

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 314
3040451
3040452
3053657

BETWEEN	SIMON BURTON Applicant in 3040451 Respondent in 3053657
AND	JOLIENE BURTON Applicant in 3040452
AND	JARROD CRUSE Respondent in 3040451 and 3040452 Applicant in 3053657

Member of Authority:	Nicola Craig
Representatives:	Margaret Revell and Hamish Burdon, advocates for Simon Burton and Joliene Burton David Venter, counsel for Jarrod Cruse
Investigation Meeting:	8 and 9 April and 10 May 2019 in Hamilton
Submissions received:	At the investigation meeting and 9 August 2019 from Mr Cruse
Date of determination:	12 August 2020

DETERMINATION OF THE AUTHORITY

Mr Burton

A. Jarrod Cruse did not bargain unfairly with Simon Burton.

- B. Mr Burton was covered by a valid trial period and his employment ended pursuant to that trial period. He is prevented from bringing an unjustifiable dismissal claim.**
- C. Mr Burton's claim regarding breach of good faith is not established.**
- D. Mr Cruse breached Mr Burton's employment agreement and the Wages Protection Act 1983 by making a deduction from his wages without consultation.**
- E. Mr Cruse is ordered to pay Mr Burton the following sums within 28 days of the date of this determination:
 - (i) \$1,052.02 gross (including holiday pay and Kiwisaver contribution) for work undertaken prior to 1 June 2018;**
 - (ii) \$693.73 gross (including holiday pay and Kiwisaver contribution) for days off which he had to work; and**
 - (iii) \$60.00 gross for an unauthorised deduction.****
- F. Mr Cruse breached the Employment Relations Act 2000 by not keeping and producing wages and time records and the Holidays Act 2003 by not keeping holiday and leave records.**

Ms Burton

- F. Joliene Burton was a casual employee of Mr Cruse.**
- G. Ms Burton's claims regarding breach of good faith and unjustifiable dismissal are not established.**
- H. Mr Cruse is ordered to pay Ms Burton within 28 days the sum of \$1,087.02 gross as arrears of wages (including holiday pay).**
- I. Mr Cruse breached the following as regards Ms Burton:
 - (i) the Employment Relations Act by failing to provide an employment agreement;**
 - (ii) the Minimum Wage Act 1983 by failing to pay her the minimum wage;**
 - (iii) the Employment Relations Act regarding wages and time records; and**
 - (iv) the Holidays Act 2003 regarding holiday and leave records.****

Penalty

- J. For the breaches outlined above regarding Mr and Ms Burton, Mr Cruse is ordered to pay within 28 days of the date of this determination a penalty of \$5,000.00, as follows:**
- (i) \$1,500.00 to Mr Burton;**
 - (ii) \$2,500.00 to Ms Burton; and**
 - (iii) \$1,000.00 to the Authority's bank account to be forwarded to the Crown account.**

Mr Cruse

- K. Mr Cruse has not established his claims against Mr Burton.**

Costs

- L. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problems

[1] Simon Burton worked as a farm manager for Jarrod Cruse on a Te Awamutu area farm owned by Mr Cruse and others. Mr Burton and his wife Joliene Burton, along with their children lived in a house on the farm. The farm had been bought by Mr Cruse shortly before and Mr Burton was the first farm manager under Mr Cruse's ownership.

[2] Mr Burton challenges aspects of his appointment, events during his employment and his dismissal. Mr Cruse denies the allegations and counterclaims for damages against Mr Burton. Ms Burton claims she was employed by Mr Cruse to help with the farm's calves but he denies any employment relationship existed with her.

[3] An investigation meeting was held on 8 and 9 April 2019 and completed on 10 May 2019. I heard evidence from Mr and Ms Burton, Mr Burton's previous employer, and a woman contracted to perform a bomb wash on the farm's milking plant. Mr Cruse gave evidence and called a fencing contractor, a farm consultant, the real estate agent who sold him the farm and two veterinarians who had provided services at the farm. I heard from the vets by phone.

[4] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority

that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[5] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings, expressed conclusions, and specified orders made as a result.

Issues

[6] The issues for determination regarding Mr Burton's claims are:

- (a) Did Mr Cruse breach s 63A(2) of the Act in his bargaining with Mr Burton (described on Mr Burton's behalf as unfair bargaining), was Mr Burton disadvantaged by that and/or was it a breach of the duty of good faith?
- (b) Was Mr Burton's employment covered by a valid trial period?
- (c) If not, was he unjustifiably dismissed and if he was, what remedies (if any) should he receive?
- (d) Is Mr Burton owed any arrears of wages or other money?
- (e) Did Mr Cruse breach Mr Burton's employment agreement and/or the Wages Protection Act 1983 regarding deductions and withholding payments?
- (f) Did Mr Cruse breach s 130 of the Act by failing to provide wages and time records and/or s 81 of the Holidays Act by failing to keep and provide holiday and leave records?
- (g) Did Mr Cruse breach his duty of good faith to Mr Burton?
- (h) If Mr Cruse breached any statutory provisions, outlined above, should penalties be imposed?

[7] The issues for determination regarding Ms Burton are firstly whether she was employed by Mr Cruse and if so:

- (a) Is she owed any arrears of wages and other money?
- (b) Was she unjustifiably dismissed and if so, what remedies (if any) should she receive?
- (c) Did Mr Cruse breach his duty of good faith to her?
- (d) In failing to provide an employment agreement, did he breach s 63A(2) of the Act (also described on her behalf as unfair bargaining) or unjustifiably disadvantage her?
- (e) If the Minimum Wage Act 1983, the Employment Relations Act and/or the Holidays Act were breached should penalties be imposed and if so, how much?

[8] The issues for determination regarding Mr Cruse's claims are whether Mr Burton breached his employment agreement by neglecting his duties as follows and if so, should damages be awarded for:

- (a) altering the farm house and not leaving it in the same condition;
- (b) repairs to farm equipment;
- (c) unnecessary repair costs incurred;
- (d) DNA tests required on calves; and
- (e) costs and loss of profits regarding cows and slipped (miscarried) calves and vet bills?

[9] I will deal with all of Mr Burton's claims, before dealing with Ms Burton's claims, followed by Mr Cruse's claims.

The parties

[10] Mr Burton was an experienced farm manager who, prior to working at Mr Cruse's farm, had worked for five years for the employer who gave evidence on his behalf at the investigation meeting. Mr Burton and his wife were looking for an opportunity to move for a lifestyle change and to find a position that would allow for growth. They wanted something long term as a change in jobs meant the family had to move homes and the younger children change schools.

[11] Mr Cruse also has extensive farming experience and owns and lives on another farm some distance from the farm Mr Burton worked on. Mr Cruse and the other owners bought the farm shortly before Mr Burton started work on it. Mr Cruse was also looking for someone likely to stay three years or so.

Advertisement and interview

[12] Mr Cruse advertised for a farm manager or contract milker. There was no reference to seeking a couple for the Te Awamutu farm. Mr Burton applied and had some discussions with Mr Cruse

[13] On 20 April 2020 Mr Burton and Ms Burton went to Mr Cruse's home farm so that Mr Burton could be interviewed. During this meeting Mr Cruse discussed with Ms Burton, the possibility of her feeding the farm's calves.

[14] Mr Cruse told them that the farm had just been purchased and the house needed some renovation. Mr Cruse took over the farm around 17 May 2018. There were only around 20 cows included in the purchase. The remainder of the herd was to arrive later.

[15] Mr Cruse showed Mr Burton the Federated Farmers standard employment agreement, saying that was what he signed with his employees. There was some discussion about terms.

[16] Mr Cruse later texted Mr Burton asking for his wife's name for the contract.

Meeting on the farm

[17] On 26 April 2019 the parties agreed to meet at the farm so the Burtons could have a look around. The Burtons messaged that they would arrive around 4.45pm. The three drove around the farm together.

[18] Mr Cruse presented the employment agreement which was the standard Federated Farmers agreement, on which Mr Cruse had filled in some of the blank spaces by hand. The agreement was put on a ute's bonnet. Mr Cruse went through the agreement page by page with Mr Burton. Mr Cruse describes this as taking about 25 to 35 minutes.

[19] Mr Cruse said that new employees had the right to seek independent advice and offered Mr Burton the opportunity to take the agreement away to look at it. Mr Burton replied no, he had signed them before, having had a series of annual agreements with his then current employer. Although the standard agreement contained a trial period, this would not have been applicable for most of Mr Burton's previous agreements. He indicated to Mr Cruse that he did not need to get advice because it is a legally binding contract. He accepts that he did not think he needed advice and that everything looked good except the pay frequency.

[20] Mr Cruse and Mr Burton signed the agreement.

[21] By this time it was after 5.30pm. Mr Cruse brought it to Mr Burton's attention that he had until 10pm that night to get back to him with anything they were not happy about and to discuss it if he wanted the employment. This was based on clause 36 of the agreement which referred to the employer making an offer of employment which was open for acceptance until a prescribed time.

[22] The time in clause 36 was filled in by Mr Cruse as expiring the same day at 10pm. Mr Cruse says that he made a mistake when completing the form as he copied it over from another contract, recognising now that it was a "silly time" to put in. It is

hard to see the clause as applicable when Mr Burton had already signed thereby accepting the offer however, Mr Cruse offered the opportunity.

[23] The parties have different impressions when looking back on the 26 April discussion. Mr Burton says he felt pressure to sign. He wanted the matter sorted for his own piece of mind. However, I consider that was based at least partially on the fact that he had already told his employer that he was leaving. Mr Burton's impression was that Mr Cruse wanted to get away as he had a long drive home.

[24] Mr Burton told Mr Cruse that he had signed this type of agreement previously. Mr Burton candidly told me that he did not realise the importance of paying much more attention.

[25] The Burtons suggested it was getting dark. However, the parties did not have to use torches or the like. Sunset in Te Awamutu on that day was 5.37pm, with civil twilight at 6.04pm and astronomical twilight at 7.06pm in Te Awamutu on that day.¹ I am not convinced that the lighting was a difficulty.

[26] Mr Cruse says that the Burtons were really happy with what they saw on the farm and Mr Burton wanted to sign straight away. Mr Cruse had no urgency to sign as the work was not going to start until 1 June 2018. Mr Cruse says that there was no pressure to sign the contract or to finish the meeting from his perspective. He told the Burtons they could take the agreement home to have a look at it. He says Mr Burton wanted to get home whereas Mr Cruse himself was in no rush.

[27] I found Mr Cruse's evidence regarding the meeting the more consistent and credible.

[28] Mr Burton phoned Mr Cruse that night regarding a term of the agreement he wanted to change. The agreement provided for fortnightly pay but Mr Burton wanted to be paid weekly, so called Mr Cruse about that. Mr Cruse agreed to the change.

¹ <https://www.timeanddate.com/sun/new-zealand/te-awamutu?month=4&year=2018>.

Section 63A of the Act

[29] Mr Burton claims that Mr Cruse breached s 63A(2) of the Act by not giving him advice about getting independent advice, giving him the opportunity to seek it and considering issues Mr Burton raised.

[30] Clause 35 of the agreement offers the opportunity for independent advice within a certain number of business days. Mr Cruse had entered “30” business days which would have taken the close of the period to after the nominated start date for employment, which would not make much sense.

[31] Clause 36 with the 10pm on 26 April requirement does not provide a realistic opportunity to seek advice. Under other circumstances that would be problematic for Mr Cruse. However, here Mr Cruse had offered Mr Burton the opportunity to take the agreement away so that he could get advice and Mr Burton had said that he did not wish to seek independent advice. Mr Burton proceeded to sign the agreement.

[32] It is unfortunate that the clauses did not sit comfortably together in this situation, given how they had been filled in. However, ultimately I conclude that Mr Cruse did not breach s 63A(2) of the Act in his dealings with Mr Burton, taking into account the following:

- (a) Mr Burton had already told his previous employer he was leaving before he went to the meeting on the Te Awamutu farm with Mr Cruse;
- (b) He had already signed the Federated Farmers agreement on a number of occasions previously;
- (c) Mr Cruse had shown Mr Burton the standard form agreement at their earlier meeting;
- (d) The terms discussed at the earlier meeting were incorporated in the agreement offered on 26 April;
- (e) Mr Cruse went through the agreement page by page with Mr Burton on 26 April. While going through the agreement on the vehicle’s bonnet may not seem ideal I take into account that the outdoors is a farmer’s workplace and Mr Burton did not suggest a different venue was needed;

- (f) Mr Cruse said that Mr Burton could take the agreement away and seek advice. At that point no time limit was specified;
- (g) Mr Burton indicated that he did not wish to seek independent advice;
- (h) Having signed the agreement, Mr Cruse gave Mr Burton the opportunity to come back to him with any issues later that evening; and
- (i) Mr Burton took up that opportunity by seeking and getting agreement to a change.

[33] Having found there was no breach of s 63A(2) of the Act, Mr Burton's disadvantage and good faith claims on the same basis must fail.

[34] For the sake of completeness I note that although there was reference to "unfair bargaining" in the statement of problem I did not take this as being pursued as a claim under s 68(2)(d) of the Act. There was no reference to s 68 in a memorandum or the submissions filed for Mr Burton. Rather the claim is based on s 63A of the Act.

Activities prior to expected commencement date

[35] Mr Cruse lived on a farm some drive from the Te Awamutu farm. There were a small number of cows on the Te Awamutu farm with no farm manager or worker in charge from the possession date of 17 May 2018.

[36] Mr Burton asked about moving furniture and other equipment to the farm prior to his formal start date of 1 June 2018. He offered to help Mr Cruse by moving the cows when Mr Burton was dropping things off. There was no discussion about Mr Burton being reimbursed other than it was agreed Mr Cruse would pay for some petrol.

[37] Mr Burton's first time moving the cows was on 17 May 2018. Mr and Ms Burton were then involved in cleaning the farm house on the weekend of 19 and 20 May.

[38] On 21 May Mr Cruse texted Mr Burton asking him to fix a kitchen wall. Mr Cruse then asked Mr Burton to fix some floor holes. Mr Burton was asked to assist with putting gib on walls. During this period Mr Burton also moved cows. Then ceiling holes were fixed by Mr Burton. He did not keep contemporaneous records of the hours he was doing.

[39] Mr Cruse said he would give Mr Burton “a little bit of something” to help him out for what he would be doing. Mr Burton indicated that the 29th or 30th of May would be the last day he could come down to the farm before starting work on 1 June. However, Mr Cruse phoned him asking how the cows were and whether they might be going hungry as Mr Cruse could not get there. Mr Burton says he felt obliged to drive down and move the cows again.

The Burtons move to the farm

[40] There were a variety of difficulties for Mr and Ms Burton once they moved into the farm house and Mr Burton took over running the farm. They refer to broken fences, water leaks and contamination of water. The Burtons complain of the farm and farmhouse not being well maintained and not being supplied with all the necessary equipment. They had to purchase fuel for the farm themselves for a period and get reimbursed.

[41] Elements of Mr Burton’s and Mr Cruse’s farming practices appear to have been different. There were some tensions between Mr Cruse and Mr Burton, as well as between Mr Cruse and Ms Burton.

[42] Mr Cruse had a sense, mostly based on the fencer’s impression that Mr Burton was not working the hours required to keep the farm operating properly. Mr Cruse was new to operating that farm and not especially familiar with the farm house. The real estate agent who sold the farm to Mr Cruse did not consider the state of the farmhouse was significantly different to others she had seen, although it was apparent that some aspects of the house, such as the oven, she had not looked at.

Dismissal

[43] After a couple of months Mr Cruse asked his farm consultant to go to the farm and give a letter to Mr Burton from Mr Cruse terminating his employment under the trial period.

[44] On 1 August 2018 the farm consultant met with Mr Burton and handed over the letter. A temporary manager had been arranged to take over the farm that afternoon. The letter dated 31 July 2019 informed Mr Burton that his employment was being terminated under the 90-day trial period.

Trial period

[45] Mr Burton's agreement contained a trial period of 90 days which was to begin on the first day of work as noted under clause 3.2.² The clause goes on to state that the employee may be dismissed within the trial period by the giving of five days' written notice. The employer may at its discretion require the employee not to work this notice period and will instead pay for the notice period.

[46] Mr Burton questions whether he had a fair opportunity to seek independent legal advice regarding the terms of that agreement. However, I have found that Mr Cruse did not breach s 63A of the Act.

[47] Mr Burton also argues that he started work before the official start date in the agreement. Even if Mr Burton's work in May was employment, I do not consider that that would not affect the validity of the trial period. The agreement was signed before Mr Burton began undertaking tasks on the farm in May 2018.

[48] It could be suggested that the trial period could only cover 90 days from the May date but that would still take the 90 day period into August. Mr Burton's dismissal on 1 August 2019 would still be covered.

[49] Was Mr Burton's employment terminated pursuant to the trial period? As held in *Smith v Stokes Valley Pharmacy (2009) Ltd*, in order to preclude the employee challenging the dismissal the specific series of steps in the Act must be complied with.³

[50] The termination letter relied on the 90-day period. Reference is made to Mr Burton not being suitable to work under the current team. This is questioned with Mr Burton seeing only himself and his wife as the team on the farm. However, Mr Cruse could also be seen as part of the team and there had been some tensions. The letter refers to 1 August 2018 as the notice day with Mr Burton not being required to work after 2pm that day. It goes on to state that he is "eligible for 5 days paid holiday pay of which you will not be required to work".

[51] The reference to holiday pay is unfortunate as it could be taken as suggesting that Mr Burton is being required to use his holiday pay for his notice period, rather than being paid notice and then paid for any outstanding holiday pay on termination.

² Clause 4 of the employment agreement.

³ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [83].

However, an examination of a record prepared by Mr Cruse's accountant indicates that that was not the case. Mr Burton was paid wages for the five days and then paid holiday pay in addition.

[52] In summary, notice was stated to be given in reliance on the 90-day clause. Five days' notice was given, as required by the trial period clause. The notice was in writing, as the clause specifies. Mr Cruse did not require Mr Burton to work during the notice period. That does not invalidate the effect of the trial period. The trial period permitted the employer to allow the employee not to work out the notice period and provide pay for the notice period instead.

[53] I conclude that Mr Burton's employment was terminated under the trial period and therefore as per s 67B(2) of the Act Mr Burton is prevented from bringing an unjustifiable dismissal claim.

Vacation of farm house and the final pay

[54] Mr Burton was given 14 days' notice to vacate the farm house on the property. No final payment was made until just after the family moved out and a final inspection is done.

[55] The agreement provided for payment of final pay to be on the later of the next pay day following termination or employment or upon vacation of the accommodation, whichever is later.⁴

Statutory breaches claims

[56] Given that penalties are sought for alleged statutory breaches it is fair that Mr Cruse knew which breaches are alleged. I also take into account the recent Employment Court decision in *Dollar King Ltd v Jun* that the Authority does not have jurisdiction to impose a penalty of its own motion.⁵

[57] Well before the investigation meeting, memoranda were sought and received regarding the Burtons' claims, so I restrict my findings to those relevant to penalty claims identified.

⁴ Clause 13.1 of the agreement

⁵ *Dollar King Ltd v Jun* [2020] NZEmpC 91.

Records

[58] The Burtons' representatives sought wages and time, along with holiday and leave, records from Mr Cruse and his representatives. Nothing was provided until after the claims were filed in the Authority.

[59] What was filed for Mr Cruse was a record from his accountant headed "Personal Wage and Tax Sheet". It looks like something that was filled in as each wage payment was made. However, when compared to Mr Burton's bank statements it is clear that this records what the accountant has calculated should have been paid rather than what was actually paid. Payments of different amounts were shown in the bank statements whereas this document records consistent amounts paid weekly.

[60] Mr Cruse began paying Mr Burton on an estimated basis and it was only himself and it was only later when Mr Burton provided Kiwisaver forms, that the accountant calculated what should have been paid and identified overpayments. For the early weeks in particular the sheet is not accurate in terms of actual payments.

[61] Also problematic were documents filed by Mr and Ms Burton headed "Individual Timesheets". Unfortunately they appear to be in the form of contemporaneous documents, utilising a fairly standard timesheet layout, with start and finish times, hours worked and codes at the bottom with an instruction for the codes to be used if not at work.

[62] It became apparent during the investigation meeting that these documents were constructed after Mr Burton's dismissal for the purposes of supporting their claim, at the request of their representative. Such an estimation of time claimed may be helpful but it should be clearly identified as such rather than allowing the suggestion the documents were records created contemporaneously with the work being undertaken.

[63] The timesheets were said to be created based on Ms Burton's diary entries, although her diary does not have start and finish times of work. Other things such as text messages were also used as a basis for the documents. I am satisfied that they have some use but do not consider them an entirely accurate record.

[64] Mr Cruse's evidence was that he left a dairy diary at the farm in the office, which includes a timesheet. Mr Cruse left it for Mr Burton to fill out but did not discuss it with Mr Burton. Mr Burton was unaware of any obligation to do so, using a notebook

for farm matters he wanted to record. Mr Cruse says that he had not brought it up by the time Mr Burton was dismissed.

Mr Burton's wage claims

[65] Working out what Mr Burton was paid for and what he may still be owed was challenging in the absence of contemporaneous timesheets and payslips. Mr Burton's representatives attempted to detail his work and claims in a memorandum although it became apparent at the investigation meeting that not all of the details were captured there.

Prior to 1 June 2018

[66] Mr Burton claims for work he undertook in May 2018 prior to his formal start date. He seeks weekly amounts of \$354.16, \$575.95 and \$833.20 calculated on the basis of his "timesheets", paid at the rate in his employment agreement.

[67] Mr Cruse accepted Mr Burton's offer to move the cows. At that time of year cows only had to be moved once every second day, making five or six moves necessary. Mr Cruse described it as a 20 minute job at most. Mr Burton described it as longer, particularly if fences had to be put up. Mr Cruse also asked the fencer to move the cows and also moved them himself.

[68] Mr Burton picked up fencing equipment Mr Cruse needed for the farm.

[69] Mr Burton also undertook tasks on the farm house, mostly at Mr Cruse's request. This applied to fixing holes and gib stopping.

[70] Although Mr Burton's work had not formally commenced in accordance with the employment agreement, he was undertaking work for Mr Cruse and he should be paid for this work. Mr Cruse had indicated that he would give Mr Burton something for it so it was not seen as volunteering. Mr Cruse benefitted substantially from the renovation work as he did not have to hire contractors to undertake the work.

[71] Mr Burton also assisted preparing for painting but this was not discussed with Mr Cruse. Mr Burton's nephew put in a quote for the house painting which was accepted. I do not consider Mr Burton should be paid for this work as it was undertaken without Mr Cruse's agreement and in relation to assisting Mr Burton's nephew.

[72] For the week ending 20 May 2018 I exclude what appears to be time cleaning the house before the painters came and allow five hours for moving the cows and fencing.

[73] For the week ending 27 May 2018 I allow Mr Burton 27.5 hours for cow and renovation work.

[74] For the part-week ending 31 May 2018 (the day before Mr Burton officially started) I allow 13 hours. The remainder of the week was paid as part of his usual wages.

[75] This totals 45.5 hours. The contract salary rate was claimed to equate to an hourly rate of \$20.83 gross. This rate was not objected to on Mr Cruse's behalf. I order Mr Cruse to pay Mr Burton within 28 days of the date of this determination, the sum of \$1,052.02 gross, being \$947.77 gross wages along with \$75.82 holiday pay and \$28.43 as the employer's Kiwisaver contribution on that sum.

Days off

[76] The employment agreement provided for a day off a week, which the parties agreed would be Wednesday. There was some difficulty with Mr Burton getting days off and a different option had been discussed.

[77] Mr Burton claims that he is owed six days' pay for working on rostered days off. He claims \$1,249.97, being six days at the daily rate of \$208.33. However, it became apparent during his evidence at the investigation meeting that more days off were taken than initially indicated.

[78] Mr Burton accepted that he had a day off on Mr Cruse's instruction when he first moved into the farm house. I deduct one day off from the claim for that week. Also in a week for which he does not claim a day off, he had two days off.⁶ I deduct another day from the total for that extra day.

[79] Mr Burton was paid two lieu days in his final pay, although one of these appears to be an alternative day for having worked on Queen's Birthday. One day in lieu for not getting a paid day off was thus paid in the final pay.

⁶ Pay week starting 29 June 2018.

[80] Therefore of the six days claimed, two were taken and one was paid for, leaving three days owing. At a daily rate of \$208.33 this amounts to \$624.99. I order Mr Cruse to pay Mr Burton the sum of \$693.73 gross, made up of \$624.99 wages, \$49.99 holiday pay and \$18.75 as the employer's Kiwisaver contribution on that.

Public holidays

[81] Mr Burton also originally claimed for payment for public holidays and an alternative day's holiday for working on the public holiday. However, at the investigation meeting Mr Burton's representative informed the Authority that payments had been made, so there was no claim being pursued.

Deductions and withholding payments

[82] Mr Burton claims that Mr Cruse breached his employment agreement by:

- (a) deducting \$5.64 net from wages received on 20 July 2018 and \$60 on 27 July 2018 (Kiwisaver 'overpayment'); and
- (b) withholding final wages and holiday until after the Burtons vacated the farm house.

Deductions whilst employed

[83] It was not straightforward to piece together information about the Kiwisaver and deduction situation.

[84] According to Mr Cruse, Mr Burton did not provide his Kiwisaver forms early on and so the accountant estimated his entitlement. Mr Burton says Mr Cruse should have provided the form but he did not receive one. Mr Cruse's accountant advised him on 13 July 2018 that Mr Burton should receive \$729.36 net (after rent and Kiwisaver were deducted) whereas he had been receiving higher pay than that.

[85] Mr Cruse forwarded that message to Mr Burton on 19 July. Ms Burton messaged Mr Cruse that evening "... so that \$60 too much have you back dated then the Kiwisaver for it to be that? Or is Kiwisaver starting from when we actually signed it? Need you to clarify for me how and where the \$60 has been overpaid". Ms Burton says she was seeking clarification of how and where the \$60 was overpaid.

[86] After this Mr Burton spoke to the accountant and seems to have been satisfied with the explanation as to what the overpayment was.

[87] However, I cannot be satisfied that there was any consultation though on the deduction to be made to reimburse Mr Cruse. Mr Burton says that he did not discuss what was to happen about the overpayment with Mr Cruse, other than Mr Cruse saying they would sort it out. The accountant did not speak to Mr Burton about what would happen. Ms Burton messaged Mr Cruse on 28 July including the comment “there was no discussion at all on how that 60 was going to be paid back as you did not communicate at all with us”.

[88] The first reduced pay was on 20 July, with a \$5.64 net reduction compared to previous pays.

[89] I cannot be satisfied that the payment of a smaller amount on 20 July 2018 was a deduction in the sense that something was taken away from what Mr Burton was entitled to be paid.

[90] On the evidence, the correct pay was actually paid on 20 July 2018, albeit it was smaller than previous pays where overpayments were made. The failure to supply payslips did not assist in making this clear and resulted in the Burtons having to communicate with both Mr Cruse and his accountant.

[91] Mr Cruse then deducted \$60 from the next pay to take back the overpayments made previously.

[92] Mr Burton’s employment agreement provided for deductions to be made from wages or salary for overpayments.⁷ However, as is evident from the text message after the smaller wage sum was received, there was no consultation about the deduction. This was a breach of the employment agreement and the Wages Protection Act 1983, both of which require prior consultation.⁸

[93] I find the deduction without consultation to be a breach of Mr Burton’s employment agreement and the Wages Protection Act and not authorised. Mr Cruse is to pay Mr Burton \$60.00 gross for the unauthorised deduction, within 28 days of the date of the determination.

⁷ Clause 13.3.13 of the employment agreement. .

⁸ Clause 13.4 of the employment agreement and s 5(1A) of the Wages Protection Act 1983.

Final pay

[94] Wages were normally received in Mr Burton's account on Friday. He was dismissed on Wednesday 1 August 2018, with work not being required from 2pm that day according to the termination letter.

[95] From the accountant's sheet, Mr Burton's final pay included a full week's pay (for work done), five days owed (for notice) and two lieu days. In addition holiday pay was calculated at 8% on all of those figures, along with all of Mr Burton's earlier earnings. Payment was not received into Mr Burton's account until 15 August, two weeks after he was dismissed. This was very shortly after the family had moved from the farm house.

[96] The employment agreement specifies that final pay will be paid on the later of the next pay day following termination or upon vacation of any accommodation provided.⁹

[97] The agreement permits deduction from wages (including final wages and holiday pay) for money owing for damage to accommodation, cleaning and unreturned chattels and property.¹⁰ However, in this case no deductions of those types were made other than the usual rent.

[98] Payment of the final pay very shortly after the Burtons vacated the farm house is therefore not a breach of the employment agreement. Although the failure to pay on the Friday after 1 August could be seen as a deduction (of the whole pay) in terms of s 4 of the Wages Protection Act it was a deduction (or delay) which had been addressed and permitted by the parties in the employment agreement.

Good faith

[99] Mr Burton claims that Mr Cruse had made misleading and deceptive comments about Mr Burton having seven days off work at the beginning of June 2018. I was unable to establish that such a comment was made during Mr Burton's employment. It may have been made once his representative raised his claim or as part of these proceedings however, the duty of good faith ends when employment ends.¹¹

⁹ Clause 13.1 of the employment agreement.

¹⁰ Clause 13.3 of the employment agreement.

¹¹ *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112.

[100] It was also suggested that misleading and deceptive comments were made about time and wage records but as far as I can ascertain these suffer the same fate of being in the post-employment context and therefore not covered by the duty of good faith.

[101] Another alleged ground is a suggested non-compliance with s 6 of the Employment Relations Act about “pre-contractual work”. Section 6 defines the term employee. The denial by Mr Cruse that Mr Burton undertook work for him as an employee before 1 June 2018 cannot be a breach of section 6 and in any event also occurred after the employment relationship finished and is thus not a breach of the duty of good faith.

Inadequacy of records

[102] As outlined above, Mr Burton’s representatives requested wages and time records and holiday and leave records from Mr Cruse. Nothing was supplied until Mr Burton’s claim was filed. The accountant’s “Personal Wage and Tax Sheet” is not an adequate wages and time record under s 130 of the Act. It is a re-creation of what should have happened with wages at the start of employment rather than what actually happened. It also does not show the hours worked or which days were had off.

[103] Mr Cruse breached s 130 of the Act by failing to keep or produce compliant wages and time records. In addition, the employment agreement requires the employer to keep time and wage records, including the hours worked per week, the rate of pay for those hours and any deductions, along with holiday and leave records.¹² That obligation was also breached.

[104] The accountant’s sheet makes little reference to holidays and leave other than including a calculation for 8% holiday pay. The sheet would comply with some aspects of s 81 of the Holidays Act but not with many others. For example, it does not indicate that Mr Burton worked on the Queen’s Birthday public holiday, as is required by s 81(2)(i) and (j). I find that in breach of s 81 of the Holidays Act Mr Cruse did not keep a compliant holiday and leave record and is therefore liable to a penalty under s 75 of that Act. .

¹² Clause 17 of the employment agreement.

Penalties regarding Mr Burton

[105] In summary, Mr Cruse has:

- (a) breached the employment agreement and the Wages Protection Act by failing to consult before making the \$60 deduction for an over payment and is liable to penalties;
- (b) failed to keep a wages and time record in breach of s 130 of the Employment Relations Act and is liable to a penalty under s 130(4); and
- (c) failed to keep a holiday and leave record in breach of s 81 of the Holidays Act and is liable to a penalty under s 75 of that Act.

[106] Although the references to the wages and time, and holiday and leave, records and the statutes which require them are somewhat overlapping in the claims, I consider there to be sufficient references in Mr Burton's statement of problem and memorandum to identify that penalties were being claimed for both the wages and time records and holiday and leave records failures.

[107] Quantification of penalties for Mr Burton is set out below after consideration of Ms Burton's claims, as globalisation penalties for both must be considered.

Ms Burton's employment status

[108] Ms Burton claims that she was employed by Mr Cruse to undertake calf rearing on the farm. Although she refers to undertaking other tasks on the farm as well as extensively cleaning the farm house before moving in, Ms Burton only claims wages for calf rearing, totalling 61 hours. Mr Cruse denies being Ms Burton's employer.

[109] I look through events, this time focusing on Ms Burton's situation. Mr Cruse's advertisement in April 2018 was not advertised for a couple, as some farm jobs are.

[110] At 20 April 2018 meeting on Mr Cruse's home farm, Mr Cruse asked if Ms Burton would be available to assist with calf rearing. She said she agreed, saying she had done it before.

[111] Mr Cruse says that he talked about paying Ms Burton but she raised a complication with that, so he suggested giving her some calves in exchange. No number was agreed. Ms Burton says no number was agreed. The provision of calves

in return for calf rearing assistance is not uncommon. Mr Cruse says he intended to monitor how much work Ms Burton did, presumably with a view to deciding how many calves.

[112] Prior to the 26 April 2018 meeting Mr Cruse messaged Mr Burton asking for his wife's name and details. Schedule 1 of Mr Burton's employment agreement regarding his job description includes, under key responsibilities, a reference to calf rearing with the key performance indicator being "Joliene Burton to help". Ms Burton is not named in the parties section of the agreement.

[113] Ms Burton asked at the 26 April meeting whether she had to sign Mr Burton's agreement and was told by Mr Cruse that she did not.

[114] Ms Burton was not in any paid employment at the time the Burtons moved to the farm. The first calf arrived around 7 July 2018. The hours claimed are worked out as best she could from her diary and text, Messenger and phone messages.

[115] Ms Burton's understanding from the 26 April discussion was that she would be an employee. Her impression was confirmed when Mr Cruse asked for her name to put it on the contract. She acknowledges that he never said she was going to be an employee explicitly or that they were going to be in an employment relationship.

[116] Mr Cruse says in his witness statement that his understanding was Mr Burton would pay his wife, not him. However, a 22 August 2018 letter from his lawyer replying to the raising of personal grievance claims by the Burtons says:

Simon Burton was employed as farm manager and Joliene Burton to do calf rearing pursuant to a written employment contract dated 26 April 2018.

[117] The letter goes on to comment that the Burtons were treated fairly and denies that he:

...terminated their employment without justification.

[118] This supports Mr Cruse's understanding closer to the time of events as being that he was Ms Burton's employer.

[119] Section 6 of the Act provides that an employee means a person employed by an employer to do any work for hire or reward under a contract of service. The definition

excludes a volunteer who does not expect to be rewarded for work performed as a volunteer and receives no work for work performed as a volunteer.

[120] Mr Cruse may not have thought he was employing Ms Burton, but his subjective view is not definitive. The question is what a reasonable observer would have thought.

[121] In evidence and submissions for Mr Cruse two, presumably inconsistent possibilities are identified; that Ms Burton was a volunteer and that she was employed by Mr Burton.

[122] Under s 6(1)(c) of the Act volunteers are excluded from the definition of employee where they:

- (a) do not expect to be rewarded for the work to be performed as a volunteer;
and
- (b) receive no reward for work performed as a volunteer.

[123] Ms Burton did not receive reward but I do not agree that she did not expect to be rewarded. She did expect a reward. Although some occasional tasks Ms Burton performed such as going out one day to assist her husband fixing a fence, could be seen as in the nature of volunteering, the calf work was more on-going, usually requiring two sessions of work most days. I do not accept that there should be an expectation that the partner of a farmer provides substantial unpaid farm labour. Ms Burton was not a volunteer.

[124] I find the prospect of Mr Burton employing his wife to assist him on the farm to be unlikely. The family finances would not be improved by this. If additional hours were needed other than Mr Burton's time, it would usually be the employer who is required to make arrangements for someone to undertake those additional hours, rather than expect the employee to themselves hire someone to undertake that work.

[125] There are some features which suggest Ms Burton was not an employee. Unlike her husband, she was not offered an employment agreement document. Her IRD and bank account details were not sought. However, I conclude on the basis of the following points that Mr Cruse did employ Ms Burton:

- (a) Mr Cruse raised the prospect of Ms Burton undertaking calving work;

- (b) She agreed to do that;
- (c) He mentioned paying her for that work, although there was a complication with that from her perspective;
- (d) The prospect of paying by the giving of calves was discussed and seemed agreeable to both, albeit no number was agreed on;
- (e) Mr Cruse then included Ms Burton undertaking that work in Mr Burton's employment agreement;
- (f) Ms Burton assisted with the calves for about three and a half weeks until Mr Burton was dismissed; and
- (g) Shortly after Mr Burton was dismissed, in response to grievances from the Burtons, Mr Cruse's lawyer acknowledged Ms Burton was an employee of Mr Cruse.

[126] For the sake of completeness I note that had I not concluded that there was an employment agreement, I would have considered the prospect of reimbursing Ms Burton's work on a quantum meruit basis.

The nature of the employment arrangement between Mr Cruse and Ms Burton

[127] Although there was an employment relationship, there is little to indicate that this was a permanent arrangement. There was no employment agreement document. There was no requirement on Ms Burton to report her unavailability to Mr Cruse. There was no agreement about hours or days of work. In some circumstances it could be implied that it was an everyday job as the calves needed daily assistance. However, Ms Burton's arrangement was in addition to the responsibilities her husband had to look after calves with his employment agreement, which referred to his wife as being there "to help". She could do less, which was likely to result in her husband undertaking more hours, or being unable to complete other farm tasks.

[128] Although there was some evidence on the value of a calve as regards Mr Cruse's claims, this does not assist as there was no agreement about the numbers to be provided. Ms Burton should therefore receive the minimum wage.

Ms Burton's wages claim

[129] Ms Burton claims 61 hours of work, covering the period from 13 July to 1 August 2018.

[130] The difficulties with the Burtons' "timesheets" have been referred to above. However, Ms Burton's timesheet reflect a realistic pattern of work with hours increasing slightly as the number of calves increased. I conclude they fairly reflect the work undertaken.

[131] Ms Burton should be reimbursed at the applicable minimum wage at the time which was \$16.50 gross per hour.

[132] I order Mr Cruse to pay Ms Burton within 28 days of the date of this determination the sum of \$1,087.02 gross, being 61 hours at \$16.50 (\$1006.50) and 8% of that amount as holiday pay.

Ms Burton's dismissal claim

[133] I find this to have been a casual arrangement. As a casual employment relationship, Mr Cruse was able to cease offering work without this being dismissal.¹³

Ms Burton's other claims

Good faith

[134] Ms Burton claims that Mr Cruse breached his duty of good faith to her by making misleading and deceptive comments that she was employed by him. I take this to be a claim in the alternative to a finding that she was an employee. As I have found Ms Burton to have been an employee of Mr Cruse, this claim does not need to be further examined.

Failure to provide an employment agreement

[135] There are three claims about Mr Cruse's failure to provide Ms Burton an employment agreement; a disadvantage grievance, "unfair bargaining" and penalty for breach of s 63A(2) of the Act. As with Mr Burton's claim the reference to unfair bargaining does not appear to be based on ss 68 and 69 of the Act. I find this matter

¹³ *Cowan v Kidd Partnership* [2020] NZEmpC 110 at [56].

best dealt with as a claim for a penalty under s 63A(3) of the Act for failure to provide an employment agreement.

[136] Mr Cruse did not provide Ms Burton with an employment agreement in her own name. The reference to her in Mr Burton's agreement as assisting with calves, is insufficient. That agreement does not set out, as regards Ms Burton, all of the items which must be included in an individual employment agreement under s 65 of the Act. When Ms Burton enquired about signing the agreement, Mr Cruse indicated she did not need to. I conclude that Mr Cruse breached s 63A(2) of the Act by failing to provide Ms Burton with an employment agreement for her.

Penalties regarding Ms Burton

[137] As I referred to above, the Authority cannot instigate penalty action of its own motion and respondents should be fairly on notice regarding penalties sought against them. I therefore limit my consideration of penalties to those claimed on Ms Burton's behalf.

[138] Breaches are established as follows:

- (a) Mr Cruse did not offer Ms Burton an employment agreement and thus breached s 63A of the Act and is liable to a penalty under s 63A(3);
- (b) Mr Cruse failed to pay Ms Burton the minimum wage and therefore breached s 6 of the Minimum Wage Act and is liable to a penalty under s 10 of that Act; and
- (c) Mr Cruse did not keep or produce provide wages and time records as required by s 130 of the Act and Mr Cruse is liable to a penalty under s 132 of the Act; and
- (d) Mr Cruse did not keep holiday and leave records as required by s 81 of the Holidays Act and is liable to a penalty under s 83 of that Act for failure to keep or provide access to such a record.

[139] Similarly to Mr Burton's situation with records, although some references overlapped, there was sufficient reference in Ms Burton's statement of problem and memorandum to identify that penalties were being claimed for both the wages and time records and holiday and leave records failures.

Penalties concerning Mr and Ms Burton

[140] As penalties may be globalised over more than one employee, I consider the penalties regarding Mr and Ms Burton together. Although it is not mandatory to impose a penalty, I consider that a penalty is appropriate in this case. There are a number of breaches which have had an impact on the Burtons and their ability to work out whether they have received their legal entitlements.

[141] In considering the appropriate amount of penalty I am guided by the Employment Court decisions in *Boorsboom v Preet PVT Ltd*¹⁴, *Nicholson v Ford*¹⁵ and *Labour Inspector v Daleson Investments Ltd.*¹⁶

Number of breaches

[142] Three breaches were identified as regards Mr Burton. Of these two related to records. These same two breaches were also established as regards Ms Burton. I globalise these to two breaches in total.

[143] In terms of separate breaches, Mr Burton has the breaches of the employment agreement and Wages Protection Act by failing to consult before making the \$60 deduction for the overpayment. I globalise the two breaches into one as they relate to the same events.

[144] Ms Burton has two additional breaches; not being offered an employment agreement under s 63A of the Act and failure to be paid the minimum wage.

[145] In total that makes five breaches. Mr Cruse is an individual and is liable to a maximum penalty of \$10,000 per breach, totalling \$50,000.

Statutory considerations 1 to 7

[146] I have assessed the following factors:

- (i) Objects – the inherent inequality of power in employment relationships and the effective enforcement of employment standards from s 3 of the Act are relevant to this claim.

¹⁴*Boorsboom v Preet PVT Ltd* [2016] NZEmpC 143.

¹⁵*Nicholson v Ford* [2018] NZEmpC 132.

¹⁶*Labour Inspector v Daleson Investments Ltd* [2019] NZEmpC 12.

- (ii) Nature and extent – The Burtons’ employment was relatively brief but the records issues applied to both employees on this farm.
- (iii) Intention – I regard the failures of record keeping as negligent, particularly in light of the clear obligation on the employer in the employment agreement to keep such records. The lack of an employment agreement and non-payment of wages to Ms Burton are more deliberate, although Mr Cruse did claim that he did not intend to employ Ms Burton..
- (iv) Loss or gains – Ms Burton was deprived of the money she should have been paid for her work. Establishing the entitlements of the Burtons was complicated by the absence of compliant time and wage and holiday and leave records. It is difficult to rule out that they may have missed some pay entitlements due to the absence of records.
- (v) Compensation or mitigation – There was no attempt by Mr Cruse to compensate or mitigate the Burtons’ losses.
- (vi) Circumstances – this is not a case involving exploitation of vulnerable employees in the usual sense although the fact that both members of a couple were involved means that the family’s whole finances were affected, particularly by the non-payment of the minimum wage.
- (vii) Previous proceedings – there was no evidence of previous proceedings.

Preet considerations

[147] The additional considerations from *Preet* are:

- (i) Deterrence – I consider Mr Cruse does need to be deterred. The keeping of records are important to ensure entitlements can be checked and claimed.
- (ii) Consistency – I have considered the range of penalties imposed in other cases with some similarities.
- (iii) Ability to pay – There was no suggestion of an inability to pay by Mr Cruse.

- (iv) Proportionality – I have looked at what figure would be proportionate to the amounts involved.

[148] I conclude that a total penalty of \$5,000.00 for the breaches is appropriate in all the circumstances. I consider that the Burtons should each receive a portion of the penalty with Ms Burton receiving more as more breaches involved her. Mr Cruse is within 28 days of the date of this determination to pay a penalty of \$5,000 as follows:

- (a) \$1,500.00 to Mr Burton;
- (b) \$2,500.00 to Ms Burton; and
- (c) \$1,000.00 to the account of the Employment Relations Authority to be forwarded to the Crown account.

Mr Cruse's claims

[149] Mr Cruse alleges that Mr Burton breached his employment agreement and neglected his duties. Damages are claimed under various heads. There is no claim against Ms Burton. Mr Burton strongly denies that he has been negligent in any of the ways alleged.

[150] The Authority has the jurisdiction to award damages. The House of Lords 1957 decision in *Lister v Romford Ice & Cold Storage Co Ltd* is often taken as authority that employers may sue employees for damages caused by carelessness or negligence.¹⁷ However, more recent judicial statements in Aotearoa question the appropriateness of awarding damages against an employee for negligence.

[151] In *George v Auckland Council* the Employment Court commented:

...[i]t is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises

¹⁷ *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 125.

policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.¹⁸

[152] I also note the caution from the Court in *Rainbow Falls Organic Farm Ltd v Rockell* regarding the “double whammy” effect of dismissal plus a damages claim arising out of the same poor performance.¹⁹ To this may be added the prospect of that occurring where the employee does not have the ability to challenge a dismissal due to a trial period being in place.

[153] In light of those statements I have reservations about awards of damages in these circumstances. In addition the first claim concerning the farm house may relate to a service tenancy as defined in the Residential Tenancies Act 1986.²⁰ As such, the Tenancy Tribunal has jurisdiction regarding disputes between landlord and tenant and other bodies are excluded.²¹ However, I leave those questions open as Mr Cruse’s claims fail on a factual basis in any event.

The house

[154] Mr Cruse claims that the farm house was altered and not returned in the same condition as when the Burtons moved in. This included removal of curtains, a shower head, water connection and a television dish.

[155] Mr Cruse did not complete the accommodation checklist in Schedule 4 of the employment agreement, which may have assisted to determine which chattels or fixtures were in the house. There is also a column for details of the existing condition and any damage, which was left blank.

[156] Mr Cruse has also not provided any receipts for replacing these items so it is not clear how much, if anything, was spent on these items or their installation.

[157] Mr Burton says the curtains in the lounge needed cleaning and were taken down. He asked Mr Cruse about dry cleaning them and putting them away. Mr Cruse said to throw them out so that is what Mr Burton did.

¹⁸ *George v Auckland Council* [2013] NZEmpC 179 at [147].

¹⁹ *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136 at [57] and [58]

²⁰ Section 2 of the Residential Tenancies Act 1986.

²¹ Sections 77 and 82 of the Residential Tenancies Act.

[158] As regards the shower head Mr Burton says the old one was filthy and green so a new one was put up. He thinks the old one may have been taken to the dump along with other rubbish when the Burtons cleaned up the house on moving in.

[159] Regarding the water connection, the Burtons had problems with effluent in the water supply. Mr Burton used one of his own connections as Mr Cruse did not have the right connections himself. Mr Burton removed his connection, referring to the instructions to remove all his belongings when given notice.²²

[160] The Burtons installed their own television aerial as there was a Sky dish in place but they did not use Sky. Mr Cruse's fencing contractor took the Sky dish and bracket.

[161] My sense is that Mr Cruse's unfamiliarity with the property, having recently purchased it, along with the renovations, did not assist. None of his claims as regards the house are established.

Farm equipment

[162] Mr Cruse also claims that two and four wheeler farm bikes were damaged and there was no reporting of any problems with them. Mr Burton says the bikes were not in good shape when they arrived on the farm and he did nothing to worsen their condition. Mr Cruse denied this as the bikes had been on his home farm previously.

[163] Invoices were supplied. However, it is not evident whether work was done which is within the normal range of repairs required or not. A fuel cap was missing on one of the bikes but Mr Burton denies being involved in that disappearing. He says a fuel tank cover was added which had not been on the bike for the entire time it was on the farm. A considerable amount of work was done on the quad bike, including the provision of new tyres. There was third hand evidence to suggest the bike may have been rolled. However, at least some of this work was a standard service and I cannot be satisfied in the absence of expert evidence, whether and how much any of the work was due to any neglect or damage. In addition Mr Cruse was uncertain whether he had insurance for an accident on a quad bike.

²² In the termination letter and employment agreement.

[164] Aside from any question regarding jurisdiction, I dismiss Mr Cruse's claims under this head on the basis of inadequate evidence and/or link with Mr Burton's conduct.

Repair costs

[165] Mr Cruse claims that Mr Burton sought to have a water pump repaired but the person who came to repair it said there was nothing wrong with it. The Burtons reported a number of problems with water to Mr Cruse during their time on the farm. The repairer was not called to give evidence. I was unable on the limited evidence available to be satisfied that Mr Burton had been negligent to suggest that there was a problem with the pump.

[166] A claim is also made regarding repairs to the milking machine. The farm consultant expected the farm manger to check the rubber ware if there was a problem with the milking machine losing vacuum. He thought the temporary manager had been able to fix the same problem later although there was no evidence regarding what the temporary managers' experience or expertise was. By contrast the witness whose business it is to clean milking machines was not trained to fix the machine, so recommended Mr Cruse got a local shed technician in to check it. Mr Burton stressed that it was Mr Cruse who asked the repairer to come in.

[167] I am not satisfied Mr Burton can be said to have been negligent in not knowing how to fix this problem.

DNA testing of calves

[168] Mr Cruse claims \$662.50 for DNA testing 26 calves as he said Mr Burton did not make sure they were accurately marked to keep correct records from. This testing was not something which was usually undertaken.

[169] Mr Burton says Mr Cruse did not provide him documents to identify the cows, which had come from more than one source so in some cases had overlapping numbers. Some cows had missing tags and there were no documents to assist with identifying them and no replacement tags. Mr Burton says that he was not supplied with tags that are usually used to mark calves. He had asked for them but Mr Cruse had not yet brought or sent any to the farm. Mr Burton used spray paint on the calves for identification where he could but that wears off after a couple of days. When he was

given notice of termination he offered to help with the identification of the mother cows but this was rejected.

[170] Mr Cruse accepted under cross examination that he had not yet had the animals DNA tested. This claim is not established.

Cows and vet bills

[171] Mr Cruse claims \$3,000 as the value of two cows which died, along with \$8,055 as loss of profits on seven cows which were found to be empty (without calves). In addition vet bills are claimed.

[172] One cow died a few weeks before Mr Burton finished employment. Mr Cruse is critical of Mr Burton not being aware that the cow had died when his impression was it had been there a day or more. He provided no evidence of the cow's cause of death. Mr Burton provided his account which places the blame on Mr Cruse due to the latter's instruction to put cows on the siding which had fences not suitable for stock. Mr Burton's negligence is not established and he cannot be held responsible for the value of the cow in those circumstances.

[173] Mr Cruse says the body of another dead cow was later found. Mr Burton was not aware of this death. Again the cause and circumstances of death are unknown. Mr Cruse's concern was that he was not notified of the death. Reporting is one issue but there is no evidence to establish any contributory conduct by Mr Burton in the death itself, even if it did occur in the time he was farm manager..

[174] Vet bills are claimed for a visit to a cow who was discovered to have in utero a dead calf in full breach position. Although the vet suggested some actions a farmer may have been able to take, it was not established that a vet would not have been needed in any event, with resulting cost. The rate of empty cows was not significantly higher than the average range which one of the vets described.

[175] Two months after Mr Burton stopped working on the farm, another vet was called to check on seven cows which were meant to calve, having reportedly earlier been tested as pregnant. All were found to be empty (not pregnant). However, the vet could not pinpoint whether they had slipped (miscarried) before Mr Burton's time on the farm or after.

[176] Also, neither Mr Cruse nor the farm consultant know the period in which the cows slipped. The temporary manager was not called to give evidence. Also, there was some evidence suggesting the temporary manager had allowed cows being near macrocarpa trees which the vet confirmed could cause miscarriage if eaten. However, Mr Cruse believed the branches were too high for the cows to eat.

[177] Mr Cruse has not established on the balance of probabilities that the slipping occurred during Mr Burton's time at the farm nor that it was the result of his carelessness.

Costs

[178] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so a party wishing to apply for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[179] The parties could expect the Authority to determine costs taking into account the mixed success of each party.

Nicola Craig

Member of the Employment Relations Authority