

NOTE: This determination contains an order prohibiting publication of certain information at paragraphs [120] and [123].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 585
3264719

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| BETWEEN | CARSTEN WEIDEMANN Applicant |
| AND | LANDCORP FARMING LIMITED Respondent |

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| Member of Authority: | Natasha Szeto |
| Representatives: | Applicant in person Jordan Boyle, counsel for the Respondent |
| Investigation Meeting: | 31 May 2024 in Rotorua and 15 July 2024 in Wellington |
| Submissions received: | 5 August 2024 from the Applicant and Respondent |
| Date of Determination: | 3 October 2024 |

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Carsten Weidemann was employed by Landcorp Farming Limited (trading as Pāmu) on a fixed-term seasonal basis as Head Calf Rearer on Pāmu's Pinta farm. A short time into his employment, Mr Weidemann began to have negative interactions with the Farm Manager.

[2] Matters came to a head when there was an incident between Mr Weidemann and two Pāmu managers on 15 August 2023. The Farm Manager stood Mr Weidemann

down and Pāmu started a process of investigating Mr Weidemann for serious misconduct, culminating in his dismissal on 29 August 2023.

[3] Mr Weidemann says he was unjustifiably dismissed. He raises claims of unjustifiable disadvantage relating to alleged bullying, harassment, discrimination, and in relation to his suspension. He claims that his expectations of privacy or confidentiality were breached in relation to a Police report. He seeks compensation, reimbursement of lost wages, and reimbursement for gumboots. He also says he is owed wage arrears for 60 hours of overtime work. He asks for the interim non-publication order over his name and identifying details to be extended for five years.

[4] Pāmu says Mr Weidemann was not unjustifiably disadvantaged and it was justified in its decision to dismiss Mr Weidemann for serious misconduct. It says Mr Weidemann has no claim for reimbursement for gumboots, and he was paid his contractual entitlement for every hour he worked.

The Authority's Investigation

[5] Written witness statements were lodged by Mr Weidemann. From Pāmu, written witness statements were lodged by Shaun Neeley (General Manager – Upper North Island) and Dirk Steeneck (HR Business Partner). Pāmu did not call the Farm Manager or Business Manager as witnesses for the Authority's investigation. They are referred to in this determination by their job titles.

[6] All witnesses attended the Investigation Meeting and answered questions from me under oath or affirmation.

[7] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[8] The issues the Authority is to investigate and determine are:

- (a) Whether Mr Weidemann was unjustifiably disadvantaged in his employment on the basis that he was subjected to bullying, harassment,

discrimination and/or his expectations of privacy or confidentiality were breached.

- (b) Whether Mr Weidemann was unjustifiably suspended from his employment.
- (c) Whether Mr Weidemann was unjustifiably dismissed from his employment on the basis that the dismissal was not substantively justifiable, and Pāmu did not follow a fair process.
- (d) If Mr Weidemann was unjustifiably disadvantaged and/or dismissed from his employment, whether he should be awarded:
 - (i) Compensation under s 123(1)(c) of the Act.
 - (ii) Reimbursement of lost wages (subject to mitigation of loss).
- (e) If Mr Weidemann is provided remedies, whether they should be reduced on the basis of any contributing behaviour by him.
- (f) Whether Mr Weidemann has a claim for reimbursement in relation to gumboots.
- (g) Whether Mr Weidemann has a claim for wage arrears in respect of hours he was required to work without his agreement (60 hours of work at an additional \$30.00 per hour).
- (h) Costs and disbursements.
- (i) Whether the Authority should make a permanent non-publication order in respect of Mr Weidemann's name and identifying details.

[9] Originally Mr Weidemann made a claim for reinstatement to the next calf-rearing season, but withdrew the claim at the investigation meeting.

Relevant Background

[10] Mr Weidemann started his employment with Pāmu on 10 July 2023 at Pāmu's Pinta farm. Mr Weidemann had chosen to work on the biggest farm in the North Island with modern equipment and a modern approach to calf-rearing, and he considered it an important next step in his career.

[11] Mr Weidemann answered an advertisement for a Head Calf Rearer, which was a Team Leader position on a fixed-term individual employment agreement with an end

date of 30 November 2023. The title of “Head Calf Rearer” was not reflected in Mr Weidemann’s letter of offer, individual employment agreement or role description, but there is no dispute between the parties that is the role for which Mr Weidemann was employed. The agreement was for one season, and Mr Weidemann had no expectation of ongoing employment after the season, or of his agreement being renewed for the next season. Although his written individual employment agreement guaranteed Mr Weidemann 20 hours per fortnight and specified there could be a maximum of 110 hours per fortnight, Mr Weidemann said there was a verbal agreement and his expectation was he would get 50 hours of work per week.

[12] Virtually from the beginning of his employment, Mr Weidemann’s relationship with the Farm Manager was fraught. The reality of the farm’s operations was different to Mr Weidemann’s expectations and he found many things not to his preference, or functioning below what he says was adequate. An example is Mr Weidemann says he was not given sufficient personal protective equipment (PPE). On his first day of work gumboots were provided that were too small and he says he was forced to purchase his own. Mr Weidemann says that despite being given multiple items of hi-visibility (hi-vis) gear, it was insufficient for six days of work and the hi-vis vest he was given was not windproof.

[13] Evidence of the relationship between Mr Weidemann and the Farm Manager came from Mr Weidemann, and extensive records of WhatsApp messages. This supports Mr Weidemann’s perspective that he asked for equipment to be provided and the Farm Manager would either ignore or turn down his requests. Messages were exchanged between Mr Weidemann and the Farm Manager well outside their usual working hours – sometimes very late at night and very early in the morning. The tone of the messages was direct and sometimes bordered on argumentative or even aggressive on both sides. Mr Weidemann says the bullying and harassment he experienced was evidenced by these messages.

[14] The situation between Mr Weidemann and the Farm Manager escalated, resulting in the Farm Manager issuing Mr Weidemann with a Letter of Expectation on 21 July 2023, only eleven days into Mr Weidemann’s employment. Multiple issues were raised including safety issues. The Farm Manager recorded that he had spoken to Mr Weidemann a number of times about wearing a seatbelt, helmet, and hi-vis gear and that he would arrange a formal meeting about potential serious misconduct if there were

any further issues with health and safety compliance. Mr Weidemann signed and dated the letter the day he received it to confirm he had read the letter and understood what was expected of him. He says he did this because there were aspects of the letter that he wanted to rely on and he thought most of the content was a common sense application of what he had agreed to in his employment agreement in terms of how the parties were going to work together.

[15] On 7 August 2023, via WhatsApp, Mr Weidemann requested a formal meeting with the Farm Manager and Business Manager and the attendance of a vet. The Farm Manager set a meeting up the next day for the two of them and the Business Manager who was not based at the farm, but would be visiting. The Farm Manager requested an agenda, and Mr Weidemann sent him a list that included the following:

- (a) Health and safety on workplace [sic]
- (b) Bullying/Honesty/Fairness
- (c) Work hours

[16] The meeting the next day consisted mostly of the three men going around the farm and addressing operational issues. The Farm Manager had not forwarded or advised the Business Manager of the agenda for the meeting, and Mr Weidemann ended up reading it off his phone. They spent two and a half hours together, but did not fully discuss the subject of bullying that Mr Weidemann had raised.

[17] The Farm Manager's notes of the meeting record there was only the briefest discussion around bullying right at the end of the visit, and it related to the Farm Manager asking Mr Weidemann about a plan for the calves who had been showing signs of illness the Friday before. The Business Manager told Mr Weidemann he did not think the bullying claim was warranted because the Farm Manager was just asking him to complete tasks which was part of his management role.

[18] Following the meeting, Mr Weidemann says he felt like there had not been a formal meeting at all because the items on the agenda he had been asked to provide were not addressed. Mr Weidemann still felt he was being bullied in relation to health and safety, seatbelts and hi-vis, but he did not escalate the matter within Pāmu.

[19] On 14 August, the Farm Manager observed Mr Weidemann not wearing a helmet on a side by side (sxs) vehicle. On 15 August, the Farm Manager approached

Mr Weidemann while Mr Weidemann was cleaning out a trough and said he needed to talk to him. Mr Weidemann was not wearing hi-vis. The Farm Manager showed Mr Weidemann a photo of him from another occasion where Mr Weidemann was not wearing hi-vis in a work area. The Farm Manager also asked Mr Weidemann if he recalled the incident with the helmet from the day before. The Farm Manager told Mr Weidemann that he needed to stand him down for his own safety. Mr Weidemann did not accept there were any safety risks in the way he had been working. The Farm Manager asked him what he thought about standing down, and Mr Weidemann said he did not accept it. The Farm Manager then removed the key from the tractor that Mr Weidemann had been driving. Mr Weidemann said he would not leave the farm.

[20] The Farm Manager then left to call the Business Manager who advised him to offer Mr Weidemann a ride back to his vehicle so he could leave the farm. The Farm Manager said Mr Weidemann swore at him, although Mr Weidemann denies this.

[21] The Farm Manager again left to update the Business Manager. Later that day, the Business Manager then arrived at the farm to talk to Mr Weidemann. The Business Manager said Mr Weidemann waved, flicked or swiped towards him with a stick (a rod with a plastic bag attached to it that Mr Weidemann had developed as a tool for herding heifers) although Mr Weidemann says he had the stick in his hand but did not wave it towards the Business Manager. The Business Manager left the area, and around 5:30 pm the Farm Manager called the Police to have Mr Weidemann removed from the farm. Mr Weidemann says he finished his tasks and left the farm when it was dark as usual, and by the time the Police arrived he was no longer at the farm. That night, the Business Manager contacted General Manager Shaun Neeley with an update on the incident. He also spoke to Dirk Steeneck in Human Resources to report that Mr Weidemann had not complied with health and safety requirements.

[22] On 16 August, Mr Neeley spoke with both the Farm Manager and the Business Manager. With assistance from Mr Steeneck and relying on file notes of the conversations with the Business Manager, Mr Neeley drafted a letter inviting Mr Weidemann to a meeting to provide any relevant information and respond to Pāmu's concerns. The letter entitled "Meeting to Discuss Concerns" contained the following:

- (1) On 14 August 2023...Farm Manager on Pinta, saw you driving a sxs without wearing a helmet. He gestured to you to put on the helmet, which you then did.

- (2) On 15 August 2023, you were seen in a paddock on farm not wearing hi-viz clothing.

...spoke to you on 15 August 2023 about standing you down from work until we had the opportunity to discuss these concerns with you in a formal meeting... You allegedly refused to leave work when asked to...When [Business Manager] asked you to leave, you allegedly waved a stick at him. [Business Manager] then did call Police to have you removed from farm.

...Your alleged behaviour may represent serious misconduct as per:

s6.b) “Failure to follow Pāmu’s five safety expectations” in particular expectation #3 “Wear personal protective equipment...”.

s6.e) “Unacceptable conduct including harassment, assault, violence, bullying, making threats, insulting, abusive or threatening language/behaviour”

Allegedly refusing to leave farm and requiring Pāmu to call Police to have you removed may also represent refusal to follow a legal and reasonable instruction by your employer and may be in breach of your fundamental obligations as an employee.

[23] Mr Weidemann says the letter from Mr Neeley made him feel bullied and harassed because the process was clearly designed to prove him guilty of serious misconduct rather than undertaking an open investigation.

[24] The same day, Mr Weidemann provided a written response to Mr Neeley’s meeting invitation. Mr Weidemann said the instance of not wearing a helmet related to him moving the sxs out of the way to one side. He raised his concerns that he had not been provided with sufficient PPE. He told Mr Neeley that his request for a formal meeting regarding “Bullying, Honesty, Fairness” was “brushed away” by the Business Manager, and that he and the Farm Manager were advised to “work it out between ourselves”.

[25] A disciplinary meeting was initially scheduled for 18 August, but was rescheduled to 21 August. It was to be by Teams given the nature of the incident. At the meeting on 21 August, Mr Weidemann raised with Mr Neeley and Mr Steeneck that he had requested a meeting complaining about bullying (by the Farm Manager) back on 7 August, and he felt he was being “set up” by the Farm Manager.

[26] Mr Neeley and Mr Steeneck tried to redirect the conversation back to what they saw as the immediacy of the serious health and safety concerns, and the culmination of these in the incident on 15 August while Mr Weidemann tried to raise his concerns about PPE and bullying and harassment.

[27] Following the 21 August meeting, Mr Neeley contacted the Farm Manager and Business Manager to clarify and seek their perspectives on some of the matters Mr Weidemann had raised. Mr Steeneck also contacted them. These conversations were not recorded or provided to Mr Weidemann, but the substance of them was captured in a preliminary decision letter issued to Mr Weidemann on 24 August 2023.

[28] On 22 August, the Farm Manager had a conversation with Police as a follow up to the incident on 15 August. The Police report states that during the conversation with the Farm Manager, they were advised Mr Weidemann “will likely be formally dismissed from his position on the farm”.

[29] On 24 August, Pāmu issued Mr Weidemann with a preliminary decision letter proposing termination of his employment for serious misconduct based on Mr Weidemann’s failure to follow Pāmu’s safety expectations (wear PPE), unacceptable conduct relating to the incident on 15 August, and failure to follow lawful and reasonable instructions. Pāmu said it did not accept Mr Weidemann’s explanation of why he was observed driving a sxs without wearing a helmet. While Pāmu did not take issue with Mr Weidemann not wearing hi-vis during smoko, he needed to put his hi-vis back on to carry out work. Its preliminary view was that during the incident, Mr Weidemann had sworn at the Farm Manager, and waved his stick at the Business Manager in a threatening manner.

[30] In relation to concerns Mr Weidemann had raised about being bullied or set-up, Mr Neeley’s preliminary view was these were unfounded and that the Farm Manager and Business Manager were simply providing appropriate management direction.

[31] On 29 August 2023, Mr Weidemann responded in writing to the preliminary letter from Pāmu. Despite missing the deadline for response, Pāmu says it took Mr Weidemann’s written response into account. However it upheld its preliminary decision. In doing so, Pāmu said it had no credible assurance that Mr Weidemann’s approach to compliance with health and safety requirements would change if his employment was to continue. Mr Weidemann was summarily dismissed from his employment on 29 August. This was seven weeks into Mr Weidemann’s employment, and thirteen weeks before his fixed term was due to end.

Was Mr Weidemann unjustifiably disadvantaged?

[32] For his disadvantage claims to succeed, Mr Weidemann must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by Pāmu.¹ This means I need to determine whether Mr Weidemann suffered a disadvantage in his employment, and – if so – whether this was caused by an action by Pāmu and whether that action was unjustified. Pāmu’s actions are assessed on an objective basis, in light of the test under s 103A of the Act. This test requires me to determine whether Pāmu’s actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[33] In this matter, I determine Mr Weidemann’s disadvantage claims before considering his dismissal because the claimed disadvantages (particularly relating to bullying and harassment) form the context for events leading up to his dismissal.

Was Mr Weidemann unjustifiably disadvantaged in relation to bullying, harassment and / or discrimination?

[34] Mr Weidemann claims he was unjustifiably disadvantaged in his employment because he was subjected to bullying, harassment and discrimination by the Farm Manager who had embarked on a campaign of trying to catch him out in health and safety failures in order to later justify his dismissal. Mr Weidemann says Pāmu did not respond appropriately to concerns he had raised about his treatment by the Farm Manager.

[35] Pāmu denies Mr Weidemann was subjected to bullying and harassment in his employment and denies there has been any disadvantage to Mr Weidemann.

[36] Based on the evidence before the Authority, I cannot conclude that Mr Weidemann was bullied or harassed by the Farm Manager or any other senior manager at Pāmu. There was insufficient evidence to substantiate that there was repeated and unreasonable behaviour towards Mr Weidemann sufficient to constitute workplace bullying as defined in case law. However, I am persuaded that Pāmu did not sufficiently investigate or take action in relation to Mr Weidemann’s claims of bullying.

[37] Mr Weidemann clearly raised issues with Pāmu relating to his employment relationship - particularly with the Farm Manager - from an early stage of his

¹ *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

employment. When Mr Weidemann requested a meeting on 7 August, he specifically noted “Bullying/Honesty/Fairness” as an agenda item. When the Business Manager visited the farm, Mr Weidemann understood he was there to discuss (among other things) the bullying allegation, but the limited file notes of this conversation make it apparent that there was no meaningful discussion about the topic. On the evidence, it seems likely that the focus of the visit was farming operations and not on Mr Weidemann’s complaints about the way he felt he was being treated by the Farm Manager.

[38] Mr Steeneck also confirmed with the Authority that neither the Farm Manager or Business Manager had asked for human resources support or advice in relation to the bullying allegation, and there was no follow up with human resources after the 8 August meeting. Mr Steeneck assumed from the lack of contact that the concerns Mr Weidemann had raised were not urgent or severe because they had not been escalated “off farm”. Pāmu also says it was Mr Weidemann who spent too little time on the issue of bullying at the meeting.

[39] I consider Pāmu’s attempt to shift responsibility for following up the bullying allegation to Mr Weidemann to be misplaced.

[40] I also conclude Pāmu did not adequately investigate Mr Weidemann’s bullying concerns when they were later raised in the context of the disciplinary investigation. Mr Neeley said he was not aware of Mr Weidemann’s concerns about bullying by the Farm Manager until Mr Weidemann raised them with him on 21 August. Mr Neeley says he investigated the claims by seeking statements from the Farm Manager and the Business Manager, but considered the concerns unfounded because the managers were providing appropriate management direction to Mr Weidemann, and plenty of suitable hi-vis clothing was available.

[41] Pāmu said it did not consider the bullying allegation Mr Weidemann had raised to be relevant to the disciplinary investigation, because it was a deflection of the concerns Pāmu had raised about Mr Weidemann’s own behaviour. That may have been a reasonable position for Pāmu to take if Mr Weidemann had first raised the allegations in response to the disciplinary process, but that was not the case.

[42] At the Authority, Mr Steeneck said Pāmu employs many managers and in his professional judgment, Mr Weidemann’s allegations about the Farm Manager did not

meet the threshold for investigating claims. The issues Mr Weidemann had raised did not get traction, because there was no evidence of inappropriate behaviour by the Farm Manager or the Business Manager. Pāmu considered Mr Weidemann was reacting negatively to reasonable management instructions and the issues Mr Weidemann was raising originated from his disagreement about how Pāmu ran its operations.

[43] Stepping back to consider the evidence objectively, it is clear that Mr Weidemann felt bullied and harassed from an early stage of his employment, and he attempted to raise this issue with Pāmu management. I am not persuaded on the evidence that Pāmu made “numerous attempts to address concerns raised” as it submits. Mr Weidemann’s claims were not sufficiently responded to on 8 August or after 21 August in the context of the disciplinary investigation. If Pāmu had decided not to fully investigate, then as a fair and reasonable employer it could have advised Mr Weidemann that his allegations did not meet the threshold for further investigation. I conclude it was unjustifiable for Pāmu to treat Mr Weidemann’s bullying claim as merely being a deflection of the disciplinary process when he had first raised the issue two weeks prior. The failure to sufficiently investigate disadvantaged Mr Weidemann because it led Pāmu to the unsafe conclusion that Mr Weidemann’s claims of bullying and harassment were unfounded and this made his ongoing employment with Pāmu more tenuous.

[44] In relation to Mr Weidemann’s discrimination claim (which is a subset of his bullying and harassment claim), I agree with Pāmu’s submission that any claims based on the grounds under s 105 of the Act are unsupported on the evidence.

Was Mr Weidemann unjustifiably disadvantaged in relation to his suspension?

[45] The second disadvantage Mr Weidemann claims relates to his suspension. Mr Weidemann says the suspension was unjustified because Pāmu did not follow the proper process in suspending him. In accordance with Pāmu policies, Mr Weidemann says Pāmu should have provided him with a preliminary decision, and given him the chance to comment. Mr Weidemann says he was not presenting a risk to himself or others and there was no reason to stand him down in the moment.

[46] Pāmu says that Mr Weidemann presented a serious health and safety risk by refusing to follow the reasonable instructions of the Farm Manager in relation to wearing hi-vis clothing and wearing a seatbelt on farm vehicles. Mr Weidemann was

asked how he felt about the proposal to suspend, and initially refused to engage. Despite being stood down, Mr Weidemann continued to work for the rest of the day as usual. When the Business Manager arrived to reiterate the Farm Manager's message to Mr Weidemann, Mr Weidemann allegedly waved a stick at him, following which Police were called.

[47] While suspension can be a clear example of disadvantage in employment because it potentially places an employee's employment in jeopardy, I find Pāmu's actions in suspending Mr Weidemann were justified. The suspension process may have been abridged, and parts of the process conflated, but Pāmu was investigating serious health and safety concerns. The way Mr Weidemann reacted to issues being raised with him and the proposal to suspend, supports that Pāmu's decision to suspend him was a fair and reasonable decision in the circumstances. There was no disadvantage to Mr Weidemann who was suspended on full pay during the subsequent disciplinary process. Mr Weidemann's claimed unjustified disadvantage relating to his suspension does not succeed.

Was Mr Weidemann unjustifiably disadvantaged in relation to breach of privacy or confidentiality?

[48] The final disadvantage claim relates to Mr Weidemann's privacy or confidentiality being breached in relation to Pāmu giving information to the Police. I find this claim unsupported on the evidence. There was no evidence Pāmu improperly provided documents or information to the Police, and no evidence of any disadvantage to Mr Weidemann arising from Pāmu having done so. The comment about Mr Weidemann's likely dismissal in the Police report was made by the Farm Manager, who was not the decision-maker in the disciplinary process. Although not argued before the Authority, it is likely Pāmu would have had a strong argument that it was entitled or even required to disclose all relevant information to the Police during their investigation in response to the incident. I conclude Mr Weidemann's claimed unjustified disadvantage relating to a breach of his privacy or confidentiality does not succeed.

Summary of disadvantages

[49] In closing submissions Mr Weidemann tried to raise a number of other disadvantage claims relating to his work diary, and a trespass notice. These claims were not supported by evidence before the Authority and I find them unsubstantiated.

[50] Based on the evidence before the Authority, I find Mr Weidemann was disadvantaged in his employment in relation to Pāmu's failure to sufficiently investigate the bullying allegations Mr Weidemann had raised. Pāmu's actions did not meet the test of justification set out in section 103A of the Act and have resulted in Mr Weidemann being disadvantaged.

[51] Mr Weidemann was not unjustifiably disadvantaged in relation to his suspension or in relation to any claims of breach of confidentiality or privacy.

Was Mr Weidemann unjustifiably dismissed?

[52] In determining whether an action by the employer (including dismissal) was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.²

[53] I need to assess on an objective basis, whether the decision Mr Neeley made on Pāmu's behalf to dismiss Mr Weidemann for serious misconduct, and how he reached that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- (a) Pāmu fully and fairly investigated the allegations against Mr Weidemann before dismissing him;
- (b) Pāmu raised the concerns it had with Mr Weidemann (including giving him relevant information) before dismissing him;
- (c) Pāmu gave Mr Weidemann a reasonable opportunity to respond to its concerns before dismissing him;
- (d) Pāmu genuinely considered Mr Weidemann's explanations before dismissing him (the decision was made without predetermination).

[54] The Authority may take into account other factors as appropriate, and must not find a dismissal to be unjustified solely because of minor defects that did not result in the employee being treated unfairly.³ While adequate consideration of alternatives to

² Employment Relations Act 2000, s 4(1A).

³ Employment Relations Act 2000, s 103A(5).

dismissal are not one of the specific statutory factors to consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

[55] The Authority's task is to objectively examine the employer's decision-making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done. There may be a range of responses open to a fair and reasonable employer and the Authority is not to substitute its decision for what a fair and reasonable employer could have done in the circumstances. The requirement is for a broad assessment of substantive fairness and reasonableness in light of the seriousness of the allegation and potential consequences⁴, and not minute and pedantic scrutiny to identify failings.⁵

[56] The duty of good faith is elevated for an employer who later intends relying on its communication in a disciplinary setting. It must be open and transparent, and remove any ambiguity from the process.

Was the process followed by Pāmu procedurally fair?

[57] Mr Weidemann says Pāmu did not sufficiently investigate the various allegations against him.

[58] Pāmu says it followed its "Handling Misconduct" policy in running the disciplinary process. Mr Neeley was appointed as an independent decision maker as he had not been involved in the prior matters between Mr Weidemann and the Farm Manager. Mr Neeley invited Mr Weidemann to a meeting by Teams and clearly set out the allegations against him.

[59] Mr Weidemann did not have a stable internet connection at home, so used the wi-fi connection in the local library in a semi-public space to connect to the meeting. His support person was someone from the library. During the meeting, the parties lost connectivity and had to complete the meeting by phone.

[60] After the meeting, Mr Weidemann raised a number of issues about how it had been conducted including that it should have been in person because of the high degree of non-verbal communication. He also raised that Pāmu had not closed the meeting

⁴ *King v PPCS Richmond Ltd* EmpC AC61/05.

⁵ *Cowan v Idea Services Limited* [2020] NZCA 239 at [18] and [40].

with a karakia. At the Authority, Mr Weidemann also alleged that the meeting was rushed because it was conducted over 1.5 hours from 3:30 pm until 5:10 pm and was late in the work day. Mr Weidemann also said he should have been invited to provide comment in person after the preliminary decision was given to him on 24 August and before the final decision was made on 29 August.

[61] Pāmu's process was imperfect in several respects, but the test that I am to apply is not one of minute and pedantic scrutiny but overall reasonableness and fairness. Following the incident, Mr Steeneck and Mr Neeley had conversations with the Farm Manager and Business Manager that were not recorded and provided to Mr Weidemann at the time. However, based on the evidence before the Authority, Mr Steeneck and Mr Neeley captured the essence of the conversations and incorporated them into the initial "Meeting to discuss Concerns" letter that was sent to Mr Weidemann on 16 August. I conclude Mr Weidemann was aware of the substance and detail of the allegations against him.

[62] The mode of the meeting was also far from ideal given the connectivity and privacy concerns Mr Weidemann later raised. However, I take into account that Mr Weidemann did not object to the meeting being over Teams at the time. Pāmu's justification for holding a "remote" meeting was because the allegation involved physically threatening behaviour towards a member of the management team. This was a reasonable approach for it to take, particularly because Pāmu was not aware of Mr Weidemann's intention to conduct the meeting at the public library. After the meeting, Mr Weidemann also said the meeting was rushed, but I was unable to conclude on the evidence that Pāmu rushed the meeting or that it was cut short. I am satisfied Pāmu gave Mr Weidemann ample opportunity to respond to the allegations against him.

[63] Based on the evidence before the Authority, Pāmu also gave Mr Weidemann reasonable opportunity to respond to the allegations in writing. While Mr Weidemann was not invited to provide comment to Pāmu in person after the preliminary decision was issued on 24 August, he was invited to respond in writing and he took this opportunity. Despite his response being sent after Pāmu's deadline, the record shows it was taken into account.

[64] I conclude that any technical flaws in Pāmu's process were not significant enough to undermine the overall justification for Mr Weidemann's dismissal. I conclude Mr Weidemann's dismissal was procedurally fair.

Was Pāmu substantively justified in dismissing Mr Weidemann?

[65] Mr Weidemann says Pāmu’s decision to dismiss him was a continuation of the bullying and harassment he had experienced. He alleges his dismissal was pre-determined, or part of a “set up” by more than one senior manager who were exploring pathways to terminate his employment.

[66] Pāmu says it was substantively justified in its decision to dismiss Mr Weidemann. He had been made well aware of his health and safety obligations in his individual employment agreement, role description and Pāmu’s policies and procedures. The Letter of Expectation issued to him on 21 July 2023 reinforced the expectations Pāmu had around his adherence to health and safety. Pāmu says it gave Mr Weidemann multiple opportunities to improve his health and safety compliance. It also says Mr Weidemann refused to accept responsibility for his actions or demonstrate any insight into the concerns it was raising, and instead dismissed Pāmu’s concerns as ridiculous and its process as a “set up”.

[67] The alleged serious misconduct involved:

Failure to follow safety expectations (wear personal protective equipment).

Unacceptable conduct including abusive or threatening language, and threatening behaviour.

[68] Pāmu says it has clear and intractable rules relating to safety and there needs to be one set of rules for all Pāmu sites because health and safety cannot be left up to individuals’ discretion. In relation to hi-vis, Pāmu says it has a zero tolerance policy and hi-vis is required to be worn at all times on the worksite and during work activities. The exception is when workers are at smoko they can take their hi-vis off but need to put it back on immediately after. If an employee was non-compliant while they were on smoko, Pāmu would not have seen this as a disciplinary issue or instigated a formal process to respond. The safety issue is making sure the employee is visible to other people and machinery or vehicles on the farms, and that is ultimately a decision made by the Farm Manager. In relation to seatbelts - if the vehicle has a seatbelt, it must be worn irrespective of the speed the vehicle is going, or the distance it covers.

[69] Pāmu was very clear that it cannot allow employees to carry out their own risk assessments for each situation, and it needs to have blanket policies. Pāmu does not

accept the suggestion from Mr Weidemann that its policies may endanger employees or create different or additional risks.

[70] Mr Weidemann says the health and safety concerns raised by Pāmu were unreasonable. He put forward a number of explanations for why he was not wearing hi-vis at all times on the farm. The explanations ranged from Mr Weidemann forgetting to put his hi-vis on after smoko, to still being on smoko, to being in a safe situation cleaning out the water trough, to Pāmu not having provided him with sufficient quality or a sufficient number of hi-vis items. In the photo Pāmu took of Mr Weidemann not wearing hi-vis that led to the incident, Mr Weidemann appeared to be in the middle of a paddock and Mr Weidemann raised for the first time at the Authority that he had created his own self-designated smoko area away from other staff on the farm.

[71] In relation to why he was not wearing a seatbelt on the sxs vehicle, Mr Weidemann said he was told by a health and safety instructor “Colin” that seatbelts should not be worn on vehicles for short rides.

[72] When Mr Neeley began his investigation into Mr Weidemann’s conduct, he was clear that he was to investigate two main issues – the health and safety concerns the Farm Manager had attempted to raise with Mr Weidemann, and the incident involving alleged threatening or intimidating behaviour by Mr Weidemann towards the managers. Pāmu says Mr Weidemann’s responses to the allegations reinforced its view that Mr Weidemann made his own decisions about whether Pāmu’s health and safety instructions were sensible or reasonable, and declined to follow instructions he did not agree with. Pāmu also says it was satisfied that Mr Weidemann had engaged in unacceptable conduct including abusive or threatening language and threatening behaviour.

[73] Based on the evidence before the Authority, Pāmu’s conclusions that Mr Weidemann had failed to follow its safety expectations and that he had engaged in unacceptable conduct including abusive or threatening language and threatening behaviour, were reasonably open to it. Further, Pāmu’s conclusion that these two concerns amounted to serious misconduct were also open to a fair and reasonable employer.

[74] Mr Weidemann’s evidence was categorised by multiple and sometimes changing explanations for why he was not wearing hi-vis and why he was not wearing

a seatbelt on the sxs vehicle. I am not persuaded by Mr Weidemann's submission that his own personal risk assessments were more reasonable than Pāmu's universal and zero tolerance policies. However, if Mr Weidemann had genuinely held the view that Pāmu's policies created health and safety risks, the appropriate response would have been to refuse work, and/or escalate his concerns about the instructions. On the evidence before the Authority, Mr Weidemann did neither of those things.

[75] In relation to the health and safety concerns, it was reasonable for Pāmu to conclude that Mr Weidemann refused to follow lawful and reasonable instructions and undertook his own risk assessments. I accept this gave Pāmu no credible assurance that Mr Weidemann's approach to compliance with health and safety requirements would change if his employment was to continue.

[76] In relation to the incident, I find it was open to Pāmu acting as a fair and reasonable employer to conclude that Mr Weidemann had sworn at the Farm Manager, and acted in a threatening way towards the Business Manager. Mr Neeley set out the different accounts of the incident, and made his own assessment of how the behaviour could objectively be interpreted. It is also clear that Mr Weidemann declined to accept his suspension, and continued to work in defiance of Pāmu's instruction that he leave the farm.

[77] Mr Weidemann has alleged the decision to dismiss him was predetermined partly because the Letter of Expectation issued to him on 21 July 2023 was effectively a written warning later relied on by Pāmu to dismiss him. Pāmu disagrees and says a Letter of Expectation was not a formal warning – it clarified expectations, safety and how we work together.

[78] Based on the evidence before the Authority, I am not persuaded that Pāmu predetermined the outcome of the disciplinary process based on the Letter of Expectation. Mr Neeley had not seen the Letter of Expectation before he commenced the disciplinary process, and while the safety concerns raised by the Farm Manager in the Letter persisted throughout Mr Weidemann's employment, the incident superseded the safety concerns in terms of the disciplinary outcome.

[79] Mr Weidemann also says there was further proof that Pāmu had predetermined it would terminate his employment because on 27 July 2023 Pāmu advertised for an "experienced calf rearer" role and then on 14 August 2023 it advertised for a "calf

rearer”. Pāmu says from July 2023 there were vacancies because it simply needed more workers. While Pāmu had originally hoped to recruit experienced workers, it opted to look for labourers when it was unable to recruit. Based on the evidence provided to the Authority, I am not persuaded that Pāmu had advertised Mr Weidemann’s role before dismissing him, or that its advertising was evidence that it had pre-determined the outcome of its disciplinary investigative process. Since Mr Weidemann’s dismissal, Pāmu has only employed one casual employee on 19 November 2023.

[80] In terms of alternatives to dismissal, Mr Weidemann raised in the 21 August interview that he would be happy to report to the Business Manager instead of the Farm Manager. Pāmu said it considered alternatives, but there was nothing that would address the serious concerns it had about Mr Weidemann’s compliance with health and safety requirements and following lawful and reasonable instructions from management. In the preliminary decision letter, Pāmu recorded that it did not consider reporting to the Business Manager to be practical, especially considering Mr Weidemann’s behaviour towards the Business Manager. Based on the evidence before the Authority, I am not persuaded it would have been a workable solution for Mr Weidemann to have been managed by the Business Manager who was not based at the farm. It was open to Pāmu to conclude that there were no reasonable alternatives to dismissal.

[81] In all the circumstances, I find Pāmu’s decision to dismiss Mr Weidemann for serious misconduct was substantively justified.

Summary

[82] Based on the above, I find Mr Weidemann’s dismissal was procedurally fair and substantively justified. Mr Weidemann was not unjustifiably dismissed.

Remedies - personal grievance

[83] I have found Mr Weidemann was unjustifiably disadvantaged in his employment, but not unjustifiably dismissed, and he is therefore entitled to an assessment of remedies for his disadvantage grievance.

[84] Mr Weidemann seeks:

- (a) Compensation under s 123(1)(c) of the Act.

(b) Reimbursement of lost wages.

[85] Through closing submissions, Mr Weidemann now also asks for reinstatement, an apology and reference, and reasoning for why he was dismissed.

[86] No evidence or submissions were provided in support of these additional remedies being ordered. An apology and reference are not available remedies and I decline to make any orders. While an employer is required to provide a written statement of reasons for an employee's dismissal within 60 days of a request⁶, this remedy was not properly claimed or substantiated by any evidence and I decline to make any orders.

Reinstatement

[87] For the sake of completeness, I record Mr Weidemann originally claimed reinstatement to his position for the new calving season in 2024 after he lodged his Statement of Problem. He then withdrew reinstatement as a remedy at the investigation meeting but appears to raise it again through closing submissions, this time requesting any 40-hour a week role in the Central North island as a Calf Rearer using specific technologies.

[88] Both parties agreed there was a valid fixed-term agreement between them which was to end on 30 November 2023. Mr Weidemann accepts he had no expectation of ongoing employment at the end of his fixed-term or of being re-engaged for the 2024 season. I accept Pāmu's submission that an employee cannot be reinstated to a position that has ended, and that he had no expectation of being re-engaged to.

[89] Any claim for reinstatement Mr Weidemann now purports to make cannot succeed and I therefore decline to make any orders in relation to reinstatement.

Compensation

[90] Mr Weidemann seeks an award of compensation for under s 123(1)(c) of \$50,000.00. In relation to impact, Mr Weidemann focuses on his dismissal, which he says has had a huge impact on his life and the people close to him. Mr Weidemann says he had organised house-sharing and a vehicle for the season in reliance on his role. His plans to spend quality time with his family were jeopardised and his finances

⁶ Employment Relations Act 2000, s 120.

declined rapidly because of his dismissal. Mr Weidemann received a mental health diagnosis for which he had to take medication, and his capacity to work was reduced.

[91] I do not accept Pāmu's submission that there has been little evidence put before the Authority in relation to claimed humiliation, loss of dignity and injury to feelings. However, I do accept the evidence Mr Weidemann gave in relation to the impact on him was substantively related to his dismissal rather than related to his disadvantage grievances. I also accept Pāmu's submission that Mr Weidemann worked for Pāmu for less than two months.

[92] Nevertheless, I conclude Mr Weidemann has suffered humiliation, loss of dignity and injury to feelings over the way he was treated at Pāmu, which includes Pāmu's failure to sufficiently investigate his bullying claims. Mr Weidemann felt that he was validly raising concerns and was not being listened to. Compensation is appropriate to recognise that Pāmu's failures gave rise to humiliation, loss of dignity, and injury to his feelings.

[93] I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$10,000.00.

Lost wages

[94] Mr Weidemann asks for reimbursement of 13 weeks' lost wages totalling \$19,500.00.⁷

[95] Under s 128 of the Act, reimbursement of wages or other money lost as a result of the grievance is available as a remedy. The law is clear that there must be a causative link between the personal grievance and the remedy. In this case, Mr Weidemann's disadvantage grievance did not give rise to three months' lost wages and I therefore decline to order it.

[96] For the sake of completeness, I note that even if Mr Weidemann had been successful in his dismissal personal grievance, his own evidence was that he moved to Australia and obtained a new role only two weeks after his dismissal from Pāmu, which

⁷ 50 hours per week for 13 weeks, at \$30.00 per hour.

would have been taken into account in making an award of reimbursement for lost wages.

Contribution

[97] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Weidemann may have acted in a way that contributed to the situation that gave rise to his grievance.⁸

[98] The Employment Court has succinctly summarised the key principles relating to contribution as follows:⁹

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[99] The Court also stated:¹⁰

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[100] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[101] Mr Weidemann says he constructively contributed to the investigation at every stage, unlike Pāmu.

[102] Pāmu says there was significant contributory conduct. In the disciplinary process and in evidence before the Authority, Pāmu says Mr Weidemann did not deny failure to comply with health and safety obligations, but instead "launched unrelated counter-allegations" and tried to explain away his behaviour. Failure to follow instructions on multiple occasions led to the finding of serious misconduct. Mr Weidemann's actions in Pāmu's submission were both causative and blameworthy.

[103] Based on the evidence before the Authority, I find Mr Weidemann was not open and communicative with Pāmu. Mr Weidemann told the Authority he had "given up"

⁸ Employment Relations Act 2000, section 124.

⁹ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

¹⁰ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

to an extent in trying to deal with the Farm Manager and thought the Farm Manager's actions in trying to catch him breaching health and safety rules was "ridiculous". I have earlier mentioned the WhatsApp messages between Mr Weidemann and the Farm Manager which were exchanged well outside their usual working hours and the tone of which was not always mutually constructive. Rather than following Pāmu's policies and procedures, Mr Weidemann conducted his own risk assessments and chose to disregard instructions and policies that he did not agree with. While that does not excuse Pāmu's failure to sufficiently investigate the bullying concerns Mr Weidemann raised, it is appropriate to recognise the part that Mr Weidemann played in the situation giving rise to his grievance through a reduction in remedies.

[104] Mr Weidemann's actions contributed to the situation giving rise to his personal grievance for unjustified disadvantage. Consequently, I find it appropriate to reduce his compensation by 10 per cent.

Other remedies

Wage arrears claim

[105] Mr Weidemann seeks wage arrears of \$30.00 per hour for 60 hours "additional time" which he says he was "compelled" to work over 50 hours per week. Mr Weidemann's claim amounts to a submission that a fair overtime rate would have been double his usual hourly rate when he worked more than his agreed hours.

[106] Pāmu says Mr Weidemann verbally agreed to work additional hours and he was paid for them at his contractual rate of \$30.00 per hour. Pāmu says there was no agreement that any of Mr Weidemann's hours would be paid at \$60.00 per hour.

[107] Mr Weidemann's offer of employment confirms he was employed on a "usual hours of work" basis of "variable hours, with a guaranteed minimum 20 hours per fortnight throughout the season". The offer states that the hours may increase to a maximum of 110 per fortnight during peak period. Mr Weidemann's substantive individual employment agreement states that hours may be varied by mutual agreement, to suit particular needs or circumstances (clause 2.11).

[108] Mr Weidemann was paid at his contractual rate for every hour that he worked. He did not provide any evidence of any agreement or reasonable expectation that he would be paid at twice his hourly rate for additional hours. I find the claim is not made out and I decline to make any orders for wage arrears.

Gumboots claim

[109] Mr Weidemann says Pāmu did not provide him with gumboots in the right size when he started work, and he was required to purchase his own.

[110] Pāmu says it provided Mr Weidemann with gumboots and there is evidence of him wearing Pāmu-supplied gumboots in a photo from 11 August 2023.

[111] Mr Weidemann started work on 10 July 2023. He purchased his own gumboots on 21 July 2023 for the sum of \$89.99 according to an invoice he has provided to the Authority. Pāmu confirmed that the Farm Manager had the discretion to reimburse Mr Weidemann for providing his own PPE and did not do so. It would have been reasonable for it to do so, on the basis that Pāmu was responsible for providing Mr Weidemann with appropriate PPE, and he had a contractual entitlement to be reimbursed for actual and reasonable expenditure. I make a further order that Pāmu is to pay Mr Weidemann \$89.99 as reimbursement for his gumboots.

Non-publication

[112] The Authority's power to prohibit publication is found in Clause 10, Schedule 2 of the Act:

10 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[113] On 14 May 2024, I granted an interim non-publication over Mr Weidemann's name and identifying details on application by him, and in the absence of any objection from Pāmu. Mr Weidemann now asks for the interim non-publication order in respect of his name and identity to be extended for five years because it is "still helpful" despite the damage he says has already been done to his re-employment options in and outside New Zealand. He says non-publication will prevent any disadvantages in his future employment and business activities in New Zealand and outside New Zealand.

[114] In his original application, Mr Weidemann said that the nature of the case and the sensitive information could potentially cause harm to his personal and professional life if made public. He points to the small industry in which he worked and wants to return. He refers to the global nature of the work, and says that certain countries will

not accept him for work which he was hoping to secure for the 2024 season. Mr Weidemann has gained experience in large-scale dairy calf rearing and says his employment options are very limited. He says the Authority’s proceedings have the potential to jeopardise the effort he has put into building relationships in the industry.

[115] Pāmu consented to the non-publication order being made on an interim basis, but objects to a permanent non-publication order. It says Mr Weidemann has not shown any specific adverse consequences and the “possibility” of the publication of a determination being used against Mr Weidemann by future employers is not sufficient to displace the principle of open justice. Pāmu also points to Mr Weidemann’s actions being contrary to his request for non-publication because he wanted to invite reporters to the Authority’s investigation.

[116] A full Court has recently considered the correct approach to non-publication in the Authority and the Employment Court in *MW v Spiga Limited*.¹¹ Open justice is of fundamental importance. The first step is to assess whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. The second step is a weighing exercise to consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.

[117] In this matter, Mr Weidemann has not satisfied me that there is reason to believe that specific adverse consequences could reasonably be expected to occur from publication of his name and identity in relation to his matter. After his dismissal from Pāmu, Mr Weidemann did not pursue an overseas engagement in one of the countries he had identified, and instead undertook a course of study in New Zealand in a different vocation.

[118] For the first time in his closing submissions, Mr Weidemann referred to a role with a “Dairy Farm Cooperation” he obtained on 22 July 2024 and which was terminated on 1 August 2024 under a 90-day trial period provision. Although Mr Weidemann says that his termination was due to his new employer finding out he had been employed at Pinta, there is no evidence to support this. Mr Weidemann has also elected to reduce the scope of his non-publication application to “the next five years” in acknowledgement that the damage has already been done in relation to his

¹¹ *MW v Spiga Ltd* [2024] NZEmpC 147.

reemployment prospects. The evidence about adverse consequences is speculative at best and I am not persuaded there is sufficient evidence of any specific adverse consequences, or that they could be “reasonably expected to occur”.

[119] Having reached that conclusion, it is unnecessary for me to conduct the weighing exercise in the second step in *Spiga*. I decline to extend the interim non-publication order for a further five years, or to make a permanent non-publication order.

[120] I will however, continue the interim order prohibiting Mr Weidemann’s name and identity from being published for a period of 28 days from the date of this determination. That will enable a challenge to the Employment Court if Mr Weidemann wishes. At the end of the 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication.

Orders

[121] I have found that Mr Weidemann was successful on one of his unjustifiable disadvantage claims.

[122] I order that Landcorp Farming Limited (trading as Pāmu) is to make the following payments to Carsten Weidemann within 28 days of the date of this determination:

- (a) Compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$9,000.00 (being \$10,000.00 less 10 per cent contribution).
- (b) Reimbursement for gumboots, in the amount of \$89.99.

[123] The interim non-publication order I granted over Mr Weidemann’s name and identifying details under clause 10, Schedule 2 of the Employment Relations Act 2000 on 14 May 2024, continues in force for a further period of 28 days from the date of this determination or until further order of the Authority or Employment Court, following which the interim order will lapse and there will be no restriction on publication.

Costs

[124] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. Mr Weidemann was successful on his disadvantage personal grievance but being self-represented has no claim to legal costs.

[125] However, if there is an issue as to costs that the parties are unable to resolve and an Authority determination on costs is needed, Mr Weidemann may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Pāmu will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[126] The parties can anticipate the Authority will determine costs, if asked to do so, with reference to the “daily tariff” unless circumstances or factors, require an adjustment upwards or downwards.¹²

Natasha Szeto
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1