

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 390  
3140781

BETWEEN

PATRICIA HUGHES  
Applicant

AND

PHILIP BAYLY FAMILY  
TRUST  
Respondent

Member of Authority: Sarah Blick

Representatives: David Watson, advocate for the Applicant  
Christopher Eggleston, counsel for the Respondent

Investigation Meeting: 16 May 2022 at Whangarei

Submissions received: At the investigation meeting

Determination: 15 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] The applicant, Patricia Hughes, says she was dismissed by the respondent, Philip Bayly Family Trust (the Trust) in September 2020. Ms Hughes had been employed by TGB Holdings Limited (TGB) which supplied operational management, including labour, to the Trust's dairy farms in Northland. As a result of financial and other issues arising around TGB's management of the farms, TGB ceased to provide farm labour services.

[2] The Trust says in August 2020 it offered employment to Ms Hughes' for a period of two to three weeks on a casual basis while she decided if she wanted to work for it after her employment with TGB ended. Ms Hughes says that she was offered and accepted permanent employment with the Trust.

[3] Ms Hughes says on 7 September 2020 the Trust unjustifiably dismissed her and claims compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Ms Hughes says the Trust also owes her annual holiday entitlements accrued during the time she was employed by TGB, on the basis the Trust had agreed to take responsibility for them upon employment of TGB employees.

[4] The Trust denies Ms Hughes was unjustifiably dismissed. The Trust says it elected to terminate her casual employment, following which Ms Hughes was paid her full legal entitlements. The Trust says Ms Hughes is not entitled to any of the remedies sought. Finally, it says if Ms Hughes is found to have a personal grievance, a significant reduction in the quantum of remedies would be warranted.

#### **What was the Authority's process?**

[5] Witness statements were filed for Ms Hughes, and for Ms Justine Rowe, Mr Philip Bayly, Mr Melvin Currin and Mr Daniel Adams for the Trust.

[6] Each witness answered questions under affirmation from the Authority and the representatives. Counsel for the Trust handed up written submissions and spoke to those, and Ms Hughes' representative made oral closing submissions.

[7] The evidence has been carefully evaluated and consideration has been given to how reasonable, plausible and probable the evidence is. Where the evidence between witnesses is not consistent, I have made findings based on the balance of probabilities as to which version is more likely than not. I have been assisted in my evaluation and consideration of the evidence by taking into account the documents provided by the parties.

[8] At the commencement of the investigation meeting Ms Hughes' representative stated she also sought arrears of wages, apparently for a period prior to her employment with the Trust. Ms Hughes did not seek those arrears in her statement of problem or provide evidence or submissions at the investigation meeting that would support a finding that they are owing. The Authority makes no findings in relation to that belated claim.

[9] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **What are the issues?**

[10] The following are the issues for investigation and determination:

- a. Was Ms Hughes a casual employee?
- b. If Ms Hughes was dismissed from her employment was the dismissal unjustified?
- c. If the dismissal is found to be unjustified should remedies be awarded and are there issues of contribution?
- d. Is an entitlement to holiday pay, accrued through service with TGB, payable by the Trust or not?
- e. Should either party contribute to the costs of representation of the other party?

### **What happened?**

#### *Trust and TGB's relationship*

[11] As trustee of the Trust, Mr Bayly entered into a contract on the Trust's behalf with TGB in around October 2016. TGB, whose directors are Trevor and Tracey Currin, took over operational management of four of the Trust's farms. The Trust received monthly invoices from TGB which included an amount for wages of employees employed directly by TGB, TGB's monthly fee and any expenses incurred for the farm.

#### *Ms Hughes' employment with TGB*

[12] The Currins are relatives of Ms Hughes. Ms Hughes was employed by TGB from November 2019 pursuant to a written employment agreement which says her employment was to commence on 20 November 2019. Her position was described as a Farm Administration Assistant, working 40 hours per week on Monday to Friday, 9am to 5pm. The agreement says Ms Hughes was employed on a salary of \$50,000 covering all hours worked and would be paid weekly. The agreement also contained

an employee protection provision, which provided where TGB proposed to restructure, it would start talks as soon as it could about the impact of restructure on Ms Hughes. This included negotiating whether Ms Hughes could transfer to the new employer, and if so, whether this would be on the same terms and conditions.

[13] Ms Hughes' job was to provide administrative services including payroll processing and other on-farm functions such as truck driving and calf rearing.

#### *TGB's restructure proposal*

[14] On or around 26 June 2020 Mr Bayly and Ms Rowe met with the Currins, who indicated that TGB no longer wished to employ staff at the farms. The Trust and TGB thereafter liaised regarding employment of farm staff transferring to the Trust.

[15] By letter dated 8 July 2020 the Currins notified TGB employees that the company was to undertake a review of the current employment model under TGB and determine if this will change to transfer to Mr Bayly. It advised once TGB had worked through this with Mr Bayly, it would advise of the outcome by the end of July 2020. Ms Hughes received a copy of this letter.

[16] Ms Rowe corresponded with TGB about its monthly charges for wages not reconciling with its invoices to the Trust and three months' of PAYE records TGB had filed. Ms Rowe concluded TGB were incorrectly accounting their staff accommodation allowances at a cost to the Trust.

#### *End of TGB's contract*

[17] Mr Bayly and Ms Rowe say TGB abandoned its contract with the Trust without notice, saying Mrs Currin abandoned it on 25 July 2020 and Mr Currin on about 6 August 2020. TGB advised it could not afford to pay staff wages and would have no funds to pay notice periods on termination or accrued leave entitlements. TGB staff remained working on the Bayly farms and Mr Currin asked the Trust to take over the payment of staff wages on TGB's behalf due to financial hardship.

[18] Faced with this situation, Ms Rowe says the Trust temporarily agreed to pay the net wages to TGB employees from 28 July 2020, as the Trust relied on TGB employees to milk over 2,000 cows twice a day. The Trust says it advised it would consider its

options about what TGB owed staff in leave entitlements subject to receiving PAYE and wages records to verify they were factually correct.

[19] On or about 27 July 2020 Ms Hughes provided Ms Rowe with the bank account details for TGB's 32 employees and provided TGB's payroll calculations to her to make the net wages payments. Ms Hughes paid net wages for TGB payrolls on 28 July, 4 August and 11 August 2020.

[20] Ms Rowe became aware TGB's employees employed on a casual basis did not have written employment agreements. By email on 28 July 2020 Ms Rowe asked Ms Hughes why there were no employment agreements for casual staff. In response to Ms Rowe's email, Ms Hughes advised that no casual staff members had written employment agreements. In a further email that day, Ms Rowe noted her plan for that day was to pay the net pay to farm employees so they are not impacted by the farm operation management situation, and that the Trust would only be paying the salary and wages on TGB's behalf.

[21] Ms Rowe says system access logins for Bayly Farms were removed from the Currins for security reasons. On 3 August 2020 Ms Hughes emailed Ms Rowe to advise she was no longer able to access the farms' Fonterra system using Mrs Currin's login. Ms Rowe then took over responsibility for this task and completed Fonterra entries from this time.

[22] By email on 5 August 2020 Ms Rowe advised Ms Hughes that Mrs Currin had not provided her with a job description and asked if Ms Hughes would be comfortable drafting a job description/list of tasks for her role. Ms Rowe advised these were required for "all the new contracts so will be helpful towards getting this done", and attached a template apparently used for other TGB employees, entitled "Performance Review Template".

[23] On 10 August 2020, Ms Hughes emailed Ms Rowe back the template document identifying what she understood her responsibility areas/tasks to be.

[24] Ms Rowe says in early August 2020 Ms Hughes advised her login she had used for tagging and recording farm animals was disabled (known as NAIT). Ms Rowe says shortly following this Ms Hughes' access to herd records also became an issue. Ms Rowe says after that the Trust did not provide Ms Hughes with login access and Ms

Rowe undertook the herd recording tasks. Ms Rowe says this was because it had come to light that Mrs Currin and Ms Hughes had created new unauthorised NAIT accounts for the Bayly farm locations to which Mr Bayly had no registered authority. Ms Rowe says subsequently NAIT removed these accounts as TGB claimed these were set up in error.

*Meeting on 13 August 2020*

[25] Ms Rowe says she and Ms Hughes and Ms Rowe met for the first time in person on 13 August 2020.

[26] Ms Hughes' witness statement says that on 13 August 2020 she attended an on-farm meeting with some other employees of TGB, where Ms Rowe and Mr Bailey explained the transfer of their employment. She says Ms Rowe handed out new written employment agreements to a number of transferring employees. Ms Hughes' statement says she was "shocked and upset by the news", and worried about what she would do for income. During questioning, Ms Hughes stated she was shocked and upset by the fact Ms Rowe had given contracts to other employees but did not have one for her. Ms Hughes says she asked about her contract, and Ms Rowe told her she had not brought one with her. Ms Hughes says Ms Rowe asked her what she wanted to do. Ms Hughes says Ms Rowe asked if she wanted a three-month contract, and Ms Hughes responded by saying she needed to continue working full-time and wanted a permanent contract. She says she needed to have a permanent contract as she had mortgage commitments. She says Ms Rowe said she would send Ms Hughes a contract, and that she expected to receive it later. Ms Hughes says she walked away understanding she would be sent a permanent contract. Ms Hughes did not recall Ms Bayly joining this conversation at all, and says he never spoke to her that day.

[27] Ms Rowe says on 13 August 2020 she and Mr Bayly visited several of the Trust's farms, and one of the reasons for which was to provide TGB employees with new intended written employment agreements with the Trust and discuss their individual leave entitlement situations. She says while they met with some staff that day to discuss their new agreements, this was on different farms and all discussions occurred individually. Ms Rowe says when they arrived at the farm Ms Hughes was working at, she introduced herself to Ms Hughes and asked how she was, at which point Ms Hughes became emotional. Ms Rowe says she replied that she was "not good" as

her heart was not in the job anymore now that the Currins were not on the farm. Ms Rowe says she told Ms Hughes she understood it would be a difficult time with the Currins being both her employers and family. Ms Rowe says Ms Hughes agreed that it was a very stressful time and advised that Mrs Currin had cut off her access to the TGB payroll system so she would not be able to provide the next pay run figures to Ms Rowe. Ms Rowe says she advised she would follow up with TGB directly on that issue.

[28] Ms Rowe also says she told Ms Hughes they were at the farms to assess flood damage and were also providing new employment agreements to some TGB employees. Ms Rowe says she advised Ms Hughes that she had not prepared a new employment agreement for her as they did not want to appear arrogant by assuming Ms Hughes would wish to work with the Trust in the circumstances.

[29] Ms Rowe says she asked Ms Hughes if she knew what her intentions were for future employment. She says Ms Hughes replied that she did not really know if she could work permanently on the farm, repeating that she had lost heart in being at the Bayly farms, but stating that she also needed to keep her current income to pay her mortgage. Ms Rowe agrees she suggested the Trust could offer her a three-month fixed term agreement, but on an hourly rate, while Ms Hughes decided what she wanted to do. Both Ms Rowe and Mr Bayly say Mr Bayly joined had the conversation, and he proposed Ms Hughes could continue to work for two to three weeks on a casual basis in what remained of her existing TGB role. Ms Rowe says she stressed that neither her nor Mr Bayly wanted staff to feel any pressure to continue to work at the farm, because if they were not happy it would not work in the long term. Ms Rowe says she asked Ms Hughes to let her know if she wanted to consider a permanent job. She says Ms Hughes appeared more relaxed at this point and agreed to this suggestion. Ms Rowe says up to that point Ms Hughes had mostly been looking at the ground and not making eye contact, but she nodded and said "Okay". Ms Rowe says she specifically told Ms Hughes that she had not prepared a contract for her and would not do so until she had told us what her long term plans were.

[30] Mr Bayly says prior to joining the conversation he was speaking with Mr Adams, a farm manager employed at one of Mr Bayly's farms in Maromaku. Mr Adams says in August 2020 he became aware Mr Bayly was having issues with a number of farms owned by the Trust up north. Mr Adams said he offered to help out,

and met Mr Bayly at the farm on 13 August 2020. Mr Adams says he overheard part of the conversation between Ms Rowe, Mr Bayly and Ms Hughes. He says it was clear that Ms Rowe and Mr Bayly were trying to find out from Ms Hughes what her intentions were regarding her employment. He says Ms Hughes repeated on a number of occasions that things were difficult and she did not know what she wanted to do and could not make up her mind. He says they suggested giving Ms Hughes two to three weeks to think about things and decide what she wanted to do. Mr Adams recalls Ms Hughes asked how she would be paid during that time and Ms Rowe said she would be paid an hourly rate. He says Ms Hughes said she could not afford to take a drop in pay and Mr Bayly said she could stay on the same money for the two or three weeks whilst she decided what to do. He recalls that was pretty much the end of the conversation.

[31] Mr Bayly says he telephoned Ms Hughes twice after the conversation on 13 August 2020, and that neither of his calls were answered or returned. Ms Hughes denied she received those phone calls.

#### *Trust's offer of employment*

[32] Ms Rowe says on 14 August 2020 she received a phone call from Mr Melvin Currin, father of Mr Currin and also Mr Bayly's good friend. Mr Melvin Currin gave evidence that he acted as a kind of intermediary between TGB and the Trust at the end of their contractual arrangement. Ms Rowe says Mr Melvin Currin advised that Mrs Currin had contacted him to ask for our help removing TGB employees off its books. He asked Ms Rowe if she could draft a letter for TGB to give to employees saying the Trust would offer new employment agreements. Ms Rowe created these letters and inserted her electronic signature in a mail merge using a list of names. She says she had not noticed Ms Hughes' name was in this list of names and a letter was created in error for her and sent to Mr Melvin Currin.

[33] Later on 14 August 2020, the Currins emailed TGB employees the letters, now co-signed by Mrs Currin. Ms Rowe says she was copied into the emails and wrote the cover email asking for their confirmation of acceptance by reply email.

[34] A letter was sent to Ms Hughes which relevantly stated:

Following the communication sent by TGB Holdings on 14<sup>th</sup> July the employment model review for the TGB Holdings employee's [sic] on the Philip Bayly Family Trust Farms has been completed.

We are pleased to advise that it has been mutually agreed for your employment to transfer from TGB Holdings to Philip Bayly Family Trust. Philip Bayly Family Trust has provided a new employment contract for your review and signature. If you have questions on the new contracts please direct these to Justine Rowe [email address, mobile number].

The transfer will be effective from Sunday 16<sup>th</sup> August and this will be your last day employed by TGB Holdings. The new employment contracts once signed will be effective from Monday 17<sup>th</sup> August 2020.

[35] No employment agreement was attached to the email sent to Ms Hughes. On the same date she received the email, Ms Hughes emailed the Currins back simply stating "I don't have a contract" with a couple of playful emojis either side of it. Ms Rowe was not copied into that email.

[36] Ms Rowe says she only became aware that Ms Hughes was sent a letter on 14 August 2020 later on, when preparing Ms Hughes' "termination letter" on 7 September 2020.

[37] On the following Monday, 17 August 2020, Ms Hughes says she attended work and carried on work as usual. She says she knew it was a turbulent time for everyone and expected that her "paperwork" would be sorted at some stage. She says she continued to do the same work as previously, which was the administration duties and some on-farm work. Ms Hughes gave evidence she continued to attend work and was paid in the usual manner on 25 August 2020, 1 September 2020 and again on 8 September 2020. Her payslips record that she was paid by the Trust on these dates. The payslip for the payment on 1 September 2020 records she was paid 16 hours salary and 24 hours as sick leave for that pay period.

[38] Ms Hughes says she still had not heard anything about her offer of employment with the Trust, so on 25 August 2020 she sent another response to the email of 14 August 2020, thinking she needed to say she accepted the transfer of employment. Email correspondence shows Ms Hughes replied to her own email of 14 August 2020 (which stated "I don't have a contract") with an email simply stating "Accept". The email was only sent to the Currins and the Trust was not copied into it.

### *Payroll situation*

[39] Ms Hughes says she had contacted Mrs Currin to ask how the TGB payroll would be processed for 18 August 2020. Mrs Currin did not reinstate Ms Hughes' access to payroll and performed the final payroll calculations herself.

[40] Ms Rowe says that as the end date of TGB's employment with other TGB employees was the following week, it would be sensible to continue to pay Ms Hughes in the same way with her TGB salary to assist her in the short term. Ms Rowe says she intended to carry on paying Ms Hughes her net earnings via TGB's payroll whilst she made up her mind what she wanted to do. However, if the Trust were to continue to pay Ms Hughes as discussed with her, the only option was to enter Ms Hughes into the Trust's payroll system from 19 August 2020. Ms Rowe says if it had been possible to keep paying Ms Hughes through the TGB payroll then this is what would have happened.

### *Date of transfer of employment*

[41] The starting date for TGB staff taking up new agreements with the Trust was proposed to be from 17 August 2020. However, Ms Rowe says of the 14 TGB employees who had been given new agreements, none had provided written acceptance or returned a signed agreement.

[42] Two of the TGB employees declined the offer of new employment and had resigned. Ms Rowe says she emailed each of the remaining 12 employees to follow up and also moved the start date back to 19 August 2020 to give them more time to consider the agreements. She says a follow up letter was not sent to Ms Hughes because her TGB employment had been extended on a casual basis as had been discussed and agreed on 13 August 2020.

[43] New employment was created for 12 of the 32 previous TGB staff from 19 August 2020.

### *19 August 2020 to 6 September 2020 period*

[44] In the period from 19 August 2020 to 6 September 2020 Ms Rowe and Ms Hughes communicated with each other by phone, text and email regularly. The issue

of whether Ms Hughes would continue in employment was not raised or discussed during this time, and Ms Hughes did not request a copy of an employment agreement with the Trust. There was no follow up by either party in relation to the draft job description Ms Hughes had emailed on 10 August 2020.

[45] Ms Rowe says she assumed Ms Hughes was familiar with the business practice of casual employees not having written agreements, in light of Ms Hughes' previous advice that TGB did not have written agreements for its casual employees.

[46] Ms Rowe says Ms Hughes carried out basic casual duties on the farm, which involved one house inspection, calf feeding and transporting calves. Ms Rowe says Ms Hughes' duties were materially reduced from her original TGB role, as all of the administration functions had already been removed prior to 17 August 2020 and were being performed by Ms Rowe.

[47] Ms Rowe says on 26 August 2020 TGB "finally" provided a breakdown of its wages cost and acknowledged its overcharging of the Trust for the previous four years through its payroll calculations. She says TGB disclosed it had overclaimed \$90,789.45 wages from the Trust. A wages reconciliation spreadsheet and TGB tax invoice was provided to the Authority. The tax invoice is dated 6 August 2020 and is addressed to Mr Bayly identifying a deduction of a "wages balance as per spreadsheet" of \$90,789.45) from the amount due.

[48] Ms Rowe says she was aware TGB had "deregistered" as an employer and that it had not included leave balances on its staff payslips. Ms Rowe says, however, that if Ms Hughes was to become a permanent employee of the Trust at some future time, the Trust would need to address her previous leave balance.

[49] On 3 September 2020 Ms Rowe emailed Ms Hughes to ask if she could advise any annual leave or sick leave taken since her employment started with TGB in November 2019. Ms Hughes replied, "Have taken no leave of any sort until last week".

[50] Ms Rowe says after 13 August 2022 there were 14 work days. She says Ms Hughes was at work for 6.5 days, away sick for 4.5 days and unaccounted for or advised she was unavailable for three of the 14 days. Ms Rowe believes Ms Hughes' inconsistent attendance at work demonstrated she was not happy working at the farms.

[51] Ms Rowe says on 5 September 2020 she prepared a letter to Ms Hughes stating the Trust had decided not to continue with her casual services, as a follow up on their meeting on 13 August 2020.

*7 September 2020*

[52] It is common ground that on 7 September 2020 Ms Rowe telephoned Ms Hughes prior to sending the letter she had prepared. Ms Rowe outlined the content of the letter and said it would be sent following their phone call. Ms Rowe says Ms Hughes did not seem surprised at the news. Ms Rowe says she asked if Ms Hughes had any questions, and Ms Hughes said she would wait to read the letter and did not raise any questions at the time.

[53] Ms Rowe accordingly emailed the letter which relevantly stated:

...In our meeting discussion at Forsythe Road Farm on 13<sup>th</sup> August 2020 I asked what your intentions [sic] were for your employment future given that TGB Holdings were not going to continue offering your employment and the boarder considerations given you are a family member of TGB Holdings. You advised me that you needed a job as you needed the income but you were not sure you could work for PBFT given the stressful situation with your family. I let you know we didn't not [sic] want to put any pressure on you to work with PBFT and to let us know your thoughts when you were ready.

On Friday 14<sup>th</sup> August TGB Holdings emailed to advise you of your employment transfer upon a new employment contract being effective once signed. This email asked for your confirmation of acceptance of the transfer by return email, a reply was not received.

I have not had a request from you for an employment contract and we have paid casual wages to you since the 19<sup>th</sup> August to ensure you were not in a position of financial hardship whilst you considered your future plans and availability.

After due consideration it has been decided not to continue with your casual services with PBFT and today will be the last day of casual work offered. You are entitled to be paid 8% holiday pay for the period of the casual employment and this will be paid in the next pay run. With regards 26, 27 & 28 August where you have supplied a medical certificate for illness, these days were paid in the interim and we will not seeking [sic] to claim a reimbursement.

[54] Ms Rowe says Ms Hughes did not make any contact with the Trust after she sent the letter, whereas Ms Hughes says she attempted to contact the Trust following its receipt. There is no evidence to confirming any attempts to make contact.

[55] Ms Hughes' representative then sent a letter raising a personal grievance on 11 September 2020, in which compensation of \$15,000 under s 123(1)(c)(i) of the Act, and other remedies, were sought.

[56] Ms Hughes' final pay was processed by the Trust on 15 September 2020. Ms Hughes says the Trust made deductions of all her leave entitlements which she says should have been transferred from TGB and paid to her on termination.

### **Was Ms Hughes a casual employee?**

[57] The Trust does not dispute that it became Ms Hughes' employer. To determine the nature of the employment I need to address the conflict in evidence about what was discussed at the meeting between the parties on 13 August 2020.

[58] When asked about her detailed recollection of what was discussed at the meeting, Ms Rowe stated she believes she made her own file notes of the meeting that night or the next day. While the Authority has not been provided with any file notes, I accept they were likely made. It appears they informed Ms Rowe's 7 September 2020 letter to Ms Hughes, which outlines what was discussed and agreed at the meeting and is consistent with her evidence before the Authority. I note Mr Bayly and Mr Adams' evidence is consistent with Ms Rowe's, with both stating Ms Hughes was unsure if she wanted to continue employment with the Trust. Both Ms Rowe and Mr Bayly say Ms Rowe offered Ms Hughes three months' employment, which Ms Hughes declined. All three Trust witnesses say Ms Hughes then accepted Mr Bayly's offer of two to three weeks' employment, and after she queried being paid at an hourly rate, Mr Bayly confirmed she would continue to be paid her usual salary.

[59] In contrast, Ms Hughes' recall of the meeting was not very good, nor was it supported by other evidence. I accept Mr Bayly joined the conversation between Ms Rowe and Ms Hughes, but Ms Hughes was unable to recall that he had taken part in it.

[60] Having carefully considered the parties' evidence about what occurred at the meeting, I accept the Trust's account. I find it therefore offered Ms Hughes two to three weeks employment. I also find it is more likely than not that Ms Rowe used the word "casual" when offering Ms Hughes that employment.

[61] I accept Ms Rowe's evidence that she intended to carry on paying Ms Hughes her net earnings via TGB's payroll while Ms Hughes made up her mind what she wanted to do, and that if that had been possible this is what would have happened.

[62] While the Trust was put in a difficult situation of effectively becoming TGB employees' de facto employer prior to their transferring to the Trust, as of 13 August 2020 the Trust was not Ms Hughes' employer. It did not have the authority to vary the nature or length of Ms Hughes' employment on TGB's behalf. I therefore find the Trust offered two to three weeks' employment to Ms Hughes on or around 13 August 2020, pursuant to an oral employment agreement. Ms Hughes accepted that offer at the meeting and was employed by the Trust between 19 August 2020 until 7 September 2020.

[63] There is no definition in the Act of a "casual" employee. I need to assess the real nature of the relationship. The courts have identified a number of factors that assist this assessment but the key factor is whether there was an obligation on the employer to provide work to the employee and an obligation on the employee to accept it.<sup>1</sup> For example, if the employer requires notice before an employee takes leave, that is a factor that indicates the employee has an obligation to accept work or if the employee works a regular shift pattern, then that is a factor that indicates the employer has an obligation to offer work, because there is an expectation created by the regularity of the work.

[64] I find on balance that Ms Hughes' employment was not casual. Despite the Trust calling it casual, the Trust expected Ms Hughes to attend work and perform her normal 40 hours per week, Monday to Friday, albeit her administrative duties had been reduced. Further, the way the Trust views Ms Hughes' sick leave and other absences between 19 August and 7 September 2020 was inconsistent with it being casual employment. While it appears Ms Hughes may have been disengaged with her employment, I find she did not have a choice about whether to accept or decline work during that period.

[65] However, this does not mean Ms Hughes was employed on permanent basis. I find instead she was employment on fixed-term basis for a period of two to three weeks. That fixed term employment did not meet the requirements of s 66(4) of the Act. While

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<sup>1</sup> *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [23]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [41].

the failure to comply with s 66(4) does not affect the validity of an employment agreement, an employer may not rely on a term ending employment (such as at the close of a specified date as here) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.<sup>2</sup> By sending a letter raising her personal grievance on 11 September 2020, Ms Hughes elected to treat the oral term that would have ended her employment at the end of two to three weeks as ineffective. I find Ms Hughes was dismissed from her employment.

**If Ms Hughes was dismissed from her employment was the dismissal unjustified?**

[66] Justification is to be assessed in accordance with the test in s 103A of the Act. This requires the Authority to objectively determine whether the Trust's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[67] The requirements of procedural fairness are not separate from determining the reasons for which an employer may dismiss. In relation to dismissal for misconduct the Court has stated that:

An employer who has failed to give its employee an adequate opportunity of being heard prior to a dismissal...cannot be said to have any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it.<sup>3</sup>

[68] A fair and reasonable employer is expected to comply with s 4(1A) good faith obligations and each of the four procedural fairness tests set out in s 103A(3) of the Act.

[69] Section 4(1A) of the Act requires an employer that is proposing to make a decision that may adversely impact on an employee's ongoing employment to provide the employee with information relevant to that decision and an opportunity to comment on that information before a final decision is made. That did not occur in this case.

[70] I note the Trust also gave evidence it had become concerned about aspects of Ms Hughes' performance in her role. It did not attempt to address those concerns however, and they appear to have played at least some part in the motivation for Ms Hughes' dismissal.

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<sup>2</sup> Employment Relations Act 2000, section 66(6)(b).

<sup>3</sup> *Madden v New Zealand Railways Corp* (1991) 2 ERNZ 690 (EmpC).

[71] The Trust followed no procedure apart from telephoning Ms Hughes to advise her employment was ending and emailing a letter to her.

[72] The Trust's failure to provide Ms Hughes with a written employment agreement, as it was obliged to, contributed to a situation of uncertainty around the nature and length of Ms Hughes' employment. Given the somewhat urgent and difficult situation the Trust found itself in, being an acrimonious ending of its contract with TGB, along with a need to ensure the ongoing operations of its dairy farms, the Authority would not have expected perfection in the Trust's process. However, the defects in the Trust's process were substantial and resulted in unfairness to Ms Hughes. They meant Ms Hughes did not have a final opportunity to confirm if she wished to continue in employment with the Trust prior to the dismissal.

[73] Further, I note as a matter of logic, an employer that denies dismissing an employee is unlikely to be able to establish justification of its dismissal, because it would not have taken any steps to have complied with any of the procedural fairness tests of the justification test in s 103A(3) in the Act. That was the case here.

**If the dismissal is found to be unjustified should remedies be awarded and are there issues of contribution?**

[74] I accept Ms Hughes suffered some distress because of her employment ending. She says she suffered anxiety and sleeplessness around how to pay her bills and mortgage. She says the abrupt way in which she was dismissed was hurtful and demeaning. Ms Hughes says if she had received the little amount owing to her in holiday pay or notice that would have helped with her family's immediate needs.

[75] She believes this pressure had a poor effect on her health, and feels the extra stress contributed to an abdominal illness which eventually required hospitalisation to resolve. It appears Ms Hughes was going through a difficult time as a result of TGB's and the Currins' circumstances, and this likely contributed to her level of stress. Ms Hughes has provided no detail about her illness nor pointed to evidence of a causal link between her stress arising from the dismissal and its contribution to her illness. Therefore, in the circumstances, the Authority gives little weight to this aspect of her claim for compensation.

[76] Ms Hughes says as the result of a fluke she was able to find employment in a previous job which reduced the financial burden losing her employment caused. That Ms Hughes found employment shortly after the dismissal further mitigates her claim regarding the stress she faced.

[77] Having carefully considered whether Ms Hughes should be awarded compensation, I find \$3,000 under s123(1)(c)(i) of the Act is an appropriate figure.

[78] The Authority finds Ms Hughes's conduct did not contribute to the situation giving rise to her personal grievance, and that no reduction in remedies is appropriate.

[79] Following Ms Hughes' meeting with Ms Rowe and Mr Bayly on 13 August 2020, the parties did not communicate about Ms Hughes' ongoing employment. Despite Ms Rowe being in regular contact with Ms Hughes as part of her role, she did not attempt to clarify Ms Hughes' intentions at the conclusion of the two to three weeks' employment agreed between them. While Ms Hughes could have been more proactive in addressing her employment situation, the responsibility lay with the Trust as the employer to ensure clarity around the situation, and to provide an employment agreement which it failed to do.

**Is an entitlement to holiday pay, accrued through service with TGB, payable by the Trust or not?**

[80] Ms Hughes says at the end of her employment with TGB she had annual holiday entitlements of \$2,865.42 (gross) owing. She has provided a TGB payroll report as of 18 August 2020 recording that amount was owed. Ms Hughes says her accrued entitlements were required to be transferred from TGB to the Trust, and that the Trust has breached ss 24(2) and 27(2) of the Holidays Act 2003 in failing to pay those amounts on termination of employment.

[81] The Trust says it issued TGB's employees with new employment agreements and hence had no obligation to recognise previous leave entitlements with TGB. It says it asked employees to confirm what their previous leave entitlements with TGB had been. It sought those verifications because while the Trust was considering taking over and honouring those prior entitlements on an ex-gratia basis, it says TGB's recordkeeping was too unreliable to be accepted without some independent verification.

The Trust says by that time TGB had provided it with a spreadsheet confirming it had overcharged the Trust approximately \$90,000.00 for wages, and given there were so many other financial anomalies, the Trust needed to be certain about taking leave entitlements over.

[82] Ms Hughes has provided evidence confirming part of the Trust's negotiations with TGB involved whether the Trust would take responsibility for holiday and leave entitlements of transferring employees. There is email correspondence before the Authority from Mr Melvin Currin to Mrs Currin dated 18 August 2020 stating Ms Rowe had confirm the Trust will definitely "take over ALL the staff holiday pay".

[83] Ms Rowe and Mr Bayly's evidence is that the Trust said it would look into the existing TGB employees' leave entitlements and agree to take these over, subject to being provided accurate wages records by TGB to validate the amounts. They say those records were never supplied by TGB. The Trust acknowledges it took responsibility for some transferring employees' entitlements, but in most cases it did not.

[84] On 3 September 2020 Ms Rowe emailed Ms Hughes to ask her to confirm any leave she had taken as a TGB employee. Ms Hughes replied, "Have taken no leave of any sort until last week". Ms Rowe says she was later advised by a Farm Manager that he was aware that Ms Hughes had taken a week's leave over the previous Christmas holidays. The Trust says it was disappointed Ms Hughes had attempted to "mislead" it regarding her actual leave entitlements with TGB. Ms Hughes explained that the week's leave referred to was time taken in lieu rather than leave.

[85] I find that while the Trust agreed in principle to take over leave entitlements of staff, individual assessments were made. Ms Hughes noted the letter of 14 August 2020 stated her employment was to transfer, and this gave her the impression her leave would transfer. There is no evidence the Trust gave any direct assurances to Ms Hughes, either orally or in writing, that it would take over responsibility for her leave entitlements with TGB. In those circumstances, I am not satisfied the Trust has taken responsibility for her accrued TGB annual holidays entitlements.

[86] If Ms Hughes is owed annual holidays entitlements from her time with TGB (which I note remains on the Companies Register) that is a matter between her and TGB. She gave evidence she has to date not attempted to recover her entitlements from TGB.

[87] Finally, I find the Trust paid Ms Hughes her annual holidays entitlements for the short period it employed her between 19 August 2020 to 7 September 2020.

**What are the Authority orders?**

[88] Philip Bayly Family Trust is ordered to pay to Patricia Hughes \$3,000 under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

**Is either party entitled to an award of costs?**

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

[90] If they are not able to do so and an Authority determination on costs is needed a party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party 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.

[91] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>4</sup>

Sarah Blick  
Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).