

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 205  
3021292

BETWEEN DANIEL SMITH &  
LORETTA SMITH  
Applicants

AND STUART MUIR  
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicants in person  
M A Pollak, Counsel for the Respondent

Investigation Meeting: 18 June 2018

Additional documents  
received: 19 June 2018 from Respondent

Determination: 27 June 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. Daniel and Loretta Smith were unjustifiably dismissed from their employment by Stuart Muir. However, no award of compensation is payable to them.**
- B. Daniel and Loretta Smith were not unjustifiably disadvantaged.**
- C. Stuart Muir did not make unlawful deductions from Daniel and Loretta Smith's wages.**
- D. Costs are reserved.**

## **Employment Relationship Problem**

[1] Stuart Muir runs a dairy farm located in Waiuku (the Farm). Daniel Smith was employed by Mr Muir as a 2IC, and Loretta Smith as a farm hand, from early June 2017 until 14 August 2017.

[2] The Smiths claim they were unjustifiably dismissed and suffered an unjustified disadvantage to their employment. They allege the disadvantage arose as a result of not being given an opportunity to seek legal advice before signing their individual employment agreement. They claim lost wages, compensation for hurt and humiliation and claim repayment of unauthorised deductions.

[3] Mr Muir denies he unjustifiably dismissed the Smiths. He says the Smiths were dismissed under a valid 90 day trial provision. He further denies that they suffered an unjustified disadvantage to their employment and that the deductions he made for rent were unlawful.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The issues**

[5] The issues requiring investigation and determination were:

- a) Is the trial period contained in the Smiths' individual employment agreement valid? If so, was the Smiths' employment terminated in accordance with the trial provision clause?
- b) If not, were the Smiths unjustifiably dismissed?
- c) Did the Smiths suffer an unjustified disadvantage to one or more conditions of their employment?
- d) If the Smiths were unjustifiably dismissed, or suffered an unjustified disadvantage, what remedies should be awarded?

- e) If any remedies are awarded, should they be reduced for blameworthy conduct by the Smiths that contributed to the situation giving rise to their grievance?
- f) Did Mr Muir make deductions from the Smiths' wages without their consent? If so, what amount, if any, should Mr Muir be ordered to repay to the Smiths?
- g) Should either party contribute to the costs of representation of the other party?

**Background against which issues are to be determined**

[6] In April 2017 Mr Muir advertised for a 2IC and a farm hand to work on his farm in Waiuku. Mr and Mrs Smith applied.

[7] The Smiths provided Mr Muir with their curriculum vitae. This showed they had worked for four entities between 2008 and 2017. The later three roles were on farms. They provided a contact name and phone number for each of these farms. Mr Muir tried to contact the farms but was only able to contact one. I shall refer to this referee as Mr R. Based on the positive reference provided by Mr R, Mr Muir interviewed the Smiths.

[8] During the interview Mr Muir discussed the salary and benefits that would be offered to the Smiths, the requirement that they provide their own 4 wheel bike, and that their employment would be subject to a 90 day trial period as well as all of the other the terms and conditions contained in the standard Federated Farmers employment agreement (IEA).

[9] Mr Muir said he also showed the Smiths a copy of the IEA and gave them an opportunity to discuss and negotiate any of the terms. He said the Smiths confirmed to him that they were familiar with the standard IEA as they had been employed under it previously. The Smiths accept these matters were discussed however they deny being shown a copy of the IEA.

[10] On 2 May 2017, Mr Muir made a written offer of employment to Mr and Mrs Smith. This outlined the verbal terms discussed and confirmed that the Farm used "the standard Federated Farmer's Employment Contract, which includes a 90 day trial period to protect both parties". The letter went on to advise that if the Smiths did not

have their own 4 wheel bike Mr Muir would assist them to organise finance to purchase one.

[11] That same day Mr and Mrs Smith accepted the roles. They asked Mr Muir to let them know when “u want to sign the contracts and we will be there”. Mr Muir responded that he would be in touch about commencement dates and the contracts. He said he later phoned the Smiths and told them that the contracts would be ready for them to sign when they arrived at the Farm.

[12] At or about that time the parties also agreed that Mr Muir would purchase a farm bike for the Smiths in consideration of them agreeing to repay the purchase price to him. It was agreed a sum of \$250 would be deducted from their wages each week until the purchase price was repaid in full.

[13] There is a dispute as to when the Smiths moved into the farm house located on the Farm, when they were provided with the IEA and when they commenced work. For reasons that I shall return to later in this determination, I am satisfied the Smiths moved into the Farm house on 31 May 2017, were provided with the IEA that same day, and commenced work on 1 June 2017.

#### *Performance Concerns*

[14] On 4 June 2017 Mr Muir and his family went away on a planned vacation for 7 days. Following their return they started to experience issues with the Smiths. They said they were regularly finishing work early, having long breaks and starting late. Mr Muir said he had an informal chat with Mr Smith shortly after he returned from holiday in mid-June 2017 about this. The Smiths denied this conversation.

[15] Sometime between then and 13 July 2017 Mr Muir spoke to Mr Smith again. There is no dispute what occurred on that occasion. Mr Muir expressed concern about the way Mr Smith was distressing the animals with his aggressive approach towards them and Mrs Smith. Mr Smith apologised for his conduct and was reminded that he was on a 90 day trial.

[16] Mr Muir then went away on holiday from 13 July 2017 to 25 July 2017. Upon his return to the farm his concerns about the Smiths continued. Not only was he concerned about their performance, he had also received information that led him to question the truth of the information they had provided on their curriculum vitae.

[17] This information came from Mr Muir's son who attended the local school with the Smiths' son. Mr Muir was told that the Smiths' son was saying he had attended about 20 different schools and had lived and worked in Otaua the previous year. This information was inconsistent with the Smiths' curriculum vitae that showed a steady work history, and no mention of working in Otaua

[18] Mr Muir said he tried to contact Mr R again to discuss his concerns. He was unable to contact him. He then asked the Smiths how he could contact Mr R. He said he was told Mr R was not contactable as he was visiting a sick brother in South Africa and that they did not have any other contact details for him. The Smiths denied telling Mr Muir this. They said they told him that Mr R had sold his farm and moved to South Africa which is why they had moved farms.

*28 July 2017*

[19] By 28 July 2017 calving season had commenced. Mr Muir had tasked the Smiths with drafting out calving cows from the herd. He discovered they had not done this correctly. A text message exchange then took place with Mr Smith.

Smith Hey we will need Monday an Tuesday of as well as weekend we got things to do an family to see

Muir Eh. No way. We have started calving. It's your weekend off. You do family stuff then. And where r u now?

Smith That's bullshit m8 we been working hard out an we need a break to an u got to spend time with ur family in the holidays

Muir Come n c us we on the pad

Smith Well we not here at moment had to go to town to get a few things

Smith I've done all the jobs down there

Muir What happened to work. We still drafting out cows on the far side that u missed. Work finishes at 5. Not 3 or 4. Remember u on a 90 day trial and it's not looking good

Smith Yeah is that right is it

Don't treat me with that shit

[20] Later that day Mr and Mrs Smith met with Mr Muir and his wife. Mr Muir said he again raised his concerns about the Smiths' punctuality, how their abusive and inappropriate conduct with one another was distressing the cows, and explained how their performance was not at the standard expected of a 2IC and a farm hand. He said

he reminded the Smiths that their employment was still subject to a 90 day trial period and that he was considering terminating the Smiths' employment in accordance with this provision as the employment relationship did not seem to be working for either party.

[21] Mr Muir and his wife said that Mr Smith then became very abusive and swore at them. They said Mrs Smith, who had refused to participate in the meeting, had walked out in anger at an early stage of the meeting shouting verbal abuse at them. Mr and Mrs Smith do not dispute they were angry and Mrs Smith left the meeting. The conversation ended with Mr Muir telling Mr Smith that he would consider his explanation and have another meeting with him to give them his decision.

[22] Mr and Mrs Smith say the only matters raised with them at this meeting were concerns about the way they were treating the cattle. They acknowledged they were aware that their jobs were in jeopardy.

*31 July 2017*

[23] On 31 July 2017 Mr and Mrs Smith attended a meeting with Mr Muir and his wife. Mr Muir said he had decided before this meeting that he was going to terminate the Smiths in reliance on the 90 day trial provision in their IEA. He said he prepared a termination letter before the meeting and handed this to them when they arrived. He told them that it was not working out and he was evoking the 90 day trial clause. The Smiths responded angrily. They swore at Mr Muir and told him they would see him in Court.

[24] The Smiths were provided with two weeks' notice but were not required to work out their notice period. They were permitted to remain living in the Farm house during this period which ended on 14 August 2017.

*Events following dismissal*

[25] In early August 2017 Mr Muir made contact with Lloyd Barriball. Mr Barriball gave evidence at the investigation meeting. Mr Barriball told Mr Muir that the Smiths had been employed by him from 1 June to 23 July 2016. He said they had been dismissed under a 90 day trial period for being unreliable, verbally abusing each other and him, causing distress to his animals and not undertaking tasks as instructed and/or to the standard required.

[26] On 4 August 2017 Mr Muir emailed the Smiths.

It has been drawn to our attention that you provided us with a false account of your employment history both on you CV and verbally during the interview process. The main reason for hiring you was your long term employment history which we now know is false. This is listed in the employment contract as Serious Misconduct which gives us reasons for instant dismissal.

We still wish to honour our commitment of paying you two wage cycles and asking you to vacate the premises by the 14/08/17.

All monies owing to you in regards to the semi purchase of the motorbike, will be reimbursed when the rental accommodation is vacated and left clean and tidy

[27] On 6 August 2017 the Smiths sent Mr Muir an email raising their personal grievance for unjustified dismissal and unjustified disadvantage arising from a failure to provide them with an opportunity to seek legal advice before signing the IEA.

[28] Mr Muir replied informing them that their final pay and holiday pay had been paid on 7 August 2017. He also advised that a refund of the monies they had paid for the farm bike would be made when the house was vacated. He advised that market rent of \$400 a week would be deducted from 14 August 2017 for rent.

[29] On 7 August 2017 Mr Muir paid the Smiths their final wages and holiday pay.

[30] On 11 August 2017 the Smiths asked to stay another week at the Farm house. They asked the Smiths to “dedut (sic) rent accordingly”.

[31] On 16 August 2017 Mr Muir paid the Smiths the sum of \$1,350. This represented the difference between the monies the Smiths had paid for the farm bike (\$2,000) and the rental for the period 14 August 2017 to 21 August 2017 (\$400 per week) and for a bed they had purchased (\$200).

### **Issue One: Validity of Trial Period Clause**

[32] Trial period clauses are governed by s 67A of the Act. This section provides:

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer ....
- (2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that—

- (a) 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; and
  - (b) during that period the employer may dismiss the employee; and
  - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) Employee means an employee who has not been previously employed by the employer.
- (4) ...
- (5) ...

[33] In *Smith v Stokes Valley Pharmacy* the Employment Court made it clear that where an employee signs an employment agreement after he or she commenced employment that employee is no longer a new employee for the purposes of s 67A and therefore the trial period provision is not valid.<sup>1</sup>

[47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees.

[48] Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

## ***Discussion***

### *When did the Smiths commence work?*

[34] The parties disagree on when Mr and Mrs Smith arrived on the Farm and when they started work. Having carefully considered the evidence of the parties I find that it is more likely than not that Mr and Mrs Smith moved into the Farm house on 31 May 2017 and started working on the Farm on Thursday 1 June 2017.

[35] While 1 June 2017 does not accord with the start date recorded in the IEA, it is consistent with the bank statements I have viewed. These show the Smiths were paid

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

on Thursday 8 June 2017 for a full week. Thereafter they continued to be paid on a weekly basis on a Thursday. It is also consistent with the wage and holiday pay calculations and industry practice. 1 June 2017 is known in the farming community as “gypsy day”. A day when new dairy contracts come into action around the country and farmers move to their next farms.

*When was the IEA provided?*

[36] I am satisfied, on balance that the IEA was provided to the Smiths when they arrived at the Farm on 31 May 2017. It is improbable that Mr Muir would have delayed providing the IEA to the Smiths until 25 June 2017, as they contend.

[37] I am fortified in this view by the parties’ agreement that an IEA would be provided to the Smiths when they arrived at the farm, Mr Muir’s pending holiday on 4 June 2017 and his need to get everything tidied up before he left, and the readily available IEA. The IEA that was used by the parties was a second-hand IEA. It had previously partially been filled in by a previous employee. Mr Muir recycled this to save the cost of obtaining another IEA from Federated Farmers.

*When was the IEA signed?*

[38] The earliest either party signed the IEA was 25 June 2017.

[39] I have viewed both parties’ copies of the IEA. These show that Mr Muir and the Smiths each signed the accommodation check list, policy acknowledgment and additional clause section of the IEA on 25 June 2017.

[40] In addition, Mr Muir signed the offer and acceptance section of the IEA on 2 July 2017. This is the same date as he provided the Smiths with a position description. The offer and acceptance section of the IEA was not signed by the Smiths. This in itself may have been sufficient to invalidate the trial provision clause but it has been unnecessary for me to consider this given the finding I have reached.

[41] By 25 June 2017, the Smiths had been working for Mr Muir for a number of weeks. They were no longer new employees and therefore a trial provision could not be entered into pursuant to s 67A.

### *Finding on Issue One*

[42] I confirm the preliminary indication provided to the parties. Namely, the trial period clause in the IEA is invalid. It could not be relied upon by Mr Muir to terminate the Smiths' employment.

### **Issue Two: Unjustified dismissal?**

[43] The onus falls upon Mr Muir to prove that his actions in dismissing the Smiths were justified.

[44] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether Mr Muir's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[45] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[46] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.<sup>2</sup>

[47] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

[48] I am satisfied the test of justification was not met by Mr Muir. There were a number of serious defects in the process he followed that resulted in the Smiths being treated unfairly in terms of s 103A(5) of the Act. Mr Muir sensibly acknowledged this in the submissions filed by his Solicitor.

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<sup>2</sup> Section 103A(5), Employment Relations Act 2000.

[49] In the present case:

- a. Mr Muir did not advise the Smiths of their rights in regard to the disciplinary process he was undertaking including the consequences of any adverse finding. The Smiths were advised of a meeting by way of a text message that simply stated:

Come n c us we on the pad

- b. Mr Muir did not outline all of the allegations against Mr and Mrs Smith for them to consider and respond to. The only concern raised whilst Mrs Smith was present was about Mr Smith's attitude. Whilst some of Mr Muir's concerns were put to Mr Smith, Mr Muir did not raise the issue of the misrepresentations the Smiths were alleged to have made on their curriculum vitae. He said this was because they had found out the information through the Smiths' son and did not want to "land him in it".
- c. Mr Muir did not give Mr and Mrs Smith a reasonable opportunity to respond to the allegations. They had no opportunity to prepare a response prior to the meeting and were not afforded with another opportunity to respond before the decision was made to terminate their employment.

[50] These defects were not minor and did result in the Smiths being treated unfairly.

#### *Finding on Issue Two*

[51] I am satisfied that Mr Muir's decision to terminate the Smiths' employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. The Smiths were unjustifiably dismissed from their employment with Mr Muir.

#### **Issue Three: Unjustified disadvantage**

[52] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[53] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[54] Mr and Mrs Smith claim their employment was disadvantaged by Mr Muir's failure to provide them with an opportunity to seek legal advice before signing the IEA. For the reasons that shall follow, I am satisfied the Smiths' had ample time to seek advice on the IEA if they wished.

- a. The Smiths were advised by at least 2 May 2017 that they would be employed under the terms and conditions contained in the Federated Farmers' IEA including the trial period provision. At this time the terms particular to the Smiths' employment with Mr Muir were also provided.
- b. Whilst the Smiths were not provided with the IEA at that time, they were familiar with the terms and conditions having worked under these previously for at least three farms. They were also familiar with the trial provision clause, having been terminated the year before under the same provision when working on Mr Barriball's farm.
- c. The IEA was provided to the Smiths on 31 May 2017. The Smiths did not sign the IEA until 25 June 2017.

#### *Finding on Issue Three*

[55] I find the Smiths did not suffer a disadvantage to their employment.

#### **Issue Four: Remedies**

[56] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances where the Authority or the Court might conclude that

it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.<sup>3</sup> The Court said:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[57] If there is misconduct by the Smiths that is outrageous, particularly egregious or disgraceful, I should consider whether it is appropriate to award any remedies.

[58] In the present case there are two areas of particular concern. The first relates to the Smiths’ knowledge of the invalidity of the 90 day trial period. The second relates to the Smiths’ misrepresentations on their curriculum vitae.

*Knowledge of the invalidity of the 90 day trial clause*

[59] In terms of the Smiths’ knowledge, they said they were aware that a 90 day trial provision was invalid if it was signed after they started work. They said they did not relay this information to Mr Muir. In response to a question from the Authority as to why this was the case, Mr Smith said:

“I didn’t tell him because it was not my responsibility. He hadn’t given me the contract to sign at the beginning so it was his fault. I didn’t want to stir the pot and hoped for the best.”

[60] I have already found that the IEA was provided to the Smiths on 31 May 2017 prior to them starting work with Mr Muir. I am satisfied in the circumstances of this case that this was sufficient timeframe for the agreement to be signed before they started work. The Smiths were already familiar with the standard terms and conditions contained in the IEA, having previously been employed using a Federated Farmers IEA, and had been aware for nearly a month before the IEA was provided of their individual terms and conditions. They could, if they wished, have sought advice during this period.

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<sup>3</sup> [2016] NZEmpC 136.

[61] There was no reason, in those circumstances, for the IEA not to be signed before the Smiths started work. Had the IEA been signed when it was provided to the Smiths on 31 May 2017 then the Authority would likely have upheld the 90 day provision as valid and the Smiths would not have a personal grievance. I find, on balance, that the Smiths delayed the signing of the IEA to ensure the 90 day trial provision clause was invalid.

[62] Even if I am wrong in that regard, the Smiths owed a duty of good faith to Mr Muir to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.<sup>4</sup> The Smiths were aware that Mr Muir believed that the trial period was valid. He referred to the trial provision during the meetings he held with them and in text messages. By the Smiths' intentionally not telling Mr Muir that the trial provision was invalid, they induced him into believing that he could terminate them in reliance on this provision without following the process prescribed in the IEA. This resulted in them being unjustifiably dismissed which may not otherwise have been the case.

[63] This was egregious conduct that cannot be condoned.

#### *Misrepresentations on curriculum vitae*

[64] Having heard from the Smiths I am satisfied, on balance, that they directly or indirectly misled or deceived Mr Muir by making false representations on their curriculum vitae. This led to them obtaining a job that they would not otherwise have been employed to undertake.

[65] The Smiths accepted during the investigation meeting that their curriculum vitae was false where it stated they had worked for Mr R from 2015 to 2017. They acknowledged that they worked for Mr Barriball for part of this period, namely from 1 June to 23 July 2016 before being terminated.

[66] Mr Smith said the other positions listed on their curriculum vitae were genuine and they had not worked for any other farms or entities during the period listed. He also said that, after working for Mr Barriball, they returned to work for Mr R.

[67] I found the Smiths' evidence unconvincing.

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<sup>4</sup> Section 4(1A)(b) of the Act.

[68] Firstly, the time periods the Smiths' said they worked for the three farms listed on their curriculum vitae were inconsistent with the number of schools attended by their son during the same period. This suggests that they worked for other entities during the time period listed on their curriculum vitae.

[69] Mr Smith said his son had attended approximately 10 different schools. If the Smiths' curriculum vitae were correct this would equate for 3 of those schools. The Smiths accepted they worked for Mr Barriball in 2016 in Otatau and for Mr Muir in the later part of 2017 in Waiuku. That accounts for 5 schools. When this was pointed out to Mr Smith he said his son attended 2 schools in Taupo. Even if that were true, there are 4 schools left unaccounted for.

[70] Secondly, the Smiths' refused to comply with directions that would have confirmed whether or not the roles listed on their curriculum vitae were accurate. Had the directed information supported the Smiths' curriculum vitae being accurate, then it is more likely than not that they would have complied with my direction.

[71] Thirdly, it is unlikely the Smiths returned to work for Mr R after being terminated by Mr Barriball. It is also unlikely they worked for Mr R for any great length of time. This was re-enforced by Mr Smiths' inability to recall the address of Mr R's farm. If the Smiths had lived on Mr R's farm for nearly two years until the end of May 2017, as they contend, it is likely that Mr Smith would know the address.

[72] By falsifying their curriculum vitae the Smiths obtained a job that they would not otherwise have been employed to undertake and that, ultimately, they did not have the skills to perform. Their conduct was disgraceful.

#### *Finding on Issue Four*

[73] In the foregoing circumstances it would be unconscionable for the Authority to reward Mr and Mrs Smiths' egregious conduct by an award of damages. The Smiths' were unjustifiably dismissed but no award of remedies is ordered.

#### **Issue Five: Deductions**

[74] As 2IC Mr Smith was expected to supply his own farm bike. During the initial discussions for the role, the parties entered into a verbal agreement whereby Mr Muir agreed to finance the purchase of a farm bike for Mr Smith in consideration of

him repaying him the purchase price at a rate of \$250 per week. It was agreed this sum would be deducted from their wages each week.

[75] In accordance with this agreement Mr Muir deducted the sum of \$2,000 from the Smiths' wages between the time they commenced working and their termination. The bank statements I have viewed show that this sum was repaid to the Smiths, less a sum of \$400 for rental of the farm house, and a sum of \$250 for a bed, on 16 August 2017.

[76] The Smiths claim that the deduction of the sum of \$400 was an unlawful deduction under the provisions of the Wages Protection Act 1983.

[77] Section 4 of the Wages Protection Act 1983 requires an employer to pay the entire amount of wages to an employee without deduction. Wages are defined as meaning:

Salary or wages; and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker for the performance of service or work; and also includes any part of any wages

[78] I am satisfied the rental payment was not deducted from wages. The wage and bank records I have viewed show that all wages and holiday pay owing to the Smiths was paid on 7 August 2017. Thereafter the Smiths' asked Mr Muir to stay on at the Farm house for an additional week and to deduct the rental from the monies owed. The rental payment was deducted from monies paid by the Smiths for the farm bike.

[79] On this basis there was no unlawful deduction from wages. The Smiths' claim must therefore fail.

### **Issue Six: Costs**

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

[81] If they are not able to do so, and an Authority determination on costs is needed, Mr Muir may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr and Mrs Smith will then have 14 days to lodge any reply memorandum.

[82] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>



Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].