

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 170
5293329

BETWEEN CHAD OLSEN and LEANNE JACKSON
Applicants

AND TE ONE A MARA LIMITED
First Respondent

AND CHARLIE PEDERSEN and CHRISTINE PEDERSEN
Second Respondents

Member of Authority: P R Stapp

Representatives: Jills Angus-Burney, Counsel for the Applicants
Michael Quigg, Counsel for the Respondents

Investigation Meeting: 8 and 9 June 2011 at Palmerston North (including
submissions from Mr Quigg)

Submissions by: 1 July 2011 (by Memoranda)

Determination: 3 November 2011

Determination of the Authority

Employment relationship problem

[1] Mr Olsen was employed to work on a farm owned by Te One A Mara Limited at Kariori, (near Waiouru) as a dairy farm manager. Mr Charlie Pedersen (Mr Pedersen) is a major shareholder of the Company and runs the company's farms with the assistance of his family: Christine Pedersen, his wife, Bryan Pederson, their son, and Karl Parker, their son in law.

[2] There has been no necessity established for citing Mr and Mrs Pedersen. There are no claims against them personally. Te One A Mara Limited is a central party for claims relating to it as the employer.

[3] Mr Olsen started work on 11 May 2009, and Leanne Jackson joined him at the farm a short time later. The farm is situated on land owned by a neighbouring partner in a sharemilking agreement with Te One A Mara Limited.

[4] Mr Olsen had an employment agreement that stated he reported to Mr Pedersen, Christine Pedersen, Bryan Pedersen, and Karl Parker. Ms Jackson claimed that she was also employed too, but this is denied by the respondents. Ms Jackson's name was written in handwriting on the agreement.

[5] Ms Jackson lived on the farm with Mr Olsen, and arrived shortly after he started because of family arrangements. However, I hold that her relationship with Te One A Mara Limited fell short of being an employment relationship and there was no employment with Mr Pedersen and Mrs Pedersen personally. Ms Jackson assisted Mr Olsen with his work on the farm while she cared for their one year old child.

[6] Mr Olsen's employment did not run smoothly from the outset. He received warnings on 28 July 2009 (for an incident that occurred in June), 2 September 2009 (for performance) and 27 September 2009 (for performance). These related to:

(1) His decision on 28 June 2009 to absent himself from work and not to feed the livestock (warning 28 July 2009). He was not aware of the weather changing for the worse;

(2) Criticisms in regard to milk quality and animal welfare (warning 2 September 2009); and

(3) Criticisms of his milk quality and animal welfare (warning 27 September 2009).

[7] Mr Olsen has challenged the justification and fairness of each of the warnings.

[8] He also claimed that the actions of the respondents were unjustified, disadvantaging him in his employment. He has claimed that allegations made of him thieving, lying, having possession of an unlicensed gun and using it, and workplace abuse by Bryan Pedersen were also unjustified. Mr Olsen has also claimed that his duties were removed from him and taken by Bryan Pedersen during the course of the employment that he says was unjustified.

[9] The first respondent denies all the allegations made against it.

[10] Mr Olsen was dismissed on 5 October 2009 for misconduct. The reason relied upon by the Pedersens was the need to intervene to ensure milk quality and proper treatment of animals were maintained on the farm. This occurred when Fonterra forewarned Mr Charlie Pedersen that it would cease collecting milk from the farm and followed it up with a letter later. Mr Olsen has claimed that a fair and reasonable employer would not have dismissed him in all the circumstances because of the poor quality of the livestock he found upon commencing work and the conditions on the farm, compounded by the climate. He says this was a significant factor in making the work and managing the livestock on the farm difficult and a factor for the poor results. The respondents denied the claim, and rely on better performance occurring when Bryan Pedersen supervised Mr Olsen on the farm.

[11] The applicants have also claimed that they are owed a payment for annual holidays, and a payment for farm reports they gave to the Pedersens during the employment. The employment agreement provided for a payment of a communications bonus of \$165 per month. The respondents denied that any money is owed to the applicants because Ms Jackson was not an employee and Mr Olsen's reports were not properly completed. The matter of the holiday pay has been settled.

[12] Both parties are seeking costs.

The issues

[13] The issues in this matter are as follows:

- (a) Was Leanne Jackson employed by the respondents?
- (b) Were personal grievances properly raised?
- (c) Were the applicant(s) unjustifiably disadvantaged by the actions of the respondents?
- (d) Was there an unjustifiable dismissal?
- (e) Are the applicant(s) owed any payments for farm reports?
- (f) What remedies apply and, if so, how much?
- (g) Which party is entitled to costs and how much?

Factual discussion

[14] Leanne Jackson was not employed by the respondents. I have applied s. 6(2) and s.6(3) of the Employment Relations Act 2000 (the Act) to determine the real nature of the relationship. The evidence does not support Ms Jackson's claim that she was employed and that there was any intended employment because:

- (a) A CV was only provided by Mr Olsen.
- (b) An application form was filled out only by Mr Olsen.
- (c) Ms Jackson conceded that the CV provided by Mr Olsen did not contain any reference and background details about her, after telling the Authority during the investigation meeting that Mr Olsen's CV did provide some details on her.
- (d) Mr Pedersen's evidence at para.11 that he did not employ Ms Jackson, she did not apply for a position, she did not supply a C V, she did not fill out an application form, she did not sign an individual employment agreement, she did not supply an IRD number, and she did not receive any income and there was no tax. This evidence was factually correct.
- (e) Mrs Pedersen's evidence at paras.2 supporting what Mr Pedersen said and at 8 in which she refers to the only employment arrangements being with Mr Olsen.
- (f) Ms Jackson never took up an issue about being employed while she was on the farm and before Mr Olsen's dismissal.

[15] My finding is also supported by the contractual documentation as follows:

- (a) Exhibit 1 – the individual employment agreement between one employer, namely Te One A Mara Limited, and one employee: Mr Olsen.
- (b) Ms Jackson's name was added to the individual employment agreement by Mrs Pedersen as a memory-jogger at the time Mr Olsen signed the agreement. Ms Jackson's name was included on one document only. There was no linkage between Ms Jackson's name on

the employment agreement and any involvement by her in signing off an employment agreement and or any terms relating to her personally.

- (c) Ms Jackson never initiated and never asked to sign an individual employment agreement at any time during the course of the period that she and Mr Olsen were living on the farm.
- (d) The individual employment agreement provided for the role of “*dairy farm manager*” only. This role related to Mr Olsen’s duties and responsibilities on the farm. There was no reference at all to any duties and responsibilities associated with Ms Jackson living on the farm and working on the farm.
- (e) There was no mention of Ms Jackson being employed to *rear calves*, which Ms Jackson claimed was the work that she was responsible for. Calf rearing was specifically referred to as a duty of the dairy farm manager in the employment agreement.
- (f) The past and current practice of the respondents when employing both partners is that each is required to sign an individual employment agreement with a separate salary package paid to each individual, even though they were a couple. Documents were produced to support this [exhibits 45 and 46, for example].
- (g) Mr Olsen specifically requested that he alone would be the employee, which I accept as being probable. Thus, the arrangement for his pay to be paid into a joint account with Ms Jackson would have been Mr Olsen’s preference, and can not be determinative of Ms Jackson being an employee.
- (h) The salary and bonus package only refers to the “*Raetihi position*”. There was no mention of a separate calf rearing position [exhibit 2].
- (i) Arrangements exist under the terms of the agreement for Mr Olsen to employ someone else, which left it open to him to employ Ms Jackson and would account for inferences about her role and any assistance she could give while she was living on the farm.

- (j) An email to Mr Olsen attaching the salary package of 20 April 2009 referred to “*Charlie and I have the pleasure of offering you the position and really look forward to the start of the new season*” [exhibit 2] (emphasis added). The above was supported by evidence from Mr Pedersen at paras.11-12, 84-85, 97-100; and Mrs Pedersen paras.3 and 4.

[16] The arrangements for the payment for the job do not assist Ms Jackson and include the following:

- (a) Mr Olsen only supplied his personal IRD number for tax purposes.
- (b) Ms Jackson was never paid by the respondents. She never provided a bank account or an IRD number to the respondents for any payment. The only payments that were made were paid into a joint bank account where there was no relationship to employment status of Ms Jackson.
- (c) Pay slips only refer to Mr Olsen.

[17] I hold that the following apply to determine the real nature of the relationship:

- (a) Mr Olsen was completely responsible for the management position he held.
- (b) The remuneration package allowed for additional staff to be managed by Mr Olsen.
- (c) Ms Jackson assisted Mr Olsen by mutual arrangement, given the living arrangements between them with her assisting him in his employment.
- (d) The work that Ms Jackson assisted with included the duties of the dairy farm manager in Mr Olsen’s employment agreement for which he had responsibility.

[18] The evidence from Mr Olsen and Ms Jackson as to the real nature of the relationship was that they:

- (a) Admitted that Mr Olsen provided his CV and was approached for the dairy farm manager role.

- (b) Admitted that Mr Olsen was appointed to the position of the dairy farm manager.
- (c) Both saw Ms Jackson as Mr Olsen's "farm assistant".

[19] An employment agreement was not deliberately withheld by the Pedersens given the evidence of the terms contained in Mr Olsen's agreement that applied to him only, provided for time off and for relief. To support this conclusion there is no conclusive evidence of her asking for an employment agreement and any issue arising from that before Mr Olsen was dismissed. The fact that her name was written on the agreement was not of its own conclusive of any intention for her to be employed, I hold. It is likely it was written on the agreement by someone, most probably Mrs Pedersen, to enable her to remember Ms Jackson's name.

[20] I therefore conclude that Ms Jackson was not employed by Te One A Mara Limited as an employee on the farm. Ms Jackson was certainly not employed by Mr Pedersen and Mrs Pedersen personally given the employment arrangements with Te One A Mara Limited and Mr Olsen, and previous practice in other arrangements.

Mr Olsen's employment agreement with Te One A Mara Limited

[21] Mr Olsen's employment agreement with Te One A Mara Limited contains disciplinary and dismissal procedures in the following terms:

Clause 20(1):

The Employer may dismiss an Employee without notice (summary dismissal) for serious misconduct. (See First Schedules for examples of what constitutes serious misconduct) after following a fair process ... the Employer will provide the Employee with information about the concern (and the seriousness of it), arrange a formal meeting, provide the Employee with an opportunity to take advice before the meeting, be represented at the meeting and provide the Employee with a proper opportunity to respond to the concern, before any decision to dismiss is made.

Clause 20(3):

Should the Employer have concern about the Employee's conduct or substandard performance, the Employer will provide the Employee with information about the concern (and the seriousness of it), arrange a formal meeting, provide the Employee with an opportunity to take advice before the meeting, be represented at the meeting and provide the Employee with a proper opportunity to respond to the concern, before any decision to issue a warning is made. Any warning will be confirmed in writing particularising the details of the

misconduct or substandard performance, and that the Employee's employment is in jeopardy if the misconduct is repeated or the substandard performance is not adequately addressed ...

The warnings

[22] The first warning of 28 July 2009 related to Mr Olsen being absent from work and leaving the animals unfed on 28 June 2009. In particular, Mr Olsen did leave the farm and the stock, but he says that he planned to feed the stock early and use the afternoon for time off. Also he says when he arrived at work he could not find the tractors and that one was being used to cart tyres. It was alleged that he failed to advise his employer that he would be unable to feed-out, and his explanation that there was no tractor available was unsatisfactory given that there were three tractors and two wagons there at the time. Mr Olsen made no approaches to Karl Parker (who was present at the time) to ascertain the availability of the tractors and wagons. Mr Pedersen relied on information from Mr Parker on this matter, and considered Mr Olsen's written explanation before making his decision.

[23] The procedure that Mr Charlie Pedersen says that was followed included:

- (a) Raising the concerns with Mr Olsen, both on the farm and via email correspondence.
- (b) Face-to-face meetings between Mr Olsen and Karl Parker.
- (c) The complaint was in writing dated 10 July 2009 for Mr Olsen.
- (d) Feedback was provided by Mr Olsen in writing on 13 July and taken into account before any decision was made.
- (e) The timing between the incident and the warning.

[24] There was a document produced during the hearing from Mr Parker that purported to be his record relating to the incident. The dates support that this was written after the event, and thus was not a contemporaneous document. Indeed the applicants never saw this document until these proceedings. Its value therefore could only help to assist Mr Parker remember what happened at the time. In regard to the respondents' reliance on contact with Mr Olsen on the warning I hold that the process was loosely arranged and informal, with the potential risk of it being challenged

because Mr Olsen never really had an opportunity to get a representative before the decision was given to him, despite the time between the incident and the warning being given. Mr Pedersen omitted to hold a meeting, which was required under the terms of the agreement. Also, the decision appeared to have been made without Mr Olsen at least having some input and comment on the penalty, that is a warning for misconduct.

[25] The second warning of 2 September 2009 milk quality/animal welfare related to:

- (a) Somatic Cell Counts (SCC) for milk between 15 August and 1 September that had all exceeded Fonterra limits.
- (b) Mr Olsen had been urged on numerous occasions to get the SCC count under control and treat the cows for mastitis.
- (c) Mr Olsen had been provided with instructions and drugs to deal with the high SCC counts.

[26] The procedure for the warning included:

- (a) Informal discussions regarding the need for Mr Olsen to improve milk quality.
- (b) Mr Bryan Pedersen was required by Mr Pedersen to supervise more directly on the farm in regard to Mr Olsen's work, and to ensure there was an improved milk quality.
- (c) A formal letter was sent to Mr Olsen requesting him to reply to various concerns.
- (d) The decision for a warning followed.

[27] I hold that there were a number of performance issues. However, Mr Pedersen omitted to follow the procedure under the terms of the agreement to hold a meeting, which a fair and reasonable employer would have done, to give Mr Olsen the opportunity to get representation and be able to respond to the matters and a penalty involving a warning because it put Mr Olsen's employment at risk.

[28] The third warning was dated 27 September 2009, and again related to milk quality/animal welfare. The warning also put Mr Olsen on notice that his employment was in jeopardy. This involved:

- (a) Discussions with Mr Olsen regarding the milk quality and mastitis treatment, the warning of 2 September, and the SCC counts remaining above acceptable Fonterra standards.
- (b) Mr Olsen had been advised of the possibility of a discontinuance of milk supply being imminent. This was supported by a letter from Fonterra produced during the Authority's investigation (exhibit 51).

[29] The procedure that involved Mr Pedersen and Mr Olsen included:

- (a) Discussions on the farm regarding the SCC count issue.
- (b) Email dated 26 September 2009 sent to Mr Olsen raising that a report from Bryan Pedersen concerned Mr Olsen's resignation and an email dated 27 September raising a number of matters.

[30] The problem with the warnings is that they were made and given to Mr Olsen, where his opportunity to comment was required after the decision. That opportunity should have been given first before the decision was made. This is particularly so given that there was a dispute between Mr Olsen and Mr Bryan Pedersen on whether or not Mr Olsen had resigned and that Mr Olsen had taken issue about Mr Bryan Pedersen's claims. There was no enquiry and no explanation about how Mr Charlie Pedersen came to his conclusions.

Other issues

[31] In the background there were a number of issues relating to the management of stock and the farm. These had been referred to in email correspondence prior to the incident on 28 June. I hold that the employer was entitled to raise these issues with Mr Olsen. However, the relationships on the farm started to deteriorate because of the farm management issues and the responses from each of the people involved. Added to the difficulties was the decision by Mr Pedersen to involve Bryan Pedersen on the farm. I hold he was entitled to put Bryan Pedersen on the farm to supervise because there were issues about stock and farm management, Mr Bryan Pedersen had a role

under the terms of the employment agreement, and Mr Charlie Pedersen was in charge. Unfortunately by doing so it is clear that Mr Olsen and Mr Bryan Pedersen had issues with each other and those issues have given rise to the reliability of their evidence in regard to what they say happened and the issues between them such as the allegation that Mr Olsen gave his resignation, Bryan Pedersen's issues about mastitis, treatment of cows and cleaning. There are a huge number of matters between them, and I have only referred to the ones that indicate some of the issues.

[32] In July 2009 Mr Olsen decided to get an independent vet's report (report dated 28 July-SOP RR) at his own cost, when he was accused of over feeding the cows with carrots by the Pedersens. He produced the report to support his claim that a fair and reasonable employer would not have acted the way the Pedersens acted, given the state of the stock on the farm and the climate. He provided the information in the report to the Pedersens. They took exception to him using a vet other than one they had approved.

[33] Mr Olsen has complained that his relationship with the Pedersens involved them alleging he had lied, accusing him of theft, accusing him of resigning and accusing him of having and using an unlicensed gun, all of which he denied. Also, he says Bryan Pedersen's behaviour in the workplace was abusive. Mr Bryan Pedersen denied the claim. This is a matter of credibility, but the allegations have arisen out of these proceedings and not in regard to claims of any unjustified action at the time, and I therefore dismiss them because they are not relevant to the employment relationship problems at the time. For completeness one witness says he overheard Bryan Pedersen's language on one occasion, and although Bryan Pedersen denied the allegations he could not establish that that evidence against him was unreliable without any witnesses directly involved.

The dismissal

[34] Mr Olsen was summarily dismissed on 5 October 2009 with four weeks pay in lieu of notice by way of being handed a letter by Christine Pedersen and one of her daughters. The intention was for an email to be delivered at the same time, but there was a snow storm and the power had been cut, and given the difficulties being experienced on the farm, Mrs Pedersen and one of her daughters decided to deliver the letter by hand. It was handed to Mr Olsen while he was milking. Mr Olsen put it

in his pocket and looked at it later. Upon looking at it he discovered a decision had been made to dismiss him and pay him four weeks notice in lieu.

[35] The reasons for the dismissal were in the letter as follows:

“Finally we are terminating your employment because you have not looked after the health and welfare of the herd despite input daily from Bryan your manager, and with the back up from feed plans made by [names withheld]. Your incompetence we believe has undermined a perfectly workable plan that should have the herd producing healthy milk from healthy cows”...

[36] Mr Olsen and his representative at the time considered the dismissal as a summary dismissal given it took immediate effect and that he would be paid for 4 weeks in lieu of notice.

[37] Further, Mr Charlie Pedersen says he had lost trust and confidence in Mr Olsen taking into account all the other issues that had been raised during 5 months of employment and the serious matter of the threat of not being able to supply Fonterra (statement paragraphs 69-79). Also Mrs Pedersen says she lost confidence in Mr Olsen because she had a genuine concern for the well being of the herd (statement paragraph 30). The dismissal took effect from 6 October 2009.

The payment for the reports

[38] Mr Olsen did prepare a number of reports in different formats. He reasonably could expect payment for these. This is because there was a contractual term for the payment under the terms of the employment agreement. Any issues about the quality and content of the reports were not raised at the time as an issue. The contract while it had had no penalty on Mr Olsen not meeting the requirements. Mr Olsen had help in completing the reports and Mr Charlie Pedersen was involved too. Thus, Mr Olsen had a reasonable expectation for payment, I hold.

Determination

Ms Jackson’s claim of being an employee

[39] Ms Jackson was not an employee. Ms Jackson’s claims are dismissed, I hold.

The farm communication/reports

[40] There has been no payment made for the farm reports. At the time there does not appear to have been any complaints made about the reports, other than discussions on producing them and the format required. The quality was not an issue at the time (although it has now become one). Mr Olsen had help during the time from Mr Pedersen (when a computer broke down) and Ms Jackson's father. Indeed the communication around any issues to do with the farm reports was wholly inadequate to withhold payment. As I have said any reason relied upon at the time was not properly dealt with by the Pedersens, and as such, Mr Olsen had a reasonable expectation for payment. Mr Olsen has claimed \$495. The Pedersens have tried to defend their action of not paying with reasoning raised now instead of at the time. The amount of the claim has not been challenged.

Raising personal grievances

[41] The raising of the personal grievance has been clumsy and inexperienced at first. The first time an issue was raised was on 6 October 2009 by Mr Olsen's representative at the time (by his father in law). The letter suggested an intention to raise a personal grievance and a claim for assistance from the Department of Labour and the Employment Relations Authority and claimed costs (document 27). Next, another letter from another representative (another lawyer) at the time reiterated the existence of an employment relationship problem and provided more details of personal grievance claims (document 28). This identified, generally, tension and difficulties in the employment relationship, the termination of employment and unjustified action. The latter letter got the issues wrong in complaining of a *constructive resignation*, when in fact Mr Olsen was actually dismissed.

[42] I am satisfied that Te One A Mara Limited consented to acknowledging the raising of the personal grievance in as much as it never expressed that it was not consenting to a personal grievance, at least in regard to Mr Olsen's dismissal and the matter of the three warnings. Further particulars were provided in the statement of problem, which with a new representative (Ms Angus Burney), attempted to fix any inadequacy about the claim. The statement in reply never alerted Mr Olsen that the employer would not consent to any part of the personal grievance being raised out of time as opposed to defending it and denying the allegations. Where any of the issues are before 90 days before 6 October 2009 and 90 days before the statement of

problem dated 2 December 2009, those are matters of background only, and will not serve as causes of action for personal grievances on their own. Thus, the three warnings starting from the disciplinary action from 2 September 2009 and the dismissal are accepted by the Authority or if out of time consented to.

[43] There are numerous other matters relating to performance that have been claimed to be unjustified disadvantages, and have never been properly raised until the statement of problem was lodged. These are background matters too, I hold. This includes the allegation of lying about the number of tractors available on the farm on 28 June. The claim of a removal of the farm manager's duties has only been raised in the statement of problem and related to Mr Bryan Pedersen being asked to supervise Mr Olsen because of an email dated 17 August 2009 addressed to Mr Pedersen. This is background too, I hold. It hardly amounts to Mr Olsen being removed from duties I hold. In any event the employer had the right to put in supervision-and there appeared to be a number of issues justifying this.

Unjustified warnings in breach of the employment agreement

[44] I am satisfied that the warnings were unjustified as the process followed was not adequate and not in accordance with the terms of the agreement (clauses 20 (1) and 20 (3)). A fair and reasonable employer would have complied with the terms.

[45] First, on the first warning a fair and reasonable employer would have conducted a proper meeting to uncover what had happened. However, Mr Olsen has made some admission about his role that a fair and reasonable employer would be able to rely on. First Mr Olsen left work when he was required to be at work, and second failed to make sufficient arrangements to take the day off or to leave early when he couldn't find a tractor to use. He admitted leaving the farm without completing his duties and not knowing about the possibility of a change in the weather. He saw Mr Parker was present and he had an opportunity to inform Mr Parker that he was leaving, but did not do so. Mr Olsen said that he had relied on arrangements with Mr Parker to leave early, but there was no conclusion by an investigation about this at the time, I hold. Mr Olsen had an opportunity to comment when matters were raised with him by Mr Charlie Pedersen on 10 July, along with a number of issues about the farm, pets and performance. However, while Mr Pedersen sought input and comments by way of emails he failed to meet with Mr Olsen thus not properly investigating the issue of the availability of the tractors, and he omitted to

provide Mr Olsen with an opportunity for representation and to provide input on the penalty when Mr Olsen had said that he was sorry. The option of a penalty was not given to Mr Olsen on 10 July. A fair and reasonable employer would have done more since Mr Olsen and Mr Parker were not getting on. Also, Mr Pedersen solely relied on Mr Parker's information and his own knowledge when he says there were three tractors, but that he did not tell Mr Olsen this. Thus that was unfair. Mr Pedersen was not able to rely solely on Mr Parker given that Mr Parker had not made a written statement as part of any inquiry at the time (Mr Olsen did reply in writing on 13 July). Mr Olsen admitted that he should have advised someone before leaving and that he was sorry and that it would not happen again.

[46] Mr Olsen's involvement in the matter is supported by his admission of fault and that he was sorry. This means there should be no remedy applied for this warning because of his contribution.

[47] Secondly, the second warning over milk quality was directly related to Mr Olsen's role and duties in his work, and he had an opportunity for input, again involving email and the usual on farm contact with Mr Pedersen. The assessment of the milk quality was underpinned by Fonterra requirements (called the SCC rates) which Mr Olsen was not meeting, and a fair and reasonable employer would be entitled to put an employee on notice for this. This was supported by Fonterra down grades, and herd infections referred to by Mr Pedersen in his evidence. Mr Olsen had an opportunity to comment when the matters were raised with him by Mr Pedersen in emails and to that extent Mr Olsen was at least put on notice of the allegations, even although he did not like it. However the process fell down when there was no investigation and opportunity for Mr Olsen to have some input on the penalty before the decision was conveyed in the email by Mr Pedersen. The request for any input and comment after the decision does not comply with the terms of the employment agreement where there needed to be a meeting first.

[48] Thirdly in regard to the third warning over the milk quality a fair and reasonable employer would be concerned about the milk quality requirement set by Fonterra and that it was not being achieved by Mr Olsen. The employer has not been able to fully justify any concerns about the animal welfare complaints and that the allegations related solely to Mr Olsen's conduct given the competing evidence about the condition and state of the livestock on the farm and the conditions on the farm

given the climate. The allegation relied on Mr Pedersen's concern about the herd being put under stress from Mr Olsen's failure to diagnose and treat infection in the herd. Mr Olsen through his representative at the time replied with a response to the allegations. The decision was made by Mr Pedersen to issue a warning without having a meeting and before any opportunity for input and comment from Mr Olsen. This is contrary to the terms of the agreement.

Relationships and dismissal

[49] Underpinning these warnings was a deteriorating relationship between the Pedersens and Mr Olsen, and miserable climatic conditions on the farm. There were arguments about the state of the stock and claims and counterclaims as to who was responsible. The conflicting vet report and climatic conditions alone would not have involved a fair and reasonable employer dismissing Mr Olsen on 5 October 2009 by handing him a letter while he was milking and finishing the work. This is despite the urgency in which Mr Pedersen assessed the situation at the time based on the Fonterra information. Mr Pedersen acted on advance notice of the likelihood of a letter from Fonterra and made the decision to dismiss Mr Olsen without giving him a proper opportunity to have some input and to comment, essentially relying on the last warning that could lead to his dismissal. Subsequently a letter from Fonterra confirmed the situation (letter 51) that milk would not be picked up after 1 December 2009 unless the mean SCC count was reduced in another month. On the face of it Mr Pedersen's action was based on the imperatives he saw for the farm since he was one of the owners and interested parties and the distance he was living from the farm. A fair and reasonable employer would have taken more time, including properly meeting with Mr Olsen, to enable Mr Olsen to comment and have input before making a decision considering the conditions, the state of the stock, and the relationship between Mr Olsen and Mr Bryan Pedersen. Also there was no reason for Mr Bryan Pedersen not being able to continue to cover, albeit he had his own farm to manage also. Given that there had been one improvement during the time with Mr Olsen's SCC count, this was not a matter relating to a breach of trust and confidence, but a matter more to do with Mr Olsen's performance, which Mr Charlie Pedersen concluded was not up to standard based on the threat of the Fonterra letter. At the very least a fair and reasonable employer would have considered Mr Olsen's performance as failing to meet requirements for misconduct on notice, and not as a breach of trust and confidence, I hold. In addition the circumstances of the climate;

Fonterra's requirements; the differing opinions on the condition and the state of the stock, the animal/stock treatment matters; and the conflicts generated between Mr Olsen and Bryan Pedersen would have all been matters that should have been taken into better account. Thus, a fair and reasonable employer would not have dismissed Mr Olsen summarily for a breach of trust and confidence to take immediate effect. The reasons for dismissal had more to do with the grounds of poor performance for dismissal, which would be consistent with Mr Olsen's dismissal and four weeks pay in lieu of notice at the time instead of a summary dismissal (as it happened).

Conclusion

[50] I hold that Mr Olsen has a personal grievance for unjustified disadvantage actions in regard to the three warnings and unjustified dismissal.

Remedies

[51] Te One A Mara Ltd is to pay Chad Olsen \$495 as claimed for farm reports.

[52] The claim for remedies has been made complex because of Mr Olsen's and Ms Jackson's joint income from other sources in their financial arrangements. He worked from 5 May 2009 until he was dismissed on 5 October 2009. His weekly income was based on a base salary of \$75,000 per annum. He has claimed 6 weeks wages lost due to his dismissal 5 October-December 2009 (accounting for a month's pay from the date of dismissal until 31 October 2009). He found a new job and started work from 13 December 2009 after being dismissed. I limit his claim to \$8,653.86 given he made attempts to mitigate his loss and had made commitments as to where he would live in the immediate time after being dismissed and in regard to losing his farm accommodation. In addition claims have been made for up to 70 weeks for the amount of lesser income received in his current role at the rate of \$300 per week. The amount claimed is \$21,000. I have dismissed this claim because there was no certainty at all that Mr Olsen would have continued in work with Te One A Mara Limited much beyond the time he has been awarded lost wages because of the performance issues. He lost no wages due to the three warnings. His loss for the claim of \$8,653.86 is entirely related to his dismissal. His contribution does relate to his performance. He did not meet the Fonterra requirements that were part of his job. Since the dismissal related to the Fonterra results and Mr Pedersen's imperative action my assessment of contribution relates to only this. The other matters between Mr

Bryan Pedersen, Mrs Pedersen and her daughter and Mr Olsen and Ms Jackson were matters relating to the on going employment relationship with Mr Olsen and Te One A Mara Limited and had nothing directly to do with the personal grievance as raised. I have therefore excluded them from my assessment. Given the differences of opinion about who was responsible and any reasons relating to the farm and Mr Olsen's performance, I have assessed Mr Olsen's contribution to the personal grievance at 15% for reduction in the remedies.

[53] Mr Olsen is entitled to compensation for humiliation, loss of dignity and injury to feelings. I accept there has been some impact on him due to his dismissal and receiving the second and third warnings. I assess his entitlement as \$8,000 less 15% for contribution.

Orders of the Authority

[54] Te One A Mara Limited is to pay to Chad Olsen \$495 for the farm report communications under the terms of the employment agreement.

[55] Te One A Mara Limited is required to pay Chad Olsen \$7,355.78 lost wages and \$6,800 compensation.

[56] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority