

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 90
3131636

BETWEEN PETER CLARKSON
Applicant

AND HUGH OSWALD CLARKSON,
IAN NEAL CLARKSON AND
PETER RICHARD CLARKSON
AS TRUSTEES OF THE
GLENLYON TRUST
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Miriam Mitchell, counsel for the Applicant
Simon Mitchell KC, counsel for the Respondent

Hearing: 13 and 14 September 2022 in Napier and by AVL

Submissions Received: Up to and including 14 November 2022

Determination: 16 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Peter Clarkson was employed by the Glenlyon Trust (the Trust) to manage Glenlyon Station, owned by the Trust. His employment commenced in 1985 and continued until 10 March 2020. Before he commenced this employment, he had been employed by the RN Clarkson Trust from 1978, working on the same farm. He is also a trustee of the Trust, along with his brothers Hugh Clarkson and Ian Clarkson, more commonly known as Sam Clarkson. The farm was the main asset.

[2] On 17 September, Mr Clarkson was advised that his employment was terminated for misconduct on 12 weeks’ notice. His last day of employment was 10 March 2020. Mr Clarkson says his dismissal was unjustified and that in any event, he was owed some \$194,750.00 on account of holiday pay. He says he was

disadvantaged in his employment because of the receipt of a final written warning which he says was unjustified. Peter Clarkson also says that the Trust breached its duty of good faith when it commissioned a report on the farm without his knowledge.

[3] The Trust disputes the claims, saying that Peter Clarkson has no valid personal grievance. He was warned appropriately for prior misconduct and was subsequently dismissed for further misconduct. They also say that his claim for holiday pay should be declined because if holiday pay is owed, then Peter Clarkson has breached his duties as manager and should be held liable personally for any sum owing.

The Authority's investigation

[4] All evidence was given by way of oath or affirmation. For the applicant, evidence was given by Peter Clarkson, Shaun Maloney, a human resources and health and safety consultant Melissa Vining (by AVL), Matthew Lawson, a lawyer who had been instructed by Peter Clarkson regarding issues in respect of the Trust, Catherine Clarkson, Peter Clarkson's wife, and Richard Cranswick, a business consultant. For the respondent, evidence was given by Sam Clarkson, Hugh Clarkson, John Cannon, a farm consultant, David Robb, an HR consultant, and Dale Fleur Clarkson.

The issues

[5] The issues the Authority needs to determine are as follows:

- (a) Was Peter Clarkson unjustifiably disadvantaged in his employment by the issuing of a final written warning, and if so what remedies should flow?
- (b) Was Peter Clarkson unjustifiably dismissed by the Trust and if so, what remedies flow?
- (c) Is Peter Clarkson entitled to unpaid holiday pay and if so should interest be paid on that amount?
- (d) If Peter Clarkson was responsible for the payment of holiday pay what affect if any would that have on any holiday pay due to him.

[6] As permitted by s 174E of the Employment Relations Act (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.

[7] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4), the Chief of the Authority has decided exceptional circumstances existed to allow written determination of findings at a later date.

Background

Glenlyon Trust

[8] The Trust was established by a deed of trust dated 3 November 1980. The settlor of the Trust was Richard Neil Clarkson, the father of Peter Clarkson, Hugh Clarkson and Sam Clarkson. Richard Clarkson died in 2003. The substantial asset of the Trust was Glenlyon Farm, a property situated on State Highway 50 between Tikokino and Hastings.

[9] Peter Clarkson had commenced work on the farm in 1978. When the Trust was formed, he was employed by the Trust as manager of the farm from 1986 until his employment terminated in March 2020.

[10] The relationship between the trustees was not ideal. Because of the various issues the brother trustees had with each other, the Trust was at risk of being dysfunctional, and following an application to the High Court, an independent trustee was appointed who subsequently applied for a variation appointing him as a receiver instead, and amongst other things allowing disposal of the Trust's assets, namely the farm.

[11] In terms of Peter Clarkson's claims, the prior issues with the Trust do not impact on these claims, but do provide evidence as to the rapidly deteriorating relationship between the three brothers.

[12] As indicated above, the main asset of the Trust was the farm. Peter Clarkson was the only brother who worked on the farm with Hugh Clarkson and Sam Clarkson pursuing careers as a medical practitioner and businessperson respectively. As farm manager, Peter Clarkson's duties included all financial actions, budgeting, paying accounts, stock health and feeding duties, stock sales and purchase, equipment, fence and building maintenance, labour organising, liaising with banks and stock agents, pest

and weed control, compliance with the council rules, together with monitoring of water supplies and monitoring of electric fences for stock control. Since 2004, Peter Clarkson was on a salary of \$65,000.

[13] In 2018, Hugh Clarkson and Sam Clarkson, on behalf of the Trust, asked Peter Clarkson for a copy of his employment agreement. At this point in time, Peter Clarkson did not have a written employment agreement, so provided his brothers with a draft Federated Farmers' template agreement. Peter Clarkson did not immediately receive a copy of an agreement back but sometime later, after a disciplinary process was commenced in July 2019, a signed copy was returned to him, backdated to 1 January 2018.

[14] On 18 July 2019, Peter Clarkson received the letter from a company called Grow HR (document 0033). The letter contained a number of allegations, including that Peter Clarkson had failed to provide a health and safety briefing for his brother and a visitor who attended the farm on a pre-arranged visit, that there was no health and safety register available for visitors to the farm to sign in and out, that Peter Clarkson had been observed driving a tractor in paddock 10 not wearing a seatbelt and having no hearing protection, and that Peter Clarkson had been seen riding a two-wheel motorbike without a helmet.

[15] The letter went on to state that the use of all motorbikes and quad bikes on the farm was to be suspended until further written notice from the trustees and that Peter Clarkson was to only use a tractor for necessary farm transport on formed tracks or flat paddocks. The 18 July letter also included a statement that a further letter would follow raising further serious allegations, although there was no explanation as to what these were.

[16] On 8 August 2019 (document 0105), Peter Clarkson received a further letter, alleging:

- (i) John Cannon of Challenge Consultancy Limited had been engaged by the Trust to review the financial performance of the farm, and his report found that farming returns were poor and falling, and investment on the farm was minimal due to low farming income.
- (ii) The recent serious health and safety matters required immediate addressing and rectification by Peter Clarkson. The letter criticised Peter

Clarkson's responses having been through a third party, namely Peter Clarkson's power of attorney.

- (iii) That the employment relationship was in trouble and that the Trust wished to discuss these matters in the context of an employment relationship problem with proposed mediation.

[17] Although mediation had been arranged, on 10 September 2019 (document 111), Grow HR wrote further, requiring Peter Clarkson to attend a disciplinary investigation in relation to alleged serious misconduct, namely:

- (i) He had failed to diligently and professionally carry out his duties as farm manager;
- (ii) Had failed to take reasonable care of his own health and safety;
- (iii) Had disobeyed a lawful instruction when he was formally instructed to immediately suspend the use of all motorbikes and quad bike use on the farm;
- (iv) Had failed to obey a lawful and reasonable instruction to confirm in writing his full compliance with the above instruction

[18] The parties attended mediation on 10 October 2019 but matters remained unresolved, although there was agreement that the parties would attend further mediation.

[19] On 6 November 2019, Peter Clarkson was issued with a final written warning (document 068) and on 7 November 2019, he was requested to attend a meeting on 12 November 2019 at the offices of Grow HR. The purpose of the meeting was to discuss governance issues, the annual accounts for 2019, the use of quad bikes without dogs, and financial performance. Sam Clarkson emailed Peter Clarkson on 11 November 2019, adding further agenda items and also informing him that he was welcome to bring a support person (document 0169). Peter Clarkson's representative, Matthew Lawson, was unavailable on that date, but advised he was available to meet any time on 15 November 2019.

[20] However, Peter Clarkson was advised that the meeting would go ahead on 12 November 2019, and he was directed to attend. Because he did not have a representative, and because he had been invited to have one, Peter Clarkson took the

view he could not attend the meeting bearing in mind the background between the parties.

[21] On 12 November 2019, the meeting went ahead in his absence and following this, he received a further letter alleging that the business was business as usual, he had no right of representation at that meeting, and he had refused to attend it. He had disobeyed a lawful and reasonable instruction. He was asked to attend a meeting on 10 December 2019 at the Grow HR offices in Napier. At that meeting, Peter Clarkson was told he was to respond to Sam Clarkson's letter of 22 November 2019. Peter Clarkson advised that he did not think he had received that letter and he was then given a copy. The meeting adjourned to give Peter Clarkson time to consider the letter with his representative and he was told to provide a response that the same day.

[22] Shortly thereafter, on 17 December 2019, Peter Clarkson received a letter terminating his employment on notice. The reason for dismissal was because he was already on a final warning and he had not attended the 12 November meeting as directed.

[23] On 15 November 2019, Peter Clarkson, through his representative, raised his personal grievance. He also claimed holiday pay and overtime. The Trust was asked to provide wage and time records, together with holiday and leave records for the last six years. It appears that the only records that existed in respect of wage and time and holidays were those records kept by Peter Clarkson. It is noted that it is Trust's view that it was Peter Clarkson's obligation as farm manager to collate these records.

Evidence and discussion

Claim of unjustified disadvantage and unjustified dismissal

[24] It is fair to say that the relationship between Peter Clarkson and his brothers, the other trustees of the Trust, had soured. This breakdown of the personal relationship seems to have spilt over to the employment relationship. Perhaps the genesis for the subsequent dismissal started when Sam Clarkson emailed his brothers on 12 June 2019, advising of his intention to visit the farm property with another party, namely Pat Portas. The farm was to be sold and there is no doubt that the fact of the proposed sale deeply upset Peter Clarkson. Peter Clarkson expressed a concern that his brother and Mr Portas entered the farm without him knowing and without the necessary health and

safety briefing which he was responsible for. He asked how it could be prevented from occurring again.

[25] Sam Clarkson took issue with Peter Clarkson's statement about being unaware of the visit. He said he had let everyone know, especially the two other trustees but accepted Peter Clarkson had not replied or acknowledged receipt of the email. He then made a number of observations, namely:

- (a) He and his guest saw Peter Clarkson in paddock number 10 on the tractor and noted he was not wearing a seatbelt, and had no hearing protection on.
- (b) Sam Clarkson said that he had a degree in agriculture and a lifetime of experience on Glenlyon, had in depth knowledge of health and safety requirements of the modern era, and that he had given the health and safety induction. Sam Clarkson stated he saw a myriad of blatant breaches; namely there was not one safety sign on the entire property, no sign in sign out register, Peter had crashed a two-wheel drive quadbike on the open hills, and he observed Peter Clarkson riding a two-wheel motorbike up the hills in paddock 10 without a helmet.
- (c) Sam Clarkson also noted that the workshop was left wide open and unattended with tools, chemicals and hazards left in hazard piles, and that he had observed a large pile of dead sheep

[26] Sam Clarkson stated these health and safety issues that he had now become aware of, and of which as trustee he may have had some liability, needed to be addressed. He wanted the immediate cessation of all quad bike and motorbike activities on the farm, only four-wheel drive tractors with a cab and seatbelt worn to be used around the farm but chasing stock in vehicles was to stop immediately, that answers be provided regarding the dead sheep, that there needed to be a report regarding the motorbike/quad incident, including any crash, immediate action was to be taken to secure all dangerous goods in the workshop, etcetera, no vehicle or machinery was to be left unattended, there needed to be warning signs regarding hazards, and the dead sheep needed to be buried. Ian Clarkson noted he had no confidence in Peter Clarkson to manage Glenlyon in a safe and professional manner.

[27] Sam Clarkson's written response to Peter Clarkson was included in the evidence and it has to be said this document too, showed the soured relationship between the brothers. In contradicting Peter Clarkson's evidence that he was unaware of the visit, Sam Clarkson stated:

There was absolutely no misunderstanding here.

And further:

....

His words to us when he saw us in paddock 10 and asked why he hadn't been at the workshop to do his precious H&S induction

...

didn't you see the quadbike tangled in the fence?

And further:

The dead sheep. Again, bullshit! Is Peter deliberately lying here, or is he in some kind of denial?

And finally:

any H&S advisors must be in contact with Hugh and I, Peter's breaches should require his stepping aside from any investigation of himself. The very point that he appears to think he has done nothing wrong just shows how far away from reality he is."

[28] On 18 July 2019, Peter Clarkson received a letter from a firm titled Grow Human Resources Limited. The letter was signed by David Robb, Director/Employee Relations. The letter advised Peter Clarkson that the company had been engaged by the Trust, although Peter Clarkson, as the trustee had no knowledge of this. Grow HR's letter referred to Sam Clarkson's visit. The letter stated that Sam Clarkson had observed the same four things set out in the original email, namely:

1. You failed to arrange and attend and provide a health and safety briefing for both Sam Clarkson and a visitor attending a pre-arranged and pre-notified visit to the farm (Pat Portas).
2. No health and safety register was available or able to be located for the farm visitors to sign in and out.
3. You were observed driving a tractor in paddock 10; not wearing the seatbelt and having no hearing protection.
4. The same day, you had an incident with a 2WD quad bike, and you were then later observed riding a two-wheel motorbike without a helmet.

[29] The letter went on to state:

The above observations give the trustees no confidence that you are observing your obligations to:

- Take reasonable care for your own health and safety and that your actions or inactions do not harm the health and safety of others
- Cooperate with any reasonable health or safety policy or procedure of the PCBU and to comply with any reasonable instruction given by the PCBU (e.g. using personal protective equipment)

[30] The letter then instructed Peter Clarkson to immediately suspend the use of all motorbike and quad bike use on the farm until further notice.

[31] Peter Clarkson was then advised, “We will be writing to you in the next few days to formally raise a number of potentially serious allegations in relation to health and safety and your related management practices and alleged non-compliances by you as the farm manager at Glenlyon”.

[32] The letter from Grow HR appears to have been written with no input from Peter Clarkson, yet makes adverse findings such as “The above observations give the trustees no confidence that you are observing your obligations ...”

[33] There appears to have been no proper discussion with Peter Clarkson regarding any conflict he may have as a trustee and employer when dealing with an employment issue involving himself. The same however can be said in respect of Sam Clarkson. This is not meant as a criticism of these two brothers but rather an observation of the difficulties facing the parties during a difficult time.

[34] Peter Clarkson responded through his solicitor, Mr Lawson, on 25 July 2019. His solicitor’s reply noted that the parties were in substantial dispute on matters relating to the Trust. Peter Clarkson also took issue with the appointment of Grow Human Resources Limited, on the basis the Trust could not appoint them because he as a trustee had no input into it, and accordingly, it was impossible for the trustees to act unanimously.

[35] Mr Lawson’s letter also raised allegations of workplace bullying and abuse of the employment relationship in actions purporting to be pursuant to that employment relationship for ulterior purposes.

[36] Mr Lawson also noted in his letter that whilst an employment agreement had been signed by Peter Clarkson, he had never been provided with the employment

agreement signed by other trustees, despite numerous requests for a copy of his agreement.

[37] During this time, there were other trails of correspondence regarding the authority of only two of the trustees of the Trust to engage Grow HR. Whilst I do not consider I need to take such correspondence into account in considering Mr Peter Clarkson's claims, I do note they give strong evidence of the growing animosity between the parties.

[38] On 8 August 2019, Grow HR wrote again to Peter Clarkson. The letter again referred to the employment agreement Grow HR said was dated and signed by Peter Clarkson on 1 January 2018. It appeared to acknowledge that Peter Clarkson did not have a copy of the agreement, stating "A full copy of your employment agreement signed by the trustees will be provided to Mr Lawson, who is acting for you." The evidence from the parties was clear that the trustees did not sign the agreement on 1 January 2018. It was signed much later.

[39] More importantly, the 8 August letter referred to a serious employment relationship problem. Reference was made to the report from John Cannon of Challenge Consultancy Limited, who had been engaged by the Trust in November 2018 to review the financial performance of Glenlyon, to assess the farming policies, and to benchmark the farm's production and financial performance against industry KPIs. The letter referenced the recent health and safety matters referred to in the earlier correspondence. It also acknowledged Peter Clarkson's claims of workplace bullying.

[40] The letter put forward the option that the parties use the mediation services of the Ministry of Business, Innovation and Employment. The purpose for this was, as Mr Robb says in the 8 August letter: "This is to assist with the employment relationship problem now being raised by your employer, and to address the fragile and currently untenable nature of this relationship." The letter did not address or discuss any potential difficulties which may arise from Peter Clarkson's dual role as both employer and employee.

[41] On 10 September 2019, Grow HR wrote a further letter to Peter Clarkson, this time requiring him to attend a disciplinary investigation meeting for potential serious misconduct. The letter referred to previous concerns, including the report from John Cannon, who had been engaged by the Trust in November 2018. It also mentioned a

failure to arrange and attend to provide a health and safety briefing when Ian Clarkson and Pat Portus attended the farm. It also contained the allegation that Peter Clarkson had failed to have a health and safety register readily available or locatable for farm visitors to sign in and out, and also referred to the issues in respect of driving a tractor without a seatbelt and no hearing protection, and the incident with a 2WD quad bike and riding a motorcycle without a helmet.

[42] A further allegation was added, namely that Peter Clarkson had disobeyed a lawful instruction when he had been told to immediately suspend the use of all motorbikes and quad bikes on the farm until further notice. It was said that Peter Clarkson had disobeyed a lawful and reasonable instruction to confirm in writing his compliance with the instruction. The letter signalled that dismissal could occur if a finding of serious misconduct was determined. The meeting was scheduled for Wednesday 18 September 2019 at the offices of Grow HR.

[43] Mr Lawson emailed on behalf of Peter Clarkson, advising he was unable to attend the meeting on 18 September. Grow HR emailed Peter Clarkson's solicitor, raising concerns about Peter Clarkson's mental and emotional state. They asked for a response by no later than Friday 20 September. After not receiving a reply, Grow HR phoned Mr Lawson's office and learned he was out of the office until 25 September.

[44] On 24 September 2019, Grow HR wrote again, this time to Mr Clarkson. The letter advised "a number of absolute conclusions". The first was a finding that there had been inordinate delays, non-responsiveness, and obstruction. The second was a complaint that Peter Clarkson had not been communicative or responsive, along with an accusation that Peter Clarkson's lawyer had also caused unacceptable delay. The letter however gave Peter Clarkson until 10am on Wednesday 25 September 2019, the next day, to respond to all matters raised in Grow HR's 10 September letter, advised after that deadline, "your employer", which in essence meant two of the three trustees would consider all information available to them and would determine any findings and outcome which could include dismissal.

[45] Mr Lawson responded on behalf of Peter Clarkson to the letter, claiming it was inaccurate and unreasonable. He further stated the raising of performance issues was a continuation of harassment and bullying, and that health and safety issues had already been addressed in earlier correspondence. He highlighted that the demand that Peter

Clarkson not use a farm bike on the farm demonstrated the unreasonable and harassing stance that was being taken. His letter ended saying, “We intended dealing with this on 10 October, which I understand to be the confirmed date for mediation.”

[46] Grow HR responded on 2 October 2019 to Mr Lawson. The letter, amongst other things, stated:

The status of this matter is that the trustees have now established findings of serious misconduct in relation to a number of the allegations raised under a disciplinary head initially in the letter of 10 September. They have placed those findings on record, and do not resile from making those findings, having given Peter Clarkson more than reasonable and ample opportunity to state his case and to respond to these allegations, either at a meeting or in writing – or both should he have elected to do so. He has elected to remain silent in every respect since the allegations were put to him on 10 September, knowing full well these allegations were raised in the context of a formal disciplinary process.

[47] The letter then gave Mr Peter Clarkson until 7 October, which was a Monday, to make any submissions regarding penalty. In essence, Peter Clarkson was given two days to respond. This is because Grow HR’s email of 2 October was emailed at 5:58pm, which means Peter Clarkson could not have seen it until Thursday 3 October at the earliest.

[48] The Trust also wrote on 2 October 2019 to Peter Clarkson, setting out its findings of serious misconduct. The letter signed by Hugh Clarkson contained the statement, “We have made findings that you have intentionally and knowingly breached the terms of your employment agreement, an agreement you provided as having been read and understood by you”. It reaffirmed that the Trust wanted submissions as to whether or not Peter Clarkson should be dismissed. Ultimately on 6 November 2019, Peter Clarkson was issued with a final written warning.

[49] It must be said that issuing the warning under these circumstances was not the action of a fair and reasonable employer. The warning was based on the findings the Trust made and outlined in its 2 October 2019 letter. Peter Clarkson was not given a proper chance to respond to any of these allegations but in any event, the evidence before the Authority, showed that right from the beginning when Sam Clarkson and Mr Portas visited the farm, the findings of misconduct were predetermined. Peter Clarkson had run the farm for decades without any oversight. Whilst of course it was open to the Trust to impose new methods of operation especially in respect of health

and safety, it is difficult to see how a unilateral approach such as the one it took, could satisfy the requirements in s 103A of the Act.

[50] On 7 October 2019, Mr Lawson wrote to Grow HR, refuting the allegations and advising that Peter Clarkson did not accept findings of misconduct and serious misconduct.

[51] In the interim mediation was held, which obviously did not resolve matters between the parties. On 6 November 2019, Peter Clarkson received the final written warning.

[52] Also on 6 November 2019, Peter Clarkson was asked to attend a meeting covering governance issues, annual accounts, health and safety, and financial performance. The email further advised they were going to discuss issues relating to Peter Clarkson's employment by the Trust. The purpose of the meeting was to establish a working employment relationship between Peter Clarkson and the Trust, and the other two trustees asked for Peter Clarkson's consent to record the meeting. On 11 November 2019, Mr Lawson emailed advising that the date was not suitable because he would not be able to attend as a support person and asked for a different date. Mr Lawson also pointed out that the matters to be covered had already been raised in a disciplinary context. Grow HR emailed Mr Lawson, saying that as the matter was not a disciplinary nor a performance management process, a support person being present was unacceptable. It went on to say that the employer had agreed to a representative being present if that was Peter's wish. This statement is quite important because later on the Trust resiled from this.

[53] Because a support person/representative was unavailable, Peter Clarkson did not attend the meeting, and on 13 November, Peter Clarkson received a further email from Trust asking for an explanation on three matters, one of which was why he had not attended the meeting. Bearing in mind Peter Clarkson's brothers knew full well why he was not attending, namely because his representative was not available, this statement seems disingenuous. It was clear the meeting would canvass issues already raised in the disciplinary context. In any event, because of the rapidly deteriorating relationship between the brothers, this is a case where Peter Clarkson was certainly entitled to have representation present.

[54] Peter Clarkson was advised that a further meeting would be set up in order to hear his explanations, and this was to occur by Friday 15 November at the latest. Peter Clarkson was also advised, "... Your future employment is now in jeopardy ..."

[55] Also on 13 November, Peter Clarkson received a document headed, 'Employee requirements to provide information' and this letter set out what information was required, including copies of employment agreements, annual accounts for 2019/2020 YTD financial and farm performance records. This letter ended with the statement that the information was to be received no later than 4pm on Friday 15 November 2019 at the very latest. It did not say what would happen if this did not occur. On 13 November, Mr Peter Clarkson also received a letter from Trust seeking an explanation as to why he had not attended the prior meeting, and as indicated, even though the Trust knew the reasons for this, namely that Peter Clarkson had been unable to have representation there.

[56] On 15 November 2019, Mr Lawson forwarded a personal grievance letter on behalf of Peter Clarkson to the Trust. The letter also offered explanations in respect of the 12 November meeting with Mr Lawson pointing out he could not attend on that date and that it was disingenuous to see that meeting as a business per usual meeting, bearing in mind prior communications between the parties. On 20 November 2019, there was an exchange between Sam Clarkson, Hugh Clarkson, and John Cannon. John Cannon was offering to run the farm accounts through his database, which would compare performance against the average and adjust for livestock valuations. Interestingly, Sam Clarkson stated:

I'll ask the dumb question ... something I've never understood. The annual accounts have always mystified me due to stock revaluations. The revaluations fog out the real cash situation, often the revaluation ... either up or down ... is greater than the cash amount. For dumb ol' me, that means I've absolutely no idea of Glenlyon's profit ability. Asking Peter to explain has brought the answer, "I don't understand it either, they're just book entries, don't worry about them".

For me, that's the major reason why I've let the situation drag out for so many years. Remember, John, you are charging us (Trust) for this analysis.

[57] The point to note here is that on 20 November, well after the complaints about the financial management had been made, neither Sam Clarkson nor Hugh Clarkson understood the annual accounts. There is also the admission, at least from Sam Clarkson, that the situation had been like this for many years. Further, Mr Cannon had

attached the first draft of the 2019 financial statements for the Trust, stating that overall, it was a good result. He noted that the Trust had an operating surplus before tax of some \$232,259.00.

[58] On 22 November 2019, the Trust wrote again to Peter Clarkson with a letter headed, 'Disciplinary Issues'. The letter raised the following allegations in the disciplinary context, namely:

- (a) The failure to attend the meeting as directed; and
- (b) The failure to provide information sought by 15 November 2019.

[59] Peter Clarkson was warned that a consequence could be dismissal. A meeting was proposed for Wednesday 4 December at the offices of Grow HR, with the purpose being to hear Peter Clarkson's response to the allegations.

[60] Mr Mitchell KC was instructed by Trust with respect to the personal grievance raised by Peter Clarkson. On 2 September, Mr Lawson's office emailed Mr Mitchell, advising that Mr Lawson could not attend the meeting on 4 December because his young daughter was having surgery. Alternate dates were canvassed, and it was ultimately agreed that the meeting would occur on 10 December 2019.

[61] On 10 December 2019, the meeting proceeded. Mr Lawson stated he believed it was a business-as-usual meeting. In other words, Mr Lawson believed that this was a meeting replacing the one which he couldn't attend, not a disciplinary meeting. It was pointed out to him that the 10 December meeting indeed was a disciplinary meeting. Mr Lawson complained that the confusion had been because the employer had been writing to different people. I accept it was confusing. Some letters were from Grow HR and others were from trustees. Some went to Mr Lawson, copied to his client, and others went to Peter Clarkson directly. The meeting was adjourned for a brief period of time and reconvened at 9:07am. Mr Lawson could not confirm whether or not he and his client had seen the letter setting out the allegations and arranging the meeting.

[62] Following the meeting, the two trustees, Hugh Clarkson and Sam Clarkson, wrote to Peter Clarkson. They outlined the background to the matter from their perspective, namely that Peter Clarkson had been issued with a final written warning on 15 November 2019, and again did not attend the farm management meeting as he

was told to do, that Mr Peter Clarkson had not provided the other information requested, that following commencement of the meeting on 10 December, there was an adjournment until a copy of the letter requesting the meeting was provided to him, that Peter Clarkson did not attend the rest of that meeting, but Mr Lawson and Mr Cranswick attended on his behalf. The letter then advised that as a result, the two trustees felt they were in a position to make a decision regarding the allegations set out in the letter of 22 November. The letter advised that the two trustees regarded the failure to attend the 12 November 2019 meeting as misconduct, and that the matter was serious. Given that there was a final warning in place, dismissal could be an appropriate sanction. The letter advised that the preliminary decision was dismissal, but Peter Clarkson was given until the close of business on 16 December 2019 to make any submission. On 16 December 2019, Mr Lawson wrote to the Trust on behalf of Peter Clarkson. He outlined that the purported failures were:

- (a) A failure to attend the meeting as directed; and
- (b) A failure to provide information sought by 15 November 2019.

[63] He stated that his client had provided a complete response to the information requested. He noted that a request for the Trust to provide wage and time records and holiday records had not been actioned.

[64] On 17 November 2019, Hugh Clarkson and Sam Clarkson wrote to Peter Clarkson, again advising:

You were asked to come to a business-as-usual meeting to take place on 12 November 2019. This was not part of any disciplinary process. The purpose of the meeting was to discuss day to day farming issues that arise. It was made clear to you that you were required to attend. You did not do so. Given that there was at the time a final written warning in place, it is considered that this is misconduct and that in the circumstances, the action is sufficient to justify the determination of your dismissal.

You are employed under an employment agreement that provides for 12 weeks' notice. Your dismissal will take place at the end of your 12 week notice period, being 10 March 2020.

Hurt and humiliation

[65] Peter Clarkson gave evidence that he had lived and worked on the farm since 1985. He found the direction not to use motorbikes or quadbikes extremely stressful as they were an absolutely necessary part of his work. He gave evidence that he had to seek considerable medical advice and support as a result of his dismissal and treatment.

He required ongoing help from his own General Practitioner as he had trouble sleeping and was suffering from frequent emotional attacks.

[66] In the six months following the termination of his employment, Peter Clarkson says he earned less than he had been earning in his role as a farm manager, and he set out the difference in his income over that six-month period in Document 0296. The difference between what he had earned in the Trust and what he had earned in the six months following his termination was some \$16,336.22.

[67] In the statement of problem Peter Clarkson claimed a sum of \$194,750 for outstanding holiday pay plus interest.

[68] Trust resisted this claim stating that as the farm manager, the preparation of wage and time records and holiday and leave records, rested with Peter Clarkson. They said that the entire time that he had been at the farm, he had never once said that any monies were owing.

[69] However, none of the witnesses for Trust could dispute the figures claimed by Peter Clarkson. It is fair to say they treated the figures with a great deal of suspicion, with at least one of the Trust's witnesses saying there were innumerable times when they observed Peter Clarkson off the farm over the years. Accordingly, it must be able to be inferred that he was taking some holidays. Being seen off the farm, is not persuasive evidence he was taking leave.

[70] There are however two major problems to Glenlyon's defence of Peter Clarkson's claim. First, under s 132 of the Act, the Authority may unless the Trust can prove the claims are incorrect, accept as proved all claims by Peter Clarkson in respect of the wages actually paid to him, and the hours, days and time worked by him. The Holidays Act 2003 has a similar provision in s 83 which provides that where there has been a failure to keep or provide access to holiday and leave records, and after hearing evidence the Authority is satisfied that an employer has failed to comply with s 81 or 82 of the Holidays Act 2003 and that failure has prevented a claimant an accurate claim, the Authority may make a finding to that effect.

[71] It is then open to the Authority to accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay or leave pay actually paid to the employee and annual holidays, public holidays, sick leave,

bereavement leave, or family violence leave actually taken by the employee. Secondly, despite the evidence of Trust being that it was Peter Clarkson's responsibility to keep those records and therefore he should not be able to rely on his own default, the signed employment agreement provides otherwise stating clause 17 that time and wage records including holiday and leave records were the responsibility of Trust.

[72] Accordingly, as there is no evidence to contradict Peter Clarkson's claims in that regard, I accept as proved his claim for unpaid holiday and or leave. In that regard, Peter Clarkson has claimed:

- (a) Outstanding holiday pay in the sum \$74,375.00.
- (b) Payment for time worked on public holidays as well as 321 days of alternative holidays in the sum of \$120,375.00.
- (c) Peter Clarkson has also claimed reimbursement for lost wages for six months in the sum of \$16,336.22.

[73] At the end of the investigation meeting, Peter Clarkson dropped his claims for penalties, acknowledging that under the circumstances a penalty was likely to be inappropriate in a situation where he was both the employee applicant, and employer as one of the trustees of the Glenlyon Trust.

Conclusion and orders

[74] The final written warning Peter Clarkson received on 2 October 2019 was unjustified. The evidence indicates that the warning itself came about after Peter Clarkson complained about the farm visit. Without in any way saying that the health and safety concerns were not real, the evidence before the Authority shows there was a high degree of predetermination, coloured by an ever-worsening relationship between Hugh Clarkson, Sam Clarkson, and their brother, Peter Clarkson. There was never any proper investigation of the allegations and, as indicated above and in this determination, the relationship between the two brothers and Peter Clarkson had deteriorated to the point that those issues had spilt over into the employment relationship.

[75] Peter Clarkson's dismissal was not something a fair and reasonable employer could have done in all the circumstances at the time. The Trust justified the termination on the failure to attend an alleged business-as-usual meeting on 12 December 2019. It considered because there was a final written warning in place, that this misconduct was

sufficient to justify the dismissal. Peter Clarkson had advised that he would not attend the meeting because his legal representative was unavailable that day. His lawyer, Mr Lawson, had also advised the Trust that he could not attend and gave reasons why. He also offered to meet at a later date. Peter Clarkson had previously been given the opportunity to have a representative present. To categorise the meeting as “business as usual” against a background of the disciplinary path the Trust was taking and the ever-worsening relationship between Peter Clarkson and his brothers, is disingenuous. The dismissal was unjustified.

[76] Peter Clarkson gave evidence regarding the loss of dignity, injury to feelings, and humiliation he suffered as a result of the dismissal. He also gave evidence as to the significant hurt he felt because of the farm’s sale. This of course is not the fault of his employer. Under the circumstances, I consider an award of \$20,000.00 in terms of s 123(1)(c)(i) of the Act to be an appropriate award.

[77] The Trust was unable to rebut Peter Clarkson’s claims for unpaid holidays or his claim for working on public holidays, and the claims he makes in that regard are accepted by the Authority. Having said that, I consider reimbursement for lost wages should be for three months, not the six months claimed. Further, under the circumstances where Peter Clarkson could have advised the Trust and should have advised the Trust earlier, regarding its liability for unpaid holidays, it is not appropriate to award interest on the sum owing.

[78] The s 124 of the Act requires the Authority when it has found that an employee has a personal grievance, to consider the extent to which the actions of an employee have contributed towards the situation that gave rise to the personal grievance—and, if so, to reduce remedies accordingly. In this case, however, I find that there has been no contribution to the dismissal, or indeed to the final written warning. Whilst the Trust may consider, Peter Clarkson should have advised it much earlier in his employment that he had accumulated a significant number of leave days. Nonetheless that has no impact on leave due.

Orders

[79] Hugh Clarkson, Ian Clarkson, and Peter Clarkson as trustees of the Glenlyon Trust, are ordered to pay Peter Clarkson the following within 28 days of the date of this determination:

- (a) The sum of \$8,168.11 as reimbursement for lost wages following his dismissal;
- (b) Compensation for loss of dignity, injury to feelings, and humiliation pursuant to s 123(1)(c)(i) of the Act, of \$20,000.00;
- (c) Outstanding holiday pay in the sum of \$74,375.00;
- (d) Payment for time worked on public holidays, together with 321 days of alternative holidays in the sum of \$120,375.00.

Costs

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

[81] If they are not able to do so and an Authority determination on costs is needed Peter Clarkson 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 [other party name] 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.

[82] 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.¹

Geoff O'Sullivan
Member of the Employment Relations Authority

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