

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 36
3203859

BETWEEN

ALAN BURT
Applicant

AND

TAWAROA FARMING
LIMITED
Respondent

Member of Authority: Claire English

Representatives: Kate Henry, counsel for the Applicant
Chris Majoribanks for the Respondent

Investigation Meeting: 10 October 2023 at Whakatane

Submissions received: 15 November and 8 December 2023 from Applicant
1 and 12 December 2023 from Respondent

Determination: 24 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Alan Burt, was employed as a fencer by the respondent, Tawaroa Farming Limited (Tawaroa). After some months of employment, Mr Burt suffered a workplace injury, being a serious tear to his shoulder. He was unable to work. He was told he needed surgery. When he told the farm manager of his surgery, the farm manager said that the farm needed a fencer, and he would have to let Mr Burt go.

[2] Mr Burt was provided a month's notice of the termination of his employment. Sums were deducted from his final pay in respect of rent, cleaning, and electricity.

[3] Mr Burt raises a personal grievance for unjustified dismissal, and seeks remedies of compensation for hurt and humiliation¹. He also seeks that penalties be awarded in respect of what he says were the respondent's breaches of good faith relating to the way he was dismissed and his employment agreement, breaches of the Wages Protection Act 1983 in relation to the deductions from his wages, and breaches of the employer's obligations to provide wage and time records and holiday and leave records.

[4] Tawaroa says that its dismissal of Mr Burt was justified, as he was not able to work, had been on sick leave for some three months, and did not provide any indication as to how long he would need off for his surgery (which was not yet scheduled) and rehabilitation. It says that it could not hold the job open any longer.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Mr Burt, and his son, Mr Desmond Burt. Mr Marjoribanks attended the investigation meeting on behalf of Tawaroa and gave in-person evidence. The witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral and written submissions.

[6] 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.

The issues

[7] The issues requiring investigation and determination were:

- (a) Was Mr Burt unjustifiably dismissed?
- (b) If Tawaroa's actions were not justified in respect of dismissal, what remedies should be awarded, considering compensation under s123(1)(c)(i) of the Act;
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Burt that contributed to the situation giving rise to his grievance?

¹ Mr Burt has not claimed for lost remuneration.

- (d) Should any penalties be awarded in respect of what are said to be breaches by Tawaroa of its duties of good faith, duties around the signing of the employment agreement, duties under the Wages Protection Act 1983, and duties to provide wage and time records under the Act and holiday and leave records under the Holidays Act 2003;
- (e) Should either party contribute to the costs of representation of the other party.

Background

[8] Mr Burt is an experienced farm hand. He had always worked in the farming industry, including previously managing a large farm. He was employed by Tawaroa as a fencer, on a two year fixed term agreement. Mr Majoribanks explained that the farm had suffered some financial setbacks in the past, to the extent that it had been unable to make payments to beneficiaries, and the trustees all performed their roles free of charge.

[9] Through hard work over recent years, Tawaroa had been able to achieve a bank loan to carry out certain important improvements including advances in pasture management and stock. A necessary part of this plan was ensuring that there were proper and adequate fences throughout the farm, hence the need for Tawaroa to hire a full time fencer for two years.

[10] Tawaroa is managed by a board of 5 Trustees, and the farm itself is run by a station manager, or general manager, Mr Wayne Atkins. Mr Atkins did not attend the investigation meeting to give evidence. All evidence on the part of Tawaroa was given by Mr Marjoribanks. Mr Atkins and Mr Burt had worked together before, and Mr Burt's evidence is that he considered Mr Atkins a friend.

[11] Mr Atkins was familiar with Mr Burt's work, and asked if he would be willing to work for Tawaroa, on a full time basis for two years. Mr Atkins was willing to accept this, including because he had recently become a single father to his young daughter, who was approximately two years old at the time.

[12] Overall, Mr Burt's employment was successful, and Mr Marjoribanks expressed the view that Mr Burt's work was of high quality.

[13] In early April 2022, Mr Burt had an accident at work, where he slipped in wet conditions, and hurt his shoulder. He expected that the pain and swelling would subside, and when they had not abated after 3 or 4 days, he went to his doctor. His doctor sent him for scans and specialist advice. His doctor also suggested that he should go on light duties, for 4 hours per day.

[14] Both parties agreed that there were, in practice, no light duties to be performed in farming work, and certainly not in fencing. Mr Burt therefore had to effectively stop work, as he was not physically able to perform his duties.

[15] Mr Burt obtained medical certificates which he provided to Tawaroa via Mr Atkins. In the interim, he was placed on ACC.

[16] He was initially asked to continue paying rent despite this, but after Mr Burt spoke with one of the trustees, there was an agreement to waive the rent while he remained on ACC.

[17] Mr Burt underwent an MRI scan on 29 June 2022, which showed that he had severely torn a muscle. He was duly advised that he would need to be referred for surgery, and that he could expect a period of some 7 weeks after surgery where he would need to wear a brace, followed by approximately 3 months physiotherapy and rehabilitation².

[18] Mr Burt and Mr Atkins met at Mr Atkins' house on 4 July 2022. The meeting was short, lasting for a few minutes. Mr Burt told Mr Atkins that his injury was serious and he would need surgery. In response, Mr Atkins' wife commented that this would require a quite bit of recovery time, or words to that effect. Mr Atkins told Mr Burt that while his fencing work was "outstanding", he needed someone who could complete the fencing. He said that he would need to let Mr Atkins go, and he should vacate his house as soon as possible.

[19] Mr Burt was shocked. He said he had not come to work to get hurt, and Mr Atkins would be making him and his daughter homeless.

² Mr Burt's witness statement at paragraph 14.

[20] Mr Burt's evidence was that at no point did Mr Atkins inquire about his diagnosis, expected recovery time, what work he might be able to do, or any alternatives to the termination of his employment.

[21] Mr Majoribanks says that by this point at the beginning of July, the trustees were very concerned about how long they could continue to hold Mr Burt's job open. He gave evidence that in April, May, and June the trustees had discussed at their monthly management meetings as part of Mr Atkins' farm management report, how seriously Mr Burt might have been injured, when he would come back to work, and how long they would be able to keep the job open for, in light of the regular progress reports including on fencing that they needed to make to the bank.

[22] The trustees had decided by the end of June that the farm needed Mr Burt back to work "pretty soon" after the end of June, given that it had already been three months. The trustees estimated that this might take a further six to nine months, based on their own personal experiences.

[23] The trustees believed they could not wait a further six to nine months for Mr Burt to return to full fitness. Accordingly, Mr Atkins was authorised to speak with Mr Burt and if Mr Burt was not able to return to full duties "pretty soon", Mr Atkins was authorised to terminate his employment.

[24] In the event, that was exactly what occurred. When Mr Burt advised that he would need surgery and rehabilitation, Mr Atkins terminated his employment, as the trustees had authorised him to do in the absence of anything short of an imminent return to full duties.

[25] Mr Burt was not aware of any of this. Mr Marjoribanks accepted that none of the trustees had spoken to Mr Burt at any point during their deliberations, and said that it would not be appropriate for Mr Burt to have attended the management meetings where this was discussed. The structure was that Mr Burt communicated with Mr Atkins and Mr Atkins communicated with the trustees.

[26] Mr Marjoribanks explained that Mr Atkins had been asked to get a medical certificate from Mr Burt, and advice as to when Mr Burt would/could return to work. It was accepted that Mr Burt had provided medical certificates when Mr Atkins asked,

and had effectively told Mr Atkins on 4 July that he could not return to work until after surgery and rehabilitation.

[27] However, by this time, the trustees had already made a decision that Mr Burt's job would need to be terminated unless he was able to return to work imminently, and had authorised Mr Atkins to terminate his employment if this were not so.

[28] Mr Atkins communicated with Mr Burt by text message about the ending of his employment and the vacating of the house by the end of the month of July. Mr Atkins confirmed the trust would continue to waive the rent until then, but that Mr Atkins would need to pay the power owing, otherwise the trust would take this out of "what's left of your holiday pay".

[29] Mr Burt vacated the house at the end of the month. He was in a difficult position, as he had not been able to find new employment, and thus new housing. He said due to the pressure to move by the end of July, many of his possessions became rain damaged due to poor weather on the day he needed to leave. In the end, Mr Burt and his young daughter had to seek shelter with his adult son, who was only able to accommodate them at some difficulty and cost to himself.

[30] Mr Burt's son, Mr Desmond Burt, gave evidence at the hearing in support of this. He explained how difficult this had been for his father, practically, physically, and mentally.

[31] On 24 August 2022, Mr Burt received an email with his final payslip. It listed deductions made from his final pay which was made up entirely of holiday pay, including \$300 for house cleaning, \$192.67 for electricity from 20 July 2021 to 22 September 2021, and \$300 for two week's rent. At hearing, Mr Marjoribanks accepted that the deduction of monies for the electricity and rent was a mistake, and was contrary to what had been agreed between the parties.

[32] In respect of the house cleaning, he explained that \$300 had been paid to Mr Atkins' wife, who was also an employee of Tawaroa for this.

[33] Mr Burt sought legal advice and raised a personal grievance. This included a request for wage and time records, and holiday and leave records. Pay slips were provided following this investigation meeting.

Analysis

[34] I must first determine if Mr Burt was unjustifiably dismissed.

[35] Long-term incapacity due to injury or sickness may provide good reason for an employer to bring the employment relationship to an end. An employer is not required to hold a job open indefinitely, or for an unreasonably long amount of time depending on the needs of the business. The courts accept that after a certain point, an employer may “fairly cry halt”, and terminate the employment relationship.

[36] In all circumstances, including where an employee is suffering from a long term injury as Mr Burt was, this must be done fairly. In considering whether Tawaroa’s actions were what a fair and reasonable employer could have done in all the circumstances at the time of Mr Burt’s dismissal, I must apply the test of justification set out in s 103A of the Act.

[37] I am required to consider:

- a. Whether Tawaroa sufficiently investigated the information it had against Mr Burt before dismissing him; and
- b. whether Tawaroa raised the concerns that it had with Mr Burt before dismissing him; and
- c. whether Tawaroa gave Mr Burt a reasonable opportunity to respond before dismissing; and
- d. whether Tawaroa genuinely considered any explanations (if any) or alternatives before dismissing Mr Burt.

[38] In addition, I may take into account any other factor I think appropriate.

[39] Tawaroa did not sufficiently investigate the concerns it had about the possible duration of Mr Burt’s injury, how long it might realistically take him to recover, or its view that it needed a person to complete fencing work and no other tasks could have been performed by Mr Burt while he recuperated. When making the decision to have Mr Atkins dismiss Mr Burt if Mr Burt was not ready and able to work by about 4 July 2022, the trustees never spoke with Mr Burt at all.

[40] He was never asked to provide a detailed diagnosis or prognosis to enable the trustees to assess whether his job could have been kept open or if he could realistically

perform other tasks. Mr Burt simply provided the medical certificate prepared by his GP and updated his manager Mr Atkins as best he could as information became available to him. No one ever mentioned to him that his job was at least partially dependant on the information he was providing, or gave him the opportunity to provide more and better information.

[41] Tawaroa did not raise any of the concerns it had about Mr Burt's employment with him before deciding to dismiss. In fact, the trustees never communicated to Mr Burt prior to his dismissal on 4 July 2022 that his job was at risk. The trustees decided not to communicate this to him, even though they had been actively discussing the possibility of terminating his employment in meetings in April, May, and June. Mr Burt was kept entirely in the dark about the fact that these discussions were occurring, and led to believe that Tawaroa had accepted his need for sick leave.

[42] This is exacerbated by the fact that the trustees made the decision to dismiss Mr Burt based at least in part on assumptions made by the trustees about how long it might take for Mr Burt to access specialist care and then recover from it. The only explanation given as to why Mr Burt's health had been the subject of discussion between the trustees without the trustees ever seeking input from Mr Burt himself is that this was a management discussion and it was not "appropriate" for Mr Burt who was merely an employee to be involved.

[43] Having never spoken with Mr Burt, or even told him his job was at risk, there was no opportunity for Mr Burt to respond to the trustees' concerns before they made the decision to dismiss. This is confirmed as Mr Atkins did not enter into discussion with Mr Burt, he merely told him his job was at an end as he had been authorised to do.

[44] Likewise, there was no indication that any explanations by Mr Burt or alternatives to dismissal were ever considered. There was no room in the trustees' process for hearing from Mr Burt at all. Mr Marjoribanks pointed to the fact that Mr Burt's surgery and rehabilitation had in fact taken some time³, as justifying Mr Burt's dismissal.

[45] However, this mis-understands the obligations on Tawaroa as an employer. Tawaroa had obligations to let Mr Burt know that his job was at risk and why before

³ This was known at the time of the investigation meeting, but was of course, not known at the time of dismissal.

the final decision had been made, so that Mr Burt had an opportunity to consider and prepare. This did not occur. Tawaroa had obligations to inquire with Mr Burt about his situation directly, rather than relying on assumptions made by un-named trustees about what might happen next. This did not occur. Tawaroa had obligations to speak with Mr Burt about the matter as a whole, and to seriously consider whatever he might have wanted to tell them, including the potential impact of dismissal on him. Mr Burt did not have the opportunity to talk with the people making a decision about the future of his employment before they closed their minds to him.

[46] For completeness, I have also considered a suggestion by Tawaroa that Mr Burt agreed to his dismissal, and that it was a mutual arrangement. Tawaroa bases this claim on a written statement provided by Mr Atkins that, after Mr Atkins had told Mr Burt that the farm could not hold his job open, Mr Burt made a comment to the effect that he agreed that the farm would need to find someone else to do the fencing work.

[47] Mr Burt's evidence was that he did not "agree" to be dismissed, and he was told he was dismissed by Mr Atkins before they had discussed anything further. As already noted, Mr Atkins did not attend the investigation meeting to give evidence.

[48] Even looking only at the written statement provided by Mr Atkins, that statement shows that Mr Atkins dismissed Mr Burt prior to the alleged statement where Mr Burt agreed that the farm needed someone else to act as a fencer. Mr Atkins' written statement in fact supports Mr Burt's in-person evidence that Mr Atkins dismissed Mr Burt without any prior discussion. This is consistent with the evidence of Mr Marjoribanks that the trustees had already authorised Mr Atkins to dismiss Mr Burt at the 4 July meeting if Mr Burt was not able to return to work promptly. The facts do not support any claim by Tawaroa that Mr Burt "agreed" to be dismissed.

[49] For all these reasons, Tawaroa's dismissal of Mr Burt does not meet the test of justification set out in s 103A of the Act. Mr Burt has been unjustifiably dismissed. He is entitled to remedies accordingly.

Remedies

[50] Mr Burt has filed a Schedule of Loss received on 6 September 2023. In this, he claims compensation for humiliation, loss of dignity, and injury to feelings of \$30,000; as well as penalties for breaches of the Act, the Holidays Act 2003 and the Wages

Protection Act 1983; that some or all of any penalties awarded be paid to him; and costs and interest.

[51] Mr Burt gave evidence of the distress he suffered as a result of his dismissal. He found it difficult to eat and sleep properly, and he had to seek help from his own son for both himself and his daughter, which experience he found to be humiliating as a parent. Mr Burt's son gave thoughtful evidence about the impacts of dismissal on his father. He confirmed the changes he had observed in his father, and that there had been a long-term affect on Mr Burt. I accept Mr Burt's evidence as to the impacts on him.

[52] I have had regard to the real distress that Mr Burt suffered, including that from his perspective that the dismissal was sudden. I have also taken into consideration that given the serious nature of Mr Burt's injury, Tawaroa might have been able to properly and fairly bring Mr Burt's employment to an end (although it did not do so), and the evidence Mr Marjoribanks provided at the investigation meeting as to Tawaroa's financial situation. After considering and balancing these matters, my view is that the sum of \$20,000 is appropriate. Orders are made accordingly.

[53] Section 124 of the Act requires that I consider whether there were actions of the employee which contributed towards the situation that gave rise to the personal grievance; and if those actions require a reduction in remedies. This is not a situation in which any reduction is required. Mr Burt's employment came to an end as a result of an injury he suffered. There was no fault on his part that contributed to this situation. No reductions are made.

[54] At the investigation meeting, there was some discussion about instances where Tawaroa said Mr Burt had not attended work in a timely way, and where Mr Burt said the house provided by Tawaroa suffered from a rat problem. These matters were contested. I record here that I have considered these matters, but I find that neither of these matters were the cause of Mr Burt's dismissal, and if the employment had continued, were practical issues which could have been practically resolved between the parties. Nothing further arises from either of these matters.

Was there a breach of good faith and if so, should penalties be awarded?

[55] Section 4(1A)(c) of the Act:

requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[56] It is submitted that Tawaroa breached its obligations under this section by failing to provide Mr Burt with access to relevant information, namely that Tawaroa could not afford to keep his job open any longer, and that Tawaroa was considering terminating his employment for medical incapacity.

[57] I have already found that Mr Burt should have been informed of these matters, and that Tawaroa's decision not to communicate these matters to him were part of what rendered Mr Burt's dismissal unjustified. In other words, it is the same conduct that Mr Burt relies on for his personal grievance claim. I have found that this claim is made out and have awarded remedies in respect of this failure.

[58] In my view, it is not appropriate to also then award penalties in respect of this same conduct. I note that the court has found that this type of "doubling up" may be wrong in principle, and that where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of that same conduct⁴. I find that this is so in the present case. Accordingly, no penalties will be awarded in respect of this matter.

Failure to allow for bargaining over the employment agreement

[59] Mr Burt also claims that a breach of s 63A of the Act occurred when Tawaroa failed to allow for bargaining over the employment agreement. The evidence of Mr Burt was that he first arrived at the farm late at night/early in the morning. Mr Atkins and a trustee (Mr Te Aho) visited the house at about 7.00 am the next morning, bringing a written employment agreement with them. He was asked to sign immediately, and did so.

[60] Mr Marjoribanks agreed that Mr Te Aho had visited Mr Burt to obtain his signature on a written employment agreement on behalf of Tawaroa. He said that Mr Burt had not "come back with anything to raise" regarding the conditions, and that Mr

⁴ See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

Atkins told Mr Burt about the key conditions of duties, salary, and housing during previous verbal discussions.

[61] Considering the situation overall, I am not persuaded that Tawaroa gave Mr Burt a “reasonable opportunity to seek advice” on the employment agreement he was asked to sign, which is what is required by section 63A(c) of the Act. Mr Burt was not given the full written terms in advance of making a commitment to move on to the farm, and it is difficult to see how he could realistically have accessed professional advice on the written employment agreement without having to make a relatively significant time and travel commitment.

[62] However, I decline to find that the situation is serious enough to warrant a penalty. Nothing has flowed from this breach. There is no dispute between the parties about any term of the employment agreement, and this has not contributed to the ending of Mr Burt’s employment. No orders are made.

Breaches of the Wages Protection Act

[63] Mr Burt claims that breaches of the Wages Protection Act 1983 occurred when Tawaroa made deductions from his final pay to cover electricity, rent, and house cleaning. The charges for electricity and cleaning were not supported by proper invoices, and Mr Burt was not consulted about these charges in advance, as required by s 5(1A) of the Wages Protection Act 1983. In addition, Mr Burt had been told by both a trustee of Tawaroa and by Mr Atkins that he would not be charged for rent.

[64] In addition, the final payslip shows that these monies were deducted from Mr Burt’s holiday pay, which is in breach of s 27 of the Holidays Act 2003.

[65] Mr Marjoribanks responsibly accepted on the part of Tawaroa that the charges for electricity and rent were a mistake. I understand that, following the investigation meeting, Mr Burt was reimbursed for the deductions for electricity and rent. There is no indication that the monies deducted for cleaning have been reimbursed, and no invoice has been provided showing that Tawaroa has incurred any disbursement⁵.

⁵ At the investigation meeting, Mr Marjoribanks gave evidence that the cleaning was performed by another employee of Tawaroa. When I questioned whether this actually resulted in any disburseable expense to Tawaroa, as this appeared to be simply Tawaroa maintaining its asset being the house, Mr Majoribanks indicated that an invoice could be provided. Although Mr Majoribanks did provide several additional documents following the investigation meeting, there was no invoice for cleaning costs.

[66] These monies were deducted in breach of two separate Acts, both of which operate to protect Mr Burt in such a situation. Tawaroa should have been aware of these protections, which are well-known and well established in law. It is unfortunate that Mr Burt had to file proceedings to have this matter resolved.

Failures to provide wage and time and holiday and leave records

[67] It is submitted for Mr Burt that penalties should be awarded for Tawaroa's failure to provide either wage and time records and/or holiday and leave records, which were requested by his representative. Following the investigation meeting, Tawaroa provided several payslips showing Mr Burt's fortnightly pay.

[68] These documents fall short of being wage and time and holiday and leave records, as they demonstrate that Mr Burt was paid for a certain number of hours in a fortnight, but not the days and hours he actually worked, or details as to his entitlements to annual leave, public holidays/alternative holidays, and sick leave. Even then, Mr Burt has a complaint that the information in the pay slips is not sufficient to enable an accurate assessment of his annual leave entitlements to be made, and they were only provided after the investigation meeting following a direction of the Authority.

Penalties relating to deductions from wages and failures to provide records

[69] For the reasons set out above, I have concluded that Tawaroa breached its statutory obligations by making deductions from Mr Burt's final pay in breach of both the Wages Protection Act 2003 and the Holidays Act 2003, and it breached its statutory obligations to provide wage and time records⁶ and holiday and leave records⁷ on request.

[70] This means there are four breaches to which a penalty might apply. That said, I consider the deduction from wages should be treated as a single breach, as should the failure to provide records.

[71] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited*

⁶ Employer obligations to keep and to provide wage and time records are set out in section 130 of the Employment Relations Act 2000.

⁷ Employer obligations to keep and to provide holiday and leave records are set out in section 82 of the Holidays Act 2003.

and *Warrington Discount Tobacco Limited*,⁸ *A Labour Inspector v Prabh*,⁹ and *A Labour Inspector v Daleson Investment*.¹⁰ Section 133A requires that I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach, any vulnerability, and finally previous conduct.

[72] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arises in circumstances involving a distinct power imbalance.¹¹ That would appear the case here.

[73] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question¹², or failed to take reasonable steps to fulfil their legal obligations. In this case, Tawaroa took no efforts to properly inform itself of its legal obligations or how to meet them.

[74] With respect to the breaches' severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%, and record keeping breaches at 50%.¹³ There is no argument from either party for an alteration either way from this starting point though I note the loss is relatively minor (\$300). This suggests a reduction should be applied.

[75] There is no evidence of similar previous conduct by Tawaroa and finally I must consider consistency and proportionality. I also take into account that Tawaroa is essentially a small business with limited means.

[76] Having weighed these factors I conclude Tawaroa should be required to pay a penalty of \$4,000. The final issue is then to whom the penalty should be paid and here I note Mr Burt has, by Tawaroa's inaction, been forced to file proceedings and wait a considerable time to get what was rightfully his and should never have been in dispute given the amount involved. I also note that the lack of reliable records means that Mr Burt is completely reliant on Tawaroa to have correctly calculated and paid him his

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

⁹ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

¹⁰ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

¹¹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

¹² *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383.

¹³ See *Preet*, at paragraph [167] and paragraph [171].

Holidays Act entitlements, but is not able to cross-check this. He should therefore share the penalty and I consider half appropriate. Orders are made accordingly.

[77] In the circumstances where I consider there is room for some doubt about what needed to be paid and when, it is not appropriate to award interest. No orders are made.

Orders

[78] Tawaroa Farming Limited is to pay to Alan Burt within 28 days of the date of this determination:

- a. The sum of \$20,000 without deduction as compensation for humiliation, loss of dignity, and injury to feelings; and
- b. The sum of \$2,000 in penalties, with a further \$2,000 to be paid to the Crown account.

Costs

[79] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The Authority notes that the investigation meeting lasted for half a day.

[80] If they are not able to do so and an Authority determination on costs is needed Mr Burt may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Tawaroa would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁴

Claire English
Member of the Employment Relations Authority

¹⁴ Please note the Authority's Practice Note on costs available at: <https://www.era.govt.nz/determinations/awarding-costs-remedies/#:~:text=The%20Authority%20normally%20awards%20a,additional%20day%20of%20investigation%20meeting.>