

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 173/08  
5110733

BETWEEN IAIN McDONALD  
Applicant

AND INTEGRATED FOODS  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Chris Patterson, counsel for Applicant  
Elizabeth Brown, counsel for Respondent

Investigation Meeting: 13 and 14 February 2008

Submissions received: 6 and 26 March, 3 April 2008

Determination: 9 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Iain McDonald and Integrated Foods Limited (IFL) had an employment relationship for several years up until Mr McDonald was summarily dismissed on 4 December 2007. Mr McDonald had been employed to manage one of IFL's farms known as Area Farm 1040, a property of approximately 2,200 hectares located in East Coast hill country near Motu.

[2] Three days after his dismissal Mr McDonald applied to the Authority for interim reinstatement, at the same time requesting urgency for the disposal of the application. The parties attended mediation on 14 December 2007 but they remained unable to resolve the personal grievances raised by Mr McDonald, or make other arrangements to avoid the need for his reinstatement application to be determined.

[3] Following an investigation meeting on 20 December 2007 the Authority for the reasons given in a written decision dated 21 December 2007 (AA406/07) declined to order the interim reinstatement of Mr McDonald. Arrangements were then made with counsel Mr Patterson and Ms Brown to enable the Authority to conduct the substantive investigation into the matter. Evidence was taken over two days. Submissions were reserved and have been supplied in writing.

### **Employer's reasons for dismissal**

[4] These were given in considerable detail to Mr McDonald by IFL in a letter dated 4 December 2007 signed by Mr Gary Alexander, the managing director of the company. The reasons were set out under six heads, as follows;

- 1. Loss or failure to account for and maintain livestock under your care and supervision**
- 2. Poor organisation and management of the livestock counts**
- 3. Failing to ensure nutritional, health and welfare needs of cattle**
- 4. Failure to ensure acceptable animal husbandry practices were undertaken as well as failure to manage stock processing to ensure animal welfare and failure to carry out your contractual duties**
- 5. Failure to follow the animal health and management plan, acts of negligence or irresponsible behaviour causing injury to livestock**
- 6. Loss of trust and confidence in your ability to carry out your duties**

[5] Two grievances were raised by Mr McDonald after his dismissal; a claim of unjustified disadvantage and a claim of unjustified dismissal. The actions of IFL between 23 October 2007 when Mr Alexander wrote to Mr McDonald expressing a number of specific concerns about his conduct and performance, are closely linked to the ultimate action taken by IFL to dismiss Mr McDonald. For the purposes of this investigation I view the complained of actions of IFL as giving rise to one grievance rather than two; s 122 and s 160(3) enable the Authority to synthesise the two grievances into one of unjustified dismissal.

[6] To resolve his grievance Mr McDonald has sought the remedies of reimbursement of lost wages of nearly \$19,000, and compensation of \$27,000 for hurt feelings, humiliation and distress caused by his employer's actions. The Authority has been advised by counsel Mr Patterson very recently that reinstatement to his job is no longer sought by Mr McDonald, as he has recently obtained new employment.

[7] In resolving Mr McDonald's grievance, while recognising that there is no sharp dichotomy between substance and procedure, I have looked at the grounds relied upon by IFL to justify the dismissal of Mr McDonald, and I have also looked at the procedure IFL followed to establish that those grounds existed and to implement the termination of employment.

[8] Examination of substantive and procedural justification necessarily requires a review of all the relevant actions of the employer from about 23 October until the dismissal on 4 December 2007. Any remedies to be awarded for a successful grievance claim will need to take account of every unjustified action by IFL over that period.

### **The employment agreement**

[9] The employment agreement in force at the time of dismissal is extensive and thorough in its provisions, many of which are of particular relevance to this determination.

[10] The agreement was an Individual Employment Agreement which was signed by Mr McDonald and Mr Alexander on behalf of IFL in 2004. It contained a job description and a number of schedules that Mr McDonald initialled. Incorporated by reference were certain policies and procedures that had been accepted by Mr McDonald at the time of execution of an earlier employment agreement in June 2003.

[11] Also among the provisions of the agreement were the following:

- Clause 2 – the Managing Director of IFL, Mr Alexander, was to be Mr McDonald's supervisor and was required to represent IFL in all employment related matters. Further, Mr McDonald was required to report at first instance to Mr Alexander as his supervisor.
- Clause 4 – Mr McDonald's obligations and duties were to be those set out in the job description.
- Clause 4.7 – Mr McDonald agreed to ensure that the performance of his duties was carried out in a careful, prompt and efficient manner, and in accordance with the employer's instructions, policies and procedures.

- Clause 4.11 – *“The parties agree that it is in their mutual interest for the business to be run efficiently, competitively and profitably.”*
- Clause 17.1.4 - IFL could summarily terminate the employment without notice *“in the case of serious misconduct or wilful breach of this agreement or repeated neglect of any of the terms of this agreement.”*
- Clause 17.2.1 – IFL was able to suspend Mr McDonald on pay pending investigation into any misconduct he was suspected of.

[12] Clause 25 of the employment agreement provided that employment relationship problems were to be resolved in accordance with the procedure set out in Schedule 5. The schedule provided that if the parties themselves were unable to resolve any such problem then the party initiating the dispute could refer the matter to the Mediation Service of the Department of Labour. The agreement explained that the mediator’s function was to try and help the parties resolve the problem but without making a decision as to the rights and wrongs unless both parties wanted that.

[13] Schedule 5, after outlining the process for resolving employment relationship problems, concludes with the following provision:

*Delays*

*In good faith we must both deal with any employment problem promptly. Any unreasonable delays may prejudice the other party’s ability to properly respond to the employment problem claimed.*

[14] At Schedule 3 there is a non-exhaustive list of types of conduct that constitute serious misconduct and as such grounds for dismissal. Of relevance to this case is the following conduct,:

4. *Loss or failure to account for property owned or controlled by the employer, including livestock and plant that are under the care and supervision of the employee.*

.....

21. *Failure to comply with all the employer’s policies or customary practices relating to agrichemical and dangerous goods use.*

**The letter of 23 October**

[15] On 24 October 2007 a letter was given to Mr McDonald by Mr Alexander. The letter, which had been written the previous day, drew Mr McDonald's attention to a number of specific concerns Mr Alexander said he had about his performance and conduct. They were in relation to missing or unaccounted-for livestock, the management of livestock, animal husbandry and stock transport logistics. In relation to each, Mr Alexander set out in some detail the basis for his concerns. Those concerns ultimately developed into conclusions and became the reasons for dismissal.

[16] The 23 October 2007 letter concluded with a request that Mr McDonald attend a meeting on 26 October at which the concerns raised could be examined. The letter advised Mr McDonald that he could have a support person attend the meeting with him if he wished, although nothing was expressly stated in the letter about the meeting being disciplinary in nature.

[17] It is not in dispute that for various reasons which have been examined in detail by the Authority during its investigation, a face-to-face meeting between Mr Alexander and Mr McDonald did not take place on 26 October or at any other time during the remainder of the former's employment, before it was terminated on 4 December 2007. Mr McDonald rejected all requests from his employer to meet made during that time.

[18] The Authority has no doubt that Mr Alexander was genuinely concerned about each of the matters raised in his letter, to the extent that he felt compelled to begin inquiring into them. I find that Mr Alexander did not feign concern to try and shock Mr McDonald or intimidate him into resigning or taking some other action. Mr Alexander's own concerns were triggered by the serious concerns he learned others held about the way Mr McDonald was managing Farm 1040.

[19] Mr Ross Buscke was one of those who were concerned. He was engaged on contract from time to time to count livestock on Farm 1040. Mr Buscke was reluctant to go behind the back of Mr McDonald about what he had found when visiting the farm, but felt compelled to do so by the plight of the animals he had seen there. He said this moved him to contact Mr Anthony Cresswell, a manager of IFL, in mid-August 2007 and voice his concerns about the poor condition of stock and lack of

feed. Mr Cresswell went to view the farm for himself and he later told Mr Alexander what he had heard and seen.

[20] As to Mr Alexander communicating his concerns to Mr McDonald by letter, I find that the nature, number and detail of those concerns dictated that they should be conveyed in writing to Mr McDonald, rather than raised orally with him for the first time. To allow Mr McDonald to consider his response to the concerns, he needed to have them clearly set out in writing so that he could reflect on them and remind himself of what each concern expressed was.

[21] The decision taken by Mr McDonald not to meet face-to-face with Mr Alexander as the latter had requested so as to provide Mr McDonald with an opportunity to discuss the concerns and explain the allegations of misconduct subsequently made against him, was unfortunate in the circumstances. In my view, that decision probably caused Mr McDonald to suffer some disadvantage, but that was a consequence of his own making rather than from any unjustified action on the part of Mr Alexander or IFL.

[22] I reject the suggestion that a meeting face-to-face by Mr McDonald with Mr Alexander would have been oppressive, intimidatory, unfair or disadvantageous in some way to Mr McDonald, especially if he had attended such a meeting with a representative as he was invited to do. I reject also the suggestion that just because Mr McDonald was a *man of the land*, as he was described several times, he could not have held his own in a conversation with Mr Alexander, even if he was perceived by some as being more articulate and intelligent than Mr McDonald.

[23] It is clear that Mr McDonald had been able to meet regularly with IFL management, including Mr Alexander, during about three years of employment preceding the letter of 23 October and had not shown he had difficulty relating to Mr Alexander.

[24] The failure to meet in person to discuss Mr Alexander's concerns raised the risk of escalating problems between employer and employee, whereas a face-to-face discussion held promptly might well have provided the answers or assurances that Mr Alexander was looking for.

[25] Both IFL and Mr McDonald, as parties to an employment relationship, were required by s 4 of the Employment Relations Act 2000 to deal with each other in good

faith. Section 4(1A) expressly required Mr McDonald and IFL “*to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*”

[26] I consider that the concerns raised by Mr Alexander on behalf of IFL needed to be dealt with promptly and directly between employer and employee, if they were to be addressed in a way that minimised damage or disruption to the employment relationship.

[27] Mr McDonalds resistance to meeting with Mr Alexander simply reflects an aspect of his conduct that in my view strongly contributed to the problems that developed in managing his farm. It is evident that he isolated himself from support and assistance when it was readily available, just for the asking, from others such as Mr Cresswell, Dr Tattersfield the vet, and Mr Buscke. Mr McDonald preferred putting a brave face on the situation as it steadily worsened around him, with large numbers of cattle, deer and sheep going missing in the bush from unfenced parts of the farm, and also a lack of sufficient feed ahead. He should have sought help and communicated these problems. Instead he was aggrieved about his lack of autonomy or independence as a farm manager, obviously preferring to be his own man rather than behave as a member of a team reporting to more senior managers and company directors.

[28] Mr McDonald cannot be criticised for engaging legal counsel to assist him or for seeking that assistance from a representative who did not practice in the Gisborne area or anywhere near the locality of the employment.

[29] What advice Mr Patterson gave to Mr McDonald, and whether Mr McDonald followed that advice at all times, is not something for the Authority to inquire into and determine, but it is clear to me the dealings by Mr McDonald with IFL between 23 October and 4 December 2007 became unnecessarily legalistic, adversarial and confrontational. They seem to have been an attempt to follow clever strategy rather than a concerted effort to maintain the employment relationship and overcome the concerns of Mr Alexander quickly, if that was at all possible.

[30] In reviewing what happened between 23 October and 4 December 2007, from the emails and extensive correspondence between the parties and their legal advisers it appears there was a tactic on the part of Mr McDonald to try and induce IFL to trip up

and do something that would create a problem which could then be turned against the employer, deflecting attention away from the concerns originally raised by it.

[31] I find that IFL at all times remained accommodating to the many requests made by Mr Patterson for information and for changes to the arrangements for meetings or other communications. Although IFL was not obliged by s 4(1A) of the Act to supply the requested information, as it had not concluded its factual investigation and reached a point of proposing to make any decision likely to have an adverse effect on the continuation of Mr McDonald's employment, IFL nevertheless supplied the information.

[32] In most employment relationships, at some time one party or the other will have *concerns* about some aspect of the relationship. Those concerns, ideally, should be addressed immediately and directly between the parties, to prevent unresolved concerns escalating into bigger problems if possible. Mr Alexander was entitled to raise his concerns as the supervisor of Mr McDonald and no satisfactory reason has been provided to the Authority as to why Mr McDonald, accompanied by a support person if necessary, could not have attended the requested face-to-face meeting and discussed these matters directly with Mr Alexander.

[33] I find there was no unreasonable delay causing prejudice to Mr McDonald in the way Mr Alexander had raised concerns about stock losses, first in August 2007 and then about two months later by the letter of 23 October. Mr Alexander had not suddenly elevated concerns raised in August into a disciplinary investigation, following his letter of 23 October. He sought initially to investigate with Mr McDonald the facts to see whether there was any basis for making allegations of misconduct or bad performance. The period of only a few weeks between August and October could not have led Mr McDonald reasonably to think that the matter had gone away. In October, Mr Alexander merely gave notice of a fact-finding investigation which he wished to carry out at that time to see whether any further action was necessary.

[34] Mr Patterson submitted that there is no distinction between an investigation process and a disciplinary process. If that was correct every communication by an employer to an employee to ascertain any matter of fact could be viewed potentially as a disciplinary process, leading the parties often unnecessarily into strained relationships or conflict. If every inquiry made by an employer of an employee

during the course of a working day was to be treated as potentially a disciplinary matter, the employment relationship would soon cease to be productive while a disciplinary process was worked through to its conclusion, using up resources of time and money.

[35] I entirely agree with Ms Brown's submission that, "*an employer is entitled to speak to its employees about concerns and investigate before deciding to commence a formal disciplinary process.*"

[36] Mr McDonald was entitled to have clear notice when the point was reached where his employer had decided to move from a factual inquiry into a disciplinary phase. That notice was given in this case after Mr McDonald had supplied in writing his responses to the concerns raised by Mr Alexander. Mr Patterson had written a detailed seven page letter responding to those various matters.

[37] IFL wrote back to Mr McDonald on 27 November 2007 advising that his responses had been considered and that a decision had been made to proceed with disciplinary action.

### **Claim of predetermination**

[38] Mr McDonald has claimed that the letter he received from IFL led him to conclude that his guilt had been predetermined in respect of the misconduct alleged against him. This was a further reason, he said, why he had again declined to meet with Mr Alexander face-to-face in what had developed into a disciplinary phase.

[39] The basis of this was a part of the letter of 27 November from Mr Alexander in which reference was made to the loss of trust and confidence in Mr McDonald. He took this to be a statement of belief and conclusion that had been reached by IFL before the employer had heard and considered his explanations.

[40] In this aspect of his claim Mr McDonald focused on the following part near the end of the long letter from Mr Alexander:

**6. LOSS OF TRUST AND CONFIDENCE IN YOUR ABILITY  
TO CARRY OUT YOUR DUTIES**

*We believe that, given the foregoing, your actions have irrevocably destroyed the confidence or trust that is an essential element of the employment relationship.*

*You have undertaken deliberate action that was adverse and/or harmful to the employer's interests, such as its reputation, and significant monetary and non-monetary costs.*

[41] It is not a fair reading of a letter of this length to isolate out one particular paragraph. It was one of several numbered paragraphs which at the beginning of the letter are referred to as containing *allegations*. Also, the paragraph immediately after para.6 refers back to the preceding paragraphs as *allegations*. The letter cannot easily be read as setting out allegations under the first five numbered headings but advising of a finding or determination of the employer in the sixth and final part. That is contrary to the way the letter appears to have been written or constructed.

[42] I find that Mr McDonald had no reasonable basis from the way the letter had been written for believing that his guilt of any misconduct had been predetermined by Mr Alexander. If that was his belief, then it was not caused by the way the letter had been composed. More probably, Mr McDonald realised that his actions had justified an inquiry into them and some form of disciplinary response by the employer.

#### **The request for urgent mediation**

[43] After IFL, through Mr Patterson, had notified Mr McDonald that a disciplinary meeting was to be held on the afternoon of Friday 30 November 2007 for him to answer the allegations expressly made against him, at 10.30 on the night before the meeting Mr Patterson sent an email to Ms Brown.

[44] In his email Mr Patterson advised that his client Mr McDonald would not be attending the next day's meeting and that an injunction was to be sought to restrain IFL from inquiring into Mr McDonald's conduct. The following was at the end of the email;

*My client requests that the company agree to attempt mediation on an urgent basis in respect of this matter.*

[45] Much was made on behalf of Mr McDonald about IFL not giving its agreement to the requested mediation, but that request had been made so late as to raise doubts about the motive behind it. It was open to IFL participate in mediation if it wished and I do not consider the employer acted in breach of statute or contract or in any way unreasonably by rejecting the request. It was IFL as the employer that had the obligation to conduct the disciplinary process and do so fairly and reasonably.

[46] It seems to the Authority that this employment relationship problem may well have been capable of resolution in a very different way if Mr McDonald had taken the opportunity offered to him to sit down with Mr Alexander face-to-face, explain his conduct and, if he wished to, make his excuses or give his apologies for what he had done.

### **Grounds for dismissal**

[47] As to the grounds for dismissal, IFL as an employer was not required to prove that Mr McDonald had been guilty of misconduct or bad performance in the manner alleged against him. Rather, IFL was required to show that it held an honest belief after a full and fair investigation had been conducted into those allegations and after Mr McDonald had been given an opportunity to explain his conduct or performance.

[48] Justification, both procedurally and substantively, for a dismissal is to be determined under s 103A of the Employment Relations Act 2000. There is nothing in that section that detracts from what has been said by the Court of Appeal in cases decided under earlier legislation, such as *Airline Stewards' and Hostesses of NZ IUOW v. Air New Zealand Ltd* [1990] 3 NZILR (CA) 584. This has been confirmed by the Employment Court more recently in *Murphy v. Steel & Tube New Zealand Ltd*, unreported, 16 October 2007, CC18/07, where the Court observed at para.[59]:

*The burden on the employer remains that of showing that conclusions were reached and action taken only after a full and fair investigation was carried out and on the basis of what that investigation disclosed.*

[49] In the 1990 Court of Appeal judgment above, there was a further relevant statement at pp.590-591 as follows:

*The employer must have more than mere suspicion but need not have proof beyond reasonable doubt ... At the time the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer can safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault ...*

[50] I find that conclusions were reached by IFL and action taken by the employer, only after a full and fair investigation had been carried out and on the basis of what that investigation disclosed. It disclosed reasonable grounds for the belief formed by IFL that in several major respects Mr McDonald had not performed his job to the standard required by his employment agreement. The facts were established to a

sufficient degree of likelihood to lead a fair and reasonable employer to reach that conclusion.

[51] From its enquiries IFL could reasonably believe that Mr McDonald by his conduct and performance had caused the situation providing the employer with the grounds or reasons relied upon for dismissal.

[52] Mr Patterson submitted that summary dismissal for misconduct or poor performance cannot be justified unless the employee's actions are so bad as to completely destroy trust and confidence. The case he relied upon in this regard was a decision of the Labour Court given in *Northern Distribution Union v. Newmans Coach Lines Ltd* [1989] 2 NZILR 677. This case must, however, now be regarded as bad law on this point.

[53] Any doubt about this was removed by the Court of Appeal decision in *Northern Distribution Union v BP Oil Ltd* [1992] 3 ERNZ 483. The Court held at page 487 with regard to the kind of conduct that will justify summary dismissal:

*Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[54] While the actions and conduct of Mr McDonald may not have been so bad as to destroy the trust and confidence required to be maintained by the parties in their employment relationship, unfortunately, because of his aversion to sitting down with Mr Alexander face-to-face to discuss the situation, there was little chance given to the employer for seeing whether anything could be rescued from the situation and allow the employment to continue.

[55] When viewed objectively, I find that it was not reasonable to expect IFL to continue to employ Mr McDonald in the circumstances. His conduct was such as to seriously undermine or damage the employment relationship, its impact being at the very core of the purposes and objectives for which the employment relationship had been formed.

[56] I find that IFL was entitled to view Mr McDonald's actions as being inconsistent with provisions of the employment agreement which expressly required him to carry out his duties in a careful and efficient manner, and in accordance with

one of the employer's policies that promoted the mutual interests of the parties in having the business run *efficiently, competitively and profitably*.

[57] I find, taking an objective view, that IFL's actions and how IFL acted were what a fair and reasonable employer would have done in all the circumstances as they had arisen between about 23 October 2007, when IFL raised its concerns, and 4 December 2007 when the employer decided to dismiss Mr McDonald. The actions of IFL therefore meet the test of justification provided by s 103A of the Act.

### **Determination**

[58] Accordingly, it must be the determination of the Authority that Mr McDonald does not have a personal grievance of any kind arising out of his dismissal or the employer's conduct leading up to that. Mr McDonald is not therefore entitled to any of the remedies claimed by him.

### **Costs**

[59] Costs are reserved. Any application for costs is to be made in writing and directions will then be given as to when a reply is to be made. Before that Ms Brown and Mr Patterson are to confer with a view to reaching agreement as to the disposal of this issue without the need for an order.