orders**

[75] I order the respondent to pay to Mr McGowan the following:

- a. The gross sum of \$5,927.48 in respect of loss of wages;
- b. The compensatory sum of \$5,000 pursuant to s.123(1)(c)(i) of the Act;
- c. The sum of \$5,105 in respect of petrol purchased by Mr McGowan for business use;
- d. A sum in respect of two days' public holidays worked by Mr McGowan, unless such payment has already been made;
- e. The sum of \$1,000 in respect of a penalty pursuant to s. 63A(3) of the Act.

[76] I order Mr McGowan to pay to the respondent the following:

- a. The sum of \$914.31 in respect of unpaid telephone expenses; and
- b. The sum of \$14,141.38 in respect of an unpaid grazing fee.

### **Costs**

[77] Costs are reserved. The parties are to seek to agree how costs should be dealt with between themselves. In the absence of such an agreement within 28 days of the date of this determination, Mr McGowan is to set out his position by way of the service and lodging of a Counsel's memorandum, and the respondent shall have a further 14 days within which to set out its position by way of the service and lodging of Counsel's memorandum.

David Appleton

Member of the Employment Relations Authority