IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 229
5311269

	BETWEEN	RUSSELL BROCKS Applicant
	A N D	PRIME RANGE MEATS LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Mary Jane Thomas, Counsel for Applicant Rex Chapman and Anna Stevens, Counsel for Respondent
Investigation meeting:	31 October and 1 November 2011 at Invercargill
Telephone Conference:	4 November 2011 to hear from Nicole Ashfield
Submissions Received	14 December 2011 and 21 February 2012 from Applicant 25 January 2012 from Respondent
Date of Determination:	24 October 2012

DETERMINATION OF THE AUTHORITY

A. Mr Brocks is entitled to payment of a bonus of $88,276 and interest on that amount at 5% from 18 May 2010 until the date of payment.

B. Mr Brocks has personal grievances of unjustified disadvantage and unjustified dismissal.

C. Taking contribution into account Mr Brocks is to be paid the sum of $8673.11 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.

D. Taking contribution into account Mr Brocks is to be paid the sum of $541.54 gross being loss of the benefit of holiday pay.

E. Taking contribution into account Mr Brocks is to be paid the sum of $655.77 net being loss of the benefit of the employer's contribution to superannuation.

F. Mr Brocks is entitled to interest on the above amounts at 5% from 31 October 2011 until the date of payment.

G. I have reserved the issue as to whether there are five days holiday pay owing as that was not a matter dealt with in evidence. If Counsel cannot reach agreement about that then leave is reserved to return to the Authority.

G. Taking contribution into account Mr Brocks is entitled to payment of the sum of $6000 being compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000.

H. Costs are reserved.

Employment relationship problem

[1] Russell Brocks was the chief executive officer (CEO) of Prime Range Meats Limited from in or about May 2008 until his employment was terminated for reasons contained in a letter dated 25 August 2010. Mr Brocks says that he was subject to unjustified actions and omissions in his employment that disadvantaged him and that he was unjustifiably dismissed from his employment. Further Mr Brocks says he is owed bonus payments.

[2] The remedies that are set out in the statement of problem are expanded on in annexure C to the applicant's final submissions. The remedies provided with the final submissions are as below:

- Bonus 2009: $203,927;
- Bonus 2010: $68,413;

- Bonus 2011: $32,160;

Total bonus claimed $304,500.

- Lost earnings: 45 days' loss of salary @ $312.50 per day: $14,062.50;
- Holiday pay on that sum: $1,406.25;
- Superannuation at 8% employer's contribution for 45 days: $1,125;
- Difference in salary for 385 days to 31 August 2011 at $85.23 per day: $32,813.55;
- Superannuation: $1,968.81;
- Holiday pay: $656.27;
- 80% Prime Range contribution superannuation for early exit: $7,710.37.

Total for the first claim for loss of earnings and benefits: $59,742.75.

- Loss of bonus from September 2010 to March 2011: 7/12ths of 2011 profit for bonus: $1,543.711 at 5%: $45,024.90;
- Loss of superannuation: $3,601.99;
- Holiday pay: $4,502.49.

Total for the second claim for loss of bonus and benefits: $53129.38

- Five days' holiday pay owing: $2,115;
- Compensation under s.123 (1) (c) (i) of the Employment Relations Act 2000: $30,000.

[3] Prime Range Meats Limited (Prime Range) is a duly incorporated company involved in the business of meat processing and export having its registered office at Invercargill.

[4] The managing director of Prime Range and a shareholder of the company is Anthony Forde.

[5] Prime Range does not accept that Mr Brocks was unjustifiably disadvantaged or dismissed. It says that its actions were justifiable and in direct response to serious breaches by Mr Brocks and that Mr Brocks is not entitled to any of the remedies he claims.

[6] Prime Range says that payment of the bonus is discretionary and subject to satisfactory performance and there is no bonus owed to Mr Brocks. Alternatively if there is a bonus payable Prime Range does not accept Mr Brocks' calculations and alternative calculations are provided.

The test in s.103A of the Employment Relations Act 2000

[7] In determining the question of whether a dismissal or action was justifiable, the Authority is required to apply the test of justification set out in the former s.103A of the Employment Relations Act 2000 (the Act) as the dismissal took place before 1 April 2011.

[8] The test requires the Authority to determine, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The issues

[9] The Authority has three main claims before it. The issues under each of these claims are as follows:

Bonus:

- What do the terms of employment provide with respect to payment of a bonus?
- Was payment of the bonus discretionary?
- Was a full year of management required before a bonus was payable?
- Does the word *company* in the bonus clause include Prime Range Livestock Limited?
- What is the meaning of *net profit* in the bonus clause?

- If it is found a bonus is payable, then should the dividend from Prime Range Livestock Limited of $1,129,573 paid in the 2009 year be excluded?

- Should the profit from sale of capital items be excluded or included as part of the calculation of net profit?

- What is the amount due and owing to Mr Brocks by way of bonus for the relevant periods?

- Was the failure to pay Mr Brocks a bonus unjustified and was Mr Brocks disadvantaged as a result?

- If the failure was unjustified and caused Mr Brocks disadvantage, what remedies should be awarded

Unjustified actions causing disadvantage other than the bonus:

Banning the applicant from the plant and removing his computer and not returning it for two months:

- These actions are not disputed so the issue is whether they were unjustified and was Mr Brocks disadvantaged as a result?

- If there was an unjustified action that caused Mr Brocks disadvantage, then what remedies should he receive?

- Does the close connection of this complaint to the unjustified dismissal claim mean that it should not be separately considered as a discrete claim?

Refusing to provide requested information regarding disciplinary proceedings:

- Was there a refusal to provide information requested by the applicant's counsel about the disciplinary process and if so, what was the information?

- Was the failure to provide information unjustified and was Mr Brocks disadvantaged?

- If there was an unjustified action that caused Mr Brocks disadvantage, then what remedies should he receive?

- As in the earlier claim for unjustified action, does the close connection of this complaint to the unjustified dismissal mean that it should not be considered as a discrete claim?

Unjustified dismissal:

- What were the reasons for dismissal?

- Was there a full and fair investigation undertaken by Prime Range into the allegations Mr Brocks was facing?

- At the conclusion of that investigation, would a fair and reasonable employer have found that serious misconduct was disclosed on the part of Mr Brocks?

- Was the decision of Prime Range to summarily dismiss Mr Brocks what a fair and reasonable employer would have done in all the circumstances?

- If the dismissal was unjustified, then what remedies should be awarded and are there issues of contribution or mitigation?

Bonus

What was Mr Brocks' entitlement?

[10] Mr Brocks did not have a written employment agreement. His agreed terms of employment were contained in an email dated 3 April 2008 sent to him by a partner at Cruickshank Pryde, Tom Pryde and in a handwritten document in the nature of a position description prepared by Mr Forde.

[11] The entitlement to a bonus was set out in a paragraph numbered 7 of the email as follows:

> *You will be entitled to a performance bonus of 5% of the nett profit of the company each year under your management – the nett profit will be the tax paid nett profit of the company as per the company's annual financial accounts. An arrangement will be worked out with*

> *you for periodic payment on accounts of prospective profit, with unders and overs adjusted at the end of the financial year on the completion of the accounts.*

Was payment of the bonus discretionary?

[12] Counsel both agree that the correct approach to the interpretation of the bonus clause is to consider the plain words contained in the clause and give them their plain meaning.

[13] The principles where there is a dispute about the interpretation of an employment agreement are helpfully set out in the Employment Court judgment of *Terson Industries Ltd v. Aaron Loder* (2009) 6 NZELR 345 at [21] as below:

> - *The Court must take an objective approach to interpretation.*
>
> - *The starting point is the words written in the agreement but the Court is not limited to giving the words a purely literal meaning. The Court looks to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> - *Previous negotiations of the parties and their declarations of subjective intent are not admissible in interpreting the agreement.*
>
> - *There is a difference between the meaning of the words in a grammatical sense and the meaning of the document being what the parties using those words against the relevant background would reasonably been understood to mean.*
>
> - *The modern approach to contractual interpretation has been described as "a more commonsense purposive approach."*
>
> - *Finally, the clear meaning of the words must prevail and extrinsic facts cannot make the words mean something they are incapable of meaning.*

[14] Mr Chapman, in his submission, places reliance on the word *performance* in the bonus clause. He submits that this means the payment of the bonus was subject to satisfactory performance of Mr Brocks as judged by the employer. He says otherwise the clause would have omitted the word *performance*.

[15] Mr Forde in his evidence referred to Mr Brocks' waiting two years before requesting a bonus. He said that if Mr Brocks considered it an automatic entitlement, then he would not have waited for this period and this failure to request a bonus

payment earlier supports knowledge on Mr Brocks' part that the bonus was performance based.

[16] Objectively assessed, the plain words in the bonus clause are clear and unambiguous and they should be applied according to their ordinary meaning.

[17] The clause provided that, in terms of the bonus, [Mr Brocks] ***will be*** *entitled to a performance bonus of 5% of the net profit of the company each year under your* ***management*** … (my emphasis). I find that the words in the bonus clause would convey to a reasonable person, with the background knowledge that Mr Brocks was offered appointment to the position of CEO, an entitlement by Mr Brocks to a bonus linked to the performance of the company under his management. If there is no net profit, then there is no bonus payable. There is no other mechanism for assessing Mr Brocks' performance in the clause that would support the interpretation advanced by Mr Chapman.

[18] The ordinary meaning of the words in the bonus clause is that Mr Brocks will be entitled to a performance bonus of 5% of the net profit of the company each year. In conclusion, therefore, I do not find the payment of the bonus was discretionary.

Was a full year of management required before a bonus was payable?

[19] Mr Chapman did not refer to this matter in final submissions although it was referred to in the evidence of Mr Forde.

[20] I accept Ms Thomas' submission that the clause did not provide that if a full year was not worked, Mr Brocks would forego the performance bonus. The clause also refers to periodic payment on account of prospective profit that would objectively assessed support a full year of management was not required before a bonus was payable. In conclusion, therefore, I do not find that a full year of management was required before a bonus was payable.

Does the word "company" in the bonus clause include the companies Prime Range and Prime Range Livestock Limited?

[21] Ms Thomas submits that the words *the company* in the bonus clause refers not only to Prime Range but also to Prime Range Livestock Limited, a wholly owned subsidiary of Prime Range. The two companies are accounted for separately.

Ms Thomas submits that Mr Brocks is entitled to two separate bonuses of 5% of the net profit for Prime Range and Prime Range Livestock Limited. She submits that if the Authority finds that Mr Brocks performed work for Prime Range and Prime Range Livestock Limited then one of two interpretations to the words *the company* can be adopted. The first is that the words refer to the group of companies Mr Brocks undertook work for or, alternatively there are two separate employment agreements with each company with two separate bonus clauses and Mr Brocks is entitled to two separate bonuses of 5% of the net profit for both companies.

[22] I shall refer to both companies by their full names to prevent confusion. The starting point for the Authority is the words written in the bonus clause. The entitlement in the clause is expressed as a performance bonus of the net profit of *the company each year under your management*. I am not limited to giving the words *the company* a purely literal meaning and can consider what those words and the entitlement would convey to a reasonable person having all the background knowledge which would reasonably have been available to Mr Brocks and Prime Range at the time the agreement about the bonus was entered into.

[23] The balance of the email dated 3 April 2008 containing the terms of employment is important and should be read as a whole. The email commences after a greeting with a reference to Mr Brocks *starting with Prime Range Meats Limited as CEO.* There is no reference in the email to Prime Range Livestock Limited or any other company. Mr Brocks replied to that email by email dated 3 April 2008 and in that email stated *I accept the position as CEO of Prime Range Meats.*

[24] Ms Thomas relies on the handwritten note from Mr Forde that was prepared before the 3 April 2008 email. It is headed *Chief Executive Officer Prime Range Meats Limited*. The final paragraph provides; *As effective systems are secured functions traditionally undertaken by the Managing Director will be included to the extent that the C.E.O. takes full responsibility for the Prime Range Meats/Livestock company.* Mr Pryde in the email to Mr Brocks containing the bonus clause refers to this memo from Mr Forde as generally setting out the terms of Mr Brocks' employment. The bonus clause in the email follows a sentence; *The following additional changes to the memo apply as well.*

[25] There was a dispute in the evidence about the involvement Mr Brocks had in Prime Range Livestock Limited. Mr Brocks said he spent about half his time

overseeing Prime Range Livestock Limited. Mr Forde disagreed with that level of involvement and his evidence was that Mr Brocks was not employed by Prime Range Livestock Limited but by Prime Range Meats Limited and that Mr Brocks had no influence over the profitability of Prime Range Livestock Limited. I accept that Mr Brocks had some involvement with Prime Range Livestock Limited. The issue of joint employment was not a matter that was directly focussed on in evidence and really only referred to in final submissions. The emails sent between the parties before the commencement of employment and the handwritten memorandum from Mr Forde do not on their face support that Mr Brocks was to be jointly employed by both Prime Range Livestock Limited and Prime Range Meats Limited.

[26] I have considered the evidence that both companies were referred to on Mr Brocks business card and in the structural diagram but those matters cannot be relied on make the words in the bonus clause mean something they are incapable of meaning.

[27] In conclusion I have had regard to the relevant background to the bonus clause. It was part of the package offered to Mr Brocks for the position of CEO of Prime Range Meats Limited to Mr Brocks. Mr Brocks, on receipt of terms of employment as set out in Mr Pryde's email and Mr Forde's handwritten document, confirmed in writing that he was accepting the position of CEO of Prime Range Meats Limited. There was no other company mentioned in the email that would be under his management. In the handwritten document the two companies could be seen as being described as one but the heading to the handwritten document described the position as *CEO of Prime Range Meats Limited*. Importantly in the email that followed from Mr Pryde there is no reference to any other company than Prime Range Meats Limited.

[28] Objectively assessed against that relevant background I do not find that the words *5% of the nett profit of the company each year under your management* in the bonus clause would convey a meaning to a reasonable person that Mr Brocks was entitled to 5% of the net profit of Prime Range Livestock Limited as well as Prime Range Meats Limited. I do not find that an interpretation is available that *the company* referred to a group of companies under Mr Brocks' management and/or that because Mr Brocks managed another company (that being a matter in dispute) the clause entitles him to a bonus of 5% of the net profit of that company.

[29] In conclusion I do not find that *the company* referred to both Prime Range Meats Limited and Prime Range Livestock Limited. Mr Brocks is entitled to a bonus on the performance of Prime Range Meats Limited only.

What is the meaning of net profit in the bonus clause?

[30] Mr Brocks had two expert witnesses, chartered accountants Kathryn Ball and David Ross, give evidence at the Authority investigation meeting. They had been asked to calculate the performance bonus for Mr Brocks and were provided with the Prime Range tax accounts. In providing a final figure to the Authority, they also included the financial statements for Prime Range Livestock Limited. Given my finding above I do not need to refer further to the financial statements of that company.

[31] In giving their evidence and providing the Authority with their calculations, Ms Ball and Mr Ross said in their written evidence that what constituted *net profit* was not defined further in the documentation. They therefore assumed that the *tax paid nett profit* would take its meaning from ordinary accounting principles. That is the accounting profit for the year as reflected in the statement of financial performance of the company less tax. They took the annual financial accounts supplied by Malloch McClean Limited. There were changes made to the financial statements for each year. Ms Ball and Mr Ross said that this was because they had included everything which would appear in net profit based on generally accepted accounting principles.

[32] Prime Range accountants are Malloch McClean Limited. I heard from an accountant from that firm John Schol. He produced to the Authority the company annual financial statements for Prime Range for the years ending 31 March 2009, 2010 and 2011 and gave evidence that these had been approved and signed off by the Board and sent to the Inland Revenue Department.

[33] Mr Schol did not disagree with the applicant's expert witnesses about the accounting standards as they relate to profit or loss from the sale of capital assets. He explained, though, that the accounts were primarily prepared for the directors and shareholders for tax purposes and that that was the way that Malloch McClean Limited had prepared accounts for most of their private clients. He said it would have

been different if the entity for which the accounts were prepared was publicly accountable or accountable to a third party.

[34] I accept Mr Chapman's submission that the bonus clause provides a definition for net profit – *the nett profit will be the tax paid nett profit of the company as per the company's annual financial accounts.* The starting point for the Authority is the words in the bonus clause. The entitlement is clear from those words that Mr Brocks is entitled to 5% of the tax paid net profit of Prime Range as per the company's annual financial statement. On the basis of the annual financial statements for the relevant years for Prime Range Mr Brocks would be entitled to a performance bonus of $88,276.

[35] I then turn to whether the company's annual financial statements should be relied on in which case the calculation is straightforward or whether the Authority should look behind the statements. There was no evidence to support the annual financial statements were fraudulent or prepared to defeat or reduce Mr Brocks entitlement to a bonus to justify on that basis looking behind the annual financial statements. I accept Mr Chapman's submission that the evidence supported that the financial statements prepared for the three years in question were consistent with what the company had always done.

[36] There are two main issues advanced about the Prime Range accounts. The first is that Prime Range says the Authority should exclude a one off dividend reflected in the 2009 year paid by Prime Range Livestock Limited of $1,129,573 as it was due to changes in company tax. I accept that a change in company tax requirements was the reason for the one off payment. Mr Brocks benefits considerably from that payment that had nothing to do with his management. The entitlement in the bonus clause though is clear. Mr Brocks is entitled to 5% of the net profit of Prime Range being the tax paid net profit of the company as per its annual financial statements. The dividend is taken into account in arriving at the tax paid net profit for that year. The Authority cannot, as Mr Chapman submits, simply imply a proviso to exclude extraordinary items such as dividends, and/or exclude this dividend because that would be consistent with the Authority's equity and good conscience jurisdiction. The dividend is not excluded.

[37] The other issue that I heard evidence about from the accountants is whether the capital profit that arose from the sale of the land of $384,489 should be reflected

in the profit and loss of the 2010 accounts rather than, as it was in the Prime Range financial statements, as a change in equity. The applicant's expert witnesses said that the generally accepted accounting principle is that items of income and expenditure must flow through profit and loss. Ms Ball and Mr Ross therefore included the profit from the sale of the capital asset in the 2010 accounts of $384,489 in the statement of financial position/profit and loss account and not in the statement of changes in equity as Prime Ranges accountant had done.

[38] As the tax paid net profit for 2010 as per the company's financial statements did not include the capital profit from the sale of the land it appears that the financial statements with respect to the capital profits may not have been in accordance with accounting standards. I am not satisfied this was to defeat Mr Brocks' entitlement to a bonus, inconsistent with how the financial statements had been prepared previously for Prime Range by its accountants or, to put it bluntly, wrong in the sense of being unlawful.

[39] Fairness is always important for the Authority but the profit from the sale of the land was, I find, unlikely to have been a matter Mr Brocks had much, if any, involvement with or influence over, as CEO. Consistency is also important. It is consistent with my reasoning about the dividend that the company's annual financial statements for 2010 should be relied on as contemplated in the bonus clause the parties agreed to. I am not persuaded that the financial statement for 2010 should be recast in the way proposed by the applicant's expert witnesses. I find that the bonus should be calculated in accordance with the tax paid net profit of Prime Range Meats Limited as per its annual financial accounts.

[40] In conclusion then, and in accordance with the Prime Range's annual financial statements, I find that Mr Brocks is entitled to a bonus of $88,276 rather than $304,500. The parties and counsel in this case have all the financial statements so I do not need to set out additional details. The bonus is payable as below and takes into account that three full years were not worked:

- 2009: $84,578;
- 2010: Nil;
- 2011: $3,698.

[41] I order Prime Range Meats Limited to pay to Russell Brocks the sum of $88,276 gross being a bonus payment.

[42] There is a claim for interest on the bonus. The Authority may make an order for payment of interest and I am of the view it would be appropriate to do so in this case. In determining when interest should be payable from I have taken into account that the first time there was a request for payment of the bonus was on 18 May 2010 by Ms Thomas on behalf of Mr Brocks.

[43] In accordance with clause 11 of the second schedule to the Employment Relations Act 2000 I order interest be paid on the sum of $88,276 at the rate of 5% per annum prescribed under section 87(3) of the Judicature Act 1908 from 18 May 2010 until the date of payment.

Unjustified action by not paying the bonus

[44] There is a claim that the failure to pay the bonus was an unjustified action that disadvantaged Mr Brocks. I accept that there was an unjustified breach of his employment agreement in that regard. Mr Brocks says that he wanted to receive the bonus to put towards the purchase of a home although did not make any request for payment himself with the first request coming from Ms Thomas on 18 May 2010. Mr Brocks said that he had not previously raised the bonus issue with Mr Forde because he was busy getting the plant functioning although he knew from discussions from the company accountant how the accounts were going. There was no clear evidence of distress or humiliation therefore from Mr Brocks about the bonus having not been paid. Obviously when it was raised disagreements between the parties became apparent. They however are addressed by awarding of a bonus payment and interest. I make no other award for compensation with respect to the bonus in the circumstances.

The remaining claims of unjustified action causing disadvantage and the claim of unjustified dismissal

13 May letter

[45] Mr Forde became concerned with Mr Brocks' performance in his role as CEO. He said in his evidence that by November 2009 he had a management crisis developing and had reached a realisation that Mr Brocks' appointment to the CEO

position was a failure in terms of the intention to upgrade the management structure for the future. He also said that a far more serious problem had emerged threatening the security of the company.

[46] For completeness, the evidence did not satisfy me that Mr Forde had formally raised issues with Mr Brocks prior to November 2009 about his performance. It was accepted by Mr Brocks (p.2 of the transcript of the recorded first meeting in the disciplinary process 5 July 2010) that in November 2009 Mr Forde had called Mr Brocks into his office to discuss performance concerns.

[47] The relationship continued after November 2009 although the evidence supports on a somewhat strained basis without any formal step being taken until Mr Forde wrote a letter on 13 May 2010 to Mr Brocks. The letter was not given to Mr Brocks until 17 May 2010 and the circumstances in which it was given and what was said at the time are in dispute although resolution of that is not material in determining this matter. The letter of 13 May commenced the disciplinary process which ultimately led to Mr Brocks' dismissal.

[48] The concerns that Mr Forde wrote about in the letter were of a general nature. The letter referred initially to assurances that Mr Brocks had given at the time of his appointment that he had the knowledge, experience and ability to meet the targets discussed during interview. The letter referred to Mr Forde having, on numerous occasions, questioned Mr Brocks' performance in relation to *inexplicable decisions* that he had made that indicated to Mr Forde that Mr Brocks' judgement, management skills and experience were quite limited.

[49] The letter concluded with the following paragraph:

> *Given that you have not been able to perform at the level of Company management you undertook, and the Board have a responsibility to ensure the Company is secure in its activities, we find ourselves in a position where we must address your management capabilities with your continued involvement in mind and we will have regard for your input on these matters.*

[50] After Mr Brocks received the letter, he engaged Ms Thomas to represent him. She wrote to Mr Forde by letter dated 18 May 2010 and asked for further details about performance concerns set out generally in the letter of 13 May. Her letter raised, for the first time, the issue of the bonus that I have dealt with earlier in my determination.

[51] Further information was provided by Mr Forde about the performance concerns in response to Ms Thomas' request by way of a detailed 17 page letter dated 15 June 2010.

5 July 2010 meeting to discuss performance concerns

[52] A meeting was held at Ms Thomas' offices with Ms Thomas and Mr Brocks together with Mr Chapman and Mr Forde on 5 July 2010.

[53] The meeting was lengthy and was taped. The Authority was provided with a copy of the full transcript and no issue was taken with its accuracy.

[54] As will become evident, the performance concerns outlined generally in the May letter and then more specifically in the detailed letter provided to Ms Thomas in June were in the main overtaken by subsequent events that were relied on for dismissal.

[55] The issue of ear tags though was both a concern discussed at some length at the 5 July meeting and relied on in making the decision to dismiss. There was no reference to the ear tag issue itself in the May letter and the only reference that could be in relation to the ear tag in the 17 page July letter was a reference to the *November 2009 incident*.

[56] It is helpful to set out at this point some background about ear tags. Ear tags in bobby calves are a key link in traceability back to the farm where the animal came from. Ear tags are required by the New Zealand Food Safety Authority. There is an identification bar-coded ear tag in bobby calves' ears when they present for slaughter. The ear tag is sent to the farmer prior to the bobby calf season so that the tag can be inserted in the calf's ear and the identity of the calf is therefore maintained throughout the slaughter process and the farmer correctly paid for the weights of his calves.

[57] The issue in this case about ear tags concerns two scenarios. The first is where calves arrive for slaughter dead or die overnight in the yards. These calves are put in a separate pen to be viewed by the vet who may decide a post mortem investigation is required. The second scenario is where a calf arrives in good condition but has lost its ear tag. These calves with ear tags missing are processed and condemned and their meat cannot be for human consumption.

[58] It was brought to Mr Forde's attention by the company accountant, Gretchen Wilson, in a memo dated 5 November 2009 that the ear tags from dead calves had been put on calves with no ear tags. Ms Wilson said in her memo that she had spoken to Mr Brocks on two occasions about this practice. She did not put a date for the first discussion but referred to the second discussion as having taken place on 5 November 2009. She said that Mr Brocks was not concerned and was *disinterested*. Ms Wilson said in her memo that she thought the situation was serious and that she should bring it to Mr Forde's attention. I find that a discussion then took place between Mr Brocks and Mr Forde on 9 November 2009 about the ear tag issue. I accept Mr Brocks' evidence that the memo from Ms Wilson was not shown to him. It is likely that Mr Forde made it very clear to Mr Brocks that he viewed the issue very seriously saying words to the effect he thought that the person who undertook this activity should *be fired*. Mr Brocks denied any involvement.

[59] Returning then to the 5 July meeting, the allegations that Mr Brocks was asked to answer about the ear tags appear throughout the lengthy transcript. They fall into three broad areas. The first is an allegation that Mr Brocks instigated the practice of swapping ear tags. The second is an allegation that Mr Brocks found out about the ear tag issue by at the latest 5 November 2009 and did nothing about it (the memo from Ms Wilson being relied on). The third allegation, and this is a matter Mr Chapman put to Mr Brocks (p.29 of the transcript), was that Mr Brocks should have launched an investigation into what the decision-making was that led to staff doing the ear tag swap, why they did it and who put the idea into their heads and how long it had been going on.

[60] Mr Brocks' explanations can broadly be stated as follows. In terms of whether he instigated the practice of swapping ear tags Mr Brocks denied this. Mr Brocks said that the first time he found out about the ear tag issue was when he was advised by Mr Forde on 9 November 2009 and he then sent an email to the slaughter board supervisor, Shane Jones, advising him to make sure that the grader did not use any condemned tags on stock. In relation to how he investigated the matter, Mr Brocks said he went to talk to Mr Jones and slaughter board foreman Tim Garrett. He said he was pretty sure the grader who was undertaking the ear tag swap got a warning although he could not recall who the grader was. He said when he was questioned at the meeting that he was unsure how long the practice had been going on for and he only asked for it to stop when he was confronted with it by Mr Forde.

[61] During the 5 July meeting, Mr Brocks denied that the matter was raised with him by Ms Wilson and/or that he was disinterested in it as alleged by her in her memo. Ms Wilson's memo was provided to Mr Brocks at that meeting for the first time.

[62] Mr Forde said during the meeting that he had tried to undertake an investigation into who was responsible for the ear tagging issue and he said that he asked other people and *they took me back to Russell* - pp.43 and 44 of the transcript. He said that the important issue for him was to stop what had been happening.

[63] Ms Thomas indicated at the disciplinary meeting on 5 July 2010 that she intended to talk to several employees mentioned primarily in relation to the ear tag issue. There was no objection to this from Mr Chapman although somewhat unusual at the disciplinary process stage whilst the employer's investigations are ongoing. Ms Thomas spoke to Mr Garrett who was referred to Mr Brocks as the person who was involved in the issuing of a warning. Ms Thomas sent an email to Mr Chapman on 5 July 2010 and advised him that if he called Mr Garrett he would confirm that a grader *did indeed do it off his own bat and received a warning for it*. Ms Thomas advised that she told Mr Garrett that Mr Chapman may call him.

Computer seized and allegation of falsification on personnel records of warnings about ear tags to two employees

[64] Mr Brocks returned to work following the meeting. On 6 July 2010, Mr Brocks' company computer was removed from his office together with his own USB drive by Mr Forde. Mr Forde said that he was unaware of the USB device at the time he uplifted the computer from Mr Brocks' office. Ms Thomas sent emails to Mr Chapman about the seizure of Mr Brocks' computer and stated that it appeared someone had stolen Mr Brocks' USB drive from his bag and asked that it be returned immediately.

[65] I heard from Paul Hamilton who is the Engineering Manager at Prime Range. I found Mr Hamilton to be a straightforward, fair and credible witness. He was with Mr Forde when Mr Forde took the computer from Mr Brocks' office on 6 July 2010 and noticed what he described as *a unit* in the side. I accept Mr Hamilton's evidence about the position of the USB drive. It corroborates the contents of Mr Forde's email

sent on 7 July to Mr Chapman and in turn forwarded by Mr Chapman to Ms Thomas that nothing was removed from Mr Brocks' bag.

[66] On 7 July 2010, Ms Thomas sent a letter to Mr Chapman with a lengthy written response to the various performance issues raised at the 5 July 2010 meeting. She referred in her letter to the confiscation of the computer and USB drive.

[67] On 8 July 2010, Mr Forde asked Mr Brocks to take annual leave and instructed him not to go on the plant. Mr Brocks did not want to take annual leave. Effectively that meant that if he continued to attend at work, which he did, then he was restricted to his office. Mr Brocks took a note of the discussion (document N) attached to his statement of evidence). On that same day the USB drive was given to Mr Chapman and in turn picked up by someone from Ms Thomas' firm.

[68] On 9 July 2010, Mr Chapman wrote to Ms Thomas and put an allegation that his client had reason to believe that Mr Brocks had been falsifying company records in respect of warnings about the ear tag issue. The interactions that occurred on 5 and 6 July between Mr Forde, Mr Garrett and Mr Brocks were set out in the letter. It was alleged that warnings were posted to two employees' personnel records on 6 July 2010 but backdated to 11 November 2009. I shall refer to the two employees on whose records the warnings were posted as Daniel and Grant. Mr Chapman referred to an earlier meeting on 6 July 2010 between Mr Brocks, Mr Garrett and Mr Jones that predated the posting of the warnings and said in his letter that the falsification was done *on Mr Brocks authority and with his knowledge*. Mr Chapman said in his letter that this was the event that led to Mr Forde taking possession of the company computer from Mr Brocks' office on 6 July 2010. He also in that letter set out the reasons why it was felt it was best for Mr Brocks to take annual leave although noted that Mr Brocks had refused to do so and that there would be no overriding of his rights by Prime Range under the Holidays Act. Mr Brocks was asked in the letter to meet at a time suitable to him. Mr Chapman set out that the allegations were serious and that they could result in summary dismissal.

19 July 2010 meeting

[69] On 19 July 2010, a meeting was held with Ms Thomas, Mr Brocks, Mr Chapman and Mr Forde to talk primarily about the allegation of falsification of the records. Mr Brocks' explanation was that although he was pretty sure the records had

been fabricated, he denied that he had fabricated the records himself and that the person who was likely to have done so was Tim Garrett. As to his own knowledge about that, Mr Brocks said by way of explanation *he was suspicious about them* [the warnings] *he knew that something was happening but he wouldn't have a clue* – p.42 of the transcript.

[70] There was also some discussion at that meeting that a new employee had been employed who was essentially undertaking the role that Mr Brocks had previously been undertaking. Ms Thomas also asked for a copy of Mr Forde's notes referred to at the meeting taken when he talked to other employees about the ear tag issue. These were not provided until 16 August 2010.

New allegations about commission payments known as headage and possession of confidential company information including information about company accounting records and Mr Forde's personal family trust on flash drive

[71] On 21 July 2010, Mr Chapman wrote again to Ms Thomas raising a further issue about a commission payment described as headage made to Mr Brocks' partner. The allegation was that Prime Range received stock from a dairy farmer who is a relative of Mr Brocks' partner and that Mr Brocks had used his authority as CEO to instruct that a headage payment on the stock be made to his partner and there was no basis for this to be paid. The letter provided that this allegation was serious and could be serious misconduct. On 27 July 2010 some further information about the headage allegation was provided to Ms Thomas.

[72] At this time, Mr Brocks took a period of annual leave of about one week. Issues about the computer and access to Mr Forde's notes continued to be raised.

[73] On 3 August 2010 Mr Chapman wrote again to Ms Thomas and said that an inspection of the [removed] computer and flash drive showed that Mr Brocks downloaded onto his flash drive highly confidential information that he had no right to access including that relating to accounting records of the company and financial information relating to Mr Forde's trusts.

Meeting on 5 August 2010 to answer allegation about headage payment and possession of confidential information

[74] Ms Thomas and Mr Brocks attended a meeting on 5 August 2010 with Mr Forde attending with Ms Stevens and Philip McDonald. Mr Brocks denied any wrongdoing and/or that payment was inappropriately made to his partner Sally Orlowski with respect to the headage commission. He said that Mr Forde had signed one of the cheques to his partner so must have known about the payment. In explanation as to why he had confidential information on his flash drive he said that he downloaded spreadsheets because he was asked by Ms Wilson to help her find out where she was out by about $200,000. He downloaded the spreadsheets so that he could go through it at home. He said Ms Wilson asked him to assist her on occasions when she had issues of this nature. Mr Brocks said he had full access to the G Drive where all the folders are kept. He also said that the Accounts Clerk at Prime Range Robyne who also acts as personal assistant to Mr Forde would if he asked for some information say go and look in files on the G drive.

[75] Following the meeting Mr Forde obtained statements from Robyne and Gretchen. In their respective statements they did not accept the explanations Mr Brocks had given. A sharp point of difference for example was that Ms Wilson said in her signed statement that she *would never consult Russell for help.* In relation to the balance sheet or monthly statement being out by $200,000 she said she could not recall an occasion when they were out by such an amount and that if she had such a problem she would not have spoken to Mr Brocks about it. She denied she had ever directed him to anyone else's files on G drive where he could access information. Ms Wilson said that Mr Brocks had early in his employment telephoned her because the Triton system was not working on the slaughter board. He asked for her password so the slaughter board could login through her name. She said that she gave him this. Ms Thomas asked for permission to talk to the accountant from Malloch McClean but that was not given.

[76] On 23 August 2010 Ms Thomas wrote to Ms Stevens, and responded to the statements of Robyne and Gretchen having received Mr Brocks' instructions. Amongst other matters she said that Mr Brocks thought he had permission to look at files on the G drive and, that Ms Wilson's statement in which she said amongst other matters that she did not recall ever asking Mr Brocks for assistance in relation to a

missing $200,000 was untrue. Ms Thomas said that Mr Brocks could not recall the exact amount but it was a significant amount of money and said that Ms Wilson advised Malloch McClean about being out by the large sum and they could not find it as well. He denied telephoning Ms Wilson and asking for her password to her computer. There was also a meeting on that date.

[77] On 25 August 2010 Mr Brocks was then dismissed for reasons contained in a letter from Ms Stevens to Ms Thomas dated 25 August 2010. The letter of termination is a long letter although the reasons for dismissal are I find summarised in the main in paragraph 19 of the letter. There is a general sentence at the commencement of paragraph 19 that *After careful consideration of all matters our client does not accept your client's explanations in respect to his performance*. I have summarised the reasons for dismissal as follows:

(a) The rejection of Mr Brocks' explanation as to why he was in personal possession of company information and Mr Forde's personal trust information. Subsequent investigation led Mr Forde to a conclusion that Mr Brocks lied as to why he was in possession of the information regardless of how it was accessed and lied about his dealings he had had with the accountancy staff.

(b) Mr Brocks' inability to manage staff surrounding the ear tag issues and to ensure that the switching of tags was ceased when he became aware that it was occurring.

(c) That Mr Forde had concluded Mr Brocks was involved in the falsification of warnings given to employees;

(d) That it was not accepted Mr Brocks could have genuinely believed it was appropriate to have authorised the payment of headage to his partner.

(e) One additional matter mentioned, not in paragraph 19 but in the body of the letter, was an untrue allegation that Mr Forde had stolen Mr Brocks' flash drive from his bag.

[78] Paragraph 19 concluded with the following sentence:

> *On considering all of the above, Mr Forde believes that your client is not capable of undertaking the role of CEO and does not have the skills and experience necessary to manage the plant and successfully*

> *carry it forward into the future, as was indicated to Mr Brocks was required at the time he was employed.*

Mr Brocks' employment was terminated immediately on 25 August 2010.

Determination

Unjustified actions alleged

Plant ban and no computer

[79] Mr Brocks was not suspended from his employment on 8 July 2010 but he was told to take annual leave and when he refused to do that he was only allowed into his office and not on the plant. The justification for this was that Mr Brocks was unsettling employees and involving them in his issues. It was alleged that Mr Brocks was advising employees without authority that Prime Range business had been sold and this caused anxiety. Mr Garrett had requested to immediately take annual leave on 6 July 2010 and appeared to be under significant stress. Mr Forde considered Mr Brocks was a party to the falsification of the warnings or at least knew of what was happening. Further there was confidential information on Mr Brocks' computer. Mr Brocks denied there was any basis to Mr Forde's concerns about his interactions with other employees.

[80] Given the concerns about Mr Brocks were such that it was felt he could not be given a computer or allowed on plant a fair and reasonable employer would have in all the circumstances in a procedurally fair manner suspended him on full pay whilst the investigation into the allegations was undertaken. Instead, and no doubt because Mr Brocks had a considerable amount of leave, Mr Forde wanted him to take the leave. A refusal to agree to that resulted in Mr Brocks only taking a small period of leave toward the end of July and spending the rest of the time in his office without a computer and not being allowed onto the plant. The insistence that Mr Brocks use his annual leave if he was to be away from the work site was an unjustified action when properly he should have been suspended on full pay. This disadvantaged Mr Brocks who felt then he was required to turn up to work but there was nothing to do and his movements were restricted.

[81] Mr Brocks has a personal grievance that he was unjustifiably disadvantaged in his employment when he was required to be away from his place of employment to take annual leave rather than being suspended on full pay. When he refused he was

not given a computer to undertake his work and confined essentially to his office and was not allowed on plant. He says he was, and I accept his evidence about this, considerably humiliated by this.

[82] Remedies will be considered as a global award of compensation as it is difficult, if not impossible, to separate the basis for the claim for compensation for this from any award that may be made in respect of the allegation of unjustified dismissal.

Refusing to provide information despite requests

[83] Primarily this allegation concerns the refusal to provide Mr Forde's notes that he took from discussions with employees including Mr Brocks on 5 and 6 July 2010 in relation to the warnings about the ear tags and the involvement of Mr Brocks. Mr Chapman did refer to extracts from the notes in his correspondence and during the relevant meeting held as part of the disciplinary process. The notes were eventually supplied on 16 August 2010 to Ms Thomas. Part of the reluctance to disclose the notes from my assessment of Mr Forde's evidence arose from a fear that either Mr Brocks or Ms Thomas may contact the employees, some of whom Mr Forde recorded in his notes had expressed concern of their involvement in Mr Brocks' employment situation. That concern could though have been raised and overcome.

[84] A fair and reasonable employer would have shown Mr Brocks the notes when they were requested because it was fair to do so and in good faith. The notes were mainly about the allegation of falsification of the warnings and any involvement/influence of Mr Brocks. Some employees were critical of Mr Brocks so that would have left Mr Forde with a negative impression which Mr Brocks had no opportunity to respond to with the knowledge of the contents of the notes.

[85] The failure to provide the notes occurred during the disciplinary process and therefore the unjustified action claim is absorbed within the allegation of unjustified dismissal and shall be assessed as such rather than as a discrete unjustified action causing disadvantage claim.

Dismissal

Reasons for dismissal

[86] I have set out the reasons for the dismissal in [77] above.

Was there a full and fair investigation undertaken by Prime Range into the allegations Mr Brocks was facing?

[87] Mr Brocks was a senior manager at Prime Range. He was represented throughout the disciplinary investigation by Ms Thomas. The process commenced with the raising of a large number of performance type concerns before moving to allegations of serious misconduct

[88] The allegations about the ear tags including management of that issue by Mr Brocks was raised at the meeting of 5 July in the long discussion about performance concerns. It was raised in that context rather than as serious misconduct although it would have been apparent to those at that meeting that it was considered particularly seriously. Mr Brocks' answers support that he had left in the main the investigation of the ear tag issue to Mr Jones and Mr Garrett. He had not been involved in any disciplinary process or outcome explaining that had been left to Mr Garrett and/or Mr Jones. He thought a grader had been given a warning. He was unable to name that grader.

[89] The failure to manage the ear tag issue and/or ensure it ceased when Mr Brocks became aware of it were not clearly put as separate allegations which could amount to serious misconduct and lead potentially to dismissal. Whilst it is argued by Mr Chapman that Mr Brocks failure to manage was self evident if it is to be a matter of serious misconduct that could result, if proven, in dismissal then that needed to be clear. Instead it was investigated as one of rather a large number of performance concerns. The result of not specifically putting the failure to ensure the ear tag issue was stopped when Mr Brocks became aware of it and, then the failure to properly manage it as allegations of serious misconduct was that these issues became lost amongst, or overtaken by, the other allegations that were made about serious misconduct.

[90] The only real opportunity Mr Brocks had to answer these matters was at the first meeting when he was addressing performance concerns and not aware of the

likely consequence if his explanation was unsatisfactory. The other difficulty for Prime Range is that Mr Forde had reached a preliminary view supported by Ms Wilson's memo on 9 November 2009 that Mr Brocks knew about the ear tag issue going on at least from 5 November 2009. Mr Forde did not dismiss Mr Brocks at that time for what if established would have been a very serious dereliction of duties for failing to stop the ear tag practice immediately. He did not show Mr Brocks Ms Wilson's memo. The consequences for Prime Range as a result of the conduct were considerable. It could have lost licences and had product recalled. It seemed from reading the transcript of the 5 July 2010 meeting that Mr Forde considered a dismissal at that time but there was a concern about widespread knowledge then occurring as to the reason for dismissal and the matter could have resulted in multiple dismissals – pg 43 and 44 of the transcript. I find it likely though that Mr Forde lost trust in Mr Brocks from 9 November 2009 about the ear tag issue. Mr Brocks felt the relationship with Mr Forde deteriorated from that time although put it down to other matters.

[91] Mr Brocks had an opportunity to answer the allegation about falsification of warnings. What I have found was unfair and not in accordance with good faith was that he was not provided with notes Mr Forde took from various interviews of employees at that time. Mr Brocks' explanation was that Mr Garrett falsified the warnings. Mr Garrett was never directly asked about whether he falsified the warnings and whether he was told to do so by Mr Brocks before a conclusion was reached that serious misconduct had occurred in relation to the warnings. Mr Forde's notes do not show a clear question to, and response from, Mr Garrett about that. To be fair to Mr Forde, Mr Garrett presented on 6 July 2010 in a state of some stress and asked to take annual leave immediately so Mr Forde understandably did not want to push him on the matter. Given the explanation that Mr Garrett was to blame for the warnings from Mr Brocks the investigation was not full or fair without further questioning of Mr Garrett. Mr Garrett gave evidence before the Authority and said that he had fabricated the two warnings and he denied that he was told to do so by Mr Forde.

[92] The commission payment allegation was clearly put to Mr Brocks and he had an opportunity to given an explanation about it. The process was fair.

[93] The allegation of possession of confidential information was clearly put. Ms Thomas responded on behalf of Mr Brocks in her letter of 23 August 2010 to the confidential information allegation. Mr Forde formed the view on receipt of that letter that Mr Brocks had lied about having access to the spreadsheets to help Ms Wilson find out where the balance sheet was out by $200,000 or thereabouts. Mr Forde was faced with conflicting accounts and a very grave allegation that Mr Brocks had lied about his interactions with Robyne and particularly Ms Wilson. A fair and reasonable employer would, given the response that Malloch McClean knew of the balance sheet being out on one occasion by a large amount, have contacted the accountants before concluding that Mr Brocks had lied about his interactions with Ms Wilson. That did not happen and Mr Brocks was dismissed two days later. That was unfair.

[94] The allegation that Mr Brocks falsely alleged that Mr Forde had stolen the flash drive from his bag was referred to in support of Mr Brocks taking annual leave in Mr Chapman's letter of 9 July 2010. It was not I find clearly put as an allegation of serious misconduct for Mr Brocks to answer but rather in support of the taking of annual leave.

[95] Ms Thomas submits that there was predetermination on the part of Mr Forde about the outcome. Two of the matters relied are procedural matters and I find not evidence of predetermination. Another employee was employed as Production Manager whilst investigations into Mr Brock were underway. The evidence supported the new employee was on a lower salary than Mr Brocks but it is likely did many of the task that Mr Brocks had undertaken previously. I accept that that appointment would have suggested to Mr Brocks he had been replaced. I am not satisfied though that that employee was doing the CEO role and had the responsibilities that role entailed that Mr Brocks had. I am not satisfied that there was predetermination of the allegations on the basis of the appointment of the Production Manager. In conclusion for the reasons set out above I am not satisfied that there was a full and fair investigation into four of the five allegations.

Would a fair and reasonable employer have found that serious misconduct was disclosed on the part of Mr Brocks

[96] Although there were five reasons for dismissal Mr Chapman in his submissions said that the employer does not need to rely on each and every one of the

substantive grounds unless the cumulative weight of all the various grounds are relied on. He submitted that there are at least two separate grounds either of which would justify the dismissal being the failure to properly deal with and manage the ear tag issue and the payment of the headage commission to Ms Orlowski.

[97] A reading of the letter of dismissal, and in particular para. 19 of the letter, in my view supported the reliance by Prime Range on the cumulative weight of four of the reasons for dismissal against a background of serious performance concerns and a rejection of Mr Brocks' explanation to these. The wording in the letter of 25 August is that all these matters were relied on by Mr Forde in reaching his conclusion that Mr Brocks did not have the skills and experience to manage the plant and was not capable of undertaking the role of CEO. In the circumstances of this case I am not satisfied that it is now open to Prime Range to rely on just two reasons to justify dismissal as Mr Chapman submits the commission payment and the ear tag issue.

[98] The procedural issues that I have found in relation to four of the reasons for dismissal are serious and substantial to the extent that I am not satisfied for four of the allegations a fair and reasonable employer would have found serious misconduct disclosed.

[99] That then leaves the issue of the commission. That was authorised by Mr Brocks and was paid for the 2009 bobby calf season only and the payment made to Ms Orlowski in total was $996.00. Mr Forde stopped the payment when he became aware of it for the 2010 season. There were two components to the allegations. The first was the relationship between Mr Brocks and Ms Orlowski in respect of the payment. Mr Brocks explanations would not to a fair and reasonable employer have reflected the understanding that would be expected of a person in the position of CEO of the inappropriateness of the payment on the basis of his relationship with Ms Orlowski. Even if the payments had started before Mr Brocks was in a relationship with Ms Orlowski he should have realised when the relationship started the need to re-evaluate the appropriateness of the payments and talk to Mr Forde. Mr Forde signing one cheque is not sufficient evidence of authorisation in the absence of establishing a clear understanding on Mr Forde's part about who was being paid and why.

[100] The second aspect was that headage was only to be paid to approved stock agents with a supply agreement with Prime Range and Prime Range said Ms Orlowski

was not one of these. Assistant stock manager Ken Cavanagh had earlier asked the administration staff to stop the payment to Ms Orlowski after the 2009 season because he felt it was inappropriate, not approved or legitimate. He advised Mr Brocks of this. Mr Brocks accepted that Mr Cavanagh had advised him that did not accept the payment of commission to Ms Orlowski was correct. Mr Brocks did not raise this issue with Mr Forde but did send an email on 28 June 2010 to Ms Orlowski asking that Mr Cavanagh be asked why she was not getting paid headage when he came to look at the cattle. A fair and reasonable employer would have found that as a CEO he should have made enquires with Mr Forde.

[101] Mr Brocks' explanation during the disciplinary process was that he believed Ms Orlowski was entitled to the payment and gave a detailed basis for this. Prime Range did not accept that there was any basis for the headage payment to be made and that Mr Brocks knew it was wrong to make the payment. It is a grave allegation that Mr Brocks knew Ms Orlowski would not be entitled to a payment but dishonestly authorised one be paid anyway. Mr Brocks gave a lengthy explanation as to why he felt a payment should have been made to Ms Orlowski at the meeting. He said another person who was not a drafter got paid headage. He said that all he was trying to do was to get bobby calves and make money for Prime Range and that Ms Orlowski did the same sort of work as the other person who was not a drafter who got paid.

[102] A fair and reasonable employer would have concluded that headage was incorrectly paid to Ms Orlowski but I am not satisfied that a fair and reasonable employer would have concluded at the end of its investigation dishonesty on Mr Brocks part rather than poor judgement and that Mr Brocks was quite misguided as to the basis of the payment. A fair and reasonable employer would have found the conduct raised serious issues as to whether Mr Brocks had a proper understanding of the obligations in his role as CEO and how his conduct might appear to others.

[103] In conclusion therefore I find that a fair and reasonable employer would conclude there was misconduct disclosed on Mr Brocks part in respect of the commission payment but not conduct that amounted to dishonesty. The procedural issues were such in relation to the other matters that a fair and reasonable employer would not have concluded serious misconduct without further investigation and putting fairly clear allegations.

Was the decision of Prime Range to summarily dismiss Mr Brocks what a fair and reasonable employer would have done in all the circumstances?

[104] Mr Brocks was the CEO of Prime Range. It was clear that Mr Forde had very serious concerns about his performance in that role. These included concerns about Mr Brocks' openness and honesty and the way he had dealt with a wide range of matters in the role and his judgement on different occasions. The ear tag issue was clearly of particular concern to Mr Forde although not referred to in the letter detailing specific concerns as such and not addressed when the issue first came to Mr Forde's attention.

[105] The maintenance of an acceptable level of compliance with the requirements of New Zealand Food Safety Authority was part of Mr Brocks' role and stressed at the time of Mr Brocks' appointment. There was nothing said at the first meeting held to discuss these performance concerns about how the relationship between the CEO and the company would and/or could continue on. There was concentration on each of the alleged matters instead and much discussion particularly about who was involved in the ear tag issue. Objectively assessed a broader view of the future of the relationship may have been at that time beneficial and pragmatic. Mr Brocks did not accept responsibility for any of the performance issues raised on 5 July 2010. It was against that background that further allegations were then put to Mr Brocks and are relied on in the decision to summarily dismiss Mr Brocks in whom Mr Forde said by the time he made the decision to dismiss he had lost all trust and confidence.

[106] I accept that Mr Forde had lost trust and confidence in Mr Brocks at the time he was dismissed. I need to objectively assess the basis for that. In light of my findings about the fairness of the process and the conduct disclosed alleged to be serious misconduct I do not find that a fair and reasonable employer would have summarily dismissed Mr Brocks in all the circumstances at the time the dismissal took place.

[107] Mr Brocks has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Remedies

Lost wages

[108] Mr Brocks seeks reimbursement of lost wages for a period in excess of three months. The evidence did not satisfy me that the employment relationship would have continued beyond three months after 25 August 2010 if the grievance of unjustified dismissal had not arisen. Mr Forde had serious concerns with Mr Brocks' performance and Mr Brocks felt the relationship with Mr Forde had been unsatisfactory for several months. There was no evidence before me to support those issues would be overcome.

[109] I find therefore that Mr Brocks is entitled, subject to any findings I go on to make about contribution to three months or thirteen weeks lost wages between 25 August 2010 and 25 November 2010. Mr Brocks was without any employment between 25 August and 11 October 2010. That is a period of six weeks and two days. Mr Brocks received at Prime Range $110,000 per annum; or $2115.39 per week or $423.08 per day. For this period he lost $13,538.50 gross. This is $2115.39 x 6 and two days at $423.08. My calculation does not accord with Mr Brocks' because I suspect he included in his calculation of days Saturday and Sunday.

[110] Mr Brocks commenced new employment on 11 October 2010 but at a lower rate of $80,000 per annum; or $1538.46 per week or $307.70 per day until 25 November 2010. For this six week three day period he would have received $13,961.58 at Prime Range but received $10,153.86. He lost wages in the sum of $3807.72 gross being the shortfall.

[111] Subject to my findings about contribution the award for lost wages for a three month period is $17,346.22 gross.

[112] Mr Brocks has claimed, and I find is entitled to the loss of the benefit of holiday pay on the first amount of $13,538.50 at 8% of $1083.08 but not the second as he had commenced new employment and his benefit to holiday pay was thereafter maintained. The total loss of benefit of holiday pay therefore is $1083.08 gross.

[113] I find Mr Brocks is entitled to the loss of the benefit of the employers contribution to his superannuation at 8% on $13,538.50 of $1083.08 net and because with the new employment there was an entitlement but it was not as favourable there

is a loss of 6% on $3807.72 of $228.46 net. The total loss of superannuation benefit is in the sum of $1311.54 net.

[114] I make no award for the loss Mr Brocks suffered by virtue of the early exit payment of his employer's contribution for the superannuation. I have not found the employment relationship would have continued beyond three months and I am not satisfied therefore that this loss would not otherwise have occurred. Although claimed, I am not satisfied that there should be any award for the loss of a bonus after 25 August 2010.

Compensation

[115] Mr Brocks gave evidence about the emotional effect on him through the process and in relation to the decision. He referred to his responsibilities being removed from him and being restricted to his office. He said that he was left with a great deal of self doubt because of what he said were false allegations and he said he could not believe how he was being treated and was humiliated. He said that he did not want to carry on going to work and sitting in his office. I also heard from Ms Orlowski who said in her evidence that Mr Brocks had a very difficult time when his employment was terminated and was not sleeping. The two of them had a commitment to a big mortgage and it was difficult to manage that.

[116] I accept that the financial impact of the disciplinary process, the confinement to the office and other restrictions and the termination of employment had a significant effect on Mr Brocks.

[117] Subject to any finding of contribution there is to be an award of compensation in the sum of $12,000.

Holiday pay

[118] Five days unpaid holiday pay is claimed in the sum of $2,115. I did not hear evidence about the basis for this claim. I suggest that counsel discuss this and see if there any agreement failing which I reserve leave to come back to the Authority.

Contribution

[119] Up until this point I have not had to determine whether Mr Brocks on the balance of probabilities did or omitted to do what was alleged by Prime Range. The

Authority is required by s. 124 of the Act to consider in determining the nature and extent of remedies whether the employee contributed towards the circumstances that gave rise to the personal grievance. If the Authority is of the view that there was contribution then the remedies must be reduced.

[120] I cannot be satisfied on the balance of probabilities that Mr Brocks lied about Ms Wilson in respect of the reasons he had downloaded the confidential information. I did not hear from Ms Wilson.

[121] In relation to knowledge of the ear tag issue I heard evidence from Mr Hamilton who I found to be a credible witness that he discussed before 9 November 2009 the concerns about the ear tags with Mr Brocks and that Mr Brocks *played the issue down*. Mr Hamilton also confirmed that Ms Wilson had raised concerns with Mr Hamilton before she wrote the memo to Mr Forde. I find it more likely than not that Ms Wilson and Mr Hamilton had talked about concerns with the ear tag issue with Mr Brocks before 9 November. He took no steps to stop it. He was not truthful with Mr Forde about earlier knowledge when Mr Forde spoke to him on 9 November 2009.

[122] I asked Mr Brocks why he did not investigate the matter of the ear tags when it came to his attention. He said Mr Forde asked him if MAF or New Zealand Food Safety Authority knew about it and Mr Brocks said no. He said it was then decided with Mr Forde to keep the matter in house because if not then the incident posed a serious risk and Prime Range could have lost licences and could not export. That was the reason he said there was no full blown investigation. Mr Forde denied he made an agreement like that with Mr Brocks and Mr Brocks had not raised that as an explanation in the disciplinary meeting at which he had an opportunity to answer that matter. I am not satisfied that Mr Forde reached an agreement with Mr Brocks. Prime Range should have been able to expect its CEO to have carried out or, at the very least to have overseen an investigation and had an awareness of why the ear tag issue arose, who was involved and how long it had been going on for. A CEO would have wanted to know what had happened. If Mr Brocks had maintained some oversight and awareness of the investigation then he should have known what the disciplinary outcome was and no other employee would have had to become involved in his disciplinary process.

[123] Mr Brocks' knowledge of the ear tag issue and failure to do anything to stop it even though he said in evidence that it was a very serious matter seriously brings into question his performance in the role as CEO and his understanding as to what was required of him in that role. His delegation then of any investigation to Mr Jones and Mr Garrett and lack of knowledge as to what they found out further brings into question his performance. There was I find further poor judgement in the payment of commission to Ms Orlowski. I do not find on the balance of probabilities Mr Brocks was involved in the falsification of warnings. Mr Garrett admitted he did that himself without input from Mr Brocks. I do remain however mystified as to why Grant also received a warning when Mr Garrett when questioned by Mr Forde earlier on 6 July said that Daniel alone received a warning. I find that there was blameworthy conduct on the part of Mr Brocks that contributed to his personal grievance for the other reasons I have set out above.

[124] Mr Chapman submits that any remedies should be reduced by 100% but I do not accept that. The difficulty for Prime Range is that the serious conduct, of Mr Brocks knowing about the ear tag issue and doing nothing about it, was known about months before the dismissal. Whilst it would be unfair for that conduct not to be taken into account in terms of contribution I do not find that it should result in a 100% contribution or a result that deprives Mr Brocks of any remedies at all. Mr Brocks I have found was treated unfairly at times during the process and there was also the unjustified action about the requirement that he take annual leave. I have also taken into account that Mr Forde did not raise other issues of performance formally at an early stage.

[125] I find that there was blameworthy conduct on the part of Mr Brocks and that the remedies I have awarded to Mr Brocks should be reduced by 50%.

Lost Wages and Benefits

[126] Applying the contribution as assessed Mr Brocks is entitled to payment of $8673.11 gross being reimbursement of lost wages under s.123 (1) (b) of the Act together with $541.54 gross being holiday pay and $655.77 net being loss of the benefit of the employers contribution to superannuation and I so order.

Interest

[127] Mr Brocks applies for and I find is entitled to a payment of interest on the above sums from the date of the investigation meeting 31 October 2011 until the date of payment at the rate of 5% per annum.

Compensation

[128] Applying the contribution as assessed Mr Brocks is entitled to payment of the sum of $6000 without deduction being compensation under s.123 (1)(c)(i) of the Act and I so order.

Costs

[129] I reserve the issue of costs. The parties may reach agreement failing which Ms Thomas has until 20 November 2012 to lodge and serve submissions as to costs and Mr Chapman has until 18 December 2012 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority