

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 49
5559490

BETWEEN NATASHA DONALDSON
Applicant

A N D GLYNN BRICK trading as
BELLFIELD
THOROUGHBREDS
Respondent

Member of Authority: Nicola Craig

Representatives: Ken Usmar, Advocate for the Applicant
Glynn Brick, Respondent

Investigation Meeting: 19 November 2015 at Hamilton

Date of Determination: 19 February 2016

DETERMINATION OF THE AUTHORITY

- A. A declaration is made that Ms Donaldson has an unjustified disadvantage personal grievance due to Mr Brick's failure to provide her with a written employment agreement. No other remedies are awarded.**
- B. Mr Brick must pay Ms Donaldson within 28 days of the date of this determination:**
- (i) **\$649.02 for Kiwisaver contributions plus interest at the rate of 5% per annum from 28 May 2015 to the date of payment; and**
- (ii) **\$1610.72 gross for holiday pay.**
- C. Ms Donaldson and Mr Brick mutually agreed that Ms Donaldson's employment would be terminated. There was no dismissal.**
- D. Costs are reserved, and a time table set for any application for costs.**

Employment relationship problem

[1] Natasha Donaldson (Ms Donaldson) alleges that she was subject to unjustified disadvantages by her former employer Glynn Brick (Mr Brick), trading as Bellfield Thoroughbreds, and that she was unjustifiably dismissed by him. There were also claims for unpaid holiday pay and for Kiwisaver contributions not being made. Mr Brick denies the claims.

Issues

[2] The issues for investigation and determination by the Authority are:

- (i) Does Ms Donaldson have an unjustified disadvantage claim regarding not being provided with a written employment agreement, and if so what remedies (if any) should be awarded;
- (ii) Does Ms Donaldson have a claim regarding the non-payment of Kiwisaver employer contributions on her behalf and/or the non-deduction of employee contributions;
- (iii) Does Ms Donaldson have a claim regarding the non-payment of holiday pay on the termination of her employment;
- (iv) Was Ms Donaldson dismissed by Mr Brick or was the employment terminated by mutual agreement;
- (v) If there was a dismissal, was it justified as something which a fair and reasonable employer could have done;
- (vi) If the dismissal was unjustified what remedies should Ms Donaldson receive; and
- (vii) Should either party contribute to the costs of representation of the other party?

Employment

[3] Mr Brick operates a small business training horses. Mr Brick usually employed a few casual or part time employees, who tended to determine their own patterns of work.

[4] The business was operated on a farm owned by Ms Jayne Baker and her partner, who also lived on the property. Mr Brick lived in a cottage on the farm. Ms Baker also ran animals on the farm, and she and Mr Brick tended to work on their animals together. Ms Baker attended the investigation meeting as a witness and support person for Mr Brick. They have known each other for about eight years.

[5] In about April 2013, Ms Baker, on behalf of Mr Brick, advertised a position of rider/groom on a job website. Ms Donaldson applied for the job but was unsuccessful. Ms Kathryn Benaim was appointed to that position. Ms Beniam gave evidence at the investigation meeting.

[6] From May 2013, Ms Donaldson started working as a rider/groom for Mr Brick. There was no letter of appointment or written employment agreement provided by either prior to her starting work or once she had started.

[7] The parties agreed that Ms Donaldson would work part time hours to fit around her children's needs, and be paid \$15.00 gross per hour.

[8] After some time the parties formed a personal relationship and Ms Donaldson moved into the cottage. Ms Donaldson's children also spent time there.

[9] At the end of June 2014 Ms Donaldson injured her wrists when working. She continued to work, although largely without the riding component of the job.

[10] In September 2014 Ms Donaldson says that she had "some sort of reaction" following on from the injury to her wrists and began getting widespread pain in her feet and legs. This resulted in her stopping work all together and being on ACC. Ms Donaldson was given personal assistance by Mr Brick and Ms Baker. There was difficulty in diagnosing the cause of Ms Donaldson's condition. After a while some of those around her began to have doubts about the validity of her condition.

[11] Ms Donaldson's employment finished in late 2014 as described below.

First Issue – Employment Agreement

[12] Does Ms Donaldson have an unjustified disadvantage claim regarding not being provided with a written employment agreement, and if so what remedies (if any) should be awarded?

[13] Although Ms Donaldson clearly had a right under the Employment Relations Act 2000 (the Act) to a written agreement, the elements of a personal grievance claim must still be established.

[14] Mr Brick as the employer had obligations under s63A of the Act when bargaining for an employment agreement with Ms Donaldson to provide her with a copy of the intended agreement under discussion¹. He was also obliged to retain a copy of a signed employment agreement under s64². There were also obligations under s65 to have a written employment agreement with certain content³. Mr Brick said that staff now have employment agreements but accepted that those things did not occur in 2013.

[15] I find that the failure to provide and retain a written employment agreement, without particular justification, when required to do so by the Act, is not what a fair and reasonable employer would do, and thus amounted to an unjustified action by Mr Brick. It was an action which was regarding Ms Donaldson's employment, as required by s103 (1)(b) of the Act.

[16] Ms Donaldson said that not having a written agreement disadvantaged her by creating uncertainty for her about her rights, including the notice period. There was no evidence that Ms Donaldson suffered any financial loss as a result.

[17] I find that Ms Donaldson was subject to an unjustified disadvantage personal grievance regarding Mr Brick's failure to provide her a copy of a written agreement. Ms Donaldson has effectively sought a declaration to that effect, which I have now made. No remedies were specifically sought in relation to this grievance. There is not sufficient evidence to support an order for compensation.

[18] The answer to the first issue is that Ms Donaldson was unjustifiably disadvantaged. No other remedies are ordered.

Second Issue - Kiwisaver

[19] Does Ms Donaldson have a claim regarding the non-payment of Kiwisaver employer contributions on her behalf and/or the non-deduction of employee contributions?

¹ S63A(2)(a)

² S64 (1).

³ S65 (1)(a).

[20] Ms Donaldson claims that she was unjustifiably disadvantaged, as despite her requests, Mr Brick did not make employer contributions to her Kiwisaver account, nor did he deduct money from her wages as her Kiwisaver employee contribution. She claims a 3% employer contribution (\$649.02), and a 3% (\$649.02) employee contribution, totalling \$1298.04 plus interest.

[21] Ms Donaldson said that she was a Kiwisaver member when she started working for Mr Brick and that early in her employment, she provided a form to Mr Brick indicating her Kiwisaver membership and, as she was entitled to do, requested for contributions to be made. Mr Brick accepted that he got a form about Kiwisaver from Ms Donaldson, but says that it was blank. That form was not produced.

[22] Mr Brick said that he now has a bookkeeper to manage staff payments, but when Ms Donaldson was employed he was personally paying the staff wages. He acknowledged that he may have been at fault regarding Ms Donaldson's Kiwisaver situation. There was no indication that Ms Donaldson received payslips, which may have assisted in determining whether her Kiwisaver contributions were being deducted from her pay. Mr Brick later appointed a bookkeeper to manage staff payments.

[23] I find that knowing Ms Donaldson wished to have Kiwisaver contributions made, Mr Brick effectively parked the issue and did not progress making deductions. There was no agreement, either written or verbal, between the parties that Ms Donaldson did not want contributions made for her, or that the employer's contributions were offset as part of her salary package.

[24] In relation to the second issue, I find that Mr Brick was required to make employer contributions to Ms Donaldson's Kiwisaver account and that he breached that obligation (*Rittson-Thomas (t/a Totara Hills Farm) v Davidson*⁴).

[25] I order that Mr Brick reimburse Ms Donaldson for the employer contributions to Kiwisaver which he should have made on her behalf, namely \$649.02. He must also pay interest at the prescribed rate of 5% on that sum from the date when Ms Donaldson filed her proceedings (28 May 2015) until the date of payment.

⁴ [2013] ERNZ 55

[26] I do not accept that Ms Donaldson should be awarded money for employee contributions to Kiwisaver which were not deducted from her wages. She had the benefit of that money and should not be reimbursed for it⁵.

[27] Although Ms Donaldson framed this Kiwisaver claim as a disadvantage claim, I consider that it is more appropriately dealt with by ordering reimbursement of the employer contributions. Ms Donaldson's evidence of disadvantage from non-payment was primarily of the financial disadvantage, which is covered by the order above. There was little evidence of what could be described as hurt and humiliation effects, such as is required to make an under s123(1)(c)(i) of the Act.

Third Issue - Holiday Pay

[28] Does Ms Donaldson have a claim regarding the non-payment of holiday pay on the termination of her employment?

[29] Ms Donaldson says that she was not paid holiday pay when her job finished and claims an unjustified disadvantage personal grievance claim as a result, as well as seeking payment of the holiday pay (under the Holidays Act 2003 (the Holidays Act)).

[30] On Ms Donaldson's behalf \$1730.72 gross holiday pay was claimed, being 8% of the \$21,634.00 which Ms Donaldson earned during her employment with Mr Brick from May 2013 to August 2014 (when she went on ACC).

[31] The \$1730.72 figure was claimed by Mr Usmar on the understanding that Ms Donaldson had taken no paid holidays during her employment. However, during the hearing Ms Donaldson gave evidence that she had had two days' paid holiday for a trip taken in about January 2014. At that time the wage records show that Ms Donaldson was paid \$15.00 per hour for 20 hours per week. On the basis of working four hours per day, I have deducted \$120.00 representing two days' annual leave pay, from the claim, leaving \$1610.72.

[32] Mr Brick disputes that there was any holiday pay owing as he made payments during the later stages of Ms Donaldson's employment. He says that he made a payment of \$500 in September 2014 when Ms Donaldson's father visited from overseas. He says that he also made payments of \$200 per week, whilst Ms

⁵ *Totara Hills Farm*, supra

Donaldson was off work on ACC, which she asked for as she was struggling on ACC. There was no indication of how the \$200 figure was reached.

[33] Ms Donaldson said that Mr Brick gave her \$500 when her family were coming to stay, but this was in the context of their personal relationship and was not described as holiday pay. She said that he also gave her money to assist her when she was on ACC but not in the regular amounts claimed. She also said that she had previously given Mr Brick money to pay for various bills of his. Obviously in the context of the parties being in a personal relationship, payments may be made which would not usually be made in the course of a solely employment relationship.

[34] Mr Brick says that these payments were made in cash, whereas Ms Donaldson's salary was paid into her bank account. He accepted in evidence that he had no record of the various payments as holiday pay.

[35] I find that Mr Brick owes Ms Donaldson the sum of \$1610.72 gross as holiday pay, under the Holidays Act.

[36] Ms Donaldson claimed as unjustified disadvantage grievance regarding the non-payment of holiday pay. A disadvantage claim on the basis of Holidays Act entitlements was considered by the Employment Court in *Shakes v Norske Skog Tasman Ltd*⁶, where employees were required to take annual leave instead of the union leave originally requested.

[37] However, I do not consider that I need to deal with Ms Donaldson's claim further, as I have already ordered repayment of the holiday pay, which covers the issue of the financial deprivation and Ms Donaldson gave little evidence of distress or hurt suffered particularly as a result of the non-payment of holiday pay. A similar issue was noted when an application was made in the *Shakes* case to re-open the Authority's investigation⁷.

[38] The answer to the third issue is that Mr Brick must pay Ms Donaldson \$1610.72 gross as holiday pay.

⁶ [2008] ERNZ 121

⁷ *Shakes v Norske Skog Tasman Ltd*, unreported, 10 July 2008, Campbell, AA243/08

Fourth Issue – Termination of Employment

[39] Was Ms Donaldson dismissed by Mr Brick or was the employment terminated by mutual agreement?

[40] In November 2014 Ms Donaldson and Mr Brick's personal relationship was breaking down. During the investigation meeting various personal accusations were made by the parties, about each other, which I need not elaborate on.

[41] Both parties had some difficulties being clear about the exact timing of the events concerning the end of their personal and employment relationships. Ms Donaldson had initially put events earlier in November 2014, saying that the personal relationship had at the time when she had moved out of Mr Brick's cottage on or about 9 November 2014.

[42] At the investigation meeting, Ms Donaldson accepted still being in a relationship with Mr Brick at the time of a horse trial on 22 November 2014, and thus the termination of the personal and employment relationships occurring after that date.

[43] There were differences between the parties regarding an event where damage was done to the house on Ms Baker's farm where the parties had been living. I find that I need to determine whether Ms Donaldson or Mr Brick was more credible regarding the events regarding leading up to and including the discussions about Ms Donaldson's departure from employment. This particularly includes the issue of who was responsible for damage from broken eggs and glass in the house where the parties were living.

Damage to property

[44] There was a heated argument between the couple likely on 22 November 2014. Mr Brick acknowledged that he was very upset by something which Ms Donaldson had said, and hit a hollow core wardrobe door and put a hole in it. Ms Baker said that Mr Brick told her about this and apologised shortly after it happened.

[45] Another dispute occurred which resulted in Ms Donaldson leaving the property and staying elsewhere for the night and then moving out of the house

permanently. The parties disagree about who was responsible for damage to the house, from broken glass and eggs.

[46] Ms Donaldson said in her witness statement that Mr Brick punched a hole in the wardrobe door and she dropped an egg she was holding. She left right away and stayed the night with a friend. The next morning she phoned three friends who she asked to help her move. She says that they saw the hole in the door, but there was no other damage to the house when she left.

[47] In contrast, at the investigation meeting Ms Donaldson said that the egg dropping incident was at a different time to the hole punching incident. This was in keeping with Mr Brick's evidence below.

[48] At the investigation meeting Ms Donaldson said that there was one egg in a bowl and she dropped them, so that the broken glass was from the bowl. Ms Donaldson denied having thrown anything or having "trashed" the house. On questioning, Ms Donaldson accepted that a friend had come to the house on the evening of the dispute and had seen the glass and egg. None of Ms Donaldson's friends who are said to have been present in this period gave evidence at the investigation meeting.

[49] Mr Brick said that on 23 November he came home from a race meeting and went briefly into the house. He says that Ms Donaldson became very angry and threw a stool or chair at him as he was leaving the house to go down to the shed. He said that she also threw footwear at him as he went down the path.

[50] Mr Brick said that Ms Donaldson followed him down to the shed. He says she picked up a hammer and threw it at a car. It made a small dent, although Mr Brick acknowledged that it was an old "beat up" car. This interaction was not witnessed by anyone other than the parties.

[51] Ms Donaldson denied having thrown anything at Mr Brick. She accepted that she had gone to the shed to tell him that she was leaving.

[52] Mr Brick said that on going up to the house he discovered a mess and went to get Ms Baker to show her. They both said that they found broken glass in the house. Mr Brick said he was not clear where it had come from but that it may have been

something like a big bowl. Ms Baker referred to the glass as being shattered all over the carpet. She said that glass was found in both bedroom doorways, into the bathroom and that chips had been taken out of the wall between the two bedrooms. Ms Baker said that she was “gobsmacked” by the glass.

[53] Mr Brick said that the egg material was not in the kitchen area but rather was on the far wall of the living room area, away from the kitchen, maybe 3 or 4 metres from the kitchen area. He said there were eggs everywhere and the egg carton was on the floor. He said that eggs appeared to have been thrown against the cupboard with the television on it, and had dripped down. Ms Baker’s impression was that about five or six eggs had been thrown with force onto the cupboard door in the living room area.

[54] Both Mr Brick and Ms Baker believed that Ms Donaldson had purposefully thrown the eggs against furniture and broken something in the house.

[55] Mr Brick was asked why he had not called the police or taken photos of the damage. He answered that he and Ms Donaldson had been in a relationship, and that she had children and he was thinking of them, particularly her 8 year old daughter.

[56] Ms Baker said that when she found out about the mess in the house, she went to speak to two farm workers, who were working on the farm relatively near the shed and Mr Brick’s house. Ms Baker said that the workers assured her that Mr Brick had been in the shed and Ms Donaldson had been in the house. They were apparently some 40 metres away but had a clear view.

[57] On questioning Ms Baker accepted that the workers were working and that it was physically possible that Mr Brick could have “sneaked” up to the house (to make a mess). Ms Baker said that she did not believe that Mr Brick would trash his own house, and that he loved “his little cottage”.

Ms Donaldson’s moves out

[58] Ms Donaldson came back to the farm the next day with friends to remove her personal property. Ms Baker said that Ms Donaldson came to see her that day and Ms Donaldson wanted to apologise. Ms Baker’s evidence was that the only thing which Ms Donaldson could have had to apologise for at that point was the trashing of the house and that that was what Ms Baker believed the apology was about. Ms

Donaldson accepted that on about 24 November she went to Ms Baker's house and said that she went there to tell her side of the story.

[59] Ms Donaldson proceeded to remove her property from Mr Brick's house. Ms Donaldson got into a dispute with Ms Baker, as Ms Donaldson was removing a mattress from the property which was Ms Baker's mattress. Ms Donaldson acknowledged that she had lent her mattress to someone else and had been using Ms Baker's mattress with her own bed base. She left the mattress behind.

[60] When Ms Donaldson was leaving the property, Ms Baker said to Ms Donaldson that she was not to be back on the property. Ms Baker later informed Mr Brick of what she had told Ms Donaldson.

Telephone discussion

[61] Mr Brick says Ms Donaldson rang on that same day (the 24th of November) all "nice and apologetic". His evidence was that he asked how do we move on? Ms Donaldson agreed that she wanted to move on. Mr Brick said that they agreed that she would resign.

[62] Mr Brick says that during this call Ms Donaldson did not seem upset or angry, and that he felt that she was probably relieved. He agreed when asked if it was a civilised conversation. He said that Ms Donaldson had calmed down since the events of the previous days and said to him that she just wanted to be rid of him and move on with her life.

[63] Mr Brick says that during that call Ms Donaldson was apologetic about the damage to the house and the whole situation. Mr Brick denied that he had fired her.

[64] Mr Brick said that Ms Donaldson asked for her holiday pay to which he responded that he felt that she'd had more than her fair share already, but that he would do all the paperwork when he got her resignation letter.

[65] Ms Donaldson denied that she had agreed to resign or reached an agreement to leave, but accepted that there had been discussion about holiday pay.

[66] Ms Baker said that Mr Brick told her that he and Ms Donaldson had just had a very amicable discussion and come to the conclusion that the best thing all round would be if she resigned.

Later meeting

[67] Both parties agreed that their next meeting occurred a week or more later. Ms Donaldson had initially put this event as occurring on 16 November. However, in light of her acceptance that she had not moved out at the time of the horse trial (18/19 November), that would make the date later. Mr Brick puts this interaction on 5 December, linking it to the day when a text message exchange occurred regarding a trespass order (see below).

[68] Ms Donaldson came onto the farm. She said that she was about to be fit to return to work, on light duties. She said that there had been discussion with her doctor and ACC case manager about returning to work. Ms Donaldson provided to the Authority some medical certificates, but none for the November to December 2014 period. She was unable to provide any documentation from ACC regarding a return to work programme, due to the unavailability of a case manager.

[69] Ms Donaldson said that at this meeting Mr Brick told her that she was fired, that there would be no further work for her and that she was not to return to the farm. She said that he did not give her a reason other than that he wanted her to leave.

[70] Mr Brick denied that he fired Ms Donaldson at the meeting. He said that he reminded her that Ms Baker said that she was not to be on the farm. He said that he told Ms Donaldson that it was not his property and he could not say who came on it.

[71] Mr Brick said that he then went to see Ms Baker to tell her that Ms Donaldson had come to the farm wanting to come back. Ms Baker said that she told Mr Brick that there was no way that Ms Donaldson was coming back here, and that she wanted him to take out a trespass order against Ms Donaldson.

Trespass Order

[72] At the investigation meeting there was a dispute about whether a trespass notice had been created and served on Ms Donaldson regarding the farm. Mr Brick and Ms Baker believed that a trespass notice had been issued and that a mutual acquaintance had delivered it to Ms Donaldson. Mr Brick thought that he had kept a copy but had been unable to find it.

[73] An email was filed with the Authority which suggested that the acquaintance had served the notice on Ms Donaldson and dropped a copy off at the police station in Cambridge. However, the acquaintance did not attend the investigation meeting.

[74] Ms Donaldson denied that she had been served with an order. On the day of the investigation she provided an email from a police file coordinator, advising that the police held no records of her being trespassed from the farm.

[75] The Authority was then shown a text of 5 December 2014 on Mr Brick's cell phone, from Ms Donaldson which included words along the lines of "Thanks for the trespass order and court papers. I'll return the favour with assault charges and civil dispute."

[76] Ms Donaldson accepted that she had sent the text but denied that those words had the meaning of her having received the trespass order. She said that Mr Brick had told her that he was going to give her a notice. Ms Donaldson acknowledged that the acquaintance had told her that she had the notice, but that delivery did not occur.

[77] In the absence of further evidence it is difficult to determine what had occurred on this issue. In any event, it is clear that Ms Baker as owner of the property did not want Ms Donaldson to come back there and wanted to have her trespassed.

Subsequent events

[78] Ms Donaldson went to the police to file an assault charge. Mr Brick denied any assault. The police did not approach Mr Brick. Ms Donaldson says that the police required her to get evidence and she "just left it".

[79] Ms Donaldson also made contact with Mr Brick's ex-partner, who asked Ms Donaldson to put in a complaint to the Racing Industry Board about Mr Brick. Ms Donaldson did so verbally and was told that to make a complaint she would have to get evidence. She said that she "couldn't be bothered". Mr Brick gave evidence that the Board's investigator met with him. The investigator emailed Mr Brick his conclusion that he could not find any evidence to substantiate the claims and the matter was filed without further action.

Dismissal?

[80] It was argued for Ms Donaldson that she was either directly or constructively dismissed; that she was told to go. Mr Brick said that there was a discussion after the breakdown of their personal relationship and Ms Donaldson moving out of the house, where they both agreed that it was better for Ms Donaldson to resign and move on with her life. He agreed that this was a civilised and amicable conversation.

[81] If Ms Donaldson was told that she was fired or was sent away at Mr Brick's initiative, then she would have been dismissed. By contrast a different situation arises if the parties genuinely agreed together that the employment relationship should end. A mutual agreement to terminate employment has been held to mean that there will be no dismissal found⁸. A close examination of events is necessary to determine whether the employer was the "prime mover" in the termination process⁹, or whether the employee was subject to some improper behaviour by the employer.

[82] I have carefully considered the evidence. I found Ms Donaldson's account of what occurred on 23 November to be changeable and somewhat confusing. She changed asserting that the egg incident occurring at the same time as the wardrobe incident, to them happening on different days. She seemed initially to say that she dropped simply an egg, but then added that there was a bowl too. She said that there was no damage for her friends to see (except the wardrobe) then said that a friend had seen the (one) egg and glass from the bowl, and that she (Ms Donaldson) had broken an egg and a bowl herself.

[83] Ms Donaldson did not bring any witnesses to support her version of events, despite various friends having apparently been present on two occasions. She implied that Mr Brick (and possibly Ms Baker as well) had deliberately made the mess so that he or they could blame Ms Donaldson. I did not find this to be credible.

[84] I find Mr Brick's evidence to be more consistent and plausible. His evidence, whilst challenged, was not demonstrably incorrect. He had a credible witness in Ms Baker, supporting his evidence.

[85] Mr Brick and Ms Baker gave consistent evidence regarding the damage found in the house. They both believed that the damage appeared to have been done on

⁸ For example, *COMPASS Union of NZ Inc v Direct Mail Processors Ltd* [1991] 2 ERNZ 645

⁹ *Marshall v TNL Freight Link* unreported WEC 65/76

purpose rather than accidentally and the evidence of where the eggs and glass were found supported that. Ms Baker gave evidence that she did not believe that Mr Brick had made the mess.

[86] Mr Brick's reason for not reporting the incident to the police seemed plausible in light of evidence from Ms Baker of his positive involvement with Ms Donaldson's daughters.

[87] Evidence regarding what other farm workers reportedly saw or overheard, may suggest that it was somewhat more likely that Ms Donaldson was responsible for the damage to the house. However, those workers were not present to give evidence to the Authority. In any event, it seems unlikely that they could say categorically that Mr Brick had not gone up to the house to damage it, given that they had work tasks to attend to.

[88] I find on the balance of probabilities that Ms Donaldson deliberately damaged Mr Brick's house by throwing eggs and breaking some type of glass container. I also find that she had thrown items at Mr Brick and his car, although these events only resulted in minor damage to the old car.

[89] Ms Donaldson herself decided to move out of the house, firstly temporarily for the night, and then permanently the next day. There was no suggestion that Mr Brick had required or suggested this.

[90] I find that the following day Ms Donaldson apologised to Ms Baker for the damage to the house on Ms Baker's property. There was also the incident of Ms Donaldson being stopped by Ms Baker from taking a mattress which belonged to Ms Baker. Ms Baker that day made it clear to both Ms Donaldson and Mr Brick that she did not want Ms Donaldson on the property again.

[91] It is with these events in mind that I turn to the conversation where Ms Donaldson phoned Mr Brick. This discussion was at her initiative. Mr Brick says that she was apologetic (regarding the damage). That was consistent with her discussion with Ms Baker.

[92] Mr Brick said he asked what they were going to do about the situation. I find that a fair and reasonable employer, when faced with a situation of property damage

by an employee and a requirement from the property owner that the employee no longer come onto the property, could raise the issue of what was going to happen with her continued employment.

[93] Mr Brick says that Ms Donaldson said she just wanted to be rid of him and move on with her life. I find this to be credible. Mr Brick's evidence, which I accept, was that they agreed that Ms Donaldson would leave her employment.

[94] Mr Brick said that Ms Donaldson did not seem upset or angry, and that he felt that she was probably relieved. I find this to be credible in all the circumstances. Ms Donaldson gave evidence at the investigation meeting of her being healthier since having got away from all the stress (of the situation with Mr Brick).

[95] I find that the parties made a decision to mutually terminate Ms Donaldson's employment. I do not find that Mr Brick was the prime mover in the process of termination. Rather I find that it was Ms Donaldson's actions on 23 November and their consequences (in terms of Ms Baker's decision) which were the main drivers behind the conversation, which Ms Donaldson had initiated by calling Mr Brick. Both parties presumably considered the relationship breakdown as well, but I do not need to find fault regarding that breakdown.

[96] With regard to the fourth issue, as this was a mutual termination there is no dismissal for Ms Donaldson to found a grievance claim on.

[97] Mr Brick said that he would do the paperwork once he received a resignation letter, but he did not receive one. I find that Ms Donaldson decided to attempt to get her job back over a week later, reportedly after discussions with ACC regarding a return to work programme. I prefer Mr Brick's evidence regarding this meeting. The situation remained one where Ms Baker was not prepared to allow Ms Donaldson on the property and on learning that Ms Donaldson had sought her job back, she asked Mr Brick to initiate a trespass order against Ms Donaldson.

[98] Ms Donaldson's work was done at the farm belonging to Ms Baker. There was no other place for her to work for Mr Brick.

[99] I do not consider that there was any obligation in these circumstances for Mr Brick to take Ms Donaldson back into employment.

[100] While it was argued on Ms Donaldson's behalf, that Mr Brick did not follow a fair and reasonable process, I find that the contacts (telephone call and meeting) were initiated by Ms Donaldson. This is somewhat different to a situation where an employer is initiating discussions with an issue or outcome in mind.

Fifth and Sixth Issues

[101] As a result of the finding that there was no dismissal, I do not need to proceed to the issues of justification and remedies.

Seventh Issue - Costs

[102] Should either party contribute to the costs of representation of the other party? Costs were sought on Ms Donaldson's behalf and this issue is reserved.

[103] The investigation meeting took almost a full day. However, Ms Donaldson has had only partial success. The Authority's usual notional tariff for a day's hearing is \$3,500. I consider that a costs award in Ms Donaldson's favour would likely reflect her degree of success.

[104] I invite the parties to discuss resolving the costs issue between themselves. In the event that they are unable to agree I invite Ms Donaldson to apply within 28 days of the date of this decision for a costs order. Mr Brick will have 14 days after the date any such application is filed and served, to reply to the Authority on the costs issue.

Nicola Craig
Member of the Employment Relations Authority