IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 518
3175803

	BETWEEN	BLAIR ROSIE Applicant
	AND	DOGTEROM GEDDES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Cain, advocate for the Applicant Louise Laming, counsel for the Respondent
Investigation Meeting:	2 and 3 May 2023 in Balclutha
Submissions Received:	25 May 2023 from the Applicant 14 June 2023 from the Respondent
Date of Determination:	11 September 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dogterom Geddes Limited owns and operates a dairy-farm business near Balclutha. Maxwell Geddes is the managing equity partner in the company. Elspeth Geddes is married to Mr Geddes. Mr and Mrs Geddes both work in the business.

[2] Blair Rosie was employed by Dogterom Geddes Limited (DGL) as a dairy farm worker from September 2021 until he was dismissed in November 2021. Mr Rosie through his representative's correspondence in December 2021 set out grounds for his personal grievance

claim of unjustified dismissal. Remedies of compensation and lost remuneration are claimed to settle the personal grievance.

[3] DGL says that Mr Rosie was employed subject to a trial period in accordance with s 67A of the Employment Relations Act 2000. Section 67B would prevent Mr Rosie from bringing a personal grievance claim in respect of the dismissal. DGL says in the alternative that Mr Rosie's conduct wholly contributed to his dismissal and alleged personal grievance.

[4] DGL says Mr Rosie is not entitled to remedies.

The Authority's investigation

[5] As a matter of convenience, a single investigation meeting was set to consider the evidence and submissions relevant to the application of s 67A and s 67B, as well as the issues about justification and remedies in the event that the trial period provision was found not to apply.

[6] Mr Rosie gave evidence as did Stacey Thomson (his partner) and Jillian Craik (Ms Thomson's mother). Mr and Mrs Geddes both gave evidence. Two other DGL employees and a contractor also gave evidence. All witnesses gave evidence and answered questions on oath.

[7] Most documents had been exchanged in advance of the investigation meeting, but several items were produced later. Both representatives provided written submissions later.

[8] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[9] The issues are:

(a) Did the employment agreement between DGL and Mr Rosie comply with s 67A of the Employment Relations Act 2000?

(b) If not, did DGL unjustifiably dismiss Mr Rosie?

(c) If DGL unjustifiably dismissed Mr Rosie, what if any remedies should be ordered?

Did the employment agreement between DGL and Mr Rosie comply with s 67A of the Employment Relations Act 2000?

[10] An employment agreement containing a trial provision may be entered into by certain employers and an employee who has not previously been employed by the employer.[1]

[11] It is accepted that DGL was within the class of employers who could enter into an employment agreement containing a trial period.

[12] A trial period means a written provision in an employment agreement that states that for a specified period (not exceeding 90 days) starting at the beginning of the employee's employment, the employee is to serve a trial period; that during that period the employer may dismiss the employee; and that if dismissed the employee is not entitled to bring a personal grievance in respect of the dismissal.[2]

[13] It is accepted that the wording in clause 4 of the individual employment agreement between DGL and Mr Rosie is consistent with the definition of trial provision set out above.

[14] The issue turns on whether Mr Rosie had "previously been employed" by DGL by the time he entered into the employment agreement containing the trial period. I need to consider the sequence of events around the start of the employment.

[15] It is common ground that the first contact was between Ms Thompson and Mrs Geddes. An interview was arranged. Nothing was said about a trial period when the interview was arranged.

Saturday 11 September 2021

[16] Mr Rosie, Ms Thompson, Mrs Geddes and Mr Geddes met on 11 September 2021 at Mr and Mrs Geddes' home on the farm. Mr Rosie's and Ms Thompson's evidence in their prepared

[1] Employment Relation Act 2000 s 67A(1).
[2] Employment Relation Act 2000 s 67A(2).

statements was that there was no mention of a trial period during this meeting and that Mrs Geddes and Mr Geddes did not refer to a template employment agreement or have a copy with them during the discussion. Their evidence on that point did not vary, when questioned.

[17] Mrs Geddes and Mr Geddes in their prepared statements did not say that either of them had mentioned a trial period or had a template agreement to hand during the 11 September 2021 meeting. However, in response to my questions, Mrs Geddes said that she had a copy of the Federated Farmers printed contract with her and that she referred to several "matters" including the "90-day trial". Mrs Geddes' evidence is that she turned through the pages and used it as a prompt to make sure she did not miss anything. Mrs Geddes could not refer me to this having been asserted at an earlier point in time.

[18] Mr Geddes gave evidence after Mrs Geddes. Mr Geddes in answer to my question agreed that Mrs Geddes had mentioned the trial period and had a copy of the Federated Farmers agreement with her. Mr Geddes could not refer me to this having been asserted at an earlier point in time. However, when cross-examined Mr Geddes said that he could not specifically recall and might have been out of the room, but thought that Mrs Geddes had mentioned the 90-day trial period.

[19] I prefer the evidence of Mr Rosie and Ms Thompson on this point. If the 90-day trial had been mentioned during the employment interview, an employer would probably have advanced that as a central fact at the very start of their reply to the grievance claim, including in their prepared evidence. I find that there was no mention of a 90-day trial period and Mrs Geddes did not turn through pages of the Federated Farmers form agreement or otherwise have it on display.

[20] During the discussion, there was mention of the hours of work, salary, duties, accommodation and a work phone, as would be expected. Following the discussion in the house, Mr Geddes showed them around the farm, the accommodation and the milking shed.

[21] Mr Rosie and Ms Thompson say that he was offered the job during the interview. The job included accommodation. Mr and Mrs Geddes dispute that the job was offered on 11 September 2021. They say that they deliberated about hiring Mr Rosie, following the interview.

[22] There was a txt exchange later on Saturday. Mr Rosie said he forgot to ask about the roster. Mr Geddes responded with details. There was then the following exchange:

> **Mr Rosie:**
> Sounds great. We have thought it over and I would love to come to work for you if you'll have me
> **Mr Geddes:**
> That's fantastic news … We will get a contract to you on Monday…
> **Mr Rosie:**
> Thank you so much, … Looking forward to hearing from you on Monday. …

[23] Mr Geddes saying he would get a contract to Mr Rosie reflects an understanding that Mr Rosie would be employed.

Monday 13 September 2021

[24] The next contact was in the evening on Monday 13 September 2021, as follows:

> **Mrs Geddes:**
> Hi, house is all good to go so you can start to move in from whenever suits. Max is just finishing the contract for Blair now so will drop it in to you guys later tonight if that is OK with you? Could we just check what your address is to drop it off to?
> **Ms Thompson:**
> Awesome that sounds great thank you. We are just about to head out and won't be back until late but we stop in and see you on the way otherwise could we pop over tomorrow morning?
> **Mrs Geddes:**
> Tomorrow morning would be fine. The house is not currently locked so if you want to have another look etc tomorrow do feel free …

[25] Nothing in these txt exchanges supports the contention that a 90-day trial period had been mentioned by that stage. I find it had not.

[26] The message makes it clear that the contract was not provided to Mr Rosie on the Monday, because DGL had not completed it.

[27] Accommodation came with the job. The reference to "start to move in whenever suits" supports Mr Rosie's view that employment had already been offered and accepted.

Tuesday 14 September 2021

[28] The next contact was in the morning on Tuesday 14 September 2021. Mr Rosie asked if it was ok "to pop over". Mr Geddes said he was tied up for half an hour, the house was "free

… to check out" and the contract was at "home" to pick up. Mr Rosie said they would go over to the house and would "pop in" when Mr Geddes messaged that he was free. Mr Rosie and Ms Thompson first dropped off some of their possessions to the house. Mr Geddes messaged to say he was heading home. Mr Rosie and Ms Thompson met Mr Geddes and Mrs Geddes there early in the afternoon.

[29] By then, information in a Federated Farmers form of employment agreement and been filled in by hand. The name of the employer and Mr Rosie were added. The first day of work was set as 17 September 2021, following the printed provision that a signed copy had to be returned before the start time but starting work without doing that demonstrated acceptance of the terms and conditions. Clause 4 provided for a trial period "*Where we have 19 or less employees and you have not been previously employed by us*". Details of the service tenancy were written in and Mr Geddes had completed the accommodation checklist. Clause 38 set "2" business days as having been agreed for Mr Rosie to obtain independent advice. The offer was open for acceptance until "5 PM" on 16 September 2021. Mr Geddes signed and dated the agreement "14/09/2021" in the six places identified in the form.

[30] The form of agreement incorporates "Explanatory notes". Relevant here is the note headed "90 Day Trial Period". It states that the employer must make sure the employee is aware of a trial period clause and has sufficient time to seek independent advice "before signing the employment agreement". It explains:

> The employment agreement must be signed by both parties before the employee starts work for the 90 day trial period to be enforceable. Signing the employment agreement even an hour after starting work is too late.

[31] Mrs Geddes says that she presented the agreement to Mr Rosie on 14 September 2021 when they met. Her evidence is that Mr Rosie then told them he could not read, but had not disclosed this in the job interview on the Saturday. Mrs Geddes says this was misleading. Her evidence is that they "emphasized very strongly" that Mr Rosie needed to find someone he trusted to go over the agreement and that he could get legal advice before signing it. Her evidence is that she "explicitly" pointed out clauses she considered very important, regarding the service tenancy, the house inspection and the "trial period". Mrs Geddes says that she told

Mr Rosie "several times" he would not be able to commence work until the agreement was signed.

[32] Mr Geddes' evidence is that Mr Rosie "had certainly downplayed his literacy issue at the job interview", a reference to Saturday. This is not consistent with Mrs Geddes' evidence that Mr Rosie had not told them at the job interview that he could not read. Mr Geddes' evidence is more aligned with Mr Rosie's evidence that he was honest about his trouble "reading and writing" right "from the start". I prefer Mr Rosie's evidence and find that DGL was alerted to Mr Rosie's literacy problems on Saturday 11 September 2021.

[33] Mr Rosie's evidence is that there was discussion about pay and days off when he collected the agreement, but not about the 90-day trial period. He says that "they" went through some pages and "bits and pieces", but there was no specific reference to the 90-day provision. Mr Rosie did not accept that clause 38 "Independent advice" and clause 39 "Offer and acceptance" were brought to his attention.

[34] I accept Mr Rosie's evidence that they went through some pages of the agreement. It seems likely that an employer such as DGL would mention the inclusion of a 90-day trial period in the agreement, so I find this was referred to on Tuesday 14 September. It had not been mentioned previously. I do not accept Mrs Geddes' evidence that they "empathized" Mr Rosie's right to obtain advice or that she "explicitly" told him he would not commence work until the agreement was signed. Mrs Geddes did not impress as a reliable witness and DGL's later conduct did not match these assertions. However, I accept that Mr Rosie was asked to sign and return the agreement before he started work.

[35] Mr Rosie was given the agreement to take with him.

Wednesday 15 September 2021

[36] The next contact by txt was on Wednesday 15 September 2021. Mr Rosie said "the move went well", referring to moving into the accommodation DGL supplied as part of the employment. Mr Rosie first stayed there that night.

[37] Mr Rosie also asked Mr Geddes if he could start on Saturday 18 September rather than Friday 17 September as he had to be present for a house inspection on the property they were

vacating. Mr Geddes asked Mr Rosie to start Friday morning, work until 9am and then have the rest of the day off. Mr Rosie agreed. They also agreed to "catch up" on Thursday at 3pm.

Thursday 16 September 2021

[38] Mr Geddes in a txt advised Mr Rosie about what wet weather gear was available. He then said he would come over at about 3.30pm to drop off the quad bike. Mr Rosie confirmed the time.

[39] The two men met briefly that afternoon. Mr Rosie's evidence is that he does not recall being asked about the agreement. Mr Geddes' evidence is that he was expecting to get the agreement, but "he didn't have it". Mr Geddes evidence is that Mr Rosie said he had not signed it, but Mr Geddes assumed that Mr Rosie had been able to read and review it. I accept that Mr Geddes probably asked about the agreement but Mr Rosie said he had not yet signed it. However, there was no reasonable basis for the assumption Mr Geddes said he had made. The Federated Farmers agreement is a substantial document, Mr Geddes had some knowledge of Mr Rosie's literacy issue and Mr Geddes did not ask whether Mr Rosie had sought advice.

[40] Mr Rosie's evidence is that Mr Geddes said about being at the milking-shed about 5.00am the next day. It is likely that an employer would mention the start time to a new employee who was due to start the next morning, so I accept Mr Rosie's evidence on that point.

[41] Mr Geddes left the quad-bike with Mr Rosie. Mr Geddes told me that Mrs Geddes came to pick him up. There is no reason to doubt that evidence. Mrs Geddes did not speak with Mr Rosie then. Her evidence is that she had "expressly reminded" Mr Geddes to collect the signed agreement from Mr Rosie when he went to drop the wet weather gear off. Mrs Geddes had been primarily responsible for the provision of the employment agreement on Tuesday. If she had been so insistent on it being signed before Mr Rosie was due to start work, one would have expected her to speak to Mr Rosie on Thursday when she learnt it had not been signed.

[42] Mr Geddes did not defer Mr Rosie's start date when he was told on Thursday afternoon that the agreement had not been signed. He just reminded Mr Rosie about the start time for the next morning. I take from this that DGL's priority at the time was for Mr Rosie to start working,

rather than to ensure he had signed the employment agreement before he started working. Mrs Geddes' evidence which I accept is that they were "desperate" for staff at the time.

Friday 17 September 2021

[43] Mr Rosie arrived at the milking shed at 5.00 am, as arranged. There is no reason to doubt Mr Rosie's evidence that he had no experience in a herringbone milking shed. However, Mr Rosie's experience in a more modern shed gave him transferable skills.

[44] Alfredo Evaristo works for DGL and is listed in the employment agreement as a person who Mr Rosie was to report to. There is no reason to doubt Mr Geddes' evidence that he had told Mr Evaristo that Mr Rosie was starting that morning and would require introduction and instructions. Mr Geddes left to get the cows in before Mr Rosie arrived. Mr Geddes did not tell Mr Evaristo that Mr Rosie had to provide his signed employment agreement before starting work or had to wait for Mr Geddes to arrive back at the milking shed before he could start.

[45] Mr Evaristo's evidence is that when Mr Rosie arrived, he went straight into the pit and started milking. Mr Evaristo said he left him to it as he seemed to know what he was doing. In response to my questions, Mr Evaristo said that Mr Rosie said good morning when he arrived and he told Mr Rosie that "he could start up". That answer is more consistent with Mr Rosie's evidence. I find that Mr Evaristo did not ask for the employment agreement, there were introductions and he gave some directions to Mr Rosie who then started working.

[46] There is no reason to doubt Mr Geddes' evidence that he was back at the milking shed by about 5.10am, shortly after Mr Rosie had started working. Mr Geddes' evidence is that he did not see the employment agreement in the office. It is common ground that Mr Geddes did not speak to Mr Rosie then. If Mr Geddes had been so insistent that Mr Rosie provide a signed agreement before he started work, one would have expected him to raise the point promptly with Mr Rosie, as soon as he returned to the milking shed.

[47] Mr Geddes' prepared evidence is that he returned to the milking shed at the end of milking and asked Mr Rosie about the signed agreement. His evidence is that Mr Rosie told him that he had signed it but had forgotten to bring it with him and Mr Geddes asked him to drop the agreement off on the way to the house inspection for the previous employer. However,

when cross-examined, Mr Geddes said he could not "recall specifically" saying anything about the contract that morning. Mr Geddes accepted that his txt later that day was the first specific reference to the contract that day. Mr Geddes' evidence in cross-examination is consistent with Mr Rosie's evidence that Mr Geddes told him when he arrived at about 9.00am that he could go home as arranged, but said nothing about the employment agreement. I accept Mr Rosie's evidence about that exchange.

[48] The next contact was later on the same day. Mr Geddes sent Mr Rosie a txt at 6.40pm. He hoped Mr Rosie's afternoon had gone well and asked him to start at "5 tomorrow", followed by:

> … Also can you bring your contract with you. I will grab in the morning and get a copy then give it back. Thanks Max

[49] Mr Rosie replied affirmatively.

[50] Neither message indicates that the employment agreement had been the topic of a discussion between them earlier that day. This supports the foregoing findings.

[51] Mr Rosie's evidence is that he signed the agreement that evening, shortly after the txt message. Ms Thompson's evidence supports that account. Jillian Craik is Mr Rosie's mother-in-law. Her evidence support's Mr Rosie's account. Ms Thompson and Ms Craik both say they saw Mr Rosie sign the agreement that evening. There is no good reason to doubt their evidence. I find Mr Rosie signed the employment agreement on the evening of 17 September 2021, after work that day.

Saturday 18 September

[52] Mr Rosie started work at 5.00am. His evidence is that he left the signed agreement at the door to Mr Geddes' house, just before 11.00am. Mr Rosie then sent a message to Mr Geddes that he had done that. Mrs Geddes' evidence is that she found the agreement there at about 11.30am when she returned from feeding the calves. There is no reason to doubt Mr Rosie's evidence about the timing.

Mr Rosie had "previously been employed" by DGL

[53] The Employment Court has confirmed that the requirements of s 67A and s 67B of the Employment Relations Act 2000 must be interpreted strictly. In *Blackmore v Honick Properties Limited* the Court explained that employers should be aware that written agreement is required before an employee begins work if they are to be regarded as not having been previously employed by the employer.[3] In practice, employers must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee.

[54] Mr Rosie commenced work at 5.00am on Friday 17 September 2021 but he did not sign the intended employment agreement until that evening.

[55] DGL places reliance on the deemed acceptance provisions at clause 3.1:

> 3.1 You must return a signed copy of this Agreement before the start time on the first day of work. However, if you start work but fail to return a signed copy of this Agreement, that demonstrates acceptance of the terms and conditions in the Agreement.

[56] However, clause 39 provides:

> **39 Offer and acceptance**
> 39.1 We, in signing this agreement, are making an offer of employment that will remain open for the Employee to accept until 5 pm on 16/09/2021 at which time it will be automatically withdrawn.

[57] When Mr Rosie started working, the written offer comprising the Federated Farmers form of agreement had been withdrawn in accordance with its express terms. Mr Rosie was already an employee when he communicated his offer to work on the terms in the Federated Farmers agreement, by leaving the signed agreement at Mr and Mrs Geddes' house on Saturday 18 September.

[58] In addition, the deemed acceptance provision is not consistent with parts of the document. The "Explanatory notes" include a symbol to show where in the agreement that parties must complete information. The use of that symbol at pages 32, 47, 52 and 56 indicates that Mr Rosie's signature was required for the agreement to be binding. The "General Advice" is that the agreement "should be completed and signed by both parties". The note regarding the

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[3] *Blackmore v Honick Properties Limited* [2011] NZEmpC 152

90-day trial refers to advice to the employee "before signing the employment agreement". It then reads:

> **The employment agreement must be signed by both parties before the employee starts work for the 90 day trial period to be enforceable.** Signing the employment agreement even an hour after starting work is too late.

[59] The notes also say:

> Offer and Acceptance
> After the employee has had time to take advice, the offer of employment can be accepted by both parties signing both copies of the agreement.

[60] These notes to and provisions of the agreement, DGL's request for the signed agreement to be returned before work started and DGL's follow up after Mr Rosie started work to get it signed lead me to conclude that the parties did not intend to be bound by the form of agreement offered by DGL until it had been signed by Mr Rosie.

[61] Even if I assume DGL's written offer was still capable of acceptance by Mr Rosie after 5.00pm on 16 September 2021, he did not validly communicate his acceptance of it until he returned the signed agreement on 18 September 2021. That fact matches what happened in *Smith v Stokes Valley Pharmacy (2009) Ltd*.[4] In *Smith*, the new employer had provided proposed written terms that included a 90-day trial period clause before the employment started, the employee worked one day for the new employer and returned the signed agreement the next day. The new employer had taken over the business in which the employee had worked for the previous employer, so the present case differs. However, the legal analysis in *Smith* did not turn on that fact.

[62] To summarise, there was an initial interview on 11 September. Later that evening DGL replied to Mr Rosie's continued interest with approval and a promise of a "contract". The "contract" was given to Mr Rosie on 14 September. The inclusion of the 90-day trial period was mentioned for the first time. The agreement was open for acceptance until 5 pm on 16 September 2021. Mr Rosie was asked to sign and return it before he started work on 17 September, but did not. DGL nonetheless had Mr Rosie work on 17 and 18 September. Mr Rosie signed the agreement on the evening of 17 September and left it for DGL the next day.

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[4] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

However, Mr Rosie had previously been employed by DGL at the time the parties entered into that form of written employment agreement. For that reason, DGL is not able to rely on s 67A and s 67B of the Employment Relations Act 2000.

[63] It is not necessary to consider whether DGL complied with the advice and reasonable opportunity requirements set out in s 63A of the Employment Relations Act 2000 or complied with the notice of termination requirements under s 67B of the Act.

[64] I was referred to *Simmons v Collins Stainless Steel Fabricators Limited*.[5] In that case it was found, from the very beginning that there was agreement that the employment would be subject to a trial period. The present case differs. DGL did not raise the trial period until late in the interactions. In addition, Mr Rosie's employment agreement containing the trial period was formed following his offer, by which time he was already an employee.

Did DGL unjustifiably dismiss Mr Rosie?

[65] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether DGL's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether DGL sufficiently investigated the matter considering available resources; whether DGL raised its concerns with Mr Rosie before deciding to dismiss him; whether DGL gave Mr Rosie a reasonable opportunity to respond to the concerns before dismissing him; and whether DGL genuinely considered Mr Rosie's responses before deciding to dismiss him.

[66] I may consider other factors, if appropriate. Clause 24 of the Federated Farmers agreement sets out minimum steps required for a formal investigation if the employer has a "concern" about the employee's conduct.

[67] Mrs Geddes posted a job advertisement for "additional staff", which was seen by Mr Rosie's and Ms Thomson's friend. The friend sought further information from Mrs Geddes, passed it to Ms Thomson who shared it with Mr Rosie. This was on 11 November 2021. Ms

[5] *Simmons v Collins Stainless Steel Fabricators Limited* [2011] NZERA Auckland 330.

Thomson and Mr Rosie thought the advertisement was to replace him, based on what had been said to the friend about the accommodation that would be supplied.

[68] DGL says they were not advertising Mr Rosie's position. It is not necessary to resolve the point. DGL unjustifiably dismissed Mr Rosie, regardless.

[69] Mr Rosie sent a message to Mr Geddes at 6.01pm on 11 November 2021. He referred to the ad, thought it sounded like his job, asked which of the workers was leaving and noted he had not been fired. Mr Geddes replied that they were looking for additional staff and could talk about it tomorrow. Mr Rosie referred to the conversation between the friend and Mrs Geddes that made him think it was his position being advertised. Mr Geddes replied that he could discuss it tomorrow but no decisions had been made at that stage. Mr Rosie asked if they could discuss it "tonight" as if he was being replaced he would prefer to know "now". Mr Geddes declined.

[70] Mr Rosie reported for work as usual on Friday 12 November. Mr Geddes did not raise concerns with Mr Rosie when they first saw one another that morning. They each got about their work. A little later, Mr Geddes went home for breakfast. His evidence is that Mrs Geddes and he decided then to dismiss Mr Rosie, based on what Mrs Geddes said she had seen Mr Rosie do that morning. Mrs Geddes drafted a letter of termination for Mr Geddes to give to Mr Rosie. It did not mention what Mrs Geddes claims she had just seen.

[71] Mr Geddes returned to dairy yard. He recorded the exchange he then had with Mr Rosie. Mr Geddes raised the txts from the night before. Mr Rosie repeated his view that it was his job which had been advertised. Mr Geddes said it was not, as they had not made any decision. He then said, while handing Mr Rosie a letter:

> but now we've made a decision last night, I'm gonna give you a letter and that's
> …
> Termination of employment letter, you can take it home and read it

[72] The exchange ended shortly after with Mr Geddes telling Mr Rosie to read the letter and Mr Rosie saying it was not legal, he would take them to court and they would be hearing from his lawyer. Mr Rosie left. Mr Geddes then told another staff member what had just happened.

[73] The letter is dated 12 November 2021 and says that DGL had decided to exercise its right under clause 4 of the employment agreement and pursuant to s 67A and 67B of the Employment Relations Act 2000 to terminate Mr Rosie's employment "effective immediately". It refers to the notice required and for Mr Rosie to work out his notice, with 16 November 2021 as his last day of work. DGL also gave notice to terminate the service tenancy no later than 26 November 2021.

[74] Mr Rosie did not return to work out the notice period. He messaged Mr Geddes to say he had a medical certificate covering the notice period and DGL paid him sick leave to cover the time.

[75] In about March 2022, DGL wrote a document entitled "Blair Rosie – Incidences of Serious Misconduct (SM) and General Misconduct (GM)". There are 13 allegations. For present purposes, I assume that the allegations and concerns that caused DGL to dismiss Mr Rosie are mentioned in this document, but note that DGL learnt of some matters after the dismissal.

[76] DGL did not investigate these allegations against Mr Rosie. DGL did not raise these concerns with Mr Rosie. DGL did not give Mr Rosie an opportunity to respond to these concerns. DGL could not give consideration to Mr Rosie's response to these concerns, because it did not seek his response. DGL did not comply with the minimum steps set out in the employment agreement with respect to these matters.

[77] I find that DGL unjustifiably dismissed Mr Rosie.

What remedies should be ordered?

Lost remuneration

[78] There is a claim for reimbursement of lost remuneration. In settling a personal grievance, the Authority has power to order the reimbursement of a sum equal to the whole or any part of the wages lost as a result of the grievance. If I determine that Mr Rosie has lost remuneration as a result of the personal grievance, I must order DGL to pay the lesser of the

sum equal to that lost remuneration or 3 months' ordinary time remuneration. I have a discretion to order DGL to pay a greater sum than that amount, to reimburse proven loss.

[79] There is some documentary evidence to establish the extent of lost remuneration. Mr Rosie received an MSD benefit from December 2021, followed by income from other employment from about June 2022. The income from the benefit is disregarded for current purposes. Mr Rosie's evidence, which I accept, is that he received no income from other employment from when he was dismissed until he started working elsewhere is about June 2022. I find that Mr Rosie's lost remuneration as a result of his personal grievance exceeded 3 months' ordinary time remuneration. Subject to what follows, I am required to order reimbursement of 3 months' ordinary time remuneration.

[80] I am asked to exercise the discretion to order reimbursement of the whole of the lost remuneration. However, there is no documentary evidence that Mr Rosie attempted to mitigate his loss. His evidence is that he applied for "many" jobs on Trademe and Facebook, so I accept that he took some steps to mitigate his loss. However, that evidence is not sufficient to warrant an order greater than 3 months' ordinary time remuneration. That equates to $17,500.00 (gross).

Compensation

[81] There is a claim for $20,000.00 as compensation for humiliation, loss of dignity and injury to feels suffered by Mr Rosie as a result of the personal grievance.

[82] Mr Rosie's evidence is that being fired "so suddenly" was the hardest thing he had gone through. He struggled to make ends meet, needed support from friends and family and felt like "the biggest failure". He and his family had to "camp" on a friend's couch for some weeks as they had no other accommodation. The experience caused Mr Rosie to lose trust in employers.

[83] Ms Thomson's evidence is that Mr Rosie became withdrawn and uncommunicative and lost trust in employers. Her evidence and that of Ms Craik is corroborative of Mr Rosie's evidence.

[84] There is no reason to doubt the evidence about the effects Mr Rosie suffered as a result of the dismissal. However, Mr Rosie has not required professional or medical support and the

effects have lessened somewhat with the passage of time and his ability to find other employment. A high level of harm has not been proven. I consider that $15,000.00 compensation would properly remedy the harm suffered by Mr Rosie.

Contribution

[85] I must consider the extent to which Mr Rosie contributed in a blameworthy manner to the circumstances giving rise to his personal grievance, and reduce remedies accordingly. I will separately consider the alleged subsequently discovered misconduct, given its potential to affect an assessment of loss.

[86] I will deal with the list of incidents provided by DGL, but should first summarise what Mr Geddes told the other employee straight after he dismissed Mr Rosie. The recording is contemporaneous evidence of the reasons for Mr Rosie's dismissal.

[87] After he dismissed Mr Rosie, Mr Geddes told the herd manager about the reasons for that. He mentioned Mr Rosie being "very aggressive" and "stand-up-ish". He said Mr Rosie "doesn't talk" and "doesn't like the cows". Mr Geddes said he had spoken to Mr Rosie about the "reels". Mr Geddes told him that "there's just a couple of things that you know I should have said probably before now". Mr Geddes agreed with him that Mr Rosie had "short patience". Mr Geddes thought they needed someone in the shed "who is bright and happy and says good morning".

[88] Mr Rosie is alleged to have threatened to "Do Max in", during his phone call to Mr Geddes after he received the dismissal letter.[6] Even if true, it followed the dismissal so could not have contributed to the situation giving rise to the personal grievance.

[89] It is alleged that Mr Rosie intentionally ran into calves with the quad-bike.[7] Mrs Geddes' evidence is that she saw this on the morning of the dismissal, told Mr Geddes about it when he came home for breakfast, and they decided then to dismiss Mr Rosie. Mrs Geddes says that she heard "screaming and swearing" nearby, Mr Rosie was hitting and kicking calves in an "extremely violent way", he then drove off in his quad-bike at full throttle while calves

[6] Allegation 2.
[7] Allegation 5.

were gathered around him and drove into the mob of cows, knocking several to the ground and driving over one. Mrs Geddes' evidence is that she has never seen anyone mistreat stock to that extent before. Mrs Geddes also claims to have seen Mr Rosie kicking a calf before, not just once.

[90] I do not accept this evidence from Mrs Geddes. If it had happened, Mrs Geddes would have told Mr Geddes about it that morning and he would have referred to it when he told the herd manager why Mr Rosie had just been dismissed. Mrs Geddes knew that such conduct was illegal, but did not report it to any authority, even though her evidence is that it was not the first time she had witnessed it. Running over a cow with a quad-bike is likely to cause the cow physical injury. There is no independent or any evidence of injury.

[91] The evidence about the incident on the Friday morning is part of a defence to the assertion that DGL had already decided to dismiss Mr Rosie the day before. An employer is likely to respond by dismissing an employee after a serious incident. However, on Friday morning Mr Geddes initially told Mr Rosie "we've made a decision last night". Later in the exchange he claimed that they had not made "any decisions as of last night", but only when pressed by Mr Rosie about why he did not answer Mr Rosie's question "last night". The first answer is more likely the truth. Mr Geddes told the herd manager "we hadn't decided up until last night", indicating that they made the decision on Thursday night, not before. If they had made the decision on Friday morning, Mr Geddes would probably have said that to the other worker. I find that DGL decided on Thursday 11 November 2021 to dismiss Mr Rosie.

[92] I do not accept Mrs Geddes' evidence about the timing of the decision. Mrs Geddes attempted to explain Mr Geddes' first statement to Mr Rosie by saying that Mr Geddes was referring to a decision about some other employment having been made "last night". That explanation lacks plausibility. Mrs Geddes answered my question about the lack of injury from running over an animal by claiming that the ground was "very soft", and then described the ground as "horrendously muddy" when pressed on the point. Mrs Geddes changed her evidence to say that she saw the quad-bike wheel lift up, but did not directly see the quad-bike run over the animal. Mrs Geddes then said that there were no bumps in the ground to cause the wheel to lift up. Mrs Geddes' responses caused me to be cautious about her reliability as a witness.

[93] In summary, Allegation 5 is unsupported except by Mrs Geddes' evidence. As I do not accept Mrs Geddes' evidence, the allegation provides no basis to find that Mr Rosie's actions on the morning of Friday 12 September contributed in a blameworthy manner to his personal grievance.

[94] Allegation 6 is that Mr Rosie kicked and hit calves at an earlier point when he was putting grain into pens. Mrs Geddes' evidence is that she saw Mr Rosie use "full leg swinging blows" to shift calves. The incident apparently involved kicking a calf in the head and chest. Mrs Geddes says this was within three weeks of him being employed and again about two weeks later, despite her telling Mr Rosie that it was illegal, extremely cruel, misconduct and was not allowed.

[95] There is no other direct evidence of these events and no contemporaneous record of them. Mr Geddes' told the herd manager that "the way he works with the cows, he doesn't like cows", but that appears to refer to "the last few days" from 12 November 2021 and is too general to be taken as corroborative of Mrs Geddes' evidence directed at allegation 6. In the absence of other evidence, I do not accept Mrs Geddes' evidence regarding this allegation. It provides no basis to find that Mr Rosie's actions contributed in a blameworthy manner to his personal grievance.

[96] Allegation 7 concerns the way Mr Rosie operated the quad-bike. Mr Rosie accepted he was "told off" about speeding once. The herd manager's evidence is that he was aware that Mr Rosie had been spoken to by Mr Geddes and Mrs Geddes about speeding. I accept there is substance to this concern. Mr Rosie drove too fast, despite directions to operate the quad-bike in a safe manner and drive slower, probably more than once. The conduct contributed to some extent to the circumstances giving rise to Mr Rosie's dismissal. I must have regard to that conduct.

[97] Allegation 8 is that Mr Rosie harassed the other staff and displayed an inappropriate manner and attitude in speaking to them. Both other employees gave evidence to support this allegation. I accept that there is some substance to the allegation that Mr Rosie did not always comply with their directions and guidance about some tasks, but not otherwise. The concerns

were communicated to Mr Geddes, but not taken up with Mr Rosie. The failure to take up the matters with Mr Rosie means that his actions do not require the Authority to reduce remedies.

[98] Allegation 9 is that Mr Rosie did not follow instructions: he put cows into the wrong paddock more than once; did not feed the right calves the right grain; did not open grain bags correctly; and did not use fencing equipment correctly. Mrs Geddes' evidence is that Mr Rosie lied to her several times about whether he had followed her directions with respect to feeding grain in a specific shed. This was about the end of October 2021. Mr Rosie says that he fed calves as instructed and did not lie to Mrs Geddes when she asked him about what he had done. He accepts that Mrs Geddes disputed his response at the time. There is not reliable evidence to find to the appropriate standard that Mr Rosie failed to follow instructions and lied to Mrs Geddes, as alleged. The allegation provides no basis to find that Mr Rosie's actions contributed in a blameworthy manner to his personal grievance.

[99] Allegation 10 is that Mr Rosie was aggressive towards cows in the milking shed. The herd manager's evidence is that Mr Rosie was "loud and aggressive", "very rough" and "generally aggressive" with the cows. He said he did not do anything about it. The other worker's evidence is that Mr Rosie was "generally aggressive" in handling stock and machinery, was "always angry" in the milking shed and "shouting at the cows".

[100] I accept that there is some substance to the allegation, but the evidence is likely to be exaggerated. I do not accept that the herd manager would have been too intimidated to report Mr Rosie's behaviour to Mr Geddes, if it had been as bad as claimed. The evidence was that he reported Mr Rosie's comments regarding a pocket-knife and about Mrs Geddes, prior to the dismissal. The other worker confirmed in his evidence that he was not scared of Mr Rosie and had reported the rope issue to Mr Geddes. It is also clear from what Mr Geddes told the herd manager straight after the dismissal that Mr Geddes knew about Mr Rosie's demeanour while working.

[101] To the extent that Allegation 10 is established on the evidence, Mr Rosie's unacceptable demeanour with the cows was known to DGL and contributed to the decision to dismiss him. It is appropriate to have regard to Mr Rosie's unacceptable demeanour under s 124 of the Act.

[102] Allegation 11 is that Mr Rosie damaged fencing gear by not winding up the reels correctly and by keeping them on his quad-bike rather than returning them to the storage area. Mrs Geddes' evidence is that there were a "huge number" of damaged reels caused by Mr Rosie. There is no objective evidence to support that contention. It is probably a significant exaggeration, at best. The matters were not taken up with Mr Rosie during the employment. There is no evidence that Mr Rosie was given any instruction about the handling of reels. The allegation regarding reels and fencing gear do not require the Authority to reduce remedies.

[103] Allegation 12 concerns Mr Rosie's "aggression, attitude and threatening manner of speaking" to other employees. It mostly repeats Allegation 8, and I reach the same view as set out above. The additional element concerns his lack of courtesy towards and failure to help Mrs Geddes.

[104] Mrs Geddes gave evidence to support the last point. Her claim is that Mr Rosie would just glare at, rather than respond to or help her. Mrs Geddes says that Mr Rosie ignored her specific request to drop a reel to allow her to drive through and on another occasion he ignored her request to lift a bucket for her. Mrs Geddes' evidence is that this was "right from the outset". Mrs Geddes says she asked Mr Rosie if she had done something and she "just got a grunt". None of this was documented during the employment. Mr Rosie disputes the allegation.

[105] It is not inherently likely that an employee would intentionally behave like that towards a person who they know effectively represents their employer. One would expect an employer who had been treated like that to unmistakably make an issue about it, leaving no room for doubt about what had happened and the employer's view of it. Given the lack of reliable evidence about such conduct on Mr Rosie's part, there is no reason to reduce remedies.

[106] Allegation 13 is that there was a misrepresentation by Mr Rosie as to his literacy, before DGL offered him the position. It is answered by the earlier finding that Mr Rosie had told DGL at an early point about his literacy issue.

[107] As will be explained, I accept Allegation 10 to the extent that Mr Rosie's demeanour with the cows was sometimes unacceptable.

[108] In summary, Mr Rosie's blameworthy contribution to the circumstances giving rise to the personal grievance was relatively modest. The overwhelming responsibility rests with DGL who did not properly take up with Mr Rosie any grounds for dissatisfaction as matters arose during the employment, then wrongly relied on the non-applicable trial period provision. I consider remedies should fairly be reduced by 15%.

Later discovered misconduct

[109] It is alleged that Mr Rosie operated a quad-bike in an unsafe manner causing it to roll, but did not report the incident to Mr Geddes, who learnt of it after the dismissal.[8] There is no direct evidence about Mr Rosie's driving to cause it to roll over. I am asked to draw an inference that he was operating it in an unsafe manner to cause it to roll from that fact alone, with him having been seen to drive too fast at other times.

[110] Mr Rosie's evidence is that the quad-bike was nearly stationary, on a bank and rolled. There is no other evidence about the circumstance. He told the herd manager who he reported to. His evidence was that he "assumed" Mr Rosie would report it to Mr Geddes, but later his evidence was that he told Mr Rosie to report it. At worst, Mr Rosie failed to report the incident except to his direct supervisor, despite the instruction to tell Mr Geddes. These facts fall well short of misconduct that might affect an assessment of loss suffered by Mr Rosie as a result of his personal grievance.

[111] Allegation 3 is that Mr Rosie used a pacifier on high setting at least 6 times, despite instructions to him to use it only on the low setting. Use on the high setting is said to create a risk of injury to the cow and to staff who have to assist the cow to stand up again.

[112] The herd manager's evidence is that he witnessed Mr Rosie using the pacifier on high setting. He showed Mr Rosie how to use it and told him that the "cows don't like it" on a high setting. The other worker's evidence is that he told Mr Rosie about the pacifier, when he saw Mr Rosie doing something else to control a cow. This was shortly after Mr Rosie started work. I accept the evidence that early in his employment Mr Rosie was told about the pacifier, shown how to use it and advised that cows do not like the high setting. The evidence does not establish

[8] Allegation 1.

that Mr Rosie used the pacifier on a high setting afterwards "at least 6 times". These facts fall well short of misconduct that might affect an assessment of loss suffered by Mr Rosie as a result of his personal grievance.

[113] Allegation 4 is that Mr Rosie wrapped the tails of cows around the rail to control them if they were unsettled during milking. It is alleged that Mr Rosie continued to do this, despite being instructed it was not allowed. After Mr Rosie's dismissal, a veterinary inspection identified 10 cows whose tails had to be amputated. Mr and Mrs Geddes say that they were unaware of Mr Rosie's conduct until after his dismissal.

[114] The herd manager's evidence is that he saw Mr Rosie wrapping cow tails, made several comments to him that the practice was illegal and he should not do it, but Mr Rosie ignored the instruction. When questioned, his evidence was that he saw this once when Mr Rosie was "still new", and then saw him a second time in Mr Rosie's second month. He told him again not to do it and did not witness it again. However, when cross-examined the herd manager said that he saw Mr Rosie break cows' tails, but did not tell Mr Geddes or Mrs Geddes as he did not want to get Mr Rosie into trouble.

[115] The other worker's evidence is that he saw Mr Rosie holding cow tails when they kicked, that it creates a serious risk of breaking the tail and "I believe he did break some". He also said "We believe" that the broken tails identified after Mr Rosie's employment ended were caused by him, based on him holding tails and tying tails to the rails. His evidence was that he saw Mr Rosie using a rope to tie a cow to a rail once and told him to use the pacifier instead. Use of a rope is a dangerous and unlawful practice. When questioned, the other worker said that he was "not sure" if he saw Mr Rosie break any tails and he reported the use of the rope to Mr Geddes within a day or two. He did not see Mr Rosie use a rope again. When cross-examined however, the worker said he saw Mr Rosie use a rope twice not once, and holding cow tails "regularly".

[116] The other worker did not give evidence of seeing Mr Rosie break any tails and that was the herd manager's evidence at first. I find as a fact that they did not witness Mr Rosie break any tails. I find that the herd manager saw Mr Rosie on one occasion at the start of his employment wrap a cow's tail around the rail and do it again on a second occasion later. I

accept his evidence that he did not see Mr Rosie do that again. I accept the other worker's evidence that Mr Rosie tied a cow to the rail once. He reported that to Mr Geddes. If the other worker had seen Mr Rosie holding cow tails "regularly" that evidence would have been part of his prepared statement. Accordingly, I do not accept it.

[117] The evidence does not establish that Mr Rosie broke any tails. Any misconduct with respect to twice wrapping cow tails is short of conduct so egregious that no remedy should be ordered, notwithstanding a personal grievance.[9]

[118] Mr Rosie's use of a rope once early in his employment was reported to Mr Geddes at the time. Mr Geddes took no action. Mr Rosie's action provides no basis now to reduce remedies for the proven personal grievance.

[119] In summary, the alleged later discovered misconduct, to the extent established on the evidence, does not affect the assessment of remedies for the personal grievance.

Summary and orders

[120] DGL is not able to rely on s 67A of the Employment Relations Act 2000 as Mr Rosie had previously been employed by it by the time they agreed to the employment agreement containing a trial provision. Section 67B(2) of the Act does not operate to prevent Mr Rosie's personal grievance claim.

[121] DGL unjustifiably dismissed Mr Rosie.

[122] To settle the personal grievance, Dogterom Geddes Limited is to pay Blair Rosie no later than Monday 9 October 2023:

(a) $14,875.00 (gross) reimbursement of lost remuneration; and

(b) $12,750.00 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[9] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[123] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, taking account of those submissions in the context of the Authority's approach to costs.

Philip Cheyne
Member of the Employment Relations Authority