

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 395
3153862

BETWEEN	MICHAEL FERRIS Senior First Applicant
AND	MICHAEL FERRIS Junior Second Applicant
AND	THE PROPRIETORS OF NUHITI Q Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Ali Bendall, counsel for the Applicants Richard Harrison, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	19 April 2023 from the Applicants 19 April 2023 from the Respondent
Date of Determination:	26 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 7 October 2021, Nuhiti Q gave Michael Ferris Senior and Michael Ferris Junior notice of dismissal from their employment as Farm Manager and Farm Hand/Shepherd respectively. They were dismissed on the grounds of redundancy and their employment ended on 22 October 2021.

[2] Mr Ferris Sr. and Jr. (the Applicants) raised a personal grievance about Nuhiti Q's decision and how it was made. They say the consultation process was not conducted fairly and

Nuhiti Q failed to fairly consider Mr Ferris Sr's alternative proposals for other options that would have preserved their employment and made their redundancies unnecessary. In their application to the Authority about their grievances, Mr Ferris Sr. said Nuhiti Q's decisions were made for reasons other than genuine business reasons because the financial reasons cited by Nuhiti Q could not be relied on as a rationale at the time of the redundancies. He also said issues with the Committee of Management (COM) forming a view about his farming ability and personality differences between him and the members of the COM are additional reasons why the Applicants say the decision making was not for genuine reasons.

[3] Both Applicants sought findings that Nuhiti Q had acted unjustifiably and breached its good faith obligations to them. If those findings were made they ask the Authority to order Nuhiti Q to pay them remedies of lost wages and distress compensation. They also claim wage arrears for two reasons. Firstly, because they say the number of hours they actually worked exceeded what they were paid for and secondly this caused their wages to fall below the minimum wage.

[4] Nuhiti denies the Applicants' allegations. It says the decision conveyed to the Applicants on 7 October by Diane Larsen on behalf of the COM was made for genuine business reasons. There was evidence of financial difficulty and decisions were made in response to the bank seeking to foreclose on Nuhiti Q's loans. These decisions were made without predetermination or ulterior purpose and after a fair process in which both Applicants' input was sought and considered.

[5] This determination deals with Nuhiti Q's actions and the decisions it made in relation to the employment relationships Nuhiti Q had with Mr Ferris Sr. and Mr Ferris Jr. There are other relationships between the parties outside of the employment relationship. This comes about by virtue of the land being managed by a Māori Incorporation, the relationships between the parties and the individuals on the COM and the fact the Applicants are also shareholders of Nuhiti Q.

The Authority's investigation

[6] The Authority held an investigation meeting for this matter in Gisborne on 5 and 6 July 2022. Mr Ferris Sr. and Mr Ferris Jr., along with Tawhipare Gray (Michael Ferris Jr's partner); Peter Reeves, Patricia Ferris (Michael Ferris Sr's daughter and sister of Michael Ferris Jr); Michelle Middleton, Raewyn Chaffey, accountant; Graeme Williams; and Evelyn Watson,

farmers and neighbours, gave evidence for the Applicants. For the Respondent, Diane Larsen, former COM chairperson; Anthony Naden; COM member and Kylee Potae, shareholder and secretary of Nuhiti Q Incorporation provided evidence. The parties also filed written submissions after the investigation meeting.

[7] This matter was subsequently reallocated to this Member on 22 March 2023, under clause 16 of Schedule 2 of the Employment Relations Act 2000 (the Act). It was subsequently agreed with the parties that this matter would now be determined on the papers.

The issues

[8] The issues for resolution were:

- (a) Was Nuhiti Q's decision to dismiss the Applicants on the grounds of redundancy, and how that decision was made, what a fair and reasonable employer could have done in all the circumstances at the time, including consideration of:
- whether those decisions were predominantly motivated by genuine business reasons, not an ulterior purpose including perceived concerns with Mr Ferris Sr's performance; and
 - whether a fair consultation process was entered into about the proposal for change and was the feedback from both Applicants fairly considered; and
 - whether alternatives to redundancy and for redeployment to other positions were fairly considered.

The test of justification

[9] The Authority does not substitute its own judgement for that of the employer when called upon to assess decisions by an employer that a position has become superfluous to its business needs and that the worker holding that position had to be dismissed because there were no suitable alternative roles for that person in the business. Rather, when considering whether such decisions were justified the Authority must determine whether the employer's actions, and how the employer acted, met the objective statutory standard of being what a fair and reasonable employer could have done in the circumstances at the time.¹

¹ Employment Relations Act 2000, s 103A.

[10] Where questions are raised about the commercial rationale for an employer's decision, or ulterior motives are alleged for the redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".²

[11] The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the particular employer.³

[12] Where the evidence discloses the employer's motive for its decisions had mixed its business needs with underlying performance or personality concerns about the worker, the employer bears the burden of persuading the Authority that the predominant reason were the needs of the business. Any paper trail generated at the time of making those changes may assist with identifying the motives for removing or changing job positions in the employer's workforce.⁴ If the predominant motive is found to be removal of what the Court of Appeal has described as a disliked employee, the dismissal will be unjustified.

Background

[13] Nuhiti Q is situated on the East Coast of the North Island between Tologa Bay and Tokomaru Bay. It is made up of three main blocks of land, being Waipare lease (700 acres from the Crown), Waiaru Road (1800 acres Māori land) and Nuhiti Q (3000 acres of coastal land). It is managed by a Māori Incorporation under the Te Ture Whenua Māori Act 1993. Under s 269 of that Act a Committee of Management (COM) is responsible for the proper administration and management of the affairs of the incorporation. Members of the COM are elected by shareholders or otherwise appointed by the Māori Land Court.

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

³ Employment Relations Act 2000, s 4(1A) and s 103A (3)-(5).

⁴ See *Rillstone v Product Sourcing International 2000 Ltd* (ERA, Auckland AA167/07, 7 June 2007) at [34] and the cases cited there.

[14] Mr Ferris Sr has had a long association with Nuhiti Station. He started employment in 1990 and had worked in farming at Nuhiti for 31 and a half years at the time of his redundancy. His father was a former chairperson of Nuhiti Station prior to incorporation in the 1980s. From an employment perspective, Mr Ferris Sr. had invested years of his life farming at Nuhiti Q. He raised his children there, including after the death of their mother. Currently his children and grandchildren all live at Nuhiti Q as well as other family members.

[15] Mr Ferris Jr. had been employed at Nuhiti Q as a Station Shepherd for approximately 10 years.

[16] The Applicants each had an individual employment agreement entered into in 2017. Prior to that there were no written employment agreements. Both agreements are almost identical except for the different roles and wages. The positions were permanent full-time positions. There is no provision dealing specifically with redundancy, but it is recorded that the employer can end the employee's job with reasonable cause and in that case must provide two weeks' notice.

How the Applicants came to be dismissed

[17] After several years of governance and financial issues the COM made a final decision to exit traditional sheep and beef farming in order to rectify a poor financial situation. This meant there was no longer a need for employees to carry out farm work. The Applicants were given two weeks' notice on 8 October 2021 that their positions had been disestablished because of the decision to exit farming. Their last day of employment was 22 October 2021.

[18] The letter giving them notice set out the background to the decision. It was acknowledged how difficult the process had been for both Applicants and their family as well as members of the COM. Reference was made to discussions occurring long before formal consultation on their redundancy started in April 2021, including freezing of the bank accounts in August 2019, removal of the previous COM by the Māori Land Court and the appointment of Kaitiaki to deal with the bank and creditors. The orchard was decommissioned, and the orchard manager position made redundant and the farm operation was discussed over this period. This ended with a motion and then a decision to exit farming in February 2021.

[19] The letter went on to record:

The Committee is not prepared to continue the current farming operation by stealth and the Committee members are not prepared to expend further capital to fund it, whether in the short term or in the longer term. While the initial sale of stock has addressed bank debt, as pointed out in the earlier proposal documents and in the course of our discussions, the continuing operation is eroding capital cash asset which has been achieved by the conversion of capital livestock to cash. This is an asset which the Committee has an obligation to protect and not allow to erode further in these circumstances.

The Committee does not consider it to be either prudent or in accordance with good business efficacy to further delay this decision to an AGM. The delay which has occurred has already eroded Nuhiti Q's capital position. We are appreciative of our responsibilities and the background to our appointment, as well as the importance of the whenua. We do not agree, however, that this equates to continuing with the current overhead structure for the benefit of Mike and his whanau in the absence of a solid business case in which we could be confident. It is for the Committee to make this decision and we have the responsibility of doing so in the interests of preserving assets and for the longer-term benefit of Nuhiti Q Incorporation.

[20] The reference in that letter to the AGM was indicating that the COM was declining Mr Ferris Sr.'s request to have the shareholders vote at the AGM as to whether or not Nuhiti Q was to exit farming.

Nuhiti Q's financial position

[21] Approximately 10 years ago, 500 hectares of land was retired from farming and converted to carbon farming. This provided an income but after an investigation following an application to the Māori Land Court, due to concerns about how the COM was managing the Incorporations affairs, several COM members were removed by the Judge. The Court was satisfied there were issues with the finances and affairs of the Incorporation which was at that time heavily in debt to the bank.

[22] On 29 April 2019 Nuhiti Q's bank had written to the COM regarding the existing debt facilities for the farming business. This letter recorded the overdraft arrangements agreed to and set out had been breached, that there has been a long history over a number of years for temporary limited increases at short notice, over limit overdraft facilities and over optimistic cashflow forecasting being provided. The bank was no longer willing or able to provide banking services and gave Nuhiti Q 3 months to find a new bank provider.

[23] On 5 December the Māori Land Court appointed two kaitiaki on an interim basis until the election of a new Committee of Management. The Court also recorded concern about conflict of interest and observed that the COM had to address its bank debt.

[24] The kaitiaki were Peter Andrew and Mitchell McFarlane. Mr Andrew was a farm consultant and Mr McFarlane was an accountant. The Māori Land Court later, after the expiry of the kaitiaki appointments, allowed a further election. At a special general meeting on 29 January 2020, elected back on to the Committee were Diane Larsen, Tony Naden, Michael Nepia, Kahu Brown, Michael Ferris Sr., Paumea Ferris (Mr Ferris Sr's brother) and Patricia Ferris. The minutes record Mr Andrew's update on the business and advice for the future as follows:

- Nuhiti farming had suffered from a lack of direction and had lost momentum;
- There had been little investment in core areas such as weed control, fencing and fertiliser;
- There was no longer scale in the stock business;
- Nuhiti Q was in a very very tight financial situation;
- Nuhiti Q currently owed the bank approximately \$579,000;
- The bank had lost confidence in Nuhiti Q because of the past operation and was rightfully nervous about their security position;
- Nuhiti Q was in a serious position and needed a capable team to navigate a pathway back.

[25] The COM held a meeting on 5 February 2020. Mr Andrew provided a further farm report covering the macadamia orchard, business direction and stock business. He concluded the farming operation was not working, it was overstaffed, stock numbers were unreliable, and recommended having an independent count of the stock. He also recommended consideration be given to alternative stocking arrangements and said cattle were a safer option than sheep.

The COM's decision to exit farming

[26] Kylee Potae of BDO had been engaged by the COM in 2020 to provide support around administrative and financial issues, including help to address the bank debt. In her report to the COM dated 8 July 2020, Ms Potae emphasised the need to provide budgets that could be delivered on as the ANZ earlier stated they would not accept budgets that were not met. The

bank debt at that time was over \$500,000 and Nuhiti Q was under management with the bank. The COM agreed not to receive a fee for their governance duties given the situation at that time. Nuhiti Q was unable to pay wages and creditors during this time period.

[27] The COM understood that the bank had the ability to initiate a mortgagee sale and that the financial position was very serious. This is debated by Mr Ferris Sr., but I was satisfied from the ongoing communication from the bank and the nature of the securities it held over land and stock and the fact that Nuhiti Q could not pay wages and creditors at that time, that the position was serious.

[28] Mr Naden described the situation from the COM's perspective very succinctly in his evidence when he stated:

...the carbon credit initiative which has produced income for the corporation but rather than use it to pay down debt, it had been used to subsidise the farming (and orchard) operation. The farming operation was not paying for Nuhiti Q and if it ever did, this must have been some time ago. In a nutshell, it was poorly managed, overstaff and loss making – kept afloat by the bank and carbon credits.

AGM 5 December 2020

[29] At the Annual General Meeting (AGM) on 5 December 2020, Ms Potae took the meeting through the annual accounts and their financial situation. Nuhiti Q had traded at a net loss of \$105,981 to the period ending 30 June 2020. In the discussion at the AGM about the financial future of Nuhiti Q, the Committee was directed to take ownership of the financial issues and the most immediate requirement was to reduce the debt with the bank.

[30] The shareholders wanted to see a dividend and the COM was asked whether it had considered exiting farming and putting it out to lease. The response from the Committee members was that this had been discussed and this was also a discussion with the bank which at that stage was closely monitoring the situation.

COM meeting on 22 January 2021

[31] The Committee held a meeting following the AGM on 22 January 2021. A new committee was elected. Diane Larsen, who had previously been the Chairperson, was re-elected. This was the next opportunity to make decisions about the future of the farming

operation. At that point the financial report to the COM indicated that Nuhiti Q was not projected to come within its banking arrangements.

[32] As of February 2021 all payments would have to be halted as there were no funds available in the account to pay wages, creditors, GST or PAYE. Noting the very large debt with the bank and bank's correspondence with Nuhiti Q and Mr Andrew's initial report, the COM passed a motion to exit farming.

Resolution to exit farming

[33] On 22 January 2021, the resolution to exit farming subject to further discussions with the Applicants is recorded in the minutes. Ms Larsen said the COM was sensitive to the long association that Mr Ferris Sr. and his whānau had with the farming operation. It was acknowledged that Mr Ferris Sr. had run the farm and brought up his family there and the COM did not wish to make any hasty decisions. The resolution was recorded as follows:

The Committee put forward the following motion to exit farming due to financial constraints subject to further discussions with M Ferris and T Ferris. *This was moved T Naden/ seconded K Brown*

M Nepia will phone M Ferris to discuss this resolution with him and share with him the discussion that was held today. All agreed that they want to follow good process and be honourable in their dealings as they work through the financial constraints that Nuhiti Q is currently under.

[34] It was agreed Mike Nepia would contact Mr Ferris Sr. to talk through the resolution and share with him the discussion at the meeting about the decision to exit farming. Mike Nepia and Mr Ferris Sr. are related, and it was agreed this would be the right way to relay the information.

[35] The Applicants say they were not aware the decision to exit farming had been made. They proceeded on the basis they agreed to sell down stock to address the bank debt.

Consultation document

[36] The COM took advice on how to progress from here and a consultation document dated April 2021 was prepared which set out a proposal to disestablish the three farm positions and a timeline to work through this process. Shortly after, a wage arrears and holiday pay claim was made by the Applicants and the other employee at the time.

[37] By this stage it appears the situation had become quite emotive and feelings were running high amongst the wider whānau and both sides were finding this to be a difficult time. Ms Larsen says she spoke with the other COM members and it was agreed to put aside the legal process and work through the issues with Mr Ferris Sr. and Jr. and the other employee.

[38] The COM acknowledged that this was not financially the best decision and pushing back the timeframe meant that they were subsidising this overhead and eating into capital. But on the other hand it was a way to reduce the antagonism from the legal process and the divisions between the whānau. It was agreed they would continue the process of selling the stock and at this time they still relied on the information that Mr Ferris Sr. provided to them that was to sell both sheep and cattle, most of which would be sold by 30 June 2021. Once this was complete then they would look at where to next, including the disestablishment of the employment positions.

COM meetings in July 2021

[39] On 2 July the COM met without Mr Ferris Sr. or Patricia Ferris present to talk about how to complete the exit from the current farming arrangement and to respond to recent communications. The farming operation had sold down most of the stock and the money received were now being eaten away by the ongoing costs that were not required. The COM held a view that they did not believe that dry stock farming would stand on its own two feet and there was every chance it would end up being subsidised by the carbon credits and other income, as had been occurring previously.

[40] The COM members at that time, noting that Mr Ferris Sr and Mr Ferris Jr. wanted to stay on the land and wanted to make a go of the dry stock proposal as a way forward, proposed a lease. The COM said this removed some of the business risk but would give Mr Ferris Sr. and his whānau this opportunity. The outcome of that meeting was to put together another proposal which the COM did with advice.

[41] At a COM meeting on 5 July 2021, there was a review of progress towards winding up the farm operation. The earlier budgets had again not been accurate and predictions were not met. However, the COM was satisfied it was making progress and Mr Ferris Sr. reported that all stock would be gone in the financial year and with these amended numbers Ms Potae agreed to amend the budgets. Ms Larsen says at this point she understood everyone was on the same page and that all stock would now be gone by 30 September 2021.

[42] Mr Ferris Sr. however believed no decision had been made other than to sell down the stock to clear the overdraft. He says he believed this was part of a plan to transition to mixed farming of carbon at Nuhiti Q beachside, dry stock farming and land lease for cropping, lamb finishing and dairy heifer grazing. That had been his proposal on 3 July to the COM.

[43] Whereas Ms Larsen says at this point in time the COM had not made any decisions about what activities, if any, might be considered by Nuhiti Q outside of payments and leasing arrangements. The focus was to complete the exiting of the farm, current farming arrangements and to wind up employee contracts with final pays so that the exit of the farming operation would be complete.

[44] At the conclusion of the 5 July meeting the Committee thanked Mr Ferris Sr. and Mr Ferris Jr. and Patricia Ferris for their work that they had undertaken to sell the stock and exit farming. Ms Larsen said the Committee was relieved to have finally gotten to this point and while the process had been slow at least they had agreement that there would be sale of all stock by September 2021, and this would also be the time in which they wound up the employment of the remaining staff which was Mr Ferris Sr. and Mr Ferris Jr.

[45] Mr Ferris Sr. provided a further email with a variety of suggestions on 27 July including a proposal to plant manuka seedlings, sell houses and shearers quarters and farm equipment. Then on 24 August he wrote to the COM making it clear he had put his proposal to the COM that would enable Nuhiti Q to carry on farming but did not know what the plan was from the COM. He said if the shareholders voted to end farming then he would go but made it clear he did not agree with that decision.

[46] The COM say this information was received and it was discussed with Mr Ferris Sr. and separately from him with his whānau. Ms Larsen says there were real reservations about the viability of his proposals and the reliability of his figures which he would have understood from the discussions they did have when he was present.

[47] Mr Ferris Sr. at this time, however, believed that the COM was not listening to him. The COM's view was Mr Ferris Sr. was continuing to run the farm operation without reference back to the Committee and by way of example they point out he re-hired an employee who had earlier resigned to help undertake a muster.

[48] At this time Mr Ferris Sr. made various claims that the Committee had not responded to him and that no-one had contacted him. Ms Larsen says that is not the case. She has several emails between the two of them that show that the Committee considered his proposals and spoke to him about them. However, ultimately the Committee did not agree with him and nor did the Committee think that his proposals were realistic given the financial situation. Mr Ferris' view was that he and his staff were the only people making money for Nuhiti and it proceeded with requesting a restructuring proposal from BDO.

[49] That proposal was dated September 2021. It suggested both a redundancy package and a lease proposal. The Applicants would be provided with the farm manager vehicle and free accommodation for six months without having to meet any utility costs. The lease proposal was for the Waipare block and possibly two other blocks for which Nuhiti Q would cover rates and expenses for the first year while the Applicants started up their farming operation.

[50] The Applicants initially dismissed those proposals at which point communications became personal and critical of the COM. The COM received further correspondence from members of the Ferris whānau seeking to have the Nuhiti Q Corporation remain a beef, sheep and carbon farming entity and to delay any decisions about employment until after an AGM. Further time was given for the Applicants to provide additional responses to the proposal.

[51] The Applicants firmly rejected the proposal. The COM's view at that stage was that given where it had been and the information that it had received, there was no realistic option around continuing to employ a farm manager or other staff, nor to revisit the farming operation.

[52] Ms Larsen says they had achieved a positive cash position by this time, and this had come about from the decision to exit the macadamia orchard and sell down stock, as well as income from the carbon credits. The Committee was of the view that it would not have been in this position if it had continued the farming operation, which by this time was an overhead that could not be justified.

[53] Ms Larsen says there was nothing in the material that the Committee received that would justify an alternative approach for continuing the employment of Mr Ferris Sr. as the Farm Manager and Mr Ferris Jr. as a farmhand.

[54] The Applicants' final proposal was dated 6 October. It also traversed a number of other issues to do with shareholding and the role of the COM. The last part though contained a

proposal from 1 October to 30 June 2022 to have the Applicants remain employees but the nature of the farming work would change because instead of beef and sheep farming it would instead be farmed for grazing, fattening lambs, dry stock farming and carbon farming. This way by changing the nature of farming activities the farming operations would fall away and both Applicants would remain employees.

[55] A budget was set out and further information was requested.

Final decision

[56] The next day on 7 October the final decision of the COM was conveyed in writing to the Applicants. Their employment was to be terminated and they were given two weeks' notice.

[57] The COM explained in its written evidence that this decision would help preserve the income from stock sales to date and those remaining to be sold which had been further delayed but was to occur. The Committee was willing to look at paying the Applicants on contract to complete the activities to be undertaken to complete the sale process of the stock and that the Committee was open to them to continue in their accommodation after 22 October 2021 at a fair market rental.

[58] The Committee agreed to pay invoices received from the Applicants but noted they significantly exceeded the remaining work prescribed by Mr Andrew. Mr Ferris Sr. says the work required was underestimated by Mr Andrew. The Committee also considered a further lease proposal from Mr Ferris Sr. and a meeting was held at the BDO Offices on 20 January 2022 to talk about his proposal, but the Committee declined it and elected to go with a different proposal.

Analysis

Genuine business reasons

[59] The analysis by the COM resulted in a conclusion that the farming operation was not providing an income. There was income from carbon credits and other sources but that was being eroded by the losses. Some of those losses could be attributed to the farming operation but that was not the full picture. In any event the financial position provided a coherent rationale for selling off the farming operation in order to preserve the financial position for

Nuhiti Q given its responsibilities to manage the land on behalf of the shareholders continued into the future.

[60] The correspondence between the parties and the statements of Ms Larsen, plus the correspondence from the bank, minutes of the COM meetings and the written evidence from Ms Potae and Ms Larson in particular, clearly demonstrate that the financial position was a genuine issue. I accept that the COM was focusing on improving its financial position, which initially involved getting out of debt and responding to what were in essence, demands from the bank.

[61] Generally, a redundancy will be genuine if it was made for valid commercial reasons.⁵ The weight of evidence clearly established that Nuhiti Q's decision to disestablish the farming operation was heavily influenced by its cash flow situation and the Māori Land Court decision urging it to take action to rectify that situation.

[62] The Applicants submit that other reasons existed that were personal to Mr Ferris Sr and views that may have formed about his farming ability. While I have found there was a genuine business case to make the decision to exit the existing farming operation, there is a question as to how much the background to the relationships played a role in considering alternative proposals that would have preserved employment and made the redundancies unnecessary. I will address that issue below.

Consultation

[63] From January 2021 to October 2021, Mr Ferris Sr. was aware that a decision to exit farming was actively being considered. He must have been aware prior to that by virtue of his membership on the previous COM and then on the new COM following the intervention of the Māori Land Court.

[64] Two proposals, created by BDO, in April and September clearly set out the options and mapped out a process for consultation. The initial proposal for dry stock farming made by Mr Ferris Sr. was engaged with fully by the COM. It created a budget to test out its viability and although in the end rejected that as an option because of the financial position Nuhiti Q was in at that time, that was clearly explained to Mr Ferris Sr.

⁵ *GN Hale & Son Ltd Wellington etc v IUOW* [1991] 1 NZLR 151.

[65] However, Mr Ferris Sr. pointed out on more than one occasion that further income was received later in the year through selling down the stock and assets from the farm and further carbon farming payments were received, changing that financial position. In essence his submission was at that time, budgets should have been re calculated in order to have genuinely considered his proposals as the financial picture changed throughout the consultation period.

[66] Mr Ferris Sr. made several additional proposals and gave further feedback on at least two other occasions as well as a number of informal emails and discussions with the COM. The pressure was evident at times from the tone of Mr Ferris Sr.'s communications and the COM accepts this was a difficult time. Consultation was halted by agreement, in an attempt to reach a conciliated position without resort to lawyers and legal processes to resolve the issues.

[67] Formal consultation about the redundancies started again in September with BDO's redundancy proposal. This was rejected by the Applicants, but a further proposal was put forward by Mr Ferris Sr. in writing on 6 October.

[68] By this stage, it was evident the COM had lost trust in Mr Ferris Sr. because in its view he had delayed selling down the stock, rehired an employee and incurred maintenance costs on vehicles without reference to the COM. While he claimed to have good reason for delaying the stock sales, the COM had become wary of unilateral actions he was taking. This had at times over the course of the year placed the COM in a difficult position with the bank. Ms Potae on more than one occasion had to explain why predicted budgets were not met when sale of stock did not proceed as planned.

[69] The COM's view was made clear in its final letter to the Applicants when it set out that it was no longer prepared to continue the current farming operation by stealth. This loss of trust in Mr Ferris Sr. to work with the COM as his employer was likely also a result of historic matters and the other relationships at play. There were glimpses of an underlying issue that had to do with the dominance of the Ferris whanau over the entire Nuhiti Q operation, running the farm and the entire operation as if it was their own and that operating in this way was said to have led to the intervention of the Māori Land Court.

[70] There was a structured consultation period to consider the BDO proposals with ongoing dialogue between the parties that appears to have as fair and reasonable procedure for the COM to follow until things were abruptly concluded with a further proposal not responded to.

[71] There is also a question mark as to whether or not the underlying views flowing from the historical relationships between the shareholders set out above could reasonably have a place in decision making about employment relationships. Where I am of the view it impacted on the Applicants unfairly is not on the decision to exit farming or the overall process but on genuine consideration of alternatives to redundancy.

Alternatives to redundancy

[72] Ultimately, I have concluded the consultation process was ended too soon for the Authority to be satisfied all options were given genuine consideration. The original report from Mr Andrew recommended an alternative stocking arrangement and this does not appear to have been advanced. This was important because to an extent alternative stocking arrangements and ways of farming formed the basis of all of Mr Ferris Sr.'s proposals.

[73] While the financial situation likely provided a complete answer to justify the decision to exit the traditional farming operation, it did not justify the decision to decline or fail to consider the last proposal. This is in part because of the nature and size of the land that Nuhiti Q is responsible for managing.

[74] The covenants of the Crown lease required pest control, maintenance of all buildings, fences, gates and other structures and rubbish removal. This meant there was ongoing work required on at least 700 acres of land leased from the Crown that had to be carried out regardless of whether or not a farming operation continued. The COM accepted given the size and nature of all the land over which it has responsibility, that work was required in order to ensure it was maintained and remained viable.

[75] While there was a plan to lease blocks of land until decisions were made about the future use of the land, farm tracks, fences, security, pest control and scrub control were required. I understood the evidence to be that even if blocks were leased, maintenance of access roads, fencing, pest control and security were all still the ongoing responsibility of the COM.

[76] That means that while the decision to exit farming was said to be necessary at that point in time to avoid eroding the capital position reached, contractors were then engaged to finish selling down the stock and a baseline amount of work in maintaining the land was apparent even once the farming operation was wound up. The decision regarding how to address

maintenance and future land use appears to have been put off for another day, but the ongoing maintenance at the very least was a natural alternative to redundancy. This undermines the financial justification given for not considering the final proposal because the COM would need to incur this expense regardless.

[77] While it may not have provided a complete answer in terms of what the Applicants were seeking, employment law is concerned with the process and genuine consultation and consideration of alternatives to redundancy where they exist. This is an important aspect of an employer's approach to redundancy terminations.

[78] It was evident from the written statements that the dominance of one family in the management of Nuhiti Q, and Mr Ferris Sr.'s farming abilities were a factor taken into account by the COM. While the interrelationships between the parties in this case are nuanced and complex, in the employment context, any decisions about redundancy could not be justified if they were based on the historical issues between the shareholders. Furthermore, any issues with farming abilities should have been raised at the time with the employee. In employment law performance or competency issues cannot later be used as a reason to justify a redundancy.

[79] Under cross examination, it was submitted it was accepted no financial analysis was conducted that separated out the macadamia business from the farming operation. It was also apparent the final proposal was partially rejected at a time when the COM was in a position where it could not trust Mr Ferris Sr. to act in accordance with its decisions.

[80] That proposal represented the first communication from Mr Ferris Sr. that appeared to accept that the farming operation needed to come to an end. Setting aside the request for the COM to allow the shareholders to make the decision regarding redundancy (because that was a matter for the shareholders to consider), the proposal on 6 October was to continue farming by obtaining income from dry stock farming, fattening lambs, heifer grazing, cropping "leased income" and carbon credits. It was said that by changing the nature of the farming activities the majority of the farming operation costs fell away.

[81] A budget was also attached and issues were raised with the accuracy of BDO's figures. There was no evidence this proposal was responded to and the fact the termination letter was dated the next day, strengthens that conclusion because there was simply insufficient time to have given it meaningful consideration before the final decision was made.

Conclusion

[82] The Court of Appeal in *Grace Team Accounting* held:⁶

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[83] There was clearly a genuine business reason in the financial position the COM found itself in to justify the decision to exit traditional farming and this does not appear to be a case in which there were mixed motives in relation to that overall decision. The financial situation that was clearly articulated by the COM, and evident in the communications with the bank was serious for Nuhiti Q. This was even more so given the financial history and the structure of securities the bank held over land and stock.

[84] However, s 4 of the Act requires an opportunity to comment before any decision is made, genuine consideration of any submissions made by the employee and the justification test requires an employer to genuinely consider what an employee has to say before dismissing an employee.

[85] There was in the end a long period of consultation. Mr Ferris Sr. put forward two proposals that the COM say were considered but discounted. The third and final proposal on 6 October, however, cannot have been considered fully because the dismissal letter was dated 7 October.

[86] The fact the Applicants were engaged on contract to wind up the farming operation also supports the proposition that the roles were not superfluous to the business needs at the time they were terminated. The point being this allowed more time to continue consultation because a decision was made to use the funds to pay contractors.

[87] A fair and reasonable employer could also be expected to consider alternatives to redundancy or redeployment. Although the financial position meant these were limited, nonetheless they arose during the course of consultation and to an extent arise naturally because of the role of the COM and its responsibilities. The land required maintenance and tending to regardless of whether the farming operation continued or not that was also an ongoing

⁶ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

responsibility of the COM. The covenants to the lease from the Crown provides a particularly strong evidential basis for that position.

[88] In the end I am persuaded, in particular, by the evidence that there were alternatives to redundancy that were not sufficiently explored by the COM. They may not have been a complete answer but the fact they were not explored is the issue for an employer in this situation when considered through an employment law lens.

[89] The structure of Nuhiti Q as a Māori Incorporation was referred to in submissions as one of whanau and their whenua and that meant that unlike many other businesses, the parties to this dispute remain connected and this will never change. It was accepted that the ongoing governance and management of Nuhiti Q will inevitably involve the Applicants and their whanau both as shareholders and future committee members.

[90] It was anticipated in the material before the Authority the Applicants and their whanau will still have the opportunity to be involved in future enterprises. The COM accepted it would need to reassess in the future what the land use might look like and it did not appear to be in dispute that that would require engaging workers in the future with the skills and abilities the Applicants had.

[91] Against this backdrop and in the context of this particular matter, I find that alternative redeployment options were never investigated or considered fully and this means I have found the Applicants' personal grievance has been successful.

Statutory entitlements

Wage arrears for work completed

[92] It was not until BDO was engaged in October 2020 to take over the administration process that monthly time sheets were requested from Mr Ferris Sr. for himself and the employees. These were not regularly provided until February 2021. Mr Ferris Sr. however, has kept farm diaries that he says are a more accurate record of hours worked.

[93] The employment agreements provided the employees would work 80 hours each fortnight on Monday to Friday but the hours were negotiable depending on the farm needs. Mr Ferris Sr. was paid a gross annual salary of \$50,000.00 and Mr Ferris Jr. \$32,240.00. The

wages clause provided their salary covered all the time worked and they were paid allowances on top of that.

[94] This means up until 2017 there were no time sheets or employment agreements. Timesheets only really started to come in regularly in 2021 but the Applicants rely on their farm diaries to support their claim for wage and public holiday arrears.

[95] It was submitted on behalf of Nuhiti Q that there is no provision in their employment agreements for payment for additional worked hours because of the way the clause is worded. An annual salary covers all time worked. In addition, Mr Ferris Sr. was the farm manager, and he should have communicated about that.

[96] Mr Ferris Sr. says he was left to his own devices for most of the time. He was unsure how to fill in time sheets and saw it as an unnecessary task. He preferred his diaries and has kept them throughout.

[97] Ms Potae has compared the payslips for both Applicants and referenced these to the farm diary notes for the period 1 July 2020 to 1 October 2021. For Mr Ferris Sr. she identified a difference of 1,101 hours and for Mr Ferris Jr. a difference of 480.5 hours.

[98] Given the lack of evidence beyond that I am unable to ascertain how many additional hours were worked or any customary informal arrangements that might also have been in place to compensate farm workers for additional work completed that would also need to be taken into account.

Minimum wage and public holidays

[99] Mr Ferris Jr's. salary recorded in his employment agreement indicates he was paid below the minimum wage. The information required to be able to calculate accurate wage arrears was unclear. Because this is a statutory minimum entitlement leave will be reserved for Mr Ferris Jr. to make a further application to the Authority in relation to that.

[100] Work carried out on public holidays is also a statutory minimum entitlement and leave will also be reserved.

Remedies

Lost remuneration

[101] Section 123 (b) of the Act provides for the reimbursement of a sum equal to the whole or any part of the wages lost because of the grievance which has been established. This needs to be considered with s 128 of the Act which deals with lost remuneration.

[102] Section 128 (2) of the Act provides the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser.

[103] Section 128 (3) the Act provides the Authority may in its discretion, order an employer pay an employee for lost remuneration a sum greater than that under subsection 2.

[104] The Applicants seek lost remuneration up until the date of the investigation meeting. Taking into account the contract work they were engaged to carry out I am unable to be satisfied there was a loss resulting from the actions of the employer and this does not appear to be a case where it would be appropriate to exercise the discretion.

Compensation for humiliation, loss of dignity and injury to feelings

[105] The Applicants seek compensation in band two (Mr Ferris Jr.) and band three (Mr Ferris Sr). I accept their evidence and that of their families and colleagues as to the distress and humiliation they both felt. The COM also acknowledges how difficult this process was for everyone involved.

[106] I was also asked to rely on conduct that occurred after the dismissal when considering compensation. However, as that occurred after the employment relationship ended, and involved at times the other relationships between the parties, I have set that aside.

[107] Mr Ferris Sr. sought medical advice and treatment to help with sleep and appetite issues caused by stress over this period. Given his role in the farming operation, I accept his evidence as to hurt and humiliation. His whanau gave evidence of the visible impact this process had on him.

[108] Mr Ferris Jr. spoke of his concerns and worry leading up to the final decision and the impact loss of security would have on him and his family. He said he felt embarrassed and that losing the job on the land he was born on will cut into his identity. He has a young family and remains worried about his family as opportunities for work are few where they live. Mr Ferris

Jr's. partner gave honest and brave evidence about the impact on them and I accept that evidence.

[109] Submissions were made on behalf of both applicants that because of their connection to the land, the loss of opportunity to continue living and working on that land is a factor that should be taken into account. Mr Ferris Sr.'s age was also submitted as a factor that increased the harm he suffered in that he is past retirement age and will be unlikely to find further work.

[110] Given my findings above, considering the distress experienced from the loss of chance that occurred when alternative proposals were not properly considered, the impact on Mr Ferris Sr. and the general range of awards in similar cases, an appropriate award for compensation under s 123(1)(c)(i) of the Act is \$20,000.00 and for Mr Ferris Jr. \$20,000.00.

Contributory conduct

[111] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[112] Redundancy is a no-fault termination and there were no actions taken by the Applicants that contributed to the personal grievance.

Orders

[113] Nuhiti Q is ordered to make the following payments to Michael Ferris Sr:

- (a) The sum of \$20,000.00 under s 123(1)(c)(i) of the Act as compensation for hurt and humiliation;
- (b) Wage arrears for 1101 hours of work in the amount of \$26,466.00.

[114] Nuhiti Q is ordered to make the following payments to Michael Ferris Jr:

- (a) The sum of \$20,000.00 under s 123(1)(c)(i) of the Act as compensation for hurt and humiliation; and
- (b) Wage arrears for 480.5 hours of work (calculated at the minimum wage rate) in the amount of \$9,610.00

- (c) Wage arrears for the remainder of his employment in an amount that ensures his wages were paid at the minimum wage rate.

[115] If the parties are unable to agree on calculating the wage and public holiday arrears, leave is reserved to return to the Authority to quantify those amounts.

Costs

[116] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Ferris Sr. and Mr Ferris Jr. may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Nuhati Q would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[117] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Sarah Kennedy-Martin
Member of the Employment Relations Authority

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www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1