

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 128  
5446364

BETWEEN                      NATHAN MORUNGA  
Applicant

A N D                              WATERFORD      HOLDINGS  
LIMITED  
Respondent

Member of Authority:      David Appleton

Representatives:              Gerhard Engelbrecht, Counsel for Applicant  
Hamish Burdon, Advocate for Respondent

Investigation Meeting:      15 July 2014 at Nelson

Submissions Received:      25 July and 11 August 2014 from Applicant  
5 August 2014 from Respondent

Date of Determination:      22 August 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.      Mr Morunga was unjustifiably dismissed and is awarded the remedies set out in this determination, with a 50% reduction for contribution.**
- B.      The proper jurisdiction for the counterclaim is the Tenancy Tribunal.**
- C.      Costs are reserved.**

**Employment relationship problem**

[1]      Mr Morunga claims that he was unjustifiably dismissed from his employment as a herd manager on 20 October 2013. He also claims that he was not given an employment agreement until shortly before his termination. He seeks remedies for

lost wages and compensation for humiliation, loss of dignity and injury to his feelings together with a penalty in relation to the failure to provide an employment agreement.

[2] The respondent denies that Mr Morunga was unjustifiably dismissed. It concedes that an employment agreement was not given to Mr Morunga until shortly before he was dismissed although claims that it was given to Mr Morunga earlier than Mr Morunga states.

[3] The respondent counterclaims against Mr Morunga in respect of costs incurred in cleaning and repairing the accommodation occupied by Mr Morunga during his employment with the respondent and for the cost of grazing animals left by Mr Morunga after he had left the employment of the respondent company. Mr Morunga says that the Employment Relations Authority does not have jurisdiction to consider this counterclaim and that the proper jurisdiction is the Tenancy Tribunal.

#### **Brief account of the events leading to dismissal**

[4] Mr Morunga was employed by the respondent company as herd manager on the respondent's farm. The only other employee was Mr Graeme Astwood. The owner of the farm, Mr Gregory Fellows, also worked on the farm.

[5] Mr Fellows' evidence is that Mr Morunga and Mr Astwood did not get on and indicated that he had concerns about Mr Morunga's behaviour towards Mr Astwood, which he thought was aggressive. Mr Morunga, for his part, expressed doubts about Mr Astwood's capabilities.

[6] It was Mr Fellows' intention to try to sort these differences out with the assistance of a farm adviser, Mr Brent Boyce. Mr Boyce advised that the first step to take was to ensure that employment agreements were given to both employees. Mr Fellows says that he, accordingly, purchased an employment contract from Federated Farmers (the October 2011 edition) in around April 2013. He admits that it took him some time to get the agreement completed, partly due to an accident he suffered in August 2013.

[7] Mr Fellows says that he gave copies of the Federated Farmers employment agreement to both Mr Astwood and Mr Morunga on 7 October 2013, leaving Mr Morunga's agreement in his house. He says that he had discussed with Mr Morunga the giving of the agreement to him prior to leaving a copy at

Mr Morunga's accommodation. Mr Morunga did not sign and return the copy of the agreement.

[8] Mr Fellows' evidence was that a meeting was going to take place between him, Mr Morunga and Mr Astwood, with Mr Boyce present, to try to settle the differences between the two employees. This meeting was due to take place on 17 October 2013. However, prior to that meeting taking place, Mr Fellows bumped into a Mr Alan Williams, a dairy technician working for Dairy Solutions. He says that Mr Williams told him that he had recently witnessed Mr Morunga committing an act of cruelty on one of the cows.

[9] The allegation was that Mr Williams had been doing work in the respondent's cowshed in early October 2013 when he had heard the farm motorbike coming and then saw a cow being chased towards the cowshed by the motorbike. The cow tried to escape by fleeing up the exit race, where it got stuck. Mr Williams' evidence was that he then saw Mr Morunga jam the cow in with a heavy gate (slamming it against the cow) and then proceeded to kick the cow and yell and scream at it.

[10] The Authority heard from Mr Williams who confirmed in his oral evidence that the above had happened and that he knew it was Mr Morunga treating the cow in the way described because Mr Astwood was in the cowshed with him. Mr Williams' evidence was that he was so disgusted with the level of brutality that he immediately picked up his tools and left the farm. When asked why he did not tell Mr Fellows immediately, Mr Williams said he was mulling over his options and was wondering whether it was his place to get involved or not. When he saw Mr Fellows in a store, however, he decided to tell him.

[11] Mr Fellows' evidence is that, when Mr Williams told him about what he had seen, he wanted to buy himself some time to think about what to do and so asked Mr Williams to confirm what he had told him in writing. Mr Williams did this, producing a letter headed up "*To Whom It May Concern*". The letter from Mr Williams is undated and does not refer to Mr Morunga by name, simply saying "*a worker*".

[12] Mr Fellows' evidence is that he had mentioned to a neighbour what Mr Williams had told him and that the neighbour had referred to another mutual neighbour, Ms Billens, who had apparently seen another incident of cruelty take place

during the calving season. Mr Fellows' evidence was that when he subsequently spoke to Ms Billens, she told him that she had seen a worker driving a motorbike into the legs of a cow on two occasions. He asked Ms Billens to confirm this in writing and a short letter was produced by Ms Billens. Her letter was dated 13 October 2013, but again did not refer to Mr Morunga by name.

[13] Mr Fellows says that he took advice from Mr Boyce who advised him to seek advice from an employment specialist, Mr Burdon. Accordingly, Mr Burdon drafted a letter for Mr Fellows to sign inviting Mr Morunga to a disciplinary meeting. The contents of the letter was as follows:

*Dear Nathan*

***NOTICE TO ATTEND DISCIPLINARY MEETING***

*Over the last couple of days, we have received 2 complaints with regards to possible animal abuse and welfare issues. These complaints have been formally put to us in writing and given the serious nature of these complaints; we need to conduct a meeting with you. These allegations are:*

1. There was an incident on the farm, where Bronwyn Billens witnessed you deliberately driving your farm bike into the legs of cow [sic] who appeared to be lame and was walking slowly up the race. She claims to have seen you do this twice before she looked away.
2. There was an incident when Alan Williams of Dairy Solutions witnessed you chase a cow into a narrow race where she collapsed on her front legs. At this stage Alan claims you slammed the gate into her and proceeded to kick her, whilst shouting and screaming at her.

*Both of these incidents, if proven to have happened are both breaches of your employment contract, and breaches to animal welfare guidelines. If proven, would constitute serious misconduct and could result in disciplinary action up to, and including summary dismissal, as outlined in Schedule 1 of your employment contract.*

*We intend conducting this meeting at 5.00pm on Thursday 17 October at our home. We will have Brent Boyce from Farmwise there to support us. We recommend you bring either a support person or representative. We have made no decisions at this stage but are very concerned regarding the nature of the allegations.*

*We look forward to meeting with you on Thursday.*

*Yours faithfully  
Gregory Fellows*

[14] Mr Fellows said that he was concerned about giving Mr Morunga this letter as he feared he would react aggressively. He had asked Mr Astwood to be present but ended up turning on the recording function of his telephone in order to record the interaction. The Authority saw a transcript of this recording which, indeed, shows that Mr Morunga became angry with Mr Fellows. The gist of Mr Morunga's immediate concern on reading the letter was that Ms Billens did not know him and so he wanted to know how she could identify him as having committed the alleged action referred to in the letter.

[15] As a result of Mr Morunga shouting and swearing at Mr Fellows, Mr Fellows' partner, Ms Nicola Grey, telephoned the Police, who arrived and, at Mr Fellows' request, issued Mr Morunga with a trespass notice.

[16] The investigation meeting then took place on 17 October 2013. Mr Morunga was present with a support person, Mr David Prebble. Mr Fellows had Mr Boyce with him. Both parties recorded the meeting and the Authority has seen a transcript of the meeting.

[17] In the meeting, Mr Morunga denied both allegations against him, saying they were false allegations and that the incidents did not happen to him. Mr Boyce asked Mr Morunga about what personal possessions he had on the farm, to which Mr Morunga remarked that asking those questions sounded very *predetermined*.

[18] Mr Morunga explained that he had approached Ms Billens after he had received Mr Fellows' letter and Ms Billens had confirmed that she did not know him. She also told him that she had not made a complaint about him but that she had *concerns that a farm worker had hit a cow*. Mr Morunga made the point that Mr Fellows was accusing him of having hit a cow, as witnessed by Ms Billens, whereas Ms Billens herself was not making that same allegation. When Mr Morunga confronted Mr Boyce about this, Mr Boyce said *maybe let's take that out then*.

[19] During the disciplinary meeting, Mr Morunga also stated that he wanted to lay a formal complaint of animal cruelty against Mr Astwood. The transcript shows that Mr Boyce stated that that was not part of the meeting. Mr Morunga did not get an answer when he asked whether his allegations would be looked into.

[20] Mr Morunga also made a statement that Mr Astwood's children had stated on the school bus that Mr Morunga had been fired for hurting animals. Mr Morunga said

this was a breach of confidentiality. During the Authority's investigation meeting Mr Morunga clarified that he had learned this via his partner's mother, whose grandchildren had been on the bus at the same time.

[21] Finally, the transcript shows that Mr Prebble suggested that Mr Morunga was prepared to accept a warning, on the basis that he rejected the allegations but so that he could maintain his employment. In addition, it was confirmed that Mr Morunga was not required to do the milking on the forthcoming weekend.

[22] Mr Prebble gave evidence to the Authority that he received a telephone call on Saturday, 19 October 2013 from Mr Burdon. He said that Mr Burdon told him that, based on the evidence he had, it was *cut and dried* that Mr Morunga had committed the action he was accused of and that there was no way he could keep his job. He then asked Mr Prebble to find out whether Mr Morunga had any further information he wanted to give. Mr Prebble said that, given the feedback he had received, he did not wish to bother Mr Morunga with that news of the decision to dismiss him on a Saturday night and so told him this on the following Sunday, at which point Mr Morunga said that all he could do then was to get a lawyer. Mr Prebble's view is that dismissal was overly harsh for the act that Mr Morunga was accused of and that it was common for all farmworkers to get frustrated with their animals.

[23] A letter was then sent from Mr Burdon to Mr Morunga dated 20 October 2013 in the following terms:

*Dear Nathan*

***RE: TERMINATION OF EMPLOYMENT***

*I confirm I act for Gregory Fellows with regards to the disciplinary matters of last week. The meeting you attended with Dave Prebble was recorded. I have taken the time to listen to the recording, speak with witnesses and gather any relevant information that needed to be considered prior to making any decisions. I then spoke with Dave yesterday with regards to the likely outcome of the process and allowed until lunchtime today for any further comments or input you may have.*

*With regard to the allegations:*

- 1. The incident where Bronwyn Billens witnessed a farm worker deliberately ramming a cow with a motorbike can not be substantiated against either you or Grahame as she can not clearly identify who the worker was. We believe this incident did occur, but can not clearly substantiate either worker, so no action will be taken on this matter.*

2. *With regards to the complaint from Allen Williams of Dairy Solutions, you claimed that it was not you. You stated the "incident did not happen", and the allegation was "False and Foundless!" I have now received a statement from Grahame who also witnessed the alleged incident and he has confirmed that it did happen and that it was very disturbing. He also advises that he intended bringing it to Gregorys attention but was very concerned as to retribution from you if you found out. It so transpired that Allen raised the complaint before Grahame had the opportunity to discuss it with Gregory.*

*Although no action is to be taken with regards to the first allegation, the second allegation is considered to be that serious that it is worthy of summary dismissal. There were two further issues that I discussed with Dave, (your support person) yesterday, and wish to outline them as follows:*

- *Dave submitted in the meeting that you should only receive a warning from this matter and that the parties should learn from this experience. The serious nature of this matter, juxtaposed with your denial that it never occurred would concern me that nothing would be learned from a warning, and that this issue could arise again, next time with far greater consequences for the employer.*
- *Dave also outlined that you had no previous formal disciplinary history whilst in this position. Although there have been no formal written warnings, there have been incidents where your demeanour has concerned Gregory and other staff. These incidents have gravitated around actions where people have felt threatened and intimidated.*

***In conclusion***, *I have now spoken with Dave today and he advises that there is nothing further to add. With that in mind, I have spoken again with Gregory, and he has decided to terminate your employment, effective as of 5.00pm today. He has decided that this is appropriate given the fact you have committed an example of serious misconduct as outlined in the first schedule of your contract. Accordingly, your employment ends today.*

*You were issued a trespass notice on 15 October, when you intimidated Gregory and the Police had to be called to remove you from the cowshed. This incident was witnessed by others and accordingly a trespass notice was issued until Sunday in order for the process to be fairly undertaken without fear of retribution. The trespass that was put in place until the end of this process is now extended for the full duration of 2 years.*

*You are entitled to remain for a further 14 days in accordance with your contract. You must have vacated the property no later than 5.00pm, Sunday 3 November 2013. You will be paid any holiday pay and final pay following a house inspection, once you have vacated the property.*

*On other matters, I understand that you have two pigs and two sheep on the property. Please advise of any other personal property you*

*may have on the farm. You are instructed that given the trespass notice, you are required to contact my office in order to make arrangements on uplifting these animals. Accordingly, I will facilitate the return of any personal property. I expect this to occur in the next week.*

*Under no circumstances, are you to approach Gregory or any of his family and employees with regard to this matter.*

*Yours faithfully  
Hamish Burdon*

[24] Although Mr Burdon was the advocate for the respondent at the Authority's investigation meeting, I felt it important to inquire of him as to what steps he had taken on behalf of the respondent between the date of the disciplinary meeting on 17 October 2013 and the writing of the dismissal letter on 20 October 2013. Accordingly, Mr Burdon was sworn in to give evidence. Mr Burdon said that, having listened to the tape of the disciplinary investigation meeting, he then spoke with Mr Williams who confirmed what he had told Mr Fellows. Mr Burdon also spoke to Mr Astwood. He said Mr Astwood was a reluctant witness who felt uncomfortable complaining about Mr Morunga. However, Mr Astwood did write a statement dated 18 October 2013. The Authority saw a copy of this written statement, which was brief, and which stated the following:

*I Graeme Astwood witnessed the incident involving with Nathan and the cow with the gate. I did not say anything at the time to anyone because of a incident that occurred in August in the fear that Nathan would hurt me and my family. But I did talk to my partner and by the time I decided to talk to Greg the plant maintenance man from Waikato Services had spoken to Greg about the incident.*

[25] Mr Burdon confirmed that he had not shown a copy of that statement to Mr Morunga or Mr Prebble prior to writing the letter of termination. He said, however, that he had told Mr Prebble that Mr Astwood had corroborated the evidence given by Mr Williams.

### **Issues**

[26] The Authority must determine the following issues:

- (a) Whether the dismissal of Mr Morunga was substantially and procedurally justified;

- (b) Whether a penalty should be imposed upon the respondent for failing to provide Mr Morunga with an employment agreement at the commencement of his employment;
- (c) Whether the Authority has the jurisdiction to consider the counterclaim against Mr Morunga; and
- (d) If the Authority does have the jurisdiction to consider the counterclaim, whether Mr Morunga is in breach of any contractual obligation in relation to the allegations comprised in the counterclaim.

**Was the dismissal of Mr Morunga substantially and procedurally justified?**

[27] Considering first the question of procedural fairness, there are a number of potential flaws in the process followed by the respondent which need to be considered.

[28] The starting point in relation to the fairness of a dismissal is s.103A of the Employment Relations Act 2000 (the Act). This provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

- (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
- (b) *did not result in the employee being treated unfairly.*

[29] The potential flaws in the process which need to be considered are as follows:

- (a) The respondent relied on s.28 of the Federated Farmers employment agreement to establish that the act allegedly committed by Mr Morunga was serious misconduct. However, a copy of the employment agreement had only been given to Mr Morunga a week prior to receiving the disciplinary letter. Furthermore, Mr Morunga did not sign the agreement;
- (b) Copies of the letters from Ms Billens and Mr Williams were not given to Mr Morunga or Mr Prebble prior to the decision to dismiss;
- (c) A copy of the statement from Mr Astwood was not given to Mr Morunga or Mr Prebble prior to the decision to dismiss;
- (d) Neither Mr Williams nor Mr Astwood were available for questioning by Mr Morunga and Mr Prebble;
- (e) The decision to dismiss was predetermined; and
- (f) Mr Morunga's complaint against Mr Astwood was not investigated.

### ***Employment agreement***

[30] Mr Fellows gave evidence that the employment agreement was left at Mr Morunga's property on 7 October 2013. It would appear that Mr Williams saw the incident with the cow prior to that date. Mr Fellows' letter of 15 October 2013

inviting Mr Morunga to an investigatory meeting refers to the examples of serious misconduct set out in Schedule 1 of the employment agreement. In the long list of examples of serious misconduct in Schedule 1, cruelty to animals is included.

[31] On the face of it, therefore, the respondent was accusing Mr Morunga of committing an act which it said constituted serious misconduct but which Mr Morunga did not know would be viewed as serious misconduct as he had not received the employment agreement prior to the act taking place.

[32] The wording of the relevant part of Schedule 1 is as follows:

*The following are examples of conduct which may constitute serious misconduct and which may give rise to summary dismissal under clause 28.2.4. Every instance of misconduct must be assessed on its facts and a "full and fair" investigation into the alleged misconduct must take place prior to a decision to terminate:*

- *Performing a deliberate action or inaction that leads or would lead to stock loss or profit loss for the Employer. Examples include failure to close gates leading onto roads, failure to report sick or injured animals, cruelty to animals, failure to notify the Employer of a breach of any known consents issued by a Council under the Resource Management Act or causing (or attempting to cause) grading or non-acceptance of milk by a dairy company.*

[33] Under many circumstances, failing to give an employee a copy of their employment agreement so that he or she does not know in advance that a specified action would be treated as serious misconduct, giving rise to the right to summarily dismiss him or her would, on its own, render any dismissal in reliance of that act unjustified. However, there are some acts committed by employees which, in and of themselves, even without that express forewarning set out in the employment agreement, can justify summary dismissal. This is because they, by their very nature, constitute a fundamental breach of contract by the employee, either because of a breach of the implied term of trust and confidence, and/or because of a breach of the duty of good faith owed by the employee pursuant to s.4 of the Act. An obvious example would be theft from an employer causing material loss.

[34] It is my view that an act of aggression to animals, especially in the context of a dairy farm, falls within that category. A cow is a significant asset and the physical violence towards the cow of which Mr Morunga was accused could certainly have led to injury, leading in turn to stock loss or profit loss. I do not believe that it changes things fundamentally because the cow was lucky enough not to be injured.

Furthermore, such an act could seriously damage the reputation of the farmer, whether or not injury occurred. I therefore believe that the alleged action by Mr Morunga against the cow as witnessed by Mr Williams falls within the category of serious misconduct which was so obvious that it did not need to be spelled out in advance.

[35] Therefore, I do not believe that the failure to provide Mr Morunga with a copy of the employment agreement prior to him allegedly committing the acts of aggression against the cow in early October 2013 constitutes a flaw which, in and of itself, renders the dismissal unjustified.

***The letters from Ms Billens and Mr Williams were not given to Mr Morunga or his representative***

[36] It is my finding that these letters were not provided to either Mr Morunga or Mr Prebble prior to the decision to dismiss Mr Morunga. Although it is the respondent's case that the material gist of each letter was summarised in the letter from Mr Fellows dated 15 October 2013, I do not accept that that justified omitting to provide the copies of the letters to Mr Morunga. Section 4(1A) of the Act, at subsection (c), makes clear that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of one or more of his employees must provide to the affected employee access to information relevant to the continuation of the employee's employment, about the decision, together with an opportunity to comment on the information to their employer before the decision is made.

[37] I do not accept that the summary of the allegations contained in the letter from Mr Fellows to Mr Morunga dated 15 October 2013 was sufficient to justify copies of the two letters of complaint being withheld from Mr Morunga. For example, neither Ms Billens nor Mr Williams' letter actually named Mr Morunga. If Mr Morunga had seen these letters prior to the disciplinary meeting, he would have been able to ask questions to elicit how a link had been made between him and the observed actions contained in the letters.

[38] It became clear during the Authority's investigation meeting that, as far as the allegation by Ms Billens was concerned, it was Mr Fellows who had made an assumption that it was Mr Morunga who had committed the act complained of by Ms Billens. However, upon cross-examination, Mr Fellows admitted that he could not be sure that it had not been Mr Astwood who had been seen committing the act in

question. Whilst this particular allegation against Mr Morunga was eventually dropped by the employer, it is illustrative of the problems that are inherent in a process which does not make available all relevant information to an employee facing disciplinary investigation.

[39] With respect to Mr Williams' letter, if he had seen a copy, he could have asked questions as to how the connection had been made with him, which would have required Mr Fellows to have explained how Mr Williams had been with Mr Astwood at the time of the cowshed incident and that Mr Williams was therefore sure that he had observed Mr Morunga committing the act in question. This may well have persuaded Mr Morunga to change his position with respect to his denials. This is important because Mr Fellows said in his evidence to the Authority, confirmed by Mr Burdon's evidence, that a major factor in deciding to dismiss Mr Morunga was his failure to admit what he had done. If he had given to Mr Morunga all of the information that Mr Fellows had had in his head when he had decided that dismissal was appropriate, including that Mr Williams could not have been mistaken when he saw Mr Morunga committing the act in question, Mr Morunga may well have taken a different approach in the disciplinary hearing.

[40] Accordingly, the failure of the employer to act in accordance with its obligations under s.4(1A) of the Act was not minor, and did lead to unfairness to Mr Morunga, which in turn leads me to conclude that no fair and reasonable employer could have failed to have provided all of the relevant information to Mr Morunga at the time the dismissal occurred.

***Failing to give a copy of Mr Astwood's statement***

[41] Mr Burdon was unsure whether Mr Astwood's written statement was available prior to him writing the letter of dismissal or afterwards. However, given that he had asked Mr Astwood to provide a written statement he should have waited to see it before writing the letter of dismissal. To go even further, he should also have made sure that a copy of it was provided to Mr Morunga prior to the decision to dismiss was made, so that Mr Morunga could have commented upon it. Again this constitutes a significant breach of s.4(1A) of the Act which, again, renders the procedure followed by the respondent unjustified, as it was not the action that a fair and reasonable employer could have carried out in all the circumstances at the time the dismissal occurred.

***Mr Williams was not available to be questioned by Mr Morunga and his representative***

[42] In a situation where the dismissal of an employee relies entirely upon the evidence of a third party, it must be a breach of the rule of natural justice for that employee to be given no opportunity whatsoever to pose questions to that third party, either directly or via the employer. As Mr Morunga did not see Mr Williams' letter, he was doubly handicapped and so really could not stand a chance to fairly defend himself against the allegations, or to admit them but give a mitigating explanation.

[43] This failure to make Mr Williams available for questioning by Mr Morunga and his representative, either directly or through the employer's representative, amounts to a fundamental breach of natural justice and was not the action that a fair and reasonable employer could have carried out in all the circumstances at the time the dismissal occurred. Therefore, this failure also renders the dismissal unjustified.

***Was the decision to terminate Mr Morunga predetermined?***

[44] It is unusual for the employer's representative to ask an employee during a disciplinary investigation meeting what property he has on the employer's premises prior to a decision being made in respect of that disciplinary investigation. It is not surprising that Mr Morunga had suspicions that this indicated that the decision to dismiss him was predetermined. Mr Morunga's suspicions were strengthened by being told that Mr Astwood's children had announced on the school bus that he had been dismissed.

[45] Mr Boyce was not available to give evidence as to why he had asked the question about Mr Morunga's personal property, although it is suggested by the respondent that this was because they were fearful of Mr Morunga's temper and wanted an answer before the possibility of dismissing him. This is not wholly unlikely in light of Mr Morunga's angry reaction to being given the letter inviting him to the disciplinary meeting. The evidence about what Mr Astwood's children said was hearsay, reported through a number of people. It is completely possible that Mr Astwood's children had been confused when they had found out from Mr Astwood that Mr Morunga had been trespassed from the farm on 15 October 2013. Given the young age of the children involved (6, 8 and 10) I cannot draw any firm conclusions about this evidence.

[46] The fact that Mr Morunga was trespassed from the farm prior to dismissal does not necessarily demonstrate predetermination either, because it was based upon Mr Morunga's angry reaction to receiving the letter inviting him to the disciplinary investigation meeting.

[47] Having heard evidence from Mr Fellows, who struck me as a credible witness, on balance I do not believe that the decision to dismiss Mr Morunga was predetermined.

[48] I also do not believe that there has been a conspiracy between Mr Williams, Mr Fellows and Mr Astwood to falsely accuse Mr Morunga of the incident involving the cow. I will address this further when I consider contribution under s.124 of the Act.

***Mr Morunga's complaint against Mr Astwood was not investigated***

[49] Mr Fellows admitted that this was the case because he believed that he already understood what the complaint concerned, as Mr Morunga had raised concerns about Mr Astwood previously. However, Mr Fellows was not certain what the allegation concerned when questioned.

[50] It is quite clear that Mr Fellows did not investigate this matter and, normally, such a failure would constitute an unjustified disadvantage in Mr Morunga's employment. However, no personal grievance has been raised by Mr Morunga or his representatives in respect of this disadvantage and no application has been made under s.114 of the Act for leave to raise a personal grievance after the statutory 90 day period. Accordingly, the Authority does not have jurisdiction to consider this matter any further.

[51] As to whether the failure to investigate the allegation represents another procedural flaw, that depends on what Mr Morunga meant by his allegation. He did not expand on it during the Authority's investigation meeting, however, and so I cannot take it any further.

**Was the dismissal substantially justified?**

[52] Having heard the evidence of Mr Williams and that of Mr Astwood, on balance, I believe that the action of which Mr Morunga was accused (involving the

cow in the exit race) did take place. I reach this conclusion because Mr Williams appears to have had no reason not to tell the truth and, also, because when the event happened, even though Mr Williams did not know Mr Morunga by sight at the time, he knew that he was with Mr Astwood, and so it could not have been Mr Astwood being aggressive towards the cow. I therefore also believe that, despite the procedural flaws leading to the dismissal, the respondent's conclusion that the event took place as described by Mr Williams was not an unreasonable one to reach. Although Mr Morunga was not given access to the statements of Mr Williams and Mr Astwood, I do not believe that they would have enabled him to persuade the respondent that the alleged action did not take place.

[53] Therefore, I am satisfied that the dismissal was substantially justified. This will have a bearing on my consideration of s.124 of the Act.

**Should a penalty be imposed upon the respondent for failing to provide a copy of the employment agreement?**

[54] Section 63A(2) of the Act requires an employer to do at least the following things when bargaining for terms and conditions in relation to an individual employment agreement if no collective agreement covers the work done by the employee:

- (a) Provide to the employee a copy of the intended agreement under discussion;
- (b) Advise the employee that he or she is entitled to seek independent advice about the intended agreement;
- (c) Give the employee a reasonable opportunity to seek that advice; and
- (d) Consider any issues that the employee raises and respond to them.

[55] Subsection (3) of s.63A states that any employer who fails to comply with this section is liable to a penalty imposed by the Authority. Section 63A(7) makes clear that the term "*employee*" includes a prospective employee. Therefore, s.63A requires the intended agreement to be provided to the employee prior to the parties entering into it. This was not done by the respondent.

[56] However, the obligations described at paragraph 54 (a) and (b) above did not come into force until 1 April 2011. There was no evidence put before the Authority as to exactly when Mr Morunga started working for the respondent, although the statement of problem states that he had been employed for approximately three years. This would mean that his employment started in or around October 2010, several months prior to the coming into force of those obligations. It would not be just to impose a penalty upon the respondent for a failure to comply with a provision which was not in force at the time the employment was about to commence and, accordingly, no penalty can be imposed under this provision.

[57] Obligations also arise under sections 64 and 65 of the Act in respect of an individual employment agreement. However, first, s.64 (as amended) came into force on 1 April 2011 and, in any event, each of these two sections makes clear that a penalty may only be imposed under them when an action is brought by a Labour Inspector.

[58] Accordingly, the Authority does not have the jurisdiction to impose a penalty upon the respondent under sections 63A, 64 or 65 of the Act.

**Does the Authority have the jurisdiction to consider the counterclaim?**

[59] A service tenancy is defined in s.2 of the Residential Tenancies Act 1986 as follows:

*service tenancy means a tenancy granted under a term of, or otherwise as an incident of, a contract of service or a contract for services between the landlord as employer and the tenant as employee or contractor, whether or not a separate tenancy agreement is concluded in writing between the parties, and whether or not any rent is payable for the tenancy; and includes—[omitted as not relevant]*

[60] Sub-sections 77(1) and (2) of the Residential Tenancies Act provide as follows:

*(1) The Tribunal has, subject to the Limitation Act 1950, jurisdiction to determine in accordance with this Act any dispute that—*  
*(a) exists between a landlord and a tenant or between a landlord and the guarantor of a tenant; and*  
*(b) relates to any tenancy to which this Act applies or to which this Act did apply at any material time.*  
*(2) Without limiting the generality of subsection (1), the Tribunal shall have jurisdiction to do the following things:*

.....

*(c) to determine whether any tenancy is or is not, or was or was not at any material time, a service tenancy:*

....

*(k) to order the tenant under any tenancy agreement to which this Act applies to pay to the landlord any sum found to be owing by the tenant to the landlord, whether by way of rent in arrear or otherwise pursuant to the tenancy agreement, and to order the landlord under any such tenancy agreement to pay to the tenant the whole or any part of any sum found to have been paid by way of rent in excess of the amount lawfully payable, or of any other sum demanded or received by the landlord in contravention of any of the provisions of this Act:*

....

*(n) to order the landlord or the tenant under any tenancy agreement to which this Act applies to pay to the other party such sum by way of damages or compensation as the Tribunal shall assess in respect of the breach of any express or implied provision of the tenancy agreement or any provision of this Act:*

...

*(q) to make orders of a consequential or ancillary nature necessary to exercise or perfect the exercise of any of its jurisdiction.*

[61] Section 82 (1) of the Residential Tenancies Act provides as follows:

**82 Exclusion of other jurisdictions**

*(1) Notwithstanding any other enactment or rule of law to the contrary, no court or other body shall have originating jurisdiction in respect of any matter that is within the jurisdiction of the Tribunal unless—*

*(a) proceedings in respect of that matter were commenced before that court or other body before the commencement of this Act; or*

*(b) an order is made under section 83(2).<sup>1</sup>*

[62] On reviewing the terms of the employment agreement between the parties, it is clear that the provision of the accommodation was intended to be a service tenancy. Furthermore, the terms of the agreement require the tenant to clean the property upon vacation of it and not to cause damage to it. In addition, there is a requirement to leave the property clear of possessions, which I believe would include Mr Morunga's animals.

[63] Therefore, in light of these contractual requirements, and the provisions of the Residential Tenancies Act cited above, notwithstanding the previous Authority determination cited to me by the respondent (which does not bind the Authority in any

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<sup>1</sup> Section 83(2) deals with transfer of proceedings to the District Court by the Tenancy Tribunal, and so is irrelevant to this matter

event) I believe that the Authority must cede jurisdiction of the respondent's counterclaim to the Tenancy Tribunal.

## **Remedies**

[64] Having found that Mr Morunga was unjustifiably dismissed due to procedural flaws which were more than minor, I must now decide what remedies, if any, he should be awarded.

[65] Section 123(1) of the Act provides as follows:

*(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

*(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*

*(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*

*(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

*(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*

*(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

[66] Section 128 provides:

### ***128 Reimbursement***

*(1) This section applies where the Authority or the court determines, in respect of any employee,—*

*(a) that the employee has a personal grievance; and*

*(b) that the employee has lost remuneration as a result of the personal grievance.*

*(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

*(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[67] Mr Morunga does not seek reinstatement. He earned \$42,600 gross a year, including a rent allowance. He stated in evidence that it took him five months to find

employment, which was on a mussel boat. That employment ended after a few weeks because the boat sunk, although that cannot be attributed to the respondent, and so any loss after that event cannot be taken into account.

[68] I am satisfied from his evidence that Mr Morunga made efforts to find new work after his dismissal, and so made attempts to mitigate his loss. However, I do not believe that there are any particular special circumstances which justify the Authority exercising its discretion to award a sum greater than three months' ordinary time remuneration. Although Mr Morunga was suspicious that the respondent may have played a part in his inability to find farming work in his local area, there was no proof of this. Three months' ordinary time remuneration equates to the gross sum of \$10,650.

[69] Turning to compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to the feelings of the employee, Mr Morunga gave little evidence about the effects upon him of his dismissal, although he did say that being dismissed had been a life altering experience, and he did talk about how hard it had been for him to find new employment. I accept that the way the dismissal had been carried out would have had an adverse effect on him, and I believe that an award of \$5,000 is an appropriate award in all the circumstances.

### **Contribution**

[70] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[71] Having considered the evidence, I have found that, on balance, Mr Morunga did commit the act witnessed by Mr Williams. I believe that such an act did justify dismissing Mr Morunga because of the risk of injuring the cow and because of the potential effects on the farmer's business. I therefore find the actions of Mr Morunga towards the cow as witnessed by Mr Williams contributed to the situation that gave rise to his personal grievance, and that they were

blameworthy actions. I therefore believe that a reduction in the remedies awarded is warranted. I believe that that reduction should be 50%.

**Orders**

[72] I order that the respondent pays to Mr Morunga the following sums:

- (a) Lost wages in the gross sum of \$5,325; and
- (b) Compensation under s.123(1)(c)(i) of the Act in the sum of \$2,500.

**Costs**

[73] Costs are reserved. The parties should seek to agree between them how costs are to be dealt with. However, if the parties cannot reach agreement within 28 days of the date of this determination any party seeking a contribution to their costs should serve and lodge a memorandum setting out their position within a further 14 days. The other party shall then have a further 14 days within which to respond.

David Appleton  
Member of the Employment Relations Authority