

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 179
3280079

BETWEEN TRACEY DEANS
Applicant

AND TM & JL DAIRY FARM LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Hayley Johnson, advocate for the Applicant
Terry McBride for the Respondent

Investigation Meetings: 29 January 2025 in Hokitika

Submissions Received: 20 February 2025 from the applicant
21 February 2025 from the respondent

Date of Determination: 28 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tracey Deans worked for TM & JL Dairy Farm Limited from June 2019 until the employment ended on 26 December 2023 in disputed circumstances. The employment was not the subject of an employment agreement but it is not disputed that Ms Deans worked as an employee.

[2] Ms Deans suggests she was unjustifiably dismissed and unjustifiably disadvantaged.

[3] As remedies Ms Deans is seeking compensation; lost wages; lost benefits and unpaid minimum entitlements and penalties.

[4] TM & JL Dairy Farm Limited deny acting unjustifiably toward Ms Deans and say they made significant efforts to accommodate Ms Deans throughout the employment relationship and that Ms Deans either abandoned her employment or voluntarily resigned and was not dismissed.

The Authority's investigation

[5] Ms Deans claims have been the subject of a day's investigation meeting and timetabled submissions. The issues I investigated and now must determine are broadly:

- (a) Whether Ms Deans was dismissed and if so, did it amount to an unjustified dismissal?
- (b) In the alternative, did TM & JL Dairy Farms Limited breach terms of employment or duties owed to Ms Deans and if so, was it foreseeable that she would resign and the ending of the employment relationship be categorised as a constructive dismissal rather than a resignation.
- (c) Did TM & JL Dairy Farms Limited engage in any actions or omissions that were unjustified and could be categorised as disadvantaging Ms Deans in her employment including a suggestion that Ms Deans' agreed working hours were unilaterally reduced.
- (d) Whether penalties should be levied against TM & JL Dairy Farm Limited for not providing Ms Deans with an employment agreement and a failure to disclose wage and time records when requested and, how the penalties should be apportioned.
- (e) What if any, remedies are appropriate and whether if granted, should they be reduced for any contributory conduct.

[6] Tracey Deans provided a written statement and gave evidence at the investigation meeting. Terry McBride a sole director and shareholder of TM & JL Dairy Farm Limited gave evidence for his company as did his nephew Tehoia John Maikara O'Connell.

[7] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the evidence, documentation and submissions received from both parties and refer to them where appropriate and relevant to the issues in dispute. For brevity I refer to the property Ms Deans worked on that is owned by TM & JL Dairy Farm Limited, as 'Mr McBride's farm'.

What caused the employment relationship problem?

[8] Ms Deans, who has considerable dairy industry and general farm work experience, started working as a dairy herd assistant, milking at Mr McBride's farm in South Westland around June 2019. Ms Deans says it was initially a casual arrangement and she was not provided with an employment agreement. At the time and thereafter, Ms Deans also undertook casual or relief milking assignments on other local farms which the parties agreed, Mr McBride generally accommodated this up until a period prior to the ending of the employment relationship.

[9] In the period 24 October 2019 to 28 July 2020, Ms Deans was absent from the farm after sustaining a work-related injury and during this period Ms Deans was paid ACC weekly earnings-related compensation. Upon returning to work after the injury Ms Deans says that in addition to milking and moving cows, she assisted Mr McBride with general farm work including mating and calf rearing.

[10] In March 2021, Ms Deans and her family (partner and school-aged son) moved into a house located on Mr McBride's farm but there was no tenancy agreement entered into. Mr McBride says the house was not part of the job and was not a service tenancy but he rented it to Ms Deans as she was looking for accommodation nearer her partners than workplace. Ms Deans says rent was deducted from her pay at \$200 per week and power on a monthly basis.

[11] Ms Deans says there was a verbal agreement she would work an eleven days on, three days off rotation from 8:30 am – 4:30-5:00 pm. Latterly at a rate of \$25 per hour. While no consistent wage and time records were kept, Ms Deans recalled a period of time when her working hours were recorded on a tablet PC system that was ad-hoc and then she resorted to recording her hours on timesheets and sending them to Mr McBride. Ms Deans says Mr McBride's son provided her with two payslips during the start of her employment but none thereafter. The Authority was provided with a incomplete selection of undated and unsigned, daily timesheets recording varying hours and start times.

[12] Ms Deans says that in late 2022 her hours reduced to milking only and she experienced issues with that task being erratically scheduled. Ms Deans says her hours reduced from eight per day to two to three and, she signalled to Mr McBride she needed to look for a second job. At or around this time Ms Deans says she supplemented her income by milking elsewhere and working at a relative's store/café.

[13] Mr McBride viewed the working relationship as casual milking with other duties being required on an 'if required' basis. Mr McBride accepted that he did not provide an employment agreement at any time. He initially stated his farm advisor had suggested an employment agreement was required but when he approached Ms Deans, she said she didn't think one was needed for part-time work. However, when pressed in questioning, Mr McBride says he is 'old school' and did not see the need for employment agreements preferring a verbal agreement or a deal done 'on a handshake'.

[14] Mr McBride says over the years Ms Deans did milking work at other farms and in 2023 also worked part-time at a local store, all of which he says was willingly accommodated. Mr McBride says he also allowed flexibility in working hours to accommodate Ms Deans caring for her son. Ms Deans confirmed that up until it broke down, the employment relationship was accommodating and she gave an example that if she was absent due to sickness, Mr McBride never asked for a medical certificate.

[15] Mr McBride conceded Ms Deans was his principal milker and no other worker covered this duty with him filling in when Ms Deans was absent or he worked alongside her (he got the cows in, Ms Deans milked them).

[16] With the above concession, I find it was wrong to categorise Ms Deans as casual – her job was ongoing and permanent part-time with hours dictated by the needs of Mr McBride’s farm milking operations. An indicator of the permanency of the relationship was Ms Deans’ occupation of accommodation on the farm and the ongoing nature of the work that she solely undertook.

Problems emerge in the employment relationship

[17] Ms Deans says in late 2022 when her hours of work were reduced by Mr McBride, she was no longer provided general farm work and was confined to milking which would entail waiting around until Mr McBride got the cows to the milking shed. Ms Deans says the impact on her was her start times varied from 8 am to 9am and the sporadic schedule that was communicated by messaging, meant she only worked two to three hours a day. An email from Ms Deans to Mr McBride of 20 November 2023, shows Ms Deans was contemplating an offer of part-time work at the store/cafe but Ms Deans was somewhat unclear in her intentions as the email says after confirming an offer of part-time work at the store had been made also said to Mr McBride: “I won’t do it but wanna see if we can make it work for here as well”.

[18] Ms Deans says the flexible working arrangement went well for a period and acknowledged Mr McBride also reduced her accommodation rent during the winter of 2023. Ms Deans says she secured a part-time milking job on a local dairy farm starting around 4-5am and finishing by 7-7:30 am that Mr McBride initially allowed her to work around his milking requirements but says he then objected to this, referring to Ms Deans as “my girl” and she gave that job up. Ms Deans suggested the relationship became tense around October 2023 onwards and she described Mr McBride as at times, acting aggressively. Mr McBride in contrast, says he had cause to speak to Ms Deans about several performance related issues including working at a local shop in preference to making herself available for milking. Clearly the lack of an employment agreement documenting hours and availability expectations was mutually problematic. In addition, Mr McBride was of the view that the relationship became different in November 2023 when he indicated it was his intention to sell the farm so he could spend more time with his wife and grandchildren.

[19] There was also a dispute over an amount of money that Ms Deans says was cashed up holiday pay owing but Mr McBride says was a personal loan and he also says Ms Deans owes rent and power arrears for the period May to September 2023.

Ending of the employment relationship

[20] Ms Deans undertook normal milking tasks on 23 December 2024 but on the following day she texted Mr McBride to indicate her partner had Covid (Mr McBride texted back: "What's Covid"). Ms Deans says this caused her to abandon a planned trip to spend Christmas day and Boxing Day with family in Reefton. Mr McBride however, says there had been an arrangement in place that Ms Deans would milk on Boxing Day and the 27th and 28th of December, as he had planned to take some heifers down to his river run off.

[21] On Christmas Day, Ms Deans texted Mr McBride to say she was lacking energy and later texted to indicate her parents would pick her son up to take him to Reefton provided he tested negative for Covid. On the morning of 26 December, Ms Deans texted Mr McBride: "Do you want me to milk today and what time??" Mr McBride inquired of Ms Deans health and indicated he had to drop his nephew off to get the bus but he would be back "between 10 and 11 (am)". Ms Deans meanwhile drove her son to a rendezvous with her parents and then returned at 11am but says she did not start work until 2pm.

[22] Mr McBride says he was very frustrated by Ms Deans delaying his milking on 26 December and felt he was being messed around to suit her needs. He says when she showed up at work around 2:30 pm, Ms Deans said she had Covid and did not want to give it to him. Mr McBride who expressed a degree of scepticism about Covid generally, said he was not concerned and asked Ms Deans to just get to work. He says she completed the milking but then refused to help him move the heifers and left around 3:30pm.

[23] After milking, Ms Deans says she told Mr McBride she did not feel well and at around 5pm, she texted him asking what time he wanted her to do the milking the next day, as "Ang has got me down at shop from 11". Ms Deans says by this point in time she had accepted a regular part-time job working at her relative's store/cafe.

[24] Ms Deans says Mr McBride then called her that evening (26 December). There are two conflicting versions of the call:

1) Ms Deans says Mr McBride was angry about her availability during the Christmas period and he told her to “get fucked and you can fuck off, you no longer have a job and you can work for whoever the fuck you want”.¹

2) Mr McBride says he first asked Ms Deans how could she work at the store when she had Covid and what time was she finishing that day, to which he says she replied she was unsure, which prompted him to state she had mucked all his plans up and to say “so if you do not want to work for me you can pay me Rent and Power and then you can work for whoever you Fuck’n want”.² Mr McBride conceded he abruptly ended the call.

The aftermath

[25] Ms Deans did not attend work on 27 December and there was no communication between the parties on that day. Ms Deans contacted local police and their disclosed occurrence record of 3 January 2024, under the heading “Circumstances” notes:

Tracey DEANS has been in contact with Police for quite some time regarding Terry McBRIDE and her issues with him leaving employment on his working farm. Originally it was to discuss her working conditions and seek advice off the record.

On the 27th of December DEANS contacted Police again to advise she was leaving the farm in which she works for MCBRIDE due to a number of issues. She explained she was scared of what he would do when she left and handed in her notice. She also advised she was scared to have a conversation around money owed. Police gave prevention advice regarding the matter and advised her to seek legal advice through an employment lawyer regarding the civil matter.

[26] The police report then noted Ms Deans had texted them a number of times between 27 December and 5 January 2024, regarding “feeling harassed by MCBRIDE” and was given prevention advice. It is then noted that Ms Deans and her partner were issued a trespass notice on 2 January for Mr McBride’s farm and that the next day Ms Deans was seen by the police and she sought to trespass Mr McBride from her new residence – the police record further

¹ Tracey Deans, Statement of Evidence, 24 October 2024.

² Terence McBride email to the Employment Relations Authority, 13 March 2024.

prevention advice was given and a trespass notice issued. The report also records a complaint made by Ms Deans that Mr McBride was intimidating her at her new workplace (the local store). Mr McBride denied this saying he used the store regularly and says the police did not speak to him about this. The nature of the intimidation was Ms Deans feeling uncomfortable at Mr McBride's lingering presence at the store/cafe and did not involve any verbal altercation. I note the police report disclosed recorded no follow up contact being made with Mr McBride.

[27] Ms Deans also provided a text exchange with a local female police officer she was friendly with, dated 27 December 2023 as follows:

.... it's Tracey we are fully going to move tomorrow, Terry rang me last night losing it again and I've had enough. Just giving yous a heads up because he's gone mad and I'm actually abit scared on what he's going to do when he sees us moving tomorrow. Hope you had a great Xmas.

[28] On 28 December, Ms Deans with the help of two friends began removing her belongings from the farmhouse. At 11am on that day, Mr McBride upon watching Ms Deans leaving, messaged her stating in summary that he:

- was engaging a professional cleaner and would bill this work to Ms Deans;
- was concerned about dogs being kept inside the house and causing damage;
- intended to retain \$1,110 of Ms Deans holiday pay to offset a debt she owed him (leaving a debt balance still owing of \$3,190);
- had "footage and evidence" of Ms Deans dishonest behaviour (examples were given);
- believed he did not need to have an employment agreement for part-time work or a tenancy agreement;
- considered a loan of \$1,500 and outstanding rent was owed.
- would provide pay slips once Ms Deans provided medical certificates;

- exhorted Ms Deans to be honest and pay him back and “God knows the truth if you don’t it will be bad Karma”.

[29] A further message from Mr McBride of 30 December detailed that he had viewed the house and had some concerns of carpet stains that would require cleaning that he would be seeking payment for. Mr McBride then reiterated what he thought was owed by Ms Deans including unpaid rent and the final power account and, that he would engage in a legal recovery process. Mr McBride stated this would “fuck your credit rating for ever” and he ended the message with “I hope you both get over your FAKE COVID”.

[30] Ms Deans responded on 3 January 2024:

To be clear I didn’t walk away you told me to fuck off and I no longer have a job with you on the 26th, no employment agreement ever, no tenancy agreement ever, no concerns raised till now. I believe I don’t owe you any money. The trespass order I got yesterday came as a shock as I’m not able to remedy these things because of the order. Regarding my final pay can I have my payslips sent to me from when I started.

[31] By way of a letter from her advocate of 9 January 2024, Ms Deans raised a personal grievance for unjustified disadvantage concerning a belief that Ms Deans hours of work had been unilaterally reduced and an unjustified dismissal claim. The letter also identified concerns that no employment agreement was in place and that PAYE was deducted from Ms Deans pay without evidence of it being forwarded to the Inland Revenue Department.

[32] From the end of December 2023, Ms Deans commenced regular part time work at her relative’s store and IRD records indicated up to 31 October 2024 she had earned \$31,747.50 in this job.

[33] Mr McBride did not respond to the personal grievance letter and the matter was lodged with the Authority on 22 February 2024. The parties were directed by the Authority to mediation on 10 March but the matter remained unresolved.

[34] The parties both provided evidence during the investigation meeting of ongoing disputation after the employment relationship ended, including mutual harassment claims and a civil claim by Mr McBride around disputed debts that are beyond the scope of this investigation. I will now focus on the central claim of unjustified dismissal.

The law : what constitutes a dismissal?

[35] The factual dispute the evidence related to was whether Mr McBride's phone call to Ms Deans of 26 December constituted a dismissal or in the colloquial sense was it an unequivocal 'sending away' by the employer. ³ The well-established test in this situation requires an objective assessment of whether it was reasonable for Ms Deans to have believed her employment had been terminated.

[36] To determine the above question to an extent involves credibility issues on who's version of the 26 December call is preferred. For guidance on assessing conflicting evidence and credibility I am assisted by Member van Keulen's summary of judicial guidance and application of such, in a recent Authority determination that:

The key aspects of this guidance for this case are consistency of the witnesses' evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident. ⁴

[37] Considering the consistency of Ms Deans' evidence first:

- (a) After the 26 December phone call two possible interpretations of what next occurred present; (i) Ms Deans took the conversation as an angry 'sending away' outburst by Mr McBride and rather than try to reason with him she decided to leave the workplace the next day; or (ii) Ms Deans was fed up with Mr McBride's allocation of work and the casual nature of their engagement and had resolved to leave and work elsewhere believing that no notice was required as no employment agreement was in place but then later seized upon the conversation wording as meaning she had actually been dismissed. .
- (b) The communication disclosed by the police show it was more likely that Ms Deans was contemplating leaving without notice and was uncomfortable about discussing this with Mr McBride given there was some outstanding monies owed for deferred rent and what later emerged was a disputed debt payment.

³ *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 103 that emphasises that termination of employment must be at the initiative of the employer.

⁴ *Reihana Macgregor v Southern Fencing Limited* [2025] NZERA 65 at [35].

The two disclosed police exchanges do not mention Ms Deans' indicating she had been dismissed. The latter text refers to Ms Deans having had enough and she was leaving.

- (c) It was not until 3 January, that Ms Deans messaged Mr McBride asserting she did not “walk away” but had been told to “fuck off and I no longer have a job with you”.

[38] In assessing the exchanges Mr McBride did not formalise the dismissal and he just passively accepted that Ms Deans was leaving by communicating how the house was to be cleaned. This could be consistent with Mr McBride's belief that he had expressed frustration with Ms Deans not making herself primarily available for his milking requirements and had made a throwaway comment that if she did not want to work for him with the benefits prevailing, she could work elsewhere – her choice.

[39] After Ms Deans abruptly vacated the house the next day, it is arguable that she should have objectively appreciated that Mr McBride believed she had resigned, yet she waited until 3 January before asserting her belief that she had been dismissed. This type of delay has been remarked upon by analogy, as fatal to an unjustified dismissal claim as where there was ambiguity the worker did not seek to communicate promptly.⁵

[40] Other than the email exchanges with the police, Ms Deans provided no corroborating evidence that she believed on 26 December she had been dismissed.

[41] It is clear that prior to the employment relationship ending neither party identified concerns about how it was operating. The limited correspondence I viewed (largely amicable) and evidence I heard, shows that Mr McBride accommodated Ms Deans' need to work part-time and on a flexible basis to meet the requirement to care for her son and Mr McBride worked around her availability. Ms Deans, while latterly raising a concern about her hours being reduced in 2022, did not identify this as an issue with Mr McBride and it would appear she chose to adapt to this situation. Ms Deans conceded that tensions arose in mid to late 2023 but there was little or no corroborating evidence that this was the case.

⁵ *Boobyer v Good Health Wanganui Ltd* WEC 3/94, 24 February 1994.

[42] In contrast, Mr McBride conceded and says:

- (a) He was frustrated with Ms Deans as the milking had been delayed on 26 December and his whole day had been 'mucked up' and he accepts he used coarse language in his brief call with Ms Deans. The purpose of the call was in response to Ms Deans signalling that on 27 December her availability for milking was compromised by her deciding to work at the store/café and she did not know when she would be finishing. Mr McBride then angrily suggested if that was the case she could choose to work for whoever she wanted and he hung up.
- (b) This left uncertainty on what would happen the next day and neither party clarified this – Ms Deans did not show up for work and communicate why and Mr McBride did not communicate with her and formalise the supposed dismissal. The next day without communicating why she was doing so; Ms Deans began moving out of the house provided and left the keys in the door.

[43] I think it can be established from the communication and Mr McBride's evidence that he became annoyed during a stressful period where Ms Deans communication about her availability was not ideal. However, Mr McBride was insensitive to Ms Deans health issue and her need to deal with her son at a time when her partner was sick on Christmas day. This led to a terse exchange in the phone call of 26 December with Ms Deans apparently choosing to treat this as the end of the employment relationship.

[44] From the evidence, I prefer the explanation as being more likely than not, that after the call, Ms Deans resolved to resign but felt unable to articulate this decision to Mr McBride fearing it would lead to a furtherance of their terse discussion. I do not find that Mr McBride intentionally sent Ms Deans away but I think it is likely he in the circumstances gave her an ultimatum of choosing between continuing working in the irregular and undocumented manner they had been used to or working elsewhere. There may have been some ambiguity in how this was phrased but neither party sought immediate clarification.

[45] Considering the consistency of evidence presented and the timing of events, I find Mr McBride's recollection of what was said to be more credible.

[46] Turning to the plausibility of the evidence at the investigation meeting:

- (a) The confrontational nature of the 26 December phone call was the only established incidence of a significantly negative exchange between the parties.
- (b) Mr McBride was clearly upset about Ms Deans' mucking him around although as discussed, the informality of the employment arrangement contributed to this situation. Ms Deans did not complain or suggest Mr McBride's language was abusive despite its richness, but she was clearly upset by the fact she had, despite being unwell, offered to make herself available for milking or at least being prepared to fit it around her other work commitment.
- (c) Mr McBride's manner and evidence was he had been patient for a long time and accommodating with Ms Deans family needs and had overlooked performance issues and despite his gruff manner, he respected Ms Deans ability and milking experience.
- (d) Ms Deans was used to working in an informal environment but was struggling with the demands of the timing of milking and family juggling family pressures and responsibilities. Financial issues also appear to have weighed upon Ms Deans.
- (e) I find it more plausible that Ms Deans just decided that she wished to leave and do something else despite the poor timing of this decision.

[47] I have also examined whether the witness accounts are tainted by confirmation bias and found to a certain extent this is the case. Mr McBride has downplayed the extent to which he failed to acknowledge his anger during the 26 December call and he has conflated a number of post dismissal frustrations with his recollection of the employment relationship. Whereas, Ms Deans has dwelled upon every negative aspect of the relationship and some resentments to support her perception that Mr McBride unequivocally sent her away on 26 December.

Finding

[48] Overall, despite the lack of an employment agreement, Ms Deans appeared to value the flexibility that allowed her at times to milk elsewhere and work at her relative's store and look after her son. The problem with the engagement was its informality and lack of agreed hours of work that left Ms Deans vulnerable with few protections. She was essentially the subject of Mr McBride's whims of when he wanted to direct her to work and at what times he wanted her to milk – Ms Deans had to make herself available to suit the milking schedule.

[49] However, I consider this objectively was not a dismissal for any significant cause. The police notes reveal Ms Deans was contemplating leaving Mr McBride's employ and giving notice and she had also committed to working part-time at her relative's store.

[50] I have carefully considered the evidence of Ms Deans that she left due to Mr McBride's outbursts and treatment of her over time. The relationship may have at times felt strained with Mr McBride expressing some misgivings about Ms Deans performance that he never formally addressed with her. Likewise, Ms Deans was unhappy about erratic work hours and the financial implications of this. There was however little to no corroborating evidence to support Ms Deans' assertions about Mr McBride's alleged negative behaviour and while I accept Ms Deans says this is because no one witnessed Mr McBride's alleged outbursts, there is nothing to suggest in the documented communication between them, mainly messaging around milking times, that Ms Deans was concerned.

[51] However, while I have emphasised the flexible nature of the relationship and Mr McBride's accommodating Ms Deans' needs, I have to stress this came at a price to Ms Deans and there was a power imbalance in the relationship.

[52] Assessing all the circumstances, I have found Mr McBride's version of the 26 December phone call to be more convincing and I find it was not objectively indicative of a 'sending away' type dismissal. In the circumstances, Mr McBride expressed a legitimate concern in robust terms about Ms Deans' availability. I find Ms Deans seized upon this as a sending away and took no timely steps to clarify Mr McBride's intentions.

[53] Ms Deans resolved to leave the workplace on 27 December and did not return. Mr McBride took no steps to formalise any dismissal or notice period and seeing her packing up and leaving, he took steps to ensure his vacated property was in good order. A significant complicating factor that Mr McBride has frankly brought upon himself by not having employment and tenancy agreements, is the disputed debts remaining unresolved when the employment relationship ended.

[54] I find there was no actual dismissal and Ms Deans resigned by conduct. I accept that given there was no employment agreement in place there was no obligation on Ms Deans to give any notice.

Constructive dismissal ?

[55] As an alternative claim, Ms Deans' advocate suggests the Authority should categorise this employment relationship problem not as a voluntary resignation but as a 'constructive dismissal', because:

- Ms Deans hours were reduced without consultation.
- Start and finish times of work fluctuated.
- Hours of work were uncertain.
- Mr McBride's aggressive outbursts increased in frequency.
- It was a clear sending away.⁶

[56] A 'constructive dismissal' can be found if an employer's conduct compels a worker to resign in circumstances where although on the surface, the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as is alleged here) is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated. The Court of Appeal has stated the broad approach as:

⁶ Advocate for applicant's submission of 20 February 2025.

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.⁷

[57] The difficulty for Ms Deans is the answer to the first question – given my factual findings above that there was no clear ‘sending away’, the resignation was not objectively caused by a breach of a duty by the employer in this context. Mr McBride at the time of the resignation had albeit in robust terms, identified concerns about Ms Deans continued availability to meet the needs of his farm and Ms Deans contribution on 26th December was that she prioritised other matters over making herself available for work as agreed.

[58] Ms Deans’ advocate has first suggested there was a relationship between the alleged reduction of hours and the resignation. The problem with this suggestion is the reduction in hours alleged had no proximity to the events that led to Ms Deans resignation so could not objectively have been an immediate causative factor.

[59] Likewise, fluctuating start and finish times and uncertainty of hours worked on the evidence do not appear to have been direct causative reasons why Ms Deans resigned and there is no evidence of Ms Deans raising concerns during employment pertaining to these issues.

[60] That leaves Ms Deans’ suggestion that what prompted her resignation was Mr McBride’s continued aggressive behaviour and outbursts in the period prior to the resignation. As above, apart from the telephone call, I have not found conclusive evidence to establish that this was the case.

⁷ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

Finding

[61] Overall, I find Ms Deans was not unjustifiably dismissed, constructively or otherwise, and is not entitled to remedies for her unjustified dismissal claim. Ms Deans, I find, resigned by conduct on 27 December 2023, after deciding to concentrate on seeking alternative employment at her relative's café/store.

Disadvantage claim for unpaid wages

[62] Ms Deans claims that the verbal agreement she struck at the commencement of employment was that she be paid \$1,100 per week five and a half days (44 hours) to be worked on eleven days on and three days off cycle that included farm work. Ms Deans claims this was reduced in late 2022 to around 2-3 hours per day and confined to milking duties only. Ms Deans is claiming 56 weeks' pay at a loss of 5.5 hours per day amounting to \$42,350 gross from 1 December 2022 to 26 December 2023. Holiday pay on the latter among of \$14,868 is also claimed.

[63] The problem with Ms Deans claims is the lack of any indication that she disputed the reduction in her hours and precisely when this occurred. This is not a claim for hours worked and not paid but a suggestion, that Ms Deans agreed hours of work were unilaterally reduced. I do not find that this claim is established to a sufficient standard of proof.

Holiday pay

[64] As I have found that Ms Deans was not a casual employee, the question of how the minimum entitlement of holiday pay was dealt with emerges. Mr McBride provided no indication of how holiday pay was calculated and the limited wage records do not identify a holiday pay component being incorporated into Ms Deans' rate of pay as would have been expected if a genuine casual employment relationship had been documented in an employment agreement. Notwithstanding, given I have found that Ms Deans was a permanent employee, the Holidays Act 2003 provides that if there is no compliance with

annual holiday pay provisions, an employer is liable for unpaid holidays “in accordance with section 16 and paid in accordance with this subpart”.⁸

[65] As such, I am going to order that Ms Deans be paid outstanding holiday pay for the entire period of her employment, to be calculated in accord with s 24 of the Holidays Act 2003.

Penalty claims

[66] There are two penalty claims. The first relates to a straightforward failure to provide a written employment agreement (a requirement under s 61A(2)(a) of the Act) and the second a failure to provide on request copies of Ms Deans’ wage and time records pursuant to s 130(2) of the Act. Mr McBride on his company’s behalf did not contest the breaches and was openly dismissive of the need to provide an individual employment agreement. I find this failure caused Ms Deans to be disadvantaged by not as a minimum, being able to have an outline of the agreed hours of work and other statutory employment protections.

[67] The evidence on the retention and disclosure of adequate wage and time records showed Mr McBride on behalf of his company was particularly tardy and inconsistent in record keeping and it was not until the investigation meeting that he provided any adequate records of the amounts of wages he paid Ms Deans and there was scant record keeping detailing what working times those wage records related to. There was some evidence however, of attempts to record working hours on an iPad and physical timesheets but not all of the latter were retained or disclosed in a timely fashion. The failure to keep and retain adequate records has compromised Ms Deans’ ability to ensure she was receiving minimum entitlements.

Assessment

[68] In the circumstances, the Authority pursuant to s 133 of the Act has jurisdiction to award penalties for the identified statutory breaches and must consider matters outlined in s133A. In applying these factors, including having regard to the Act’s object of amongst

⁸ Holidays Act 2003, Section 28 (4).

other matters, the need to address the inherent inequality of power in employment relationships,⁹ I find it is appropriate to award penalties for both the identified breaches.

[69] In considering the quantum of the penalties given the size of the business and other extraneous factors including Mr McBride's personal circumstances, I consider they should be reasonably moderate and serve to encourage future compliance.

Finding

[70] For both the uncontested breaches I award separate penalties of \$1,000 for each breach and find it appropriate that these amounts be paid in full to Ms Deans.

Contribution

[71] Section 124 of the Act states that I must assess the extent to what, if any of Ms Deans' actions contributed to the situation that gave rise to her personal grievances and then assess whether any calculated remedies should be reduced.

[72] On balance, having found no grounds for the unjustified dismissal claims advanced by Ms Deans and therefore no remedies applicable for these claims, I consider no reduction in the remedies granted is warranted as they relate to unpaid holiday pay and penalties.

Orders

[73] I conclude that:

- (a) Tracey Deans was not unjustifiably dismissed by TM & JL Dairy Farm Limited.
- (b) TM & JL Dairy Farm Limited must calculate pursuant to s 24 of the Holidays Act 2003 outstanding holiday pay owed to Tracey Deans for her entire period of employment and pay to Tracey Deans the sum owed within 28 days of this determination. Should the parties be unable to come to an agreement on this amount owed, either party must make a further application to the Authority to determine the matter.

⁹ Employment Relations Act 2000, Section 3(a)(ii).

(c) In addition, TM & JL Dairy Farm Limited pursuant to s 133 of the Employment Relations Act 2000, must within 28 days of the date of this determination, pay penalties in the amount of \$2,000 without deductions to Tracey Deans.

The Costs

[74] Costs are reserved.

[75] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Tracey Deans may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum TM & JL Dairy Farm Limited 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.

[76] The parties can expect the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁰

David G Beck

Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1