**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 109
ARC 29/10**

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	SHELBY PARK LIMITED Plaintiff
AND	MARK RUSSELL BLACKIE Defendant

Hearing:	4 and 5 April, 21 and 22 July and 13 September 2011 15 November 2011 by telephone conference call (Heard at Hamilton)
Counsel:	Eugene Morgan-Coakle, counsel for plaintiff Alex Hope, counsel for defendant
Judgment:	11 July 2012

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff company (Shelby Park) has challenged a determination[1] of the Employment Relations Authority which upheld the defendant's claim that he had been unjustifiably summarily dismissed from his employment on 6 November 2008. All relevant events, unless otherwise indicated, took place that year.

[2] As Mr Morgan-Coakle, counsel for the plaintiff, put it in his final submissions, the plaintiff rested its case on the assertion that it was justified in summarily dismissing the defendant Mr Blackie, for serious misconduct because he was assessed as being "dangerous". The plaintiff contended this resulted from an incident on the day of dismissal when Mr Blackie released a yearling horse[2] before

[1] AA 87/10, 24 February 2010.
[2] Aged between one and two years.

another employee, Cameron Knight, was able to release a yearling he was leading into adjoining paddocks through separate gates. The co-owner and one of the directors of Shelby Park, Robert James Skinner, who summarily dismissed Mr Blackie, claimed that this had placed Mr Knight in an extremely vulnerable situation which could have led to serious injury to Mr Knight and also to the yearling Mr Knight was trying to release. The early release of the yearling by Mr Blackie was said to have been in breach of Shelby Park's procedures which required the yearlings to be released at the same time to prevent the risk of any serious injuries to the handlers or the horses.

[3] The evidence for the plaintiff was that the early release of the horse by Mr Blackie was deliberate and malicious and intended to harm Mr Knight. Mr Blackie conceded that he had released his yearling too early but claimed this was accidental.

Factual background

[4] The plaintiff owns a 50 acre agistment farm in Cambridge which, for the last 20 years, has been dedicated to the preparing and presenting of weanlings (up to 12 months old) and yearlings for the national yearling sales at Trentham and at Karaka.

[5] The business is operated by Mr Skinner and his wife, Glenda Skinner, another director of the plaintiff. Mr Skinner asserted that after many years of experience he believes he is a leading expert in the handling of horses and especially weanlings and yearlings. Mr and Mrs Skinner lived on the farm, as did Mr Blackie.

[6] In November, the plaintiff had two men working full time for the company. These were the defendant, Mr Blackie who was employed in July as the farm manager, and Mr Knight, the yearling manager, who had been employed by the plaintiff for three years and worked under Mr Blackie. In addition there were six seasonal staff members.

[7] Mr Blackie's duties involved the general care of the horses, the supervision of staff, the preparation and the training of weanling and yearling horses in readiness for their sale.

The evidence before the Court

[8] As the evidence emerged during the course of a lengthy trial which produced over 400 pages of evidence, there was a real issue between the parties as to the actual grounds for the summary dismissal.

[9] The evidence led on behalf of the plaintiff canvassed in considerable detail the process for simultaneously releasing two horses in the same or adjoining paddocks, including a close analysis of the removal of the bridle and other harness equipment, accompanied by detailed photographs. There was, however, no issue between the parties that Mr Blackie did release his horse too early. He admitted to this in Court and at the time of the incident in an exchange which I will set out later in this judgment.

[10] Because of this admission I do not propose to summarise the plaintiff's extensive evidence on the methodology of releasing horses. The evidence of the plaintiff's witness Miss Sally House, a very experienced horse-trainer, satisfied me that when releasing two horses it did not matter how the restraining harnesses were removed as long as both horses were released simultaneously. This requires communication between the horse handlers.

[11] The plaintiff's witnesses also gave extensive evidence of Mr Blackie's work record at his previous employment and about a series of incidents which took place at Shelby Park for which Mr Skinner attempted in his evidence to hold Mr Blackie responsible. Mr Skinner claimed that these incidents gave rise to performance issues on Mr Blackie's part which, to use the wording of Mr Morgan-Coakle in his final submissions:

> … were known at the time of dismissal and had an influence on the decision to [dismiss] as many of them also relate to outbursts of anger or violence issues, trust and confidence and reliability.

[12] The defendant claims that Mr Skinner was not aware of some of those issues until after the dismissal had taken place.

[13] Mr Skinner's evidence-in-chief dealt with six pages of a work diary which was kept in the stables and intended to be viewed by Messrs Blackie and Knight as well as other employees of the plaintiff as it dealt with day to day operational matters. The first page to which Mr Skinner referred was for 24 September where there is an entry which states:

> Mark 1st warning re loading Golden Sparkle LD Coupe [Little Deuce Coupe] using whip told Liz he did not care about hurting horses.

[14] This was described by Mr Skinner as the first warning.

[15] The second warning was said by Mr Skinner to have been supported by a reference in the diary for 17 October which states, "Itznow, Mark drove thru fence & hedge". "Itznow" was apparently a filly.

[16] Mr Skinner referred to another entry on that page which showed that "Itznow" had received stitches from a veterinary surgeon at around 4.30pm. It also refers to what was prescribed by the veterinary surgeon for ongoing treatment.

[17] Mr Skinner referred to a diary entry for 20 October which reads:

> 2nd Warning Mark. Re Itznow Too many injuries.

[18] Mr Skinner later in his evidence stated that on 20 October the yearling "Itznow" was injured by Mr Blackie and the veterinary bill was $2,000. It is difficult to reconcile the dates. He claims he told Mr Blackie that he was not putting up with any more injuries, there had been too many and this was the second verbal warning he gave to Mr Blackie.

[19] Mr Skinner referred to a diary entry on 28 October, relating to a horse called "Floridas". The entry states:

> …run in fence stiches. Boxed 10 days.

[20] Mr Skinner claims that this was another horse that got away from Mr Blackie. There is a further entry on that page relating to "ItzNow" and "Revive the

[Phoenix]". Mr Skinner claimed that these were horses that were injured in Mr Blackie's care although he did not say he had warned Mr Blackie about these.

[21] Mrs Skinner gave detailed corroborative evidence about these incidents and the alleged warnings.

[22] The next diary entry referred to by Mr Skinner was on 6 November, although the page was so full that he claimed that part of the entry for that day had to be written on the previous page for 5 November. On the page for 5 November, but allegedly referring to events on 6 November, it states:

> Cam exposed to immediate danger with Mark. 6 November.

[23] On 6 November the following appears:

> Cam exposed to serious danger thru Mark's arrogance, final straw, fired on spot.

[24] I note at this stage that Mr Blackie denied ever receiving any warnings, although he accepted he did discuss the injuries to the horses with Mr Skinner on two occasions, when they were under the management of Mr Knight, the yearling manager.

[25] Mr Skinner's written evidence, which he read to the Court, dealt with the events leading up to the dismissal in the following manner:

> 46 **The events leading up to the dismissal** I have been told that on Tuesday the 4th of November 2008, Mark Blackie (Mark), [Ms A] and Cameron Knight (Cam) were in their small lunch/kitchen room together.
>
> 47 **On Wednesday the 5th** Mark complained to Glenda saying that [Ms A] had complained to him (Mark) about Cam's touching [Ms A's] breast several times the day before. Glenda said we would look into it. It was after 5pm and the staff had gone for the day when Glenda told me of this complaint.
>
> 48 **On Thursday the 6th of November** I (Bob) spoke to Cam about the complaint, it was about 10am. Cam gave his explanation that the touching did occur but was not sexual in nature. I then decided I needed to talk to [Ms A], she was in the barn. Given what was being said, I decided not to speak to her alone, so I asked Glenda to accompany me. When Glenda and I spoke to [Ms A] one of the

questions I asked her was: "was it malicious?" [Ms A] replied "No". She said "it was just an accident". At the end of the conversation I asked: "is it all done and finished?" [Ms A] replied "yes".

49 **Between 11am to 12 noon** I spoke to Mark about the complaint he had raised. I told Mark I had spoken to both Cam and [Ms A] and it was all resolved.

50 Mark's reaction was: he looked a bit angry but he did not contest what I'd said. Mark claims I said "..I'll sack the bitch". This was not said I had no reason to say that. It's not the sort of language I use or have ever needed to use. We do not permit bad language at SP.

[26] Ms A was an 18 or 19 year old female employee of the plaintiff at the time, who gave evidence to the Court for the defendant. I suppressed her name as an alleged victim of sexual harassment.

[27] Mrs Skinner gave evidence that was virtually identical to that of her husband. She said that she asked Ms A if she was alright and that Ms A just kept sweeping the barn and said "yes". She claimed that Ms A was totally unconcerned and showed no signs of distress or even being upset. She stated that she thought Mr Blackie had insisted that Ms A make an issue of it and that Mr Blackie was the one that kept on about it.

[28] Mr Knight's evidence was that on 4 November when Mr Blackie, Ms A and himself were in the kitchen waiting in line to get a coffee, she patted him (Mr Knight) three times on the stomach with the back of her hand to hurry him up and he reached over and inadvertently touched her breast. Mr Knight confirmed that on 5 November, Mr Skinner had questioned him about a complaint that Mr Blackie had made to Mr Skinner saying that Mr Knight had touched Ms A's breast. This was the first that Mr Knight knew of the complaint and he explained to Mr Skinner what had happened. He denied that he has ever made any inappropriate sexual advances towards Ms A and that the accusations she made about him were not true.

[29] The evidence of Mr Blackie and Ms A was at considerable variance to the account of Mr and Mrs Skinner and Mr Knight and I shall refer to it later. For present purposes, I find that on 6 November Mr and Mrs Skinner considered the complaint about Mr Knight's alleged conduct had been disposed of but that Mr Blackie would not let the matter rest and kept raising it. Mr and Mrs Skinner were

annoyed at Mr Blackie persistently raising the matter. There was a somewhat heated exchange that morning between Mr Skinner and Mr Blackie when Mr Blackie was given to understand by Mr Skinner that the issue was closed. Mr Blackie did not accept that it was.

[30] I find that at about 2.30pm on that day, Mr Blackie and Mr Knight were leading two yearlings back into their paddocks. The plaintiffs' evidence is that Mr Knight was leading his horse into the far paddock, separated from the one into which Mr Blackie was releasing his horse through a gate. Mr Blackie's evidence was that they were both being released into the same far paddock. Nothing turned on this. As I have found, it was common ground that horses are supposed to be released together so that one does not scare the other. I accept the plaintiff's evidence that it can be dangerous if one horse is released too early as this can cause the other horse to react whilst still being held by the other handler. The evidence for the plaintiff was that Mr Knight had only just got through the gate and was undoing part of the rearing bit when Mr Blackie let his horse go and that Mr Knight was dragged along in the paddock while trying to release his horse.

[31] Mr Knight claims that Mr Blackie had not asked him if he was ready, and had not given him any warning of the dangerous situation. He says Mr Blackie's horse ran towards Mr Knight. Mr Knight said his horse began rearing up and began dragging him across the paddock. Although Mr Knight was a bit apprehensive at this, he was not really frightened because he was able to keep control as he had a good rapport with the horse. Mr Knight also claimed that he was very highly skilled and he was able to hold onto the yearling, do a very quick removal of the rearing bit and release the lead rope. Mr Knight's evidence was that he believed that this could have been planned by Mr Blackie and that Mr Blackie was trying to hurt him, since Mr Blackie was fully aware of the release procedures. Mr Knight claimed that he could have been seriously injured had the circumstances been different, for example, if his horse had been a little harder to control. He claimed that Mr Blackie did not speak to him, did not apologise to him immediately and that Mr Blackie had never apologised to him. He gave evidence that he then saw Mr Blackie talking to Mr Skinner about Ms A and that Mr Blackie was saying that Mr Skinner did not believe him and that Mr Skinner was always taking Mr Knight's side.

[32] Mr Blackie claimed in evidence that he had undone all the necessary harnesses and was holding his horse by a spring loaded clip and a leg rope. He claimed that his horse moved forward and ran out of the spring loaded clip. This, he said, caused Mr Knight's horse to take five or six steps backwards.

[33] Mr Blackie claimed that he apologised to Mr Knight straight away and said:

> …sorry mate, I didn't mean to do that on you.

[34] It is common ground that Mr Knight and the two yearlings were not injured in the incident.

[35] It is also common ground that immediately after the incident, Mr Skinner approached Mr Blackie. I find that Mr Skinner said to Mr Blackie words to the effect "You have done that on purpose, you are trying to get Cameron hurt". Mr Blackie claimed that he said in response, "No I'm not trying to do that."

[36] Both Mr and Mrs Skinner claimed that Mr Blackie had a smirk on his face, was not contrite, displayed no remorse whatsoever, and that Mr Blackie said "I fucked up again, didn't I". Mr Blackie did not deny using words to that effect but claimed it was his way of apologising for letting his horse go too early.

[37] In his written brief of evidence, Mr Skinner claimed that in relation to Mr Blackie's response:

> … I was incredulous. Mark's smirk and admission that "he had fucked up again" as he walked away, his reaction made me think he didn't care, he wanted to frighten and hurt Cam and he very nearly did. The look on Mark's face made me think he could do it again. Mark was dangerous.
>
> … I made a decision to protect my staff members and my babies, I told Mark to get off my property immediately. I dismissed Mark on the spot, but said I would pay two weeks wages to him.

[38] Mr Blackie's evidence was that after he had told Mr Skinner that he would not release a horse intentionally, Mr Skinner responded:

> … yes I think you are, you have been dragging your bottom lip all day. I said to Bob in reply I said its only about its about the Cameron and the [Ms A] matter. Cameron touching [Ms A] and I've said to Bob I said you never

> believe what I say to you Bob. He wouldn't follow it up. And he said you have been dragging your bottom lip all day you can leave you are dismissed. I said what because of I am trying to protect my staff. And he said yeah you can leave.

[39] The discussion had become quite heated. Although Mr Blackie worked on that afternoon and briefly returned to the farm the following day, it was common ground he was dismissed on 6 November and vacated his accommodation on the farm the next day.

The grounds for dismissal

[40] In the course of a lengthy and thorough cross-examination of Mr Skinner by Mr Hope the following exchange took place.

> **Q.** And you called out to Mr Blackie when you saw the horse released?
> **A.** Yes I walked over to the fence.
>
> **Q.** What did you call out? What words?
> **A.** To the effect that "You did that purposely. You did that maliciously."
>
> **Q.** And what did he say in reply?
> **A.** "I fucked up again didn't I?" And I quote.
>
> **Q.** And what did you say "You better watch yourself."
> **A.** Yes we walked over to the fence together. We walked out to the gate together. Then I got the barrage of the sexual harassment thing which had been plaguing Mr Blackie for several days.
>
> **Q.** And then you said to him "I'm sick of this you've been dragging your lip all day."
> **A.** No I said "You're dropping your lip, you have dropped your lip."
>
> **Q.** Referring to the sexual harassment matter?
> **A.** Yes.
>
> **Q.** And then you said to him "You can go." Is that what you said?
> **A.** No I said "Look get off the farm."
>
> **Q.** And it was then you said "I'll give you 2 weeks wages, just get off."
> **A.** Yes.
>
> **Q.** And this was all within 60 seconds?
> **A.** No that was probably within about – from the beginning to the end of the barrage it was probably a good 5 minutes.
>
> **Q.** You were both raising your voices?
> **A.** Yes.

Q. And you were pretty hot about it?
A. Well I wasn't happy.

Q. And he wasn't happy either?
A. No. But he created it.

[41] This account extracted in cross-examination, I find, is substantially the same as Mr Blackie's account of the exchange that actually led to his dismissal. It contains an admission by Mr Blackie that he had made a mistake and that Mr Skinner had dealt with the incident by saying "you had better watch yourself". That may have been the end of the matter, if that is what took place. On this view, it was only after Mr Blackie pursued the matter of Ms A's complaint of sexual harassment that he was dismissed with immediate effect. If that is how the dismissal occurred, it will immediately be seen that it entirely undermines the plaintiff's claim that it was justified in summarily dismissing Mr Blackie for serious misconduct because he was dangerous in the way that he had released the yearling.

[42] It is common ground that there were no other relevant exchanges between Mr Skinner and Mr Blackie and no further attempts on Mr Skinner's part to obtain an explanation for either the early release of the horse or Mr Blackie continuing to raise the issue about the alleged sexual harassment of Ms A.

[43] Mr Skinner, with the assistance of Mr Morgan-Coakle, attempted to resile from the account he gave in cross-examination. He confirmed his view that the issue of sexual harassment had been resolved that morning but that Mr Blackie would not accept it. Mr Skinner claimed that Mr Blackie wanted Mr Knight to be reprimanded when the matter had been totally resolved by Mr Skinner and his wife with Mr Knight and Ms A, but that Mr Blackie had not accepted it was resolved. Mr Skinner confirmed that he had said that the release was malicious and deliberate and that Mr Blackie had better watch himself. He said that Mr Blackie had replied to Mr Skinner that Mr Skinner needed to watch himself over the business about Ms A.

[44] There appears to be no issue that, after dealing with the early release, it was Mr Blackie who raised the matter of Ms A. Mr Morgan-Coakle pointed to the following passage in the evidence of Mr Skinner:

> Then I got the barrage of the sexual harassment thing which had been plaguing Mr Blackie for several days.

[45] Mr Morgan-Coakle then submitted that, at the time of the dismissal, there were no issues relating to Ms A in the mind of Mr and Mrs Skinner because the issues had been resolved.

[46] That may well be so but on Mr Skinner's own evidence, in the passage from the cross-examination quoted above, it was because Mr Blackie raised the issue again when Mr Skinner considered that it had been concluded, that the dismissal then followed. This conclusion is also partly supported by a written statement signed by Mr Skinner dated 30 September 2009 to which I shall later refer.

Credibility issues

[47] Both parties attacked the credibility of the witnesses led by the other side. I accept Mr Morgan-Coakle's submission that there were some conflicts and inconsistencies in Mr Blackie's evidence concerning the procedures for release of the horses. I did not find these to be material or intended to mislead the Court because of Mr Blackie's frank admission that he had wrongly released his horse too early. The detail of precisely why that happened did not assist me in determining whether a fair and reasonable employer would have been justified in concluding that the release was deliberate, malicious, and intended to harm Mr Knight. I accept Mr Hope's submission on behalf of Mr Blackie, that Mr Blackie's response that he had "fucked up" was Mr Blackie's way of apologising for what had happened.

[48] Mr Knight also accepted that experienced horse handlers like himself and Mr Blackie would often use non-verbal responses to ensure that they both released the horses at the same time. His evidence on the release procedures was not as rigid as that of Mr Skinner.

[49] Mr Knight also fairly accepted that in his role as yearling manager, he was responsible for some of the incidents which led to injuries to horses for which Mr Blackie was allegedly warned. According to the submissions made on behalf of the plaintiff, those were matters for which Mr Blackie was held responsible and were

important factors which led to Mr Blackie's dismissal on 6 November. Mr Hope took Mr Knight through each one of the incidents in which horses were injured. Mr Knight accepted that in some cases he had the responsibility for the safety and care of the horses as yearling manager and he was present when they were injured, but Mr Skinner had not held him responsible. He did not know whether Mr Skinner had held Mr Blackie responsible.

[50] Mr Knight's evidence also cast doubt on the veracity of the entries in the work diary on which Mr Skinner relied as proof of two warnings to Mr Blackie. Mr Knight had never seen those entries, even though he looked at the diary on a daily basis. They were all entered in a different hand and in a different ink to the other entries on the relevant pages and on some occasions were squeezed into small gaps. I find that those entries cannot be relied upon.

[51] As Mr Hope submitted, the plaintiff then attempted to impeach its own witness by alleging that Mr Knight was not the yearling manager and was therefore not responsible for the injuries to the horses even though he was present at the time.

[52] My broad conclusion is that the injuries to the horses occurred in an accidental manner for which neither Mr Blackie nor Mr Knight were held responsible by Mr and Mrs Skinner. I accept the evidence that Mr Skinner was concerned about the level of injuries and that he drew this to Mr Blackie's attention but I find that was far from sufficient to amount to a warning which would justify the later disciplinary action.

[53] The plaintiff also relied on another incident which allegedly showed that Mr Blackie had seriously breached his employer's trust. He is alleged to have illegally taken a container of Roundup weed killing chemical without authority, a fact he admitted to Mr Skinner. This allegedly occurred in September and the two litres taken were worth between $200-$300, according to Mr Skinner's evidence.

[54] Mr Skinner gave no evidence that this was a matter that had formed the basis of any disciplinary action he took against Mr Blackie. It is not even recorded in the work diary.

[55] Mr Blackie's evidence was that he did not admit to stealing the two litres of Roundup. His evidence was that he took 500 mls from a 20 litre drum in a shed. He claimed that Mr Skinner had said to him that if he ever needed anything just ask and they would talk about it. He said that Mr Skinner was not around and he needed a small amount of Roundup for the weeds on his mother's driveway. His evidence was that Mr Skinner knew his mother, and she had made Mrs Skinner's wedding dress. He claimed that he took the Roundup and told Mr Skinner about it a couple of days later. Mr Blackie's evidence was that Mr Skinner said that "you should have told me, just buy me a litre of rum and we'll call it quits". Nothing more was said and nothing more was done and he did not receive a warning.

[56] Mr Blackie was not cross-examined on this. I find the incident relating to the Roundup was exaggerated by Mr Skinner as a makeweight after the event to support his decision to dismiss Mr Blackie.

[57] Dealing with matters which occurred after the dismissal, an important issue that arose during the trial was the evidence of Jason Lowe, an equine veterinary surgeon. He gave evidence of the injuries to horses at Shelby Park in the months of September/October/November and said that on 5 November he visited Shelby Park with a nurse team in order to radiograph two year-old horses. Whilst in the stables, he said Mr Blackie had handled a horse in a manner which could have injured Mr Lowe.

[58] The key issue with Mr Lowe's evidence was that he did not inform Mr Skinner about the issue at the time and he confirmed that he had told the Employment Relations Authority that he did not tell anyone about the incident until after Mr Blackie's dismissal.

[59] In his evidence to the Court, Mr Skinner referred to his earlier signed statement, which was presented to the Employment Relations Authority, in which he claims to have recorded "Facts" about Mr Blackie's conduct. In his evidence, Mr Skinner addressed paragraph 4 of that statement, dated 30 September 2009, which reads as follows:

> ... After the reports [from] Jason Lowe our veterinary, about the number of horses that were injured and the incident of 5 November 2008 that could have resulted in very serious injuries to Mr. Lowe, as well as Elizabeth Cave[3] telling me of the applicant's abusive behaviour towards her, and what the Applicant had told Mrs. Cave about his threat to inflict physical harm on Cameron Knight, I decided to terminate the Applicant's employment on 6 November 2008.

[60] In his evidence before the Court he stated:

> I did know something had happened to Jason Lowe and that Mark was involved, I did not know at the time of the dismissal about the details of what happened to Jason Lowe the veterinary. At the Authority hearing I became unsure of when I became aware of the these facts. [see paragraph 19 of the determination.] Glenda has since confirmed our discussions and I have checked my diary which concurs with my original statement.

[61] The passage in the Employment Relations Authority determination, to which Mr Skinner's evidence before the Court referred, reads as follows:

> [18] In his written evidence Mr Skinner told the Authority he made the decision to dismiss Mr Blackie following reports from his veterinarian Mr Lowe about the number of horses which had been injured during Mr Blackie's employment, alleged abuse of Ms Cave, and alleged threats apparently communicated to Ms Cave about what Mr Blackie would do to the male employee about whom he had made a sexual harassment complaint.
>
> [19] In answer to questions at the Authority investigation meeting Mr Skinner conceded that all three points set out in his evidence and which he says he relied to make his decision to dismiss were not actually known to him at the time he made the decision.

[62] Mr Skinner added the following further explanation concerning the inconsistency of his written statement of 30 September 2009 and what he told the Authority in his written evidence-in-chief to the Court:

> … Why did I agree with the Authority member that they were things I heard after the dismissal? Well, I got confused. I had made a mistake about Jason Lowe's near injury. Whilst, I was told about a complaint about Mark from Jason Lowe at the time it happened, I did not know the details till after the dismissal. When Alex Hope was intensely questioning me I thought I had got the timings wrong of when I knew about Mark's threats to smash Cam, and the abuse he gave to Liz (Cave).

[63] Ms Cave did not give evidence before the Court. In any event, in light of Mr Skinner's concessions to the Authority that what Ms Cave was able to tell him was

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[3] Ms Cave was another employee of the plaintiff, who did not give evidence before the Court.

not available at the time of the dismissal. I did not find Mr Skinner's explanation for his confusion over the timing of Mr Lowe's advice convincing. The Authority's investigation meeting was held on 14 October 2009, less than one year after the incident. The evidence given by Mr Skinner then is more likely to be accurate than his reconstruction some 18 months later.

[64] What is of more concern is that the signed statement from Mr Skinner dated 30 September 2009 giving the "facts" of the dismissal makes no reference at all to the early release of the horse by Mr Blackie. This casts severe doubt upon the plaintiff's argument as to the real reason for the dismissal.

[65] Because of these matters I found Mr Skinner's evidence in chief as to the reasons for the dismissal to be unreliable. I find that the true position was as conceded by Mr Skinner in cross-examination in the passage I have set out above which largely corresponds to Mr Blackie's evidence. I therefore find that Mr Blackie was dismissed not because of the early release of the horse for which he was told to "watch yourself" but for raising again, the allegation of the sexual harassment of Ms A.

[66] I also found that the other matters now relied upon by Mr Skinner for the dismissal, that is Ms Cave's allegations about what she had been told by Mr Blackie of his view of Mr Knight and Mr Lowe's concerns about Mr Blackie's horse handling in the stables on 5 November, were not known by Mr Skinner at the time of the dismissal. The other matters which he has purported to rely on involving the injuries to the horses and the allegation of stealing the Roundup, were not, I find, the subject of any warnings. The horse injuries were not Mr Blackie's sole responsibility. I find these matters were not relevant considerations in Mr Skinner's decision to dismiss Mr Blackie.

[67] I also accept Mr Hope's submissions that the dismissal was procedurally unfair. Mr Blackie was given no real opportunity to explain the circumstances and to answer the precise allegations against him.

[68] For all of these reasons. I find that the plaintiff has failed to discharge the burden of showing that, in terms of s 103A of the Employment Relations Act 2000, as it was formulated at the time of the dismissal, the plaintiff's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. Consequently, the plaintiff's challenge to the Authority's determination that the dismissal was unjustified has failed.

Remedies and contributory conduct

[69] Both the plaintiff and the defendant put in issue the question of contributory conduct and the level of remedies.

[70] Mr Blackie gave evidence of the efforts he made to obtain work. He claimed to only be able to find part-time work at the rate of two hours of work per day for five days per week until the end of January 2009. He claimed to have lost wages at the rate of $700 nett per week, plus an additional $180 per week for the accommodation provided by the plaintiff together with power, making a total of $880. This was for the period from 6 November 2008 until 27 May 2009 when he went onto the unemployment benefit for one week and then obtained a full time job. He claimed that his gross loss before tax during that period of 28 weeks and five days was $33,894.97. From that was to be deducted his gross earnings from other sources during that period of $8,454.42 giving his claimed lost before tax of $25,440.55 gross.

[71] Mr Blackie's evidence was that when he was dismissed, Mr Skinner said he would be given two weeks' pay but that Mr Skinner then resiled from that, claimed the money had been paid by mistake and Mr Skinner deducted it from Mr Blackie's holiday pay. He was not cross-examined on that assertion, which I find proven.

[72] There was an issue over the work available from another potential employer for whom Mr Blackie worked for one week following the dismissal. Mr Blackie claimed that he did not take that work because it was too hard for someone of his age as it involved galloping horses in circumstances where there was a risk of a fall. Mr

Morgan-Coakle submitted that because Mr Blackie had voluntarily left that employment on 13 February 2009 any award of lost remuneration should cease at that point in time. He relied on Mr Skinner's evidence that breaking in horses, which was a job that Mr Blackie had performed for the plaintiff before becoming the manager, was far more dangerous than galloping horses.

[73] I find that Mr Blackie's election not to take the job offered was reasonable, did not break the chain of causation and did not breach the duty to mitigate. However, for reasons which I will give, I am only going to award him three months' lost remuneration which would run until 6 February 2009, a period I round out to 12 weeks. The later employment therefore becomes irrelevant.

[74] Mr Morgan-Coakle also submitted that the accommodation was worth $80 per week and not $180. There was insufficient evidence to support that submission and I find it was a part of Mr Blackie's employment package and award the equivalent of $180 per week as lost benefits he would otherwise have received, but for the dismissal.

[75] Like the Authority, I therefore find that Mr Blackie has made out a claim for lost remuneration. I received evidence, noted above and apparently not available to the Authority, that the one or two week's notice allegedly paid in lieu of notice, was not in fact paid.

[76] The amount sought by Mr Blackie exceeds the three month's ordinary time remuneration referred to in s 128(2) of the Act. It amounts to nearly 29 weeks. Section 128 provides:

> **128 Reimbursement**
>
> (1) This section applies where the Authority or the court determines, in respect of an employee,-
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.
>
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other

> remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[77] In the leading decision on the section, *Sam's Fukuyama Food Services Ltd v Zhang*,[4] the Court of Appeal found that although ss 128(2) and (3) refer only to the Authority it is also to apply to the Employment Court.[5] The Court of Appeal rejected a submission that the total package of remedies must be considered when determining the amount of the award for lost remuneration and that the appropriate level of compensation for lost remuneration should be dealt with as a discrete exercise.[6] The Court of Appeal then went on to state:

> [36] It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.
>
> [37] Bearing in mind the factual circumstances of this case summarised above, we are of the view that a moderate award, based on the discretionary power under s 128(3) of the Act, would be in the range of 25 to 30 weeks of ordinary time remuneration. But that is not the end of the analysis. It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment.
>
> [38] In this context, we do not consider that we are required (as the respondent argues) to ignore the factual events that occurred during the period of employment. The fact that those events were relevant to another aspect of the case, such as whether or not a personal grievance was established, does not make such matters irrelevant on the very different question of remedies. What actually happened, if relevant, cannot be ignored. The key feature on appeal is that this Court must respect the factual findings of the Judge. …

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[4] [2011] NZCA 608.
[5] At [19].
[6] At [35].

> [39] Having regard to the individualised aspects of the respondent's employment history with the appellant over the period of ten months, we consider that it is likely that his employment would not have continued for a further 30 weeks, being the top end of the range we have identified above. We are satisfied from the evidence that the relationship between Mr Zhang and the employer had plainly broken down and was dysfunctional. It follows that the employment relationship would not have continued indefinitely into the future.

[78] Mr Morgan-Coakle observed that Mr Blackie's employment was a short one of some four months' duration and that is clearly a relevant factor when compared to the level of remuneration sought. Moderation is required.

[79] A more relevant consideration is whether Mr Blackie's employment would have lasted for another 29 weeks had he not been dismissed on 6 November. In reaching a view on that matter it is necessary to canvas and make findings on the events that have been relied upon by the plaintiff under s 124 as behaviour on the part of Mr Blackie which amounted to contributory conduct. I am, however, cognisant of the fact that in making an award under s 123, which is fair and reasonable to both parties in settling the grievance, that Mr Blackie should not be exposed to a double reduction for the same events – one for the length of his remuneration period and then a further reduction for contributory conduct. It is, however, convenient to deal with the aspects of contributory conduct at this point in this judgment.

[80] Section 124 provides:

> **124 Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[81] For the reasons set out above, I was not persuaded that any contribution that Mr Blackie may have made to the circumstances that gave rise to the injuries to the

horses on the farm were matters that amounted to blameworthy conduct, or, in any event, contributed towards the situation that gave rise to the personal grievance. In view of the credibility findings I have made, I concluded that the entries in the work diary were added after the event, that there were no warnings at the time given to Mr Blackie and that Mr Knight bore an equal if not greater share of any responsibility for the injury to the horses. I have also concluded that the matter of the use of the small quantity of Roundup by Mr Blackie, without obtaining permission in advance, did not amount to a breach of any duty he owed to the plaintiff, because he drew Mr Skinner's attention to the matter. Mr Skinner accepted the position and suggested compensation of an alcoholic nature. This was, therefore, not blameworthy conduct which contributed towards the situation that gave rise to the personal grievance.

[82] I find that none of the matters raised on behalf of the plaintiff up to 5 November amounted to contributory conduct. Had it not been for the matters that came to a head on the afternoon of 6 November, Mr Blackie would not have received a warning for them and nor would any disciplinary action have been taken. The only possible exception to that is the handling of the horse described by Mr Lowe. Had that been brought to Mr Skinner's attention, it may well have led to a disciplinary inquiry. Because it was not known at the time, it did not contribute to the situation that gave rise to the dismissal.

[83] I also find as a fact that Mr Blackie was dismissed by Mr Skinner because he confronted Mr Skinner about Ms A's complaint immediately after the early release of the horse. Had he not done so, I find it highly unlikely that Mr Skinner would have taken any disciplinary action against Mr Blackie for what I find was an act of negligence in releasing his horse before Mr Knight was able to release his. That was a potentially dangerous incident which could have injured Mr Knight and the horses. That it did not do so is partly a tribute to Mr Knight's handling of the situation. I am not, however, persuaded that the situation was as dangerous or as negligent as the plaintiff endeavoured to paint.

[84] Mr Hope argued that because the dismissal was not for the early release of the horse, that matter should not amount to contributory conduct. I do not accept that submission. The release of the horse clearly concerned Mr Skinner and led him

to confront Mr Blackie. Mr Blackie was warned to watch himself. I find that Mr Blackie responded by telling Mr Skinner that he should watch himself also, because of the events relating to Ms A's complaint. The discussion then became heated. As Mr Skinner said in evidence, and I agree, Mr Blackie caused that conversation to become heated because he immediately raised the issue of Ms A's complaint when Mr Skinner had just dealt with a potentially dangerous release of a horse. Regardless of the merits of Mr Blackie supporting Ms A, this was neither an appropriate time nor place for Mr Blackie to deal with those issues. Thus both the release of the horse and the inappropriate raising of Ms A's complaint immediately following that event, I find, amounted to blameworthy conduct, which contributed to the situation that gave rise to the dismissal.

[85] The degree of blameworthiness, especially in relation to raising the matter of Ms A's complaint, will depend upon the factual findings I must now make for the purposes of s 124. As will have been observed at this point in the judgment, I am no longer reviewing the employer's actions in terms of s 103A but the actions of the employee and how he contributed to the situation that gave rise to the grievance and whether that should reduce the remedies I would otherwise have ordered.

[86] As I have noted above, the evidence of Mr Blackie and Ms A was in sharp contrast to the evidence of Mr and Mrs Skinner and Mr Knight in respect of Ms A's complaint.

[87] Ms A gave evidence to the Court and, although the cross-examination indicated she had some confusion over the dates on which events took place, she was clear as to those events. Her evidence was largely supported, except for dates, in a statement she had made to the Police on 11 November. The evidence of the Police Officer, Constable Hewald, who took her statement was taken as read and he was not required to be called and subjected to cross-examination. I found Ms A's evidence to be honest and reliable, and where there was a conflict, preferred it to that of Mr and Mrs Skinner and Mr Knight.

[88] I find that on Thursday 30 October when Ms A was in the smoko room making coffee, that she tapped Mr Knight on his shoulder to get his attention while

he was talking to Mr Blackie. Mr Knight turned to face her, looked at her chest and without any warning started to tap her left breast with the back of his right hand, all the while repeating her first name. Mr Blackie then turned around and asked Ms A what Mr Knight was doing and she said that he was touching her breasts. Mr Blackie looked at Mr Knight and said "don't do that mate, that's sexual harassment, that's disgusting". Mr Knight said she did it to him first.

[89] On Tuesday 4 November, while Ms A was walking down the driveway to get one of the fillies, together with Mr Knight and Mr and Mrs Skinner, Ms A and Mr Skinner were walking behind everyone else. Mr Knight was about a metre behind her and he got up alongside and pushed her with his shoulder and then as she got her balance back, he slapped her on her buttocks. She said it was like a grope and he just kept walking. She went to Mr Blackie and told him what had happened and she claimed that she did not feel comfortable telling Mr Skinner herself, so Mr Blackie said he would tell Mr Skinner.

[90] Ms A was not present when Mr Blackie reported the matter to the Skinners.

[91] Ms A had been working for the Skinners for approximately five weeks. Ms A's evidence was that shortly after she had spoken to Mr Blackie, Mr and Mrs Skinner spoke to her while she was alone, sweeping, in the barn. The evidence was that they said to her that they did not believe that Mr Knight had done anything wrong and that she had to either "shut my mouth or pack my bags." She claimed to have felt very threatened and very scared and she told them that she would stay. They then asked her if it was all over and whether she was satisfied.

[92] She then said that she had taken time off around 7 November because she had stayed up late with a friend who was in childbirth. Her father had rung on her behalf to say that she was not coming in. She then rang on the next Sunday to say that she would be in on the following Monday, and Mr Skinner said "don't bother, we are taking legal action against you and so is Cameron for slander for what you said about him". She took that to be a dismissal.

[93] Ms A said she thought that Mr Blackie had been dismissed shortly after she was, but when the dates were looked at, Mr Blackie's dismissal had taken place on the previous Thursday. She raised a personal grievance, which apparently was settled in mediation. A strenuous effort was made on the part of the plaintiff to prevent Ms A giving evidence, because of the settlement of her grievance in mediation. Because her evidence was not created or made for the purposes of the mediation it therefore did not come within the statutory prohibitions contained in s 148(1). The evidence given by Ms A and her statement to the Police, which was admitted without objection and used by the plaintiff in cross-examination, was not created for the purposes of the mediation

[94] Constable Hewald gave evidence that after he received Ms A's statement on 11 November, the following day he contacted Mr Skinner and spoke to him at the farm. Mr Skinner informed him that the person named "Mark" in the statement, who worked on the farm at the time of the incident complained of by Ms A, had left as Mr Skinner had to let him go as he was found to have mistreated horses. Mr Skinner confirmed that he had spoken to Mr Knight about the touching of Ms A's breast but claimed to be unaware of the second incident.

[95] Constable Hewald then spoke to Mr Knight about the two matters. Mr Knight said he was not looking where he was tapping at the time and unfortunately touched Ms A's breast. He denied grabbing Ms A's buttocks and said that nothing of the sort had happened. Constable Hewald's evidence was that due to the nature and circumstances of the incident he formally warned Mr Knight for his actions and informed him that this incident was now on Police file. Mr Knight accepted that he was a bit reckless, apologised and confirmed that this type of thing would not happen again.

[96] As he was leaving the farm, Mr Skinner approached Constable Hewald and he informed Mr Skinner of the Police action taken and suggested that Mr Skinner speak to his employee about the incident and take any employer action he deemed necessary.

[97] Mr Blackie's evidence was that he told Mr and Mrs Skinner that Mr Knight had been touching Ms A on the breast and on the buttocks and that Mr Skinner said that he would talk to Mr Knight. Two days later he asked Ms A what had happened about Mr Knight and she claimed that Mr and Mrs Skinner had approached her and told her that she was lying.

[98] Mr Blackie's extensive evidence-in-chief did not deal with the events of the morning of 6 November, but he was cross-examined on these matters and referred to how they had been set out in the letter his solicitors wrote on his behalf on 28 November 2008 in which they raised the grievance. The paragraphs in that letter are instructive and read as follows:

> 16. On the Thursday morning (6th November 2008), at about 9am Mr Skinner questioned Mark about his handling of the complaint and told Mark that he wanted nothing more to be said about the matter. He told mark that if mark persisted with the issue then he, Mr Skinner, would "sack the bitch".
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> 17. Mark was angry about the employer's response. He was well aware of the obligations of an employer to treat such complaints seriously and to take all reasonable steps to ensure the safety of the employee concerned. He felt for the employee and was concerned that the employer's failure to act or address the complaint in any way may have indicated to the yearling manager that his behaviour was acceptable. After that conversation Mark continued with his duties but he was unhappy and disappointed about the situation and the possible ramifications for the female employee. All of this was on his mind.
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> 18. A couple of hours later Mr Skinner was watching Mark and another staff member releasing two horses into the paddock. Mark accidentally let his horse go early which caused the other horse to pull away from the other staff member. This was not done deliberately but mark was probably not performing at his best, or concentrating solely on his tasks, given the conversation he had with Mr Skinner that morning.
>
> 19. Mr Skinner approached Mark and accused him of deliberately letting the horse go early. He said Mark had done so to upset everyone. Mark denied doing so deliberately and said he immediately apologised to the staff member holding the other horse at the time. Mr Skinner then told Mark he had "better watch what you are doing" and Mark responded that Mr Skinner should also watch what he was doing.
>
> 20. Mr Skinner then accused Mark of "dropping his bottom lip" that day. He said "how about I give you two weeks wages and you quit?" Mark asked Mr Skinner if he was sacking him. Mr Skinner said "yes, you leave tomorrow. I'll give you two weeks wages and you leave". Mark said "Ok Bob, you never believe what I say; this is what I am talking about. I saw that guy grab her on the tit" and Mr Skinner said "She never told me that".

[99] Mr Blackie confirmed in cross-examination that this letter was written on his instructions and, under some pressure during cross-examination, accepted that he was angry about the sexual harassment matter. He claimed not to be angry about Mr Skinner but it is difficult to accept that evidence. I find that Mr Blackie was upset with Mr Skinner's response and that was why he raised the issue with Mr Skinner again in the paddock.

[100] I also find, as had Constable Hewald, that there was real substance in Ms A's complaint, that it was not properly dealt with by the Skinners and that they brought unreasonable pressure on Ms A to abandon the matter. There is evidence that they were very supportive of Mr Knight who had suffered severe injuries in the past and who had worked for them for a number of years.

[101] Mr Blackie was correct when he observed that the employment of young women in the horse training industry was very important and that the conduct of Mr Knight should not have been allowed to pass without a proper investigation. However, I find that he should not have raised the matter at the time and in the way that he did.

[102] Standing back from all of the detail, I conclude that Mr Blackie's conduct on the day would justify a reduction of some of the remedies that would otherwise be ordered by 25 percent.

[103] These matters also suggest that the employment was becoming dysfunctional. It appears that Mr and Mrs Skinner were wishing to protect themselves against a claim of sexual harassment and to prevent any consequences flowing to Mr Knight. Although this is somewhat in the realm of speculation, it is likely that this may have been why Ms A was dismissed.

[104] I therefore have to consider the likelihood of the employment relationship continuing beyond the ensuing three months, the limit set by s 128(2). I conclude that it is more likely than not that the relationship would not have extended beyond three months and that therefore this is not a proper case for exercising the discretion under s 128(3) to award more than the three months' remuneration less the amount

earned in that period. That period ran from 6 November until 6 February 2009 which I round out at 12 weeks.

[105] From the material subsequently provided by the defendant I find that the lost remuneration, for 12 weeks including the $180.00 accommodation benefit before tax is $14,338.68. The sum of $1,800 gross appears to have been earned from 24 November until the end of January 2009 from other sources. I have deducted this amount and the total is $12,538.68.

[106] For the reasons I have given I do not consider it appropriate to reduce the extent of the remuneration award any further by the 25 percent contributory conduct deduction as that would in effect doubly penalise Mr Blackie. I therefore award the sum of $12,538.68 before tax as lost remuneration and other benefits for the purpose of s 123(1)(b).

[107] There was no investigation of the incident reported by Mr Lowe and there was insufficient evidence to make a finding of misconduct which might have been relevant as subsequently discovered misconduct in terms of *Salt v Richard Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands*.[7]

[108] Turning now to the issue of compensation for distress and humiliation, Mr Blackie gave evidence that he was very upset by his dismissal and that it was heart-wrenching and disgusting. He believed that if Mr and Mrs Skinner had talked and listened more it would not have happened and said that he had never been dismissed before. He felt he was being dismissed for protecting one of his staff.

[109] Mr Blackie said he had been out of work with horses for approximately three years and it seemed that this was a good opportunity to get back into horse work which he enjoyed. His marriage had just broken up and he had considerable debts and child support to meet. The dismissal was said to have affected his reputation in the area, and I can accept that it would have had that effect. It also appeared to have affected his ability to obtain ongoing work. It also deprived him of his accommodation.

[7] [2008] ERNZ 155 (CA) at [102].

[110] I am satisfied that an award of $10,000 would have been appropriate to compensate Mr Blackie for his humiliation, loss of dignity and the injury to his feelings. I reduce that award by 25 percent and award him $7,500.

[111] In terms of s 183(2), this decision stands in the place of the Employment Relations Authority's determination.

[112] Costs are reserved. If they cannot be agreed, they may be dealt with by an exchange of memoranda. The first memorandum is to be filed and served within 60 days of the date of this decision.

B S Travis
Judge

Judgment signed at 9.30am on 11 July 2012