

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 75
5434361

BETWEEN MURRAY MCGRANNACHAN
 Applicant

AND FARMLANDS CO-OPERATIVE
 SOCIETY LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Janet Copeland and Rebecca Laney, Counsel for
 Applicant
 Fiona McMillan, Counsel for Respondent

Investigation Meeting: 27 and 28 March 2014 in Invercargill

Submissions Received: On the day

Determination: 14 May 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed from his employment.**
- B. There is no order for reinstatement.**
- C. The applicant is to be paid six months lost wages from the date of dismissal less one month's notice paid, earnings received and 20 % contribution. There is no award of interest on that sum. Counsel are to discuss whether agreement as to that sum can be reached failing which leave is reserved to return to the Authority.**

- D. The applicant is to be paid the sum of \$8,000 compensation without deduction under s.123 (1)(c)(i) of the Employment Relations Act 2000.**
- E. Costs are reserved and failing agreement a timetable has been set.**

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the Second Schedule of the Employment Relations Act 2000 (the Act) details of any shareholder of Farmlands Co-Operative Society Limited (Farmlands) I have not heard evidence from.

[2] Farmlands was formerly known as CRT Co-operative (Combined Rural Traders Society Limited). It is a co-operative society owned by its shareholders who are its customers and clients. Farmlands operate throughout New Zealand providing a wide range of agricultural products and services. I shall refer to the respondent in this determination as CRT or Farmlands.

Employment relationship problem

[3] Murray McGrannachan commenced employment with CRT on 3 December 2001. From in or about 2004 he was promoted to the position of Branch Manager of the Winton Farm Centre and performed well in that role.

[4] In 2010 CRT undertook a change to the management structure of the CRT stores. A new structure was implemented. At that time it was proposed that Mr McGrannachan become the Technical Field Officer (TFO) for the Winton area. Mr McGrannachan accepted the TFO role in which he was to have responsibility for field based sales of farm supplies like netting and drench and was to provide technical product advice.

[5] Mr McGrannachan signed a new individual employment agreement (the employment agreement) for the TFO role on 4 December 2011 having earlier been provided with a TFO position description. Schedule C of the employment agreement provided examples and a procedure for dealing with serious and less serious misconduct.

[6] In his written evidence Mr McGrannachan said that he commenced his TFO role on or about 3 December 2011. He clarified in his oral evidence that on reflection

he may not have actually started that role until January 2012 because he was required to continue undertaking the duties of a Branch Manager for a period of time.

[7] On 10 May 2013 Mr McGrannachan was dismissed from his employment for performance issues that were the subject of a disciplinary meeting held on the same day. Written reasons for Mr McGrannachan's dismissal were contained in a letter dated 20 May 2013 from the Regional Manager Southland CRT, Harry Soper. That letter confirmed that Mr McGrannachan was to be paid out four week's pay in lieu of notice from 10 May 2013.

[8] Mr McGrannachan says that his dismissal for poor performance was procedurally and substantively unjustified. He seeks the following remedies:

- A finding that he has been unjustifiably dismissed;
- Reinstatement to his former position as TFO in Winton;
- An order for reimbursement of lost income from the date of dismissal to the date of the investigation meeting;
- An order for payment of compensation;
- Interest;
- Costs.

[9] CRT says that Mr McGrannachan's dismissal was substantively justified for poor performance. It says that Mr McGrannachan was clearly told that CRT was not happy with his performance and that he needed to improve. Further that he was given training and the expected level of performance was clearly advised to him and that any procedural errors were minor and did not cause disadvantage or unfairness to Mr McGrannachan. It says that Mr McGrannachan did not seek reinstatement before his position was advertised and an appointment made to replace him and that reinstatement is not practicable and reasonable for this reason and because Mr McGrannachan did not enjoy his work as a TFO and did not perform in that role and that is unlikely to change.

The issues

[10] The test of justification of the dismissal is found in s.103A of the Act. Justification must be determined by the Authority on an objective basis as to whether the decision to dismiss and how the decision was made was what a fair and reasonable employer could have done in all the circumstances at the time. A fair procedure includes the elements set out in section 103A (3) (a) to (d) of the Act. The statutory obligations of good faith inform the process and in turn the decision under s 103A. The Authority may also consider any other factors that it thinks appropriate and must not determine a dismissal unjustifiable if the defects in the process were minor and did not result in the employee being treated unfairly.

[11] This was a dismissal for performance concerns. The Authority needs to consider whether there was a fair trial of Mr McGrannachan's performance so that CRT could conclude that Mr McGrannachan's performance was below the standard required. If there was a fair trial and Mr McGrannachan fell short of the standard required then there is an issue as to whether a fair and reasonable employer could have dismissed him. The issues to be considered by the Authority include those referred to as relevant considerations for a dismissal for poor performance in *Trotter v Telecom Corporation of New Zealand* [1993] pg. 659 at 681 and are as follows:

- (a) Did CRT inform Mr McGrannachan that it had become dissatisfied with his performance and require in a measureable way that he achieve a higher standard?
- (b) Was he allowed a reasonable time to demonstrate that he had improved?
- (c) At the end of that time was he assessed objectively on the targets?
- (d) Was he provided with all the relevant information and was he given an opportunity to be heard on the conclusion reached about his performance?
- (e) Was his explanation genuinely considered before a decision was made to dismiss him?
- (f) Was consideration given to alternatives to dismissal?
- (g) Are there any other relevant factors?

- (h) Were there minor defects that did not result in the unfair treatment of Mr McGrannachan?
- (i) Was dismissal what a fair and reasonable employer could have done in all the circumstances at the time it occurred?
- (j) If the dismissal was not justified then what remedies should be awarded? Is reinstatement practicable and reasonable and are there issues of mitigation and contribution?

Did CRT tell Mr McGrannachan that it had become dissatisfied with his performance in the TFO role?

[12] From September 2012 Nicholas Hughes as District Sales Manager for Farmlands Finance became responsible for twelve TFOs, including Mr McGrannachan.

[13] The evidence supports that Mr Hughes became dissatisfied with Mr McGrannachan's performance from in or about October/November 2012 when he concluded that Mr McGrannachan did not achieve agreed sales of drums of drench. Although Mr McGrannachan did not accept that agreement had been reached about the sales to be achieved at that level he did not subsequently challenge as incorrect what was written about that in his performance appraisal.

[14] Mr McGrannachan knew that CRT was dissatisfied with his performance prior to the disciplinary meeting on 10 May 2013. The first time he knew of this was when a performance appraisal was carried out by Mr Hughes on or about 6 December 2012 known as a Trakstar performance review. Mr Hughes said that by this time he had started to have serious concerns about Mr McGrannachan.

[15] The process for the review was that Mr McGrannachan initially rated himself against 12 areas of performance and then met with Mr Hughes on or about 5 December 2012 and talked about each performance area. Mr Hughes gave his input and then there was agreement about a suggested rating and what was said in the performance appraisal. I accept as Mr Hughes said in his evidence that if there had been objection to what was written in the appraisal the words would not have been used.

[16] Out of 12 performance areas Mr McGrannachan was rated by Mr Hughes as needing improvement for 4 of them, below acceptable standard in 3 and that he met expectation in 5. The performance review took place over half a day and Mr McGrannachan felt it was worthwhile. Mr McGrannachan spoke frankly about the difficulties he was experiencing in performing his role including that he had no confidence which was impacting on the cold calling aspect of sales. Mr Hughes concluded that this was holding him back in his role as TFO.

[17] Mr McGrannachan was rated below acceptable standard under the performance area, *total business growth*. Mr Hughes wrote under that area that he planned to spend at least one full day per month with Mr McGrannachan in the field to promote this concept.

[18] The second occasion at which I am satisfied that it was clear to Mr McGrannachan that CRT was dissatisfied with his performance was on 20 February 2013. Mr Hughes undertook a joint calling session with Mr McGrannachan on that day.

[19] Mr McGrannachan accepted that he was told by Mr Hughes that his sales needed to improve immediately and that he was spending too much time in the Farm Centre. Further he needed to stop visiting his house and the stables where his wife worked on Campbell Road. I find it likely in the latter context there was reference to Navman records showing visits to these places in his company vehicle.

[20] Specifically Mr McGrannachan was advised that he needed to be making up to 10 sales calls per day. This would require Mr McGrannachan covering a geographical area, district or road and calling up 10 farm driveways.

[21] Mr McGrannachan said when he gave his evidence that he was confused about that requirement because he thought it was 10 actual sales that were required rather than 10 physical calls up farmers' driveways. He said that led to incorrect conclusions being drawn about whether he made these calls or not. Mr Hughes said that Mr McGrannachan told him on 20 February 2013 he was only making 2-3 calls per day on farmers. Mr McGrannachan denied saying that he had only made 2-3 calls per day on farmers at that time and said he was referring to calls from which actual sales had eventuated when he gave those numbers.

[22] Mr Hughes did not accept the requirement of 10 sales calls was not clear to Mr McGrannachan and said in his evidence that 10 sales calls a day was quite manageable because on 20 February he went with Mr McGrannachan and they made 5 cold calls in the morning on farmers and one additional call where there had been a pre-arranged appointment.

[23] Mr Hughes, in accordance with a file note that he took at that time, said he advised Mr McGrannachan that the situation was serious and could not continue. Mr Hughes was a diligent taker of notes following meetings and I accept that he wanted to make it clear to Mr McGrannachan the situation was serious.

[24] Mr McGrannachan said that he considered the discussion informal and not of a disciplinary or performance management nature. He said that he did not consider that he was at risk of dismissal if performance did not improve. There was no written follow up to the concerns that Mr Hughes talked to Mr McGrannachan about on 20 February 2013 which were listed in Mr Hughes file note.

[25] Ms Copeland in her submissions helpfully set out a number of employment cases as to whether a failure to warn an employee that dismissal was a possible consequence of poor performance meant a subsequent dismissal was procedurally unfair and unjustified. She accepted that there is no general proposition that a formal warning is a condition precedent to the proper termination of employment and that repeated instances of poor performance can justify termination of employment although submits that was not the situation here. She submits that a fair and reasonable employer could and should have formally warned Mr McGrannachan.

[26] If there is no clear warning there is always the possibility that an employee is unaware of shortcomings and importantly has no opportunity to improve. In this case Mr McGrannachan knew that there was concern about his level of sales but I am not satisfied that he knew as a result of the discussion with Mr Hughes on 20 February 2013 if sales did not increase and/or if he did not undertake 10 sales calls each day it would be viewed so seriously by CRT that his employment may be in jeopardy.

[27] Some guidance can be obtained from the employment agreement as to whether the discussion on 20 February 2013 was sufficient warning. Poor performance is described under the employment agreement as less serious misconduct. The procedure for dealing with less serious misconduct focuses on warnings referring to

both verbal and written before dismissal. A formal meeting is required before the issue of any warning including an oral warning. The discussion with Mr Hughes on 20 February 2013 was in an informal setting. The content of a written warning is set out on pg 16 of the employment agreement and includes a timetable to achieve the corrective action and a clear statement that failing to complete the corrective action *could* result in further disciplinary action or dismissal. In *Trotter* Chief Judge Goddard noted at pg 680; *A warning is not a magic wand creating a ground for dismissal. It is rather a step fairly taken to enable a dismissal to be averted.*

[28] The employment agreement I find in all likelihood requires a level of formality in dealing with performance issues beyond that of the verbal discussion on 20 February 2013 if it is to be subsequently relied on as a fair trial in a disciplinary setting. The corrective actions are required to be clear as well as the way any improvement is to be measured and the timeframe within which improvements are to be made. I will go on to consider those matters.

Measurable improvement to achieve a higher standard required?

[29] The sales achieved by Mr McGrannachan would be the obvious measure of improvement of his performance. Mr Hughes in his evidence said that there were sales expectations of \$1 million per annum for TFO's of Mr McGrannachan's experience.

[30] Although the evidence of Mr Hughes and Mr Soper was to the effect that Mr McGrannachan should have known that this was the level of required achievement I cannot be satisfied of that. That is because Mr McGrannachan was not provided with a budget and it was not until after dismissal that Mr McGrannachan was shown his sales figures. In short there was no evidence to support any discussion of the level of sales required or sales actually achieved before dismissal.

[31] The 10 sales calls per day is a specific requirement and is measurable. What is not clear is how the numbers of sales calls were to be measured. There is also a complicating factor that Mr McGrannachan says he was confused by what was required by 10 sales calls. A discussion as to the measurement of sales calls made each day by Mr McGrannachan would have removed any possibility of confusion. Recording sales calls made each day and providing those to Mr Hughes on a weekly

basis would have been a satisfactory measure but that level of formality was never implemented.

Was there a reasonable time to demonstrate improvement?

[32] No specific time was given for improvement except to the extent that Mr Hughes wanted a noticeable and immediate improvement in sales. I cannot therefore conclude that Mr McGrannachan had fair warning he had a specific timeframe to show improvement. The next step in any performance process was the preliminary meeting on 8 May 2013 followed two days later by the disciplinary meeting and dismissal. Over the intervening period there had been training but no close supervision in the sense of regular assessments with Mr McGrannachan as to whether he was meeting sales targets and/or whether sales calls were being made appropriately and to the number required.

Was Mr McGrannachan at the end of that time assessed objectively on the targets?

[33] There was no objective assessment as stated already about sales made by Mr McGrannachan and whether there had been an immediate and noticeable increase in sales before or at the disciplinary meeting. The focus at the disciplinary meeting was on the 10 sales calls per day, performance during the recent dairy canvass and on the amount of time spent in the Farm Centre and at non-work related addresses.

[34] In conclusion I am not satisfied that the discussion with Mr McGrannachan on 20 February 2013, although I accept intended to convey the seriousness of the situation, was of the level of formality required to indicate to Mr McGrannachan he had moved into a performance management regime and/or that it was clear enough to amount to a verbal warning.

[35] I accept Ms Copeland's submission that CRT did not meet the requirements or standards of *Trotter* for a fair trial. I shall assess whether the disciplinary process then adopted by CRT and the outcome of dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place.

Was Mr McGrannachan provided with all relevant information that the conclusions were based on and was there an opportunity for him to be heard on the conclusions reached about his performance?

[36] After a meeting described as preliminary in nature with Mr McGrannachan on 8 May 2013, Mr Soper and Mr Hughes decided that they needed to have a formal disciplinary meeting with Mr McGrannachan. Mr Soper wrote a letter to Mr McGrannachan dated 8 May 2013 which Mr McGrannachan received on 9 May 2013. He was advised about the following issues to be discussed at the disciplinary meeting on 10 May 2013 that related to poor performance:

- *A clear mutually agreed objective of achieving at least 10 sales calls per day had been set by your line Manager.*
- *Excessive periods of time are being spent by you in the Winton Farm Centre during the working day. This is contrary to your Technical Field Officer role.*
- *Results to date for the 2013 Dairy Canvass demonstrate that a less than acceptable level of customer contact had been made in the subsequent three weeks up to 8/5/2013.*
- *Vehicle tracking records (Navman) clearly show that multiple daily calls to non-work related addresses are being consistently made.*

[37] I have accepted that Mr Soper's handwritten note from the meeting is the best evidence available from the 10 May 2013 meeting. Mr McGrannachan when he provided both written and oral evidence tendered I find to expand on or provided new explanations for the allegations not given at the disciplinary meeting.

[38] Although advised to bring a representative to the meeting Mr McGrannachan chose not to do so. I shall refer to this decision in due course. At the disciplinary meeting Mr McGrannachan did not really challenge any of the allegations including that he had not made the required 10 sales calls. He offered limited explanations and did not appear to dispute CRT's view that he had not been performing the role. The evidence supports that he explained that he had lacked the confidence around the sales calls. He said that since the preliminary meeting on 8 May 2013 he had been out doing the role and had five new calls lined up. He told Mr Hughes and Mr Soper that the last two days [following the 8 May 2013 meeting]

he has shown himself *that he can do it*. He said that he felt safer in the Winton Farm Centre and that he did make some contacts whilst he was there. He explained that he had a high level of fear, about the sales calls, and I find it likely that he said that fear *paralyses me*. He also, I find in all likelihood, agreed that he did not find it easy to ask for help.

[39] There was some dispute about whether Mr McGrannachan made comments that he was disappointed with himself and that he had let the company down. Having heard from Mr McGrannachan I find it is likely that he did express some disappointment with himself in respect of his performance. He denied saying it was *too little too late* and I accept that is more likely to have been a statement from Mr Soper or Mr Hughes.

[40] I have considered Ms McMillan's submission that there was no explanation given that by Mr McGrannachan on 10 May 2013 that he was confused about what was required for 10 daily sales calls. I find that likely. There was some evidence to support some confusion in Mr McGrannachan's mind about the 10 sales calls requirement at the meeting on 8 May 2013. Mr Soper agreed when he gave his evidence that he stated to the effect it was a *big ask* to have sales from 10 calls. I do not find it likely that he would have responded that way unless Mr McGrannachan had talked about sales from each call.

[41] At the end of the meeting on 10 May 2013 CRT had reached some conclusions about Mr McGrannachan's performance. I find from objectively assessing the disciplinary meeting that Mr McGrannachan was not provided with all the relevant information before CRT reached conclusions about his performance. That affected his ability to comment specifically on the information before he was dismissed. This impacted in turn on what a fair and reasonable employer could conclude about Mr McGrannachan performance and any decision about his future with CRT.

[42] Section 4(1) (A) of the Act requires that an employer proposing to make a decision that may adversely impact on the continuation of an employee's employment must provide the employee with access to the relevant information and an opportunity to comment on that information before it makes a final decision about the employee's ongoing employment.

[43] There was no provision of, or discussion about, Mr McGrannachan's sales figures at or before the disciplinary meeting. I find that the sales figures were relevant information and should have been provided. Mr Soper said in his evidence, *actions and behaviours dictate sales results*, but sales are the overarching measure of performance.

[44] Documents provided after dismissal show Mr McGrannachan's sales were low in comparison with other TFO's and were not at the level expected by CRT of \$1 million. Mr McGrannachan takes issue with the figures and says they were incorrect, that some sales he made were not allocated to him and that a large account secured at the time of the disciplinary meeting would have taken him to the expected level of performance. I shall refer more to this shortly. There was no opportunity for that discussion to take place at the disciplinary meeting and/or before the meeting as part of a performance management process.

[45] The evidence did not support that Mr McGrannachan was offered the records that supported any figures for the dairy canvass. Mr Hughes said that Mr McGrannachan would have had records about the dairy canvass but he was not asked for these and there was no discussion therefore about them. There were no clear records provided as part of the Authority process about the dairy canvass.

[46] Mr Hughes relied I find about the diary canvass figures on discussions with Mr McGrannachan at weekly meetings in the Winton Farm Centre when Mr McGrannachan advised him of only a small number of clients he had spoken to.

[47] I am strengthened in my view about the importance of the provision of such information about sales and the dairy canvass by an email Mr McGrannachan sent to Mr Hughes on 7 May 2013. The contents were not referred to at the disciplinary meeting. The email was sent as part of Mr McGrannachan's required reporting to Mr Hughes and was obviously very close in time to the disciplinary meeting. Mr McGrannachan in the 7 May email states amongst other matters – *Have had a good week last week with dairy canvass signing up contracts for 600 tones of PKE and 300 tones of summer milk pellets, 12 tones of Mag C and 6 tones of Mag Oxide with Craig Rye.*

[48] I asked Mr Hughes at the investigation meeting whether he considered the sale to Mr Rye as part of the dairy canvass. His answer was to the effect that it was different although that was clearly not Mr McGrannachan's view.

[49] In his evidence Mr McGrannachan said in line with the email reporting that he had at the time of the disciplinary meeting just secured a feed account for Rye Dairies Limited (Rye Dairies) of about \$450,000. His evidence was that the feed account together with other general farm supplies he sold to Rye Dairies would amount to annual sales for him from Rye Dairies alone in the vicinity of \$700,000. I heard from Craig Rye who is a Director and Shareholder of Rye Dairies. He confirmed that the feed account contract entered into with CRT was in the region of \$450,000 and that Rye Dairies also purchased general farm supplies from CRT.

[50] Mr McGrannachan made no mention of this large sale at the disciplinary meeting although it would have been known about by Mr Soper and Mr Hughes. Mr McGrannachan was instrumental in achieving this sale but whether or not this sale should have been taken into account in his sales figures or not was never discussed before dismissal.

[51] Navman records were available at the disciplinary meeting for Mr McGrannachan to consider but he chose not to look at them and I find it likely he indicated there was no need. I have then considered what a fair and reasonable employer could conclude about that in respect of the allegation that he was making multiple daily calls to non-work related addresses.

[52] It was not clear to me what period CRT relied on at the disciplinary meeting in relation to this allegation. The Authority had before it as part of the documentation some Navman records from February 2013 provided as a sample. They had markings on them relating to the non-work related visits. Most of these related to dates prior to 20 February 2013 which was the day on which Mr Hughes asked Mr McGrannachan to stop the visits to home and stables. Mr Soper said that after dismissal he emailed on request by Ms Copeland about 570 pages of marked Navman vehicle tracking records. Mr McGrannachan said that the pile of Navman records at the disciplinary meeting was not that of a depth of 570 pages. If there were 570 pages of records then it would have been unfair and unreasonable for Mr McGrannachan to have been expected to go through and respond to that material at the meeting. There was no summary of the visits provided to non-work related addresses. Mr Hughes in his evidence said that in preparation for the Authority investigation meeting he had undertaken an analysis of March records but that was not undertaken earlier.

[53] A fair and reasonable employer could have been expected with an allegation regarding vehicle tracking records to have provided a summary of its investigation into the allegation that non-work calls were being made and over what period of time and provided with that summary the supporting Navman records. This should have been provided in advance of the disciplinary meeting so that the allegation could be properly answered. To the extent that conclusions by CRT were drawn about visits to non-work related addresses they could only fairly and reasonably be general in nature and not specific conclusions.

[54] There was some dispute as to whether Mr McGrannachan recognised the seriousness of the situation and that he could lose his job before the disciplinary meeting. Mr McGrannachan I find thought the matter was serious after the preliminary 8 May 2013 meeting. I prefer Mr Hughes evidence that he received a call directly after the 8 May 2013 meeting from Mr McGrannachan asking if he still had a job or not. Mr Hughes advised that no decision had been made at that point and there would be an opportunity for a response to the concerns at the disciplinary meeting.

[55] It then appears that Mr McGrannachan placed reliance on the wording in the letter of 8 May 2013 which he received on 9 May 2013 inviting him to the disciplinary meeting; *as these issues are serious, they may result in disciplinary action which could include a warning or in some situations dismissal.* Mr McGrannachan said he thought about the Rye Dairies account and the booked in dairy canvass appointments and did not consider that it would be one of the situations where dismissal would occur so did not take a representative with him to the disciplinary meeting.

[56] The words in the letter of 8 May 2013 seemed to me likely to have been a combination of the process in the employment agreement for both less serious misconduct requiring an employee be advised a possible outcome is a warning and serious misconduct which requires an employee be advised that a possible outcome of the meeting may be dismissal or another penalty. The words were in all likelihood not as clear in the letter as they could have been for that reason. Objectively assessed it seems inconceivable that if Mr McGrannachan thought he would lose his job he would not have raised the significant account secured with Rye Dairies for feed. There was no opportunity for him to make any further explanation with respect to any proposed outcome.

[57] I do not find in conclusion that Mr McGrannachan had a proper opportunity to explain and/or refute the allegations because he was not provided with adequate records and/or specific details of the allegations in order to do so. That failure was a breach of the good faith obligations. There was insufficient investigation into the specific allegations about time spent at non-work related addresses and the Farm Centre.

[58] Mr McGrannachan gave a general explanation that he found the sales calls difficult and that there was a degree of fear involved in the undertaking of that important aspect of his role. CRT concluded, I find not unreasonably, that he was not achieving 10 sales calls per day. If there was confusion about that requirement I do not find Mr McGrannachan gave that explanation at the disciplinary meeting. He explained that he felt safe in the Farm Centre which no doubt accounted for additional time spent there. As with the calls to non-work related addresses there was no specific breakdown of the period excessive time was spent in the Farm Centre. Mr McGrannachan appeared to have a good level of insight into why he had difficulties with undertaking the role.

Was Mr McGrannachan's explanation genuinely considered before a decision was made to dismiss him?

[59] The failure to provide information and/or specifics to Mr McGrannachan I find impacted on the ability of Mr McGrannachan to give proper explanation to the allegations and in turn prevented a proper consideration of his performance.

[60] Only limited consideration of about an hour was given to the explanation after the disciplinary meeting on 10 May 2013 adjourned. Reliance was placed on an earlier final written warning for 2012 for an inventory issue in the letter confirming dismissal dated 20 May 2013. That had not been discussed with Mr McGrannachan before dismissal and was for misconduct and not a performance issue. Although issued in June 2012 the warning concerned conduct in 2010. The failure to advise Mr McGrannachan that was going to be taken into account was unfair. He could not as Ms Copeland submits persuade CRT that the warning was for a misconduct and not performance.

[61] Mr Soper said that he was not confident that Mr McGrannachan's performance would be able to be lifted but I am not satisfied that there was any account taken of the Rye Dairies account that Mr McGrannachan secured.

[62] The meeting then reconvened and Mr McGrannachan was advised that a decision had been made to dismiss him as of 5pm that day. He did not have an opportunity to make any further explanation. Given the lack of clarity that an outcome of the meeting may be dismissal and that the fact McGrannachan was not represented that could be seen to be unfair. Initially Mr Soper said that it was felt summary dismissal was justified but on reflection it was decided to pay four weeks' notice. That reflection I find in all likelihood took place over the days following the dismissal and it was not until the letter of dismissal on 20 May 2013 that Mr McGrannachan understood he was to be paid four weeks in lieu of notice.

Was consideration given to alternatives to dismissal?

[63] Mr McGrannachan did not, as part of his explanation at the disciplinary meeting, say that he had not been adequately supported in his role. The Authority was provided with a list of training Mr McGrannachan had attended including sales training. Mr Hughes implemented weekly all up meetings for TFO's in each Farm Centre and said he did not find Mr McGrannachan's level of participation during the meetings particularly satisfactory. Mr Hughes did undertake some cold calling with Mr McGrannachan although not to the extent envisaged at the performance appraisal. He did attempt appropriately in my view to deal with Mr McGrannachan's lack of confidence by encouraging a *whole of business approach to sales* including a CRT corporate presentation to become familiar with all aspect of the business. I accept that if approached in that way that could assist with reducing the possibility of rejection.

[64] Although Mr McGrannachan had told Mr Hughes that he had a lack of confidence in undertaking the cold calling required in the role, at the meeting on 10 May 2013 this had reached a level of fear. Sales training and whole of business approach did not seem to have reduced that fear. A fair and reasonable employer could have considered closer supervision and even some counselling/coaching to see if that fear could have been overcome. There was no consideration of redeployment even though Mr McGrannachan had said at the 8 May 2013 preliminary meeting that he preferred working in the store and the TFO role was the first in which he had had performance difficulties.

Are there any other relevant factors?

[65] There are two relevant additional factors that I wish to refer to.

[66] I do not find that the procedure adopted by CRT was in accordance with the procedure on page 15 of Mr McGrannachan's employment agreement for less serious misconduct. Inadequate performance of work is an example in the employment agreement of less serious misconduct. The procedure for less serious misconduct requires an investigation to commence and there is to be advice to the employee that such an investigation is underway. It is not clear how the investigation was undertaken. There was a preliminary meeting on 8 May 2013 at which Mr McGrannachan answered questions about some concerns with no records and then was almost immediately asked to attend a disciplinary meeting two days later.

[67] Furthermore the process requires that if there is to be a disciplinary meeting the employee is asked to attend an interview and brings a support person or a representative. Mr McGrannachan was advised about that but then the process in the employment agreement requires the employee is advised that a *possible* outcome of that meeting is a warning. If a warning is to be issued then it is a verbal warning, written warning or a final written warning depending on the seriousness with which the misconduct is regarded.

[68] A fair and reasonable employer could be expected to follow the agreed process in the employment agreement before it moved to a possible outcome of dismissal. I do not find it did in this case.

[69] Although Mr Hughes and Mr Soper said they took into account Mr McGrannachan's service of over ten years in making the decision to dismiss I am not satisfied that sufficient regard was had to the fact that Mr McGrannachan's performance prior to the TFO role was good and he had had success in his role as Branch Manager. That would support that his difficulties were with the requirements of the TFO role.

Were there minor defects that did not result in the unfair treatment of Mr McGrannachan?

[70] I do not find under s.103A (5) of the Act the procedural deficiencies I have identified above were of a minor nature. The process and substance are closely linked

in a case of poor performance and in this case the procedural deficiencies were serious so that they impacted on and affected the outcome.

Was dismissal what a fair and reasonable employer could have done in all the circumstances at the time it occurred?

[71] CRT was concerned about Mr McGrannachan's performance. For all of the reasons identified above I find that CRT is not able to justify its decision to dismiss Mr McGrannachan. There was no clear formal warning to Mr McGrannachan that he was in a performance management process and his employment may be at risk if he did not achieve measurable improvements before he was dismissed within a particular timeframe. The investigation process adopted by CRT and the outcome was not in accordance with Mr McGrannachan's employment agreement with CRT for less serious misconduct which included performance issues. Relevant information and specifics with respect to the allegations were not provided to Mr McGrannachan during the disciplinary process so that he was able to properly respond to the allegations. There was no or limited consideration of favourable matters known to CRT in the decision making process but there was reliance placed on an earlier warning for misconduct which was never discussed with Mr McGrannachan. Alternatives to dismissal such as redeployment were not considered.

[72] Objectively assessed the investigation and decision making process was not what a fair and reasonable employer could have done in all the circumstances. A fair and reasonable employer could have given Mr McGrannachan a written warning or a final written warning.

[73] Mr McGrannachan has a personal grievance that he was unjustifiably dismissed. He is entitled to remedies.

Remedies

Reinstatement

[74] The Authority may, under s.125 of the Act where it has determined that Mr McGrannachan has a personal grievance, order reinstatement if it is practicable and reasonable to do so.

[75] Reinstatement is resisted on the basis that CRT has employed a replacement for Mr McGrannachan before he first sought reinstatement and that his ability to perform the job to a suitable standard is unlikely.

[76] Mr McGrannachan had a different representative before Ms Copeland. Ms Copeland, when instructed, raised the possibility of reinstatement as a remedy with CRT on 4 July 2013 but it was not actually sought as a remedy until in or about September 2013. The position had been offered to and accepted by the new employee on 8 July 2013.

[77] That is a factor to be considered as to whether reinstatement is practicable and reasonable.

[78] I have also considered whether the relationship could continue or would performance issues make *it a tenuous proposition – Li v Vice Chancellor of Auckland University of Technology* (2006) 3 NZELR 66.

[79] Mr McGrannachan acknowledged that he had difficulty making cold calls and referred to the fear in doing so and the effect it had on him in undertaking his role. Instead of doing the cold calls Mr McGrannachan did things that he felt more comfortable doing notwithstanding he had been clearly told to get out in the field and make cold calls.

[80] There was a large sale achieved to Rye Dairies. I questioned Mr McGrannachan as to how the sale to Rye Dairies had come about and he confirmed it was achieved in a way other than a cold call. That sale was impressive and Mr McGrannachan clearly has many skills including good people skills which no doubt why he was offered the role of TFO. The reality is that McGrannachan will, if reinstated, return to a job which involves cold calling by driving up farmers' driveways every day. He will continue to face rejection. This is something that he has clearly struggled with. I heard no evidence to suggest Mr McGrannachan enjoyed the role of TFO or at least that aspect of it. I cannot be confident that he will not continue to struggle with the cold calling aspect of the role.

[81] Mr McGrannachan in his evidence was quite critical of the type of support and training received from Mr Hughes. He also had a tendency to compare the requirements that were put on him with other TFO's and conclude there was unfairness. The difference was that CRT did not have issues with their level of sales

but did with Mr McGrannachan. Mr McGrannachan did not ask for help for what was quite a specific problem for him when he found that the training did not assist and did not undertake fully the requirements of the role.

[82] I cannot be satisfied even with proper training and support that the employment relationship could be carried out successfully if Mr McGrannachan was to be reinstated.

[83] I do not find reinstatement practicable and reasonable in this case.

Lost Wages

[84] Mr McGrannachan has attempted to mitigate his loss of wages and had applied for a number of positions. He has however failed to secure a permanent role to date and puts that down to the abrupt end of employment and the lack of a positive reference from CRT. Winton is also a small area and that increases the difficulty in obtaining employment. He has obtained sporadic casual work.

[85] Mr McGrannachan seeks to be reimbursed for 41 weeks lost wages from the date of dismissal to the date of the Authority investigation meeting on 27 March 2014 taking into account the one month payment in lieu of notice. Ms Copeland has calculated lost wages taking gross earnings of \$27,159.77 after dismissal into account from what Mr McGrannachan would have received on a salary of \$55,000. The lost wages claimed are \$16,205.52 gross.

[86] Ms McMillan submits that Mr McGrannachan's entitlement to lost wages should be restricted to a maximum of three months on the basis he delayed in pursuing the matter and then reduced for contribution.

[87] The Authority may under s.128 (3) of the Act in its discretion order an employer to pay an employee by way of compensation for remuneration lost as a result of the personal grievance a sum greater than 3 months to pay an employee.

[88] The loss of wages has to be related to the personal grievance. There are various views about who was responsible for any delay in lodging the statement of problem. I do not consider that a significant factor. I am not satisfied though that the employment relationship would have lasted for the ten months claimed but equally I do not find with any certainty that it would only have lasted for three months.

[89] Subject to any findings as to contribution I find it is appropriate to exercise my discretion and order payment for lost wages for a six month period from 10 May 2013. One month paid in lieu of notice will have to be taken into account and earnings over the six month period. Ms Copeland has provided IRD figures to verify earnings which are useful to a point. That is because they do not break down the earnings for the six month period so I am unclear as to what months the income was received for. In fairness to both parties I will leave it to Counsel to see if some agreement can be reached about earnings failing which leave is reserved for either party to return to the Authority.

[90] I do not in my discretion make any award of interest on that amount. The matter was able to be scheduled and determined without significant delay from the point the statement of problem was lodged.

Compensation

[91] The Authority heard evidence from Mr McGrannachan and his wife Tracie Marie about the effect of the dismissal. Mrs McGrannachan said that the dismissal took a huge emotional toll on her husband and he was shocked and upset after his dismissal. As the family live and work in a small town and they know many people it increased the embarrassment for Mr McGrannachan. Mr McGrannachan was the main income earner for the family.

[92] Mrs McGrannachan said that Mr McGrannachan had become withdrawn and was not as happy as he had previously been before he was dismissed. She said they no longer go out in public and rarely have friends over. My observation of Mr McGrannachan as evidence was being given was that dismissal has had a significant effect on him. Mr McGrannachan was also embarrassed by having to clean out his work Ute at the Farm Centre Invercargill. There was a dispute as to whether staff could actually see or not but nevertheless I accept Mr McGrannachan felt embarrassed. I accept that he suffered after dismissal from a loss of confidence. I find the evidence about humiliation and loss of dignity compelling.

[93] Subject to any findings as to contribution I am of the view a suitable and fair award for compensation is the sum of \$10,000.

Contribution

[94] The Authority is required under s. 124 of the Act to consider the extent to which Mr McGrannachan's actions contributed to the situation that gave rise to the personal grievance and, if the actions require, reduce the remedies that would otherwise have been awarded.

[95] If there is no fair trial for performance there may be no contribution in a blameworthy way to the situation giving rise to the dismissal. I find that this situation is slightly different. Mr McGrannachan knew that he had to spend more time on the road and less in the Farm Centre and that he was not to visit his home and the stables. The reason for that was that his level of sales was poor. Mr Hughes said that an analysis subsequent to dismissal of Navman records show an average call rate by Mr McGrannachan to farmers each day of 2.25 calls and the remainder of calls were to addresses Mr McGrannachan had been instructed not to visit. The reason for that I accept was fear predominantly of rejection. Instead of simply continuing in this way Mr McGrannachan should have made a request for help.

[96] Mr McGrannachan was open at the disciplinary meeting about his difficulties. Given his explanation and admissions in a general way about the concerns he was not undertaking his role a fair and reasonable employer could have justifiably given Mr McGrannachan a written warning.

[97] I find that Mr McGrannachan did contribute in a blameworthy manner to his dismissal and the remedies referred to above are to be reduced by 20%.

Findings and orders

[98] Mr McGrannachan is entitled to six months loss of wages from the date of dismissal of 10 May 2013 less one month paid in lieu of notice, earnings over that period and contribution ordered. Counsel are to discuss whether agreement as to this amount can be reached failing which leave is reserved to return to the Authority.

[99] CRT is to pay Mr McGrannachan the sum of \$8,000 without deduction as compensation under s.123 (1)(c)(i) of the Act.

Costs

[100] I reserve the issue of costs. The parties should attempt to reach agreement failing which Ms Copeland is to lodge and serve submission as to costs by 26 May 2014 and Ms McMillan is to lodge and serve submissions in response by 16 June 2014.

Helen Doyle

Member of the Employment Relations Authority