

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 547
3281080 and 3281099

BETWEEN	ANDREA MITCHELL Applicant in 3281080
AND	PAUL JENKINS Applicant in 3281099
AND	LONE PINE FARMS LIMITED Respondent

Member of Authority: Rowan Anderson

Representatives: Lars Hansen and David Sutton, counsel for the Applicants
Andrew Laurenson, counsel for the Respondent

Investigation Meeting: 21 and 22 May 2025 in New Plymouth

Submissions and other information: Up to and including 25 June 2025

Determination: 3 September 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrea Mitchell and Paul Jenkins were employed by Lone Pine Farms Limited (LPFL).

[2] Ms Mitchell and Mr Jenkins have each lodged a statement of problem claiming, amongst other things, that they were unjustifiably dismissed from their employment on 26 April 2023.

[3] LPFL's position is that Ms Mitchell and Mr Jenkins were justifiably dismissed because of their committing serious misconduct.

Issues

- [4] The issues identified for investigation and determination, are:
- (a) Was Ms Mitchell unjustifiably dismissed?
 - (b) Was Mr Jenkins unjustifiably dismissed?
 - (c) If LPFL's actions were not justified what remedies should be awarded;
 - (d) If remedies are awarded, should any reduction be made on account of contribution?
 - (e) Did LPFL breach its statutory duty of good faith under s 4 of the Employment Relations Act 2000 (the Act) in relation to Ms Mitchell and/or Mr Jenkins? If so, should any penalties be imposed in terms of s 4A of the Act?
 - (f) Are Ms Mitchell and/or Mr Jenkins entitled to any payment in relation to a Public Holiday on 24 October 2022?
 - (g) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[5] On 25 March 2024 a request was made by counsel for Ms Mitchell and Mr Jenkins for the matters to be heard together. A case management conference was held on 22 May 2024 at which I directed, in the absence of any objection, that the matters be heard together. Timetable directions were issued and an investigation meeting scheduled.

[6] The investigation meeting was adjourned on two occasions having regard to issues of availability and complications relating to travel on the part of the Authority given local events.

[7] Written witness statements were lodged prior to the investigation meeting from Ms Mitchell and Mr Jenkins, and from Mr Jenkins' brother, Alan Jenkins. For LPFL, witness statements were lodged from Thomas Weston, sole director; his wife, Kelly Weston; two of their children; Daniel Crisp, family friend; and Shaanene Minhinnick, Artificial Breeding Technician.

[8] An investigation meeting was held on 21 and 22 May 2025 in New Plymouth.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Further background and evidence

[10] Ms Mitchell and Mr Jenkins signed individual employment agreements (IEAs) on 15 April 2022 and moved onto the farm property on or about 14 May 2022. Mr Jenkins commenced employment on 16 May 2022 as a Farm Manager. Ms Mitchell commenced later, on 1 June 2022.

[11] Clause 18.4(g) of both IEA's contained a provision which included the following as "misconduct":

Any rude, abusive, violent, threatening or seriously inappropriate conduct including bullying towards other employees or towards customers; or employers

[12] There was an incident in September or October 2022 during which Ms Mitchell said something to the effect that they would be looking for alternative work if the hours of work didn't change.

[13] As part of what Ms Mitchell and Mr Jenkins say was a condition of taking leave, they say they both worked on 24 October 2022, that being Labour Day, but were not paid appropriately. Following that, they took a 12 day period of leave during which they travelled to Australia.

[14] Ms Mitchell's evidence was that she said the word 'cunt' during a conversation with Mr Weston on 15 September 2022. She said she made a comment to the effect of "you know how you told Paul that one of your previous employees had told you that you were a cunt to work for, I am beginning to think they were right". She also said that followed an incident where Mr Weston had sworn and yelled and her and Mr Jenkins, including by saying "why don't you both fuck off I would rather milk my own cows" in circumstances where Mr Weston considered a milk vat had not been cleaned.

[15] Mr Weston said, and it was submitted for LPFL, that the relevant incident involving Ms Mitchell calling him a 'cunt' occurred in February 2023 rather than in November 2022.

[16] Ms Mitchell said that on 8 February 2023 she became aware that the farm manager roles had been advertised. Ms Mitchell's evidence was that Mr Weston, in

mid-March 2023, asked her and Mr Jenkins how they felt about him showing someone around the house. She said that she said he couldn't do that and that she told him that they would still be there milking cows if they hadn't found a new job by 1 June 2023. She also said Mr Weston backed off on the issue for a time.

[17] It is claimed that Mr Weston approached Ms Mitchell and Mr Jenkins on 20 March 2023 asking them whether they had found another job.

[18] On 23 March 2023, Mr Weston issued a letter setting out that the employment would be terminated as of 31 May 2023, being at the conclusion of the season. Ms Mitchell said that a discussion was had that day with Mr Weston with him asking then whether they had found a new job yet. Her evidence is that Mr Jenkins said no but that they would provide plenty of notice as soon as they did.

[19] The letter of 23 March 2023 provided as follows:

Dear Paul and Andrea

Termination of Employment Agreement-Lone Pine Farms Ltd
Tom and Kelly Weston

Further to our discussion both last year and this year.

In September last year 2022 you advised us that you were looking for a new job.

On the 3rd of January 2023 a discussion was had in regards to employment for next season starting 1st June 2023, you advised me that you were still looking for a job and waiting to hear back.

You confirmed to use you were looking for employment and given the nature of farming we would not be able to keep the two positions available and would need to look for new workers.

You agreed with this, thereby agreeing that the employment relationship would terminate on the 31st May 2023.

I wish to confirm this and we understand that you may well have a new position in the very near future.

Both Kelly and I wish to thank you for your efforts over the last year and wish you all the best for the future.

....

[20] Ms Mitchell said that Mr Weston again asked them about other employment about one week later and that she told him to the effect that he could not end their employment like that and that she made a comment about wrongful dismissal.

[21] There was an incident on 14 April 2023. Mr Jenkins' evidence was that Mr Weston came to the cowshed and complained to him about an issue relating to colostrum milk. He said Mr Weston started having a go at him, yelled at him, and was

angry. He said that Mr Weston then raised other issues about cows not being fed, and that he tried to explain that he had talked to Mr Weston that morning about the issue. His evidence was that as he was trying to work, he felt Mr Weston was following him around and yelling at him, and that he told Mr Weston to “fuck off out of [his] face” three times as Mr Weston followed him and continued to “chip away at him”.

[22] Mr Weston’s version of the incident is that it occurred when he raised several issues with Mr Jenkins about things that had not been done correctly. The issues he said he raised are not inconsistent with the issues Mr Jenkins noted. He said that Mr Jenkins told him to “fuck off” three times, and that he told Mr Jenkins he could not speak to him like that. He said “I was not going on and on, I did not follow him and chipping (sic) away trying to provoke him”. He also said one of his daughters had been on a tractor outside the shed and had heard Mr Jenkins yelling. Her evidence was that she heard Mr Jenkins yell, but did not see the incident.

[23] A letter dated 17 April 2023, provided on 20 April 2023, was addressed to both Ms Mitchell and Mr Jenkins and provided:

Possible Serious Misconduct – Possible Summary Dismissal

On Friday 14 April 2023 I spoke to you about several things which haven’t been done correctly. This included not putting freshly calved cows on the test bucket to prevent dry cow therapy and treat seal from entering the dairy plant. I advised you on many occasions about this as has been best farm practice. In doing so, I had no fresh gold colostrum to feed the eight new calves and the colostrum cows had no silage and hadn’t been given a proper break throughout the day.

When I stopped at the cowshed and asked why they hadn’t been given silage or the proper break you told me that you had a lot going on and to fuck off. I advised you, that you can’t speak to me like that which you again replied fuck off for a second time. I told you again that you can’t speak to me like that and you told me to fuck off for a third time.

On previous occasions regarding the vat I was sworn at and told to go wipe my arse. Prior to that in the spring I asked you to help feed the calves because it was dark from you guys finishing late to which Andrea replied feed you own fucking calves. There was also a discussion with regard to taking time off, Andrea told me I was a cunt to work for and a fuckwit twice as a result of discussions.

I consider, that this behaviour, may amount to serious misconduct and accordingly I wish to have a disciplinary meeting with you. I would like to have this meeting on the 21st of April 2023 at (whatever time suits).

I confirm, that if this is found to amount to serious misconduct then you may be summarily dismissed. You are entitled to a representative or support

person given the possible seriousness of the outcome, and I strongly suggest you do so.

....

[24] A meeting was held on 26 April 2023. The meeting was attended by Ms Mitchell and Mr Jenkins, with Alan Jenkins in attendance in support of them. Mr and Ms Weston attended the meeting for LPFL. The Authority was provided a copy of a recording of that meeting.

[25] At the outset of the disciplinary meeting, Mr Weston said “we’re just wanting an explanation for the way you’ve spoken to me”. Mr Jenkins then read out a written response saying that Mr Weston had had “yet another go at [him]”, that Mr Weston had followed him going on about the matter, and that he considered Mr Weston had an agenda. He said there was no excuse, he accepted he should not have behaved that way, but said that he did not consider his actions were serious misconduct. Mr Weston then disagreed about the sequence of events with Mr Jenkins.

[26] Alan Jenkins asked Mr Weston at the meeting why Ms Mitchell was involved given the event relating to her occurred six months prior. Mr Weston responded recounting feeding the calves in the dark asking Ms Mitchell to help, with Ms Mitchell responding “no, fuck you, feed you own calves” and telling him they were looking for a new job and if they found one they would leave.

[27] Towards the end of the meeting, Alan Jenkins noted that Mr Jenkins would like them to think about what’s been said, Mr Weston responded “we’ve been thinking about it already”.

[28] Mr Jenkins asked at the meeting what the situation was in terms of going back to work. Mr Weston responded advising they would pay sick leave if needed until that was sorted out. He also said, “if Andrea wants to come back to work this afternoon, you can come back”, with that apparently being directed at Ms Mitchell.

[29] During the meeting, Ms Weston twice commented on Ms Mitchell and Mr Jenkins having made comments about looking for another job. On the first occasion, after it was explained to Ms Weston that they had not resigned, she said words to the effect that “it was not how it worked in farming”. The second time, toward the end of the meeting, she asked the question of Alan Jenkins “so when you got people and they’re looking for another job, do we just wait?”.

[30] Ms Mitchell and Mr Jenkins were advised that their employment was being terminated later that same day of the disciplinary meeting. They were provided a letter as follows:

Kelly and I confirm, that we met with you today, that being Wednesday 26 April 2023 in relation to a letter that I recently handed to you. The issue involved, was in relation to a recent conversation that I had with Paul where he told me to fuck off three times and also, a recent conversation I had with Andrea in relation to taking time off. Andrea told me twice, that I was a cunt to work for and a fuckwit.

In relation to these accusations, Paul admitted that he had spoken to me in this way and also acknowledged, that this was wrong, that it was misconduct but did not amount to serious misconduct and accordingly in your and your support person view, we were not entitled to summarily dismiss you for serious misconduct.

In relation to the accusations regarding Andrea, Andrea denied the accusations and said that there was one situation last November where the word “cunt” was used but that it was not directed at anyone in particular.

Andrea denied, that she had called me a fuckwit and a cunt to work for recently.

You and your representative also said, that we, spoke to them in a similar way and you provided as evidence, several texts...

...

The difference, in our view, is that you have directed abuse at us, particularly me, in an abusive and aggressive manner. You also allege, that in the past I have told you to “fuck off then”, relating to an incident at the milking shed. Firstly, I deny that this occurred, and further, event if it had occurred, once again the words were not directed at either of you personally. You further allege, that the way you have spoken to me has been reciprocated by myself regularly. I do not accept this.

Finally, you raised the issue of the termination of the Employment Agreement on 31 May this year. I confirm, that that was a separate issue and was not relevant to today’s meeting.

This meeting concluded and Kelly and I agreed, that we would consider you explanations and would hopefully provide you with a response today or tomorrow.

After discussing with Kelly, we have both concluded that the abusive language directed towards me does amount to serious misconduct under clause 18.4(g) of your Employment Agreement which was signed by all parties on 15 April last year. This clause states that the following may be regarded as serious misconduct:

“Any rude, abusive, violent, threatening or seriously inappropriate conduct including towards other employees or towards customers; or employers”

We have determined, that both of your behaviour falls clearly within this clause of the contract and have therefore concluded that your behaviour does amount to serious misconduct under the terms of the Employment Agreement.

The next question of course is what sanction we should apply, whether that be a written warning or summary termination.

We have given much thought in relation to this and have considered that we have no option but to summarily dismiss you for serious misconduct. We consider, that given your behaviour the relationship between the parties is irreparable and to the point, we feel unsafe working in your company.

...

[31] The termination letter went on to give Ms Mitchell and Mr Jenkins 14 days’ notice to vacate the service tenancy they had on the farm.

Was Ms Mitchell unjustifiably dismissed from her employment?

[32] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether LPFL’s actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[33] Justification requires the consideration of both substantive and procedural fairness. The onus is on LPFL to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

[34] At the investigation meeting, Mr Weston said that the “cunt” incident occurred on 8 February 2023. When asked why the issue was not dealt with for around two months, Mr Weston’s response was that he didn’t know it was serious misconduct and that he later found out that Ms Mitchell couldn’t speak to him that way. He also said that ‘they’ had been speaking to him like that for months. Mr Weston denied their refusal to leave at the end of the season was the trigger for taking disciplinary action.

¹ Employment Relations Act 2000, s 103A.

[35] It was acknowledged in submissions for LPFL that the alleged incident with Ms Mitchell should have been dealt with closer to the time. It was also submitted that such as the delay amounted to a defect in process, that it was minor and did not result in Ms Mitchell being treated unfairly.²

[36] Ms Mitchell's response at the disciplinary meeting was that she denied calling Ms Weston a cunt. She gave her version of the incident relating to the vat being cleaned. She said that Mr Weston had said "why don't you both fuck off, I would rather milk my own cows" prior to her comment that she said involved her saying that she could understand why a former employee had said that Mr Weston was "a cunt to work for". She said that Mr Weston had told her about the former employee's comments. Ms Mitchell said that the alleged comment was not raised with her at the time and she expressed the view that Mr Weston raised the issue later so as to end her employment at the end of the season.

[37] At the disciplinary meeting, Mr Weston initially disagreed with Ms Mitchell about the timing of the incident and what was said. Ms Mitchell maintained the only time the word 'cunt' was used was in November 2022. Mr Weston said that they would agree to disagree about the vat wash incident but then asked "how about in spring...". Ms Mitchell pointed out that that was about 10 months ago. Mr Weston then said, "what I'm trying to show is there is a history of you guys taking to me like this the whole time you've been here". Ms Mitchell said in response that Mr Weston had spoken to them like that, telling them to "fuck off, I'd rather milk the cows on my own".

[38] The recording of the disciplinary meeting shows that Mr Weston asked Ms Mitchell how many times she had sworn at him, with her responding "I have no idea, but as many times as you have sworn at me. Because what you give is what you get". Mr Weston then questioned Ms Mitchell about another alleged incident with Ms Weston interrupting and commenting on what was said at the relevant time despite her not having been present.

[39] Ms Mitchell maintained at the investigation meeting that there was only one occasion that the word "cunt" was used and that that was in November 2022 and that it was not said in the context of a discussion about taking time off for a birthday in March 2023 as Mr Weston alleged at the disciplinary meeting.

² Employment Relations Act 2000, s 103A(5).

[40] The allegations made against Ms Mitchell were problematically lacking in detail and did not specify a date on, or event date range within, which the relevant conduct was said to have occurred. That uncertainty flowed into the disciplinary meeting, and into the Authority's investigation meeting with the parties being at odds as to when and in what circumstances the incident occurred. The lack of detail and clear identification as to the details of the allegation provided during LPFL's process was a significant failing.

[41] That failure impacts significantly on the issue of justification. First, I am not satisfied that there was sufficient clarity such as LPFL, acting as a fair and reasonable employer, could possibly have established that Ms Mitchell had made the alleged comment, nor that her actions had amounted to serious misconduct. Second, the vague nature of the allegation was such that, from a procedural point of view, Ms Mitchell was not given clear notice of the concern and consequentially that she was not provided a reasonable opportunity to respond.

[42] Such that there was one, the investigation into the allegation was fundamentally inadequate. To the extent Mr Weston's version of events was recorded, that appears to have only been recorded in the letter giving notice of the disciplinary meeting. Further, Mr Weston, as evident from his opening remarks at the disciplinary meeting, had drawn a conclusion that the conduct had occurred prior to hearing from either Mr Jenkins or Ms Mitchell. The allegation was not detailed, little information was provided, there was clear disagreement as to both the timing and nature of the incident, and no assessment of the competing accounts was made prior to LPFL drawing conclusions about Ms Mitchell's conduct.

[43] There were clearly significant issues with both employment relationships as to communication. I find that all parties at times used profane language. While many of the text messages provided go to use of profanities in a more conversational manner, I conclude that such language was used in a more directional way, including by Mr Weston. So far as such behaviour was exhibited by Ms Mitchell, I conclude that it was not open to LPFL to treat Ms Mitchell's conduct such that it justified dismissal where it had tolerated and not acted on that behaviour previously.

[44] I also find it was not open to LPFL acting as a fair and reasonable employer to raise the allegations with Ms Mitchell only following an unrelated incident that she was

not involved in. The alleged conduct was not dealt with at the relevant time, and I find it was unreasonable to simply rely upon an unrelated incident to trigger allegations of misconduct belatedly.

[45] In effect, the allegation was an afterthought and was only made when LPFL thought it might have a basis on which to dismiss Mr Jenkins. I am satisfied that is the case having regard to the timing of the allegation being raised, the substance of the correspondence issued which was primarily focused on Mr Jenkins, the conduct of the disciplinary meeting, and lack of clarity regarding the details of the allegation.

[46] I also find that the allegation relating to Ms Mitchell was only made because of a desire on the part of Mr and Ms Weston to have both her and Mr Jenkins leave the farm. Having considered all of the evidence as to the timing of the allegation and the purported notice of termination relating to the end of the season, I conclude that the allegation against Ms Mitchell was made for an ulterior purpose.

[47] While there was some significant frustration on the part of LPFL as to the overall employment situation, it was not open to LPFL to bring about the end of Ms Mitchell's employment based on that frustration, nor because it wanted certainly about staffing. While Mr Weston maintained that the dismissals related only to the alleged misconduct, I find that the ulterior purpose was prominent in his decision making.

[48] I am not satisfied that LPFL established that the alleged conduct occurred, nor that it was such that amounted to misconduct justifying dismissal. I also find the dismissal was without substantive justification in that Ms Mitchell was dismissed for an ulterior purpose rather than the alleged misconduct itself. Both the approach taken, and the decision made, were not consistent with the actions of a fair and reasonable employer.

[49] I find that Ms Mitchell was unjustifiably dismissed from her employment.

Was Mr Jenkins unjustifiably dismissed from his employment?

[50] I have referred to the test for justification above and need not repeat it.

[51] Mr Jenkins accepts that he told Mr Weston to "fuck off" three times. Mr Jenkins' evidence was that the incident occurred in circumstances where he tried to

walk away from Mr Weston, but that Mr Weston followed him. He acknowledged the conduct occurred and did so at the disciplinary meeting when providing his response.

[52] In terms of the investigation of the allegations, the primary conduct was admitted. Mr Jenkins and Mr Weston were, I find, the only persons present at the time of the incident that meaningfully were able to observe what occurred. Part of Mr Jenkins' explanation for the conduct was that he was frustrated with Mr Weston raising issues and going "on and on" and that Mr Weston followed him while he was trying to remove himself from the situation. To the extent there was a factual dispute, I find that was not satisfactorily resolved by LPFL.

[53] Having regard to the evidence of both Mr Jenkins and Mr Weston, I conclude it is more likely than not that Mr Jenkins' comments were made in the context of Mr Weston raising his various concerns while Mr Jenkins was trying to perform his duties, that Mr Weston was frustrated and was raising those issues in a manner that was at least perceived by Mr Jenkins as badgering, and that Mr Jenkins tried to extricate himself from the situation. That does not mean that Mr Jenkins' conduct in telling Mr Weston, who was effectively his employer, to "fuck off" was appropriate or acceptable.

[54] In terms of the context of the incident, I also consider it relevant that, and least in terms of being able to fully observe the incident, only Mr Jenkins and Mr Weston were present. Such as the comments made could be viewed as being insubordinate, the language was not out of character with previous comments made in the workplace, including by Mr Weston. Further, while directed towards Mr Weston, the comments were not a personal insult as such. The comments made, and in effect accepted by all involved, are in my view consistent with Mr Jenkins seeking to end the interaction rather than to persist with it and to intimidate Mr Weston.

[55] While I consider LPFL were entitled to consider Mr Jenkins' conduct to have been unacceptable, there are several other relevant considerations. First, I find that LPFL relied more generally on what it considered was a pattern of inappropriate conduct in circumstances where it had not meaningfully dealt with that conduct previously. In doing so, I find it was motivated by general frustration with the employment relationship and a desire to replace Mr Jenkins and Ms Mitchell by the start of the next season. It had already taken steps to do so despite it having been made clear that Ms Mitchell and Mr Jenkins had not resigned. The ulterior motive persisted

throughout the process, including with Ms Weston expressing frustration at the situation during the disciplinary meeting.

[56] I conclude that LPFL was seeking to exit both Ms Mitchell and Mr Jenkins from their employment on the farm and had been doing so for some time. Ms Mitchell and Mr Jenkins had stated, I find, that they would likely leave when they found other work. However, I also accept their evidence that they had not resigned and that they did not agree that their employment was to terminate at the end of the season. I find that LPFL were aware of that when they purported to give notice that the employment would end at the end of the season.

[57] Mr and Ms Weston, perhaps understandably, found the uncertainty of the situation somewhat frustrating. However, I find that LPFL persisted in asserting that the employment was to be terminated at the end of the season despite being aware Ms Mitchell and Mr Jenkins were not obligated to leave their employment. Those were not the actions of a fair and reasonable employer. Further, that situation was hopelessly intertwined with the conduct allegations and decision making that followed.

[58] I find that LPFL failed to take proper account of the background and conduct of all parties. It relied on previous alleged incidents despite those not having been subject to any formal process at the relevant time and it did not impartially consider the conduct and circumstances that led to it, including by failing to have appropriate regard to Mr Jenkins' view being that Mr Weston had baited him and followed him at the time the comments were made. I conclude that Mr Weston was hopelessly conflicted and that the evidence as to the raising of the allegations, including those against Ms Mitchell, demonstrates that Mr Weston did not have an open mind when considering the conduct allegations.

[59] It was submitted for Mr Jenkins that a fair and reasonable employer could not have dismissed Mr Jenkins, and that the decision to do so was disproportionate to the allegations. As with the dismissal of Ms Mitchell, it was submitted that LPFL was dismissive of the explanations provided and had predetermined the outcome. I accept those matters as submitted. In the context of language used previously having not been acted on, including by Mr Weston, the decision to dismiss was grossly excessive. If LPFL were motivated to improve the communication and put a stop to such language and actions, then it should have done so in a timely manner. The failure to do so

effectively condoned such behaviour. Having regard to the context, I find it was not open LPFL to treat the incident of 14 April 2023 as serious misconduct justifying dismissal without notice.

[60] I also find that LPFL also considered other alleged incidents involving the use of profane language in reaching the decision to dismiss. While some effort was made by Mr Weston to focus on the single incident at the disciplinary meeting, several other incidents were also raised. I consider, having heard from him at the investigation meeting, that Mr Weston's decision making clearly took into account his views about the relationship more generally and what he personally perceived was a pattern of bad behaviour. That behaviour had been previously tolerated without, for example, the conduct being dealt with by way of issuing a written warning. Mr Weston's decision making was infected by broader considerations that were not subject to satisfactory investigation.

[61] I also find that the outcome of the disciplinary process was predetermined. While an employer is, for example, not prevented from dismissing an employee for misconduct reasons during a notice period, or generally where they would prefer the employee no longer work for them, the problem here is that LPFL was actively seeking to end Mr Jenkins' employment. The same person that was seeking to exit Mr Jenkins for other reasons, in a context where I find it was known he had not resigned, was purporting to exercise a fair mind in relation to the misconduct allegations. Mr Weston was hopelessly conflicted and I find inevitably swayed by the desire to have Mr Jenkins off the farm by the end of the season.

[62] I consider the following comments made by Mr Weston at the disciplinary meeting evidence the issues identified above:

I'm getting to the end of this season, to next season. I've had enough of all of it. He talked to me like that. That changed it. I can't go back from that. It was just one too many times...

[63] Mr Jenkins was given notice of the allegations that were ultimately relied upon by LPFL as the conduct underlying its decision to dismiss him from his employment. He was provided an opportunity to respond to the allegations made and to raise other matters he considered relevant. He attended the relevant meeting with a support person, his brother. Despite some feature of procedural fairness being present, I conclude that

the dismissal was procedurally unfair having regard to the conflicted position of Mr Weston and a failure to disclose the ulterior motivation for the dismissal.

[64] I record that, in relation to both Mr Jenkins and Ms Mitchell, I have considered the nature of the business and resources available to LPFL. There is a reality about the small nature of the business operations and family farm. While those are relevant considerations and perfection in both the relevant investigations and disciplinary processes is not required, the flaws here were significant and unjustifiable.

[65] I find that Mr Jenkins was unjustifiably dismissed from his employment.

Are Ms Mitchell and Mr Jenkins entitled to remedies?

Compensation for humiliation, loss of dignity and injury to feelings?

[66] Ms Mitchell's evidence is that this was the first time she had been dismissed from employment and that she was angry and shocked. One consequence of the dismissals was that they had to move from the farm within two weeks. She said she was embarrassed to leave the house, including because she might have had to tell others she had been dismissed. She recalls being embarrassed by having to borrow money.

[67] Mr Jenkins' evidence is that the dismissal made him feel like he had failed as a provider for his family. He recounted feeling stressed and having had difficulty sleeping and eating. There was a financial impact, but he also said he felt lost and worthless. He said they were forced to take the first available job they could find and that there were further implications from that, including having to just move with the "bare essentials" for a period. His evidence was that the way his employment ended continues to cause him anxiety.

[68] I find that both Ms Mitchell and Mr Jenkins were impacted significantly by the actions of LPFL. While there had been somewhat of a breakdown in the employment relationships, the dismissals were sudden, occurred in the context of other attempts to have them leave their employment, and the implications were significant. The impacts included the stated issues with sleep and anxiety. While no medical information was provided, I accept that the situation was stressful and impacted Ms Mitchell and Mr Jenkins significantly.

[69] I have considered the impact of LPFL's actions and awards made in other similar and comparable circumstances. I order, subject to any reduction on account of contribution, that LPFL make payment to:

- (a) Ms Mitchell of \$20,000 as compensation for humiliation, loss of dignity, and injury to feelings; and
- (b) Mr Jenkins of \$20,000 as compensation for humiliation, loss of dignity, and injury to feelings.

Compensation for lost wages?

[70] Ms Mitchell and Mr Jenkins found alternative work sharemilking. Ms Mitchell's evidence was that they entered a contract, effectively taking what work they could despite not wanting to do that work again, and started work on 1 June 2023. That was approximately five weeks after the dismissals. She said they then did not have any income for the next four and a half months, receiving their first payment on 15 September 2023.

[71] I am satisfied that both Ms Mitchell and Mr Jenkins lost wages as a result of their personal grievances and the actions of LPFL. I am also satisfied that they took appropriate and sufficient steps to mitigate their loss by finding alternative work. They were successful in doing so to some extent and commenced alternative work some five weeks after they were dismissed.

[72] Ms Mitchell and Mr Jenkins did not receive any payment for the alternative work until a later date, that being 15 September 2023. While the payment occurred later, I consider the arrangement was such that they were paid for work undertaken from 1 June 2023. That is to be considered in assessing lost wages.

[73] The records provided to the Authority show that, as of 15 November 2023, Ms Mitchell and Mr Jenkins together had received remuneration from the alternative work, for the season, of \$39,843.57 covering a period of 24 weeks.³ On that basis, each were paid \$19,921.79 for the 24 week period.

[74] When working at LPFL, each were to be paid an annual salary of \$75,000. Each would have earned \$34,615.38 for the period 1 June 2023 and 15 November 2023 had they remained employed. The difference between what they would have been paid at

³ Between the commencement of work on 1 June 2023 and the payment on 15 November 2023.

LPFL and what they were paid as sharemilkers is \$14,693.59 each for that 24 week period, or \$612.23 per week.

[75] I calculate that each of Ms Mitchell and Mr Jenkins lost \$7,211.54 for the first five week period. Additionally, over a further period of 8 weeks, each lost \$4,897.84 as being the difference between what they were paid for the alternative work and what they would have been paid at LPFL.

[76] Subject to any reduction on account of contribution, I would order LPFL to make payment to:

- (a) Ms Mitchell of the sum of \$12,109.38 as compensation for lost wages; and
- (b) Mr Jenkins of the sum of \$12,109.38 as compensation for lost wages.

Contribution

[77] Section 124 of the Act requires that I consider the extent to which Ms Mitchell's and Mr Jenkins' actions contributed towards the situation that gave rise to their respective personal grievances, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.⁴

[78] I have found that the dismissals were substantially motivated by erroneous considerations. Neither Ms Mitchell nor Mr Jenkins could be said to have contributed to the circumstances giving rise to their personal grievances such as those considerations are concerned. While there were background issues regarding communication and a general breakdown in the employment relationships, I cannot be satisfied that Ms Mitchell's or Mr Jenkins' conduct contributed in any blameworthy sense to the dismissals.

[79] The dismissals were devoid of procedural fairness given the ulterior motivations. Additionally, I do not consider that conduct that was tolerated and reciprocated, can properly establish a basis for a reduction in contribution where dealing with that conduct was selective and, at least in substantial part, motivated by other erroneous considerations.

[80] I do not consider any of Ms Mitchell's conduct to have contributed to the situation giving rise to her personal grievance. Ms Mitchell was not subject to any

⁴ Employment Relations Act 2000, s 124.

investigation or disciplinary process prior to the allegations being made against Mr Jenkins. Absent the incident with Mr Jenkins, I have no doubt the matter would not have been subject to any employment process at all. That is indicated by statements made by Mr Weston during the disciplinary meeting suggesting that she could have returned to work that day. Her conduct did not, in any blameworthy sense, contribute to the situation. The dismissal was also occasioned by such significant procedural errors that I consider a finding of contribution in her case to be unavailable.

[81] The situation is somewhat different in relation to Mr Jenkins. In his case there was some conduct which he accepted amounted to misconduct. However, I consider the resulting dismissal was predetermined, that LPFL jumped on conduct with some relish in circumstances where there had been mutual communication issues that had not been meaningfully acted upon by LPFL, and that the dismissal was motivated by erroneous considerations. While I find Mr Jenkins' conduct amounted to misconduct, having regard the ulterior motivations and absence of procedure fairness, I do not consider Mr Jenkins acted in a blameworthy way creating the situation that gave rise to the dismissal. I find Mr Jenkins' conduct did not contribute to the circumstances giving rise to his personal grievance.

[82] I decline to make any reduction on account of contribution.

[83] I order that LPFL make payment, within 28 days of this determination, to:

- (a) Ms Mitchell of \$20,000 as compensation for humiliation, loss of dignity, and injury to feelings;
- (b) Mr Jenkins of \$20,000 as compensation for humiliation, loss of dignity, and injury to feelings;
- (c) Ms Mitchell of \$12,109.38 as compensation for lost wages; and
- (d) Mr Jenkins of \$12,109.38 as compensation for lost wages

Breach of good faith

[84] LPFL were entitled to have a view, even a negative one, about the indication from Ms Mitchell and Mr Jenkins that they might leave their employment at some uncertain time. LPFL were also able to follow up with them as to whether they had found alternative employment. However, the manner of that follow up, the advertisement of the roles, and ultimately the action taken in issuing a termination letter,

were all inconsistent with the duty of good faith, including the obligation to be active and constructive in maintaining a productive employment relationship.⁵

[85] I have found that both dismissals were substantially motivated by the erroneous concerns LPFL had as to replacing Ms Mitchell and Mr Jenkins at the end of the season. Further, I am satisfied that the actions of LPFL, in purporting to give notice of termination applying at the end of the season to Mr Jenkins and Ms Mitchell, was a serious breach of the duty of good faith. LPFL sought to deliberately and unilaterally bring about the end of the employment relationships. While, as I have noted elsewhere, there were some concerns as to the conduct of Ms Mitchell and Mr Jenkins, the actions in seeking to end the employment relationships in my view contributed to the situation and later conduct.

[86] I also consider, especially in the case of Ms Mitchell, that the allegation made which resulted in her employment being terminated was not genuinely raised. The allegation was vague, historic, related to alleged behaviour that had not been acted upon, and I find was only raised because of the incident with Mr Jenkins. LPFL breached its duty of good faith in raising the allegations in the manner and at the time it did.

[87] I conclude that in both cases, the disciplinary process was initiated and followed through because LPFL wanted Ms Mitchell and Mr Jenkins gone. The reasons for that included the general breakdown in the relationship, but also critically, the desire to have them leave by the end of the season.

[88] I find that the breaches of good faith were deliberate, serious, and sustained.⁶ I also find that LPFL's failures were intended to undermine the employment relationships.⁷ LPFL deliberately sought to end Ms Mitchell and Mr Jenkins employment. Its attempts to do so were deliberately taken despite an apparent awareness that there was no basis for ending the employment at the end of the season. It persisted with a course of action to bring about that result with the impact of Ms Mitchell's and Mr Jenkins' employment was terminated.

⁵ Employment Relations Act 2000, s 4(1A)(b).

⁶ Employment Relations Act 2000, s 4A(a).

⁷ Employment Relations Act 2000, s 4A(b)(iii).

[89] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*⁸ and had regard to the mandatory considerations at s 133A of the Act.

[90] I find there is a single breach in relation to each of Ms Mitchell and Mr Jenkins. The actions of LPFL were, in effect, a continuing course of conduct in each case. The maximum penalty in this case is \$40,000, \$20,000 in relation to each breach.⁹

[91] The nature of the breaches are serious and LPFL's actions were entirely inconsistent with the duty of good faith it owed to Ms Mitchell and Mr Jenkins. The importance of that duty is significant as is reflected in the objects of the Act. I am satisfied that LPFL's actions were deliberate and that Ms Mitchell and Mr Jenkins were significantly impacted by the relevant breaches. There is no evidence of any similar conduct by LPFL having been the subject of other proceedings. There is some, but not a full, overlap in terms of the compensation I have otherwise ordered in relation to the unjustified dismissal claims.

[92] I order that LPFL make payment, within 28 days, of a total penalty of \$4,000 for the breaches of its duty of good faith towards Ms Mitchell and Mr Jenkins in terms of s 4A of the Act. \$2,000 of that sum is to be paid to the Authority via the Crown account. \$1,000 is to be paid to each of Ms Mitchell and Mr Jenkins.

Are Ms Mitchell and/or Mr Jenkins entitled to any payment in relation to a Public Holiday on 24 October 2022?

[93] Ms Mitchell and Mr Jenkins claim that they are entitled to be paid in accordance with ss 50 and 56 of the Holidays Act 2003 for working on 24 October 2022, that being Labour Day.

[94] I accept the evidence of Ms Mitchell and Mr Jenkins as to having worked on 24 October 2022 as part of an agreement with Mr Weston to ensure they could take time off work for a trip to Australia. There is no dispute that Mr Jenkins worked that day, and I find that Ms Mitchell also worked that day. The response to the personal grievance notifications dated 26 July 2023 also accepted that both had worked that day, albeit while asserting that compliant payment had been made.

⁸ [2016] NZEmpC 143.

⁹ Employment Relations Act 2000, s 135(2)(b).

[95] There is no written record of any agreement to transfer a public holiday to another day and I otherwise accept the submissions made on behalf of Ms Mitchell and Mr Jenkins that LPFL has not established compliance with s 44 B of the Holidays Act 2003.

[96] I am satisfied that both Ms Mitchell and Mr Jenkins were not paid compliantly. Both were entitled to payment for that day based on their relevant daily pay and half that amount again in accordance with s 50(1)(a) of the Holidays Act 2003. Both also should have been credited with an alternative holiday and are entitled to payment for that based on their relevant daily pay.¹⁰

[97] Having reviewed the relevant records provided, I conclude that Ms Mitchell and Ms Jenkins were paid their ordinary pay for the relevant period. I calculate the sums due based on the wage and time records provided to the Authority, the content of which is not contested. Ms Mitchell and Mr Jenkins were, according to those records, paid at the rate of \$288.46 for a public holiday and a sick day with their final pay. There is no evidence that those sums were attributable to the disputed payment. I adopt that as the relevant basis for payment and order that LPFL make payment to:

- (a) Ms Mitchell is entitled to payment of a total of \$432.69; and
- (b) Mr Jenkins is entitled to payment of a total of \$432.69.¹¹

Summary of orders

[98] Lone Pine Farms Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) \$20,000 to Ms Mitchell as compensation for humiliation, loss of dignity and injury to feelings;
- (b) \$12,109.38 to Ms Mitchell as compensation for lost wages
- (c) \$20,000 to Mr Jenkins as compensation for humiliation, loss of dignity and injury to feelings;
- (d) \$12,109.38 to Mr Jenkins as compensation for lost wages
- (e) \$432.69 to Ms Mitchell as unpaid entitlements under the Holidays Act 2003;
- (f) \$432.69 to Mr Jenkins as unpaid entitlements under the Holidays Act 2003;

¹⁰ Holidays Act 2003, s 60(2)(b).

¹¹ In both cases the total calculations comprise \$144.23 as the additional half of the pay for the time worked and \$288.46 as payment for the alternative holiday.

(g) a penalty of \$4,000 for breach of its duty of good faith in terms of s 4A of the Act. \$2,000 of that sum is to be paid to the Authority via the Crown account. \$1,000 is to be paid to each of Ms Mitchell and Mr Jenkins.

Costs

[99] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[100] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Mitchell and Mr Jenkins may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum LPFL 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.

[101] The parties can anticipate 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.¹²

Rowan Anderson
Member of the Employment Relations Authority

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