

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 181
5337459

BETWEEN ANDREW ALAN TODD
Applicant

AND GLENMAVIS LIMITED
First Respondent

AND GLENMAVIS FARM
PARTNERSHIP (2007)
Second Respondent

Member of Authority: Philip Cheyne

Representatives: James Guest, Counsel for Applicant
Len Anderson, Counsel for Respondent

Investigation Meeting: 2 November 2011 at Dunedin

Further material received: 16 November 2011 from Respondent

Determination: 21 November 2011

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Todd worked as farm manager at Glenmavis Farm, a dairy farm business operated by Glenmavis Farm Partnership (2007) at Wendon on land owned by Glenmavis Limited. The three partners in the partnership are the shareholders in the company which leases the land, stock and plant to the partnership. The three partners are Dr Linley Walker, James Budge and Glenmavis Trust. Glenmavis Trust is a family trust associated with Brian Walker and his family and whose trustee is now Dr Walker. Dr Walker and Mr Budge are married and Brian Walker is Dr Walker's brother.

[2] Mr Todd was dismissed in circumstances described by his employer as redundancy. He says that he was unjustifiably dismissed, there being neither a true redundancy nor any consultation with him prior to the dismissal, and he is claiming compensation for distress. Mr Todd also says that before the dismissal his working conditions were injurious to his health and he was never provided with a written employment agreement but has not claimed any remedies separately for these matters. Finally, Mr Todd says that employment entitlements have been withheld from him. That is a reference to what he describes as a bonus by which he says he is entitled to the discharge of a mortgage to Dr Walker and Mr Budge that secures funds advanced by them and used by Mr Todd to purchase some land in 2008.

[3] When he initiated these proceedings Mr Todd cited the company as the only respondent. In a statement in reply the company explained the ownership and business arrangements summarised above. In the absence of agreement about the proper identity of Mr Todd's former employer, by consent I joined the partnership to these proceedings with the issue of the proper identity of the employer for resolution as part of this investigation.

[4] To resolve these issues I must explain what happened when the employment commenced and the subsequent dealings over an employment agreement and how Mr Todd came to buy land and grant a mortgage to Dr Walker and Mr Budge. I will then explain the circumstances in which Mr Todd's employment was terminated before considering justification for the admitted dismissal.

The employer's identity

[5] Mr Todd saw the position advertised. He applied, was offered the position and started work on 1 June 2006. He was provided with a limited term written employment agreement which was signed by him and Dr Walker. The agreement variously describes the employer as *Glenmavis Farm Partnership* and *Glenmavis Partnership* and also refers to *Glenmavis Farm*.

[6] Mr Budge's evidence is that sometime in 2007 there was a change in the trustee of the Glenmavis Trust which resulted in an IRD requirement for a new partnership, hence the commencement of the present second respondent, which then

assumed responsibility for the farm operations. Counsel later advised of his instructions that IRD registered the start of the Glenmavis Partnership (2007) on 27 November 2007 and it commenced paying wages from 1 December 2007. Nothing was done to advise employees such as Mr Todd about this change. Mr Todd continued to deal with Jim Budge, Linley Walker and Brian Walker just as before.

[7] Sometime later the partnership engaged the services of a payroll clerk who started providing payslips to Mr Todd. These payslips referred to *Glenmavis Farm Partnership 2007*. Despite that, Mr Todd's bank statements continued to show his salary as being paid by *Glenmavis Farm*.

[8] Clause 2.1 of the 2006 agreement provides that that it *commences on the 1st day of June 2006 to the 1st March in each year*. Clause 2.3 provides *Either party will acknowledge their continuance or termination of this agreement for the following season, by the 1st day of March in each year*. There were discussions at some point in 2007 which resulted in a second signed written employment agreement applicable for three years. It appears that neither party has a copy but it is not suggested that there was anything materially different in that agreement regarding the employer's identity. In particular it is not suggested that the agreement mentioned the partnership change which may have occurred after the signing of the agreement.

[9] There were discussions about a third employment agreement. A draft was sent to Mr Todd who marked various clauses he wanted to discuss or change. He gave it back to Mr Budge. This document is part of the evidence. There was never any further discussion about the draft and it remained unsigned. It did not refer to the 2007 partnership.

[10] I have been given some payroll documentation for November 2010 which indicates that Mr Todd and other staff were paid by *Glenmavis (2007) Farm Partnership*. I have also been given extracts from accounts for the company and for *Glenmavis (2007) Limited*. These extracts do not help with whether the partnership or the company employs staff and operates the dairy farm business. This name differs slightly from that given in the statement in reply.

[11] In July and August 2008 there was a transaction where monies were advanced to Mr Todd to enable him to buy some land (the Chatton property) and he granted a mortgage over that land. The exact arrangement is disputed and I will return to that shortly. However, Mr Todd received a payment of \$13,500.00 credited into his bank account with *Glenmavis* and *Salary* shown on his bank account. He used that money to pay the deposit on the transaction. He signed the mortgage transfer dated 22nd August 2008 which showed the mortgagee as *GLENMAVIS LIMITED*. He received a settlement statement dated 29 August 2008 from the solicitors who acted for him and the mortgagee that recorded monies received from *Glenmavis Limited being mortgage advance*. Then on 1 September 2008 a mortgage to *Linley Margaret WALKER and James Stuart BUDGE* was registered. The mortgage transfer document has a line through *GLENMAVIS LIMITED* and *Linley Margaret WALKER and James Stuart BUDGE* typed immediately underneath. The change is not initialled. Mr Budge's evidence is that they had to use the payroll system to advance the deposit funds within time and the settlement statement and mortgage transfer documents mistakenly referred to the company.

[12] Understandably Mr Todd says he is unsure of his employer's proper legal identity. However, I think the point is resolved by the agreed position of counsel discussed during the investigation meeting. Both counsel submitted, and I accept, that the 2007 change in the identity of the trustee of the Glenmavis Family Trust did not alter the partnership which was always between Linley Walker, James Budge and the Glenmavis Family Trust. It was sufficiently clear from the 2006 and 2007 – 2010 signed employment agreements that Mr Todd was employed by the *Glenmavis Farm Partnership*. All that happened is that the partnership name changed in 2007 to *Glenmavis (2007) Farm Partnership* but not all the employment documentation was changed to reflect that.

[13] I find that the partnership not the company employed Mr Todd.

The land purchase

[14] Mr Todd's position is that he received, as part of his remuneration package and as an encouragement for him to stay in his position for at least three years, a bonus of \$50,000 per year which was partly paid to him by the advances mentioned

above allowing him to purchase some land and grant a mortgage pending the expiration of the three years. He says that he is entitled to a discharge of the mortgage (or compensation equivalent to the sum thus secured) and the balance of the funds to make a total of \$150,000.00.

[15] The respondents say that Dr Walker and Mr Budge personally (not the partnership or the company) loaned \$136,054.46 to Mr Todd to allow him to purchase some land. They deny that this was a bonus.

[16] I have already mentioned the only contemporaneous documentation. It shows that the formal dealings over the advance were with the company. However, the accounts for the company and the partnership as exhibited do not refer to the loan, consistent with Mr Budge's evidence that the loan was from him and Dr Walker personally, not the employer. There is no loan agreement and I am told that the solicitor does not have any other contemporaneous file material. To resolve this part of the problem I need to explain what happened.

[17] Prior to the land transaction Mr Todd had had discussions with Mr Walker about an equity partnership to encourage him to stay on as manager. Mr Todd was not interested in this. Mr Todd also had discussions with Dr Walker about alternative ways in which he might be persuaded to remain as manager. I infer that Dr Walker knew of the outcome of Mr Walker's discussions about an equity partnership or she may have been involved directly. As Mr Budge puts it in evidence *We were conscious of the fact that we lived at the other end of the country from the farm. We had had a difficult time with previous managers and we had great hopes for a continuing relationship with Mr Todd.* By the use of *We* Mr Budge is referring to himself and his wife in their personal capacities, not as two partners and the trustee of the third partner comprising Mr Todd's employer. The discussion between Dr Walker and Mr Todd resulted in an offer of funds to allow Mr Todd to purchase some land. Some other land was looked at before Mr Todd settled on the Chatton property. It is common ground that Dr Walker suggested that Mr Todd make an offer under the \$147,000.00 asking price. Mr Todd's offer of \$135,000.00 was accepted.

[18] Mr Todd received the deposit moneys as described above. To settle, the solicitors acting for Mr Todd used \$122,854.46 which was either monies held or

received as described above to meet the settlement statement and to pay their own fees. A mortgage to Dr Walker and Mr Budge was registered as described above.

[19] Mr Budge's evidence is that the loan was made to Mr Todd from his and Dr Walker's personal assets as part of an understanding that Mr Todd would manage the farm until it was sold which was expected to be in 2013. They felt that if they got a good price for the farm then Mr Todd would share in that by way of forgiveness of the debt. He also says that while they indicated a minimum of three years they did not undertake to forgive the loan at any particular time as it ultimately depended on the price they got for the farm. His evidence in chief is that forgiveness would be considered when Mr Todd left the partnership's employment. However, when questioned, Mr Budge said that the only uncertainty was the timing of the forgiveness, not whether the loan would be forgiven. That is consistent with a passage from a letter dated 28 October 2010 set out below, which Mr Budge did not resile from when questioned. If Mr Budge's evidence in chief was intended to mean that Mr Todd might not be entitled in due course to the forgiveness of the loan, I reject it.

[20] By late 2010 the lack of action on the forgiveness of the loan had been troubling Mr Todd for some while. He discussed the matter with a farm advisor (Gordon Platfoot) who in a letter dated 29 September 2010 to Dr Walker and Mr Budge recommended *Please provide peace of mind related to Andrew & Tara's ownership of the block of land Glenmavis purchased for them.*

[21] That and other issues caused Mr Todd to seek legal advice. On 8 October 2010 his solicitor wrote to Glenmavis Limited as follows:

Dear Sir/Madam

Re: Employment – Andrew and Tara Todd

We have been consulted by Andrew and Tara Todd in respect of their employment by your Company.

Mr and Mrs Todd have raised the following matters in respect of their employment:

1. *That despite numerous requests, they have not received any formal employment contract.*
2. *That they have very little time off and tend to have to work their three rostered days off per fortnight and are currently owed eight weeks holiday and 17½ days in lieu for working statutory days.*
3. *That as an incentive to work on your property they were promised a bonus of \$50,000.00 a year for each of the three years. In this regard \$120,000.00 has been advanced to the Todds but no formal*

documentation confirming that this advance is to be extinguished on the completion of three year employment has been provided.

Mr and Mrs Todd have considered selling the Chatton property and need confirmation of the Company's position before they can market same.

These matters are causing Mr and Mrs Todd considerable stress and the issues need addressed.

Yours etc

[22] Dr Walker replied by letter dated 28 October 2010. Regarding the present issue it reads:

...
The Chatton real estate was acquired by and for Andrew on the following basis: to provide both parties with a form of security – for Andrew it was to be an asset when he left our employment and for us it gave the stability of long-term planning. There was to be a minimum period of 3 years of satisfactory performance and this gift was to financially compensate for difficulty factors in the job such as shortage of labour that increased his workload. He has now completed the three years but our intention was to remove the mortgage at the completion of his employment, not after the minimum period was completed.

This was not as Andrew has stated to you in any way a specific per annum bonus. We agreed to purchase price of up to \$150,000. The property he purchased was placed on the market at \$147,000 and it was at our suggestion that Andrew offer a lesser price \$132,000, which was accepted. We also paid the legal fees on purchase and since purchase he has had the benefit of any capital gain whereas we have paid the interest on the capital. Glenmavis Farm has also additionally provided Andrew with numerous other benefits of which he is fully aware.

We were unclear why Andrew seemed to require our mortgage to be released forthwith and uncertain of his intentions and since the matter had not been put to the company in writing his request was not acted upon. I was unaware that he had asked for the mortgage to be lifted. However, Tara did explain the matter more clearly to Brian Walker albeit in a very unprofessional manner; not greatly appreciated given that it was the first time that she had spoken to him about it.

We are agreeable to releasing the mortgage on the 31st May 2011 or when he leaves our employment if before that date with the condition that we have a written agreement from Andrew that this will satisfy all his financial claims against Glenmavis other than his salary and any holiday pay owing under the conditions of his most recent contract.

Yours faithfully

[signed]

Dr. Linley Walker

Glenmavis Farm Partnership

[23] For the most part this description, I find, represents a substantially accurate account of what had been agreed between Mr Todd and Dr Walker. First, it nowhere mentions the distinction now sought to be made between the actions of Dr Walker and Mr Budge personally as opposed to their capacity as partners of Mr Todd's employer. Mr Budge's evidence when questioned was that he did not believe that the Glenmavis Trust was ever mentioned as not being part of the land arrangement. I accept that

evidence. Mr Todd naturally understood from his discussions with Dr Walker that he was entering into an arrangement with his employer. After all, only an employer would compensate him *for difficulty factors in the job such as shortage of labour that increased his workload*. The arrangement between the partners, unannounced to Mr Todd at the time, that Glenmavis Trust would neither share in the funding nor take a mortgage, makes no difference to this analysis.

[24] Second, there is no mention of the position now advanced by Mr Budge that the proposal was for Mr Todd to share in the capital gain on the sale of the farm which was expected to occur in 2013. While that might have been part of the thinking behind the offer to Mr Todd, it was never expressed that way to him or included as a condition of the arrangement.

[25] I find that the arrangement was a term of the employment. It related to the satisfactory performance of Mr Todd's work, his continuation in the employment for a minimum of three years and was intended to financially compensate him for increased workload. That last aspect related to what was a current issue between the parties. The 2006 employment agreement provided either three days off per fortnight or one day off a week depending on the season with an average of 100 hours work per fortnight. I do not know what the 2007 – 2010 agreement said on this point. The stipulation for time off was removed from the 2010 proposed agreement but it still expressed the average hours requirement. In practice Mr Todd found it difficult to take time off. As he put it during the investigation meeting, *You farm cows not people* meaning that the requirements of the stock got priority. If other staff were not available Mr Todd performed whatever work was required. As part of the arrangements with Dr Walker about the land transaction it was further agreed that Mr Todd's legal fees would be paid in exchange for extinguishing any claim for having worked on his rostered days off.

[26] A submission for the respondents is that the loan and mortgage arrangement was not regarded by Mr Todd as a term of the employment because he did not refer to it in the negotiations for the replacement agreement in 2010. I have been provided with a copy of the annotated draft agreement that Mr Todd gave back to Mr Budge. Mr Todd's evidence is that he had written some notes about the arrangement on the back of the document he gave to Mr Budge. The original has not been made available

so I cannot confirm Mr Todd's evidence. In any event, the negotiations were never completed. If they had progressed either party could have raised the matter for inclusion in the written agreement. The absence of any reference to the matter in the limited exchanges over a new employment agreement makes no difference to the conclusion expressed above.

[27] The agreement between Dr Walker and Mr Todd was about an advance of up to \$150,000.00 for a land purchase. It was not specifically a bonus at \$50,000.00 per year. I do not accept under the agreement that Mr Todd was entitled to a further payment to bridge the difference between the amount advanced and the maximum discussed at the time. While I do not accept that the arrangement was ever characterised at the time as a bonus, nor do I accept that it was described as a gift. Both words are an attempt in hindsight to put a gloss on the arrangement.

[28] The final point to mention is that Mr Todd had completed the stipulated period of satisfactory service for the entitlement to have the mortgage released and the advance forgiven to vest unconditionally. While in the letter Dr Walker sought to include a condition that there would be no other financial claims, that was not part of the original arrangement. Nor did Mr Budge suggest in his evidence that there was any such condition accompanying the original agreement.

[29] To summarise, I find that Mr Todd is entitled to a discharge of the mortgage held by Dr Walker and Mr Budge.

Holiday pay

[30] In practice Mr Todd's salary was split so that he received half and his partner (Tara Malota) received half. Ms Malota also worked part time for the partnership rearing calves and was paid additionally for this work. For present purposes I will assume that Mr Todd received the whole of his salary.

[31] When Mr Todd finished up he was paid all the accrued holidays and time in lieu shown as owing by the partnership's payroll system. The final pay included 800 hours at ordinary time for pay in lieu of notice. The evidence is that the partnership intended to pay Mr Todd eight weeks pay in lieu of notice relying on the notice period

specified in clause 13.1 of the 2006 and proposed 2010 agreement. It is accepted by both parties that this was the operative notice period. Mr Todd's evidence is that the payment of 800 hours is twice the amount that was due to him by way of notice. He was overpaid 400 hours and accepts that there should be an adjustment to reflect this.

[32] Later, the partnership recalculated Mr Todd's final pay, reducing the notice payment to the correct amount and reducing to nil all the time in lieu and accrued holidays that were paid at termination. Mr Budge's evidence is that there are no records to establish that Mr Todd was owed any time in lieu or holidays, that it was Mr Todd's responsibility to keep records and that the partnership encouraged him to take all leave that was owed. I am also referred to provisions in the exhibited employment agreement about leave being taken in the year in which it accrues. That was referred to in email communications to Mr Todd about the alleged overpayment. There is also evidence about Mr Todd taking time off in June and/or July 2010.

[33] During the investigation meeting Ms Malota provided me with a selection of payslips for her and Mr Todd for 2009 and 2010. Up to the balance date of 1 July 2009 they show 4 weeks holiday due and then 8 weeks annual holidays due following 1 July 2010. It is unclear why 1 July is used as the anniversary date when Mr Todd actually commenced work on 1 June 2006 but otherwise the information is consistent with Mr Todd working without taking any annual leave. These payslips also show the time in lieu balance increasing periodically consistent with him actually working on statutory holidays. Mr Todd provided information to the partnership's payroll person who arranged the pays and maintained the computer payroll system. The provision in the 2006 employment agreement about taking annual leave in the year in which it accrues cannot defeat the statutory obligation to pay for untaken annual leave at the conclusion of the employment.

[34] There is no reason to doubt the payroll information about Mr Todd being owed 18.5 days in lieu at the end of his employment. It seems Mr Budge may have been confused about this entitlement. It represents a statutory entitlement to alternative holidays pursuant to the Holidays Act 2003 because Mr Todd routinely worked on statutory holidays. It does not represent any entitlement for Mr Todd working on rostered days off as he apparently did quite often. Because Mr Todd had not taken

these alternative holidays by the time his employment ended he must be paid for the 18.5 days.

[35] There is evidence about Mr Todd having some leave in June or July 2010. Mr Todd accepted that he was on leave for about 12 days in July 2010. His evidence is that the time off was on account of having worked on rostered days off. There was no oral agreement between Mr Todd and the partnership allowing him to work on rostered days off but take paid time off at a later date. The 2006 agreement did not permit Mr Todd to do this either. In the absence of any such agreement I do not accept that the 12 days off in July can be treated as Mr Todd asserts. He must be regarded as having been on annual leave for those 12 days.

[36] In addition to the payments for alternative holidays and untaken annual leave referred to above Mr Todd is entitled to 8% of his gross earnings since 1 July 2010 pursuant to s.25 of the Holidays Act 2003. The payroll system generated a figure for that proportionate holiday pay on the adjusted pay slip but that calculation will need to be reassessed in light of the foregoing findings.

Dismissal

[37] In late October 2010 Mr Todd phoned and spoke to both Mr Budge and Dr Walker. He was in a distressed state. The partners decided to get their farm consultant to visit the property and report.

[38] Mr Todd saw his doctor on 1 November 2010. He was certified unfit for work for a period of 21 days from that date. The certificate was given to Mr Budge the next day. There is a counsellor's report dated 6 May 2011 describing Mr Todd's state as at 29 October 2010 and 19 November 2010, the dates he was seen by the counsellor. To summarise, Mr Todd felt overwhelmed by the amount of work required of him on the farm, staffing issues and his inability to find a solution with his employer.

[39] Gordon Platfoot is the dairy farm management consultant who was engaged by Glenmavis Farm to visit the farm periodically and report. He had done so in September 2010. He was asked by Dr Walker and Mr Budge to visit in November 2010 *to ascertain the wellbeing of Andrew, farm manager who had made a distressed*

phone call to Glenmavis as to his ability to continue managing the farm.

Mr Platfoot's visit on 1 November 2010 resulted in a written report that included a number of comments critical of Mr Todd. Mr Platfoot also reported on the results of his having placed advertisements in the Southland Times on 5 & 6 November 2010 for staff to manage Glenmavis Farm. Mr Platfoot's report was only sent to Dr Walker and Mr Budge. Normally his reports were sent to Mr Todd as well but not on this occasion. Mr Budge's evidence, which I accept, is that the report caused considerable concern. He flew down from Paihia to take direct control of the farm.

[40] I should mention some background. At some point there had been discussion between Mr Walker and Mr Todd about Mr Todd taking some equity in the farm but Mr Todd was not interested in such an arrangement. Then there were discussions between Mr Todd, Mr Budge and Mr Platfoot about Mr Todd becoming a contract milker. That too did not progress. This background gives some context to Mr Platfoot's comment in his 29 September 2010 report (which Mr Todd did receive):

The Future

As usual we had discussions about the farms future. I gather Glenmavis has employed a financial consultant to do some forecasts. I understand that there will be no change to the manager type arrangement for next season.

[41] Mr Budge saw Mr Todd on or about 2 November 2010. Mr Todd gave him the medical certificate and Mr Budge told him to get well and said that he would pick up the pieces, meaning the management of the farm in the meantime.

[42] The next exchange between the two men was on 21 November 2010. Mr Todd intended to return to work the next day so he had a discussion with Mr Budge. Mr Budge however told him that they had decided to make him redundant. There had been no earlier consultation with Mr Todd about the prospect of his redundancy. Mr Todd asked for this to be put in writing. Mr Budge agreed to do so. The next day Mr Budge gave Mr Todd the following letter:

Dear Andrew,

Re: Employment Glenmavis farm

We advise that we have made a decision for reasons largely financial to restructure our dairy farming operation.

As we have decided to appoint Jim Budge as manager, your services are no longer required. We further advise that we require to terminate your employment in accordance with Clause 13.1 of your contract which requires us to provide 8 weeks notice in writing. We have also taken the option in lieu of working through the 8 week period of paying you a lump sum for that time.

We are also prepared to allow you to continue in occupation of the residence for a period of 2 weeks from the date of this letter when the house will be required for other farm workers.

We wish to express our thanks for your services to us and advise that we will release the security over your property as soon as we receive an appropriate letter from you confirming that you will not pursue any additional monies perceived by you to be owing in respect of your employment.

We also request that you leave the residence in a clean and tidy condition.

Yours sincerely

[Signed]

Linley Walker (Dr.)

On behalf of Glenmavis Farm

[43] As required Mr Todd and his family vacated the property soon after his dismissal.

Justification

[44] Whether the decision to dismiss Mr Todd was justifiable must be determined on an objective basis by considering 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.

[45] The statutory duty of good faith applies when an employer is making employees redundant: see s.4(4)(e). S.4(1A)(b) provides that the duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are, amongst other things, responsive and communicative. S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made. To summarise, good faith includes the mandatory requirement to consult with the potentially affected employee before the decision is made.

[46] Consultation is a well understood concept in the present context. For example in *Cammish v Parliamentary Service* [1996] 1 ERNZ 404 the Employment Court said:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to

suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.

[47] There was no consultation. Mr Todd was not told what was proposed, he was not given any information and there was no opportunity to respond. Mr Budge and Dr Walker decided to dismiss Mr Todd and simply communicated that decision to him.

[48] There is a submission that there had been consultation with Mr Todd about a redundancy proposal. I do not accept this submission. I have already mentioned discussions with Mr Todd about equity involvement and contract milking. Those arrangements consequentially would have affected his employment if there had been agreement, but there was not. There is evidence also that Glenmavis Farm had appointed a financial consultant to give advice about restructuring. It was put to Mr Todd that he refused to speak to this person. Mr Todd denied that assertion. There is no other direct evidence on the point so I accept Mr Todd's denial. In the end however, the respondent's position advanced by way of justification is that Mr Todd was redundant because of the decision that Mr Budge take over direct management of Glenmavis Farm. There was never any consultation with Mr Todd about that.

[49] I should record the respondent's position that the correct procedure was not followed resulting in the redundancy.

[50] However, I also agree with Mr Todd's claim that this was not a genuine redundancy. Mr Todd was dismissed principally for other reasons. It was thought that there were difficulties in his management of staff on the farm. Dissatisfaction had developed with him over the issues of him wanting time in lieu for working on his rostered days off, wanting to formalise the discharge of the mortgage and requiring a 2010 written employment agreement following on from his critique of the proposal. Critically, Mr Todd became unwell and needed time off work at a busy time. There were no backup arrangements to cover him for such illness. These matters caused Glenmavis Farm to dismiss Mr Todd, to have Mr Budge take more direct control of the farm management meantime and to advertise for a replacement for Mr Todd. That

was dressed up as *a decision for reasons largely financial to restructure our dairy farming operation* and therefore a redundancy.

[51] Mr Budge's evidence is that Glenmavis Farm did not advertise in the Southland Times for or replace Mr Todd with another manger. That evidence does not accurately describe what happened. Glenmavis Farm entered into a contractual relationship to perform Mr Todd's work with an entity associated with applicants who responded to the Southland Times ads. More recently, Glenmavis Farm has reverted to a directly employed manager. Curiously, in the midst of these proceedings, an approach was made to Mr Todd's parents to see if Mr Todd might be interested in reappointment. However, Mr Todd secured other employment soon after his dismissal and had never sought reinstatement.

[52] For the foregoing reasons I find that Mr Todd was unjustifiably dismissed and he has a personal grievance as a result.

[53] Tied in to Mr Todd's personal grievance claim is a complaint about his working conditions being injurious to his health. That is a reference to the onerous hours of work required, the failure to abide by the agreement about discharging the mortgage and the failure to provide a 2010 written employment agreement. That all culminated in the symptoms Mr Todd reported to his counsellor and doctor in late October and early November 2010. There is merit all those complaints but the matters are all connected to the circumstances of the dismissal and can be remedied in that way.

Remedies for the personal grievance

[54] There is no claim for lost remuneration since Mr Todd promptly obtained other employment.

[55] It was obvious to attendees at the investigation meeting that Mr Todd still feels very angry towards his former employer. That too was Mr Todd's evidence, which I accept. His counsellor reported *symptoms of stress and probable depression ...an agitated state, anxiety, frustration, difficulties sleeping, feelings of guilt and hopelessness, and low mood* which eased after his period of sick leave. However, the

dismissal revisited all those symptoms on Mr Todd. What is worse is that Glenmavis Farm had some knowledge of Mr Todd's fragile state. Despite that, as Mr Todd put it *I was then dismissed without actual notice while on sick leave, and given short period of time to get off the farm with my family.* Those effects were exacerbated by the threat in February 2011 to lay a complaint of theft with the police regarding the overpaid wages and a formal demand in July 2011 requiring Mr Todd to repay the \$136,354.46 advanced to him in 2008. Mr Todd' evidence, which I accept, also makes it clear that he feels betrayed by his employer after having worked *extremely hard under difficult circumstances.*

[56] There is a claim for \$20,000.00 compensation for distress. I consider an appropriate award for the proven effects is \$15,000.00.

[57] It was not suggested that Mr Todd contributed in a blameworthy way to the circumstances giving rise to his grievance.

Other matters

[58] Several additional matters were raised by counsel in submissions. I am asked to impose a penalty for the respondent's failure to provide time and wage records. There was no claim for a penalty in the statement of problem and I decline to entertain such a claim at this late stage.

[59] I am asked to impose a penalty for breaches of good faith arising from the purported redundancy and the respondent's present characterisation of the 2008 advance as a loan. For the same reasons as above I decline to entertain this claim.

Orders

[60] To remedy Mr Todd's personal grievance, Glenmavis Farm Partnership 2007 must pay Mr Todd \$15,000.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[61] An appropriate remedy concerning the mortgage requires further comment. I have found as a term of the employment that Mr Todd is entitled to a discharge of the

mortgage registered in favour of Dr Walker and Mr Budge. There is a submission that compensation could be awarded under s.123(1)(c)(ii) of the amount secured by the mortgage. That would compensate Mr Todd for the *loss of a benefit, whether or not of a monetary kind, which the employee might reasonably have expected to obtain* ... That might be correct but it attacks the problem indirectly because it only creates the circumstances in which the respondent would meet the compensation award by offering to discharge the mortgage.

[62] There is an alternative submission that the Authority could make a compliance order pursuant to s.137 of the Employment Relations Act 2000. I think this is a better approach. Dr Walker's and Mr Budge's refusal to discharge the mortgage (except subject to conditions) amounts to a failure to comply with a provision of an employment agreement entitling the Authority to order them to do a specified thing (discharge the mortgage) to prevent further non-compliance. The matter was put thus only in submissions for the applicant. In addition it may be unnecessary to make a formal order now that the factual dispute has been determined in Mr Todd's favour. I will reserve the issue of an appropriate remedy for further consideration if the matter cannot be resolved between the parties.

[63] There may be issues about the calculation of Mr Todd's final pay. I will reserve that in case the parties cannot agree quantum after applying the following findings. Mr Todd was overpaid 8 weeks salary and it must be accounted for. Mr Todd must be paid 18.5 days for alternative holidays. Mr Todd must be paid 8 weeks holiday pay less 12 days taken in July 2010 which must be treated as annual leave. Finally Mr Todd is entitled to 8% of his gross earnings from 1 July 2010.

[64] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority