

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 38
5286229

BETWEEN GRAEME TOD
 Applicant

AND SATARA CO-OPERATIVE
 GROUP LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: D Jacobson, Counsel for Applicant
 M Beech and S Grice, Counsel for Respondent

Investigation Meeting: 4 and 5 August 2010 at Tauranga

Submissions Received: 19 August and 10 September 2010 for the Respondent
 2 September 2010 for the Applicant

Determination: 27 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Tod, brings two matters to the Authority for determination. Firstly, Mr Tod says that his employment was affected to his disadvantage by an unjustified action by his employer, Satara Co-operative Group Limited (“Satara”). The alleged unjustified action and disadvantage relates to a warning issued to Mr Tod, dated 18th May 2009. Mr Tod also claims that he was unjustifiably dismissed, effective from 27th May 2009. Mr Tod seeks that the Authority find that he has personal grievances and award to him various remedies including loss of wages and compensation. Mr Tod also seeks that penalties be awarded against Satara for alleged breaches of the express and implied terms of his employment agreement. Conversely, Satara deny any wrongdoing. The company says that both the warning and the dismissal were justified due to the poor performance of Mr Tod.

[2] The Authority heard evidence from Mr Tod and Mrs Pamela Tod. For Satara; there is evidence from Mr Paul Moriarty, the Chief Financial Officer, Mr Leslie Anstis, Chief Operating Officer,¹ Ms Candida Gray, Human Resources Manager, and Ms Jewel Ahomiro, Site Manager. A comprehensive and agreed bundle of documents has also been produced. All of the evidence available, along with comprehensive submissions, have been closely considered, albeit they may not be specifically referred to in this determination.

Background facts and evidence

[3] Satara is a company that specialises in the processing, packing and exporting of green and gold kiwifruit. Mr Tod had an employment relationship with Satara going back to June 1998, albeit the company has had two name changes during that relationship. Initially Mr Tod was employed by Bay of Plenty Fruitpackers Limited which changed its name to BK Mergeco Limited which then transformed into Satara Cooperative Group Limited.

[4] On 4th July 2002 Mr Tod signed an employment agreement with BK Mergeco Limited. At clause 4 of this agreement it is recorded that Mr Tod's "start date" with the company was 6th July 1998. In the introduction to the agreement (at D.) it is provided that:

The company may change its name from BK Mergeco Limited to some other title. In this event, the terms and conditions as set out in this agreement will remain unchanged.

[5] Mr Tod held a number of positions during his employment. He commenced his employment as a kiwifruit orchard casual worker and then became an Orchard Manager. During the 1999 kiwifruit season he took on the role of Night Shift Line Manager at the Satara processing plant located at Collins Lane, Te Puke. In 2003 Mr Tod was promoted to Area Orchard Manager. In 2005 he was appointed to the position of Day Shift Line Manager with the responsibility for packing kiwifruit at the Collins Lane site.

¹ At the material times pertaining to Mr Tod's claims, Mr Anstis was the General Manager of Operations.

[6] The evidence of Mr Tod is that due to an unacceptable gold kiwifruit loss for Satara in 2006, a decision was made to upgrade the Collins Lane site and it was rebuilt during the summer of 2006/2007. Mr Tod was subsequently approached in February 2007 to consider the new role of Site Manager for Collins Lane. Mr Tod says that after careful consideration and “assurances of support and training” he agreed to take the new job. Mr Tod started in his role as Site Manager on 1st April 2007. He reported to Mr Ian Vandernagle, the General Manager of Operations at that time. It appears that Mr Vandernagle resigned in April 2008, which would have been during the peak of the kiwifruit season.

[7] The evidence of Mr Tod is that there was another unsatisfactory gold fruit loss incurred by Satara in 2007. He says that when the packing for the 2007 season began at Collins Lane, it was still a “construction zone” and the building, cool stores and amenities were not completed until late May 2007. Mr Tod says that he received “virtually no training” and he learnt how to run the packing machine as the packing went along. Mr Tod attests that he spent most of the summer of 2007/2008 making modifications and improvements to the grading machine and the work site.

[8] It appears that there were some issues in regard to management continuity. The evidence of Mr Anstis², the General Manager of Operations from January 2009, is that upon the resignation of Mr Vandernagle in April 2008, Mr Wes Anderson-Smith, the Commercial Manager, picked up the responsibility for operations management. Then in mid-2008 the Chief Executive Officer, Mr Murray Gough, became ill and Mr Anderson-Smith took on the role of Acting CEO while also continuing to have the responsibilities of Commercial Manager and Operations Manager.

[9] Clearly Satara were looking for a better year in 2009. On 5th December 2009, Mr Moriarty, the Chief Financial Officer, sent an email to the Satara site managers, including Mr Tod. Mr Moriarty informed of the draft 2009 budget for the business and the need for the site manager’s input regarding, in particular, KPIs for each site. Mr Moriarty informed that:

You will own these budgets and have accountability for performance against them so we are very keen to get your input, agreement etc.

² And also Mr Tod.

[10] Mr Tod met with Mr Moriarty on 19th December 2008. Mr Tod was on leave at the time but he understood that it was important that he met with Mr Moriarty. They discussed appropriate production targets for the Collins Lane site for 2009. The evidence of Mr Tod is that he felt that if there was a “good season” and all went well, it was possible for the site to produce 0.4 bins per man hour. But Mr Moriarty says that he thought that Mr Tod’s projected target was too high and “unachievable” as it was higher than had been achieved in 2008. Mr Moriarty says that “following discussion” with Mr Tod, it was agreed that a lower production target for 2009, than that suggested by Mr Tod, would be entered into the draft budget model. This figure was 0.38 bins of gold kiwifruit per man hour.

[11] There is some disparity between the evidence of Mr Tod and Mr Moriarty in regard to the discussion on 19th December 2008 about the 2009 production target for the Collins Lane site. Firstly, Mr Tod says that the meeting only lasted ten minutes. But in response to a question from Mr Beech, Mr Moriarty says that his meeting with Mr Tod lasted “one hour maybe two.” Even allowing for the not insubstantial margin in Mr Moriarty’s time estimation, it seems more probable that the meeting between the two men lasted somewhat longer than Mr Tod says. I come to this conclusion on the basis that it appears obvious that the setting of the 2009 production figures for the Satara sites was an important step in regard to Mr Moriarty preparing a budget for the forthcoming season. Mr Moriarty had previously met with other site managers, as a group (on 11th December 2008) and presented the budget model: “... showing the fundamental importance of agreed KPIs to the financial budget.” Mr Moriarty says that in an “open session” the other site managers: “... discussed and debated their relative performances in 2008 and agreed their targets for 2009.” Because Mr Tod was unavailable to participate in the group discussion, this led to Mr Moriarty meeting with him separately. Mr Moriarty says that he presented Mr Tod with the same budget model and showed him how the KPIs “drove the budget,” and also the targets agreed by the other site managers for the 2009 season.

[12] A further important difference in the evidence of Mr Tod and Mr Moriarty is that Mr Tod believes that he was only giving “an indication of what was possible.” The evidence of Mr Tod is that: “I believed this was just a discussion not a minimum target setting process.” But Mr Moriarty says that he does not accept that it was “just a discussion” with Mr Tod or that Mr Tod was just giving “an indication” of what

production was possible. In support of this view Mr Moriarty refers to the email to the site managers dated 5th December 2008 and he also says that he: "... made it clear [to Mr Tod] that I was setting the budget." Given the overall evidence regarding the setting of the production targets and their importance to the financial planning for Satara, I conclude that it is more probable than not that Mr Tod would have (and most certainly should have) understood that the production target for the Collins Lane site (0.38 bins per man hour) was the budgeted expectation.

The 2009 season

[13] Mr Anstis commenced his role as General Manager of Operations for Satara in January 2009. He has worked in the kiwifruit industry for approximately 30 years having held a variety of management roles in that time. In particular, he has been involved with the handling and processing of gold kiwifruit since the crop was first released in the late 1990s. From January 2009, Mr Anstis was responsible for all packing, cool storage and logistics activities undertaken by Satara across its various sites.

[14] The gold kiwifruit packing season started at Collins Lane around 23rd March 2009. In an email dated 28th March 2009, Mr Anstis informed Mr Tod that he had an expectation that the plant would process an average of 65 bins of Hayward (green) kiwifruit per hour and 40 bins of gold fruit per hour, without losing the focus on quality. Mr Anstis concluded that these figures were "modest" given the equipment available. Mr Tod says that the 2008 production figure for gold fruit was 25 bins per hour and that he told Mr Anstis that he felt that the expectation (40 bins) was too high. Nonetheless, in an email to Mr Anstis dated 30th March 2009, Mr Tod informed that "ideally" he would like to see 600 bins of gold kiwifruit per day coming into the plant which would appear to be around 33 bins per hour for two nine hour shifts. [It seems appropriate to note at this point that while the budgeted production for the Collins Lane site was 0.38 bins per man hour, most references to production are in terms of bins per working hour or 9 hour shift. The Authority understands that the actual hourly or daily production is dependant on the number of staff that are available on any given day, hence the bins per man hour reference. For example; the production cost reporting programme (KiwiTracker) used by Satara (1/05/2009), shows a target staff of 80 and target bins per man hour of 0.36 or 234 bins per shift. But over a

period of 22 days the average staff number was 73.23 and the average number of bins per man hour was 0.34 and 238.8 per shift.]

Performance Concerns

[15] Mr Anstis says that after observing the “usual challenges” at the beginning of the season relating to new staff and the fruit, it became apparent to him that the performance of the Collins Lane packhouse was not what he would have expected for the machinery at the site, or even up to what Mr Tod thought could be processed. Mr Anstis attests that he was bringing the attention of Mr Tod to “matters” as they came up and that he and Mr Tod; “frequently discussed issues of productivity and quality.” Mr Anstis says that Mr Tod “continually” referred to physical damage to the fruit as a major problem in meeting the quality standards. Mr Anstis responded by suggesting, among other things, that the packing staff inspected the fruit to determine where (if at all) the damage was occurring. In response to the quality issues, via an email dated 20th April 2009, Mr Anstis informed Mr Tod of certain action to be taken including:

For week 16 reduce speed if necessary (hopefully no less than 25 bins/hr).

Mr Anstis says that slowing the processing down did not result in an increase in quality and that Mr Tod did not meet even the reduced target, as the packing analysis for the week 23rd April to 27th April 2009, shows an average of 23.4 bins per hour.

[16] A further problem arose on 21st April 2009 when Zespri put the Collins Lane site “on hold” because the fruit inspection audit conducted at the wharf found that the quality standard had not been met. According to Mr Anstis, the consequences of being put “on hold” are significant, in that Satara have to prove to Zespri that the “problem” production line and/or lines has been identified, and that appropriate corrective action has been taken. This usually means repacking the fruit. Sometimes the fruit is returned from the wharf and if Satara cannot replace the product, penalties are payable. As a result of this problem arising, Ms Ahomiro was seconded from her role as site manager at Totara Street (Mt Maunganui) to Collins Lane, to assist with the repackaging. Mr Anstis visited the Collins Lane site on 22nd April 2009 and via an email to Mr Tod of the same date, he recorded his concerns and his observations regarding inappropriate work practices on the part of some staff.

[17] Mr Anstis met “informally” with Mr Tod on 28th April 2009 to discuss issues at the packhouse. In an email to Mr Anstis of the same date, Mr Tod records his

concern that the packing targets for Collins Lane were set too high and that “this pressure” resulted in a higher than acceptable level of physical damage to the gold fruit. Mr Tod also expressed his disappointment that the facility and staff at the Totara Street site had not been utilised. Mr Anstis says that this suggested to him that Mr Tod expected Totara Street to “tidy-up” after him rather than Mr Tod ensuring that his packhouse did its job properly. Also, Mr Anstis did not support Mr Tod’s view that the targets were too high for that period of the season; nor did he believe that the targets had been, or were, the contributing cause of the failure in quality. Mr Anstis attests that he came to these conclusions on the basis that:

- a. At that point in time the average YTD packing rate was about 27 bins per hour which was well within the capability of the machine.
- b. The predominant issue with the failed fruit was physical damage.
- c. The quality controllers and the Quality Manager frequently commented that the issue was physical damage to the fruit and that the majority of it was old which should be picked up in the packhouse.
- d. Various staff, including Ms Ahomiro, were complaining about the lack of organisational management at Collins Lane and this was supported by the personal observations of Mr Anstis in regard to the packing, coolstore and repacking operations.
- e. The fruit being processed at that time was of a nature that the skin was more elastic and less prone to damage.

[18] The evidence of Mr Anstis is that he was: “... starting to form the impression that Collins Lane (the company’s flagship site and Gold champion) was not functioning properly and the core issue was Graeme’s management.” Mr Anstis decided to meet with Mr Tod to: “... discuss his performance with a view to improving it.” Mr Anstis informed the Authority of the various (8) reasons why he decided to meet with Mr Tod promptly, rather than wait to the end of the kiwifruit season. The reasons (summarised) included :

- (a) Loss of production, higher storage costs and the potential for grower dissatisfaction and movement to a competitor.
- (b) The profitability was lower than expected.
- (c) The “on hold” issues with Zespri including the effects of repacking fruit.
- (d) Giving Mr Tod an opportunity to prove that he was capable of managing the site.

[19] At 7:58a.m. on 30th April 2009, Mr Anstis sent a cryptic email to Mr Tod:

Can I see you at 1.00pm.

Then at 8:31a.m, a further email from Mr Anstis to Mr Tod:

Postpone Please. Will advise later in the day.

Later in the day, Mr Tod had a letter delivered to him by Ms Gray, the Satara Human Resources Manager. Apparently (and prudently), Ms Gray had advised Mr Anstis of the correct procedures in regard to addressing the performance concerns, albeit given that Mr Tod was required to address some serious issues, he was given no time to prepare as he was required to attend a meeting at 4:00p.m. that day (30th April), or at 8:30a.m. on 1st May 2009. The letter, over the signature of Mr Anstis, informed Mr Tod that:

1. Over the past few weeks I have been discussing some concerns about your performance with you. I remain concerned about your performance specifically areas which relate to:
 - Poor productivity
 - Management of staff - staff do not take all possible steps to ensure physical damage is not in the trays.
 - Targeted repack figures as outlined in my email to you dated 22 April 2009 were grossly underachieved.
 - Lack of order and timeliness in supplying fruit to vessels.
 - Overall your site is not well managed.
2. I intend to meet with you to discuss options to assist you to improve including putting together a Performance Improvement Plan. At the meeting we will work together to finalise this Improvement Plan.
3. The purpose of the Performance Improvement Plan is to help you achieve a satisfactory level of performance. However I must point out that this issue is serious and if your performance does not meet a satisfactory level, disciplinary action may be taken against you.
4. I require you to attend a meeting with me in the HR Manager's office on either **Thursday 30 April at 4pm** or **Friday 1 May at 8.30am** to discuss my concerns and the Improvement Plan. During this meeting you will have an opportunity to provide any comments or explanations.
5. After the meeting I will finalise the Performance Improvement Plan and provide you with a copy.
6. At the meeting I will be accompanied by Candy Gray – HR Manager. You are strongly urged to have a representative with you. You may also wish to bring a support person.

[20] Mr Tod attests that attached to the letter were several KiwiTracker production reports. He says that the reports were not correct as they showed the labour costs for both shifts but only the trays produced by the day shift. Despite the short notice of the

meeting Mr Tod opted to meet that afternoon as he felt that: “I could explain things and clear it all up.”

The meeting on 30th April 2009

[21] The meeting took place at 4:00p.m. Mr Tod was accompanied by a support person, Mr Alasdair Sutherland. Notes of this meeting (and others) have been produced to the Authority. The discussion largely centred on the expectations of Mr Anstis in regard to an improved performance from the Collins Lane site and conversely, Mr Tod’s view of what was achievable in the circumstances. A key exchange is recorded as follows:

Les: Where to from here then? The site is not performing.
 Graeme: Specifically where it [sic] the site not performing?
 Les: Timliness,[sic] productivity, quality, cost control (e.g. Sunday wages, I flagged early on) service – internal.
 I see two solutions and I would like you to go away and think about them;
 1) I want you to improve production to achieve a satisfactory outcome.
 I know the site is complex. You need to drive your staff to make sure they do the deliverables. We want you to improve.
 2) We offer you a position at Griffin Road which is a simpler model.
 There would be no change in remuneration. It is a simple site to manage. Your current site is complex and you cannot afford not to perform.

[22] There was some further discussion about the productivity problems with Mr Anstis highlighting that the “spotlight” was on Mr Tod. A further meeting the next day was agreed to.

The meeting on 1st May 2009

[23] Mr Tod attended this meeting alone. He says that he did not have time to organise a support person but he also says that he was “open minded” that “we could work this out.” Also, Mr Tod confirmed when asked, that he was happy to proceed without a support person. Following on from the previous meeting, Mr Tod informed that he wished to remain in his role at Collins Lane “with support” to which Mr Anstis responded:

The option of Collins Lane* may not exist in the future. Collins Lane will be a serious challenge, if that is your decision. It is your call. You need to step up from where you are to where I want to see you. It may be more achievable at Collins Lane*³ due to the reduced complex, but your choice. There is an offer on the table to support you. You know Collins Lane is more complicated.

3. *It seems that this may be a mistake in the transcript as it appears more likely that this reference would be to Griffin Road.

[24] There was some discussion about the number of people working at Collins Lane and whether the figures were correct and then Mr Anstis informed that:

Helping Collins Lane is like running into brick walls, nothing happens, but if it does, it is so slow! Girlie [Ms Ahomiro] does find it difficult to help you. Heather and others say it is hard to offer help. They get frustrated at their inability to make a difference.

[25] Mr Anstis presented to Mr Tod a document headed *Performance Collins Ln Date 1/05/2009*. It sets out what Mr Anstis refers to as “specific and measurable targets” for the three areas:

Packhouse *Coolstore* *Personnel*

Then for the first two areas there are performance categories, namely:

Productivity *Costs* *Quality* *Service*

Against each one of the performance categories are the performance targets (28 in total) for example: *Packhouse – Productivity – 1GKCK 33 Bin/hr (Avg for remaining of the season)*. In regard to the personnel function, the target is: *A strong integrated well trained cohesive team that strives to maintain the productivity and quality.*

[26] The notes of the meeting record, and the evidence of Mr Anstis (and Ms Gray) is, that Mr Anstis discussed each of the targets with Mr Tod and sought his input. The notes also record that Mr Tod affirmed on four occasions that the targets were “reasonable”(x1) or “achievable”(x3). The evidence of Mr Tod now is that although he: “... may disagree with figure applied, it is measurable, eg, 36 bins per man hour on Gold.’ Mr Tod now also says that many of the “issues raised are vague and not measurable” and he gives examples. But there is no indication that he felt this way when the performance measures were discussed at the meeting on 1st May 2009. Mr Anstis informed Mr Tod that: “We will look at this each week to see how you are going.” It was confirmed that the next meeting would be on 8th May 2009.

[27] However, almost immediately after the meeting, Mr Tod clearly had second thoughts about the performance targets that had been set and he visited Ms Gray and asked her to record in the minutes of the meeting that he didn’t think that the targets set were fair. On the advice of Ms Gray, Mr Tod went to Mr Anstis and asked to change some of the targets as he felt they were “unfair.” The evidence of Mr Tod is that Mr Anstis: “... made it clear that he [Mr Anstis] was very experienced in the industry and would not be changing anything. I also asked him if he would have any understanding if some of the targets were not met.” Mr Tod says that the response of

Mr Anstis was that all of the targets must be met “without exception” and there was little or no room to move. Mr Anstis confirms that Mr Tod raised concerns about the targets but says that: “I also told him that a degree of reasonableness would apply provided there was a plausible explanation. It was not my intention to penalise him if he just fell short of the targets.”

[28] Mr Anstis visited the Collins Lane site on 2nd May 2009 and asked Mr Tod if he would consider moving to the position of site manager at Griffin Road. Mr Anstis says that this is a smaller and less complex site and it was “well within” Mr Tod’s capability to run that site. Mr Anstis says that he made this offer to assist Mr Tod and provide him with an alternative as: “I could see he was struggling at Collins Lane.” Mr Anstis also attests that in order to assist Mr Tod to meet the revised targets, Ms Ahomiro and another employee, Ms Shannon, were brought in to help Mr Tod. Mr Anstis also says that he observed that fruit was running across the grading table without any staff manually checking it and was just “vision graded” by the machine. He raised this matter in an email to Mr Tod on 5th May 2009. In another email the same day Mr Anstis raised a concern about the quality of product being sent to the wharf. In regard to the matter of the inspection of the fruit on the grading table, Mr Tod has produced a brief note, dated 5th May 2009, from Ms Gillian Peake, the Grading Supervisor (day shift). Ms Peake informs that:

In the last two weeks we have had all grading tables manned by graders and at no time have we had fruit going past without being looked at.

But Mr Anstis maintains that this is not consistent with his observations and also attests that Mr Tod never provided this note to him; nor did Mr Tod respond to the email from Mr Anstis or discuss this matter at any of their meetings.

[29] The further evidence of Mr Anstis is that on 4th May 2009, Zespri placed the Collins Lane site on hold because the quality standard was not met.

[30] On 7th May 2009 Mr Tod met with his lawyer, Mr Jacobson, who wrote to Mr Anstis on 8th May seeking to postpone the scheduled meeting for that day, largely on the grounds that Mr Jacobson was unavailable to attend the meeting, and there were a number of concerns about “the process” followed to date. Mr Anstis says that he was not prepared to cancel the meeting as the gold kiwifruit season was running out and the performance issues had to be addressed promptly. Mr Anstis was also of the view

that as the meeting had been scheduled for a week, Mr Tod had ample time to arrange for a representative to attend and Mr Jacobson had only been instructed the evening before.

The meeting on 8th May 2009

[31] Mr Tod informed that his lawyer had told him not to say anything and it appears that he was only prepared to listen to what Mr Anstis had to say and take notes. The offer of the Griffin Road position was reiterated and Mr Anstis was seeking a response as to Mr Tod's position on this. Mr Anstis indicated that some of the "challenges" at Collins Lane would be difficult to resolve and that it would be beneficial for Mr Tod and Satara, if Mr Tod accepted the Griffin Road job. Mr Tod says that he believes that he had made it clear that he wished to remain in his role at Collins Lane.

[32] There was discussion about the production figures for the past week and a conclusion that the target of 300 bins per shift per day had not been met in the past week but due to the weather, there had only been three days of production. The notes of the meeting record that Mr Tod was given an opportunity to make a response but he declined to do so. Mr Anstis also expressed a number of other concerns to which Mr Tod did not respond. The position of Mr Anstis is summarised in the following extract from the notes:

Where to from here? From last week I have not seen any significant shifts. If it doesn't improve then we will be heading towards disciplinary procedure that will lead to dismissal. The current practice is totally unacceptable. The next meeting is next Friday at 3.00pm with data of this week. Week 19 will have finished and we will know about J product. At that meeting if we do not see any improvement we will be taking the next step.

Mr Tod was informed that the next step would be a formal written warning.

[33] The notes record that a relevant point arose near the conclusion of the meeting in that Mr Anstis informed Mr Tod that if Mr Tod thought the targets set were not achievable then: "... *you need to come back with what is achievable.*" Ms Gray then asked Mr Tod to put in writing the production targets that he "*thinks are reasonable.*" Mr Tod advised that he would be able to do this by Wednesday 13th May 2009. The evidence of Mr Tod is that he stated that his lawyer was "going to send a letter asking for information" and when there was a response from Satara, Mr Tod would be in a

position to provide alternative targets. But this is not what he told Ms Gray. Mr Tod also attests that the KiwiTracker production figures or details of other alleged issues were not presented to him at this meeting or any other meeting. However, the notes of the meetings set out quite clearly what was discussed and Mr Tod should have had no doubt about what was required from him. Furthermore, the evidence of Mr Anstis and Ms Ahomiro (as a site manager) is that all site managers have access, via KiwiTracker, to the production performance of their respective site and I accept that Mr Tod largely (if not totally), had access to the same information as Mr Anstis.

[34] On 11th May 2009, Mr Anstis, via an email to Mr Tod advised that:

At our meetings on 30 April, 1 May and 8 May 2009 I have offered you the option of moving to the Griffin Road site. You advised that you would consider this offer and get back to me. To date you have not responded to this offer. This email is to advise that my offer remains open until 3.00pm meeting on Friday 15 May 2009, at which time the offer will cease to be an option.

In a letter to Mr Anstis dated 13th May 2009, Mr Jacobson records that the notes of the three meetings to date do not accurately record Mr Tod's responses. But Mr Jacobson does not make any reference to what is inaccurate. Nor, when invited to do so, having received copies of the notes, did Mr Tod give any indication that they were inaccurate. Mr Jacobson also refers to Mr Tod's "recorded desire" to remain at the Collins Lane site.

[35] In the same letter (13 May) Mr Jacobson requested that Satara provide certain information relating to Mr Tod's role as site manager along with production figures for the Satara sites and average industry throughputs. A postponement of the meeting scheduled for 15th May 2009 was also requested on the basis that it would be unfair for the meeting to proceed without Mr Tod receiving the information sought and making appropriate preparations.

[36] In letter dated 15th May 2009 Ms Gray responded. She expressed disappointment that Mr Tod: "... has now chosen not to engage with us by providing comment and feedback on the targets, but instead has sought to challenge our attempts to improve his performance." Ms Gray also responded to the request for further information.

The meeting of 15th May 2009 – Written Warning

[37] A request from Mr Jacobson for the meeting to be adjourned was not accepted on the same grounds that Mr Anstis gave previously. Mr Anstis says that he was also concerned that this was the second time an adjournment had been sought. Mr Tod attended the meeting without representation, having previously asked for the meeting to be postponed in order have his lawyer present. There is no record in the minutes, but the evidence of Mr Tod is that he: "... made it clear and reiterated" that he felt he was being denied his right to representation. Mr Anstis confirmed that Mr Tod's lawyer had informed that the notes of the previous meetings were not correct but there had been no advice as what was deemed to be inaccurate. Mr Anstis then proceeded to inform Mr Tod that he had obtained productivity information from other packhouses (31 bins per hour) which confirmed that the 33 bins per hour for Collins Lane is not unreasonable, given the advanced equipment and the time of the year. Mr Tod says that he was not given this information before the meeting. He also says that he had conversations with the suppliers concerned and he disputes the figures and he has not seen any information to support them.

[38] Mr Anstis then referred to production figures for 21/4/09 and 22/4/09 in regard to the packing of bins per hour and per man hour. But this was before the performance management plan was discussed with Mr Tod on 30th April. Given that the weekly meetings (8th and 15th May 2009) were to compare productivity rates for the week before, the above dates cannot reasonably have any bearing and one is left to ponder why these dates came into the discussion. Mr Anstis then moved on to the repacking figures which are in the correct context and reveal that the productivity for week 19 was considerably less than week 18. Other performance measures appeared to be at least reasonable with no adverse comment from Mr Anstis. It is most peculiar, that given the overall gravity of the situation, Mr Tod was not prepared to make any comment. While it appears that he refrained from commenting, on legal advice, given that Mr Tod was the only person that could contribute another view to the discussion, as it involved his management skills and experience, the failure to make any comment, not surprisingly, left Mr Anstis to assess whether or not Mr Tod was capable of making a constructive contribution to the Collins Lane site. Indeed, it appears that Ms Gray recognised this and attempted to give Mr Tod an opportunity to make a comment on his performance, but he declined to do so.

[39] There was an adjournment during the meeting and following this Mr Anstis informed Mr Tod that as a result of Mr Tod's failure to adequately respond to "the lack of performance" despite being given an opportunity to do so, he would be receiving a written warning "because your performance has not improved." The notes of the meeting also record that the next meeting would be on 25th May 2009 and that Mr Anstis informed Mr Tod that:

For clarity, it may result in dismissal unless we have an increase in performance. This will be a challenging season and there is an extreme spotlight on Collins Lane because of the technology it has in it.

[40] A written warning was duly given to Mr Tod on 18th May 2009. The germane content is:

As I informed you at our meeting, there have been concerns over your performance. In particular there have been several recent occasions where your performance is inadequate, namely:

1. Packhouse productivity
2. Packhouse costs
3. Coolstore productivity – DIFOTIS & Truck Penalties
4. Coolstore Costs
5. Personnel Management

It is disappointing to note an overall deterioration in your performance in key areas rather than an improvement. It appears to me that you have yet to take proactive steps to improve the performance of the site which you manage.

You have been given opportunity to provide an explanation for this behaviour, but you have declined to engage with us or comment on your performance and lack of improvement. Specifically, pursuant to section 4(1A)(b) of the ERA, the duty of good faith "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive relationship in which the parties are, among other thing, responsive and communicative."

I expect to see significant improvement in your work performance. Should your poor performance continue, however, your employment may be subject to further disciplinary action up to and including dismissal.

Your performance will be reviewed on Monday 25 May 2009 at 3pm which allows time for you to demonstrate significant improvement. In the meantime, if you require any assistance with your role or if you are in any doubt as to what is required, please contact me as soon as possible.

[41] On 22nd May 2009 Mr Tod's lawyer wrote to Satara raising a personal grievance in regard to the warning letter. In particular, the letter informed that:

Satara does not seem to appreciate that Mr Tod has a right to a representative of his choice when facing disciplinary action. While Satara has denied on the one hand that it has been taking any disciplinary action whatsoever, it has issued a written employment warning and in that warning threatened further disciplinary action up to and including the dismissal of Mr Tod. Both the process followed and the written warning itself are procedurally flawed and defective.

[42] On Thursday 21st May Mr Tod became ill and on Friday 22nd May he went home due to sickness. A doctor's certificate has been produced. It indicates that Mr

Tod attended on Saturday 23rd May 2009 and was unfit for work until Tuesday 26th May because of a severe respiratory infection. Mr Tod says that he emailed the certificate to Satara on Monday 25th May. It is recorded as being received at 1:44p.m that day. Mr Tod informed Mr Anstis that he wanted the meeting that day to go ahead as his lawyer was available and this was the first opportunity for Mr Tod to be represented.

The meeting of 25th May 2009

[43] By consent, a recording was made of the proceedings of this meeting and the Authority has viewed a detailed transcript. The meeting opened with a “recap” by Mr Anstis of what had occurred in regard to the performance of Mr Tod to date. Mr Tod then reiterated that he still felt that the targets/expectations given to him at the meeting on 1st May were not fair. He explained his view of various production issues. Mr Anstis then gave a summary of various production figures and his observations regarding the respective production areas. After about 45 minutes, the meeting reached a point whereby Mr Tod’s lawyer indicated that Mr Tod was not in a position to comment as he had not been provided with information prior to the meeting, and he requested that Mr Tod be given an opportunity to respond in writing to the concerns of Mr Anstis. An adjournment was taken.

[44] At 4:15p.m. the meeting reconvened. The minutes record that Mr Anstis informed Mr Tod that:

Okay its quarter past 4 and we continue with the meeting where we have actually considered the targets, we’ve heard some of your explanations and I have concluded that the targets are reasonable and the business has an entitlement to settle. You have not provided us with an alternative set of targets for discussion with the exception of a target you gave Paul back in, I think it was November where you bullishly stated you were capable of achieving .42 bins per man hour for the period of May. You run the production unit. You should know what you’ve done and you should know who to contact if you actually need more information. I believe that most of the data which we are using here is available to you if you ask. We have not at any stage withheld this from you. In my opinion you have failed to actively engage in this performance process either in comment or in charge of practice. Neither have you provided us with any written comment subsequent to any meeting in respect to these performance measures. It is my opinion that the figures presented to you should not be a surprise. This is your job. I do not accept that you cannot respond today with the figures presented. A number of my sites are watching these figures daily. It is only a phone call if you want something that’s not there. Therefore, because of the absence of any significant performance improvements and your complete lack of engagement through the whole process which we have been going through here it is my decision to dismiss you effective today.

Via a letter dated 28th May 2009, Mr Tod's dismissal was confirmed.

Was Mr Tod unjustifiably disadvantaged in his employment and was the dismissal of Mr Tod unjustified?

[45] Given that the overall circumstances applying to both the unjustified disadvantage claim and the claim of unjustified dismissal, are inextricably linked, it seems appropriate to determine both matters on a combined basis.

The Legal Principles

[46] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied; to a dismissal and in circumstances where an unjustified disadvantage in employment claim arises. In determining whether a dismissal or an action was justifiable, 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.

[47] Both parties have referred the Authority to the benchmark case of *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659. There are a number of legal principles set out by Goddard CJ that have application to the circumstances surrounding the dismissal of Mr Tod. Firstly, (at p.679):

When the dismissal is to be for reasons of alleged unsatisfactory work performance, fairness and reasonableness require that the specific reasons for dissatisfaction are disclosed to the employee; a reasonably specific and measurable improvement demanded of him or her; and a reasonable period of time given for it to be established whether the employee is able to achieve that improvement, and at the end of that time a dispassionate consideration given to the question whether enough progress has been made to avert dismissal. This consideration should also take into account the previous good record of the employee who is entitled to have account taken of all that is going for the employee as well as all that has been built up against him or her. Even if the employee is unable to come up to the mark, consideration should be given to possibilities of redeployment in other operations.

And further:

Just as in the case of alleged misconduct there must be a fair inquiry, so in the case of alleged non-performance there must be a fair trial of the employee's work. This involves providing the employee openly (as opposed to secretly watching him as happened here) with measurable or, as Ms Hailstone put it, monitorable targets or goals which in turn implies that they must be articulated to the employee being monitored and that they must be such as can later be the subject of an objective decision on the question of whether they have been attained or not.

Goddard CJ also refers to *Pacific Forum Line Ltd v Merchant Service Guild* [1991] 3 ERNZ 3 1035, 1046, where Colgan J (as he then was) said:

It is only fair that where an employee is so criticised for poor performance that termination of the employment is contemplated, clear advice to this effect should be given and an opportunity to improve or disagree with the assessment given, if this is to be the justification for the dismissal.

[48] As set out in *Trotter*,⁴ it is not for the Authority to be the arbiter of the standards set by the employer or of the employer's judgment of whether the employer's standards have been met. But, Goddard CJ concluded that:

The Court [Authority] can and does, however, exercise judgment on the question whether dismissal for unsatisfactory work performance is fair and that involves reaching a view on a number of questions.

The questions referred to by the Chief Judge Goddard include: Did the employer in fact become dissatisfied with the employee's performance of his duties? And: If so, did the employer inform the employee of that dissatisfaction and require him to achieve a higher standard of performance? In regard to Mr Tod's circumstances, I find that both of these questions must indisputably be answered in the affirmative as the evidence of both parties is consistent in regard to the subject matter of both questions.

[49] I also find that the performance targets, as set out in document given to Mr Tod at the meeting on 1st May 2009, could reasonably be identified as an objective statement of the required standards to be met by Mr Tod. And I find that the combination of the dissatisfaction expressed by Mr Anstis, along with the performance targets required, would have left Mr Tod with a readily comprehensible understanding relating to the criticisms of his work and the standards that Satara expected him to meet. Furthermore, at the meeting on 1st May, Mr Tod confirmed several times that he understood what was required and indicated that the required targets or standards set down were achievable. Nonetheless, it is accepted that almost immediately after the meeting, Mr Tod clearly had second thoughts as to what could be achieved and he approached Mr Anstis accordingly. However, Mr Anstis was of the view, based on his substantial experience in the industry, that the targets he had set were reasonable. But even then, Mr Antis (via Ms Gray) gave Mr Tod a subsequent opportunity to present his version of what could be more reasonable targets. Of course there is no certainty that Mr Antis would have been prepared to modify the performance measures, but Mr Tod made no attempt whatsoever to present any

⁴ P.681.

alternative targets for consideration. This was despite being invited to do so, then giving an undertaking that he would. In the absence of any plain evidence that the criticism of Mr Tod and the targets set for him were unreasonable, it is not for the Authority to: [“... be the arbiter of the standards set by the employer.... ” and I find that the performance measures set for Mr Tod were clearly understood by him and were reasonably attainable given his experience and the resources available to him.

[50] A further factor set out in *Trotter* is that a reasonable period of time must be given for it to be established, whether the employee is able to achieve the improvement sought by the employer. Mr Tod was given the task of showing an improvement in regard to the targets set for him, on a weekly basis. From when the performance targets were set (1st May 2009) to the date of Mr Tod’s dismissal (25th May 2009) a period of three working weeks elapsed, taking into account that Mr Tod was unwell or off work on sick leave for a total of three days.⁵ There is some confusion as to when the various tasks or targets (29 in total) had to be attained. For example, looking at the productivity for the packhouse, the target was to process an average of 33 bins per hour for the remainder of the season. The evidence is that shortly before 25th May 2009, the gold kiwifruit season had finished, so it appears that the time frame for attaining the standard applying to the gold fruit was somewhat less than three weeks; governed entirely by the amount of fruit left to process. Then in regard to the green kiwifruit, there had to be an average of 60 bins per hour processed for the remainder of the season. It has not been established as to when the green kiwifruit season ended. But the transcript of the meeting of 25th May, records Mr Anstis saying that it is “early days yet” and the tally of bins for the 23rd and 24th May had not been finalised, and perhaps there had been an improvement to 40-50 bins per hour. There are other targets that do not have a date as to when they should be attained; for example, the personnel related target. However, because of the number and varying complexity of the targets set for Mr Tod it was clearly not possible for him to have achieved them all with the three weeks that he was eventually given. Nonetheless, I accept the evidence of Mr Anstis that the harvesting and processing of the kiwifruit occupies a relatively short season, it is weather dependant and the expectation of the growers is such that there is little room for any productivity shortfalls by Satara, hence the time frame available for Mr Tod to show some

⁵ Mr Tod’s evidence is that he was unwell on Thursday 21st May, went home sick on 22nd May and was off work on 23rd May.

improvement in his performance was essentially dictated by the length of the kiwifruit season; for gold and green fruit.

[51] But it appears to be commonly accepted that the Collins Lane facility was a complex operation, both in terms of the equipment involved and the need to have personnel with the essential training and skills to ensure that the balance between quantity and quality production was achieved. Therefore, on the one hand, given the evidence of the complexity of the variety of factors that Mr Tod was expected to manage, and given that he was dismissed after three weeks from when he was given the performance targets, and not withstanding the time constraints of the kiwifruit season, I find that the time frame for Mr Tod to meet Satara's overall expectations was unreasonable.

[52] However, in my view, the matter is not as simple as that. Given the overall evidence, I cannot help but conclude that when it came down to it, the performance management of Mr Tod was not totally about him attaining specific goals by a specific time. Indeed, it seems to have been, to a large extent, about Mr Tod being able to show that he was making a constructive effort to improve the overall operations of Collins Lane, and showing that there were measurable gains, particularly in throughput. It seems to me that Mr Tod did not account himself at all well in regard to his obligation to engage constructively in the performance management process and I am bound to say that he did not show as much initiative as could reasonably be expected from a responsible manager, with full knowledge that his continued employment was under close scrutiny. This is matter that I will return to in due course.

Were the actions of the employer and how the employer acted, what a fair and reasonable employer would have done in all the circumstances?

(a) **The written warning**

[53] Turning firstly to the whether or not the written warning issued to Mr Tod was an unjustified action by his employer leading to a disadvantage to his employment. It is submitted for Mr Tod that the issuing of the warning by Satara was simply a part of the process used to subsequently justify his dismissal. I do not accept this to be correct. Rather, I find that Satara fairly and reasonably made Mr Tod aware of the concerns about his management performance and sought to have him show some

improvement. It was only when an improvement failed to materialise that his employer moved towards a disciplinary process. This was a step that Satara was entitled to take. Mr Tod was made well aware that this step was being contemplated, in the event that he failed to show an improved performance.

[54] It is also argued for Mr Tod that Satara failed to follow its contractual obligations in regard to the process that was followed leading to the warning and the eventual dismissal. At *SCHEDULE ONE* of the applicable employment agreement there is a code of conduct. It provides for actions that constitute serious misconduct and less than serious misconduct. The introduction in regard to less than serious misconduct is:

General misconduct will result in such disciplinary action as an official warning. Examples of general misconduct that may constitute a warning includes (**but is not limited to**):

The examples of general misconduct that follow include; “Poor work performance.”

Then at clause 33 of the agreement, the company disciplinary procedures are set out.

Included at subclause 33.1 is:

Prior to any disciplinary meeting, the Employee will be advised of the specific allegation and of the likely consequences should the allegation be found to be true. The Employee will also be advised that he/she is entitled to have a support person at the disciplinary meeting. During the meeting the Employee will be given an opportunity to explain or deny the allegation(s). The Employee’s explanation and any mitigating circumstances will be considered before a decision is made on the [sic] whether or not to issue a formal warning.

If the company decides to issue a verbal warning this will be recorded on the “Record of Verbal Warning” form, which will be placed on the employee’s file.

If the company decides to issue a written warning, this will be confirmed in writing. The Employee will be advised of any corrective action that is required and the consequence of continued or further instances of breach, misconduct or substandard job performance.

[55] The Disciplinary Procedural Steps for General Misconduct follow at subclause 33.2:

There are 3 steps in the formal disciplinary procedure for general misconduct that will be followed:

- Verbal warning (confirmation in writing - employee to sign)
- Written warning (employee to sign)
- Dismissal

[56] Upon considering the above contractual provisions I find that there is considerable substance in the assertion for Mr Tod that Satara failed to follow the due

process set out. The failure was on several counts. Firstly, prior to attending the meeting on 15th May 2009, Satara was required to advise Mr Tod of the “specific allegation” (poor work performance) and of “the likely consequences” (a warning) should the allegation be found to be true. A further requirement is that Mr Tod should have been advised that he was entitled to have a support person at the meeting. Even it is to be accepted that what started out as a further performance management meeting, subsequently transformed into a disciplinary setting, this does not excuse or allow Satara to substantially depart from the agreed disciplinary procedures.⁶ This is particularly so when the outcome of the meeting was that Mr Tod received a written warning that put his continued employment in jeopardy. I also suspect that Mr Anstis and Ms Gray would have known that it was likely that Mr Tod may not have been able to give an acceptable explanation for his failure to improve his performance; hence the possibility of a warning being issued was something that may well have been contemplated. Furthermore, Mr Anstis refused to delay the meeting (even for a short time) to allow Mr Tod to have Mr Jacobson present and no attempt was made to enquire as to when Mr Jacobson would be available. While it can be accepted that during the kiwifruit season, time is at a premium, there is no good reason why the meeting could not have been delayed for a short time, with urgency being impressed upon Mr Tod and Mr Jacobson.

[57] There was a further departure from the contractual process. Apart from the fact that Mr Tod was not cautioned that he was participating in a formal disciplinary process on 15th May, the disciplinary procedure for “general misconduct” provides that three steps “will” be followed. Firstly, a verbal warning – confirmed in writing and signed by the employee. Secondly, a written warning – signed by the employee. The final step is dismissal. Had it not been for the fact that Mr Tod was substantially denied his rights to be made aware that he was engaged a disciplinary process, without knowledge of any allegation and without representation, one could conclude that the failure to give a verbal warning, before the written warning, was not a substantial or unreasonable departure from due process, given the context of the discussions that had gone beforehand, and the fact that Mr Tod was well aware that disciplinary action was a possibility. However, the overall failure by Satara to observe

⁶ The meeting could have been adjourned to allow the disciplinary process to be followed.

its own procedures is indefensible. As was held in *Lewis v Howick College Board of Trustees*:⁷

Policies and procedures are more than just a requirement to be prepared, updated and held for quality assurance and certification purposes or simply allowing boxes to be ticked. They are living documents in the integrity of which affected persons are entitled to place their reliance. They cannot be read down or ignored when perceived to be inconvenient or inappropriate in a particular case.

And further:

In cases such as this, they are enforceable in the sense that compliance with them may determine whether a dismissal is justifiable. To use the language of s 103A of the Act, a fair and reasonable employer will comply with its own relevant policies.

It follows that I must find that the warning issued to Mr Tod was unjustified and a disadvantage to him in his employment pursuant, to section 103(1)(b) of the Employment Relations Act 2000, and that he has a personal grievance. It is appropriate to record here that given the overall outcome of this investigation, I do not believe that the award of a penalty for a breach of the above provisions of the employment agreement is warranted.

(b) **The dismissal**

[58] The letter from Mr Anstis, dated 28th May 2009, sets out in comprehensive detail the background leading up to the dismissal of Mr Tod and the reasons for it. In summary, Mr Tod was dismissed:

Due to the lack of improvement in your performance and complete lack of engagement throughout the process.

Mr Antis also addresses a number of complaints made by Mr Jacobson on behalf of Mr Tod. Some of these complaints have also been put to the Authority in support of the contention that Mr Tod's dismissal was unjustified.

[59] In response to an argument made by Mr Jacobson that Mr Tod was unfairly subjected to a disciplinary process, Mr Anstis responds that the process undertaken was of performance improvement. That was initially true, but as of 15th May 2009, the process was clearly disciplinary in nature, albeit related to improving Mr Tod's performance, and the processes in the employment agreement provide for such circumstances.

⁷ [2010] NZEMPC 4, ARC 82/08, para [63].

[60] In regard to the targets that were set for Mr Tod being unreasonable and/or immeasurable, Mr Anstis responds that he has considerable experience in the kiwifruit industry and he posits that the targets set were reasonable by industry standards. As discussed earlier in this determination, in the absence of any evidence to suggest that the targets were unreasonable, it is not for the Authority to be the arbiter of the standards set by the employer.

[61] However, in regard to the measurability of what was or was not being achieved by Mr Tod, while it appears that some targets were measurable, i.e. the number of bins being processed, others appear to be less so, particularly in the short time frame allowed. And while various conclusions were placed before Mr Tod about his failure to achieve what was required, there is room for some doubt as to whether some of the analysis presented by Mr Anstis was entirely accurate, or in one case even within the correct time frame.⁸ However, I have to say that Mr Tod did not particularly help himself to any extent. He did not put forward alternative production figures or point out any inaccuracies in the conclusions reached by Mr Anstis, even though he had access to the same data base via the KiwiTracker system.

[62] But looking at the circumstances as a whole, while I note that there were faults on his part, I cannot help but conclude that the performance management of Mr Tod was undertaken with indecent haste, even allowing for the time constraints of the kiwifruit season. If it had just been the number of bins of gold kiwifruit being processed that Mr Tod was being taken to task over, then the overall actions of Satara may not have been unreasonable in the circumstances. But the weight of the evidence is that if higher quantities of fruit were produced; i.e. at a higher speed, then the quality suffered and then the plant was put “on hold” by Zespri; leading to further complications including repacking and cost implications for which Mr Tod was also held accountable. Perhaps Mr Tod was simply not experienced or capable enough to manage the complexity of the Collins Lane plant; a factor that was apparently on the mind of Mr Anstis when he was focused on the redeployment of Mr Tod to Griffin Road. And perhaps in hindsight, Mr Tod would have been wise to have accepted the offer of redeployment. However, it seems to me that given the length of service of Mr Tod and the fact that he appears to be a hard working and conscientious person, a reasonable employer would have given Mr Tod more time to realistically consider his

⁸ Para [38].

options. One of these could have been to accept the redeployment, or at the end of the season face the realistic possibility of dismissal on the grounds that he was not able to meet the overall performance targets.

[63] Furthermore, had Mr Tod been given even a little more time, a full and proper analysis of the various targets could have been available for all to see and acted on accordingly. Indeed, while Mr Tod, somewhat belatedly it has to be said, produced some information at the meeting on 25th May, I believe that a reasonable employer would have allowed Mr Tod some further time to produce a written summary of why the production levels were not meeting expectations, including a full analysis of the Line Manager's diaries, which appear to show that there were a number of problems relating to the "Invision" equipment, as well as various staffing issues. Indeed, given the complexity of the Collins Lane situation, and the capital invested in it by Satara, it is surprising that Mr Anstis (and/or the Board of Satara) did not insist on a written report as to why the plant was not meeting expectations.

[64] I also conclude that a reasonable employer would have taken into account that Mr Tod had been working consistently long hours and was under some considerable stress to ensure that the production from Collins Lane was up to a satisfactory standard, and that on top of the usual seasonal demands and pressures, Mr Tod was faced with trying to preserve his own future. It is not difficult to conclude that any manager under that sort of pressure, should have been shown somewhat more consideration in the circumstances.

[65] Finally, there is the matter of the failure by Satara to follow the disciplinary process that I have referred to earlier in this determination. It seems to me that because the failure to follow the process outlined, led to the warning being unjustified and hence void, it must follow that the dismissal is also flawed. Given that poor work performance constitutes less than serious misconduct, whereby the process set out above must be followed; effectively, Mr Tod never received a valid warning hence a procedural issue arises. But even apart from this factor, I conclude that there were a significant number of unfair and unreasonable actions by Mr Tod's employer to warrant a finding that the dismissal of Mr Tod was unjustified and that he has a personal grievance accordingly.

Remedies

[66] Having determined that Mr Tod has a personal grievance pertaining to the claim of unjustified disadvantage and unjustified dismissal; 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 s 128(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

[67] Mr Tod seeks reimbursement of wages. He commenced employment, as an Orchard Manager, with another kiwifruit producing company (Seeka) on 25th July 2009, on a salary of \$60,000 per annum. This is \$10,000 less than the salary he received at Satara at the time of his dismissal. Mr Tod was paid for one month in lieu of notice hence the "base line" in regard to the period for which he was without wages appears to be one month @ \$5,833.33 (gross). The evidence of Mr Tod is that he carried out contract work prior to obtaining the new employment. He has presented a summary of this income; being \$4,030.75 (gross). From this sum he has deducted expenses⁹ of \$2,197.74 leaving a residue of \$1,833.01.

[68] A submission for Satara is that Mr Tod turned down pruning work with the company and elected to set up in business himself and as a result of pursuing his own business operation, rather than taking up pruning work with Satara, he earned less

⁹ Equipment, jacket, vehicle costs, business cards, GST and wages paid to an employee.

income. Mr Tony Clarkin has provided a “File Note” that makes it clear that if Mr Tod “was considering employment” on Satara orchards, Mr Clarkin would be happy to employ him and that “other issues” were irrelevant to “that offer” While Mr Tod acknowledges that Mr Clarke rang him and informed that he would be “allowed” to work in the Satara orchards, there was not a job offer made and at that point (10th June 2009), Mr Tod had already found work as apparently evidenced from the summary of his contracting work invoiced on 12th June 2010.

[69] A further submission for Satara suggests that there is some doubt as to the identity of the “employee” to whom Mr Tod paid wages of \$933.90¹⁰ and an inference that Mr Tod’s overall business expenses should not be deducted from his total income as a contractor But the focus of the Authority is on Mr Tod’s overall attempts to mitigate his losses. He has been industrious about doing this and on the evidence he has provided, I accept that his personal gross income was \$1,833.01. Deduction of this sum from his loss of wages for the period in question leaves a residue of \$4,000.32. Finally, it is submitted for Satara that it may have been possible for Mr Tod to have commenced his employment with Seeka earlier than he did and hence reduce his loss of income, but I find that the evidence is inconclusive on that point.

[70] Mr Tod also claims a further loss of wages related to the \$10,000 difference in income between his earnings at Satara as compared with his new employer, Seeka. Mr Tod says that the Authority should exercise its discretion pursuant to s 128(3) of the Act and award him loss of wages for a total period of 12 months. He has provided calculations taking into account that he received a wage increase from Seeka on 25th February 2010. The total sum claimed under this head is \$7,200.36

[71] However, I am cognisant of the finding of Goddard CJ in *Davis Trading Company Limited v Lewis* [1993] 2 ERNZ 272 at 288:

But once contributory fault is established, there seems no warrant for exercising in the respondent’s [employee’s] favour the discretion to award more than the minimum loss and even that requires to be reduced

Given that I find that there has been contributory fault by Mr Tod because his actions contributed to the situation that gave rise to both of the personal grievances, I decline

¹⁰ It is established to the satisfaction of the Authority that this was a reasonable expense.

to award more than three months' loss of wages. Therefore, subject to a reduction, pursuant to s 124 of the Act, I award Mr Tod reimbursement of lost wages as follows:

(a)	From 27 th June to 24 th July 2009	\$4,000.32
(b)	From 25 th July to 24 th September 2009 (\$273.41 x 2)	\$546.82
	Total:	<u>\$4,547.14</u>

(b) Loss of benefits

[72] In his *Statement of Problem*, Mr Tod sought an award recognising the loss of benefits that had in employment with Satara (a car and phone) but he now acknowledges that because his new employment provides both of these benefits, he is no longer pursuing this claim, albeit both parties have made submissions on this matter with Satara suggesting that the value of the vehicle provided by Satara should be calculated as a component of Mr Tod's remuneration. Apart from there being no evidence that this is so, I find both sets of submissions to be generally without merit.

(c) Compensation

[73] There is no evidence of any affect on Mr Tod regarding the unjustified disadvantage and while Mr Tod was off work sick shortly after receiving the written warning, he makes no mention of the warning being the cause of his sickness, or of any other negative factor relating to the warning, hence I decline to make any award for this grievance.

[74] In regard to the overall circumstances, including the dismissal, Mr Tod seeks the sum of \$30,000 under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Given the usual awards of the Authority, this is an extraordinary claim and it is not supported by sufficient evidence to justify an award of anything close to the sum sought. Mr Tod gave evidence of being shocked at the decision to dismiss him and being asked to immediately give up his phone and keys to the company vehicle. He also says that he was "completely devastated" and was not given the opportunity to say goodbye to any of the people he worked with – some for more than 10 years. The evidence of Mr Tod is that he broke down in tears and was taken home by his lawyer. Mr Tod says that his self confidence was severely affected and that his reputation in the post harvest side of the kiwifruit industry has been damaged.

[75] Mrs Tod has provided evidence of the affect of the dismissal on Mr Tod; of him being depressed and wanting to move away from Te Puke because of the loss of his reputation in a small town. As has been submitted for Satara, there is no medical evidence to support whether Mr Tod was depressed in medical terms, or of any collaborative evidence of disparaging rumours pertaining to why Mr Tod left the employment of Satara. Nonetheless, I accept that Mr Tod was substantially affected by the sudden loss of his employment and the manner in which his dismissal was implemented and assess that an award of compensation of \$12,000 is appropriate. I arriving at this sum, apart from the evidence of Mr and Mrs Tod, I have taken into account awards made in similar circumstances by both the Authority and the Employment Court.¹¹

(d) Contributory Fault

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.

[76] I consider that the actions of Mr Tod did contribute towards the situation which gave rise to the personal grievances. This is because he largely, and without good reason, failed to actively engage in the performance management process. This was particularly evident when he failed to make any constructive response at the meetings on 8th and 15th May 2009. While I have taken into account that Mr Tod was particularly entitled to be represented at the latter meeting, and I have made a finding about this, I find his overall reluctance to make any constructive response to the views expressed by Mr Anstis, until the meeting on 25th May, to be quite astounding. I accept that Mr Tod was most probably acting under legal advice and that he wanted his lawyer to be more actively involved. But it was only Mr Tod that could make a response to the performance concerns. It was only Mr Tod that that could put forward alternative reasons as to why the production targets were not being met. And it was Mr Tod's future that was being given close attention by his employer.

¹¹ For example; *Lewis v Howick College Board of Trustees* [2010] NZEMPC 4, ARC 82/08, para [110]. Chief Judge Colgan made a "modest" award of \$10,000 "in the absence of particular evidence and to reflect the need under s 124 to reduce remedies"

[77] It is also telling that under cross-examination by Mr Beech, Mr Tod acknowledged that he never instructed his staff about the number of bins that had to be processed following the meeting on 1st May 2009, when the performance targets had been set, nor was Mr Tod able to point to any other tangible action that he took to make improvements within the plant. This is consistent with the fact that there was no evidence forthcoming from Mr Tod that he took any tangible steps to improve the productivity and overall management of the Collins Lane operation. Nor did he put any suggestions or plans to Mr Anstis when he was given the opportunity on several occasions. On the contrary, rather than make a constructive effort to show some improvements to the productivity of the plant and demonstrate that he was up to the job, the stark reality is that Mr Tod appears to have disengaged from the process and indeed there is evidence of a reduction in productivity. This is despite the fact that he was given the extra assistance of Ms Ahomiro and Ms Shannon for some of the time involved. While Mr Tod was given many targets to meet, it later became clear that what Mr Anstis was really looking for was some constructive input from Mr Tod that would lead to a measureable improvement in the way the Collins Lane facility was operating. But Mr Tod simply failed to engage.

[78] It is my conclusion that this failure to engage was a substantial contributory factor leading to his dismissal and for which the remedies due to him should be reduced by 40%.

Determination

[79] It is determined that:

- (a) For the reasons set out above, I find that Mr Tod was unjustifiably disadvantaged in his employment but due to the lack of evidence to support such, there is no award under s 123(1)(c)(i) of the Act. I also find that Mr Tod was unjustifiably dismissed and that he is entitled to the following remedies.
- (b) Pursuant to sections 123(1)(b) and 128(2) of the Act, Satara Co-operative Group Limited is ordered to pay to Mr Tod the gross sum of \$2,728.28 as reimbursement of lost wages. (\$4,547.14 less 40%)
- (c) Pursuant to s 123(1)(c)(i) of the Act, Satara Co-operative Group Limited is ordered to pay to Mr Tod compensation in the sum of \$7,200.00. (\$12,000 less 40%)

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, 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