

**Attention is drawn to a
non-publication order
at paragraph [1]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 330
3265479

BETWEEN SIMON STEWART
Applicant

AND OPEN COUNTRY DAIRY
LIMITED
Respondent

3275619

AND OPEN COUNTRY DAIRY
LIMITED
Applicant

AND SIMON STEWART
Respondent

Member of Authority: Andrew Dallas

Representatives: Robert Davies, counsel for Mr Stewart
Mark Hammond and Jake Russ, counsel for Open
Country Dairy Limited

Investigation Meeting: 10 and 11 September 2024 in Auckland

Submissions: 29 November 2024, 20 December 2024 & 7 March
2025 for Mr Stewart
11 December 2024 & 12 March 2025 for Open
Country Dairy Limited

Determination: 12 June 2025

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] By consent, a non-publication order is made the under clause 10(1) of the second schedule to the Employment Relations Act 2000 in respect of any evidence

which identifies members of Mr Stewart's family, Open Country Dairy Limited's customers or relates to Mr Stewart's health.

Employment relationship problem

[2] Simon Stewart alleges he was unjustifiably dismissed by Open Country Dairy Limited (OCDL) from his position as Group Market Manager. OCDL is a manufacturer of milk powder, cheese, milk fats and milk protein at various sites across New Zealand and, consequently, also a global trader in dairy commodities.

[3] Mr Stewart also alleges he was disadvantaged in his employment prior to his summary dismissal because of an unjustified action or actions by OCDL. He seeks reimbursement of lost wages and compensation for hurt, humiliation and injury to feelings. OCDL resists Mr Stewart's allegation and the claim for remedies.

[4] OCDL for its part says Mr Stewart breached express or implied duties of confidentiality, fidelity, confidence and good faith obligations he owed to it by divulging confidential pricing information to customers and as a result is entitled to an assessment of compensatory and special damages and statutory penalties.

The Authority's investigation

[5] By consent of the parties, Authority matters 3265479 and 3275619 were consolidated and investigated together. Mr Stewart was also granted leave to lodge and serve an Amended Statement of Problem setting out remedies sought. OCDL was afforded the opportunity to reply to this but in the event, elected not to.

[6] In discussions with the parties, it was agreed that I would determine both Mr Stewart's personal grievance(s) and OCDL contentions about his alleged conduct and breaches of contractual and statutory obligations. In the event any questions of consequence and quantification arises out of this determination, then the Authority will further investigate it.

[7] During the investigation meeting, I heard evidence from Mr Stewart and his friend, Shayne Joyce. For OCDL I heard evidence from Chief Customer Officer, Andrew McCutcheon, Chief People Officer, Hendrick Peters, Chief Financial Officer, Berin Jones and Group Marketing Manager, Glen Pickles. During and after the investigation meeting consideration was given to issuing a

witness summons to a former member of the marketing team. However, ultimately, the decision was made not to follow that course.

[8] Also during the investigation meeting, Mr Peters gave evidence to the effect that notes were taken during the meeting where OCDL suspended Mr Stewart. The meeting was otherwise electronically recorded, and a transcript provided. However, a subsequent communication from counsel for OCDL dated 27 September 2024 advised it would appear no notes were taken during the meeting. In response to this advice, the Authority requested Mr Peters prepare an affidavit setting out, and resolving the reasons for, the apparent contradiction in the record. This affidavit was lodged and served on 10 October 2024. Having reviewed the affidavit, and in the absence of further controversy about the matter advanced by Mr Stewart, I am satisfied the matter is now resolved to my satisfaction.

[9] Finally, following lodgement and service of submissions, the Authority sought clarification about a statement made by counsel for Mr Stewart about “workplace culture”. Further submissions were sought from the parties about this and its relevance, or otherwise, to the matters in issue. I record, these submissions, as with all submissions advanced by the parties have been fully considered by me regardless of whether they are directly referred to or not.

[10] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I have not referred to all the evidence received from witnesses in this determination.

Issues

[11] The issues for investigation and determination are as follows:

In respect of matter 3265479

- a) Was Mr Stewart’s dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- b) Was Mr Stewart unjustifiably disadvantaged in his employment through suspension by OCDL?
- c) If OCDL’s actions were not justified, what remedies should be awarded, considering:

- a. compensation for humiliation, loss of dignity and injury to feelings; and
- b. reimbursement of lost wages?
- d) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Stewart that contributed to the situation giving rise to his grievance;
- e) Is Mr Stewart due contractual entitlements to an incentive bonus and long service leave?

In respect of matter 3275619

- f) Did Mr Stewart breach express or implied obligations of confidentiality, fidelity and good faith owed to OCDL?

[12] The following issues were adjourned pending resolution of the foregoing:

- a) If (f) above is satisfied in whole or in part, is Mr Stewart liable for statutory penalties and/or compensatory and special damages; and
- b) Should either party contribute to the costs of representation of the other party?

What caused the employment relationship problem?

[13] Mr Stewart commenced employment with OCDL as Market Manager in 2013. In 2018, Mr Stewart was promoted to Senior Market Manager. In September 2021, Mr Stewart was promoted to Group Market Manager. In the latter role he reported to Chief Customer Officer, Andrew McCutcheon. Mr Stewart undertook these roles from OCDL's premises in Ellerslie, Auckland.

[14] In his capacity as Group Market Manager, Mr Stewart had several other employees report to him. He was also directly responsible for a very large customer's account and two geographic territories. Mr Stewart said his key responsibilities were to maximise sales, team development, business development (new markets and customers) and customer management. Responsibility for geographic territories often gave rise to close relationships with customers in those localities.

[15] On the evidence, OCDL's product pricing is informed by the global dairy trade (GDT). GDT is an international trading platform for dairy products and a

“strategic partnership” between the European Energy Exchange, Fonterra Cooperative Group and the New Zealand Stock Exchange. OCDL uses the GDT to set prices for its long-term supply contracts and “spot” sales.

[16] While the relevance of this will be apparent in due course, it is necessary to introduce at this stage that on 8 April 2019, while a fulltime, senior employee of OCDL, Mr Stewart set up a company called “Simojen Limited” (NZBN 9429047380936).¹ Mr Stewart was the sole director and shareholder (in two equal parcels). Mr Stewart said he intended to channel payments from his “consultancy” business, which provided “market predictions” about dairy commodities to, at least, one of OCDL’s customers, through the company. However, Mr Stewart said he was advised by the customer’s representative there was a preference to make payments in “cash” or by “straight deposits”. Mr Stewart said he received in the order of \$US100,000 for his consultancy services.

Preliminary investigation

[17] Mr McCutcheon said that on 3 October 2023, a senior OCDL employee approached him to advise that he had become aware that Mr Stewart had asked another (now former) employee how to get money out of one of the territories he was responsible for. And Mr Stewart told the same employee he had been given a watch by Company A within that territory. Mr McCutcheon said this watch had not been declared to OCDL as required by policy.

[18] In response to this information, OCDL commenced a preliminary investigation into Mr Stewart’s workplace conduct. Mr McCutcheon met with Mr Peters, and they organised to access Mr Stewart’s email. OCDL said this was permissible under its “email, internet and phone policy”. As a result of the search, Mr McCutcheon said he found several emails which suggested Mr Stewart was sharing confidential pricing information with Company A and Company B.

[19] Mr McCutcheon said information about minimum pricing, competitor pricing and OCDL “total company sold position” was “power” and the only beneficiaries were the customers to whom the information had been provided as it improved their negotiation position at the expense of OCDL.

¹ Now removed from the Companies’ Register.

[20] Mr McCutcheon said he formed the view, based on the information disclosed, that Mr Stewart may have breached his employment obligations. Due to the seriousness of the situation, he said OCDL needed to consider suspending Mr Stewart.

[21] In respect of matters such as those confronting Mr McCutcheon, OCDL's Employee Handbook provided as follows:

Process

Before commencing a disciplinary process there is a set process that must be followed in all cases, whether it is for poor performance or for breaches in policy and procedure. The foundations of this process are consistency, confidentiality and good record keeping. [OCDL] must also be able to demonstrate that they have substantive genuine reasons and must be able to demonstrate that [OCDL] has followed a fair disciplinary process. An employee's manager can provide information and assistance regarding investigation, disciplinary and termination processes.

Investigation Meetings

The purpose of the investigation meeting is to determine whether the alleged misconduct occurred and if so, in what circumstance and to what extent i.e. Managers will conduct an investigation to clarify or obtain factual evidence. Employees will be invited to all such meetings in writing, whereby the allegations will be clearly outlined to them and any supporting evidence will be provided. Employees will always be provided with the opportunity to have a representative or support person present at any time during the disciplinary process. Once sufficient information has been obtained a disciplinary meeting may then follow.

Disciplinary Meetings

When a manager has the fact of an issue at hand, they may immediately progress directly to a disciplinary meeting. The purpose of a disciplinary meeting is to provide a forum for OCDL to formally address alleged behaviour/conduct that OCDL alleges to be misconduct or serious misconduct. Employees will be invited to all such meetings in writing, whereby the allegations will be clearly outlined to them and any supporting evidence provided. Employees will always be provided with the opportunity to have a representative or support person present at any time during the disciplinary process

...

Overview of Procedure for Investigation/Disciplinary Meetings

1. Manager to prepare for the meeting by obtaining all relevant information.
2. Manger to invite the employee(s) to an investigation meeting and/or disciplinary meeting (both orally and written letter)
 - a) Providing the employee with an opportunity to have a support person.
 - ...
3. Manager will conduct the meeting
 - a) Support person:
 - Employee must have an opportunity to have one
 - Employee must have one.

- ...
- d) Once all sufficient information have been obtained, the meeting will be adjourned to allow the manager the opportunity to consider all the information and subsequently make a decision about what action to take.
 - e) If any new information has come to light during the adjournment, this new information will be put to the employee. The manager will listen to their response(s) and asked questions to clarify any points.
 - f) The meeting will subsequently be recommenced so that the manager can deliver their decision to the employee. The verbal decision will be confirmed in writing.

And as follows:

Suspensions

Open Country Diary may suspend an employee where there is suspected serious misconduct and further investigation is required. The suspension will be on full pay (for a maximum of two weeks) and will only be for the minimum duration necessary for a proper investigation. The ability to suspend shall not be invoked unless the employee has first been given an opportunity to make any submissions on the appropriateness of the suspension.

[22] Mr Stewart's individual employment agreement also provided for suspension as follows:

Suspensions

If a serious issue arises, the Employer may suspend you from work until the problem is resolved. While suspension is usually on pay, the employer has the right to suspend without pay if it decides that to be appropriate.

[23] The interrelationship between Mr Stewart's individual employment agreement and the Employee Handbook is set out in the agreement as follows:

The specific terms and conditions as detailed or referred to in this Individual Employment Agreement must be read in conjunction with the Company House rules as contained in the Employee Handbook and Job Description for your position as supplied to you.

[24] This is reinforced by the Employee Handbook which relevantly provides:

Importance of House Rules

House Rules form part of all (OCDL's] employees' Individual or Collective contracts, be it a full time, fixed term or casual basis. They are lawful instructions to the staff. Breaches of any of these rules will be regarded as misconduct which may result in disciplinary action up to and including termination of employment ...

If there is any conflict between the interpretation of house rules and any Individual or Collective Agreement then these rules shall prevail.

Meeting on 10 October 2023 and suspension

[25] On 10 October 2023, Mr McCutcheon and Mr Peters met with Mr Stewart to discuss their concerns. Mr Stewart said he was asked to stay back in the boardroom by Mr McCutcheon after an earlier meeting. Mr Stewart said Mr McCutcheon advised him that he needed to get “someone”. Mr Stewart said he was not advised what the matter was about or given the opportunity to request a support person. Mr Stewart said he thought the subsequent discussion might relate to an interpersonal relationship issue with a former colleague.

[26] Mr McCutcheon then re-entered the meeting room with Mr Peters. They sat opposite Mr Stewart and Mr Peters advised that he was going to electronically record the meeting and advised him they were proposing to suspend him for potential breaches of his employment obligations by divulging confidential information to customers. Mr McCutcheon advised Mr Stewart that OCDL was going to undertake a forensic examination into their concerns and his presence in the workplace with access to his computer, mobile phone and work email could jeopardise the investigation.

[27] Before suspending Mr Stewart, Mr McCutcheon and Mr Peters briefly sought his views about the proposed suspension. Mr Stewart said suspension was “a little bit unjustified”, an opportunity should be given to view and discuss the emails and that he had not been given an opportunity to have a support person.

[28] Mr McCutcheon and Mr Peters then left the room to consider the situation. Several minutes later they returned and confirmed that Mr Stewart would be suspended pending further investigations into their concerns. Mr McCutcheon said he believed the seriousness of the issue, including that Mr Stewart may have benefited personally from the sharing of confidential information, warranted suspension on pay. Mr Stewart’s suspension was confirmed in a letter (dated 10 October 2023). There was confusion in the evidence about when this was provided to Mr Stewart. However, Mr Stewart did ultimately receive written notification of his suspension.

[29] Mr McCutcheon and Mr Peters decided in consultation with Mr Stewart to notify staff he was on sick leave. Mr Stewart was asked for his laptop, phone, passwords, parking “fob” and company credit card. Mr McCutcheon and Mr Peters asked Mr Stewart for an alternative contact phone number for him. He refused to provide one. Mr Stewart said this was because he was in shock, felt ambushed and did not know what to do.

[30] Mr Stewart said Mr McCutcheon escorted him out of the building after he had collected some items from his desk, also in the company of Mr McCutcheon. Mr Stewart said Mr McCutcheon said “see ya” to him as he exited the building. Mr McCutcheon would deny this. Mr Stewart said he drove to the control gate and Mr Peters pushed the release button to allow him to egress the premises.

[31] Mr Stewart contended his suspension on 10 October 2023 was an unjustified action by OCDL to his disadvantage. Mr Stewart also contended he was disadvantaged by OCDL not facilitating him access to his laptop and mobile phone, thereby depriving him of access to personal information, and unreasonably delaying access to his personal email account.

Letter of 18 October 2023

[32] On 18 October 2023, Mr McCutcheon sent Mr Stewart a letter via his solicitor inviting him to an investigation meeting on 25 October 2023. The letter also outlined two potential allegations of serious misconduct. The first allegation was an alleged breach of confidentiality by divulging confidential information to representatives of Company A and Company B. The second allegation was based on “WhatsApp” messages between Mr Stewart and a representative of Company A.

[33] The emails, provided with the letter, were dated between March 2021 and October 2023, and sent from Mr Stewart’s work email address. OCDL alleged they show Mr Stewart providing pricing advice to representatives from Company A and Company B to allow them to secure a lower price.

[34] Also enclosed with the letter were copies of “WhatsApp” messages between Mr Stewart and a representative of Company A which OCDL alleged showed Mr Stewart arranging payments for the benefit of himself. OCDL said the messages were sent within the timeline consistent with the divulgement of OCDL’s confidential information.

[35] OCDL contended that if the allegations were substantiated, wholly or in part, that this could mean Mr Stewart was liable for summary dismissal. In advancing this, OCDL relied on the “confidentiality” provision in Mr Stewart’s individual employment agreement, which provided:

Confidentiality

Except in the proper performance of your duties, or as authorised by their manager, they shall not use, or divulge to anyone, or use to the detriment of OCDL, any information which may come to your knowledge as a result of your employment. This restriction shall continue to apply after termination of your employment until such time as the information may become public knowledge without breach by you of this restriction.²

[36] Second, OCDL relied on the definition of “serious misconduct” in the Employee Handbook, which included a provision dealing with “breach of confidentiality” and otherwise provided that serious misconduct was “any behaviour, work related or private, which is likely to impact in a negative way on the employee’s credibility, integrity or trustworthiness, or damage[d] the reputation of [OCDL]”.

[37] Mr Stewart was invited to attend an investigation meeting to provide his explanation to the allegations. He was advised of his right to a support person at this meeting. Mr Stewart was also advised that Mr Peters and Mr McCutcheon were the decisionmakers in the process.

[38] In this same correspondence, OCDL referred to Mr Stewart’s individual employment agreement, position description and the OCDL Employee Handbook. However, these documents were not provided. Mr Stewart said this information was not provided by OCDL until 2 November 2023. Mr Stewart said he delay in providing relevant employment information represented an unjustified disadvantage.

² For completeness, the Employee Handbook contained an identical confidentiality provision but included the following additional sentence: [a]ny breach of this clause or disclosure will be considered as serious misconduct and may lead to the employee’s dismissal.

[39] During his suspension, Mr Stewart assisted OCDL deal with an important matter arising out of its relationship with a key customer. Due to his communication issues (not having his mobile phone or laptop), this was facilitated through his solicitor. Mr Stewart said OCDL never acknowledged this assistance. OCDL denied this.

[40] On 20 October 2023, Mr Stewart's solicitor provided OCDL with a medical certificate. The certificate stated: "[t]he above named was seen and examined by me today. In my opinion is/has been medically unfit for work from 20/10/23. He/she should be fit to return to work on 3/11/23". The medical certificate was accompanied by a letter which asserted Mr Stewart's suspension was unjustified, requested further information, and posed a series of questions to the investigators.

[41] On 1 November 2023, Mr Stewart's solicitor followed up with OCDL regarding his information request made on 20 October 2023. The communication also advised that Mr Stewart was "actively receiving treatment" but "needs time and space to improve his wellbeing so he can fully participate". OCDL was asked to consider using an "independent investigator" and given Mr Stewart's concerns about his suspension, mediation was requested.

[42] On 2 November 2023, OCDL's solicitors responded to Mr Stewart's solicitor by refuting that the suspension was unjustified, enclosing all information requested by the respondent and answering the questions posed. While acknowledging the medical certificate and it would be a stressful time for Mr Stewart, OCDL asserted it was inherent in any employment investigation process that there would be some level of stress. OCDL also contended that delaying the process would not alleviate any stress and matters should be dealt with in a timely fashion. OCDL declined Mr Stewart's mediation request and his request for the appointment of an independent investigator.

[43] On 6 November 2023, Mr Stewart's solicitor provided a further medical certificate declaring Mr Stewart unfit for work for a further 14 days. This medical certificate referred to Mr Stewart's "acute anxiety/depression and stress". The certificate and accompanying email said Mr Stewart was "committed" to engaging and was preparing a written reply.

[44] OCDL's solicitors responded on 7 November 2023 acknowledging the medical certificate but reiterating its belief that continuing to delay the process was not alleviating Mr Stewart's stress and, despite being on sick leave, he was still able to instruct his solicitor. OCDL further advised:

[OCDL] does not intend to delay the investigation process any longer. Therefore, Mr Stewart has until 5pm tomorrow, 8 November 2023, to provide any response he has to [OCDL's] letter of 18 October 2023 and any further information enclosed with this letter. If Mr Stewart fails to provide a response by 5pm tomorrow [OCDL] will be making a decision based upon the information it has before it.

[45] Accompanying the letter was a copy of a report prepared on 30 October 2023 by Beattie Varley, the contractor which carried out a forensic examination of Mr Stewart's work laptop and mobile phone. The report was provided because it was further information OCDL was relying on and for Mr Stewart's consideration and comments. The Beattie Varley report stated, among other things:

[a]n analysis of his communications with overseas customers of [OCDL] has identified him providing confidential market information and advice that potentially undermines the company and may have impacted on the company's financial position. The communications have also referred to the payment of funds to him by an overseas company customer in cash and by bank transfer. On its face, any financial benefit received by him was in return for the confidential information and advice.

[46] Further new information was also provided in the body of the letter. This information had come to the ODCL's attention late on the previous day (6 November 2023) when Mr Stewart's laptop bag was returned by Beattie Varley. OCDL said the bag contained \$1,600 United States dollars in cash and a foreign exchange receipt (changing \$3,825.00 Australian dollars into \$3,686.00 New Zealand dollars).

[47] Mr Stewart was given until 5pm on 8 November 2023 to provide any responses he had to the letter, Beattie Varley's report and new information about the cash and receipt found in his laptop bag.

[48] On 8 November 2023, Mr Stewart's solicitor provided a response on his behalf, the letter, among other things stated:

- a) he had not had enough time to consider the allegations;
- b) he was never paid to supply confidential information;
- c) the foreign exchange receipt was money won at a casino and given his frequent travel he routinely kept funds in United States dollars in his laptop bag;
- d) he had at all times acted in the best interests of OCDL;
- e) he had never used the OCDL's information to its' detriment;
- f) in performing his role he was required to exercise "strategic judgment" and only ever used OCDL's information to achieve sale and profit targets;
- g) any information he disclosed was in the proper performance of his duty.
- h) he had found himself in the middle of OCDL's commercial relationships with key customers;
- i) when he started managing the relationship with Company A, OCDL supplied around 200 metric tonnes and it was now 12,000 metric tonnes;
- j) OCDL must have been happy with the deals with Company A because it approved them and there is no evidence of loss;
- k) some of the email evidence provided was "speculative";
- l) he was not well enough to engage; and
- m) he was open to having his medical situation reviewed by a medical practitioner of OCDL's choosing.

[49] OCDL, through its solicitors, replied to Mr Stewart's solicitor's letter on 9 November 2023. OCDL advised Mr Stewart had sufficient time to consider the allegations and noted, given the contents of the letter of 8 November 2023, had been able to instruct his solicitor and provide denials to the allegations.

[50] OCDL's letter then set out preliminary conclusions from its investigation. These were, in summary, as follows:

- a) The first allegation relating to a breach of confidentiality should be upheld. The emails provided to Mr Stewart show him divulging confidential information (pricing information) to customers; essentially "tipping them off" so they could secure a lower price for OCDL's product. The Beattie Varley report concluded Mr Stewart had provided confidential market information and advice that potentially undermined OCDL and may have impacted on its financial position. At no time did OCDL authorise Mr Stewart to divulge such information to customers or third parties. Mr Stewart's assertion he was merely building a "relationship" and was using "strategic judgment" was not supported by the emails and WhatsApp messages. OCDL contended Mr Stewart's strategic judgment seemed to advantage its customers more than it benefited itself; and
- b) the second allegation that Mr Stewart received financial benefits should be upheld. The WhatsApp conversations supported OCDL's allegation that Mr Stewart received large sums of money for the information he was providing to a representative of Company A. The conversations referred to cash being paid to Mr Stewart and him providing bank account information for the payments to be made. OCDL said its investigations, including forensic analysis, supported the second allegation which it said was not a "one-off" error.

[51] OCDL proposed Mr Stewart's summary dismissal as the proposed sanction. Mr Stewart was given until 4pm on 13 November 2023 to provide any comment about OCDL's preliminary conclusions and proposed sanction. OCDL said comment could be provided in writing or by arranging a meeting prior to this date and time.

[52] On 13 November 2023, Mr Stewart, through his solicitor, responded to OCDL's preliminary decision. His responses included:

- a) OCDL was not acting in good faith;
- b) he was available to meet in person "early next week" and that it was unreasonable for OCDL to assume the worst and forge ahead;
- c) he was regularly meeting with medical practitioners, who based on their assessment, believed him unfit for work.
- d) reiterated his claim there was no prohibition on divulging OCDL's confidential information; and
- e) provided further information regarding his concerns that Mr McCutcheon may be biased against him, specifically that he has been "mocking and teasing" about personal issues, which were unrelated to the extant investigation.

[53] On 14 November 2023, OCDL summarily dismissed Mr Stewart by letter dated the same day. In the letter, OCDL said while they appreciated the "explanations" provided by Mr Stewart these contained "nothing new or material which alters [OCDL's] preliminary views". OCDL confirmed on the balance of probabilities having taken into consideration the Beattie Varley report, an analysis of relevant emails and "WhatsApp" messages and Mr Stewart's explanations, the two allegations were substantiated.

[54] OCDL also advised that it remained of the view that he had been provided with sufficient opportunity to provide responses, given his ability to instruct his solicitor. Moreover, OCDL said while "stress" had been identified as the reason for preventing Mr Stewart engaging in the disciplinary process, this was inconsistent with his "active" in "participating" in an online OCDL-wide "tipping" competition for the 2023 Cricket World Cup. OCDL also observed that Mr Stewart intended to "attend a private, lucrative golfing tournament he enters every year" later that week and had (earlier) applied for annual leave for that purpose. OCDL said both these matters suggested Mr Stewart was "well enough" to participate in the disciplinary process.

[55] Mr Stewart’s final pay was processed on 17 November 2023, including an additional two weeks’ pay. On 22 December 2023, a personal grievance for unjustifiable dismissal was raised on Mr Stewart’s behalf by his solicitor.

Other matters

Incentive bonus

[56] Mr Stewart contended he was eligible for an incentive bonus in the order of \$NZ30,000 to \$NZ35,000. OCDL said the payment of an incentive bonus was discretionary. Mr Stewart’s individual employment agreement relevantly provided:

[OCDL] may provide incentive bonuses to drive certain Key Performance Indicators (KPI). It must be fully understood that such an incentive bonus arrangement is not to be taken as a given part of the remuneration package on offer. Accordingly, the Company reserves the right to review, modify or withdraw such incentive bonus arrangements it may or may not extend to you now or in the future.

Long service leave

[57] Mr Stewart also contended that as the ten year anniversary of his employment with OCDL passed in October 2023, he was entitled to ten extra days of annual leave. Mr Stewart said he was not aware of any person who had worked ten years for OCDL being denied this extra leave. However, OCDL said, as with the payment of an incentive bonus, this was “discretionary”.

The Authority’s view of the problem

Mr Stewart’s suspension

[58] OCDL’s Employment Handbook contains a very robust employment investigation/disciplinary process, parts of which are set out above.³ As would be expected, the process deals with suspension. Suspension is also dealt with in Mr Stewart’s individual employment agreement.⁴ There is a presumption in both documents that suspension will be on pay; and for an initial two week period under the Employee Handbook. In the end, Mr Stewart was suspended on pay for 35 days.⁵

³ Above para [21]

⁴ Above para [22]

⁵ 10 October 2023 to 14 November 2023

[59] Neither the Employee Handbook nor Mr Stewart's individual employment agreement directly addresses the issue of representation during any discussions about suspension. It may be good practice to facilitate representation in some circumstances but even a botched suspension process will not prevent an employer from subsequently justifying a dismissal.⁶

[60] Mr Stewart was a sophisticated, experienced and senior employee. Having regard to the reasonable process followed by Mr McCutcheon and Mr Peters and reviewing the transcript of the meeting, I find Mr Stewart was capable of both understanding what was being put to him and providing sensible and credible responses to it. However, this may not have been the case for an employee who lacked Mr Stewart's experience and seniority. That said, suspension, in and of itself, is not irreversible nor is it terminal to an employment relationship. Mr Stewart was certainly suspended for a significant period but against this: (a) he contributed to the length of the suspension through the provision of two contiguous medical certificates and (b) OCDL continued to pay him throughout.

[61] I accept OCDL's submission, given the circumstances of the matters there was a reasonable and discernible risk if Mr Stewart was not quickly restricted from his laptop and mobile phone, he could have interfered with or deleted information which was relevant to the investigation.

[62] While acknowledging that Mr Stewart wanted more information, the investigation was in its infancy and the purpose of the meeting was to advise of the formal start of that process and address the issue of suspension; not deal with the substantive allegations, which were still being formulated. Ultimately, I find there was nothing unreasonable or unjustified in OCDL's suspension of Mr Stewart on 10 October 2023.

⁶*Kereopa v Go Bus Transport Ltd* (EC, AC29A/09, 18 September 2009, Travis J) at [29]

Could a fair and reasonable employer have reached in all the circumstances at the time the decision to dismiss Mr Stewart?

[63] OCDL said it carried out a procedurally fair process into its concerns about Mr Stewart's conduct. Specifically, OCDL said it:

- a) sought legal advice;
- b) engaged Beattie Varley as an independent forensic accountant to investigate the allegations;
- c) provided all the information to Mr Stewart that it was relying on to make its decision on the continuation of his employment;
- d) gave Mr Stewart a reasonable opportunity to comment on all the information it based its decision on;
- e) genuinely considered Mr Stewart's explanations.

[64] I accept OCDL sought, and relied on, extensive legal advice. The Beattie Varley report, whose findings I accept are both robust and sound, and thereby, expressly reject criticisms advanced by Mr Stewart about its independence and veracity, provides a very strong basis for the substantive justification of Mr Stewart's dismissal. Indeed, the quote from the report reproduced at paragraph [45] above is damning of Mr Stewart's conduct.

[65] I also accept that OCDL provided Mr Stewart with sufficient information that it would ultimately rely on to dismiss him for his response, except the material in relation to the on-line tipping competition and the golf tournament.⁷ Mr Stewart asserted information was "drip-fed". I think this criticism is largely unjustified with OCDL providing the information to Mr Stewart that became available at various junctures during the investigation. Mr Stewart's criticisms included that OCDL did not provide him with his employment agreement, job description or its Employee Handbook. However, it is not clear why Mr Stewart did not independently, and prudently, hold, at least, his employment agreement and job description.

⁷ Above para [54]

[66] However, I do not accept OCDL gave Mr Stewart a genuine opportunity to respond to the allegations because it failed to follow its own very fair, very reasonable and all-embracing process for investigating and disciplining its employees.⁸ The process OCDL developed for itself, is described as “a set process” and one that “must be followed in all cases”. All cases include that of Mr Stewart.

[67] On a plain reading the OCDL process clearly envisages, at least, two meetings: one during the investigation phase and another during any resultant disciplinary phase. In its submissions, OCDL quoted from the Employee Handbook as follows: “[t]he purpose of a disciplinary meeting is to provide a forum for [OCDL] to formally address conduct that it alleges to be misconduct or serious misconduct.”⁹ However, OCDL then went on to set out the efforts it made to give Mr Stewart opportunity to “comment” on the information it was seeking to rely on, in the absence of an investigation (or disciplinary) meeting. The Act requires more than an ability to “comment”, it requires an ability to “respond”. The process for responding that OCDL developed, and then imposed on itself, required responses to be provided largely in meetings.

[68] Having cauterised any further potential commercial consequences arising out of Mr Stewart’s actions through suspending him and securing both his work laptop and mobile phone for forensic analysis, OCDL should have taken more time to allow it to comply with its own policy and for Mr Stewart’s second medical certificate to expire.

[69] I do not accept Mr Stewart “declined to participate” in OCDL’s investigation. Nor do I accept, based on the documentary evidence before the Authority, Mr Stewart did not keep OCDL apprised of his medical situation. In any event on 8 November 2023, Mr Stewart offered to be reviewed by a medical practitioner of OCDL’s choosing. Any concerns OCDL had about the veracity of Mr Stewart’s medical certificates including the involvement of a registered nurse, rather than a medical practitioner, in providing the second certificate, the bona fides of delay and a likely prognosis for participation in the investigation process could have all been addressed. However, the offer was not taken up and OCDL

⁸ Employment Relations Act, s 103A(3)(c). As to the process, see para [21] above.

⁹ *Submissions for Open Country Dairy Limited on Liability*, 11 December 2024 at [45]

“assumed the worst” and “forged on” to the end, as was put on behalf of Mr Stewart.

[70] Indeed, rather than relying on independent verification, OCDL, as is set out above, chose to raise two new matters when confirming Mr Stewart’s summary dismissal – participation in a “tipping” competition and a golf tournament – which it said “further solidify” its view that Mr Stewart was “well enough” to participate in its investigation. In my view, they were an unfair makeweight.

Conclusions about Mr Stewart’s dismissal

[71] The Employee Handbook says that OCDL “must be able to demonstrate that [it] has followed a fair disciplinary process”. Unfortunately, it has been unable to do so on this occasion. OCDL is a large and well-resourced employer.¹⁰ This not one of those cases, as was submitted by OCLD, where the “spirit” of compliance with the process is, or could be, met on an “overall” basis.¹¹ These defects in process are not minor and, I find that they did result in Mr Stewart being treated unfairly.¹²

[72] While OCDL may assert Mr Stewart was not treated unfairly by the failure to follow its own process, this can only be an assertion. I find OCDL’s failure to follow the process is a relevant factor going to justifiability of Mr Stewart’s dismissal under s 103(A)(4) of the Act. Indeed, the first time the issues surrounding Mr Stewart’s participation in the charity golf tournament and the company-wide “tipping” competition were properly ventilated between the parties was during the Authority’s investigation meeting. This is not acceptable for matters upon which Mr Stewart’s dismissal was based. It is also a contravention of s 103A(3)(c) of the Act.

¹⁰ Employment Relations Act, s 103A(3)(a)

¹¹ See, *Clarke v Affco NZ Limited* [2011] NZEmpC 17 at [18]

¹² Employment Relations Act, s 103A(5)

[73] I further find summarily dismissing Mr Stewart while he was on sick leave is also a relevant factor going to the justifiability of Mr Stewart's dismissal under s 103(A)(4) of the Act. In order to be able to justify such a bold move OCDL would have needed to be able to demonstrate that Mr Stewart was actively obstructing its investigation. I find it could not do this when it decided to dismiss Mr Stewart summarily on 14 November 2023, being also his last day covered by his medical certificate.

[74] Standing back and reviewing the matter objectively, I find Mr Stewart was unjustifiably dismissed by OCDL. This is not a conclusion I have come to lightly and the basis of the unjustifiability of Mr Stewart's dismissal is solely on procedural grounds. So then, this is not a generalised approach to procedural fairness, extrapolatable across the jurisdiction and overlaying Mr Stewart's employment relationship problem. The procedural fairness requirements extant are from OCDL's own policy which it required itself to follow "in all cases" and Mr Stewart could legitimately and reasonably expect it would be followed in his case.

[75] The two substantiated allegations put against Mr Stewart are overwhelming. Mr Stewart's misconduct as an employee was egregious and this warranted his summary dismissal. However, this should have occurred *after* his medical certificate had expired on 14 November 2023 and OCDL had correctly followed its own investigation and disciplinary process.¹³

[76] Finally, to the extent Mr Stewart raised and pursued other personal grievances for unjustified disadvantage arising out of OCDL's investigation, I find these are, or would be, subsumed by the finding Mr Stewart was unjustifiably dismissed.¹⁴ So, in other words, no separate grievance findings are made in respect of these matters.¹⁵

¹³ See above paras [33], [34], [45] and [50]

¹⁴ See paras [31] and [38] above.

¹⁵ See, Employment Relations Act, s 122.

Remedies

[77] Having found Mr Stewart was unjustifiably dismissed, he is entitled to an assessment of remedies under the Act. In respect of his grievance, Mr Stewart sought compensation for humiliation, loss of dignity, and injury to his feelings and reimbursement of lost wages.

[78] Mr Stewart provided extensive evidence of what he said was the profound impact of his suspension and OCDL's investigation on his health and wellbeing. This was supported, to the extent it was, by his friend Mr Joyce.

[79] Remedies are set in section 123 of the Act, which relevantly provides:

123 Remedies

- (1) Where the Authority or the court determines that an employee has a personal grievance, it *may*, in settling the grievance, provide for any 1 or more of the following remedies:
 - (a)...
 - (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
 - (c) the payment to the employee of compensation by the employee's employer, including compensation for—
 - (i) humiliation, loss of dignity, and injury to the feelings of the employee... (emphasis added)

[80] The emphasis on the use of the word *may* when setting out s 123(1) above is deliberate. It is deliberate because the provision requires me to positively exercise my discretion to grant any, and all, of the listed remedies in s 123 to Mr Stewart. While I have found Mr Stewart was unjustifiably dismissed, as set out above, this is solely on a procedural basis. Mr Stewart's substantive actions were overwhelmingly contrary to his express and implied obligations to OCDL, justified his dismissal and, as such, militate against the sound and principled exercise of my discretion in his favour. Consequently, I decline to grant Mr Stewart any remedies under s 123 of the Act.

[81] I do not doubt that Mr Stewart is accurately reflecting the impact and did experience a full range of emotions, many negative, about the investigation. That being said, it is very clear from the foregoing, supplemented further in the later discussion about Mr Stewart's alleged breaches of express and implied obligations of employment, that he, through his actions, is the architect of his own misfortune and that is, indeed, very regrettable for him.

[82] However, that is not the end of the matter. Section 128 of the Act provides a limited mandatory “carve out” (or potentially “carve in”) to the discretionary nature of reimbursing an employee’s lost wages under s 123(1)(b).¹⁶ Section 128 relevantly provides:

128 Reimbursement

- (1) This section applies where the Authority or the court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority *must*, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate. (emphasis added)

[83] The mandatory language in s 128 of the Act must be properly contrasted with the discretionary language contained in s 123. So then, having found Mr Stewart was subject to an unjustifiable dismissal by OCDL if he has lost wages as a result, I must, even though I have awarded no remedies under s 123, order payment of the lesser of a sum equal to his actual lost wages or three months ordinary time wages. Despite not being quantified, I accept based on the evidence before the Authority that Mr Stewart has lost wages as the result of his personal grievance, and I make this finding accordingly.

[84] However, again, this not the end of the matter, for the Act requires s 128 be read subject to s 124. Section 124 relevantly provides:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

¹⁶ Sections 125 provides a similar limited carve out in respect of reinstatement, but that is not relevant for our purposes here.

[85] Mr Stewart said any remedies should not be reduced under s 124 because he “did not contribute” to the circumstances giving rise to his personal grievance because he was doing what was required of him including managing a difficult and sometimes fraught relationship with an important, but challenging, customer. OCDL said Mr Stewart had significantly contributed and should receive no remedies.

[86] Based on the finding that *but for* significant procedural defects by OCDL, Mr Stewart’s dismissal would be overwhelmingly justified on substantive grounds, there can no doubt he has “contributed” towards the situation giving rise to his personal grievance. Having declined to grant Mr Stewart remedies under s 123, it would be contrary to the positive remedial scheme of the Act¹⁷, of equity and good conscience¹⁸ and the overall justice of the case between the parties not to reduce any entitlement to be reimbursed for lost wages arising out of the operation of s 128.

[87] On the evidence before the Authority, I find Mr Stewart’s contribution towards the situation giving rise to his personal grievance warrants a proportionate reduction of one hundred percent (100%) to his reimbursement of lost wages remedy under s 128(2). On a proper construction, there is nothing in the statutory language of s 124 that prevents this being a possible outcome of its application to s 128(2).

Summary

[88] Mr Stewart is awarded, and will receive, no remedies for his personal grievance for unjustified dismissal.

Other matters

Incentive bonus

[89] While Mr Stewart sought payment of an incentive bonus, it is clear from a plain reading of the incentive bonus clause in his individual employment agreement that it is entirely discretionary and OCDL have declined, not unsurprisingly, to exercise that discretion in his favour. Consequently, I am not in a position to assist Mr Stewart further here.

¹⁷ For instance, see the reference to “settling” the grievance in s 123 of the Act.

¹⁸ Employment Relations Act, s 157(3)

Long service leave

[90] Similarly, I cannot assist Mr Stewart in his claim for 10 days long service leave. Indeed, I cannot find any support in Mr Stewart's individual employment agreement or the Employee Handbook for this contention. If this is some type of recognition of long service leave by OCDL, it seems, consistent with the company's own position, to be discretionary.

Has Mr Stewart breached express, or implied obligations owed to OCDL?

[91] OCDL alleged that Mr Stewart's conduct has resulted in breaches of the confidentiality term in his employment agreement and the implied obligations of confidentiality, fidelity and good faith.

Breach of confidentiality

[92] As identified above, Mr Stewart's employment agreement and OCDL's Employee Handbook both dealt with "confidentiality" and did so in materially similar terms.¹⁹

[93] The elements of the test as to whether information is "confidential" or not has been variously examined.²⁰ These elements are: the role played by the employee and whether they routinely deal with sensitive information, the nature of the information, whether the employer regards the information as confidential and if this has been communicated to the employee and the extent to which the information said to confidential can be "isolated" from other information the employee has access to.²¹

[94] OCDL said as part of his role, Mr Stewart routinely deal with confidential information relating to dairy commodity pricing and price mechanism. OCDL said its pricing mechanisms were based on inventory levels, markets forecasts and the milk supply in New Zealand and were very valuable to it in extracting the best possible price for its product. In his evidence and in submissions advanced on his behalf, Mr Stewart went to some lengths to cast doubt on the confidentiality of the information he had access to and the nature of the information he disclosed. The crux of Mr Stewart position was that he "did not consistently or repeatedly disclose

¹⁹ Above at para [35]

²⁰ See, for example, *Faccenda Chicken Ltd v Fowler* [1986] 1 ALL ER 617 (CA)

²¹ Above n 20 at 626-627

[OCDL's] confidential information" and did so "on only a handful of occasions ... exercising strategic judgment, as permitted by his position description".

[95] OCDL rejected this characterisation and said Mr Stewart was not authorised to disclose this information. OCDL said Mr Stewart's role was to *maximise* price and it was entirely contradictory to its position to be disclosing its minimum possible price (or "the walk away price") for the spot market, as he had been doing. OCDL said Mr Stewart's use of "strategic judgment" while disclosing confidential information did not advance its short or long-term commercial interests. OCDL said its pricing information was easily isolated from its non-confidential information and by disclosing this information, Mr Stewart was not acting in the best interest of OCDL and had caused it significant financial harm.

[96] Ultimately, while the significance, or otherwise, of the financial harm caused to OCDL by Mr Stewart's actions remains to be determined, I find, on the balance of probabilities, the information disclosed by Mr Stewart did have the requisite characteristics of "confidential" information about it and his actions did breach both the express "confidentially" provision in his employment agreement and the implied duty of confidentiality Mr Stewart owed as a senior and trusted employee of OCDL. Mr Stewart may well have exercised "strategic judgment" in disclosing pricing information to OCDL's customers, but it was exercised in his own best interests and not those of his employer.

Breach of the duty of fidelity

[97] OCDL said Mr Stewart's conduct breached the duty of fidelity he owed to it. An employment agreement) contains, for its life, an implied term that an employee would perform agreement in good faith and with fidelity.²² The content of the duty of fidelity is not subject to a fixed test²³ and the boundaries of the duty are to be determined by the facts of a particular case.²⁴ A breach of the duty of fidelity is determined by conduct which, viewed objectively, undermines the relationship of trust and confidence between an employer and employee.²⁵

²² See, *Schilling v Kidd Garrett Ltd* [1976] 1 NZLR 243 (CA)

²³ *Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141

²⁴ *Tisco Ltd v Communication and Energy Workers Union* [1993] 2 ERNZ 779 (CA)

²⁵ *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA)

[98] OCDL advanced five bases upon which it said Mr Stewart breached his duty of fidelity. I have no trouble, on the evidence, accepting four of these.

[99] First, Mr Stewart failed to protect OCDL's confidential and proprietary information, specifically pricing information. Second, Mr Stewart received payments from at least one of OCDL's customers, without its knowledge and consent. Third, Mr Stewart approached OCDL's customers to conduct business on his own behalf. Fourth, Mr Stewart failed to devote exclusively to OCDL his contracted hours of employment.

Mr Stewart's consultancy business

[100] As outlined in paragraph [16] above, Mr Stewart established a consultancy company called "Simojen Limited" to channel payments for providing "market predictions" about the dairy commodities. During the investigation meeting, Mr Stewart said he received in the order of \$US100,000 from his consulting business. Mr Stewart said he wound up his consultancy in 2020 as he decided to focus on his career at OCDL instead. Mr Stewart said at the time he had an "outstanding balance" owed to him that he would occasionally request payments for. He said these payments had "nothing to do" any information belonging to OCDL.

[101] Mr McCutcheon described Mr Stewart's consultancy business as a "fantasy". OCDL said while Mr Stewart was not precluded from self or secondary employment this was required to be outside of his contracted obligations and not negatively impact on his employer's business. OCDL said Mr Stewart's consultancy impinged on both of those and he disclosed confidential information to one of OCDL's major customers which undermined its negotiating position.

[102] OCDL observed, correctly, that as a senior employee a more onerous duty of fidelity was placed on Mr Stewart and that his conduct, again correctly, was sufficiently serious to warrant dismissal.²⁶ OCDL said by Mr Stewart receiving payments from one of OCDL's customers in exchange for advice was a "blatant breach of the trust and confidence it had placed in him".

²⁶ See, *Morris v Interchem Agencies Ltd* [2003] 1 ERNZ 93 CA at [45]

Breach of the duty of good faith

[103] OCDL said Mr Stewart breached s 4 of the Act, which sets out the obligations of good faith between parties in an employment relationship, because he engaged in misleading and/or deceptive conduct. OCDL advanced five bases on which such a breach of good faith could be founded. I accept two of those. The other three matters relate to Mr Stewart's participation in OCDL's employment investigation, and I have made findings about that above.

[104] Based on the evidence, I have no trouble finding Mr Stewart breached his good faith obligations by conducting business either in competition with OCDL or, at the very least, at the expense of it. And secondly (while observing there is a reasonable degree of overlap here with the beach of the duty of fidelity finding above) that Mr Stewart acted in a way which was detrimental to OCDL's best interests.

Next steps

[105] The findings that Mr Stewart has breached the confidentiality provision in his employment agreement and the duties of confidentiality, fidelity and good faith he owed to OCDL means the door is open and the company is entitled to an assessment of remedies including statutory penalties and/or compensatory and special damages.

[106] It may be the parties are able to resolve these matters between them. The parties are welcome to request the assistance of a mediator if they believe that will assist them achieving resolution.

[107] If the matter proceeds, a further investigation meeting will be scheduled to consider what, if any, remedies should be awarded. If this investigation meeting is required, the parties should, where possible, bring forward expert evidence. In advance of any such investigation meeting, further consideration will be given by the Authority to summoning the witness referred to in paragraph [7] above to provide any relevant evidence that may assist the Authority in the final disposition of this matter.

Costs

[108] Costs are reserved pending resolution of all matters before the Authority.

Andrew Dallas
Chief of the Employment Relations Authority