IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 673
3320380

	BETWEEN	COREY VAN DER HULST Applicant
	AND	BARTON DAIRIES LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Lawrence Anderson, advocate for the Applicant Hamish Burton, advocate for the Respondent
Investigation Meeting:	2 July 2025
Submissions and information received:	13 and 21 August 2025 from the Applicant 3 July and 21 August 2025 from the Respondent
Determination:	23 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Corey Van der Hulst was employed by Barton Dairies Limited (BDL) as an assistant farm manager/2IC from 17 June 2024 until 4 July 2024 when he was dismissed under the terms of a trial period. Mr Van der Hulst says the trial period was invalid, and that he was unjustifiably dismissed. He also says he was unjustifiably disadvantaged in his employment when he was not provided with work and a shift was cancelled. He seeks remedies to compensate lost wages and injury to feelings as well as holiday pay arrears and a contribution to costs.

[2] BDL owns and runs a dairy farm in Cambridge. It denies Mr Van der Hulst was unjustifiably disadvantaged or unjustifiably dismissed or that its actions were not in

compliance with the obligation of good faith. It says it engaged in a fair process with him and its actions, including rent deduction were within the terms of the parties' employment agreement. It says no holiday pay arears are due.

The Authority's investigation

[3] The Authority received evidence from Mr Van der Hulst and his partner Rebecca McMillan and for BDL, Trent Barton, a director of BDL and Mr Van der Hulst's manager and David Gardner, the manager of the neighbouring farm, who gave evidence of relevant matters he had observed.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has considered all the material before it, including all information received from the parties and the submissions of their representatives.

The parties' employment agreement

[5] On 21 May 2024 Mr Van der Hulst met with Mr Barton to go through the proposed written individual employment agreement (the IEA). They discussed a 90-day trial and Mr Barton confirmed it was to be included in the IEA. Mr Van der Hulst took a copy of the IEA with him to consider and on 24 May the parties met again and signed the IEA. Mr Van der Hulst was provided a copy of the executed document.

[6] The trial period is set out a clause 4 of the IEA:

> 4 Trial period
>
> (Where we have less than 19 employees and you have not been previously employed by us)
>
> 4.1 The parties agree that this employment is subject to a trial period of 90 days, under section 67a of the Employment Relations Act 2000.
>
> 4.2 The trial period will begin on the first day of work, as noted in clause 3.2 above.
>
> 4.3 You acknowledge:

4.3.1 During this trial period, we may dismiss you at any time within the trial period by giving 5 days' written notice. We may, at our discretion, require you not to work this notice period and will instead pay you for the notice period.

4.3.2 In the event of dismissal, you are not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal. However, you are still entitled to bring a personal grievance on other grounds, such as discrimination, harassment or unjustified disadvantage.

4.3.3 We do not have to provide a written statement of the reasons for that dismissal.

Relevant law

Trail periods

[7] Section 67A of the Employment Relations Act 2000 (the Act) **[check the Act]** provides an employment agreement entered by a 'small-to-medium-sized' employer and an employee who has not previously been employed by that employer may contain a 90-day trial provision. Section 67B of the Act sets out the effect of a s 67A trial provision in an employment agreement namely, within the trial period an employer is able to give notice to the effected employee of termination of employment and the employee is unable to bring a personal grievance for unjustified dismissal or other legal proceedings in respect of the termination.

[8] Strict compliance with the requirements of s 67A is required. In *Smith v Stokes Valley Pharmacy (2009) Ltd* the Court emphasised a strict approach was appropriate in light of the fact that the trial provisions removed longstanding employee protection and access to dispute resolution and justice.[1] A failure to secure the employee's signature on the written employment agreement before they started work has been found fatal to justifiability.[2]

Test for justification

[9] When the Authority considers justification for the actions of BDL, which may include the dismissal decision subject to any finding regarding the trial period, it does so by applying the test of justification in s 103A of the Act. In determining justification

[1] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48].
[2] *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45 at [43].

of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of BDL and how it acted were what a fair and reasonable employer could have done in all the circumstances including at the time of the alleged disadvantage and dismissal.

[10] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations set out in s 4 of the Act. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".[3]

Issues

[11] The issues requiring investigation and determination are:

(i) Whether Mr Van der Hulst was unjustifiably disadvantaged in his employment by the actions of BDL failing to provide hours of work and/or cancelling shifts?

(ii) Whether Mr Van der Hulst was unjustifiably dismissed?

(iii) If so, is Mr Van der Hulst entitled to a consideration of remedies sought including:

a. compensation under s 123(1)(c)(i) of the Act;

b. lost wages (a sum of $2,036 and a sum to be quantified and calculated); and

c. Kiwisaver and holiday pay calculated on lost wages.

(iv) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Van der Hulst which contributed to the circumstances which gave rise to their grievance?

(v) Interest and holiday pay should be awarded on any order of arrears;

[3] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

(vi) Is either party entitled to an award of costs?

Discussion

(i) Was Mr Van der Hulst unjustifiably disadvantaged – failing to provide hours of work?

[12] Clause 6 of the IEA records Mr Van der Hulst was an employee on a roster. No rosters were provided to the Authority – Mr van der Hulst did not have them and said Mr Barton messaged him and BDL was unable to retrieve the rosters from the software application (the App) used for that purpose along with other work and operational purposes. The consequence of this is the rosters are unable to be reconciled against the wage and time record which BDL produced. I find it is likely there were rosters posted for Mr Van der Hulst by way of the App because the wages and time record records rostered days off and Mr Van der Hulst gave evidence he had difficulty getting used to the App.

[13] The witnesses agreed in terms of day-to-day work Mr Barton provided the tasks to be completed. Where the parties disagree is Mr Van der Hulst says he should have been rostered minimum hours from 4.30am to 6pm for 7 days in a 14-day span. He says this is what the IEA provides and specifically records the task of calving with those start and finish times in the "likely period July/August".[4] He claims unpaid minimum guaranteed hours of 13.5 hours per day, less 2 breaks of 30 minutes.

[14] BDL says the role was a minimum of 20 hours per week, this was what was advertised, what Mr Van der Hulst was rostered and the work he was provided during his employment. It says he was paid for the work he performed. Mr Van der Hulst's actual working time is precisely detailed in the wages and time record.

[15] I am not satisfied the agreed hours of work are as Mr Van der Hulst claims. The employment agreement provides the roster pattern he seeks to enforce applies to the calving season and the evidence before the Authority leads me to conclude that season had not started by the time his employment ended. Over the three weeks he worked for BDL the hours he worked did not reflect such a roster and there is no contemporaneous record that he asserted an expectation of such a rostering pattern. In addition, the job

[4] IEA clause 6.2.

advertisement title "Milk for Rent" was for a 20 hours per week and Mr Barton's evidence was this was discussed at interview with Mr Van der Hulst. There is also the matter of Mr Van der Hulst receiving accident compensation payments during this period, which suggests part time work was suitable for him at that stage in his recovery from injury.

[16] The personal grievance is not established because the factual basis of the claimed disadvantageous action has not been proved. However, looking at the wages and time record, Mr Van der Hulst did not receive at least 20 hours per week the minimum I have found the parties agreed. Mr Van der Hulst is entitled to the balance between what he was paid per week and 20 hours calculated over the four weeks of his employment which commenced 17 June and ended 12 July 2024. Holiday pay at 8% is to be calculated and paid on the outstanding balance.

(ii) Was Mr van der Hulst unjustifiable disadvantaged – cancelling shifts?

[17] The basis of his claim is being sent home on 3 July when Mr Van der Hulst attended work late. He says he was late by about 10 minutes. Mr Barton says it was an hour and that he asked Mr Van der Hulst to complete feeding the herd he (Mr Barton) had moved but Mr Van der Hulst went home. I prefer Mr Barton's detailed recollection of the circumstances he found that morning, the work occasioned by Mr Van der Hulst's lateness and the description of the work he asked Mr Van der Hulst to complete. The claim does not succeed. The evidence does not support a finding that a shift was cancelled as anticipated by clause 7 of the IEA – on attending work Mr Van der Hulst was asked to complete a task which he did not do when he went home.

(iii) Was Mr van der Hulst unjustifiably dismissed?

[18] As discussed above on 3 July Mr Van der Hulst was late for work. When he attended Mr Barton asked him to feed out the cows he had moved that morning, to then go home and he would speak with him later in the day about extra jobs. Mr Van der Hulst did not do as asked and went home. Mr Barton then discussed with his wife the ongoing concerns they had with Mr Van der Hulst's work performance and the pressure the farm would be under with the upcoming calving season.

[19] At 5.05pm that evening Mr Van der Hulst messaged Mr Barton apologising for being late to work and asked if he was working tomorrow. Mr Barton replied he (Mr

van der Hulst) was not working tomorrow. Mr Van der Hulst sought clarification of when he would be working again and Mr Barton replied "We will chat tomorrow". At 3.18pm the following day Mr Barton messaged Mr Van der Hulst asking him to meet him at the cow shed at 3.45pm. The meeting proceeded as proposed.

[20] Mr Barton said he had a letter with him addressed to Mr Van der Hulst terminating his employment under the 90-day trial provision. He said he tried to give the letter to Mr Van der Hulst and that he (Mr Van der Hulst) would not take it, that he explained it was a dismissal letter and that Mr van der Hulst eventually took the letter and left the cow shed. At 8.26pm that evening Mr Barton emailed a copy of the letter subject line "Digital copy":

> Hi Corey
> A digital copy of today's letter is attached.
> The bike and wet weather gear need to be returned to the cow shed tomorrow morning.
> Thank you.

[21] Mr Van der Hulst's recollection is different. He says he attended the cow shed as requested at 3.45pm on 4 July and Mr Barton told him his employment was ending with immediate effect, that he asked why and was told a reason did not have to be given. Mr Van der Hulst says the first time he received the dismissal letter was by email that evening and he intended to respond at 9.47pm with the following which he inadvertently sent to himself:

> I will return the bike and wet weather gear as you have asked. I was not given that letter today. I was only told that I am being terminated effective immediately so I am now reading it for the first time. I withdraw all consent to deductions from my wages and final pay.

[22] Mr Van der Hulst says BDL's actions invalidated the IEA trial clause because it was non-complaint in the following respects:

(i) the trial clause required communication of dismissal in writing and he was advised verbally; and

(ii) the trial period clause did not permit BDL to declare an immediate cessation of employment and then make payment in lieu of notice, only garden leave was permissible.

[23] I find Mr Barton attended the 3.45pm meeting on 4 July with a written letter of termination, that he tried to hand it to Mr Van der Hulst, who initially refused to take it, that he verbally advised the decision to end the employment relationship and then gave Mr Van der Hulst the letter. I make this finding because of the detail of Mr Barton's description of events is compelling and is supported by the email sent to Mr Van der Hulst that evening. Written notice of dismissal as required under the parties' trial provision has been met.

[24] The next question is that of notice. In *GFW Agri-Products v Gibson* [1995] 2 ERNZ 323 at 329 the Court of Appeal considered the question of when employment comes to an end when an employee is told their employment is to be terminated and then paid until a future date without being required to work during that period:

> It is a mixed question of fact and law as to when a contract of employment comes to an end. A "payment in lieu of notice" is equivocal: *Delaney v Staples* [1992] 1 AC 687, 692. It may be that there is a summary dismissal putting an end to the employment relationship with the payment being, in effect, on account of damages for breach by failure to give proper notice. It may be on the other hand that the employment relationship continues with the payment of wages until the end of the period of notice though the employee is not required to attend for work. In the present case the company's letter of 20 December 1991 indicates there is no immediate payment of a lump sum in lieu of notice but an undertaking to pay the month's salary and holiday pay should the house be vacated prior to 10 January which was specified as the "final date of employment".

[25] With regard to notice the dismissal letter provides:

> In accordance with 4 of your employment agreement, the Company exercises its contractual right to pay you out your notice period of 5 days. Accordingly, today will be your last day of employment and we will pay you 5 days wages in lieu of notice.

[26] The letter is silent on when the final payment would be made. Applying *GFW Agri-Products v Gibson* when then did the employment end? While I accept "last day of employment" could indicate Mr Van der Hulst's employment ended immediately it is also clear from the dismissal letter that BDL was seeking to exercise rights under and within the terms of the IEA. Given the terms of the IEA Mr Van der Hulst's employment could not end that day but properly at the end of his notice period. Further BDL's actions are not consistent with an intention to end the employment relationship with immediate effect – the letter does not say the notice would be paid with immediate effect, and indeed that is not what occurred, Mr Van der Hulst was asked to return the

wet weather gear the following day and the 2-week notice of the tenancy was advised in the dismissal letter. In addition, and for completeness the evidence is unclear if Mr Barton told Mr Van der Hulst at the cow shed meeting his employment was to end with immediate effect.

[27] I find on 4 July Mr Van der Hulst was given written notice his employment was ending under the trial provisions and that DBL did not require him to work out his 5-day notice period. Mr Van der Hulst's employment in law ended at the notice period and in practical terms on 4 July in accordance with the parties IEA. The claim of unjustified dismissal does not succeed.

Summary

[28] Within 21 days of the date of determination Barton Dairies Limited is to calculate and pay to Corey Van der Hulst at least 20 hours for every week of employment for the period 17 June to 11 July 2024 and calculate and pay to him 8% holiday pay on those arrears.

Costs

[29] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Corey Van der Hulst may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Barton Dairies Limited will then have 14 days to lodge any reply memorandum.

[30] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. 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.

Marija Urlich
Member of the Employment Relations Authority