Employment Court of New Zealand

Thomas t/a Totara Hills Farm v Davidson [2013] NZEmpC 39 (20 March 2013)

Last Updated: 2 April 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 39

WRC 15/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN MICHAEL RITTSON-THOMAS T/A TOTARA HILLS FARM

Plaintiff

AND HAMISH DAVIDSON Defendant

Hearing: 27-28 February and 1 March 2013 and by written submissions filed on

4 and 6 March 2013 (Heard at Hastings)

Appearances: Gary Tayler, advocate for plaintiff

Sachi Govender, counsel, and Piers Hunt, advocate, for defendant

Judgment: 20 March 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This challenge and cross challenge to a determination[1] of the Employment Relations Authority, finding that Hamish Davidson was dismissed unjustifiably by his employer, Michael Rittson-Thomas who trades as Totara Hills Farm, has been heard de novo by Court direction.

[2] The issues for decision include:

- Whether Mr Davidson was dismissed unjustifiably;

if so, the remedies for that personal grievance;

- the employer's obligations to the plaintiff under the KiwiSaver Act

2006;

- whether the employer failed to keep proper wage and holiday records;

and

- whether the employer made unauthorised deductions from the

plaintiff's holiday pay;

[3] The Employment Relations Authority's determination was given on 26 April

2012 after investigation meetings in September and December 2011 and the receipt of submissions from the parties' representatives on numerous intermediate dates. It held that Mr Davidson had been dismissed unjustifiably and awarded him distress compensation of $4,000 but did not allow compensation for any loss of salary. The Authority also directed the employer to comply with the KiwiSaver provisions of the employment agreement but did not specify how this was to be achieved.

[4] The events in this case having occurred before 1 April 2011, the statutory personal grievance justification test under s 103A of the Employment Relations Act

2000, as it applied before that date, was used by the Authority. This case being a challenge to its determination (albeit now directed to be heard de novo), that former section applies. In shorthand, this is what is known as the "would" test version of s

103A.

Relevant facts

[5] Mr Rittson-Thomas owns a Hawke's Bay farm known as Totara Hills Farm. This operates as two separate units although some functions are shared between them. He employed Mr Davidson as a unit manager who began work on

11 August 2009. Other staff on the farm included a senior stock manager (who was also responsible for the other unit) and a shepherd. Mr Davidson was paid a salary of $36,000 per annum. His individual employment agreement included provision for deductions from wages and had a KiwiSaver clause. Despite the agreement providing for the deduction of KiwiSaver contributions, none was made from Mr

Davidson's pay during his employment. Nor did the plaintiff pay any employer's contributions to Mr Davidson's KiwiSaver account. Mr Rittson-Thomas's case was that Mr Davidson said specifically that he did not want to join the KiwiSaver scheme. Mr Davidson said he did indicate that he wanted KiwiSaver deductions and contributions made, and did not realise that they had not been because he did not receive any payslips throughout his employment or other notification to this effect. It will be necessary to resolve this conflict of evidence in the course of this judgment.

[6] Mr Davidson and his domestic partner rented a cottage on the farm under a tenancy agreement which was with the partner alone, although Mr Davidson's employment agreement provided for this accommodation as well.

[7] During the early months of Mr Davidson's employment there were discussions between the two men about the defendant's performance of his work and an improvement plan was agreed on. Mr Davidson had been warned that his employment was in jeopardy if he did not improve. That improvement had occurred several months before Mr Davidson's dismissal and continued until then. After an initial disagreement about the hours of work that Mr Davidson put in, Mr Rittson- Thomas required him to complete weekly timesheets. The defendant did so although only a few of these were produced in evidence.

[8] In July 2010 Mr Rittson-Thomas met with his lawyer to establish how he might go about ending the employment of one or more staff by reason of redundancy. Three months later, in early September 2010, Mr Rittson-Thomas met with his banker to discuss reducing farm expenditure.

[9] On 3 September 2010 Mr Rittson-Thomas met with the staff of the farm. He said he needed to reduce expenditure because of several years of drought and poor prices and the fact that the outlook was not good. He asked for ideas from the employees to reduce costs and they made a number of suggestions at a further meeting on 7 September 2010.

[10] On 1 November 2010, there was another meeting between Mr Rittson- Thomas and his staff and he read to them a prepared document. He said that one of the unit manager positions would be redundant and that he would make a decision after the two affected employees, the stock manager (Barrie Crosse) and Mr Davidson had considered the proposition. There was a further meeting on 8

November 2010 at which any further input from staff was invited. On the following day, 9 November 2010, Mr Rittson-Thomas told Mr Davidson that he was to be made redundant. This was confirmed in writing in a letter of the same date giving the reasons for the redundancy as "market and seasonal factors". Mr Davidson was not required to work out his notice but was given time to vacate the cottage which he and his partner and their child did on 7 December 2010.

[11] Although Mr Rittson-Thomas now says that, before dismissing him, he offered Mr Davidson an alternative position as a junior shepherd, Mr Davidson's evidence is consistent with the written document that Mr Rittson-Thomas presented and read from at the time. This said that Mr Davidson was entitled to apply for the junior shepherd position. I prefer Mr Davidson's evidence, confirmed as it is by Mr Rittson-Thomas's written documentation. An opportunity to apply for a position (which theoretically at least is open for anybody to do in any event) is not the same as an offer of the position and, given its significant reduction status and remuneration, I find that Mr Davidson's rejection of that opportunity as demeaning, to be a

reasonable response in all the circumstances.

[12] Mr Davidson obtained replacement employment within a couple of weeks of his dismissal but this did not start until about 7 January 2011. Although Mr Rittson- Thomas is critical of Mr Davidson for not mitigating his position in the period of less than one month between the expiry of the notice of his dismissal and his commencement in new employment, I have concluded that Mr Davidson took reasonable steps to mitigate his loss by securing employment. At that time of the year it was not unreasonable that this replacement job did not start for about a month. Mr Davidson did mitigate his losses by staying privately with family until he began his new job.

[13] There were allegations by the plaintiff that Mr Davidson and/or his partner had damaged the cottage and its surroundings and also that it had not been maintained properly. New tenants went into the cottage on being employed shortly after Mr Davidson vacated it.

KiwiSaver contributions?

[14] Mr Davidson claims unpaid employer KiwiSaver contributions. Mr Rittson- Thomas says that not only did the parties' employment agreement not oblige him to make KiwiSaver contributions but, indeed, that Mr Davidson told him that he did not wish to have KiwiSaver contribution deductions made from his wages.

[15] The individual employment agreement addresses KiwiSaver issues expressly. In view of the fundamentally different and uncorroborated assertions of each of Messrs Rittson-Thomas and Davidson about what was said at the start of the employment about KiwiSaver, the provisions of the written agreement effectively determine what was agreed and there is some other corroboration of that statement of intent.

[16] The agreement is a standard form of individual employment agreement prepared by Federated Farmers of New Zealand for its members who included Mr Rittson-Thomas. The generic form of agreement requires both the addition of some specific terms and conditions and an election to either delete other provisions or parts of other provisions which provide alternatives. It was the employer's form of employment agreement.

[17] Under a heading "Wages, Allowances and Accommodation", there appears cl

8 ("Remuneration"). After specifying that Mr Davidson's gross annual salary (paid by weekly instalments) would be $36,000 "including the accommodation allowed at

$50 per week", cl 8.2 provided:

In addition to the above hourly rate/salary, the Employer will contribute in each pay period the minimum required by the provisions of the KiwiSaver Act 2006 to the Employee's specified superannuation scheme/to the Employee's KiwiSaver scheme.

[18] Mr Rittson-Thomas says that at no stage did Mr Davidson provide him with information about where the employer's KiwiSaver contributions should be made. It is common ground that no KiwiSaver contributions were paid to his scheme or employee deductions made from Mr Davidson's salary. It is also common ground that no payslips or make-up records of his remuneration were provided to Mr Davidson throughout the course of his employment. He simply received a net sum each week in his bank account from which he assumed PAYE tax had been deducted and also that employee contributions to KiwiSaver had been paid by his employer to the Commissioner of Inland Revenue as should have occurred. It is not, therefore, relevant that Mr Davidson may not have advised his employer of the identity of his KiwiSaver provider or his account number.

[19] Mr Davidson was a member of a KiwiSaver scheme when he began his employment with Mr Rittson-Thomas. If the employee is to continue to contribute, the statutory scheme provides that in such circumstances an employer will pay the employer's contributions at, at least, the minimum statutory rate for the time being to the Commissioner of Inland Revenue who will remit these payments to the employee's KiwiSaver scheme by reference to information identifiable from the employee's IRD number.

[20] If, as Mr Rittson-Thomas contends, the parties had agreed orally that there would be no KiwiSaver contributions or payments, it might have been expected that the parties would have deleted cl 8.2 as they did other inapplicable provisions in the agreement. Its non-deletion is more consistent with Mr Davidson's account of their negotiations.

[21] I find it more probable that Mr Davidson said to Mr Rittson-Thomas at the outset that he wished to contribute, and thereby to have the employer contribute also, to KiwiSaver. Mr Rittson-Thomas's account of their conversation was that Mr Davidson said that he did not wish to join KiwiSaver. Although what Mr Rittson- Thomas added belatedly in evidence was Mr Davidson's stated reason for not doing so (that he and his partner were expecting a baby and the money would be needed for that event) might be a creditable explanation, this was not put to Mr Davidson in cross-examination about those events. It emerged first when the plaintiff added to

his written brief of evidence in chief. I put little store by this belated account of what Mr Rittson-Thomas claims Mr Davidson to have said.

[22] But more significantly, I have concluded that if, as he said and on which he was not contradicted, Mr Davidson was already an existing member of a particular KiwiSaver scheme, it is unlikely that he would have told Mr Rittson-Thomas that he did not wish to "join" KiwiSaver. If Mr Davidson had not wished to continue to contribute to KiwiSaver (or to have his employer subsidise his contributions), he would have been more likely in all the circumstances to have used an expression such as taking "a KiwiSaver holiday", "not continuing to contribute" to KiwiSaver or the like.

[23] Mr Rittson-Thomas's argument in this regard also relies upon the absence of any expression of concern by Mr Davidson during the 16 months of his employment that KiwiSaver deductions were not being made from his wages. Not unassociated with this, Mr Rittson-Thomas also claims that Mr Davidson would probably have received, or have expected to receive, advice from either his KiwiSaver provider or the Inland Revenue Department about deductions made and accumulations to his scheme.

[24] Mr Davidson received no payslips or other periodic advice about how his regular pays were made up. He simply received a weekly or fortnightly net amount in his bank account so that the absence of any KiwiSaver deductions would not have been obvious to him. When asked about the return of income tax that he may have been required or have chosen to make after the end of the first financial year in which he was in employment, Mr Davidson explained that all of his tax affairs were dealt with by his father's accountant in association with a family trust so that he did not receive or deal with information about his income for this purpose. He was not challenged on this explanation and it is credible.

[25] I have concluded, therefore, that Mr Davidson worked for Mr Rittson- Thomas for the period of 16 months, having agreed, and in the belief, that KiwiSaver contributions were being deducted from his remuneration and that his employer was making contributions to his KiwiSaver scheme, but ignorant of the fact that neither

of these events was taking place. The parties' agreement obliged the plaintiff to make these payments. Mr Davidson is entitled to compensation for his losses attributable to this breach of his employment agreement which I address later in this judgment.

Counterclaim for property damage

[26] The plaintiff claims an entitlement to monetary compensation from Mr Davidson for damage said to have been caused by him or his family to the house on the farm in which they lived. Mr Rittson-Thomas purported to offset such sums against holiday pay due to Mr Davidson and paid after his dismissal.

[27] Mr Davidson says that this issue is not justiciable by this Court. He says that the rental of the house was covered by an agreement with his then domestic partner (now his wife) which is subject to the Residential Tenancies Act 1986 so that any claims for money arising out of that tenancy could not lawfully be deducted from monies otherwise lawfully owed under employment law.

[28] Although the case raises interesting and potentially important questions about the lawfulness of deductions from holiday pay of debts allegedly due under employment and tenancy agreements, it is unnecessary to deal with these. It would, also, upon reflection, be an inappropriate case to do so given the paucity of submissions to the Court about those legal questions. Even if the plaintiff was entitled to deduct property damage debts from holiday pay under either the employment agreement or the tenancy agreement (and, in the latter case, whether such claims would be justiciable in this Court or the Authority in any event), the plaintiff has failed to prove his claimed losses. It is appropriate, in these circumstances however, to give my reasons for that factual conclusion.

[29] Mr Rittson-Thomas had to prove, on the balance of probabilities, that damage to the farm property was more than normal wear and tear, was caused by Mr Davidson (or his family), and that the sums claimed were expended necessarily to repair that dwelling to the condition in which it was when the parties' employment

agreement began. Mr Rittson-Thomas has failed to establish each of these essential prerequisites, certainly on the balance of probabilities and, in most instances, at all.

[30] The only evidence adduced was a series of indecipherable photocopies of digital photographs taken by Mr Rittson-Thomas. As the only witness about these matters, he did not describe (at least sufficiently) what the photographs portrayed and did not correlate them to the various claims of restoration costs incurred. Mr Rittson-Thomas was not present when the house was inspected after it was vacated by Mr Davidson and his family and there was no explanation of the property schedules attached to the residential tenancy agreement (with Ms Skogstad) that may have assisted in determining the probabilities of pre-existing damage asserted by Mr Davidson. The quotation from a building company to undertake repairs and renovations was not prepared until after an inspection which occurred six months after the property was vacated by Mr Davidson and after other people had lived in it for most of that time.

[31] So I am not persuaded on the balance of probabilities that damage amounting to more than fair wear and tear (which is not recompensable) was attributable to Mr Davidson or, even if it was, that the costs of repair or restoration were appropriate. That claim by Mr Rittson-Thomas is not sustained as it was not in the Authority. It follows that Mr Rittson-Thomas must pay to Mr Davidson the amounts deducted by the employer from holiday pay together with interests on those amounts.

Holiday pay

[32] Even discounting any deductions from holiday pay owing at termination, how much holiday pay was due is also problematic. That is largely, if not completely, because of the employer's failure to maintain holiday and leave records as required by s 81 of the Holidays Act 2003. I note that although some computerised accounting records were kept in respect of remuneration paid to Mr Davidson, these employer's records did not meet even the minimum requirements of s 130 of the Employment Relations Act to maintain a time and wages' records. Mr Rittson- Thomas conceded in evidence that his records were non-existent (holidays) and only partially compliant (time and wages).

[33] Section 83 of the Holidays Acts addresses the failure by an employer to keep a holiday and leave record as I have concluded was the case for Mr Rittson-Thomas. Pursuant to subs (3) the Authority (or, in this case, the Court) must be satisfied on the evidence that the employer has failed to comply with s 81 and that this failure has prevented Mr Davidson from bringing an accurate claim for arrears of holiday pay. Subsection (4) provides that, in these circumstances, the Court may accept as proved, in the absence of evidence to the contrary, statements made by Mr Davidson about holiday pay or leave pay actually paid to him, or annual holidays actually taken by him. I have already concluded that s 83(3) applies.

[34] The following relevant matters are not in dispute. Mr Davidson worked for Mr Rittson-Thomas between 11 August 2009 and 9 December 2010 when the employer's notice of termination of his employment expired. During that period Mr Davidson took eight days of annual leave. At the end of the first 12 months of his employment Mr Davidson became entitled to four week's leave. For the purpose of calculating the monetary value of untaken leave, his remuneration package consisted of a salary of $36,000 per year together with accommodation benefits amounting to

$50 per week ($2,600 per year). The value of the remuneration package was, therefore, $38,600.

[35] Relevant facts not agreed include how many hours or days per week were worked by Mr Davidson. The difficulties created by the parties' disagreements over Mr Davidson's working hours and days are, if not attributable to Mr Rittson-Thomas's failure to maintain a wage and time record under s 130 of the Employment Relations Act, then at least made significantly more difficult by the absence of these records. As already noted, the timesheets that Mr Davidson completed to log his working days were incomplete but they do provide a snapshot.

[36] Much as s 83 of the Holidays Act does, s 132 of the Employment Relations Act addresses the consequences of a failure to keep wage and time records. Subsection (2) provides that where such a failure is established (as here), the Authority (or the Court) may accept as proved all claims made by the employee in respect of the hours, days and time worked by him unless Mr Rittson-Thomas proves that those claims are inaccurate.

[37] I am not satisfied that Mr Rittson-Thomas has proved, on the balance of probabilities, that Mr Davidson's claims in respect of the hours, days and times worked by him are incorrect.

[38] In these circumstances, I accept Mr Davidson's holiday pay calculations. His accumulated holiday pay entitlements at the date of his dismissal amounted to

$3,074.48. He was paid $1,507.61 although this figure took into account some deductions that I have determined Mr Rittson-Thomas was not entitled to make. The difference between those two figures is, therefore, the balance of holiday pay due to Mr Davidson. He is entitled to interest on this sum as calculated at the conclusion of this judgment.

Redundancy a charade?

[39] As already noted, Mr Davidson believes that the real reason for his dismissal was not for redundancy of his position. He says it was Mr Rittson-Thomas's dissatisfactions about the performance of his work and Mr Davidson's challenges to what he categorised as Mr Rittson-Thomas's demeaning and bullying conduct towards him.

[40] For the same reasons as did the Employment Relations Authority, I have concluded, albeit by a narrow margin, that these were not such contributory causes of the dismissal that redundancy can be said to have been a charade.

[41] By their starkly different and uncorroborated accounts of their interactions on the farm, each of Messrs Rittson-Thomas and Davidson portray very different scenes. No other witnesses gave evidence independent of either account. In these circumstances, contemporaneous documentation has assisted me in determining where the probabilities of the accuracy of these accounts lie.

[42] The parties agree that Mr Rittson-Thomas expressed some initial reservations about Mr Davidson's work performance

and that these were contained in written records of what were described as two "verbal warnings" given to Mr Davidson. The two men part company when it comes to Mr Davidson's response. His written

response to Mr Rittson-Thomas was to support the putting in place of a performance improvement plan. Mr Davidson committed himself to following this plan and improving his work performance. He wrote of his long-term ambitions which included necessarily performing to high standards for Mr Rittson-Thomas. The plaintiff says that he took this written advice from Mr Davidson at face value and that Mr Davidson thereafter worked satisfactorily so that there was no further need to address his work performance over the period of at least several months before his redundancy became an issue.

[43] Mr Davidson, on the other hand, says that he and his wife prepared, in effect, an abject and fulsome acceptance document based on what he believed Mr Rittson- Thomas would want to hear rather than, he now says, on the truth of the position. That was that he had been, and was continuing to be, bullied and harassed by his employer including in front of other employees. Mr Davidson says that living on the farm with his partner and a young baby, he had no alternative but to accede to Mr Rittson-Thomas's demands if he was to keep his employment. So, Mr Davidson says in effect, Mr Rittson-Thomas's performance issues were contrived and his subsequent dismissal on grounds of redundancy was a convenient excuse to get rid of the defendant because of the conflicts in their working relationship.

[44] No other evidence was produced about these allegations. Apart from his explanation for it now, there is nothing contained in Mr Davidson's written commitments to Mr Rittson-Thomas about his future job performance and commitment that would suggest that they were false.

[45] Although finely balanced, I am not persuaded that Mr Rittson-Thomas had the ulterior motives ascribed to him by Mr Davidson so that the defendant's claims of unjustified dismissal on those grounds are unsustainable.

[46] That is, however, not the end of the matter because, as the Authority found, there were other aspects of the dismissal and the way that the plaintiff went about it, that need to be examined in the assessment of justification. Before doing so, however, some explanation of the Court's approach to this exercise in redundancy cases is necessary.

***Simpsons Farms v Aberhart* explained**

[47] As in a number of redundancy cases over the last few years, this Court's judgment in 2006 in a case called *Simpsons Farms Ltd v Aberhart*[2] has been relied on by the employer to seek to limit the scope of the Court's inquiry into the substantive justification for a dismissal by reason of redundancy. That 2006 judgment has also been the subject of comment in academic articles and speeches and this is an opportune moment to explain what may have been intended, although

expressed somewhat cryptically by me as the author of that judgment. Coincidentally, that case also concerned the dismissal on grounds of redundancy of a farm employee but that is of no significance.

[48] In *Simpsons Farms* I said that I did not understand Parliament to have intended the principles stated by the Court of Appeal in *GN Hale & Sons Ltd v Wellington Caretakers IUOW*[3] to be affected when it enacted the Employment Relations Act and, in 2004, s 103A in particular. That statement may be interpreted to say that an employer only has to persuade the Authority or the Court that the decision to declare a position redundant (and, thereby, to dismiss the holder of that

position) was a genuine business decision in the sense that it was not a charade dismissal for other motives. That, in turn, has resulted in employers presenting evidence to this effect and then submitting that the Authority or the Court is not entitled to inquire further into the decision if it is satisfied that business reasons were the true ones for the dismissal. If that has been taken from what I wrote in *Simpsons Farms*, it was not what was intended. Readers of my judgment in that case will note that after making those remarks about *GN Hale*, I did then apply a s103A analysis to the employers decision to dismiss the grievant in that case and did not simply accept the assertion that it was a genuine business decision.

[49] It is important to go back to what the Court of Appeal held in *GN Hale* to analyse whether Parliament intended to alter that. In that case the Labour Court examined the employer's business decision and found that it, the Court, would not

have made the decision to declare the employee redundant. The Labour Court also

held that an employee's position could not be considered to be redundant if the employer's motive was to make the business more efficient. It seemed to say that redundancies were only justified if an employer's business was failing. The Labour Court's conclusion was, therefore, that the dismissal was unjustified.

[50] The Court of Appeal in *GN Hale* held against the Labour Court's assertion that redundancies are only permitted in failing businesses. Importantly for present purposes, the Court of Appeal made it clear that it was not for the Court (or now the Authority) to substitute its decision for that of the employer on these questions. So, in practical terms, a Judge (or an Authority Member) cannot say "On the information now before me I would not have made the decision the employer did and so the employer should be found to have done so unjustifiably".

[51] It was this principle that I was satisfied in *Simpsons Farms* that Parliament did not intend to change by enacting, first, the

Employment Relations Act and then, in 2004, s 103A in particular. As has been the law since *GN Hale* in the Court of Appeal, it is still not for the Court (or the Authority) to substitute or impose its business judgment for that of the employer taken at the time.

[52] But, that said, the Court cannot ignore the statutory refinements to the law of justification in personal grievances effected, first, with s 103A in 2004 and, subsequently, with the amendments to that section made in 2010. For the purposes of this statement of principle, both versions of s 103A are materially indistinguishable. In other words, it does not matter whether a "would" or "could" test is applied.

[53] Section 103A does require the Court to inquire into a decision to declare an employee's position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified. The statutory mandate does not, however, go as far as the Labour Court did in *GN Hale*, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done, and how it was done, were what a fair and reasonable employer would (now could) have done in all the

circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[54] It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.

[55] It may be seen that the enactment of the Employment Relations Act and, in particular, s 103A in 2004 and as amended in 2010, did affect the previous law about justifications for dismissal on grounds of redundancy but not to the fundamental extent of setting aside everything that the Court of Appeal propounded in *GN Hale*.

Unjustified dismissal?

[56] Mr Rittson-Thomas challenges the Authority's determination that he dismissed Mr Davidson unjustifiably. The onus of establishing justification for the admitted dismissal rests on Mr Rittson-Thomas. The applicable test is contained in what is now the former s 103A of the Employment Relations Act. Mr Rittson- Thomas must satisfy the Court that the dismissal of Mr Davidson, and how Mr Rittson-Thomas went about that, were what a fair and reasonable employer would have done in all the relevant circumstances.

[57] Mr Rittson-Thomas's evidence of justification for Mr Davidson's dismissal was scant. After describing the manner in which the farming business was organised, Mr Rittson-Thomas's evidence moved directly to what he described as "the new structure" of the farming operation and said that "a new lower position was created which paid a lower salary" which required a new employee to report to the senior stock manager who would be responsible for both farming units. Mr Rittson-Thomas's evidence was that Mr Davidson was offered "the new lower position as

part of the consultation process so as to avoid dismissal" but Mr Rittson-Thomas said that Mr Davidson declined that offer, saying that it was insulting.

[58] As I have already recorded, Mr Rittson-Thomas's evidence of his offer of the position to Mr Davidson is, however, at odds both with Mr Davidson's position but, more importantly, with Mr Rittson-Thomas's own written advice to Mr Davidson of

9 November 2010. This was a letter both read and then handed to Mr Rittson- Thomas on that date. It included this advice: "You may apply for the junior shepherd's position on Totara Hills". That was not an offer of the position but an offer to allow Mr Davidson to apply for the position. That was a position which paid a salary of about 18 per cent less than the modest remuneration package Mr Davidson was then on.

[59] In all the circumstances at the time, a fair and reasonable employer would have done more than offer Mr Davidson the opportunity to apply for another position as I am satisfied was put to him by Mr Rittson-Thomas on 9 November 2010. A fair and reasonable employer would, at the least, have offered that alternative to Mr Davidson who was well regarded by Mr Rittson-Thomas and whose skills and experience would have been more than adequate for it. The plaintiff did not act as a fair and reasonable employer would have.

[60] Mr Davidson's case is that there was no genuine need for his position to be redundant and for cost savings of only about $6,000 per year to be made. That was the difference in the annual salaries between Mr Davidson's as unit manager and that which was paid to the junior shepherd position which replaced Mr Davidson's. Without discounting completely the possibility that a saving of $6,000 per year would have been a significant reduction in the farm's costs, there was simply no evidence put forward by Mr Rittson-Thomas to justify cost savings of this level.

[61] Mr Rittson-Thomas gave evidence about meetings that he held with staff on 3 and 7 September 2010 and 1 and 9

November 2010 at which their input was sought. His evidence was that the suggestions made by staff, including Mr Davidson, were not accepted because only “minimal savings” could have been made. There was, however, no evidence of what these “minimal savings” may have been and how they

would have compared to the savings of about $6,000 per year made by the redundancy of Mr Davidson’s position. Neither the suggestions proffered by staff about potential cost savings, nor Mr Rittson-Thomas’s analysis and rejection of them, were explained at all in his evidence.

[62] Mr Davidson’s evidence referred to a number of documents and, in that sense, their contents are able to be considered by the Court. Exhibit 11, Mr Rittson- Thomas’s written analysis of the need for expenditure reduction dated 1 November

2010, referred to the combined effect of a drought and diminishing returns. It was also said that he had “researched some of the options [put forward by employees in September 2010]. However, they did not achieve the required savings.” This was not explained in evidence by Mr Rittson-Thomas.

[63] Mr Rittson-Thomas’s written advice to the farm’s employees was that fertiliser and wages each contributed about equally to 50 per cent of the farm’s total expenditure and fertiliser costs having been reduced, he was looking to reduce the wages bill. His conclusion was that one position would be disestablished and another (at a lower level of remuneration) established to provide the required savings. This was said to have the prospective effect of a reduction in the wages bill of almost 10 per cent which, together with some other savings, would tackle the undesirable position that the farm was then in.

[64] Although this was not explained by Mr Rittson-Thomas, if his advice to staff was correct and a 10 per cent saving was $6,000 per annum, then the farm’s wages bill must have been in the region of $60,000. Without further evidential explanation, however, that is incomprehensible on the other evidence presented.

[65] There were, by Mr Rittson-Thomas’s account in evidence, three staff on the Totara Hills Farm. One was Mr Davidson who was the unit manager for one half of the farm. One other was Mr Crosse who was the unit manager for the other half of the farm but also the senior stock manager responsible for the whole of the operation in Mr Rittson-Thomas’s absence. I infer that Mr Crosse’s remuneration would have been no less than that of Mr Davidson which was in excess of $38,000 (including

perquisites) per year. There was also some evidence that Mr Crosse’s remuneration

indeed exceeded Mr Davidson’s, commensurate with Mr Crosse’s superior role.

[66] There was also another employee called Jason who was a general shepherd. Again, in the absence of evidence but inferring what I am able to about the remuneration level proposed for a junior shepherd position ($30,000 per annum plus accommodation equivalent to $2,600 per annum), I conclude that Jason’s remuneration would have been no less than this.

[67] That brings the combined remuneration bill of the farm (before restructuring) to more than $100,000 per annum, even at a conservative estimate. The achievable remuneration savings by disestablishing Mr Davidson’s position and replacing it with a junior shepherd’s position ($6,000) would not have been the 10 per cent saving which Mr Rittson-Thomas advised his staff but, rather, at most a six per cent saving, almost half that level. If Mr Rittson-Thomas’s advice to his staff of a need or a wish to save 10 per cent from the farm’s wages bill was correct, then the arrangements put in place would not have achieved this which, in turn, throws into doubt the genuineness and, therefore, the justification of making Mr Davidson’s position redundant. None of this was explained in evidence by Mr Rittson-Thomas as the Court would have expected from an employer obliged to satisfy the Court that he had acted as a fair and reasonable employer would have in all the circumstances.

[68] Mr Rittson-Thomas not having met the test of justification for Mr Davidson’s dismissal, that must be and is determined to have been unjustified. Remedies for this grievance follow at the end of this judgment.

Remedies - KiwiSaver

[69] Raised for the first time in final submissions (and, therefore, the subject of written submissions filed after the close of the hearing) is the apparently novel question of what compensation should be allowed to Mr Davidson for the breach by the employer of his obligations to deduct KiwiSaver contributions from Mr Davidson’s wages and the employer’s failure to make his employer contributions to Mr Davidson’s KiwiSaver fund.

[70] Mr Govender asserted that, in addition to seeking a compensatory payment equivalent to the minimum sum that the employer would have paid had it contributed to Mr Davidson’s KiwiSaver, the grievant should also be compensated for the loss of a government subsidy to his KiwiSaver fund which was not provided in the absence of contributions to it.

[71] This issue has not arisen before to my knowledge, at least in this Court, and some guidance about KiwiSaver entitlements in these circumstances may be beneficial to others.

[72] Although Mr Rittson-Thomas failed to make deductions of Mr Davidson’s own contributions and remit these, Mr

Davidson has, of course, had the benefit of receiving these monies not deducted so that there can be no question of their reimbursement to him. However, the failure to make these deductions from Mr Davidson's wages caused him to lose the government subsidy he would have received had the employer done so. That is a compensable loss.

[73] On the matter of calculations of KiwiSaver contribution, I prefer and adopt Mr Tayler's, except as to the temporal element of the multiplier. Mr Tayler's calculations involved two methodologies, for the first KiwiSaver year using months worked and for the second KiwiSaver year using weeks worked. Mr Davidson's employment agreement provided that he would be paid weekly. A consistent formula is appropriate and I adopt a weekly one rather than the monthly formula adopted by Mr Tayler for the 2009-2010 year.

[74] The KiwiSaver financial year runs from 1 July to the following 30 June. For the 2009-2010 KiwiSaver year, the defendant worked for the plaintiff for 46 weeks. At $745 per week, Mr Davidson's salary for the 2010-2011 KiwiSaver year was

$31,846 ($36,000 divided by 52 times 46 weeks). Two per cent (the minimum employer contribution) of that is $636.92.

[75] For the KiwiSaver financial year 1 July 2010 to 30 June 2011 the defendant worked for 23 weeks. His salary for that period was $15,923 ($36,000 divided by 52 times 23 weeks). Two per cent of that figure is $318.46

[76] The combined totals of the employer's contribution should therefore have

been $955.38 and this amount, plus interest, is due to Mr Davidson.

[77] Turning to member tax credits (mtcs) for those periods I conclude as follows. The statutory KiwiSaver scheme is that the Crown will match dollar-for-dollar an employee's contributions to his or her KiwiSaver scheme in each KiwiSaver year by providing that person with an mtc. The matching mtc has a maximum amount. At all times material to this case, the maximum mtc was $1,042.86 per KiwiSaver year. That amount has since been reduced by half to $521.43 but, pursuant to the Taxation (Annual Rates and Budget Measures) Act 2011, this reduction did not come into effect until after the events with which this case is concerned.

[78] Mr Rittson-Thomas breached the employment agreement by failing to deduct KiwiSaver contributions from Mr Davidson's remuneration. Had the plaintiff done so, Mr Davidson would have been entitled to mtcs.

[79] Mr Rittson-Thomas accepts that Mr Davidson's mtcs for the 2009-2010

KiwiSaver year would have been equivalent to his contributions had these been made. Revising Mr Tayler's figures from those calculated monthly to weekly, Mr Davidson's mtcs for the 2009-2010 KiwiSaver year would have been

$636.92

[80] The position is not so easy when it comes to the 2010-2011 year because Mr Davidson not only worked for Mr Rittson-Thomas for part of that year but was in new employment for the balance of it. His evidence does not disclose any mtcs for that year or indeed what, if any, contributions he may have made to his KiwiSaver account. In these circumstances Mr Tayler submits that any loss of mtcs in the second KiwiSaver year at issue is Mr Davidson's sole responsibility and certainly once he became aware, as he did after his employment with Mr Rittson-Thomas terminated, that the plaintiff had not made deductions from his salary.

[81] I disagree. It is unnecessary to know whether Mr Davidson did make payments to his KiwiSaver account from his earnings with his new employer in that year. He would, irrespective of that, have been entitled to an mtc for the payments

that, but for Mr Rittson-Thomas's breach of contract, would have been made whilst employed by the plaintiff. These mtcs would have been at the same rate as the contributions, at a minimum of two per cent of his salary, and, therefore, $318.46

[82] Compensation for both KiwiSaver losses together amount to $1900.76 and Mr Davidson is entitled to interest thereon at the rate of five per cent calculated from the date of issuing of his proceedings in the Authority to the date of payment thereof to him.

Remedies for unjustified dismissal

[83] As already mentioned, the Authority allowed Mr Davidson compensation under s 123(1)(c)(i) of $4,000. This issue was not addressed by the parties at the hearing and, in all the circumstances, I would not be prepared to alter this amount or the plaintiff's liability for its payment. I find that Mr Rittson-Thomas is liable to Mr Davidson in this sum under s 123(1)(c)(i) of the Act.

[84] The Authority was, however, in error in declining Mr Davidson any award of compensation for lost remuneration. That is because s 128 of the Act provides that where the Authority (or the Court) determines that the employee has a personal grievance and that the employee has lost remuneration as a result of the personal grievance, then (subject to s 124) the Court must order the employer to pay to the employee the lesser of a sum equivalent to that lost remuneration or three months'

ordinary time remuneration. As the Authority concluded, I too find that there was no element of contributory conduct by Mr Davidson which might, under s 124, reduce an award of compensation.

[85] For the sake of completeness, I record my finding that Mr Davidson mitigated his loss by accepting a job that started on 7 January 2011 and that it was reasonable for him to have declined the offer of applying for the junior shepherd's position on the farm (to which he may or may not have been appointed) and which was at a significantly lower remuneration level than he had received previously.

[86] Although Mr Davidson found new employment relatively quickly (and certainly within the period of three months from his dismissal taking effect), he nevertheless did lose remuneration between jobs. That was for the period of approximately one month, from 9 December 2010 to 7 January 2011. He is entitled to compensation for loss of remuneration for that period based on the monetary element of his remuneration package which was $36,000. Mr Davidson's remuneration loss is, therefore, $3,000 (plus interest) which the plaintiff is ordered to pay to him.

Summary of remedies

[87] The plaintiff is to pay to the defendant:

☐ the sum of $3,000 for lost remuneration together with interest thereon calculated at the rate of five per cent per annum from the date of issuing the proceedings in the Employment Relations Authority to the

date of payment to Mr Davidson;

☐ the sum of $4,000 as compensation under s 123(1)(c)(i) of the Act;

☐ the sum of $1,090.76 together with interest thereon at the rate of five per cent per annum calculated from the date on which Mr Davidson issued his proceedings in the Employment Relations Authority until

the date of payment to him for KiwiSaver losses; and

☐ the sum of $1,566.87 representing deductions made unlawfully from Mr Davidson's holiday pay entitlements together with interest on that sum at the rate of five per cent per annum calculated from the date on which he issued his proceedings in the Employment Relations Authority until the date of payment of that sum to him;

Costs

[88] The Authority awarded Mr Davidson costs and those are not in issue. He is also entitled to an order for costs on the challenge to this Court but the amount of these is reserved as agreed with counsel at the conclusion of the hearing. Mr Davidson may have the period of one month within which to file and serve a memorandum about the amount of costs payable to him, with the plaintiff having the period of one month thereafter to respond likewise.

GL Colgan
Chief Judge

Judgment signed at 10 am on Wednesday 20 March 2013

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[1] [2012] NZERA Wellington 49.

[2] [2006] NZEmpC 92; [2006] ERNZ 825.

[3] [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA).
