

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 160/08
5096046

BETWEEN LEE CROWN
 Applicant

AND TIROA "E" & TE HAPE "B"
 TRUST
 Respondent

Member of Authority: Vicki Campbell

Representatives: Alan Taylor for Applicant
 Murdoch Pahi for Respondent

Investigation Meeting: 12 March at Hamilton

Determination: 30 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Lee Crown was employed by Te Hape B and Tiroa E Trusts ("the Trusts") as a farm hand from September 2005 until 30 July 2007 when he was dismissed with one months notice. As is typical with such employment relationships, Mr Crown was entitled to live in a house on the farm, provided by the respondent.

[2] Mr Crown claims his dismissal was unjustified and seeks remedies. The Trusts denies the dismissal was unjustified.

[3] Pursuant to section 103A the Authority must scrutinise the Trusts' actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[4] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations

between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[5] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Background

[6] Members of Mr Crown's whānau are responsible for managing the Trusts' business affairs. Mr Crown was employed as a farm hand and reported to Mr Jimmy Hose, the Stock Manager. Mr Hose, in turn, reported to Mr Rod Walker, the Farm Manager.

[7] During late June 2007 Mr Crown discussed with Mr Hose the stock movements to be undertaken for the first week of July as Mr Hose was to be away on leave for that week. At the same time Mr Crown alerted Mr Hose to the fact that he needed to take his daughter to Waikato Hospital for a pre-booked operation on Monday 2 July 2007. Mr Crown says that in order for him to be able to meet his commitment to his daughter, Mr Hose agreed that Mr Crown would move the stock on the Sunday night.

[8] After moving the stock on the Sunday night, Mr Walker, attended Mr Crown's house and demanded an explanation of why the stock had been moved. Mr Crown explained about the arrangements he had made with Mr Hose. I am satisfied it is more likely than not that the two men then began to argue about the stock being moved and that when Mr Walker left Mr Crown's residence he was angry and upset.

[9] At the investigation meeting Mr Crown told me he had a fairly close relationship with Mr Walker up to that point. He said they drank together and one weekend, while Mr Walker and his wife attended the Farm Awards, Mr Crown and his wife had looked after the Walker's children. Mr Crown felt Mr Walker's behaviour was unusual.

[10] Mr Weo Maag, is Kaiwhakamana and a member of the Trust Board. He has responsibility for employment relationship issues. Shortly after the altercation between Mr Crown and Mr Walker, Mr Maag received a phone call from

Mr Walker who was upset and advised Mr Maag that he had had an issue with Mr Crown regarding the movement of stock.

[11] The next day, 2 July, on his way to taking his daughter to Waikato Hospital, Mr Crown visited with Mr Magg and discussed the previous evenings events. Mr Maag confirmed to Mr Crown that he had received a telephone call from Mr Walker the previous evening.

[12] Mr Maag suggested they get together for a meeting to discuss the issues. Mr Crown agreed and it was then settled that Mr Crown would call in to the Trusts offices on his way back from the hospital the following day at 3.00pm.

Disciplinary process

[13] As agreed, on 3 July, Mr Crown called into the offices of the Trust the following afternoon at about 3.00pm. On arrival he was handed a letter dated 2 July 2007 and which says:

It has been brought to my attention that a potentially serious employment matter has occurred between yourself and your Manager, Rod Walker.

It is alleged that you have wilfully chosen not to follow "lawful instructions" on several occasions as directed by Rod Walker. This has led to verbal defiance on your behalf.

The Trust would therefore like to meet with you to resolve these matters and would appreciate your attendance at a meeting in the Trust boardroom at Tiroa House, Te Kuiti at 3.00pm on Tuesday 3rd July 2007.

It is vitally important for the Trust that all staff work together harmoniously and respect each other in the workplace.

Attending this meeting on behalf of the Trust will be Hardie Peni, Weo Maag, and Rod Walker. You are invited to bring a support person with you to this meeting.

[14] Mr Crown says that when he entered the meeting room with the Trustees and Mr Walker present he felt intimidated and uncomfortable. Mr Crown read the letter after he entered into the meeting room. A reasonable discussion as to what had occurred on the Sunday night, took place. However, this soon became heated with the result that Mr Crown left the meeting.

[15] Mr Crown left the meeting because when he tried to give his explanation for what had happened regarding moving the stock on the Sunday evening he was not given much of an opportunity to speak. He said it was a waste of time and so he walked out.

[16] Mr Maag says that after Mr Crown walked out of the meeting it was decided that all the Trustees should be advised of the gravity of the situation and given the whānau relationships, the Trustees were instructed not to communicate with Mr Crown until a course of action had been unanimously agreed.

[17] At about 5.00pm that afternoon Mr Crown visited again with Mr Maag. Mr Crown asked Mr Maag for his advice about how to resolve the problem with Mr Walker. Mr Maag reluctantly advised Mr Crown that if it were him, he would approach Mr Walker and apologise for things he had said to him. Mr Maag was reluctant to discuss the matter with Mr Crown given the decision that afternoon that the Trustees were to have no contact with Mr Crown until a decision had been made.

[18] Throughout the day on 4 July 2007, email dialogue took place between the Trustees. The allegations against Mr Crown had escalated to include allegations that Mr Crown had blatantly accused Mr Walker of lying; had used abusive and threatening language towards the Trustees; and had shown a clear unwillingness to resolve the matters at hand.

[19] I record here my surprise that the Trustees felt Mr Crown had demonstrated a clear unwillingness to resolve the matter, especially in light of the fact that Mr Crown had specifically met with Mr Maag and sought advice as to what he could do to resolve things. Further, Mr Maag's gave oral evidence at the investigation meeting that at the time he had his discussion with Mr Crown he was still hopeful matters could be resolved. Having given Mr Crown advice on that issue he did not, at the time these allegations were being discussed by the Trustees, check as to whether Mr Crown had followed his advice to resolve the matter.

[20] It was not until 7.30pm on 4 July that Mr Maag contacted Mr Walker to see whether Mr Crown had been to see him. Mr Walker advised Mr Maag that he had not seen Mr Crown. Mr Walker took the opportunity to tell Mr Maag that after considering everything that had happened on 3 July, coupled with some past situations, he would not accept an apology as he felt he could no longer trust Mr Crown.

[21] I am not satisfied Mr Maag made any enquiries of Mr Walker as to what the past situations involved nor did he seek any further information from Mr Walker about his assertions. Mr Maag told me Mr Walker was clear that he could no longer work with Mr Crown as he could no longer trust him.

[22] On 5 July 2007 Mr Maag continued his email dialogue with the other Trustees. He conveyed Mr Walker's sentiment that he could no longer work with Mr Crown due to the break down in trust. Later that day the Trustees decided that they should support Mr Walker and that Mr Crown should be dismissed.

[23] Without any further ado, Mr Crown was dismissed by letter dated 6 July 2007.

[24] After receiving the letter of dismissal, Mr Crown wrote to Mr Murdoch Pahi the Board Chair and requested a review of the decision to dismiss him and asked for reinstatement. Mr Crown also requested that the Board and he enter into mediation to try and resolve the differences between them. This was declined. A subsequent request to meet one on one with Mr Pahi was also declined.

Serious Misconduct

[25] Mr Crown was subject to a written employment agreement. The employment agreement in schedule D describes what the parties to this employment relationship mean when they talk about Misconduct and Serious Misconduct. Failure to comply with lawful instructions is included in the definition of both misconduct and serious misconduct. The use of threatening or abusive behaviour is included in the definition of serious misconduct.

[26] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[27] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[28] The letter dated 6 July 2007 does not set out the actual reasons for dismissal. However the letter does make reference to Mr Crown's behaviour in the meeting on 3 July as being "...at times threatening and abusive". The letter also make reference to the fact that no amicable way forward was determined at the meeting. It was common ground that these allegations were never put to Mr Crown for his explanation.

[29] It was not until the respondent lodged its statement in reply that Mr Crown was advised he had been dismissed due to the employment relationship breaking down because there was no longer any trust between the applicant and the farm manager.

Procedural fairness

[30] Clause 8 of the agreement deals with terms of employment. Specifically clauses 8.3 and 8.4 state:

8.3 Disciplinary Procedures

The procedures set out in this clause are to be followed in circumstances where the matter(s) causing concern is/are not of sufficient seriousness to warrant summary dismissal.

8.3.1 The employee must be advised:

- (a) Of his/her right of assistance and/or representation at any stage;
- (b) Of the specific matter(s) causing concern and given an opportunity to state any reasons or explanation;

The employer will give consideration to the employees explanation and may choose to take no further action or, if warranted, issue a written warning, setting out:

- (i) The details of the complaint;
- (ii) The corrective action(s) required to remedy the situation;
- (iii) The timeframe in which the improvement is sought; and,
- (iv) The likely outcome if there is a further breach.

8.3.2 Under normal circumstances the first instance would entail a first written warning, a second instance a final written warning and the third instance could entail dismissal with or without notice.

8.3.3 Any action under this clause is to be recorded in writing and both parties are to receive a copy.

8.3.4 If, in the opinion of the employer, the situation warrants it, an employee may be suspended on pay pending the resolution of the matter(s) causing concern.

8.4 Summary Dismissal

8.4.1 The employer may dismiss the employee without notice for serious misconduct.

8.4.2 The procedure for summary dismissal will be as follows:

- (a) The employee must be advised of his/her right to assistance and/or representation at any stage.
- (b) The employer will advise the employee of the specific allegation, and the seriousness of the situation, and provide the employee with an opportunity to refute the allegation or explain the misconduct. If the explanation is not satisfactory to the employer, the employer will inform the employee that the allegations will be investigated further. The employee may be suspended, on pay to allow a full investigation to take place.

- (c) When the employer is satisfied that the matter has been fully investigated, the employer will arrange a meeting with the employee and make the findings of the investigation known. The employee will be allowed a reasonable and adequate opportunity to make further representations to the employer.
- (d) If the employer is satisfied there is just cause to dismiss, the employee must be informed of the decision to dismiss.

[31] It is well known and standard practice that an employer must tell an employee who is summoned to a disciplinary meeting that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* (unreported) Goddard CJ, 24 June 2004 CC13/04).

[32] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR set out what the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[33] On 4 July 2007 Mr Maag discussed the disciplinary process with Mr Walker and sought his input. Mr Maag accepted Mr Walker's advice that he [Mr Walker] could no longer work with Mr Crown and that there were other instances of misconduct which had led him to that conclusion.

[34] Mr Maag seems to have accepted that advice as being the truth of the matter and passed that information onto the Trustees during their dialogue over Mr Crown's fate. Without any further reference back to Mr Crown, a decision was then taken to dismiss him.

[35] There are some fundamental flaws in the procedure used by the respondent in reaching its conclusions to dismiss. I accept Mr Crown's evidence that when he walked into the meeting on 3 July he felt intimidated by having to face four Trustees when he was expecting to meet only with Mr Maag and Mr Walker.

[36] I am satisfied Mr Crown went into the meeting not knowing that the incident from Sunday evening had escalated to serious misconduct. I accept he was given a letter, but he had no opportunity to read the letter until after he had entered the meeting room. This letter advised him he could have a support person, however, there was no indication that his job was at risk. Indeed at the time Mr Crown went into the meeting I am satisfied there was no thought by

anyone that Mr Crown may be dismissed. This conclusion is supported by Mr Maag's oral evidence at the investigation meeting that until the decision was taken to dismiss Mr Crown, he was always hopeful matters could be resolved.

[37] Following the meeting on 3 July 2007, the allegations against Mr Crown changed from failing to comply with a lawful instruction, to using threatening and abusive behaviour. These new allegations were never put to Mr Crown and he was never provided with any opportunity to comment or explain. These failures are in direct breach of the employment agreement, in particular the procedural steps set out at clauses 8.4.2 (a) to (c). An employer who fails to follow its own prescribed process in pursuing disciplinary action against an employee is in a very tenuous position.

[38] I have reached the conclusion that on the balance of probabilities the respondent's process in effecting the dismissal was unfair and the consequential dismissal which resulted from it can not be allowed to stand. I accept that Mr Crown's conduct at the end of the meeting on 3 July was not good. He became angry and upset and walked out of the meeting after he felt he wasn't being listened to. That does not justify the respondents' behaviour in failing to conduct a proper enquiry into matters in contention.

[39] A fair and reasonable employer in the circumstances of this case, would have set out the new allegations made about Mr Crown, given Mr Crown a reasonable opportunity to reflect on the allegations and to take advice. Further, a fair and reasonable employer would have ensured Mr Crown was in a position to appreciate the significance of his responses. In other words, a fair and reasonable employer would have made clear to Mr Crown that his job was now at stake.

[40] Mr Crown has been unjustifiably dismissed and is entitled to remedies.

Remedies

Contribution

[41] I am bound by section 124 of the Act to consider the extent to which Mr Crown's actions contributed towards the situation that gave rise to his personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[42] As stated earlier, I am satisfied that Mr Crown did become angry and frustrated in the meeting on 3 July and that he left abruptly. However, I have

accepted Mr Crown's evidence and find that it was more likely than not that he was intimidated by the fact that he was facing three Trustees and the Farm Manager when he was only expecting to be meeting with Mr Maag and Mr Walker. As to the threats and abusive behaviour, Mr Maag notes that a discussion took place about a bonus Mr Crown had received the year before in recognition of his good work. Mr Crown was reminded of the bonus and he offered to give it back. The evidence produced at the investigation meeting does not support a finding that Mr Crown acted in an abusive or threatening way.

[43] I am not satisfied it is just to reduce the remedies in this case. Mr Crown's actions have not contributed towards the situation that led to the unjustifiable dismissal such that would require a reduction in either the nature or extent of the remedies to be awarded to him.

Lost wages and interest

[44] Mr Crown was dismissed on 6 July and was paid one months notice. He found alternative employment which he commenced on 4 September 2007. I award Mr Crown lost income for four weeks.

Te Hape B and Tiroa E Trusts are ordered to pay to Mr Crown, four weeks pay (\$2,541.66 gross) as reimbursement for lost wages within 28 days of the date of this determination.

[45] Mr Crown seeks payment of interest on the above amount. The Authority has discretion to award interest on orders involving the recovery of any money.

[46] The interest calculated under clause 11 of Schedule 2 of the Employment Relations Act is to be at a rate not greater than the 90-day bill rate at the date of the order plus 2 per cent. Interest is to be paid at the rate of 9% on the above sum.

Te Hape B and Tiroa E Trusts are ordered to pay to Mr Crown, interest on the sum of \$2,541.66 at the rate of 9% per annum for the period 9 July 2007 down to the date of payment.

Reimbursement for the costs of moving

[47] Mr Crown seeks a payment for the reimbursement of the costs involved in him moving his family and household effects to his new location. There is no evidence to show how Mr Crown's claim is made up nor is there any documentation before the Authority to support such a claim. In those circumstances I decline to award an amount for the reimbursement of the costs of Mr Crown moving his family and personal effects.

Compensation

[48] The evidence with regard to the hurt, humiliation and distress caused to Mr Crown as a result of his dismissal was scarce. I am satisfied it was a distressing time for him. He had been living in the farm house and was given three weeks notice to remove himself, his wife and their four children. Mr Crown sought the assistance of the Tenancy Tribunal which ruled that he and his family could remain in the house until his personal grievance was resolved or he found new employment.

[49] Mr Crown wrote several letters to the respondent seeking meetings and/or mediation to resolve the issues between them. Those requests were met with a negative response.

[50] In coming to my conclusions under this heading I have taken into account that Mr Crown obtained appropriate alternative employment fairly quickly and this must have reduced his ongoing distress.

[51] In all the circumstances I assess compensation for distress at \$5,000.

Te Hape B and Tiroa E Trusts are ordered to pay to Mr Crown, \$5,000 pursuant to section 123(1)(c)(i) within 28 days of the date of this determination.

Costs

[52] Mr Crown has not sought a contribution to costs in his statement of problem, however it is common practice for a successful party to receive a contribution to costs. Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority