NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 193
3081539
3081540

	BETWEEN	IAY Applicant in 3081539
	AND	MATHIS FARMING LIMITED Respondent
	BETWEEN	CYE Applicant in 3081540
	AND	MATHIS FARMING LIMITED Respondent
Member of Authority:	Marija Urlich	
Representatives:	Ira White, for the Applicant Scott Mathis, for the Respondent	
Investigation Meeting:	19 and 20 October 2020, 14 January 2021	
Submissions and information received:	5 and 17 November 2020, 21 and 28 January and 9 February 2021, from the Applicants 29 January and 3 February 2021, from the Respondent	
Determination:	10 May 2021	

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The applicants seek non-publication of their names. The grounds for non-publication is their belief the negative personal consequences of their employment with

Mathis Farming Limited (MFL) will be perpetuated if their names are published. Evidence has been provided to the Authority to support these concerns. MFL does not oppose the application. It accepts they are young people at the start of their working lives and that publication of their names in this determination may have negative consequences for future employment opportunities.

[2] The Authority is satisfied the information provided prior to and after the investigation meeting establishes the applicants' concerns regarding publication including health issues are serious and likely to be exacerbated by publication of their names.

[3] On balance, the requisite high standard has been met and the interests of justice require a non-publication of the applicants' names.[1] The order is made under clause 10(1) schedule 2 of the Act.

[4] For the remainder of the determination the first applicant is referred to as IAY and the second applicant is referred to as CYE. The letters used were selected using a random online selection tool. The letters bear no relation to the applicants' names.

Employment Relationship Problem

[5] IAY and CYE were employed as farm assistants by MFL from 4 June 2019 on twelve month fixed term employment agreements the terms of which were recorded in written individual employment agreements. MFL operates a contract farm management and share milking business. IAY and CYE worked at a farm managed by MFL.

[6] IAY's employment ended by operation of the fixed term however, for the last months of his employment he was off work on extended sick leave. CYE's employment ended by way of resignation on 24 September 2019. They both say MFL breached the terms of their employment agreements which amount to personal grievances and they seek remedies including compensatory damages, lost wages and wage arrears. They also seek an award of penalties against MFL.

[7] MFL denies these claims.

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[1] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78] and *XYZ v ABC* [2017] NZEmpC 40, EMPC 69/2017.

[8] During the course of the investigation of these employment relationship problems the parties advised the Authority they had resolved the holiday pay claim to their satisfaction. It is recorded also that issues between the parties concerning motor bike purchases and residential tenancies are not before the Authority.

The Authority's investigation

[9] By consent IAY and CYE's applications were heard together. During the investigation meeting the Authority heard evidence from IAY and CYE, IAY's wife, IAY's father, Scott Mathis, MFL's director and the farm manager, Simon Anderson, Steve Mathis, Mr Mathis' father and who, along with Mr Anderson stepped in to manage the farm during periods of sick leave Mr Mathis took. Katie Jones, a veterinarian surgeon who provided veterinary services to the MFL herd also gave evidence. A co-worker did not attend the resumed hearing at which she was scheduled to give evidence.

[10] In addition to the witnesses' evidence the Authority has received and considered minutes of staff meetings, rosters, text messages, photographs, hazard identification information, performance reviews and other contemporaneous documentation. Spreadsheets of hours worked, breaks taken and arrears sought have also been provided and considered.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[12] The issues identified for investigation and determination are:

IAY

a. Did IAY suffer an unjustified disadvantage in his employment arising from MFL's actions in:

i. Requiring that he work longer hours than contracted?

ii. Failing to increase his pay after 90 days as verbally agreed?

iii. Making unlawful deductions from his pay?

iv. Subjecting him to bullying and harassment by a co-worker and manager?

v. Failing to provide a safe workplace?

vi. Making eight late wage payments?

vii. Exposing him to animal abuse?

CYE

b. Did CYE suffer an justified disadvantage in her employment arising from MFL:

i. Requiring her to work longer hours than contracted?

ii. Unlawfully making deductions from her pay?

iii. Subjecting her to bullying and harassment by a co-worker and manager?

iv. Failing to provide a safe work place?

v. Making eight late wage payments?

vi. Exposing her to animal abuse?

c. Was CYE unjustifiably constructively dismissed?

d. If IAY and/or CYE were unjustifiably disadvantaged, and/or CYE unjustifiably constructively dismissed, what remedies should be awarded, considering:

i. Lost wages;

ii. Interest on any lost wages;

iii. Compensation under s 123(1)(c)(i) of the Act.

e. If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by IAY or CYE that contributed to the situation giving rise to his grievance?

f. Are IAY or CYE owed any wage arrears arising from non-payment for hours worked?

g. Has MFL breached the employment agreement and/or statutory obligations under the Employment Relations Act 2000 and the Wages Protection Act 1983?

h. If so, are penalties warranted and should part of any penalty go to the applicants?

i. Should either party contribute to the costs of representation of the other party?

Relevant law

The test for justification

[13] When the Authority considers justification for the actions of MFL it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of MFL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions and, in CYE's case, alleged unjustified constructive dismissal.

[14] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in IAY and/or CYE being treated unfairly.

[15] MFL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Background

[16] IAY and CYE claim MFL has breached obligations owed to them in the following two categories:

- failing to comply with agreed working hours and pay wages and provide breaks in accordance with the employment agreement and statutory requirements; and
- failing to provide a safe and healthy workplace.

[17] They also say the breaches are grounds for personal grievances and were of such a nature and sufficient seriousness to warrant the Authority exercising its discretion to award a penalty.

[18] There are features of this employment relationship problem which have heightened the issues between the parties.

[19] Both IAY and CYE lived on the farm in accommodation provided under the terms of their employment and tenancy agreements. They were part of a small, relatively inexperienced team made up of themselves, one other farm assistant (the co-worker), the manager Scott Mathis and, for a short time, his then partner. During their employment IAY and CYE worked on their first calving season which ran July to September 2019. The calving season requires long and intense working hours. It is the busiest time of the farming year. The reasonableness or otherwise of the hours they were required to work during this period is a central issue for determination. Also, during their employment IAY and CYE were exposed to farming practices which they had not experienced before and/or which they did not approve. They were concerned

about the treatment of cows with pinched nerves (downed cows), treatment of cows in the milking shed, wandering stock and treatment of calves.

[20] It is also apparent from the evidence that the management of MFL was under pressure during the relevant period. This was one of the first share milking/farm management contracts MFL had run. Soon after IAY and CYE's employment commenced Mr Mathias' then partner's involvement in the management of the farm, which included day to day management of employment issues, ended. The roles she undertook were taken on by Mr Mathis, so increasing his workload. Mr Mathias was hospitalised twice and off work for extended periods during the period IAY and CYE were employed. During his absence the farm was managed by off farm managers.

Discussion

Breaches of agreed working hours and wage and break obligations

Required to work unreasonably long hours?

[21] The parties' employment agreement records that IAY and CYE would work according to a roster with a normal start time of 5am and end time of 5.30pm with three days off in every 11 day span (3 days per 11 days).[2] In practise though, and consistent with the varying times set out in clause 5.3 of the employment agreements, the usual work pattern was 11 days on and 3 days off. I find this is more likely to have been the parties' agreed work pattern. In addition, at clause 5.4 the parties agreed they "will be available to work reasonable additional hours and additional days, from time to time as required by us".

[22] The additional hours' requirement was activated by MFL during the calving season which fell during the months July to September.

[23] IAY and CYE say the additional hours were not reasonable because:

- they were not consulted about the additional time requirements;

[2] In the hours span breaks of 1 hour and 1.5 hours were agreed: clause 15 of the parties' employment agreements.

- the weekly rosters were either not posted or not posted with sufficient notice to allow them a fair opportunity to comment; and
- the calving night checks (rostered from 21:00 – 22:00) were so outside the agreed range of hours set out in clause 5.3 that they should have been agreed by the parties and outlined in the employment agreement.

[24] MFL says:

- IAY and CYE were paid for every hour worked;
- at the time they agreed to work the additional hours; and
- the parties' employment agreement records their agreement the hours of work will vary during the farming year.

[25] MFL is correct that the employment agreement builds in significant flexibility of hours and records that IAY and CYE have agreed to work reasonable additional hours. The concomitant obligation the parties' have agreed is that additional hours will be reasonable and that where there are variations to the usual rostered hours and/or days due to the time of year and farming operation requirements that "should be outlined below…".[3] Calving hours including night checks are not outlined in the employment agreement.

[26] Having read the minutes of the staff meetings, considered the rosters and the information as to when they were posted and considered the clause 5.3 roster variation set out in the employment agreement ("twice a day milking July to May" and "dry season June") I am satisfied MFL have breached the obligations owed to IAY and CYE to give them fair notice and an opportunity to comment on the extended hours it wanted them to work during the calving season. I am also satisfied these breaches have disadvantaged IAY and CYE in their employment because they were denied a fair opportunity to comment on proposed rosters and make arrangements to accommodate the extended hours including dealing with the associated fatigue and stress of calving. The claims of personal grievances for the requirement to work long hours has been established.

[3] Clause 5.3 individual employment agreements.

Unlawful deductions

[27] An employer cannot make deductions from an employees pay without the employees written consent. An employer seeking to make a specific deduction in reliance on a general deduction clause must first consult with the effected employee:[4]

> 5 Deductions with worker's consent
>
> (1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—
> (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or
> (b) on the written request of the worker.
> (1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

[28] The employment agreement has incorporated these statutory requirements:

> 13 Payment of wages or salary and deductions
> …
> 13.3 You authorise us to deduct from your wages, salary, and final wages including holiday pay, any monies owed by you to us.
> …
> 13.4 Before we make a deduction under clause 13.3 above, we will consult with you as to the amount of the deduction.
>
> 13.5 By signing this agreement you are providing your consent to deductions under the Wages Protections Act 1983.

[29] There is no dispute between the parties the first two pays MFL made to IAY and CYE on 14 and 27 June 2019 were lump sum payments of $1000 which was more than the value of the hours they had worked for the pay periods at the agreed hourly rate.

[30] There is no dispute that MFL did not discuss these lump sum payments with IAY and CYE prior to the payments being made. MFL says the lump sum payments were made because there was a delay in setting up the payroll system.

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[4] Wages Protection Act 1983, s 5.

[31] There is also no dispute that after the pay roll system was in place that MFL made deductions from subsequent pays to recoup the earlier overpayments. These were specific deductions and consultation with IAY and CYE was required before the deductions were made.[5]

[32] No such consultation occurred. This failure to consult was a breach of the parties' employment agreement and obligations under the Wages Protections Act 1983.

[33] The Authority accepts the impact of the breach was significant. Both IAY and CYE had recently moved into accommodation on the property incurring the costs of relocating and had recently commenced their employment with MFL. A fair and reasonable employer complying with contractual and statutory obligations should have consulted with them prior to the deduction being made so that it could understand the potential impact of any proposed deductions and considered and weighed any issues raised by IAY and CYE in assessing how the deductions could be fairly and reasonably made.

[34] IAY and CYE seek payment of the $2000 deducted from their pay. While the deductions have been found to be unlawful there is not dispute MFL overpaid IAY and CYE in the first two pays and they were entitled to recover the overpaid sums. This part of the claim is declined. The error made was the recovery did not comply with how the parties had agreed it would occur or the relevant statutory obligation.

[35] If wages are payable in terms of the relevant employment agreement then any failure to make either full or part payment of wages is an unlawful deduction within the meaning of s 4 of the WP Act.[6] The parties' employment agreement provides IAY and CYE would be paid fortnightly.[7] The employment agreement does not say which day payment would be made.

[36] IAY and CYE say the parties agreed at the start of their employment timesheets and hours would be processed on Tuesday and wages paid into his bank account on Wednesday. This is supported by the July and August rosters which record in Mr

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[5] Wages Protection Act 1983, s 5(1A).
[6] *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580 at [78].
[7] Clause 12.1 individual employment agreement.

Mathis' hand pay day is a Wednesday. Mr Mathis says the parties agreed pay day would be Thursday. I am satisfied pay day was a Wednesday.

[37] The records show for IAY eight out of thirteen wages were paid late and for CYE six out of nine pays were late.

[38] The negative impact of the deductions and late pays on IAY and CYE was clear; it compromised their ability to meet their financial obligations and provide for their families. Their personal grievances in respect of these matters have been established.

[39] They have also established MFL's unlawful deductions were in breach of the Wages Protection Act 1983. A consideration of whether a penalty is warranted is below.

Did IAY and MFL agree to a 51 cent per hour pay increase at the end of the 90-day trial period?

[40] IAY says MFL offered to increase his pay from $19 to $19.51 per hour after the successful completion of the 90-day trial period.

[41] A note in Mr Mathias' hand writing records this and the response to the letter raising the personal grievances dated 9 October 2019 records a pay rise of fifty cents per hour for IAY. Mr Mathias said in evidence he offered IAY a pay rise, IAY did not accept it because he wanted more and he (Mr Mathias) was waiting for IAY to accept the offer. IAY disagrees. He says he accepted a 51 cent per hour pay rise at the meeting.

[42] On balance I am satisfied it is more likely than not MFL offered and IAY accepted a pay increase of 51 cents per hour on the successful completion of the trial period.

[43] IAY has established his claim for arrears of wages of $67.45.

Failure to provide rest or meal breaks

[44] The parties' employment agreement records normal work hours are 5am to 5.30pm with an eleven day on three day off roster and 60 minute break for breakfast

and 90 minute break for lunch.[8] IAY and CYE said they were often unable to take these breaks because of workload or animal welfare issues. IAY says of the total 84 days he worked for MFL on 38 days he did not receive contracted break times and at least seven days where he did not get a break at all for the whole day. CYE says she missed a total of 52 contractual breaks during her employment. I am satisfied these figures are supported by the analysis of the wage and time records provided by IAY and CYE.

[45] There is no dispute IAY and CYE have been paid for every hour worked, including any breaks taken for which they were entitled to be paid. The issue is the inability to take breaks.

[46] MFL says IAY and CYE received all their rest and meal breaks or, due to the nature of the work there was fair opportunity to take the required rest and meal breaks during the working day or they were provided late starts or reduced hours in subsequent work periods. It accepts rest and meal breaks were not directed.

[47] With respect to meal and rest breaks the parties' employment agreement provides:

> 15.1 You agree that rest and meal breaks will be taken as follows: (insert times)
>
> 1hr for breakfast and 1.5 hours for lunch.
>
> 15.2 You agree that the above times may be varied where it is not practicable to stop work, in which circumstances the break will be taken as soon as reasonably practicable.

[48] Part 6D of the Employment Relations Act 2000 deals with rest and meal breaks. Section 69ZD provides an employee's entitlement to rest breaks under this section is to paid rest breaks, and an action for arrears of wages would be possible.

[49] On the evidence I am satisfied MFL have failed to take reasonable steps to ensure IAY and CYE were able to take their breaks as soon as reasonably practicable where variation to usual break times was required. Given the evidence of fatigue and health and safety issues on farm I am satisfied MFL's failure has disadvantaged IAY and CYE in their employment and that they have established their claims for unpaid

[8] Clauses 5.2 and 15 employment agreements.

meal breaks. They are entitled to be compensated for that loss at $936.48 and $869.50 respectively.[9]

Failing to provide a safe and healthy workplace?

[50] Farms are inherently dangerous workplaces. It is well established that an employer is obliged to provide a safe and healthy workplace which includes both the physical and psychological safety of employees. The claim before the Authority involves a number of factual claims that need to be considered.

Hi Vis jacket and replacement overalls

[51] The parties' employment agreement includes MFL would provide wet weather gear and protective clothing or, in the alternative, an allowance would be paid if the employee provided their own "wet weather gear and/or protective clothing".[10] Both alternatives are ticked in the employment agreement. Hand written beside the first alternative is "Hi Vis wet weather jacket". This has created confusion between the parties. The allowance was paid as agreed but the hi vis jackets were not provided. MFL says the hi vis jackets were not provided because IAY and CYE used their own gear for which they received an allowance. IAY and CYE say they needed a hi vis jacket and it should have been provided as agreed and that the allowance covered the other gear they provided.

[52] On the evidence provided I am not satisfied detriment was suffered consequent to the failure to provide the hi vis jackets. The claim is not allowed.

[53] IAY's overalls were damaged during the wandering stock event referred to below. He seeks to recover from MFL the cost of replacing the overalls. The findings below do not support the claim because, if MFL had approached the event in a more methodical way there is still a possibility the overalls may have been damaged and there is insufficient evidence as to the loss suffered considering the age and condition of the overalls at the time they were damaged. This part of the claim does not succeed.

Marijuana and alcohol use on farm

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[9] The analysis of the missed breaks is 47 hours each x the relevant hourly rate.
[10] Clause 10.11.

[54] The co-worker's use of marijuana and alcohol on the farm including during the course of her duties was reported to MFL by IAY and CYE as they were obliged to do under the terms of their employment agreements. MFL accepts the reports were received and says they were investigated.

[55] It is accepted IAY and CYE were concerned about the behaviour and that they complied with their reporting obligations. However, there was insufficient evidence of detriment suffered by IAY and CYE as a consequence of the adequacy of the investigation undertaken by MFL into these issues. This part of the claim does not succeed.

No accident reporting

[56] IAY and CYE say there was no reporting of accidents and this was actively discouraged by MFL. They say they did not have access to accident reporting forms which, they understand, were located in a room in Mr Mathis' home to which they did not have access.

[57] Specific examples of accidents in the milking shed on 14, 17 July and 9, 11 August were given for which near miss or accident forms could reasonably be expected to have been completed. MFL was unable to provide accident reporting for these events. Indeed, no accident or near miss reports were provided despite a request that all such reports be provided to the Authority.[11] It is clear there were multiple events which would warrant accident reporting.

[58] MFL's explanation was this was IAY and CYE's fault for not completing the necessary reporting.

[59] MFL was responsible for the maintenance of health and safety systems in the work place and it did not claim it was unaware of incidents occurring in the work place. To blame staff is not reasonable or fair. That said, I am not satisfied MFL actively discouraged accident reporting. The evidence suggestions otherwise. For example, the

[11] Second minute of the Authority 27 October 2020.

minutes of 13 August 2019 record "accidents report straight away" which is understood to be a reminder to staff to do so. The minutes provided to the Authority also record health and safety as a standing item and that related issues have been noted. It is therefore accepted some form of reporting of health and safety incidents has occurred. This part of the claim dies not succeed.

Bullying/harassment by co-worker

[60] On 24 July 2019 IAY raised with MFL a complaint about a co-worker. He had overheard her say to CYE that she would "create a little work accident for IAY and push him off his bike down the hill." He also overheard her say she wanted to "throw bricks at the little one". IAY did not know if she was referring to one of his dogs or one of his pre-school children. He, unsurprisingly, found these comments disturbing. He raised his concerns with Mr Mathis and Mrs Mathis.

[61] In addition to the example set out above IAY and CYE gave numerous examples of behaviour from this co-worker which they say amounts to bullying and harassment including:

- using abusive language directed at them;
- recklessly hitting CYE on the forehead while wearing a motorbike helmet; and
- hitting and swearing at cows while working with IAY and CYE.

[62] The meeting minutes and text messages provided in evidence show IAY and CYE repeatedly raised these issues with MFL. It is accepted that the incidents occurred as they have been described to the Authority and that IAY and CYE found the conduct unwelcome, distressing and repeated. It is behaviour which falls within the Worksafe definition of bullying.[12]

[63] It is also accepted that MFL put some of the complaints to the co-worker to comment on and that disciplinary action against her was taken, in respect of at least some of the conduct complained of, in the form of a verbal warning. However, given the nature, seriousness and, in some respects, ongoing nature of some the complaints

[12] Worksafe New Zealand "Preventing and responding to Workplace Bullying: The Guidelines", first published in 2014 and updated in 2017.

MFL were obliged to take a serious look into the complaints. What occurred was not adequate. This conduct is to be contrasted with evidence which shows MFL were able to conduct a proper investigation into employment issues -–on 4 November a serious misconduct allegation of a health and safety breach was formulated and put to IAY to respond.

Unauthorised entry to premises

[64] On 9 September 2019 Mr Mathis entered IAY's property with two dogs off leash. He wanted to talk about why IAY had called in sick for that afternoon's milking. IAY told Mr Mathis to get off his property, not bring the dogs on the property and any employment issue needed to be raised formally.

[65] The farm housing occupied by IAY and his family was subject to a tenancy agreement. As is usual with tenancies the landlord, Mr Mathias, should have sought IAY's permission before entering the property. At the very least, the dogs should have been restrained while Mr Mathis sought IAY's consent to discuss the issues of concern. The action was unwise but does not amount to bullying and harassment.

Required to work in dangerous situations

[66] There were a number of specific examples given by IAY and CYE of having to work in dangerous situations in an ad hoc and unplanned manner including:

- on 22 August IAY and CYE were required to assist with the rescue of a wandering cow down a scrub covered bank;
- on 23 September IAY was asked to euthanise a cow with a broken leg in the milking shed; and
- CYE was encouraged to teach herself how to ride the work issue motor bike.

[67] MFL said all actions were reasonable and appropriate.

[68] On the evidence before the Authority it is wholly accepted these incidents were dealt with by MFL in an ad hoc manner. No planning documentation either procedural or specific to the above events was provided.[13] No reporting of the events was provided.

[13] It is accepted high level farm hazard identification document was on farm.

IAY and CYE were entitled to feel alarmed by these events and given the manner in which MFL handled the situation, to feel uncertain as to how their employer intended to keep them safe at work.[14]

Animal welfare issues

[69] IAY and CYE say during their employment with MFL they were exposed to many incidents which raised concerns about animal welfare. They made complaints to the Ministry of Primary Industries about these concerns and their statements to MPI have been provided to the Authority. There are no related current proceedings.

[70] Careful consideration has been given to the evidence IAY and CYE have given of their concerns. It is accepted that their concerns are genuine and sincere. However, their evidence must be weighed against the evidence of Dr Jones, who regularly attended and treated the herd. She was unequivocal that the herd was regularly seen by a vet, that treatment was given as prescribed, she was not aware of any animal welfare issues on the farm and the examples put to her did not raise undue concern. Dr Jones' evidence is accepted. This part of the claim does not succeed.

Was CYE unjustifiably constructively dismissed?

[71] It is well established that an employee may be constructively dismissed by his employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice of resigning or being dismissed.
(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
(c) A breach of duty by the employer causes an employee to resign.[15]

[72] The Authority understands CYE says breaches of duty by MFL caused her to resign. If the Authority finds that is the case then the next question is whether the breach

[14] In closing submissions claims for days taken due to injuries sustained in the milking shed were advanced. The claims are untested and not supported by calculations and are unable to be advanced.
[15] [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

was of sufficient seriousness to make it foreseeable the employee would not continue to work in the circumstances. Justification is then considered.

[73] Specifically, CYE says despite her attempts to engage with MFL to resolve issues in the work place, including up to fifteen meetings and advising MFL in one of these meetings in early September she would resign if matters did not improve that after she was admitted to hospital and MFL put pressure on her to provide a medical certificate, it became clear to her the situation at work would not improve and her mental health would suffer due to the stress. She sent the following resignation, including reasons, on 24 September:

> So I have been doing a lot of thinking. I have been having pay problems and disrespect problems from Scott and [co-worker] from day 1. I have spoken to them about this many times and nothing has changed. [co-worker] rams a pole up a cows backside, rams cows over with the quad, hits and kicks them and she doesn't get disciplined when it is a legal offence. I have been told off for things I was told to do. There are many other problems such as paid meal breaks not being paid, breaks not being able to be taken, I don't even talk about it once but many [times] and nothing ever changes. Scott overpays and then takes it back in amounts he decides with no agreement whatsoever we don't even know how much he's taking, doesn't even tell us when we will be paid late. He neglects the cows when he was on the farm etc. I even bought it up to a few people regarding my annual leave day not being paid and I didn't even get a single reply. Not once have I been late to work. I've done all my jobs as expected and I've continually strived to learn and excel. But my mental health is suffering because of all this stress. When Scott was on farm he would always snap and speak rudely for no reason. Now [co-worker] is. I spoke to Mark and Simon about her but she still [decides] to speak rudely and act horribly. Quite frankly I'm at a point where I've had enough. I've spoken many times and nothing has changed. So I am left with no choice but to hand in my notice, effective immediately. I will clean the house and I will vacant (sic) in 7 days of today's date.
> …

[74] Mr Mathis replied the following day:

> Morning Renee
>
> I am sorry how this has turned out. I was told yesterday that you were really enjoying your job I'm unsure all of a sudden what has changed. Your final pay will come through on 2nd October and a house inspection will be done on 1st October 1pm.
> …

[75] The text message exchanges between Ms Mathis Snr and CYE have been made available. The messages request a medical certificate to ensure CYE was cleared to return to work. This is not unreasonable. However, by this stage, it is clear to the

Authority CYE had had enough. In response to the request for a medical certificate CYE provided one to MFL dated 27 September 2019. I accept the medical certificate was provided to support the dates in hospital. The doctor's note of the same date sets out the issues relevant to the medical certificate including "difficult work situation", "animal cruelty investigation" and "under stress at work – short staffed".

[76] The Authority has found MFL made unlawful deductions from CYE's pay in respect of unauthorised deductions and late pays and that she did not receive breaks as entitled. These issues were outstanding at date of resignation except the unauthorised deductions which CYE had negotiated an acceptable deduction rate of $50 per pay.

[77] Findings have also been made that CYE's complaints of harassment and bullying by the co-worker had not been fairly investigated and that some of her concerns about the provision of a safe and healthy workplace were reasonable.

[78] Given these circumstances, including CYE's repeated efforts to resolve the issues with MFL it was reasonable for CYE to form the view that on her return to work after her hospitalisation that her employer would not comply with the terms of the employment agreement. These breaches, as outlined above, were sufficiently serious that a risk of resignation was foreseeable and that was indicated clearly to MFL in early September. Careful consideration has been given to the circumstances of MFL at this time particularly given the busy time of the farming year and Mr Mathis' hospitalisation and the inevitable disruption to the business this caused. Consideration has also been given to the size of MFL and its access to resources to deal with the employment matters it faced. These factors do not justify or minimise the breaches that have been made out and which have caused CYE's resignation. CYE was unjustifiably constructively dismissed from her employment with MFL on 24 September 2019.

Remedies

[79] IAY and CYE have established personal grievances arising from MFL's failure to comply with their employment agreements in respect of wage payments, breaks, working hours and providing a safe and healthy work place. IAY has established a personal grievance for failure to pay the correct hourly rate. CYE has established that

she was unjustifiably dismissed. They are entitled to consideration of the remedies sought.

Compensation

[80] The impact of the unjustified actions of MFL on IAY and CYE and additionally, in CYE's case, her dismissal has had a profound and negative impact on them. The Authority is satisfied they have experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation[16]. Compensation has been assessed on a global basis.

(i) IAY

[81] IAY said he would have thought when he went to MFL with outstanding issues that they would have been taken seriously. He is an experienced hunter and outdoorsman familiar with animals and health and safety and that even so this employment experience has taken a significant toll on him and has put him off the dairy industry.

[82] IAY's wife said the late payments and deductions took a huge toll on the family as they found it hard to afford to cover their bills and feed their children. She said she often ate less to ensure IAY and the children had enough to eat. She suffered personal tragedies while they were on the farm which she attributes to the stress of the working situation. IAY's wife said consequent to the long work hours and lack of breaks IAY was incredibly tired and physically depleted. She said she was worried IAY would be injured and attended to a number of injuries he and CYE received during their employment including bruising from being kicked in the cow shed. She said the conduct of the co-worker towards IAY caused unnecessary stress in their home and she spent many hours with IAY trying to brainstorm ways to improve the situation.

[83] IAY's father said the workplace stress on IAY was unbearable and he had to take stress leave from his job with MFL. He said it took many months for IAY to recover and required the emotional and financial support of family.

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[16] *Richora Group Limited v Cheng* [2018] NZEmpC 113.

[84] IAY is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to the unjustified actions of MFL of $15,000.00.

(ii) CYE

[85] CYE said the effect of the employment environment on her were suicidal thoughts, poor sleep, weight loss, poor self-esteem, lack of motivation, low mood, tearfulness, feelings of hopelessness and lack of enjoyment of life. The medical certificate provided in evidence supports she experienced this mental distress during her employment with MFL. CYE said her employment with MFL has had lasting effects on her mental health and caused her to suffer anxiety. She said once she moved off the farm her suicidal thoughts stopped and since the end of her employment she has learnt behavioural techniques to deal with anxiety. She said since being employed by MFL she has struggled to trust employers and has been hard on subsequent employers about matters concerning health and safety.

[86] CYE is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to the unjustified actions of MFL of $18,000.00.

Lost benefit and lost wages

(i) IAY

[87] IAY did not return to work at the farm after 27 September 2019. He seeks payment at his usual hourly rate from that date until the date his employment would have ended under the terms of his fixed term agreement being 31 May 2020.[17]

[88] A medical certificate has been provided which states IAY is unfit to work for 60 days from its date being 7 November 2019. A further medical certificate has been provided which records IAY attended his doctor on 10 October, 7 November and 30 December presenting as anxious and stressed by his work situation and concerned about his safety at work.

[17] Employment Relations Act, s 123(1)(c)(ii).

[89] I am satisfied there is sufficient connection between IAY's absence from work for the period 28 September to 7 January 2020 and the circumstances at work because it is supported by medical evidence. Further, I am satisfied but for the established breaches of the employment agreement by MFL IAY would have been able to attend work. MFL were on notice of these concerns – IAY had raised his concerns repeatedly throughout his employment and on 9 October 2019 raised personal grievances outlining in detail the issues of concern and remedies sought. IAY is entitled to the loss of benefit of wages of $12,247.20 which he would have earned for the period 9 October 2019 to 7 January 2020.[18] I decline to award the balance of wages sought because there is insufficient evidence IAY's continued absence was due to work related ill health.

(ii) CYE lost wages

[90] CYE has established a personal grievance for unjustified constructive dismissal. The Authority is satisfied she has lost remuneration as a result of her dismissal and is entitled to be reimbursed for a sum equal to three months' lost remuneration.[19] She gave evidence of attempts to mitigate her loss and that she was able to secure new employment within four weeks of her employment ending with MFL.

[91] CYE is entitled to her claim of four weeks lost wages of $3,404.12.

Contribution under s 124 of the Act

[92] IAY and CYE did not contribute to the circumstances which gave rise to their grievances.

Penalties

[94] Penalties are sought for breaches of the Wages Protection Act 1983, all statutory breaches under the Employment Relations Act 2000 and the employment agreements.

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[18] Period calculated from date the personal grievance was raised until expiry of the medical certificate ($19.51 per hour x 10 hour day (5am – 5.30pm less 2.5 hour breaks clause 5.2 IEA) x 72 days (11 on 3 off roster clause 15 IEA) less rental of $150 per week = $12,247.20.
[19] Employment Relations Act 2000, s 123(1)(c)(ii) and 128.

Wages Protections Act 1983

[95] As found above MFL have failed to comply with obligations under the Wages Protection Act. I am satisfied that it is appropriate to impose a penalty for these breaches.

[96] In *Nicholson v Ford*[20] Chief Judge Inglis provided guidance on the inter-relationship between: (a) *Preet*, which sets out a four step process for assessing penalties for breaches of minimum standards; (b) s 133A of the Act, which relates to the imposition of penalties by the Court and the Authority; and (c) the other relevant factors to be taken into account, when imposing penalties.

[97] Taking this guidance and all of the factors outlined by the Chief Judge into account and after considering the parties' submissions and assessing the circumstances of the omissions, I find that $2,000.00 is an appropriate penalty to impose in all the circumstances of the case. Having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award 50% of the penalty to IAY and CYE in equal share the balance to be paid to the Crown.

Employment Relations Act 2000 and employment agreements – breach of good faith

[98] A penalty has been sought for breach of the Employment Relations Act and employment agreements which is understood to be a claim for breach of the duty of good faith.[21] The duty of good faith includes parties to an employment relationship being active and constructive in establishing and maintaining an employment relationship in which parties are responsive and communicative. There are breaches of good faith in this case because of the failure of MFL to be responsive to IAY and CYEs concerns when they were raised. I have considered the circumstances of MFL during the period in question but conclude this did not preclude a fair consideration of the concerns raised and reasonable communication regarding those issues which was not apparent on the evidence. The requirements for a penalty for a breach of good faith are made out.

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[20] *Nicholson v Ford* [2018] NZEmpC 132.
[21] Employment Relations Act 2000, s 4(A). Refer statement of problem IAY.

[99] Applying the factors in s 133 of the Act including the number and extent of the breaches, the seriousness and vulnerability of IAY and CYE, I conclude an appropriate penalty, assessed with other penalty awards is $2000 50% of which is to be paid to IAY and CYE in equal part and the balance to the Crown.

Interest

[100] IAY and CYE are entitled to an award of interest on the awarded wage arrears. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[101] MFL is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:[22]

(i) Interest on arrears due and owing to IAY of $67.45 and $936.48 from 2 October 2019 until the date payment is made in full; and
(ii) Interest on arrears due and owing to CYE of $869.50 from 30 September 2019 until the date payment is made in full.[23]

[102] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Summary of Orders

[103] The Authority orders as follows:

a) Within 14 days of the date of determination Mathis Farming Limited is ordered to pay IAY the following sums:

(i) wage arrears of $67.45 and $936.48;
(ii) compensation under s 123(1)(c)(i) of $15,000.00;
(iii) lost benefit under s 123(1)(c)(ii) of $12,247.20.

[22] www.justice.govt.nz/fines/civil-debt-interest-calculator.
[23] The dates the employment relationship problems were formally raised.

b) Within 14 days of the date of determination Mathis Farms Limited is to calculate and pay IAY interest on wage arrears as awarded in paragraph [101] above.

[104] The Authority orders as follows:

a) Within 14 days of the date of determination Mathis Farming Limited is ordered to pay CYE the following sums:

(i) wage arrears of $869.50;
(ii) compensation under s 123(1)(c)(i) of $18,000.00;
(iii) lost wages s 123(1)(b) of $3,404.12.

b) Within 14 days of the date of determination Mathis Farming Limited is to calculate and pay CYE interest on wage arrears as awarded in paragraph [101] above.

[105] The Authority orders as follows:

c) Within 14 days of the date of determination Mathis Farming Limited is ordered to pay a penalty of $4000 as follows:

(i) $2000 to the Crown;
(ii) $1000 to IAY; and
(iii) $1000 to CYE.

Costs

[106] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and IAY and CYE seek a contribution to costs, they should file and serve a costs memorandum within 14 days of the date of this determination. Mathis Farming Limited should file any reply memorandum within 7 days of receipt of such.

Marija Urlich
Member of the Employment Relations Authority