

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2025] NZERA 445
3309620
3364603**

BETWEEN ZAYNE SHERWOOD
Applicant (3309620)/Respondent
(3364603)

AND PURE AG & EQUINE LIMITED
Respondent (3309620)/Applicant
(3364603)

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, Advocate for Applicant (3309620) and
Respondent (3364603)
Beverley Edwards, counsel for Respondent (3309620) and
Applicant (3364603)

Investigation Meeting: On the papers

Submissions received: 19 June 2025 from the Applicant
2 July 2025 from the Respondent

Determination: 23 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Pure AG & Equine Limited (Pure AG) dismissed Mr Sherwood on 30 November 2023. Mr Sherwood lodged a Statement of Problem in the Authority on 11 July 2024 claiming that his dismissal was unjustifiable and seeking recovery of unlawfully withheld pay and entitlements (file No:3309620).

[2] Pure AG lodged a Statement in Reply on 1 August 2024.

[3] On 8 November 2024 Pure AG lodged a Statement of Problem in connection with a counter claim against Mr Sherwood (the Counter Claim Statement of Problem file no: 3364603). (the CC SOP) In the CC SOP it was claimed that Mr Sherwood was responsible for financial losses caused by his incurring damage to farm equipment and property whilst in the employ of Pure AG.

[4] Mr Sherwood denies that Pure AG has suffered any financial losses arising from the employment relationship and claims that the CC SOP claims are a cynical and spiteful response to his personal grievance claims against it.

[5] The preliminary matter which is before the Authority for determination is whether or not the CC SOP claims against Mr Sherwood are frivolous and vexatious and should be dismissed.

[6] The parties agreed to the Authority determining this issue based on the CC SOP, the CC Statement in Reply, documents submitted by the parties, and on submissions from the parties.

Issues

[7] The issue for determination is whether or not the claims against Mr Sherwood are frivolous and vexatious pursuant to s.12A, Schedule 2 to the Employment Relations Act 2000 (the Act), and should be dismissed.

Brief Background Facts

[8] Pure AG is a limited company operating in the dairy cattle farming industry. The sole director and shareholder is Sarita-Jo Ryder.

[9] Mr Sherwood had previously worked for Pure AG in 2019 and was re-employed on or about 25 September 2023. No signed employment agreement has been provided to the Authority, however there is an unsigned employment agreement with an unsigned offer of employment attached which states that Mr Sherwood's employment was as a Milk Harvester.

[10] The unsigned employment agreement states that Mr Sherwood would be provided with accommodation as part of the terms of his employment.

[11] On the evening of 28 November 2023 Mr Sherwood's sister was admitted to hospital. Mr Sherwood accompanied her to the hospital and at 5.44 a.m. on 29 November 2023 he emailed Ms Ryder to inform her of his whereabouts. He explained that he intended to be back at work the following morning to do the milking.

[12] On 30 November 2023 Ms Ryder text messaged Mr Sherwood stating that his personal items were being removed from the property. When Mr Sherwood telephoned Ms Ryder about her messages, she told him he had been dismissed.

Legal basis

[13] Mr Sherwood is seeking to have Pure AG's counter claims dismissed in their entirety on the basis that they are frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act.

[14] The Authority has the power under clause 12A, Schedule 2 of the Act to dismiss frivolous or vexatious proceedings, and may do so at any time in a proceeding where the Authority considers that matter to be frivolous or vexatious:

12A Power to dismiss frivolous or vexatious proceedings

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In such a case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[15] A frivolous case has been described by an English Judge as one which: "no reasonable person could properly treat as bona fide".¹

[16] Chief Judge Inglis stated in *Lumsden v Skycity Management Ltd* that:

[37] ... It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority ...

...

[39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases....²

[17] In *AFT v BCM* former Chief Judge Colgan, agreeing with the analysis of Judge Inglis in *Lumsden*, considered the meaning of a 'frivolous' case as being one in which there was a significant lack of legal merit so that it is impossible for the claim to be taken seriously. Vexatious meant conduct without reasonable or probable cause or excuse; harassing; or annoying. His Honour stated in paragraph {78}:

... cl 12A of sch 2 contains quite specific powers to be exercised in unusual circumstances and, in particular, should not be used by the Authority to dismiss, without consideration of their merits, proceedings which impress the Authority as having low or no expectations of success.³

¹ *Norman v Mathews* [1916] 85 LJKB 857.

² *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225.

³ *AFT v BCM* [2015] NZEmpC 234.

[18] I observe that the judgments cited above have set the threshold very high to justify dismissing an applicant's claims on the basis that they are frivolous or vexatious. I note by way of illustration the phrase: "no reasonable person could properly treat as bona fide".

The claims

(i) *Contamination by incurring a grade wash into vat in September 20 causing \$739.15 damages/loss.*

[19] Pure AG claims in the CC SOP that Mr Sherwood contaminated the Bulk Milk Vat on repeated occasions and at paragraph 2.7 that it 'incurred a grade wash into vat in September causing \$739.15 damages/loss'.

[20] It is submitted for Mr Sherwood that no evidence has been provided to substantiate such a loss.

[21] It is further submitted that according to the (incomplete) wage and time records received from Pure AG, deductions were made from Mr Sherwood's weekly pay throughout the period of his employment. These were under the heading 'Milk Contamination contribution' and totalled \$587.79.

[22] On that basis, and reserving the issue of the lawfulness of such deductions which will need to form part of the substantive investigation, it is submitted for Mr Sherwood that the \$739.15 claimed by Pure AG amounts to 'double dipping' if not dishonesty.

[23] Pure AG has not provided any evidence to substantiate its claim of contamination by a grade wash into a vat. It submits that the deductions made from Mr Sherwood's weekly pay did not fully equate to the loss suffered and there is no 'double dipping' involved.

(ii) *Rolling of the 4 wheel motorbike and 550L cafeteria on the tanker track necessitating repairs of \$2,434.63.*

[24] In the CC SOP paragraph 2.8 Pure AG alleges that Mr Sherwood 'rolled the 4 wheel motorbike and h5550L cafeteria (sic) on the tanker track' and that damages to the bike and calf feeder lead to repair costs totalling \$2,434.63'.

[25] It is submitted for Mr Sherwood that the tax invoice provided by Pure AG in support of this claim relates to the 'sale of DR200' and a front puncture repair. It is submitted that the tax invoice provided relates to a two-wheel motorcycle, not a four wheel one.

[26] Pure AG submits that the invoice for repairs was mislabelled and that the dispute over the vehicle type is a matter for evidence.

(iii) *Damage to a calf mobile module feeder causing damage of \$5,849.99.*

[27] In the CC SOP paragraph 2.9 Pure AG alleges that a new 50 teat calf mobile feeder was driven recklessly and damaged by Mr Sherwood causing damage in the sum of \$5,849.99.

[28] It is submitted for Mr Sherwood that, while denying the claim, no evidence whatsoever has been provided by Pure AG to substantiate its claim.

[29] Pure AG submits that invoices will be provided at the Investigation Meeting.

(iv) *Purchase of PPE equipment not used to the value of \$104.96.*

[30] In the CC SOP paragraph 210 Pure AG alleges that Mr Sherwood purchased PPE supplies on 23 June 2023 which he did not use, using the staff account and is claim the sum of \$104.96.

[31] It is submitted for Mr Sherwood that since he did not commence employment with Pure AG until September 2023, over three months after the date of purchase, it is unclear how he could have purchased the PPE items. It is also submitted as unclear how a loss could have arisen from any non-use of PPE equipment.

[32] Pure AG accepts that the date of the invoice provided is incorrect, and it shall provide the correct version at the investigation meeting.

(v) *Damage to workplace equipment, two headlights, to value of \$477.93.*

[33] In the CC SOP paragraph 2.11 it is alleged that Mr Sherwood damaged a Hi4R.2 headlamp and KIDLED4R headlamp to the value of \$477.93.

[34] It is submitted for Mr Sherwood that Annexure PAE 3 which is purported to substantiate the loss is a receipt/tax invoice dated 18 July 2024 (some seven and a half months after Mr Sherwood's dismissal) for the purchase of two Ledlenser headlamps, one of which is an adult's headlamp, and the other a child's dinosaur headlamp. Mr Sherwood accepts he used an adult headlamp during his employment, but that he did so in a safe and proper manner and returned it in full working condition with no damage.

[35] It is submitted for Pure AG that it notes the submission from Mr Sherwood about the child's headlamp and amends its claim to \$419.99.

(vi) *Breaking the tail of Cow 24 causing loss in selling price of \$2,300.00*

[36] In the CC SOP paragraph 2.12 Pure AG claims that Mr Sherwood, in the presence of Ms Ryder, broke the tail of Cow 24 reducing her value by \$2,300.00.

[37] It is submitted for Mr Sherwood there is no supporting evidence of the loss allegedly incurred. It is also noted in the submissions that this claim in the CC SOP contrasts with the allegation set out at paragraph 2.9 of the statement in reply lodged by Pure AG dated 1 August 2024 which states that “On the 14th November, Respondent found a cow with a broken tail in the cowshed which could only have occurred on his shift...” .

[38] Mr Sherwood submits this is a further example of gross embellishment and dishonesty by Pure AG.

[39] It is submitted for Pure AG that the cow’s injury was contemporaneous with Mr Sherwood’s shift and he was seen to handle the cow. It is submitted that loss value is based upon market values and production history.

(vii) Beating of Cow 8 which had to be euthanised causing loss of \$3,000.00 plus GST.

[40] In the CC SOP paragraph 2.13 it is alleged that “cow 8 was beaten by the Respondent to the point she could no longer walk and had blood coming out of her nose”. It is claimed that Pure AG had to euthanise the cow at a loss of \$3,0000.00 plus GST.

[41] It is submitted for Mr Sherwood, who denies the allegation as hurtful, that no evidence of the incident and/or resultant loss has been provided by Pure AG.

[42] It is submitted for Pure AG that Ms Ryder witnessed the incident, and that it is not necessary to provide supporting evidence at this stage.

(viii) Failure to bring Cow 524 in from paddock so she died of starvation causing a loss of \$2,300.00 plus GST

[43] In the CC SOP paragraph 2.14 alleges that Mr Sherwood failed to “bring Cow 524 out from paddock 29, leaving her with no water or food, resulting in her dying from stress/starvation on 23 November 2023” resulting in a loss to Pure AG of \$2,300.00 plus GST.

[44] It is submitted for Mr Sherwood that there is no substantiation of this claim. While he recalls one dying of mastitis during his period of employment, he does not recall if this was Cow 524. Irrespective, this death was not caused by him.

[45] It is submitted for Pure AG that Mr Sherwood was responsible for the cow’s death.

(viii) Production losses caused by Mr Sherwood from cows 8,24 and 254 caused by Mr Sherwood to value of \$6,727.47 plus GST.

[46] In the CC SOP paragraph 2.15 it is alleged that Pure AG suffered production losses due to a loss of production from cows 8, 24 and 525.in the sum of \$6,727.47 plus GST.

[47] It is submitted for Mr Sherwood that there is no evidence provided by Pure AG in support of this claim.

[48] Pure AG submits that the production losses are properly quantified and not speculative.

(ix) Building repairs necessitated to property occupied by Mr Sherwood to value of \$3,258.89.

[49] In the CC SOP paragraph 2.16 it is alleged that repairs to the property occupied by Mr Sherwood during his period of employment were necessary and cost Pure AG \$3,258.89.

[50] It is submitted for Mr Sherwood that despite Pure AG asserting that it would provide invoices, none have been provided. Mr Sherwood categorically denies causing damage, intentional or otherwise, to the farm accommodation beyond ordinary wear and tear. Moreover, no evidence has been provided of the condition of the property before and after Mr Sherwood moved in.

[51] It is submitted for Pure AG that the invoiced repair costs were not recoverable via the tenancy bond and arose directly from damage during Mr Sherwood's period of residency.

(x) cleaning costs for property occupied by Mr Sherwood to value of \$1,442.86.

[52] In the CC SOP paragraph 2.17 it is alleged that Pure AG incurred cleaning costs to remove the rubbish from the house in the amount of \$1,442.86.

[53] It is submitted for Mr Sherwood that annexure PAE4 which has been provided by Pure AG in support of the claim shows that Pure AG invoiced itself and it is submitted it is not clear how the cleaning cost has been calculated.

[54] It is submitted for Pure AG that the cleaning invoice was issued by the farm's internal business arm. GST documentation is claimed to be available in support of the cost calculated.

(xi) Costs incurred as a result of shift coverage

[55] In the CC SOP paragraph 2.18 it is alleged that Pure AG had cover Mr Sherwood's absence from work from 28 November to 12 December 2023, at a cost of \$5,321.25 calculated at 96.75 hours at \$55.00 plus GST per hour.

[56] It is submitted for Mr Sherwood that the basis for this, undocumented, calculation is unclear when Mr Sherwood's remuneration was \$24.00 per hour. It is also noted that Mr

Sherwood's absence was caused on 28 and 29 November by his attending hospital and from 30 November 2023 because he had been summarily dismissed by Pure AG.

[57] Pure AG submits that the fact that it had dismissed Mr Sherwood meant he was not available to work and it had to engage temporary labour at much higher hourly rate.

Is the counterclaim frivolous or vexatious?

[58] As stated in *Newick*, a claim should not be summarily struck out unless I can be certain it cannot succeed. Whilst at this preliminary stage I can have no certainty as to the strength of Pure AG's claims because there has been no testing of witness or documentary evidence, and while some of the claims appear, at this initial stage, to have a low chance of success, I cannot be certain that Pure AG will not succeed in some of its counter claims.

[59] However I find that the claims raised by Pure AG are claims that will need to be supported by strong evidence at the substantive investigation meeting. In particular I note:

- At this stage there is no signed employment agreement in evidence and there will need to be supporting evidence for the viability of those claims which seek to rely on a basis for deductions considering s 4 of the Wages Protection Act 1983 (WPA);
- some claims rely on Ms Ryder's evidence which is strongly disputed by Mr Sherwood;
- the inconsistency between the damage claim to Cow 24 cited in the Statement in Reply dated 1 August 2024 and the CC SOP;
- the non-third party cleaning cost invoice.

[60] In conclusion, I determine that the claims against Mr Sherwood made by Pure AG are not frivolous and vexatious pursuant to s.12A, Schedule 2 of the Act and should not be dismissed.

Costs

[61] Costs in respect of the counterclaim are reserved pending the final resolution of the substantive matter.