

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 89/10
5163881

BETWEEN JOANNE RUSSELL
 Applicant

A N D CANDY DAIRY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Tim Jackson, Representative for Applicant
 Nic Soper, Counsel for Respondent

Investigation Meeting: 15 January 2010 at Timaru

Determination: 12 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joanne Russell worked for Candy Dairy Limited (CDL) as farm manager from June 2008 until her employment ended by being given notice of dismissal due to redundancy in March 2009. Mrs Russell says that there was no genuine restructuring, that her employer embarked on a non-genuine process of consultation but always intended to terminate her employment and predetermined the decision to dismiss her. Mrs Russell worked most of the notice period, then an incident occurred on 8 April as a result of which Mrs Russell says she was dismissed giving rise to a second personal grievance. There are also some ancillary issues about wages and accommodation referred to in the statement of problem.

[2] CDL says that it disestablished Mrs Russell's position as it was not financially viable to continue with a full time farm manager. It adopted a fair process, first consulting with Mrs Russell about that proposal. CDL then considered her and the incumbent farm worker for the continuing farm worker position but preferred the

incumbent (Jamie O'Brien). CDL says that it dealt with the entire situation in a fair and sensitive manner.

[3] To resolve these problems, I will set out more fully what happened before applying the test of justification for a dismissal. There are some conflicts to resolve.

CDL employs Mrs Russell

[4] Bruce Eggleton and Jennifer Eggleton are the directors and shareholders of CDL. The statement of problem identified them jointly as first respondents and CDL as the second respondent. Even though CDL was incorporated in October 2007 and it is clear that the company owns and operates the farming business in which Mrs Russell worked, Mr and Mrs Eggleton identified themselves personally as the employer in the written employment agreement. At the start of the investigation meeting and without objection, Mrs Russell withdrew all claims against the first respondents so the matter proceeds only against the company which was in fact the employer.

[5] CDL operates a dairy farm in South Canterbury. Mrs Russell had some experience in the dairy industry and the position with CDL was her first as a farm manager. There is a written employment agreement using the standard form Federated Farmers document. Accommodation was provided and the agreement records it was for the exclusive use of Mrs Russell and her family.

[6] In late July 2008, CDL employed a second fulltime employee (Mr O'Brien) as a farm worker. There are some others who do relief milking and the like. Mrs Russell's evidence, which I accept, is that her working relationships with Mr O'Brien and others up until November/December 2008 were good. A measure of that is the evidence, which I accept, of the support provided by Mrs Russell and her husband (Tim Russell) to Mr O'Brien when he was facing criminal charges some time in 2008. In the last part of 2008 and early 2009, Mrs Russell's relationship with Mr O'Brien deteriorated somewhat as he began to seek Mr Eggleton's opinions and direction rather than respond to her authority as farm manager. Mr Eggleton and Mr O'Brien had become quite friendly. There is evidence also that Mr Eggleton became less friendly towards Mr Russell. I do not consider that there was any breach of CDL's obligations to Mrs Russell arising from any of this.

[7] In her evidence, Mrs Russell is critical of Mr Eggleton for leaving her notes of jobs to be done and asking her about her start and finish times. As I understand her point, the suggestion is that this reflects a deterioration in their relationship and some predetermination about her fate. I do not accept that CDL breached any obligation owed to Mrs Russell if Mr Eggleton did leave notes for her or request her to identify start and finish times.

Redundancy process

[8] In November 2008, CDL was refused a resource consent to take ground water for irrigation. That meant fewer stock units on the land and lower milk production than required for the property to be commercially sustainable in its existing configuration. In response, CDL attempted to reduce expenses and improve efficiency and productivity. As farm manager, Mrs Russell was aware of and participated in these issues and initiatives.

[9] These actions were not sufficient. Mr and Mrs Eggleton decided they needed to look at reducing salary costs alongside Mr Eggleton taking a more hands on day to day management role in the farming business. Their solicitor drafted a letter dated 24 February 2009 for them to give to Mrs Russell to initiate the process of consultation with her about the proposal to disestablish her position and make her redundant.

[10] Mr Eggleton gave the letter to Mrs Russell that same day. In her evidence, Mrs Russell says that when she asked what was the position with Mr O'Brien, Mr Eggleton told her that he would be staying on. Mr Eggleton's evidence is that he said that the farm worker's position was not considered surplus to requirements. He denies saying that Mr O'Brien would be staying on. It is more likely than not that both Mrs Russell and Mr Eggleton used Mr O'Brien's name in their brief exchange; but in doing so, they were really referring to his position. If Mrs Russell had any doubt about that, it was dispelled by the 24 February 2009 letter which clearly explains the rationale for considering the farm manager's position rather than the farm worker's position for redundancy. The letter proposes a meeting for Friday, 27 February 2009.

[11] Having received this letter, Mrs Russell sought advice from Tim Jackson who wrote to CDL's solicitor on 26 February 2009. That letter suggests that CDL treat the

matter as one of selection between Mrs Russell and Mr O'Brien for the remaining farm worker position rather than simply Mrs Russell being seen as superfluous because of the proposal to disestablish her position. There is also a request to defer the meeting because of Mr Jackson's unavailability on the Friday.

[12] The scheduled meeting proceeded in Mr Jackson's absence but on the understanding that there would be a later meeting scheduled. Mrs Russell was supported by her husband and Mr and Mrs Eggleton were represented by their solicitor. There is a brief document headed *discussion document* that sets out topics for consideration which was given to Mrs Russell. There are also notes by the solicitor made during the meeting. Mrs Russell's evidence is that the notes *seem reasonably accurate*. This meeting represents a successful attempt by the employer to expose to an employee facing the possibility of redundancy information relevant to that consideration. Mrs Russell's proposal conveyed in the 26 February letter was left open for further consideration.

[13] The next meeting was on 13 March. Mrs Russell was supported by her husband and represented by Mr Jackson. Mr Eggleton and his solicitor were present for the company. Mrs Russell's evidence about the meeting establishes that it was a full discussion about the restructuring proposal that involved Mr Eggleton taking a more hands-on management role at the farm on a day-to-day basis, and the redundancy of one full time staff member. At that stage, no redundancy process had been initiated with Mr O'Brien, and Mrs Russell was told that when the question was asked. Mr Jackson asked if the company would consider appointing Mrs Russell to the remaining farm worker position so as to allow her to compete for it with Mr O'Brien. The solicitor said that the company would do so.

[14] In an email later on 16 March, Mr Jackson conveyed an offer to settle matters on a full and final basis with the payment of a sum of money. The email also refers to Mrs Russell's concern about not being told about Mr O'Brien's absence from work and Mrs Eggleton's response when that was raised with her; Mrs Russell's concern about not being told about a computer training course that she would have expected to attend; and about Mr O'Brien's source of knowledge of events suggesting he was being kept up-to-date. There is a response dated 17 March from CDL's solicitor. It is not necessary to repeat that in full here but I accept that it accurately conveys the

position from the employer's perspective. It also foreshadowed the prospect of a decision about the disestablishment of the farm manager's position later that day.

[15] That decision was conveyed in a letter dated 17 March 2009. The letter formally advises of the decision to disestablish the farm manager's position and leaves open for further consideration whether any other role could be found for Mrs Russell in the business. It is helpful to set out part of that letter:

Both you and your representative have made it clear that, should your current position be made redundant and staffing levels reduced, you consider that you should be able to "compete" with Jamie O'Brien for any remaining staff position on the farm. You have provided a variety of reasons why you believe you are the best person for any job remaining on the farm, and concluded that you should remain while Jamie should go.

A business/restructuring process focuses on positions that are potentially surplus to a business's requirements, rather than the people in those positions. Your proposal would dictate a shift in focus to essentially one of "performance review" of both yourself and Jamie O'Brien – which, as your representative will tell you, would ordinarily bring into play other procedural/fairness considerations, since we are moving away from a position redundancy situation, to a more broader, general assessment of overall staffing.

That said, you have squarely raised your proposal as an alternative to your outright redundancy. As responsible employers Bruce and Jenny therefore have a duty to consider it, despite the reservations detailed above, which I believe are ameliorated by virtue of the fact that we are going down this particular path at your request.

Fairness in the context of your proposal requires us to consult with Jamie O'Brien, and I have done this today. While Jamie has previously been informed that a restructuring of the business is in train, and which might involve staff cuts, he hasn't previously been told that he will need to compete for his existing job (as you propose he should) – and nor has he been told that his job is safe, as you asserted was relayed to you in the Cave Hotel.

We have therefore discussed with him his attributes, and what he offers the business moving forward.

As agreed with you, we are prepared to offer you the same courtesy – noting, of course, that we have the benefit of what has already been outlined in Tim Jackson's letter of 26 February 2009 and amplified at our meeting last Friday, and now Tim Jackson's email last night. If you wish to have a further opportunity to persuade Bruce and Jenny that you should be retained, then we are happy to accommodate this. We would like to make a final decision on future staffing before the end of the week, and accordingly could I suggest that you liaise with Tim Jackson to decide whether you wish to provide any further information (whether in writing or by a further meeting) as soon as possible.

Many thanks for your participation in this process, which we acknowledge is difficult for everyone.

[16] Mrs Russell had concerns about the situation and instructed Mr Jackson to respond to this letter by email. In her evidence, Mrs Russell cited a substantial part of the email. I will refrain from repeating it here, except as follows, with an additional extract:

However, once your client has completed the restructure ... he still has two employees for the remaining position because both employees can do the work.

...

I point out that once there is a single position with two candidates, as we now have, then the analysis becomes one of matching the position description with the skills, qualifications and experience of the candidates ...

[17] I should note that this extract does not correctly characterise the situation faced by CDL. The company disestablished the position of farm manager, not the farm worker position. It was not a situation of considering which of two incumbents holding the same position should be selected to remain in a single position following a downsizing or restructuring exercise. One only needs to view the situation from Mr O'Brien's perspective to see the fallacy. CDL would never be able to establish a genuine redundancy situation affecting him when only the farm manager's position was disestablished.

[18] CDL's solicitor was Wayne van Vuuren. It is clear from his correspondence at the time and his evidence that he understood clearly the distinction just made. It arises from the definition of redundancy relied on in the absence of a contractually agreed alternative; see *G N Hale & Sons Ltd v. Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079. Redundancy is determined in relation to the position, not the incumbent as a matter of the employer's business judgment: see *NZ Fasteners Stainless Ltd v. Thwaites* [2000] 1ERNZ 739 at 747. The new statutory test for justification has not displaced those principles; see *Simpsons Farm Ltd v. Aberhart* [2006] ERNZ 825. Because Mr van Vuuren is obviously familiar with this law, I do not accept that his client, through him, agreed to anything other than to consider Mrs Russell for the remaining farm worker position by offering her the opportunity to provide further information in support of her retention over that of Mr O'Brien. There

was no offer to treat the situation as one of selection of two candidates for one remaining position.

[19] In the event, Mrs Russell provided a covering letter, a CV including her qualifications and met with Mr and Mrs Eggleton for an interview. During this interview, Mrs Russell promoted her skills and also criticised Mr O'Brien, especially by alleging that he had stolen petrol. There is some criticism by Mrs Russell in her evidence that CDL was just going through the motions. I do not accept that as an accurate characterisation of events. Mr van Vuuren's evidence, which I accept, explains the consideration given to retaining Mrs Russell over Mr O'Brien which included him doing some reference checking. In the end, Mr and Mrs Eggleton concluded that they would retain Mr O'Brien in preference to making him redundant and appointing Mrs Russell to the farm worker position. Naturally, Mrs Russell contends that she was the much better candidate, but I accept that CDL was entitled to exercise its own judgment on the matter.

[20] Mr and Mrs Eggleton went to see Mrs Russell during the evening of 23 March to announce this decision. Mrs Russell was given a letter advising that CDL had decided to give the farm worker position to Mr O'Brien meaning that Mrs Russell's employment would end. Mrs Russell was offered the option of working out the three week notice period or receiving pay in lieu. The letter makes it clear that CDL would support Mrs Russell's efforts to find alternative employment with a favourable reference. There is mention of other support as well. I will refrain from setting out the letter in full, but it reads as a sensitive and thoughtful communication about Mrs Russell's situation, which I find reflects CDL's approach. Mr and Mrs Eggleton refrained from expanding on the written communication. Mrs Russell decided to work out the notice period.

[21] Further allegations of Mr O'Brien stealing petrol came to Mrs Russell's attention. She had Mr Jackson communicate this to CDL, ask for notes and details of the selection criteria and offer an opportunity for CDL to reverse its decision pending the raising of a personal grievance. This was done by email on 1 April and Mr van Vuuren replied the same day. Mr Jackson sent a further email on the same issues and received another reply. It is not necessary to detail the debate now since CDL must justify its decision to dismiss Mrs Russell as at 23 March. However, there are several matters that arose during the notice period that should be mentioned.

During the notice period

[22] In October 2008, following some issues over Mr O'Brien's preschool children, CDL decided to restrict children from the farm or possibly only from the milking shed. It is not necessary to resolve that evidential dispute. On 2 April 2009, Mrs Russell saw Mr O'Brien's two children at the milking shed. Mr Eggleton's evidence, which I accept, is that he had seen the children a little earlier nearby the milking shed. It was not milking time. Mrs Russell raised the matter with Mr Eggleton and was told it was nothing to do with her. Mr Eggleton thought that Mrs Russell was simply chipping Mr O'Brien again. Mrs Russell said that it created a potential OSH liability for her so Mr Eggleton said he would check it out. Later, he asked Mrs Eggleton to contact the Department of Labour, which she did, to be told that no law prohibited children from a farm but that an owner or occupier had to ensure no exposure to risk and proper supervision.

[23] Mrs Russell separately received advice from Mr Jackson to the effect that, as manager, she had OSH responsibilities as the person in charge. She also contacted OSH (DOL) and was told that children were not permitted on farms. Mrs Russell was asked if she wanted to make a complaint and she said she did.

[24] On 6 April, Mrs Russell again saw Mr O'Brien's children in and near the calf shed. Mrs Russell spoke to Mrs O'Brien who was present. She was told that Mr Eggleton had okayed the children being present on the farm so long as they were not in the milking shed. Mrs Russell then rang OSH for a second time and was told that the matter would be investigated.

[25] On 8 April, there was an exchange between Mr Russell and Mr Eggleton about this OSH complaint. Mr Eggleton initiated the exchange. He thought that the complaint was not genuinely motivated by any OSH concerns but was simply Mrs Russell creating a difficulty for him and further criticising of Mr O'Brien. Mr Eggleton's view would have been apparent to Mrs Russell from his approach. She responded by saying *you have already lost your son, you don't want to be responsible for another death*. That was a reference to the death of Mr and Mrs Eggleton's son in a car accident in 2007. Mr Eggleton became very angry and told Mrs Russell to leave. Mrs Russell said she would carry on working but Mr Eggleton insisted that she leave so she did. Mr Eggleton's evidence, which I accept, is that she said *you deserve everything you get* as she left.

[26] Later on 8 April, Mr Eggleton went to Mrs Russell's house on the farm, took her possessions out of the work vehicle and drove it away. Mrs Russell was rostered for milking later that evening. She went to the milking shed. Mr and Mrs Eggleton were either there or arrived soon after. They asked her what she was doing, she said *milking* and they told her that she was not required and to leave the shed. Mrs Eggleton's evidence, which I accept, is that she thought Mrs Russell had already moved out of the accommodation so she asked for the keys. Mrs Russell said she had not finished cleaning up or moving and refused to hand them over. She then left. Mrs Russell says it was this exchange which caused her to think that she had been dismissed for a second time whereas Mr Eggleton's instruction earlier in the afternoon to go had meant only for the afternoon.

[27] Mrs Russell's last rostered working day was 9 April. She did not work that day. CDL said that Mrs Russell had earlier requested the day off, which request had been granted. I will return to that matter shortly. Mrs Russell finished clearing up at the house on or about 13 April and returned the keys the next day. There were apparently some delays in her receiving all her final pay but I understand that matter is now resolved.

Justification for dismissal

[28] Justification for dismissal must be determined objectively by considering whether CDL's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time. Despite the onus resting on the employer it is useful to address Mrs Russell's submissions first.

[29] The starting point for Mrs Russell's submissions is that she should not have been made redundant because her position continued to exist. I do not accept this submission. For genuine business reasons, after consulting with Mrs Russell, CDL made a decision to disestablish the position of farm manager. Mrs Russell was told of that decision by letter dated 17 March 2009. The number of full time salaried positions was reduced by one. No one has been employed by CDL as a farm manager since. Mrs Russell's position did not continue to exist.

[30] Mrs Russell's second submission is that, had the employer's process been fair, reasonable and even-handed, she would have been offered the remaining farm worker's position. It seems that Mrs Russell cannot get past the notion that

Mr O'Brien was preferred to her. However, there is no reason for the Authority to question CDL's decision on its merits. It genuinely thought that Mr O'Brien was better suited to the farm worker role than was Mrs Russell and it reached that conclusion after allowing both Mrs Russell and Mr O'Brien to advance their respective merits. No doubt if CDL had been considering both of them for the farm manager position, it would have preferred Mrs Russell. That does not mean that she must necessarily be regarded as a better farm worker. Mr O'Brien obviously has his flaws, one of which is not answering a summons (more of which shortly), but CDL was entitled to think that he was the better farm labourer. It was, after all, his position.

[31] I am referred to *HP Industries (NZ) Ltd v. Davison* [2008] ERNZ 514. In that case, the Employment Court referred to the *Simpson Farms* case for guidance about the principles of consultation in light of statutory changes. Those principles are applicable here.

[32] CDL allowed sufficient time and did not treat the consultation process perfunctorily. It was not a charade. The point about time is demonstrated by CDL's willingness to defer its proposed timeframe to accommodate Mr Jackson's other commitments. The genuineness of the consultation is demonstrated by CDL's willingness to consider Mrs Russell's offer to reduce her salary and status so as to compete for the remaining farm worker position.

[33] Consultation must precede change and a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view. CDL did not act on its proposal until after consulting with Mrs Russell and she was made aware of the proposal.

[34] Precise information and a reasonable opportunity must be given to enable an employee to express a view. CDL took care to share relevant information with Mrs Russell and she had a reasonable opportunity, which she took advantage of, to express her views.

[35] There must be genuine efforts to accommodate the employee's views with a tendency to seek consensus. This is demonstrated by CDL's willingness to consider Mrs Russell for the farm worker position even though it did not have to.

[36] The employer must have an open mind and be willing to change, but may have a working plan already in mind. CDL's open mind and willingness to change is demonstrated by its response to Mrs Russell's request to be considered for the farm worker position.

[37] Overall, CDL comfortably met the consultation requirements as described in *Simpson Farms*.

[38] Mrs Russell's representative made several points about *Davison* by way of suggesting it is analogous to this case. *Davison* is a case of a large corporate that formulated a plan to implement redundancies across its business but failed to properly consult with the grievant over his individual circumstances. The grievant was significantly disadvantaged compared with other employees regarding consultation. The same is not true in this case.

[39] There is a submission that the redundancy process was a smokescreen for dismissing Mrs Russell for other unstated reasons. I do not accept that submission. The failure to secure water rights meant that the property could not be sufficiently productive to support its overheads. A way of addressing that was for Mr Eggleton to take over the day-to-day farm management. That meant that CDL no longer required an employed farm manager, the position held by Mrs Russell. No other undeclared reasons were behind the termination of Mrs Russell's employment.

[40] In part, the attack on the genuineness of the redundancy is based on the contention about the number of staff required to properly run the farm. That aspect of the challenge to the dismissal falls foul of the law which clearly entitles an employer to run its business in accordance with its commercial judgment: see the *Hale* case.

[41] At p.8 of the written submissions for Mrs Russell, there starts a list of *evidence* to support the contention that CDL simply went through the motions rather than genuinely consulted Mrs Russell over the farm worker position. I will not refer to each part since I have already found that CDL did not engage in a sham, but some points should be mentioned specifically.

[42] There is a complaint about a lack of evidence from CDL showing it considered Mrs Russell's settlement offer. The open offer was fully responded to in correspondence which is part of the evidence. There is no need for CDL to say any more on this point.

[43] There is mention that Mr O'Brien was not part of the restructuring until CDL was *effectively forced* to include him. CDL was not forced; it accepted Mrs Russell's proposal to consider her for the farm worker's position. At that point, CDL engaged in a consultation exercise with Mr O'Brien. Mrs Russell was potentially advantaged by this, not disadvantaged or treated unfairly.

[44] There is a complaint about CDL failing to take account of Mrs Russell's views as to Mr O'Brien's work performance. The argument is, as Mr O'Brien's manager, her views should have been heard or even accepted. CDL resisted that because it was alert to the obvious potential unfairness to Mr O'Brien that the competitor for his position might get the inside running to advance her case. CDL's refusal demonstrates that it took fairness seriously.

[45] Finally, it is said that CDL mistakenly thought that Mrs Russell engaged in a personal attack on Mr O'Brien by highlighting his deficiencies. It was open for CDL to reach that conclusion.

[46] There is criticism of CDL for involving its solicitor. None of that criticism has any merit. CDL was entitled to obtain legal advice and representation, as was Mrs Russell.

[47] Standing back, I accept that CDL's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances.

The second dismissal

[48] It is common ground that Mrs Russell's notice ended on 13 April. Her last day of rostered work was 9 April. There is a dispute about whether or not Mrs Russell had been granted that day as a day's leave but it is not necessary to resolve the dispute. It is common ground that Mrs Russell was entitled to be paid up until 13 April.

[49] I do not accept that CDL terminated the employment relationship when Mr Eggleton sent Mrs Russell away on 8 April. In effect, CDL no longer required her to work the few hours (on Mr Eggleton's account) or the day and a bit (on Mrs Eggleton's account) remaining of her notice period. No one stopped to look at the employment agreement at the time; but if they had done so, they would have seen

the provision in the termination of employment clause permitting the employer to pay wages in lieu of part of the notice period. CDL simply exercised its contractual right.

[50] It might be asserted that Mrs Russell was unjustifiably disadvantaged by being sent away; or I might be wrong to say that it does not amount to a dismissal. Neither approach would advance Mrs Russell's claim for compensation any further. Mrs Russell's reference to the death of Mr Eggleton's son caused his anger and the instruction for her to leave. If there was a disadvantage or dismissal, it arose then. In her evidence, Mrs Russell seems to suggest that it was okay for her to reference that tragedy in order to make her point about children on the farm. Her comment was insensitive and inflammatory to say the least. I would find her completely to blame for the response it drew and decline any remedy, even if some loss could be established.

Accommodation

[51] As noted above, Mrs Russell's employment agreement entitled her to exclusive use of supplied accommodation. When she started work, it was expected that a new house would have been completed by July 2008 for her use. However, the house was not completed until Labour weekend 2008 which is when Mrs Russell moved in to the house. There is a claim for money based on CDL not supplying exclusive accommodation from the commencement of the employment until Labour weekend. The claim appears to be for the whole of the accommodation payment made by Mrs Russell for the entire employment. The statement of problem refers to lost remuneration pursuant to s.123(1)(b) of the Act.

[52] The first problem with the claim is that Mr Eggleton offered, but Mrs Russell declined, off-farm accommodation instead of the shared on-farm accommodation when it became apparent that the new house would not be completed in time. The second problem is that s.123 deals with remedies for a personal grievance. No grievance was raised in respect of this matter within time. The third problem is that Mrs Russell did not lose any remuneration because of the problem with the accommodation so there is no loss of remuneration to remedy. Accordingly, the claim in respect of accommodation fails.

Failure to supply time and wage records

[53] The statement of problem raises an issue about CDL's failure to supply time and wage records in response to a request. The matter was not pursued during the investigation meeting and Mrs Russell, in her evidence, confirmed that the Authority did not have to investigate the matter or the associated issue about statutory holidays.

Non appearance of Mr O'Brien

[54] On Mrs Russell's initiative, a summons was issued by the Authority for Mr O'Brien to appear and give evidence. The summons was served on Mr O'Brien. However, he did not appear at the investigation meeting.

[55] Mr O'Brien apparently told others that he would become the farm manager. He also apparently was told by Mr Eggleton that 20 March would be Mrs Russell's last day at work and that he (Mr O'Brien) would be managing the farm. No doubt Mrs Russell wanted to get Mr O'Brien to confirm these things that he had reportedly told others. However, neither story is plausible or came true. Mr Eggleton denied telling Mr O'Brien these things. Mr O'Brien must have been either mistaken or mischievous if he did say these things to others.

[56] Mr Russell met Mr O'Brien on two occasions after the termination of Mrs Russell's employment. On the first occasion, Mr O'Brien was looking for, and by the second occasion he had started, other employment. Mr O'Brien told Mr Russell that Mr Eggleton had reneged on the promise of a higher position; that Mr Eggleton had told him he was dissatisfied with Mrs Russell's performance but had been advised that redundancy was the safest approach to get rid of her; and that Mr Eggleton had paid him \$400 per week extra. Mr Eggleton denied the truth of these reports and I accept his denials. In light of the genuine financial problems faced by the business the comments attributed to Mr Eggleton are not plausible.

[57] Mr O'Brien obviously became disgruntled with his employment, perhaps because he was drawn into a redundancy process that should never have affected his position. When he left the employment, there was a dispute about holiday pay. His comments to Mr Russell must be seen in light of those facts.

Conclusion

[58] Mrs Russell does not have a personal grievance or any other valid claim against Candy Dairy Limited.

[59] Costs are reserved. If costs are sought a party may lodge and serve a memorandum within 28 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority