

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 128
5299656

BETWEEN DAVID SKUDDER
Applicant

AND ARAI MATAWAI
INCORPORATION
Respondent

Member of Authority: K J Anderson

Representatives: L Hemi, Counsel for Applicant
D Sharp, Counsel for Respondent

Investigation Meeting: 20 October 2010 at Gisborne

Submissions Received: 1 November and 3 December 2010 for the Respondent
22 November 2010 for the Applicant

Determination: 31 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Skudder, claims that he was unjustifiably dismissed on 3rd December 2009. He asks the Authority to find that he has a personal grievance and award him various remedies including reimbursement of wages and compensation. The respondent, Arai Matawai Incorporated (AMI/the Incorporation) says that the dismissal of Mr Skudder was justified due to him continually failing to meet the operational requirements of the business.

[2] In addition to Mr Skudder's evidence, the Authority received evidence for him from Mr Selwyn Scudder, Mr Marty Charteris and Mr Hamish Morrison. For AMI, there is evidence from Ms Linda Scott and Mr Gregg Pardoe. The parties also produced a considerable number of relevant documents. The totality of the evidence

and the respective submissions produced by the parties, has been closely considered, albeit there may not a specific reference to such within this determination.

Background Facts and Evidence

[3] Mr Skudder has been involved with sheep and cattle/beef farming for all of his working life, having worked on sheep and beef stations from the age of 15. He was first appointed as a manager of a station when he was aged 24 and has been a station manager for at least thirty five years.

[4] Mr Skudder commenced his employment as Station Manager with AMI in 1989. The evidence of Mr Skudder is that when he first came to Arai Matawhai Station (Arai) the property was “a big mess” with the stock in bad shape and paddocks “like dirt.” Mr Skudder says that within six months of him being employed at Arai, he helped to turn the operation around, it has been successful ever since and it is now well known for the quality of its stock. Mr Skudder told the Authority that due to the success of Arai, the Incorporation was able to expand into two other stations – Awapuni and Kaikoura - as well as purchasing a vineyard.

[5] In 2005 or 2006, Mr Gregg Pardoe was appointed as Manager of the Kaikoura Station. Mr Skudder continued to manage the Arai and Awapuni stations. In early 2008, Mr Pardoe was promoted to Operations Manager for AMI. In this role he was responsible for the three stations and reported directly to the Chairman of the Management Committee of AMI.¹ This effectively removed some considerable autonomy from Mr Skudder as he had to report to Mr Pardoe, rather than directly to the Management Committee as previously. From the time of the appointment of Mr Pardoe as Operations Manager, Mr Skudder was only required to manage Arai Station.

[6] The evidence of Mr Pardoe is that when he was employed by the Management Committee (the Board) it was stressed to him that the committee wished to see an improvement in the farming practices of AMI. Mr Pardoe says that the committee wanted a more “streamlined and effective” system of management; requiring the three

¹ The Authority understands that the Management Committee consists of a Chairman, Vice-Chairman and five other committee members. The term “Board” also appears to be commonly used when referring to the Management Committee.

stations to operate “in conjunction rather than as virtual competitors.” The further evidence of Mr Pardoe is that when he had “initial discussions” with Mr Skudder, he was concerned that Mr Skudder’s “style of management” was going to be difficult to fit within the type of structure that the committee of management required. In his oral evidence Mr Pardoe enlarged on what he meant in regard to Mr Skudder’s style of management. Mr Pardoe was of the view that Mr Skudder has been answerable “to himself” for a long period of time and it was anticipated that he would find it difficult to take instructions from someone else. Nonetheless, Mr Pardoe says that he was prepared to work with Mr Skudder to address this.

[7] The evidence of Mr Skudder is that during the first year of working with Mr Pardoe there were “no issues” between them. However, Mr Skudder says that there was one important issue that was not ever fully addressed. This is that: it was never “made clear” where the respective roles of Mr Pardoe as the Operations Manager, and Mr Skudder as the Station Manager, “started and finished.” The Authority understands that there was some confusion in the mind of Mr Skudder, as to how much autonomy he had over the day-to-day management of Arai Station. This situation was not assisted by the fact that AMI never provided Mr Skudder with an employment agreement or position description until 19th May 2009.

Performance concerns and disciplinary action

[8] While it appears that during first year of the reporting relationship between Mr Pardoe and Mr Skudder there may not have been any issues at surface level, it is clear that there was a definite undercurrent of dissatisfaction, as far as Mr Pardoe was concerned, in regard to how Mr Skudder was adapting to managing Arai Station under the new management structure. The dissatisfaction being experienced by Mr Pardoe was such that he sought advice from Ms Linda Scott, a Human Resources Advisor. The outcome was that via a letter from Mr Pardoe dated 19th February 2009, Mr Skudder was required to attend a meeting on 23rd February 2009. The substance of the letter informed Mr Skudder that:

Over the past 12 months you and I have spoken on many occasions regarding a number of issues and I have provided to you instruction and advice regarding these. Unfortunately none of these conversations have been recorded in writing so we are unable to substantiate what was actually said and agreed during these discussions. I appreciate that you have been with the Incorporation for 19 years and during that time there hasn’t been much of a reporting requirement. You have been left to

manage the farm/s as you have seen fit. This can make it difficult to adjust to a new regime and I have taken this into account over the past 12 months to assist you through this transition. However, I am now at a stage where a more formal process is required to address concerns that are potentially detrimental.

Under the new, more formalised structure that is in place, it is necessary for everyone to work as a team, take advice and instruction from me or their direct manager, adhere to policies in place and take into account consequences of actions.

My concerns are:

1. Your apparent discomfort with taking and carrying out reasonable instructions (e.g. sending 512 'short term' lambs to Awapuni then Awapuni having to return 200 of them because they were too small).
2. A lack of understanding of the importance of following company policies and procedures (e.g. sending the 'short term' lambs uncrutched and undipped).
3. An apparent disregard for authority and a lack of understanding of the importance of why things need to be done and by when (e.g. the recent list of tasks provided to you including timeframes).
4. An unwillingness to accept change (e.g. subdivision plans around fencing etc).
5. An attitude that lacks interest and one that indicates to me that your mind is not on the job.

I need to meet with you to discuss these concerns in more detail and to obtain an explanation from you as to reasons for the above. We can discuss how things could be changed and what additional assistance you may need to improve on the points above. By that I mean, over and above and different from what has been provided to you over the last 12 months.

Meeting on 23rd February 2009

[9] Mr Skudder was accompanied by his brother Mr Selwyn Skudder. Mr Pardoe was accompanied (and advised) by Ms Scott. The overall evidence about the general progress of the meeting is reasonably consistent in that the five points set out above were discussed and Mr Skudder was given an opportunity to explain his view of those matters. Indeed, the evidence of Mr Skudder in regard to his response to these five matters is quite comprehensive and to an objective observer, such as the Authority, cogent and reasonable. The evidence of Mr Selwyn Skudder is that he believed that his brother "had a good explanation" for all of the matters that were raised including "documentary proof" relating to the "weigh dockets" for the lambs in question. Mr David Skudder says that the weigh dockets confirmed that the lambs were of a good weight. The weigh dockets have not been produced to the Authority and it is not clear if they were produced at the meeting on 23rd February 2009. But I note that AMI has not taken issue with the evidence of the Skudder brothers on this matter. Of further note is Mr Skudder's response in regard to first matter that Mr Pardoe had concerns about; the return of 200 lambs. His explanation is that the lambs were never returned and Mr Pardoe accepts that this is so. He acknowledged under questioning from Mr Hemi that the decision to retain the lambs was made "within a week" of the letter of

19 February being written. By this I understand Mr Pardoe to be saying that at the time of the meeting on 23 February 2009, the lambs had not been returned. Given this is so, one has to question why Mr Skudder was asked, in a disciplinary setting, to account for something that, it is commonly accepted, had not happened.

[10] Mr Skudder has conveyed to the Authority, in some detail, his explanation in regard to the five matters that he was asked to account for. Unfortunately, notes were not taken at the meeting and it is difficult to determine if Mr Skudder gave the same account to Mr Pardoe and Ms Scott at the time. But Mr Skudder's evidence, as to the explanation he gave at the meeting, is collaborated by that of Selwyn Skudder, and while one must be cautious of the possibility of a bias on the basis of family loyalty, I have no reason to doubt the credibility of this evidence. Furthermore, the evidence of both men was not challenged. The further evidence of both men is that they believed that the explanations given by David Skudder were accepted by Mr Pardoe. Indeed, Selwyn Skudder attests that when the meeting adjourned to allow Mr Pardoe and Ms Scott to consider Mr Skudder's explanations, he: "... immediately said to David that I could not see him getting a warning as all of his explanations had been accepted." However, in response to this, Mr Pardoe says while he accepted that what Mr David Skudder was saying was his perception of the matters in question, he [Mr Pardoe] didn't accept that this perception was correct.

[11] There is a conflict in the evidence in regard to how long the meeting was adjourned for. Mr Pardoe and Ms Scott say that it was for approximately 40 minutes. Selwyn Skudder says that he is "certain" that Mr Pardoe and Ms Scott "were not out of the room for more than 10 or 15 minutes" but I note that David Skudder was silent about the time frame. In the round I am inclined to the view that the adjournment, and the time given to the explanations of Mr Skudder by Mr Pardoe and Ms Scott, was more likely to have been closer to their estimate than that of Selwyn Skudder. The relevance of the time taken for the adjournment appears to be associated with a submission for Mr Skudder, that the consequent issuing of a first warning to Mr Skudder was pre-determined but I find that this submission is not supported by the weight of the evidence.

The first written warning – 23rd February 2009

[12] The evidence of Mr Pardoe and Ms Scott is that they gave consideration to the explanations that Mr Skudder had given in regard to the five issues raised with him. Mr Pardoe says that the explanations “did not satisfy the issues that had arisen” and it was decided that a written warning was the “appropriate response.” The evidence of Ms Scott is that she typed the warning letter during the break from the meeting and I accept that this is so.

[13] There is a conflict in the evidence in regard to the presentation of the warning letter. The evidence of Ms Scott is that the letter was given to Mr Skudder “and explained” at the meeting. Mr Pardoe says that they “went through the letter and explained why we came to that decision.” But Mr Skudder says that upon the return of Mr Pardoe and Ms Scott to the meeting, he was given a sealed envelope. He says that there was no discussion about the warning and there was “no why or whatever” and he didn’t know it was a written warning until later. In response to a question from the Authority, Mr Skudder said that he took the envelope home and “put it on the bench” and then his son opened it. It was only then that he knew he had received a written warning. Selwyn Skudder says that there was “no further discussion” when Mr Pardoe and Ms Scott returned to the meeting and that: “David was just handed an envelope.” The further evidence of Selwyn Skudder is that he is “adamant” that the warning was not discussed and that he received a phone call from David about 6:30-7:00 o’clock that evening and was told about the warning.

[14] The matter of which evidence the Authority accepts goes largely to the credibility of the respective witnesses, albeit the matter of the issuing of the warning will be examined further because it is a part of the overall circumstances that must be taken into account when the justification for the dismissal of Mr Skudder is weighed.² I initially found that the evidence of David and Selwyn Skudder was somewhat more convincing in regard to overall detail. But given the stance adopted by them in the subsequent meeting on 1st April 2009, I now have some doubts about the reliability of their evidence pertaining to the receipt of the warning letter. But in any event, I find it difficult to understand why there should be any conflict in this evidence at all as there

² It is appropriate to record that Mr Skudder has not raised an unjustified disadvantage to his employment grievance in regard to the warnings he received. Rather, it seems that he has chosen to have the Authority examine all of the circumstances in its consideration of the justification for his dismissal.

is little for either party to gain by presenting a different version of events in regard to the presentation of the warning.

[15] Some of the warning letter (over the name of Mr Pardoe) appears to be a “cut and paste” of his letter of 19th February 2009 but the germane content is:

The nature of these most recent concerns however have brought things to a head. Your explanations have been considered and it is now appropriate to issue you with a First Written Warning.

This will be placed on your personal file for a period of six months and any further breaches of not following reasonable instructions from management or not adhering to company policies and procedures within that time may warrant a further warning being issued, and your employment may, at that time, be in jeopardy.

I am out of the country from 25th February to 16th March, I would ask that you use this time to think about what actions can be taken moving forward, to assist you in your job, including what you would like me to do to help you.

We will meet when I return from overseas and agree a plan going forward to ensure that job expectations are understood and that the farm continues to operate in an effective way for all concerned.

I note that no reason has been given for not accepting Mr Skudder’s explanation of the matters leading to the warning. This is consistent with the lack of evidence from Mr Pardoe and Ms Scott as to why Mr Skudder’s explanations were deemed to be unacceptable, particularly when it appears that he went to some length to explain his view of the matters in question and there is little or no evidence from Mr Pardoe or any other source that contradicts Mr Skudder’s version of events.

[16] Mr Skudder consulted his lawyer (Mr Rishworth). Via a letter dated 17th March 2009 to AMI, Mr Rishworth informed that Mr Skudder did not accept that there was any factual basis for the warning issued on 23rd February 2009. The explanations that Mr Skudder gave on that date were reiterated. The further concerns of Mr Skudder were also expressed being (in substance) that:

- (a) He felt that he was no longer being treated as the Manager of Arai Matawai but more as a shepherd.
- (b) Despite his position of Manager, he was being curtailed in the decision making process and was effectively not allowed to make decisions.
- (c) His wages were cut significantly some time ago without consultation.³
- (d) His shepherd is often advised of matters affecting station policies before he is.

³ Mr Skudder now appears to acknowledge that the reduction was because he was no longer responsible for managing two stations.

- (e) That the parvo vaccines for his dogs were no longer being paid for while shepherds at the other two stations continued to have the vaccines paid for.
- (f) He feels that he has been treated unfairly by Mr Pardoe over the past 12 months and that there is an agenda to have him dismissed.

The letter concluded by expressing the view that because the performance issues/concerns expressed by Mr Pardoe are subjective and do not stand close scrutiny, these “purported performance issues” should be dealt with by “a more independent person.” The Authority understands that it was envisaged that someone from the Management Committee might become involved in what was potentially a substantial breakdown in the working relationship between Mr Skudder and Mr Pardoe. There was no meaningful response to Mr Rishworth’s letter.

Meeting 1st April 2009 and action plan

[17] Via a letter dated 27th March 2009, Mr Pardoe invited Mr Skudder to a meeting to be held on 1st April 2009. In his letter Mr Pardoe informed that:

I refer to my letter to you dated 23rd February which stated that on my return from overseas, we would get together and agree a plan going forward to ensure that job expectations are understood. We will also agree procedures to be used to improve communication and reporting. It is important these work effectively for everyone to achieve this. The continued efficient operation of the farm is our key objective and all that we do is to achieve this.

Mr Pardoe confirmed that Ms Scott would be facilitating the meeting and his understanding that Mr Skudder would be accompanied by Mr Rishworth. The letter concluded by informing that:

The meeting will only focus on agreeing an action plan and will not, at any stage, discuss the recent correspondence we have received from your lawyer.

Meeting on 1st April 2009

[18] At this meeting, in addition to Mr Rishworth, Mr Skudder was supported by Selwyn Skudder and Mr Marty Charteris. Notes of the meeting prepared by Ms Scott have been produced to the Authority. While Ms Scott opened the meeting by indicating that the reason for the meeting was to discuss and agree on an action plan it seems that Mr Skudder and his support team were more interested in discussing the matter of the warning issued on 23rd February 2009 and Mr Rishworth’s letter of 17th March 2009. I note from Ms Scott’s notes that Mr Skudder “insisted a few times” that he received the warning letter by post the following day (24th February) and this was

denied by Ms Scott and Mr Pardoe.⁴ It appears that not much was achieved at the meeting apart from the fact that a draft action plan was given to Mr Skudder for him to consider and he was asked to contact Mr Pardoe by Friday 3rd April 2009 to advise if he wished to make any changes or add any items.

[19] The Authority has viewed the draft *Action Plan*. It is a very basic document and the requirements for Mr Skudder are simple. Effectively all that was required of him was that he participate in a communication process involving fortnightly meetings, that he participate in a phone call with Mr Pardoe each Monday and Wednesday to discuss the week's work and how it is progressing, and pick up his phone messages each day. There is a requirement for regular vehicle maintenance and to provide stock truck dockets to Mr Pardoe at the fortnightly meetings, for reconciliation purposes. The evidence of Mr Pardoe is that on 9th April 2009, Mr Skudder indicated that he wanted to add to the action plan and would provide some details "by Easter" but nothing was forthcoming from him.

[20] Via a letter dated 27th April 2009, Mr Pardoe confirmed the attached action plan and notified Mr Skudder of a review to take place on 13th May 2009. However, Mr Pardoe also highlighted some things that had not been progressing as planned. These included that, while Mr Skudder had attended the first fortnightly meeting (31st March) he had not attended the second (16th April) and had not given any notification about his absence. Also, Mr Skudder had made one of Monday morning phone calls to Mr Pardoe, as set out in the action plan, but there had been no others. Mr Pardoe also informed that he had left phone messages for Mr Skudder but these had not been returned. Nor had the stock truck dockets been provided.

Mr Pardoe concluded his letter:

This action plan is reasonable instruction. I refer to my letter dated 23rd February which stated the consequences of not following reasonable instructions from management or not adhering to company policies and procedures. I urge you to consider again the consequences in that letter and ask that you make efforts to work to the action plan so positive outcomes can result from our meeting on 13th May. If you have any comments whatsoever, please discuss these with me.

⁴ Mr Skudder does not appear to take issue with the overall accuracy of the notes albeit it is clear that they are simply a summary of the proceedings.

[21] Mr Pardoe wrote to Mr Skudder again on 14th May 2009 about the review meeting that was to take place, now on 19th May. Mr Pardoe informed that the meeting will cover the formal review which will revisit the action plan and:

[“... discuss progress relating to regular communication involving meetings, phone calls and picking up phone messages; vehicle maintenance and truck docket. The objective of these is to keep the communication lines between you and I open and clear. We will talk about what is working, what isn’t working so well and what else needs to be done to ensure the objectives are achieved.

Mr Pardoe also informed that there was a need to discuss some instances where reasonable instructions had been given and not followed. Four instances were listed relating to:

- i. The failure of Mr Skudder to attend the second regular scheduled meeting on 16th April without advice or explanation.
- ii. A request from Mr Pardoe for Mr Skudder to complete pasture covers prior to the meeting on 28th April.
- iii. The failure of Mr Skudder to attend the Pakarae/B5 Field day on 7th May when having been asked to do so.
- iv. A drench resistance test was to be done during “the week 4th May” but to date, this had not been done.

Mr Skudder was informed that he would be asked for explanations about the above “breaches” and that these explanations would be considered and: “a decision made as to what action, if any, will be taken.” Mr Skudder was reminded of the content of the warning letter dated 23rd February 2009.

Meeting on 19th May 2009

[22] Mr Skudder was supported by Selwyn Skudder and Marty Charteris. Ms Scott was in attendance with Mr Pardoe. Notes of the meeting were produced by Ms Scott. A letter from Mr Pardoe to Mr Skudder, dated 20th May 2009, appears to effectively summarise the discussions. The substance of it being:

1. We presented to you an updated employment agreement for consideration.
2. We talked through the Action Plan that has been in place since 1st April, discussed what has gone well and what has not gone so well. You were asked for explanations for the issues that have not gone so well and Selwyn and Marty contributed to these in their capacity as your support people. Attached as Schedule A are the issues covered on the Action Plan, the explanations provided and the considerations.

3. We also covered some additional performance issues that have been of concern and which you were provided with prior to the meeting. We discussed these and obtained from you explanations for your actions. Attached as Schedule B⁵ are the additional performance issues, the explanations received and the considerations.

You are now required to attend a disciplinary meeting. The purpose of the meeting will be to advise you of our decision as to what action is to be taken, which could be no action or a final warning, at which time your employment may be in jeopardy. This decision will be based on our discussions and the explanations that were provided at our meeting on 19th May. We have agreed that this meeting will be held on Friday 22nd May at 3.30 at BDO Spicers. You are welcome to bring support person(s) and we understand that Selwyn and Marty will be attending to support you.

Meeting 22nd May 2009 – Final Written Warning

[23] Mr Skudder was accompanied again by his brother and Mr Charteris. Ms Scott was present with Mr Pardoe. There are no notes available but the general thrust of the proceedings and the outcome appear to be summarised in the final written warning that was given to Mr Skudder. The substance being:

We covered each point of the action plan in detail and discussed areas that were going well and those that were not going so well. Explanations were provided by you with input and comments also received from Selwyn and Marty. Consideration has been duly given to these explanations.

We also covered additional performance issues which you had advised of in writing prior to the meeting. These were covered in detail including explanations from you for each of the points as well as input from Selwyn and Marty. Consideration has been duly given to these explanations.

A copy of the action plan explanations and considerations and the performance issue explanations and considerations have been provided to you.

Based on this information and the responsibilities you have as an [sic] manager, it is essential that you comply with reasonable instructions from your employer. Your continuing non-compliance to follow reasonable instructions from your employer and for not adhering to company procedures are considered to be misconduct. These breaches give Arai Matawai no option but to issue you with a Final Written Warning. A copy of this letter will be placed on your personal file and will remain in place for a period of six months. Further breaches of company policies and procedures and/or of not following reasonable instructions may result in the termination of your employment.

I am again heading overseas for the period 28th May and returning to the office on 13th July. An independent farm consultant will be managing the farms to an agreed plan over that period. He will also be tasked with monitoring an ongoing action plan with you. The action plan is attached. If you have any comments regarding this, please let me know.

[24] It seems that Mr Skudder did not make any comments but his evidence is: "... that none of the alleged performance issues were sufficiently serious to warrant a written warning." Mr Skudder also says that he was not informed about the issue of the requirement to provide pasture cover tests. Mr Skudder also says that he was not

⁵ The Authority has viewed Schedules A and B and they constitute a detailed analysis of the issues discussed and Mr Skudder's explanations.

provided with a written employment agreement with an attached job description until 19th May 2009, which he signed on 12th June 2009. Mr Skudder asks how he could be expected to know exactly what his role was, and be expected to comply, before being provided with “*the information setting these things out.*”

[25] Mr Skudder has provided in his witness statement, a detailed response to the matters that he was expected to give an explanation for. The understanding of the Authority is that these are the explanations that he gave at the meeting on 19th May and again at the meeting on 22nd May 2009. There are no notes of the latter meeting but AMI do not appear to take issue with Mr Skudder’s evidence and I accept it accordingly. There appears to be a consistent thread running through the meetings that took place up to 22nd May 2009. This is that, Mr Skudder (and his support people) seem to have given, what appear to be reasonable explanations, in regard to the issues that Mr Pardoe was concerned about, but these seem to have then been rejected without any explanation as to why. Nor has any alternative version to Mr Skudder’s explanations been advanced.

[26] While Mr Pardoe was out of the country for the period 28th May to 12th July 2009, an independent farm consultant took over his role. Mr Skudder appears to have worked amicably with the consultant (Mr MacGillvary) without any issues arising. Indeed, in a letter dated 4th August 2009, following a review meeting the day before, Mr Pardoe records that:

I had previously met with Lochie MacGillvary from AgFirst and received positive reports about your work during my absence overseas.

Mr Pardoe also acknowledges that Mr Skudder has been cooperative in regard to the requirements of the action plan:

I would also add that, since I returned, I appreciate that you have continued to call me and keep me up to date on farm issues. Our regular phone calls and meetings, and submission of truck dockets and pasture covers, as well as other issues covered in the action plan, are required to be in maintained at that minimum level. We agreed that communication is a two way process and we will work to keep it that way.

We will hold a monthly review meeting to ensure that expectations are clear and that we continue to operate in an effective way. Our next meeting will be on 28th August at a time to be agreed.

But then having given Mr Skudder some positive feedback, Mr Pardoe, rather oddly, inserts a negative note and reminds Mr Skudder that a final written warning remains on his personal file until 22nd November 2009, and that any further breaches may

result in the termination of his employment. The letter ends on a more positive note in that Mr Skudder is thanked for his work.

[27] Unfortunately, the positivity that appeared to have been building did not last long; as we can see from a letter from Mr Pardoe to Mr Skudder, dated 24th September 2009:

You are invited to a meeting to discuss three issues that occurred during the week beginning 14th September 2009. The meeting will be held on Wednesday 30th September 2009 at 3pm at BDO Spicers, 1 Peel Street.

At this meeting you will be requested to provide an explanation for your actions regarding the three issues as tabled below. At the conclusion of the meeting your explanations will be considered. If other action is required to confirm or corroborate an issue, this will also be completed and another meeting held to discuss this additional information. Otherwise a further meeting will be scheduled to advise you of the outcome of the meeting.

The issues are:

1. Early docking which was in conflict with a previously agreed timetable
 You and I met on Monday 14th September at Arai station with the fencing contractors. We were planning to replace an old yard and put up a short fence to make a holding paddock, this would allow us to dock 2 paddocks in the new yard. After discussion you could see the benefit of the new yard and holding paddock. I asked you to delay the docking from this week (14th September onwards) as you had planned, to the end of the month. I explained that the main reason for this was the high numbers of mismothered lambs that result from docking when they are too young. These lambs either die younger as a result or they end up very little and not worth anything. Once again you could see where I was coming from and I took this as agreement as there was no objection at the time.
 Late on Tuesday 17th September, I heard that docking had started (Paddock 1). I was waiting for a call from you to discuss this but none came. I believe you advised the fencers on the Wednesday 16th that docking was starting early and to get the yard ready as docking was going ahead on Saturday 19th (Paddock 4). They were rushing to make it workable. On the Friday, Paddock 2 had been docked and as Paddock 3 was already in the yard I agreed for these to be completed. I reiterated however that docking of Paddock 4 was not going ahead the next day (Saturday) and would wait until later in the month as earlier discussed and agreed.
2. Feeding out a paddock that had agreed to be locked up for hay
 On Friday 18th I noticed that a mob of ewes and lambs, possibly two mobs, had been in the paddock that we had agreed to lock up for hay. They ate most of the feed that had been saved and a consequence of this is the possibility of the paddock not growing enough grass for us to make hay. We could spend money on fertiliser (unbudgeted) to encourage growth and this would be to the detriment of other planned spending for the farm.
3. Late notification of docking tallies
 Before I left you on Friday 18th September, I asked you to call me and leave a message on my phone with the docking tallies of the 3 paddocks that had been done. I wanted the tallies of the wet ewes, dry ewes and lambs for reporting purposes on Monday 21st September. This request was completed on Tuesday 22nd September.

I remind you that you were issued with a final written warning on 22nd May which stated that “Further breaches of company policies and procedures and/or not following reasonable instructions may result in the termination of your employment. This final warning is active until 22nd November 2009. You are entitled to bring a support person to this meeting which will also be attended by Linda Scott from MBE. Dave, your performance since my return from overseas mid-July has been considerably improved however these recent issues are a sign of old habits returning and as you are aware, are not conducive to the effective running of the farm and cannot continue.

Meeting on 30th September 2009

[28] The three issues (above) were discussed. Mr Skudder had prepared a written response. In regard to the matter of the docking of the lambs in contravention of what had been discussed, Mr Skudder’s explanation was that the lambs in question were the early lambs and these are usually docked at the end of August and were now approximately three weeks older and bigger. It seems that Mr Skudder decided that if the docking was left longer, as proposed by Mr Pardoe, they would be too big. But there is no explanation as to why he didn’t discuss this with Mr Pardoe. As far as having stock in a designated hay paddock, Mr Skudder explained that the stock was in the paddock for one night only and he has customarily “locked up” the hay paddocks in mid-October, when the weather is warmer. In regard to the stock tallies, Mr Skudder emailed these to Mr Pardoe at 9:49a.m. on Monday 21st September. Mr Skudder explained that he wasn’t aware that Mr Pardoe required the information for a report that morning.

Mr Skudder on sick leave

[29] Also on 30th September 2009, Mr Skudder attended his doctor. The medical certificate records that:

He has become very stressed and depressed after prolonged conflict at work and it is starting to affect his physical health. I consider that he is suffering significantly from stress and should have 2 weeks off work immediately. He will then be reassessed.⁶

[30] In a letter to Mr Skudder dated 2nd October 2009, Mr Pardoe records the discussions of the meeting on 30 September. Mr Pardoe also records that Mr Skudder is now off work for “stress associated with conflict at work (your doctor’s words).” Mr Pardoe then makes the observation:

I would suggest that the formal nature of the process and the expectations that have been put on you during this time are the cause of your stress as the process is more than likely, very foreign to you.

⁶ On 14th October 2009, Mr Skudder was certified to be off work for a further two weeks.

Mr Pardoe then informs that;

As a result of the meeting on Wednesday, I am now required to submit a recommendation to the Committee of Management (Board) on what action is the most appropriate to take at this time. They will be provided with the documentation produced during this process up until now so they can make a fully informed decision. A meeting will be scheduled with you in due course to advise of the outcome of this decision. Action to be taken could range from no action to termination of your employment.

Inexplicably, while Mr Pardoe appears to recognise that Mr Skudder was then off work for two weeks due to work related stress, the reference to “your doctor’s words” and a further reference to the possibility of the termination of Mr Skudder’s employment, tends to suggest that Mr Pardoe had little regard for Mr Skudder’s current situation.

[31] Mr Pardoe prepared a document; *RECOMMENDATION TO THE COMMITTEE of ARAI MATAWAI INC.* This provided a chronology of events pertaining to matters involving Mr Skudder from 19th February to 2nd October 2009, along with relevant documents, including the two written warnings. A number of options are canvassed as to what could be done in regard to Mr Skudder. Mr Pardoe concluded his summary with a recommendation that mediation be initiated with the Department of Labour. It seems that the recommendation was accepted by the committee. Mr Skudder was subsequently certified by his doctor to be fit for work again from 29th October 2009.

Meeting 3rd November 2009

[32] Via a letter from Mr Pardoe dated 30th October 2009, Mr Skudder was invited to attend a meeting on 3rd November 2009. Mr Pardoe informed that the matters for discussion at the meeting would be:

1. The final written warning dated 22nd May 2009 is still active.
2. It is our intention to extend your final written warning for one month to 22nd December 2009 in light of your absence from work.
3. What is expected going forward.
4. The outcome of the recommendation that was made to the Board after our meeting in September.
5. The rescheduled mediation meeting.⁷

[33] The evidence of Mr Skudder is that on 15th October, he wrote to the Management Committee setting out a written summary/list of what he wanted from the “process.” Summarised, Mr Skudder required:

⁷ Mediation had been scheduled for 22nd October but due to Mr Skudder’s illness was postponed until 26th November 2009.

- (a) To continue as the Manager of Arai Matawai Station (Arai).
- (b) That the Management Committee take into account his 20 years of employment at Arai and what had been achieved due to his experience and honesty and that he be able to use his farming experience and knowledge attained over 45 years.
- (c) To be part of the decision making processes for Arai.
- (d) That all messages and meetings relating to Arai be directed to him and not via other employees.
- (e) In summary, to be actively involved in the decision making, planning and operation of Arai, including budgets, staff management and being made aware of financial information regarding purchases, sales and expenditure.
- (f) To have a Management Committee member or another third party present at the meetings between him and Mr Pardoe.
- (g) That he be treated fairly.

[34] The oral evidence of Ms Scott is that she and Mr Pardoe were told at the meeting on 3rd November, that Mr Skudder had sent his letter to the Board but nobody appears to have seen the letter until then. The understanding of the Authority is that the Board may not have ever viewed this letter and the evidence of Ms Scott is that it wasn't considered to be necessary to "pass it on" to the Board. The further evidence of Ms Scott is that she and Mr Pardoe considered Mr Skudder's requirements, as set out in his letter, and (in summary) concluded that:

- (i) The process was designed to help Mr Skudder improve his performance as a manager but he did not seem capable of performing to the level expected.
- (ii) That Mr Skudder had opportunities available to discuss operational requirements and duties associated with Arai.
- (iii) That Mr Skudder's experience and knowledge of stock was accepted and Mr Pardoe had attempted to treat Mr Skudder as a manager but he had failed to communicate effectively hence making the relationship very difficult. Albeit Mr Skudder's years of service had been taken into account, he was expected to act upon the directions of Mr Pardoe.
- (iv) That Mr Skudder had been included in the decision making process but he had on occasions chosen to deviate from agreed decisions without further consultation, particularly with Mr Pardoe.

- (v) Messages had been left for Mr Skudder on occasions but communication seemed difficult and there appeared to be no certainty that messages would be responded to.
- (vi) It was not accepted that Mr Skudder had been treated unfairly.

[35] The further evidence of Ms Scott (and that of Mr Pardoe) is that during the meeting on 3rd November, Selwyn Skudder and Mr Charteris, in the absence of Mr Skudder, explained that they were concerned about the state of Mr Skudder's health. They informed that Skudder's character had changed during the performance management/disciplinary process and his mental and physical health had been affected. It was their view that it would be best to have Mr Skudder back at work and "getting on with his job." But Mr Pardoe says that he could not agree to this as:

"The problem with David being at his work was that he was not doing the job that the committee of management wanted him to do. David was not managing in the way that his employer wished and he appeared to be resisting being required to manage in a structured way in accordance with direction. As far as I was concerned issues would continue to arise and the stress on David would be unmanaged."

[36] The outcome of the meeting appears to have been that, because of his concerns for Mr Skudder's health, particularly having received the information about this from Selwyn Skudder and Mr Charteris, Mr Pardoe was not prepared to allow Mr Skudder to return to work without some medically supported certainty that he was fit to do so. But Mr Pardoe also appears to have anticipated that there would be continuing performance issues with Mr Skudder that would compound any possible medical issues. Via a letter dated 6th November 2009, Mr Pardoe wrote to Mr Skudder's medical practice seeking a diagnosis pertaining to Mr Skudder's health issues, subject to his consent. Dr Peters responded informing that he could not provide a medical report without Mr Skudder's consent.

[37] Also on 6th November 2009,⁸ Mr Pardoe wrote to Mr Skudder informing him of the outcome of the meeting on 3rd November. The germane content is:

Firstly I need to relay Selwyn and Marty's concerns (which were made during your absence from the meeting at Selwyn's request), about the change in character he has witnessed during this performance management process and how it has affected you mentally and physically. I took this on board immediately as I do want to see your health suffer. I do not want to put you in a position where your personal life is

⁸ According to Mr Skudder's written response (13th November 2009) it seems that Mr Pardoe delivered this letter in person on 9th November.

suffering and I certainly do not want the situation to become too much for you that it significantly affects your ability to work.

On this basis, I am instructing you to take leave, effectively immediately until the mediation date of 26th November. The time will be deducted from your annual leave. This will alleviate the day to day pressures of work and the expectations associated with it. I have an obligation to ensure your health and safety at work and I strongly believe that this is the best action to take under the circumstances. If you disagree with this decision please talk to me urgently.⁹

[38] Mr Pardoe then reminds Mr Skudder that:

1. The written warning issued to you and dated 22nd May 2009 is extended for one month due to your months absence from work which to date is unexplained.¹⁰
2. You are expected to follow plans and instructions as agreed with or requested by me.
3. If you require additional time off work for any reason this should be discussed with me immediately so options can be explored as to how this will be treated. You do not have any sick leave available.
4. The outcome of the recommendation made to the Board after our meeting in September was to initiate mediation with you to work towards a resolution for the problems that are and have been experienced. Mediation was scheduled for 22nd October however this mediation was postponed after a strong request from Marty and your lawyer Doug Rishworth. The reason being that you were off sick due to stress and this would aggravate the situation. We talked at length about why we needed a medical explanation for your sick leave and how we had attempted to obtain this from your Doctor.

It was confirmed that mediation was scheduled for 26th November 2009. The purpose being to “foster a resolution for the problems that to date, have not been successfully resolved.”

[39] Via an email dated 13th November 2009, Mr Skudder advised Mr Pardoe that he was fit to resume work in accordance with his medical certificate dated 28th October. Mr Skudder advised of his intention to “continue work as per that certificate.” Mr Skudder then informed that:

I can confirm that I do not agree with your verbal instructions to take annual leave because of my health. I worked for seven working days (29th-6th Nov). The following Monday (9th Nov) you (Greg [sic] apox. [sic] 6.30am) arrived at my home to tell me “to stay by the phone until Linda had contacted me.” You also, presented a letter that stated I was to have Annual leave straight away. You also requested that I sign a paper to obtain my medical records. I informed you that you needed to discuss this with Marty Charteris or my Lawyer.

⁹ Via a letter dated 13th November 2009, Mr Skudder’s lawyer challenged the right of the employer to direct that Mr Skudder take annual leave without appropriate notice being given.

¹⁰ This is despite earlier acknowledging his concerns about Mr Skudder’s health and then again confirming that Mr Skudder had been “sick due to stress.”

That same morning, you verbally agreed with Marty Charteris to allow me to work from Rockhill Road for Arai Matawai – getting Arai works sheep from the back country and working all week on sorting/dagging/trucking etc taking a half day for tangihanga leave on the Wednesday (Bill Donnelly). There are various witnesses to this work I have done. Plus, you visited Marty’s place approx. [sic] 9.30 am (Friday 13th Nov.) to observe the ewes and lambs going back to Arai.

Also, I have had to use my own vehicle (Thursday/Friday) to complete this Arai work as you took my vehicle from me.

I am fit for work and do not wish to be on Annual leave. Therefore, I will continue to work effectively for the Incorporation as I have done since my return to work.

[40] However, via a letter dated 18th November 2009, Mr Pardoe confirmed his advice to Mr Skudder that he was to take sick leave “effective from 16th November until the mediation scheduled for 26th November.” Mr Pardoe informed that:

As a fair and reasonable employer we are obligated to look after the well being of our employees and if, in our opinion, a situation or illness has, or could affect your health and/or your ability to carry out your duties effectively, then we need to take steps to minimise or eliminate the risk. Given the information we have received, we warrant it serious enough to put you on sick leave.

I have assumed that you would like to be paid for this time off therefore it will be deducted from your annual leave. If you disagree with this and chose not to be paid, please advise me immediately.

There is no evidence that Mr Skudder disagreed with the payment arrangement proposed by Mr Pardoe or anything else pertaining to the content of this letter, but the evidence of Mr Skudder appears to suggest that he believed that he had made his position clear via earlier communications to Mr Pardoe, by objecting to being placed on leave and not being permitted to work. It is Mr Skudder’s view that if his employer did not want him at work, he should have been suspended on pay. The oral evidence of Mr Pardoe is that it was a “Board decision” that Mr Skudder should have to use his leave rather than be suspended on pay.

[41] Mediation took place on 26th November 2009 but was unsuccessful. There is evidence of a “without prejudice except as to costs” offer being made to Mr Skudder. It was rejected on 2nd December 2009, via an email of this date from Mr Skudder’s lawyer to Ms Scott. Mr Hemi also informed that:

David has advised me that he wants to return to work as Station Manager on Arai as soon as possible. Could you please confirm when he can return to work. I have told him that I will contact him tonight with the view of him returning to work tomorrow, Thursday the 3rd of December 2009. Could you please conform this as soon as possible.

The dismissal of Mr Skudder

[42] Mr Skudder did not return to work. Rather, he was dismissed via a letter from Mr Pardoe dated 3rd December 2009; the germane content being:

Termination of Employment

It is unfortunate that we have been unable to satisfactorily resolve the employment relationship problem. We have worked with you over many months to improve the situation. These attempts have been unsuccessful and a resolution hasn't been achieved. You are under a final written warning for not following reasonable instructions which has resulted in trust and confidence in the employment relationship being lost. Therefore, I advise that your employment at Arai Matawai is terminated, effective immediately.

In the next pay day, you will be paid notice of one month in lieu (excluding allowances). Outstanding leave, less any reasonable expenses incurred, will be withheld until the property inspection has been completed. Reasonable expenses refer to any non-return of company property or an unsatisfactory property inspection, e.g. if the house needs to be cleaned.

Tenancy

You are hereby given 14 days notice of the termination of your tenancy. You will be required to vacate the house by 5pm Thursday 17th December 2009. An inspection will be carried out at this time and you are expected to be present. The house should be clean, all your property should be removed, all rubbish taken away, all keys returned and any property belonging to Arai Matawai should remain.

Mr Skudder was instructed to remove his animals from the property by 5:00p.m. 17th December, and to return the farm vehicle immediately. The letter concludes:

For the period to 5pm 17th December 2009, you will not venture on to farm property without authority from the Operations Manager other than to reside in the house and to reasonably take care of your horses and pigs.

[43] While the letter is dated 3rd December 2009, it seems that it was couriered to Mr Skudder the next day. It is unclear from the overall evidence as to exactly when the decision was made to dismiss Mr Skudder, but I conclude that the evidence of Ms Scott is probably the most reliable. Her oral evidence is that following the mediation on 26th November there was a period of "about five days" for consideration of what should happen regarding Mr Skudder and there had been some contact with the Board. Ms Scott says that she was aware that there was meeting on the night of 26th November and she had been involved in discussions with Mr Pardoe about the details of terminating Mr Skudder's employment. Ms Scott attests that on 3rd December 2009, she became aware of the decision to dismiss Mr Skudder¹¹ and she contacted Mr Hemi for the purpose of having Mr Skudder come to a meeting to give him the opportunity to "comment on the decision to terminate his employment." Apparently,

¹¹ In response to a question from Mr Hemi, Mr Pardoe informed that the decision to dismiss Mr Skudder was made by the Board.

the response of Mr Hemi was to question why Mr Skudder would want to attend a meeting just to be told his employment was to be terminated. Ms Scott typed the letter of dismissal on 3rd December. It was emailed to Mr Hemi at 9:35a.m. on 4th December 2009. The evidence of Mr Pardoe is that he also had a similar discussion with Mr Hemi prior to the letter being emailed. Mr Pardoe also said that:

Attempts were made to make contact with David to meet concerning whether this would be the decision. We tried to give him an opportunity to make comment on the action proposed but we felt urgent action was needed.

Mr Pardoe did not explain why “urgent action” was needed.

Legal Analysis and Conclusions

[44] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied when determining whether or not the dismissal of Mr Skudder was unjustified. The Authority is required to consider on an objective basis, whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[45] But as was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer’s actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer’s actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

And then further, in regard to the application of s103A:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer’s actions, the test for justification applies at all stages including the employer’s decision that misconduct has occurred and the employer’s decision to dismiss. Each of these stages are open to scrutiny although this is not to be done in a mechanical way as it is recognised that the lines between each stage are often blurred.

[46] The meaning of s103A was again clarified more recently by a full bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

The actions of the employer up and including the decision to dismiss

[47] Given the background leading up to the dismissal of Mr Skudder, a review of the actions of his employer must include an analysis of the warnings issued to Mr Skudder on 23rd February and 22nd May 2009.

[48] The reason given to Mr Skudder for his dismissal is that, he was: “*under a final warning for not following reasonable instructions which has resulted in trust and confidence in the employment relationship being lost.*” Just why it was felt that trust and confidence in Mr Skudder was lost to such a degree that the employment relationship could not continue, has not been fully explained. While considerable weight appears to have been placed on the final warning issued to Mr Skudder on 22nd May 2009, it is unclear what further transgression/s led to the decision to terminate his employment; a matter that I will return to in due course.

[49] While Mr Skudder did not receive an employment agreement until 19th May 2009, nearly three months after the receipt of the first written warning (23rd February 2009), it appears that AMI were cognisant of the disciplinary procedures set out in the agreement at Schedule ‘B’ – *Code of Conduct and Disciplinary Procedures*, and generally attempted to adhere to those, albeit rather oddly, the introduction at clause 1, informs that:

This policy does not relate to retrospective appointments i.e. appointments made or in existence prior to the date that this Individual Employment Agreement is signed off by the Committee of Management and signed by the Employee (PL).

However, clause 10 of the agreement provides that:

The Employee accepts that the Employment Policies annexed to this Agreement form a binding part of this agreement and the Employee will observe the provisions of the following policies:

-
- Schedule ‘B’ Code of Conduct and Disciplinary Procedures
-

Given that Mr Skudder has signed that he understands and accepts the conditions detailed in the agreement, it seems reasonable to assume that both parties accept that the code of conduct and disciplinary procedures apply.

[50] At clause 2, of the code of conduct (the code) various rights and obligations of the employer and employee are set out. In particular, for the employer:

- a)
- b) Clear statements of Employee's duties and expectations of them
- c) Appropriate feedback and communication on work performance

And for the employee:

- a)
- b) Obey all lawful and reasonable instructions
- c)
- d) Ensure competence and efficiency in the performance of expected duties

Then at clauses 7 and 8 of the code are examples of misconduct and serious misconduct. In regard to the former, where there is "unsatisfactory behaviour" which constitutes misconduct, this: "could lead to the employee receiving an oral warning, a written warning, or dismissal, where a previous written warning has been given." One of the examples of misconduct is:

- a) To disobey, or disregard lawful instruction, either verbal or written, given by the Operations Manager or the Committee of Management.

[51] Then, following from the code, the disciplinary procedures, at clause 1, provide that:

- d) Where it is considered that a breach of the Code of Conduct has occurred and the seriousness of the breach would not warrant immediate consideration of dismissal, the matter is to be dealt with by way of a warning.
- e) There are three types of warnings; an informal oral reprimand (for a minor incident) and oral and written warnings (which arise from the formal disciplinary process).

Then, in regard to misconduct, at clause 2, there is a specific provision for formal oral warnings:

A formal oral warning should be issued in cases of breaches of the Code of Conduct where the act of misconduct is not regarded as serious enough to warrant an immediate written warning.

There then follows a procedure that applies in regard to oral warnings.

At clause 4 there is a provision for written warnings:

Should the Employee engage in misconduct for which an oral warning has been previously given, or in cases where it is more appropriate that a written warning be issued at the outset, a warning is to be issued to the Employee in writing.

There then follows a procedure that applies in regard to written warnings.

[52] The relevance of the foregoing extracts from the employment agreement is that, in regard to the first written warning, Mr Skudder says that he should not have received this. In itself, the warning could not be seen as being of particularly gravity. But the next sanction was a final written warning. This appears to have placed Mr Skudder's employment in considerable jeopardy and it is relied upon by AMI as a substantial factor in regard to the circumstances that led to the dismissal of Mr Skudder. Therefore, it is appropriate to examine the validity of the first written warning.

[53] The background to the issuing of the first written warning is set out earlier in this determination¹² and it related to five matters that were put to Mr Skudder for his explanation. The first two of those matters concerned the 200 lambs. Firstly, it transpired that the lambs were not returned when it was alleged they had been. Nonetheless, Mr Skudder was required to answer an allegation to the contrary. There also appeared to be considerable doubt regarding the substance of the second allegation. In regard to the other three allegations there was a lack of specific detail as to the substance or otherwise of the allegations. Mr Skudder gave what appeared to be a reasonable explanation of his perception of those matters. There is no evidence of any reason being given by Mr Pardoe for the rejection of those explanations before the warning was issued.

[54] Therefore, given all of the circumstances, including Mr Skudder's reasonable explanations, the lack of tangible evidence in regard to the allegations against him and the fact that he had approximately 20 years of apparently, blemish free employment with AMI, I find that the issuing to Mr Skudder of a first written warning was unjustified. I conclude that it would have been more reasonable for Mr Pardoe to have treated, what appear to be relatively minor allegations, as "*misconduct not regarded as serious enough to warrant an immediate written warning*" under the disciplinary procedures; and that an oral warning would have been more appropriate. This is particularly so as the agreement places an obligation on the employer to give "*Clear*

¹² Paragraphs [8] to [10].

statements of Employee's duties and expectations of them." It wasn't until 1st April 2009 that Mr Skudder received an action plan that set out the expectations required of him. Furthermore, a perusal of the job description/manager's responsibilities attached to Mr Skudder's employment agreement, reveals that he was given considerable authority and/or autonomy to carry out a range of duties and responsibilities pertaining to how Arai Matawai Station should be managed and one can easily understand why he was initially confused as to where the line should be drawn between his role and that of Mr Pardoe.

[55] The effect of reducing the written warning issued on 23rd February 2009 to an oral warning, is that if the allegations pertaining to the final written warning of 22nd May 2009 are taken into account, and generally accepted as having at least some substance, albeit perhaps not as much weight as was given to them by AMI, then under the disciplinary procedures, it would have been appropriate for Mr Skudder to have been issued with a first written warning, but not the final warning that subsequently placed his continued employment in jeopardy. I find that AMI were not entitled to rely upon the purported final warning as a contributing factor in regard to the decision to dismiss him. When an employer is seeking to justify a dismissal on a series of warnings, the onus is on the employer to establish that each of those warnings was justifiable.¹³ This is particularly so given the test under s103A of the Act.

[56] But even apart from what I conclude are fundamental omissions by AMI, in regard to observing the code of conduct and disciplinary procedures in the employment agreement, pertaining to the two warnings issued to Mr Skudder, I find that the dismissal of Mr Skudder cannot be accepted as the action of a fair and reasonable employer in all the circumstances. I come to this conclusion because:

1. The final written issued to Mr Skudder on 22nd May 2009 was unjustified for the reasons set out above. Therefore, AMI were not entitled to rely upon it as a contributing factor in regard to the decision to dismiss him.

2. The reasons given for the dismissal of Mr Skudder are unclear. Apart from (or perhaps additional to) the reliance on the purported final written warning, the reason given for the dismissal of Mr Skudder is that "trust and confidence in the employment

¹³ *Northern Distribution Union v Armourguard Security Ltd* [1989] 3 NZILR 262 at 267.

relationship” had been lost. No explanation was given to Mr Skudder via the letter of dismissal. But what I find is most unfair and unreasonable is that this allegation was never put to him with an opportunity to respond before the decision was made.

Fairness and reasonableness clearly required that Mr Skudder had a right to be heard by the decision maker, the Management Committee (apparently), prior to the decision being made to dismiss him. As correctly submitted by Mr Hemi, the Employment Court (Palmer J.) held:

It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting an employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted should be dealt with.¹⁴

There is evidence of a cursory attempt being made to have a meeting with Mr Skudder, prior to confirming that a decision had been made to dismiss him. But the response of Mr Hemi (on behalf of Mr Skudder) was understandable. There was little to be gained by Mr Skudder coming to a meeting simply to be told that a decision had already been made to dismiss him and that effectively, he was going to be presented with a *fait accompli*.

3. It has to be accepted, I find, that Mr Skudder was not entirely blameless in regard to the circumstances that lead up to his dismissal and that is a matter that will be addressed as it pertains to appropriate remedies due to him. However, that does excuse the cavalier manner in which he was dismissed.

4. Neither does there appear to be any real substance behind the dismissal. It seems that AMI took into account the matters that were raised with Mr Skudder via the letter dated 24th September and then discussed at the meeting on 30th September 2009, as well as the difficulties pertaining to the uncertainty of Mr Skudder’s health, following the concerns expressed by Selwyn Skudder and Mr Charteris, and Mr Skudder’s reluctance to provide a medical report, but this is not at all clear. But given that none of this was ever communicated to Mr Skudder for a response, the substance of the dismissal remains questionable at best. Overall I find that there is not sufficient evidence to satisfy the established test set down by the Court of Appeal in *Northern Distribution Union v BP Oil Ltd*:¹⁵

¹⁴ *Irvines Freightways v Cross* [1993] 1 ERNZ 424 at 442.

¹⁵ [1992] 3 ERNZ 483.

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship.

5. It is clear that the relationship between Mr Pardoe and Mr Skudder was always going to be difficult given that Mr Skudder had previously had more or less total autonomy to manage as he saw fit, providing that the outcomes were satisfactory to AMI. And they apparently were for the better part of twenty years. While it is obvious that Mr Skudder had real difficulties in adjusting to the more corporate management style that AMI has chosen to adopt as being, most probably, more appropriate in today's world, it seems to me that the Management Committee turned a blind eye to the consequences and real difficulties that developed and that led to a dramatic and detrimental affect on a longstanding and loyal employee, whom had substantially contributed to the success of AMI over many years. It is difficult to determine what really should have been done about this, but at the very least, one would have expected that someone from the Management Committee would have actively intervened in an intermediary role to assist Mr Skudder (and possibly Mr Pardoe) in what was clearly a very difficult transition for both of them. It seems that rather than offer some assistance to Mr Skudder or talk to him about possible options, the Management Committee chose to let Mr Pardoe embark on a course that inevitably was going to lead to the dismissal of Mr Skudder. This is even more remarkable when it was obvious to even a causal observer, (as submitted on his behalf) that Mr Skudder wished to have someone from the Management Committee involved. It has been submitted for AMI that Mr Skudder could have made a personal approach to Board members at any time for assistance. Perhaps this is true, but my observations of Mr Skudder are that he is a proud man and of the "old school" with a somewhat taciturn manner and hence he, most probably, would have found it difficult to personally ask for assistance.

[57] In summary, I find that the dismissal of Mr Skudder was not the action of a fair and reasonable employer in all the circumstances. This is due to the obvious procedural deficiencies but also the dismissal was substantially lacking in merit. It follows that I find that the dismissal of Ms Skudder was unjustified and that he has a personal grievance for which remedies are available.

Remedies

[58] Having determined that Mr Skudder has a personal grievance, pursuant to s 123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for 1 or more of the following remedies.

Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s 128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been lost remuneration because of the grievance, the Authority:

[...] must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

And at s128(3):

Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

(a) Reimbursement of wages

[59] Mr Skudder was paid \$55,000 per annum. He seeks reimbursement of wages on three counts to a total sum of \$56,754. Firstly, he claims for lost remuneration for three months pursuant to s128(3) of the Act (\$13,750). In addition to this Mr Skudder claims the difference between his earnings with AMI and that earned at his new employment at a local meat plant; claiming a net difference of \$15,504. Then, Mr Skudder claims loss of wages for a further six months in the sum of \$27,500. Finally, Mr Skudder seeks reimbursement for the one month of annual leave that he was required to take when he says that he was fit to resume work.

[60] The evidence of and submissions for Mr Skudder, are that he found new employment in February 2010 at a local meat plant. But there is only minimal evidence from Mr Skudder about this. Nonetheless, I accept that he was unemployed for a very short period of time. While the dismissal was effective from 3rd December 2009, Mr Skudder was paid one month's notice. Therefore, his loss of wages accrued from 4th January 2010. The actual date of the commencement of Mr Skudder's new employment at the meat plant has not been identified (only February) and Mr Skudder

has not provided any evidence that assists. But even if it is allowed that it was mid-February (albeit that is not certain), then Mr Skudder was only without wages for a total of six weeks (not three months). Therefore, the total loss of wages for which Mr Skudder can be reimbursed for this period is the gross sum of \$6,346.15 ($\$1,057.69 \times 6 \text{ weeks}$). His closing submissions say that there was a seasonal loss of income between February and October 2010 but there is no evidence about this nor have any calculations pertaining to Mr Skudder's income at the meat plant been provided to show the difference in the wages as claimed, or for when. There is only a letter from a Human Resources Co-ordinator at Mr Skudder's new place of employment and this does not assist. Furthermore, there is no evidence from Mr Skudder in regard to any attempt to obtain alternative employment that may have utilised his considerable experience as a farm manager. Therefore, I find that any loss, other than the above sum, is unproven and/or unmitigated, hence it cannot be considered further.

[61] In regard to the claim for the one month's holiday pay, the evidence produced by AMI shows that Mr Skudder had used his sick leave entitlement (20 days). Due to the doubt raised by Selwyn Skudder and Mr Charteris about Mr Skudder's overall welfare in their discussion with Mr Pardoe and Ms Scott, this particular issue about whether Mr Skudder was fit for work remained problematic, particularly given that Mr Skudder would not assist by consenting to a medical report being provided by his doctor. Therefore, it seems to me that Mr Pardoe was left with something of a dilemma. If he had allowed Mr Skudder to return to work in the knowledge that he may not be fit to do so and detrimental consequences to Mr Skudder arose from that, then AMI may have been faced with a health and safety issue, or an employment related stress claim. On the whole I am inclined to accept that Mr Pardoe acted reasonably in the circumstances by not allowing Mr Skudder to return to work until the pending mediation took place, where presumably, both parties were hopeful of a satisfactory outcome. Given that Mr Skudder had exhausted his sick leave entitlement, then it appears that Mr Pardoe effectively had three choices; suspend Mr Skudder on pay, use some of his accrued annual leave entitlement, or not pay him. The second option was chosen but it seems to me that given all of the circumstances, particularly the fact that Mr Skudder was a long serving employee and a crisis situation had arisen in the employment relationship, to which both parties required a solution, a more fair and reasonable decision would have been to have suspended Mr Skudder on full pay until the mediation had been concluded. Therefore, I find that because Mr Skudder

never consented to his accrued holiday pay being used he is entitled to reimbursement of one month's holiday pay in the gross sum of \$4,583.33.

(b) Compensation

[62] Mr Skudder claims the sum of \$30,000 under s123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Given the usual awards of the Authority (and the Employment Court), this is a very high claim. The evidence of Mr Skudder is that he was “incredibly hurt and upset” about the way he was treated having given twenty years of loyal service to AMI. Mr Skudder attests that he is a proud person and the circumstances pertaining to his dismissal are the hardest thing that he has had to deal with. Mr Skudder also says that another matter that made the dismissal “a lot worse” was that he was only given two weeks notice to vacate the farm house that he was living in and he had to be out only a week before Christmas. Mr Skudder says that:

I felt that this was a further kick in the guts after my 20 years of service. I felt that I was treated like a nothing. This hurt and still hurts.

Mr Skudder says that there was no urgency for him to vacate the house as it remained vacant for six months after he left and this is not contested by AMI. There is further evidence from Mr Charteris and Selwyn Skudder about the affects on Mr Skudder relating to his dismissal. In particular, Mr Charteris attests to Mr Skudder being dedicated to his job for 20 years and being “shattered” by the way he was treated.

[63] I accept the evidence pertaining to the affect of the dismissal on Mr Skudder. It is not the role of the Authority to impose a penalty upon the employer in regard to their behaviour in such circumstances. But I do find that Mr Skudder was affected substantially by what can only be seen as a particularly vindictive and pernicious attitude being adopted by Mr Pardoe and the Management Committee in regard to their decision to not only suddenly dismiss Mr Skudder, in a callous and heartless manner, after twenty years of loyal service, but then humiliating him further, by unreasonably forcing him to rapidly vacate his home; for no good reason, with Christmas pending. The overall hurtful affects on Mr Skudder of such actions are proven to my satisfaction and warrant a substantial award of compensation in the sum of \$18,000.

Contributory Fault

[64] Pursuant to s 124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided:

- (a) consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[65] A submission for AMI is that if Mr Skudder had done what he was lawfully and reasonably asked to do, then his grievance would not have arisen. A further submission is that Mr Skudder refused to accept Mr Pardoe's authority as the Operations Manager. And he made conscious decisions to ignore the instructions that were given to him. I accept that there is some merit in those submissions as there is evidence that Mr Skudder did not see fit to cooperate with Mr Pardoe on a number of occasions. This was particularly evidenced by Mr Skudder's refusal to reply to messages left for him and generally failing to communicate with Mr Pardoe in regard to changing matters that had been agreed to, or failing to pay Mr Pardoe the basic courtesy of notifying when he was unavailable to attend to various matters. On the whole I find that there is some merit in the view advanced by AMI that Mr Skudder adopted an attitude that he knew best. I also conclude that Mr Skudder more probably than not, resented and reacted against the appointment of Mr Pardoe and the loss of autonomy that resulted from that appointment. While Mr Skudder had considerable and proven experience as a manager, nonetheless he was required to accept the authority of Mr Pardoe even if he disagreed with his decisions as to how Arai Matawhai should be managed. Therefore, I find that the actions of Mr Skudder did contribute towards the situation which gave rise to the personal grievance to an extent that the compensation awarded to him under s123(1)(c)(i) should be reduced by 20%.

Determination

[66] For the reasons set out above, I find that Mr Skudder was unjustifiably dismissed. Pursuant to section 123(1)(b) of the Act, Arai Matawai Incorporation is ordered to pay to Mr Skudder the gross sum of \$6,346.15 for loss of wages; and under section 123(1)(c)(i) of the Act, the sum of \$14,400 (\$18,000 less 20%) as compensation. Arai Matawhai Incorporated is also ordered to pay to Mr Skudder the gross sum of \$4,583.33 as reimbursement of the accrued holiday pay that was wrongly utilised to pay him whilst absent from work for one month.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority