

[3] Alternatively MFL says if the trial period is not enforceable, it claims Mr Valois' dismissal on 5 July 2011 was justifiable and procedurally fair. MFL denies that Mr Valois was unjustifiably disadvantaged in his employment.

Was MFL able to dismiss Mr Valois according to the trial period contained in the MFL employment agreement?

Relevant facts

[4] Prior to commencing employment with MFL Mr Valois worked for approximately 5 ½ years as a farm manager on Brooklands Station (Brooklands), a farm property in the Wairapa. He was employed by Glenbrae Trust (Glenbrae) pursuant to a written employment agreement.

[5] Brooklands had been on the market for two years prior to 8 April 2011 when MFL purchased the property.

[6] On 24 March 2011, 2-3 weeks before the transfer of Brooklands to MFL Mr Valois met MFL director, Mr Selwyn McLachlan, for the first time at the farmhouse Mr Valois occupied. Previously there had been some communication via third party land agents as to whether Mr Valois and another employee of Glenbrae would be interested in continuing their respective roles for MFL.

[7] The meeting on 24 March 2011 was predominately between Mr McLachlan and Glenbrae trust member Mr John McFadzean but a brief discussion was had with regards to Mr Valois remaining at Brooklands. It is common ground that Mr McLachlan made a verbal offer of employment to Mr Valois which was accepted and they agreed Mr Valois would continue in his role as farm manager on Brooklands and be employed by MFL.

[8] Mr Valois says that during the conversation on 24 March 2011 Mr McLachlan told him "*things would stay the same*". Mr Valois says he understood this to mean that his terms and conditions of his employment would remain the same as they had been with Glenbrae Trust. He says this understanding was confirmed later that day in the course of a farm tour when Mr McLachlan further advised he would be "*leaving things as they were for now*".

[9] Mr McLachlan says it was unrealistic for Mr Valois to consider his employment with MFL would stay the same as it had with Glenbrae. He says he told

Mr Valois that Brooklands would be run differently under MFLs' ownership. He says his reference to matters "*staying the same*" was in regards to Mr Valois' salary. He says it was never MFL's intention to have Mr Valois continue on exactly the same terms and conditions of employment as those with Glenbrae. He further says he was not provided with details as to the terms and conditions of Mr Valois' employment until after Mr Valois had agreed to work for MFL.

[10] It is accepted that specific terms and conditions of employment were not discussed nor was a written employment agreement provided to Mr Valois on 24 March 2011.

[11] Mr Valois commenced employment with MFL on 11 April 2011. He says that he was not given an employment agreement until after his employment with MFL commenced. Mr Valois' written evidence states he was provided with a copy of the employment agreement on 17 April 2011.

[12] In contrast Mr McLachlan says he is certain that he gave Mr Valois two copies of a draft employment agreement on Wednesday 6 April 2011 prior to Mr Valois starting work for MFL.

[13] Mr McLachlan says when he gave Mr Valois two copies of the employment agreement he proposed a "*honeymoon period*" of three months, so that they could each assess each other's suitability. He reports Mr Valois did not raise any opposition to his suggestion at this time. He says he told Mr Valois of his right to seek independent advice, to read the agreement and sign it. He acknowledges he did not specify when the agreement needed to be signed and returned.

[14] Mr Valois attests he was not advised by Mr McLachlan to seek legal advice as to the employment agreement or when he needed to sign it by. Mr Valois says he agreed to the proposed honeymoon period with the belief that if "*things didn't work out they would talk about it at the time*". He says there was no reference to a trial period.

[15] Clause 3.2 of the written employment agreement given to Mr Valois contains the following provisions:

Trial Period

At the beginning of employment the employee will serve a trial period of 90 days pursuant to section 67A of the Employment Relations Act ('the trial period). The purpose of the trial period is to assess the employee's suitability for the role. Over this period the employee's performance and conduct will be monitored.

Notice

For the avoidance of doubt, the notice provisions contained elsewhere in this agreement do not apply to the trial period.

At any time during the trial period the employer may give written notice of dismissal to the employee, to take effect during, at or after the end of the trial period. The notice period shall be at the discretion of the employer.

At any time during the trial period the employment may be terminated by the employee on the giving of one week's written notice.

Effect of dismissal under this clause

If the employee is dismissed under this clause, the employee may not bring a personal grievance or any other legal proceedings in respect of the dismissal.

[16] Mrs McLachlan says that on the third day of Mr Valois' employment (13 April 2011) whilst Mr McLachlan was in the South Island, she met with Mr Valois to attend a local field-day. Her evidence is that she asked Mr Valois if he had signed the employment agreement. She says his reply was that he "*had not looked at it*". She says she told him "*it needed to be sorted*".

[17] Mr Valois does not recall any discussion with Mrs McLachlan with regards to the employment agreement.

[18] It is common ground that Mr Valois did not sign the agreement prior to his employment commencing with MFL on 11 April 2011, or at any time during his employment with MFL.

Determination as to enforceability of trial period provisions

[19] The Chief Judge of the Employment Court made it clear in *Blackmore v Honick Properties Limited*¹ that where an employer seeks to rely on a trial period provision, the employer and the employer must agree to the trial period prior to the employee commencing his or her employment with the employer.

[20] If I accept that Mr Valois was not provided with the intended employment agreement until after he commenced his employment with MFL as he contends, then

¹ [2011] NZEmpC 152

in accordance with the decision in *Blackmore*² as a matter of law there cannot have been an agreement to a trial period.

[21] In contrast to Mr Valois' evidence, MFL say Mr Valois was provided with the employment agreement prior to his employment with it commencing. Mrs McLachlan was certain in her evidence that the employment agreement was devised and provided to Mr Valois in the first week of April 2011. She says she is able to identify those dates as she associates them with events occurring prior to Mr McLachlan's departure to the South Island. I consider her evidence to be more reliable than that given by Mr Valois whose evidence prevaricated before the Authority as to exactly when he received MFL's employment agreement.

[22] I find that Mr Valois was provided with the MFL's intended employment agreement on 6 April 2011 prior to his employment with MFL commencing. However this finding does not conclusively determine whether MFL is entitled to rely on the trial period as justification for Mr Valois' dismissal.

[23] MFL submits, in reliance on the facts contained in *Simmons v Collins Stainless Steel Fabricators Ltd*³ that Mr Valois had agreed to a trial provision prior to his employment commencing but had unreasonably delayed signing the employment agreement until after his employment began.

[24] MFL say Mr Valois had tacitly agreed to the trial period provision contained in the proposed employment agreement by virtue of his omission to protest Mr McLachlan's suggestion of a 'honeymoon period' or raise his objection to the employment agreement until 2 ½ months into his employment.

[25] I do not consider the evidence supports MFL's submission on this point. The conversation between Mr McLachlan about a honeymoon period was very brief and held at the same time Mr Valois was given a copy of the intended agreement and prior to any opportunity for him to read the document. No discussion was had as to the consequences of the trial period and I accept the inference from Mr Valois' evidence that his agreement to a honeymoon period did not constitute agreement to a trial period which would prohibit him from exercising his right to raise a personal grievance following a dismissal. I find Mr Valois did not agree to a trial period.

² Ibid at 2

³ [2011] NZERA Auckland 330

[26] I also do not accept that Mr Valois unreasonably delayed executing his employment agreement. The evidence is that the employment agreement was given to Mr Valois at approximately midday on Wednesday, 6 April 2011. It had been anticipated by both parties that Mr Valois would commence employment with MFL on Monday 11 April 2011. In these circumstances Mr Valois had two and a half working days to obtain advice and respond.

[27] In *Blackmore*⁴, Colgan CJ stated at [64]:

... the law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend on the circumstances of the case. However realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like),...

[28] There is no evidence that MFL intended in any way to deprive Mr Valois of a reasonable opportunity to seek advice as to the terms of the employment agreement. However in circumstances where Mr Valois was working on a rural farm in Waiarapa some 50 kilometres away from Masterton, I do not consider 2 ½ working days was sufficient to allow Mr Valois a reasonable opportunity to seek and obtain independent advice as to the contents of the proposed employment agreement and in particular the trial period provisions. I conclude that Mr Valois was not given sufficient opportunity between the time he was provided a copy of the employment agreement and the commencement of employment with MFL to properly obtain and consider advice and negotiate. I hold that MFL cannot rely on a trial period contained in a proposed employment agreement where there was an inadequate opportunity for Mr Valois to properly consider and respond one way or another to a trial period provision.

[29] There is no evidence to support a submission that Mr Valois agreed to a trial period tacitly or otherwise prior to the commencement of his employment with MFL, nor is there evidence to support a finding that Mr Valois delayed execution of the employment agreement so as to avoid enforceability of the trial period.

[30] It is clear Mr Valois did not sign MFL's employment agreement prior to or post commencing his position with MFL. I also accept his evidence that Mr McLachlan told him "*things would stay the same*" and that he relied on that statement

⁴ Ibid at 2

as confirmation that his terms and conditions of employment would continue unchanged.

[31] In all the circumstances I conclude that the relevant terms and conditions of Mr Valois' employment with MFL were the terms and conditions that applied in his employment with Glenbrae and Mr Valois did not agree to terms contained in MFL's intended employment agreement nor in particular to the trial provision contained in that agreement. MFL cannot rely on the trial period provisions as a means to lawfully abstain from a requirement to justify its decision to dismiss.

Claims of unjustified dismissal and unjustified disadvantage

[32] The test by which MFL must justify its decision to dismiss and defend claims against it of unjustifiable disadvantage is set out at s 103A in the Employment Relations Act 2000 (the Act) which came into effect on 1 April 2011.

[33] Section 103A requires the Authority to assess justification on an objective basis by assessing whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[34] Section 103A(3) sets out a number of statutory natural justice and procedural fairness considerations which the Authority must consider when assessing justification. These include: (a) whether, given the employer's resources, it sufficiently investigated the allegations against the employee; (b) whether the employer raised its concerns with the employee; (c) whether the employee had a reasonable opportunity to respond to the employer's concerns; (d) whether the employer genuinely considered the employee's explanation.

[35] In this case, I consider it appropriate to examine the events which MFL say caused it to terminate Mr Valois employment and whether MFL's actions were what a fair and reasonable could have done in all the circumstances. I note also that s. 103A(5) prevents the Authority from determining that a dismissal of action is unjustifiable solely because of procedural defects, if such defects were minor.

Relevant information

[36] Mr Valois' evidence is that relatively soon after he commenced employment with MFL he became dissatisfied with his new employer. He says he was not

provided with a farm ute work vehicle or tools with which to work and he formed a view to seek alternative work.

[37] On 17 May 2011 Mr Valois contacted MFL's directors, Mr and Mr McLachlan by phone and told them he did not think the employment relationship "*was going to work*", that he was going to look for another job and that he wanted Mr McLachlan "*to hear it from him first*" before they heard it from another source. Mr Valois says the conversation was polite and cordial.

[38] Mr McLachlan says he received the call on speaker phone. He says Mr Valois would not engage in any discussion as to why he was leaving other than to say "*I'm moving on and it's not going to work*". Both Mr and Mrs McLachlan said Mr Valois announcement came from "*left field*" and they were shocked by the bluntness of manner.

[39] It is clear there was some confusion between Mr Valois and Mr McLachlan as to the significance of the phone call. Mr Valois was of the view that he had simply advised he did not have a future with MFL and was looking for alternative employment whereas Mr and Mrs McLachlan each regarded Mr Valois as having given notice of his resignation.

[40] On 18 May 2011, Mr McLachlan sent an email to Mr Valois asking him to confirm his resignation in writing. Mr Valois did not respond to that email. He says this is because he considered he had not resigned.

[41] A series of casual conversations between Mr Valois and Mr McLachlan as to Mr Valois' intentions were had between 18 May and 24 June 2011 as outlined below.

18 May 2011

[42] The evidence is that Mr McLachlan and Mr Valois met briefly on 18 May 2011 outside the farm workshop. Mr McLachlan asked Mr Valois why he was leaving. Mr Valois told Mr McLachlan that he regarded himself as little more than an "*overpaid shepherd*". Mr McLachlan's evidence is that Mr Valois did not provide him with a timeframe when asked as to when he anticipated leaving but, rather, stated "*there are not a lot of good jobs out there, but I'm looking for something – I'm not staying*".

2 June 2011

[43] On or about 2 June 2011, Mr McLachlan contacted Mr Valois by telephone and advised he wished to visit the farm on Saturday 4 June 2011 with an applicant for the role of Farm Manager. Mr Valois' evidence is that he agreed to Mr McLachlan's proposal during the telephone conversation however once the telephone conversation was over he became concerned as to why Mr McLachlan would bring a prospective employee to the farm when he (Mr Valois) had not resigned.

3 June 2011

[44] On 3 June 2011 Mr McLachlan and Mr Valois met at the sheep-yards. Mr Valois says that he advised Mr McLachlan that the purpose of the 17 May phone call was to advise of his intention to look for a new position because he did not want Mr McLachlan to hear about it behind his back. He told Mr McLachlan that he had not resigned. He says Mr McLachlan apologised for "*getting it wrong*" and had said it would be difficult to replace him. Mr Valois says they agreed that once he found an appropriate job that they would meet again to discuss an appropriate notice period.

[45] Mr McLachlan says Mr Valois told him he hadn't resigned and advised he would leave "*when he was ready*". Mr McLachlan acknowledges that he did apologize to Mr Valois '*if*' he had got in wrong (as to whether Mr Valois had resigned or not) but said to the Authority he did not think he was mistaken on this point. Mr McLachlan does not challenge Mr Valois' evidence that they agreed a suitable notice would be canvassed between them once Mr Valois had found alternative employment.

[46] Later that evening Mr McLachlan called Mr Valois and told him he was going to bring a person out to Brooklands the following day (Saturday) to have a look at the farm. Mr Valois says that he told Mr McLachlan that would be fine, that he would be away for the weekend but he would leave the house unlocked.

24 June 2011

[47] No further discussions were had about the issue of Mr Valois leaving his employment with MFL until 24 June 2011. Mr McLachlan says he visited Mr Valois on 24 June 2011 specifically with the intention of reaching an agreed timetable with Mr Valois as to when he would be leaving Brooklands.

[48] Mr Valois and Mr McLachlan agree as to the content of the discussion that followed including that it resulted in a heated argument and each swore at the other. Both apportion blame to the other as initiating the aggression.

[49] It is common ground that Mr McLachlan asked Mr Valois how the job hunting was going and that Mr Valois reply was “*not very well as there did not appear to be any available jobs*”. Mr McLachlan says that he wanted to “*sort out a finish date*” with Mr Valois that would work for them both.

[50] It appears Mr McLachlan told Mr Valois that he was entitled to know when Mr Valois would be leaving as he regarded Mr Valois as having given notice of his resignation. Mr Valois responded by saying he was not going to go until he had found the right job and asked what was wrong with him staying on until that eventuality occurred. Mr Valois says Mr McLachlan told him that he had someone ready to commence employment as the farm manager and that he wanted to know when Mr Valois would be leaving. Mr McLachlan referred to the terms of MFL’s employment agreement whereas Mr Valois stated that the employment agreement provided to him did not govern the employment relationship. Mr McLachlan replied that Mr Valois had accepted the employment agreement and that it did apply.

[51] It is unclear as to the order in which the following remarks were made but it is agreed that Mr McLachlan told Mr Valois he would go when “*the money dried up*” and Mr Valois told Mr McLachlan, amongst other things, that he was a “*prick*”, and that “*he could crutch his own sheep*”. Submissions on behalf of MFL report that in farming speak Mr Valois’ statement can be interpreted as a refusal to engage in animal husbandry.

[52] It is clear that the argument became physical, with Mr Valois pushing Mr McLachlan. Evidently Mr McLachlan went to his utility truck and then returned to Mr Valois with an invoice associated with a recent servicing of Mr Valois’ Hi-Lux vehicle. Mr McLachlan told Mr Valois that he was unwilling to pay for the service of Mr Valois’ personal vehicle.

Correspondence between 27 June 2011 and 5 July 2011

[53] On 27 June 2011 MFL wrote to Mr Valois and initiated a disciplinary process. The letter referred to the agreed trial period based on their employment agreement and to Mr Valois’ notice of resignation on 17 May 2011. MFL noted its request to Mr

Valois on 18 May for his written confirmation of resignation. The letter advised that the employment relationship was “*not conducive to a positive ongoing mutual management relationship*” whereby by Mr Valois’ actions had made it clear to MFL that it “*would not be able to have trust and confidence in [Mr Valois] continuing as manager of [the] property*”. The letter advised that MFL was considering termination of Mr Valois’ employment as of 1 July 2011 and vacation of the accommodation by 3 July 2011. MFL sought to meet with Mr Valois the following day to allow him to provide MFL with information before it made a decision.

[54] On 27 June 2011 Mr Valois, by his representative, sent a letter to MFL. He advised that his terms and conditions of employment were those he had enjoyed prior to MFL purchasing the farm and that those terms and conditions had been confirmed during the meeting prior to transfer of the farm. Mr Valois stated that he had not agreed to the terms contained in the employment agreement given to him. He advised that although MFL’s letter purported that it no longer had trust and confidence in him it did not provide reasons as to why MFL had formed this view and in the absence of reasons he was unable to respond. He advised he did not consider he had done anything to put trust and confidence at issue between them.

[55] On 28 June 2011 MFL wrote again to Mr Valois and reiterated its view that the terms and conditions of employment were those contained in the employment agreement provided to Mr Valois prior to 11 April 2011 and noted that Mr Valois had not objected to those terms prior to his letter of the previous day. The letter contained a chronology of events as viewed by MFL and, inter alia, stated the following:

So that you are clear: our process is not about whether or not you have resigned. That is irrelevant. There are two issues: you have expressed a lack of trust and confidence in us and since this is a fundamental part of the employment relationship it needs to be mutual, you have put this in doubt with us. We will therefore decide whether your employment should be terminated under the trial period provision. Furthermore, and put another way, we allege that you are guilty of serious misconduct (insubordination), as a result of the statements you made on 22 June* and are therefore also considering summary dismissal on this basis.

You are therefore required to attend a meeting at 1100 on Saturday 2 July to give us your response to these allegations. Failure to attend this meeting will result in a further allegation of refusal to obey a lawful instruction.

* MFL advise that the recorded date of 22 June was a typographical error and the correct date is 24 June 2011.

[56] There were further written exchanges between Mr Valois and MFL between 30 June 2011 and 1 July 2011. Each refuted the other's version of events. MFL made several requests to have Mr Valois meet with Mr and Mrs McLachlan so that Mr Valois could provide information before MFL made a decision as to the continuation of Mr Valois' employment. On 1 July 2011 Mr Valois advised he did not have any more information to add which had not already been provided.

[57] On 2 July 2011 Mrs McLachlan sent an email to Mr Valois advising that MFL would proceed to make a decision after 12 noon on Monday 4 July 2011 and if he or his representative wished to provide further information or attend the meeting scheduled, they should contact her or Mr McLachlan prior to that time.

[58] On 5 July 2011 MFL advised Mr Valois in writing that it had decided to terminate his employment. It proposed that Mr Valois continue to work on Brookfields Station under supervision until Sunday 10 July 2011 and in exchange it would pay the equivalent of one month's salary less any holiday pay owing. MFL advised that if this proposal was unacceptable then termination of Mr Valois employment would take effect immediately.

[59] Mr Valois responded by way of letter dated 5 July 2011. He stated, amongst other things:

You have repudiated my contract of employment. I accept this repudiation and advise that the contract is cancelled with immediate effect. I will remove my property and belongings from the farm and vacate the house as soon as I can.

[60] Mr Valois left Brooklands Station three days later on 8 July 2011. Within a week Mr Valois commenced casual employment with his previous employer on another farm owned by Glenbrae.

[61] On 8 August 2011 Mr Valois commenced a permanent position as a farm manager on a farm based in Taumarunui in a role similar to that at Brooklands.

The issues

[62] The Authority needs to determine:

- Did Mr Valois provide notice of his resignation on 17 May 2011?

- If not, was MFL able to conclude that it no longer had trust and confidence in Mr Valois such that it could, reasonably decide to dismiss Mr Valois?
- Was Mr Valois unjustifiably disadvantaged by:
 - i. MFL's actions in bringing a prospective employee to Brooklands?
 - ii. the events of 24 June 2011?
 - iii. failing to pay for the service costs associated with Mr Valois' vehicle?
- What, if any, remedies should be awarded?
- Do Mr Valois' actions amount to a breach his statutory obligation to act in good faith such that a penalty should be awarded?

Did Mr Valois provide notice of his resignation on 17 May 2011?

[63] I find that the evidence does not support the proposition that Mr Valois gave notice on resignation on 17 May 2011 for following reasons:

- i. The evidence is that there were no less than three conversations between 17 May and 24 June where Mr Valois and Mr McLachlan discussed when Mr Valois intended to leave. In particular both Mr Valois and Mr McLachlan each agree that on 2 July 2011 Mr Valois specifically advised that he had not given notice. Mr Valois' unchallenged evidence is that during the discussion of 3 June 2011 it was agreed between Mr Valois and Mr McLachlan that having obtained alternative employment Mr Valois would advise Mr McLachlan of the event and they would then discuss an appropriate notice period.
- ii. Both the MFL employment agreement and the Grenbrae employment agreement each required notice to be given in writing. MFL did not receive written notice of resignation because Mr Valois did not provide it.

[64] In these circumstances I find that MFL could not have reasonably regarded Mr Valois advice on 17 May 2011 that he was looking for alternative work as having given notice of resignation.

Was MFL able to conclude that it no longer had trust and confidence in Mr Valois such that it could, reasonably decide to dismiss Mr Valois?

[65] MFL's letter advising Mr Valois of his dismissal did not specify reasons for the dismissal other than referring to its previous correspondence. The letters of 27 and 28 June and 1 July 2011 written by MFL refer to, amongst other things Mr Valois' alleged aggressive responses to MFL inquires as to when he intended to leave MFL which culminated in the physical altercation between Mr Valois and Mr McLachlan on 24 June 2011. Each of the letters advise that MFL regarded Mr Valois actions as collectively indicating to MFL that he did not have trust and confidence in his employer and led MFL to conclude it did not have trust and confidence in Mr Valois.

[66] As regards the argument which developed between Mr Valois and Mr McLachlan on 24 June 2011, while I do not accept that such behaviour is acceptable in an employment relationship I do not consider that Mr McLachlan can rely on statements made by Mr Valois in the heat of the moment so as to conclude that MFL no longer had trust and confidence in him. The facts are that both parties swore and made inflammatory and antagonistic statements to the other.

[67] Mr McLachlan's evidence is that he specifically travelled to Brooklands on 24 June with the intention of settling with Mr Valois a time frame for his departure. There is no information to suggest that Mr McLachlan intended on fighting with Mr Valois. However I conclude that the altercation between Mr McLachlan and Mr Valois is likely to have occurred as a consequence of Mr McLachlan's growing frustration with what he perceived as Mr Valois' unwillingness to engage in meaningful conversation as to when he would leave Brooklands.

[68] I consider Mr Valois' failure to be responsive to Mr McLachlan's growing demand for clear notice of his intentions coupled with the events of 24 June 2011 led MFL to conclude it could no longer have trust and confidence in Mr Valois. I do not regard MFL's action in forming this conclusion were the actions of a fair and reasonable employer in all the circumstances and do not accept that MFL's reasons for dismissal are justifiable.

[69] Mr McLachlan's evidence was that there was a shortage of farm labour at that time and he was cognisant that Mr Valois needed only to give one week's notice before leaving the farm. He was keen to ensure there was little time between Mr Valois' departure and a replacement manager commencing work on the farm so as to ensure a smooth transition between managers. To this end Mr McLachlan wanted Mr Valois to provide advice as to when he was leaving so that he would have sufficient time to find a replacement.

[70] However Mr Valois was under no contractual obligation to advise when it was that he intended to provide notice of his resignation and in this respect his omission to do so cannot be characterised as a breach of terms of employment or as misconduct warranting dismissal. On questioning Mr McLachlan acknowledged that MFL's employment agreement provided for one week's notice only (within the provisions of the trial period). In these circumstances MFL cannot reasonably have expected Mr Valois to provide notice beyond what was required according to its own employment agreement. I note MFL's employment agreement (outside the trial period provisions) required one month's notice and the applicable Glenbrae employment agreement provided for eight weeks' notice.

[71] Finally, as noted Mr McLachlan and Mr Valois had agreed on 3 June 2011 that when Mr Valois found alternative employment they would meet and discuss an appropriate notice period. In these circumstances I do not accept that a fair and reasonable employer could dismiss an employee on the basis that information as to notice was not forthcoming when alternative arrangements for the provision of notice had already been agreed by the employer.

[72] In all the circumstances I find Mr Valois has a personal grievance for unjustified dismissal.

Was Mr Valois unjustifiably disadvantaged by MFL's actions in bringing an applicant for Mr Valois position to the farm?

[73] Mr Valois says he was unjustifiably disadvantaged by MFL's actions on 4 June by bringing a prospective applicant for his position to tour the farm.

[74] On 3 June 2011 and following the discussion in which Mr Valois advised Mr McLachlan that he had not resigned, Mr McLachlan rang Mr Valois and advised he was bringing a prospective applicant to Brooklands the following day. The evidence

is that Mr Valois agreed to Mr McLachlan's proposal and advised he was away for the weekend and would leave the house unlocked.

[75] I accept Mr McLachlan's evidence that the applicant was advised that the position was not available until Mr Valois had left MFL. I also accept unchallenged evidence that Mr Valois had informed others in the farming community that he was leaving Brooklands. I consider it was reasonable of MFL to commence preparations for Mr Valois departure from Brooklands it had as long as it did not make arrangements so as to cause Mr Valois to leave.

[76] There is no evidence that an offer of employment was made to the prospective applicant nor was any evidence provided to support Mr Valois claim disadvantaged unjustifiably by MFL's action in this regard. I do not accept this claim.

Was Mr Valois unjustifiably disadvantaged by MFL's actions of 24 June 2011?

[77] Mr Valois says he was unjustifiably disadvantaged by Mr McLachlan's actions on 24 June 2011 and in particular Mr McLachlan's representations that Mr Valois had given notice of resignation and the employment relationship was governed by the terms contained in the MFL employment agreement.

[78] I consider the actions undertaken by MFL on 24 June are integral to the factual matrix on which I have reached my conclusions that Mr Valois has a successful claim of unjustified dismissal. I decline to make a finding of an unjustified disadvantage and award remedies separate to those associated with the claim for unjustified dismissal.

Did MFL cause Mr Valois an unjustifiable disadvantage by not either providing a farm ute and/or by failing to pay for the service costs of Mr Valois' vehicle?

[79] The evidence is that during his employment with Glenbrae Trust Mr Valois had use of a farm ute (Toyota Hi-Lux) and Glenbrae Trust paid for the running cost that vehicle. At the conclusion of his employment with Glenbrae Trust in April 2011 the vehicle was gifted to Mr Valois.

[80] Although it was not entirely clear from the Statement of Problem and submissions, Mr Valois appears to claim that he was unjustifiably disadvantaged by MFL actions by its failure to:

- (a) pay service costs of \$865.56 associated with the vehicle which he says was a term of his employment; and/or
- (b) provide him with a farm ute which he also says was a term of his employment.

[81] I note Mr Valois did not raise these matters as claims for breach of contract.

Payment of service costs

[82] The employment agreement at clause 10.1 under the heading “*Reimbursing Allowances*” refers to circumstances where the employee is required to use his or her own vehicle as follows:

10.1 Vehicle

Where the Employee is required to use his/her own road vehicle on the Employer’s business the Employee shall be reimbursed at the rate of cents per kilometre.

[83] The rate of reimbursement was not stipulated at clause 10.1 however at the conclusion of the “*Reimbursing Allowances*” provisions the employment agreement notes “*All allowances to be paid and accounted for in terms of the current Inland Revenue policies. (Reimbursing allowances are tax free in the hands of the Employee and tax deductible for the Employer).*”

[84] MFL says it was not a term and condition of Mr Valois’ employment that it would pay for the service of Mr Valois’ personal vehicle. MFL says Mr Valois was never asked or required to use his personal vehicle on the farm and that he had the use of the farm motorbikes. MFL further says the invoice for the 150,000 kilometre service reflected that the vehicle had an additional 467 kilometres on it. MFL says it is not liable for the cost of the vehicle’s service, and any associated cost lies with the previous employer or with Mr Valois.

[85] Mr Valois says he was never asked not to use his Toyota Hi-Lux for farm use.

[86] Having heard the evidence and reviewed the relevant clause within the employment agreement I find Mr Valois was not required by MFL to use his vehicle for farm work and was therefore not entitled to reimbursement of costs for its use. In circumstances where there is no obligation by MFL to pay for service costs I do not find consider Mr Valois was unjustifiably disadvantaged by MFL’s refusal to do so.

Provision of farm ute

[87] Mr Valois claims that it was a term of employment that he was provided with a farm ute. However there is no reference express or otherwise within his employment agreement given to the Authority, that the employer is obliged to provide a farm ute.

[88] Alternatively, an email prepared by Glenbrae Trust for MFL prior to transfer of ownership, headed “Jack and Clint’s wages” was provided to the Authority in evidence. The email refers to Mr Valois salary and benefits and makes reference to a “farm ute”. There was no precise detail in the email as to what significance or status was attached to the term “farm ute” as within the employment relationship however Mr McFadzean on behalf of Glenbrae Trust attested that at the time of sale of Brooklands Mr Valois’ remuneration package included a farm ute for both work and personal use.

[89] The evidence on behalf of MFL was that MFL had not been provided with the email detailing Mr Valois remuneration package until after it had made an offer of employment to Mr Valois. The inference I take from this evidence is that it was not MFL’s intention to specifically provide a farm ute to Mr Valois as a term of his employment.

[90] On balance I find that provision of a farm ute did form part of Mr Valois’ remuneration package. However I was not provided with any evidence to support the claim that Mr Valois was unjustifiably disadvantaged by MFL’s omission to provide a farm ute. I accept MFL’s evidence that farm motorbikes were available for Mr Valois use on the farm and there was no evidence that Mr Valois raised the absence of a farm ute during his employment with MFL as a matter of concern so that MFL could address the issue.

[91] I conclude Mr Valois was not unjustifiably disadvantaged by MFL’s failure to provide Mr Valois with a farm ute and decline to make an award in relation to this claim.

Remedies

[92] Mr Valois seeks \$20,000 in compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act (the Act). He has also asked to be awarded special damages for lost wages and dog food. I consider these claims should be dealt with

according to s. 123 and s.128 of the Act which provide for remedies where the Authority has determined, as I have in this case, that Mr Valois was unjustifiably dismissed and has a personal grievance.

Lost wages and benefits

[93] Mr McFadzean on behalf of Glenbrae Trust provided information as to the various components of Mr Valois' remuneration package at the time Mr Valois concluded his employment with Glenbrae Trust and commenced working for MFL. Mr McFadzean's evidence as to how Mr Valois' remuneration was calculated was not disputed before the Authority and I have already found on the facts that MFL had agreed that Mr Valois' remuneration would remain as it had with Glenbrae Trust.

[94] Mr Valois was paid an annual salary of \$65,000, plus a non-taxable dog allowance which equated to \$9.00 per week. The vehicle was valued as \$12,500 per annum which appears to accord with 2011 Automobile Association estimates for fixed, running and operating costs associated with such a vehicle. The sum of \$220 in total was deducted from Mr Valois' wages each fortnight for the farm house, electricity and Sky TV but this sum was reimbursed to Mr Valois at a later date.

[95] In the three months from 5 July 2011 Mr Valois worked for 3-4 weeks as a casual employee for Glenbrae Trust and earned \$1444 (gross). On 8 August 2011 Mr Valois commenced permanent employment with Te Uranga B2 Incorporation on 8 August 2011 with an annual salary of \$70,000 plus accommodation valued at \$3,500 per year, a dog allowance and use of a farm vehicle. Based on this evidence I calculate Mr Valois earned \$11,123.28 (gross) between 8 August and 4 October inclusive.

[96] Between 5 July 2011 and 4 October 2011 Mr Valois earned \$12,567.28 (gross).

[97] Under s 128(2) of the Act MFL must pay Mr Valois the sum of \$3,682.72 minus PAYE. This is the difference between what Mr Valois would have earned if he had remained employed by MFL for a further 3 months and the wages and salary he earned at Glenburn and Te Uranga B2 Incorporation within 3 months following his dismissal.

[98] Under s. 123(1)(c)(ii) of the Act MFL must also pay Mr Valois for the loss of benefits he was entitled to, as follows:

Dog allowance (6/07/2011 - 7/08/2011 inclusive)	\$42.42
Rent (9/07/2011 – 7/07/2011 inclusive)	\$207.14
Electricity (equal to 3 months)	\$520.00
Sky TV (equal to 3 months)	\$130.00
Vehicle (6/07/2011 - 7/08/2011 inclusive)	<u>\$1095.89</u>
Total	\$1985.45

Compensation under s 123(1)(c)(i) of the Act and assessment as whether Mr Valois contributed to the situation giving rise to his grievance

[99] I accept the evidence of Mr Valois that he was distressed and humiliated by his dismissal and that these feelings were exacerbated by the need to find alternative accommodation for him as well as his horses and dogs. I understand he sold three horses and three of his dogs as locating suitable grazing and kennels proved to be difficult at short notice.

[100] In an assessment of the nature and extent of remedies to be provided in respect of Mr Valois' unjustified dismissal the Authority is required to consider whether the actions of Mr Valois contributed towards the situation which gave rise to his personal grievance.

[101] MFL submits that Mr Valois aggressive behaviour towards Mr McLachlan significantly contributed to MFL's loss of trust and confidence in Mr Valois. In particular MFL says that Mr Valois statement to Mr McLachlan that he "*could crutch his own sheep*" has an inference in farming terms that Mr Valois would refuse to undertake animal husbandry or take care of animal welfare. MFL says this statement cut to the very heart of the employment relationship.

[102] I have found that the genesis of the breakdown in the relationship between MFL and Mr Valois was the result of MFL's demand that Mr Valois advise as to when he would be leaving Brooklands and Mr Valois' unwillingness to do so. As previously noted, whilst I consider Mr Valois could have been more forthcoming about his future plans he was under no obligation to advise MFL as to when he would proffer his resignation. I do not consider Mr Valois' conduct can be held against him in circumstances where he was not obliged to provide MFL with a response beyond

the requirement of his employment agreement. I decline to order a reduction of remedies in these circumstances.

[103] Pursuant to s 123(1)(c)(i) I order MFL to a pay compensation of \$6,000 to Mr Valois.

Claim for Animal Food

[104] Mr Valois has requested special damages of \$1214.29 (34 days at \$250/wk) for animal food. No information was provided to the Authority to evidence this sum was accrued or paid.

[105] I consider payment of animal food would have occurred whether or not Mr Valois was dismissed from his employment with MFL and do not regard this claim as arising from his dismissal. It is also clear that at the time Mr Valois was dismissed he was provided with a dog-allowance of \$9.00 per week. He has been compensated for the loss of this benefit. I do not accept this claim.

Penalty for breach of good faith pursuant to s 4(A)

[106] MFL alleges Mr Valois was in breach of his obligations to be active and communicative during his employment with it and says Mr Valois' failure to act in good faith was deliberate, sustained and designed to undermine the employment relationship. Pursuant to s 4A of the Act MFL requests the Authority award a penalty against Mr Valois for breaches of his duty of good faith.

[107] MFL refer to Mr Valois' failure to communicate:

- i. that he did not accept the MFL employment agreement: and
- ii when he would leave Brooklands.

[108] MFL say these actions collectively evidence a breach of good faith by Mr Valois to be active and communicative with it.

[109] As noted I have already found Mr Valois was under no obligation to advise when he would tender his notice.

[110] As to discussions in relation to the MFL employment agreement I consider Mr Valois could have been more forthcoming and expressly advised he did not accept it. I equally consider that MFL should have pursued inquiries with Mr Valois beyond

that made by Mrs McLachlan on or about 13 April 2011. I regard each party as contributing to the misunderstanding between them as to the status of the employment agreement.

[111] In these circumstances I do not regard Mr Valois' conduct amounts to as a breach of good faith. I decline to award a penalty pursuant to s4A.

Costs

[112] Costs are reserved.

Summary of finding and orders

- i. Mr Valois has a personal grievance for unjustified dismissal.**
- ii. Mr Valois' various claims for unjustified disadvantage fail for the reasons given in this determination.**
- iii. MFL is ordered to pay \$3,682.72 minus PAYE as reimbursement for lost wages (s 128(2)), and \$1,985.45 as compensation for lost benefits (s 123(1)(c)(ii)).**
- iv. MFL is ordered to pay \$6,000 in compensation (s 123(1)(c)(i)).**
- v. Mr Valois was not in breach of his good faith obligations. No penalty has been awarded.**

Michele Ryan
Member of the Employment Relations Authority