

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Wendy Dickson (Applicant)
AND New Zealand Grazing Company Limited (Respondent)
REPRESENTATIVES Grant Wilkin, Counsel for Applicant
Alex Hope, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 27 October 2005
11 November 2005
3 February 2006
SUBMISSIONS RECEIVED 27 February 2006 and 20 March 2006
DATE OF DETERMINATION 7 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This matter first came to the Authority by way of a *Statement of Problem* received from Ms Dickson on 2 May 2005. Ms Dickson claims that she was unjustifiably dismissed effective from 17 March 2005. Ms Dickson also claims that she has a further personal grievance in that she was disadvantaged in her employment by certain unjustified actions by her employer that led her to tender her resignation. Ms Dickson seeks that the Authority finds that she has these two personal grievances and award her appropriate remedies, including loss of wages, payment for lost benefits, and compensation. Consistent with her claim for the loss of wages, is an allegation that the Respondent sought to enforce a restraint of trade provision and that this prevented her from taking up employment in the occupation that she is experienced in.
- [2] The Authority received a *Statement in Reply* on 20 May 2005, and then an *Amended Statement in Reply and Counterclaim*, from the Respondent on 12 September 2005. The counterclaim is that Ms Dickson breached the duty of fidelity owed to her employer by failing to advise the New Zealand Grazing Company Limited (“NZGC”), that a previous employee, Mr Bruce Fraser-Jones, was operating a business in direct competition, and that she had knowledge that Mr Fraser-Jones had contracted with farmers, that were NZGC clients that Ms Dickson had previously managed for the company.

As an alternative action, NZGC claimed that Ms Dickson had breached the restraint of trade covenant provided in her employment agreement in that she specifically assisted Mr Fraser-

Jones in the operation of his business.

However, on 3 February 2006, NZGC withdrew and discontinued this counterclaim.

In regard to remedies for the loss of potential income associated with the loss of certain clients, that NZGC allege Ms Dickson was aware of, and could have prevented, had she carried out her responsibilities to her employer, NZGC seek an order against Ms Dickson for the sum of \$25,601.50.

Background Facts and Evidence

- [3] The primary business of New Zealand Grazing Company Limited is to arrange for the grazing of young dairy animals – weaners and heifers. The animals are usually owned by dairy farmers who for economic reasons, prefer to graze the young stock away from their own farms. The dairy farmers pay for the grazing and are offered various choices as to the target weight they wish to have their stock grown to. The outcome that is sought by the dairy farmers is to have their young stock grown as well as possible in order to obtain greater productivity when the young stock enter the milking herd.
- [4] Because NZGC does not own any land, it contracts with a number of farm owners (graziers) who provide the grazing for stock. NZGC makes its margin by buying the grazing rights in for less than it charges the dairy farmer. NZGC also adds value through its systems for managing the growth and wellbeing of the animals and this includes weighing and weight monitoring of them.
- [5] Mr Ian Wickham is the Managing Director and a shareholder in NZGC. He incorporated the Company in 1987. Mr Wickham told the Authority that one of the key aspects of the business is the relationship that the Company’s personnel develop with dairy farmer clients and the graziers. Dairy farmers entrust their stock to NZGC to look after and graziers are dependant upon the Company providing sufficient stock numbers in order to maintain their level of income. The Company employs Service Managers to carry out this role.
- [6] Ms Dickson was employed as a Service Manager, taking up this role on 6 October 2003. She had previously been employed by the Company in the roles of Weigh Technician and Sales Agent. She worked with Mr Fraser-Jones who was the Senior Service Manager for the Company at that time. Mr Fraser-Jones later resigned from the employment of the Company and ceased his employment on 30 September 2004. He subsequently set up a grazing business called Waikato Heifer Growers Limited in direct competition with NZGC.
Ms Dickson succeeded Mr Fraser-Jones as the Service Manager for the South Waikato Region.

Matters leading up to the resignation/dismissal of Ms Dickson

- [7] The evidence of Ms Dickson is that she went on leave from 29 December 2004 and resumed work again on 24 January 2005. Ms Dickson acknowledged that at the time she went on leave, she had not signed up contracts for as many stock as she had hoped. However, she says that a number of her regular clients had advised her that they were unsure if they would re-sign contracts with NZGC for that season, but at that stage she did not have any concerns.
- [8] Ms Dickson says that when she returned from her leave she got back into working with existing clients including the weighing of stock; [“and events overtook any thoughts concerning why dairy clients had not re-signed with the company, although I was in the process of chasing up clients as I realised by then that a reasonable number had not resigned with the company.”

- [9] The matter of less weaner stock being available to the Company was discussed at a Service Managers meeting on 11 February 2005. The minutes of that meeting record that there had been an intake of 2,961 as compared with 5,083 the year before at the same date. The minute also records that there was significant variation between the areas. The evidence of Ms Dickson is that Mr Wickham produced a graph at the meeting and Ms Dickson says that from the information provided, it was clear that the “heifer” numbers for the whole company were down.
- [10] The Authority has viewed this graph. It makes reference to weaners rather than heifers but apart from that, the clear impression gained from the graph is that while it shows that stock numbers attained are down across the Company compared with other years, there is clearly a variation in the stock numbers attained for the four regions covered by the Company. The stock numbers attained by Ms Dickson are less than the numbers attained by the other area Service Managers and considerably less than those attained in the area with the highest stock numbers.
- [11] On 16 February 2005, Mr Wickham had occasion to be driving past the farm of Mr Murray Gemmell, a farmer whom had grazed weaners for NZGC the year before, under the supervision of Mr Fraser-Jones, and whom Mr Wickham says was a potential grazier again for the Company for the 2004-2005 season. Mr Wickham says that he had discussed the retention of Mr Gemmell as a grazier with Ms Dickson. She had informed him that she had phoned Mr Gemmell a couple of times but he had not responded and she was not prepared to take the matter any further because Mr Gemmell had not bothered to return her calls.
- [12] Mr Wickham noticed that there were weaners on the Gemmell property and upon closer inspection, he was able to ascertain that they had Waikato Heifer Grower (“WHG”) ear tags. Mr Wickham then met with Mr Gemmell who explained that he had decided to become a grazier with WHG because he had always had good dealings with Mr Fraser-Jones and was happy to stay with the “man” rather than the company. Mr Gemmell acknowledged that Ms Dickson had contacted him but he had not responded to her.
- [13] Mr Wickham ascertained that the stock being grazed on the Gemmell farm belonged to Mr Gerald McDonnell, a good client of NZGC. Mr Wickham met with Mr McDonnell on 16 February 2005 and was informed by Mr McDonnell that he had decided to put his business with WHG for the same reason as Mr Gemmell. Mr Wickham’s evidence is that upon enquiring from Mr McDonnell if Ms Dickson knew that his weaners had gone to WHG, Mr McDonnell confirmed that she did. Mr Wickham showed Mr McDonnell a cell phone record of two calls made by Ms Dickson to Mr McDonnell on 29 October and 31 October 2004. Mr McDonnell confirmed that he would have informed Ms Dickson that his stock was going with Mr Fraser-Jones during those phone calls.
- [14] Also present at the meeting with Mr McDonnell was Mr McKee, another Service Manager with NZGC. He has verified much of what was discussed. Mr Wickham also wrote up some notes of the meeting immediately after leaving the McDonnell farm. Mr Wickham says that the notes were verified by Mr McDonnell. However, I note that Mr McKee’s evidence and Mr Wickham’s notes record that the meeting with Mr McDonnell took place on 18 February 2005 but it is unlikely that this is so. On the basis of the overall evidence, it appears more likely that the meeting with Mr McDonnell was on 16 February 2005.
- [15] Mr Wickham’s further evidence is that he spoke to Mr McDonnell’s son David McDonnell, much later (mid-2005), and was informed by David McDonnell that he had engaged in a

discussion with Ms Dickson, just before Christmas 2004, and had mentioned to Ms Dickson that his father had signed contracts with Bruce Fraser-Jones. Mr Wickham says that David McDonnell informed him that Ms Dickson did not express any surprise about this. Mr Wickham also says that Ms Dickson did not pass that information on to him.

- [16] Mr Wickham's evidence is that on the evening of what was probably 16 February 2005, he discovered during an internet company register search that Mr Fraser-Jones was actively involved as a director and shareholder of WHG. Following a meeting with others with an interest in NZGC, Mr Wickham decided to investigate the matter of why stock numbers attained by Ms Dickson were so low and concluded that he needed to discuss this with her. It was eventually agreed that they would meet at the Rose and Thorn Hotel, Te Awamutu, on Friday 18 February 2005.
- [17] In the meantime, Mr Wickham paid a visit to the farm of Mr and Mrs Calvert after discovering that they were grazing both NZGC and WHG stock. Mr Wickham had a discussion with the Calverts. His notes record that upon enquiring whether Ms Dickson was aware of the WHG stock being grazed by the Calverts and what she had said about that, Mrs Calvert replied: "Yes" and; "that it was our choice."
- [18] The evidence of the Calverts is that they did not convey any information about whether Ms Dickson was aware of the WHG stock on their farm. However, I conclude that the evidence of Mr Wickham is more probable as it appears that the Calverts are not very favourably disposed to Mr Wickham, due to some conflict in past business dealings between them.

The meeting between Ms Dickson and Mr Wickham on Friday 18 February 2005

[19] *Ms Dickson's evidence*

The evidence of Ms Dickson is that she was not particularly happy about meeting with Mr Wickham at a hotel at 4:30 on a Friday afternoon. Ms Dickson says that due to running late and having to change her clothes, having just finished work, it was 5:30 before she arrived to meet Mr Wickham. Ms Dickson told the Authority that the meeting commenced with Mr Wickham producing a client list and asking her about some of those clients and why they had not signed a further contract with NZGC. Ms Dickson says that she responded that she didn't know why but thought that some still might. Ms Dickson's evidence is that Mr Wickham then produced an envelope for her to open and it contained the following letter dated 18 February 2005:

"Hand delivered by Ian Wickham, Managing Director

Regarding: Your Employment

Dear Wendy

This letter is to inform you that I have some concern regarding the performance of your duties for this company.

I have reason to believe that you have entered into a paid grazing arrangement on you [sic] own behalf with one of our Graziers CF & JM Barker of Gribbon Road Mahoenui with regard to 24 weaners (born 2004) owned by yourself. I am concerned that this may be a breach of your employment contract and may amount to serious misconduct.

I am currently investigating my concerns and I require you to attend an investigation meeting with me at **9.00am on Friday 25 February 2005 in our office at 64-66 Vivian Street, New Plymouth.**

You will be given the opportunity to respond to my concerns.

You have the right to have a support person or representative present as well. The investigation is a serious matter and may lead to a formal warning or a dismissal.

Please confirm by 5.00pm Wednesday 23rd February, 2005 that you will attend this meeting.

If there is anything you would like to discuss in advance of the meeting, please do not hesitate to contact me.”

[20] Ms Dickson says that she was “stunned” by the content of the letter and was close to tears and felt “extremely vulnerable” being in a public place and did not want to break down emotionally in public. Ms Dickson says that she denied entering into a paid grazing arrangement with the Barkers but Mr Wickham appeared not to be listening; [“so I said to Ian Wickham words to the effect of; “You can have your job then.” Ms Dickson then left. She says the meeting lasted only about 10 minutes.

[21] *Mr Wickham’s evidence*

The evidence of Mr Wickham is that the meeting started about 4:30pm having been postponed from 3:00pm because Ms Dickson was running late. Mr Wickham’s evidence is that he wrote up some notes of the meeting at its conclusion. The Authority has viewed the notes and it is recorded that Ms Dickson left at 5:05pm. Mr Wickham also says that the meeting covered substantially more ground than Ms Dickson says. Apart from the matter of her stock being grazed at the Barker’s farm without a contract with NZGC in place, Mr Wickham says that he had with him *Stock Reconciliation Reports* and discussed the position pertaining to several clients not re-signing contracts with NZGC.

[22] The reports made available to the Authority show that Mr Wickham made brief notes of Ms Dickson’s response accordingly. I also accept that the meeting lasted somewhat longer than Ms Dickson says, albeit it ended on the same note, though Mr Wickham says that the letter in question was already open for Ms Dickson to read and the words that she used upon her departure may not have been heard clearly by him, as he has some hearing difficulty

Resignation

[23] Following the meeting at the Rose and Thorn Hotel, Ms Dickson says that she went home and wrote out her resignation and posted it to the NZGC office in New Plymouth. It appears that it was not received until one week later. The envelope is date stamped 22 February 2005. Ms Dickson indicated in her letter that she would be available to work until 30 April 2005 and that: “I have enjoyed working with you.”

[24] The evidence of Mr McKee is that he received a phone call from Ms Dickson sometime in the week before 25 February 2005 and Ms Dickson conveyed to him that: “Just keep it to yourself. I’m handing in my resignation. Just wait to you hear about it and give me any feedback you hear.” Mr McKee says that he was very surprised to receive this phone call but he was aware that Ms Dickson had called the other Service Managers and they had the same experience.

[25] The overall evidence points to the fact that Mr Wickham was unaware that Ms Dickson had formally resigned until the morning of 25 February 2005

Invitations to further meetings

[26] Consistent with Mr Wickham being unaware of Ms Dickson’s resignation, he wrote another letter to her on 24 February and indicated that because he had not had verification of

attendance at the meeting proposed for 25 February, he was now requiring her attendance at a meeting on 28 February 2005. In addition to wishing to speak to Ms Dickson about her attitude to other Service Managers and her reluctance to adapt to the use of new technology, Mr Wickham indicated that he wished to discuss:

“The lack of progress you are making in carrying out your Number 1 Primary Objective and the reasons for this. That is: “To establish, maintain and grow a safe, quality business in the designated area.” The area being South Waikato. As we have discussed previously your weaner numbers are particularly low and that is of concern. It is also of concern that you are not able to provide me with any cogent reasons as to why the numbers are so low.”

It was conveyed to Ms Dickson that her performance as a Service Manager was below the standard required and that discussion was necessary to ascertain why and what should be done.

- [27] The delivery of this letter came close to something resembling a French farce with Mr Wickham and another Service Manager, Mr Rushbrook effectively “staking out” Ms Dickson’s parent’s home, awaiting her arrival in order to give her the letter, and Ms Dickson being aware of this and avoiding going there. Eventually, the letter was left with Ms Dickson’s father and he agreed to give it to her.
- [28] Mr Wickham wrote again to Ms Dickson on 28 February 2005. He indicated that he had not yet decided whether to accept her resignation and that he wished to continue to investigate her performance. Mr Wickham also conveyed that he now wished to meet with Ms Dickson on 7 March 2005 and that if she did not attend, she would be failing to comply with a lawful requirement of her employer, and that would be grounds for instant dismissal. Mr Wickham also made reference to the activities of Mr Fraser-Jones and conveyed that:

“It is only fair to warn you that at this early stage of investigating the position with Mr Fraser-Jones, it appears to me that you may have given him some assistance in his activities of competing against us. If indeed that proves to be the case we warn you that the Company will be seeking compensation not only against Mr Fraser-Jones but also against yourself for all losses which the Company has incurred as a result.”

- [29] Ms Dickson sought legal assistance and subsequently mediation took place between the parties without success.

Meeting on 14 March 2005

- [30] This meeting took place at the office of NZGC’s solicitor. The evidence of Ms Dickson as to what was discussed at this meeting is lacking coherence and as with much of her other evidence, there is considerable ambiguity. Effectively, the evidence of Ms Dickson is that she was unprepared for the meeting, did not understand what it was all about and that she was not given an opportunity to give a reasonable explanation in regard to the matters that were put to her. Ms Dickson also says that she was upset by the manner in which questions were put her by Mr Wickham and that he; [“adopted a very aggressive and derogatory tone during the meeting and I was often interrupted when attempting to explain things.”
- [31] Ms Dickson was represented by an experienced employment lawyer (other than Mr Wilkin) and the Authority would have expected that had events transpired as Ms Dickson testifies, her previous lawyer would have been called as a witness to collaborate that evidence.
- [32] Nonetheless, one can understand why Ms Dickson may have been confused initially in regard

to the issues that were being investigated, as they had been conveyed to her in a variety of ways at various times before the meeting on 14 March 2005. However, this meeting was quite lengthy in nature, beginning at 1:45pm and concluding some time after 4:00pm, with an adjournment of some 15 minutes at one point. I have no doubts that by the time the meeting concluded, Ms Dickson was fully aware of what Mr Wickham's concerns were and why he was unhappy about her actions, or perhaps more to the point, her inaction. I am also satisfied that Ms Dickson was given a fair and reasonable opportunity to respond to Mr Wickham's concerns.

- [33] In contrast, the evidence of Mr Wickham is specific as to the matters that were put to Ms Dickson for her explanation and her responses are also clearly articulated. In summary, the substance of what was put to Ms Dickson for her explanation, was that Mr Wickham believed that Ms Dickson had previous knowledge of a major client with three farms, Mr McDonnell, placing his business with Mr Fraser-Jones, and she had failed to convey that to him. Also, others clients, including the Calverts, had placed their business with Mr Fraser-Jones and Ms Dickson was aware of that also and failed to notify Mr Wickham.

The dismissal

- [34] At the conclusion of the meeting on 14 March 2005, Ms Dickson was suspended from her employment on pay while Mr Wickham and his lawyer considered what action would be taken. Via a letter dated 17 March 2005 from NZGC's lawyer to Ms Dickson's lawyer, Ms Dickson was informed of her summary dismissal. The grounds for the dismissal are summarised in the letter:

"The end result is that Mr Wickham had reasonable grounds to believe that Wendy Dickson knew that Bruce Fraser-Jones and or WHG Limited were competing against NZ Grazing Company Limited and that she did not advise Mr Wickham of the competition and threat to NZ Grazing Company Limited and that on 11 February 2005 she stated expressly that the clients were not going elsewhere, when in fact Mr Wickham reasonably believes that she did know that they were going to Bruce Fraser-Jones and/or WHG Limited. At least 1,050 weaners and/or heifers which Mr Wickham would have expected to have been part of his business. Graziers who have used NZ Grazing Company Limited in the past have now signed contracts with Bruce Fraser-Jones and or WHG Limited.

Mr Wickham has not been able to calculate the losses to NZ Grazing Company Limited caused by the loss of the clients within Wendy Dickson's area, however he is able to say that the losses would run to tens of thousands of dollars.

It is Mr Wickham's view that Wendy Dickson's conduct amounts to serious misconduct."

Analysis and Conclusions

- [35] Having analysed the totality of the considerable evidence presented, the role of the Authority is to determine on an objective basis, whether the dismissal of Ms Dickson was justifiable. The Authority is required to consider whether Mr Wickham's actions, and how Mr Wickham acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.
- [36] It is not the role of the Authority to place itself in the shoes of Mr Wickham in regard to his analysis of the information that he had in his possession at the time the decision to dismiss was made. As the Employment Court has stated:

“A personal grievance is not an appeal to the Employment Relations Authority from the employer’s findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.” *Chief Executive of the Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at 184.

- [37] Ms Dickson had a duty of fidelity and good faith towards her employer. That duty is well recognised in common law and by the provisions of section 4 of the Employment Relations Act 2000. Section 1A of the Employment Relations Amendment Act (No 2) 2004, effectively codifies certain common law requirements. As was held by the Court of Appeal in *Tisco v Communication & Energy Workers Union* [1994] 2 ERNZ 779:

“Any conduct by an employee which is likely to damage the employers business, for instance by impairing its goodwill, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.”

- [38] The Court of Appeal returned to *Tisco* in *Big Save Furniture v Bridge* [1994] 2 ERNZ 507 at 517:

“As stated in *Tisco* the duty of fidelity and loyalty which an employee owes to his employer is broken when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee. Whether the conduct is sufficiently serious to warrant instant dismissal is a matter of fact and degree which must be judged against the circumstances of the individual case. One way of putting the essential question is to ask whether in the light of the employee’s conduct it is reasonable to expect the employer to continue to employ the employee.”

- [39] The essential question to be determined in this case is: Was the conduct of Ms Dickson sufficiently serious to warrant summary dismissal on the grounds that her conduct significantly undermined the relationship of trust and confidence that is essential to the employment relationship?

- [40] Ms Dickson says that she had no knowledge that the clients in question were entering into contracts with the competing business of Mr Fraser-Jones and that she simply thought that they didn’t wish to re-sign contracts with NZGC. I have to say that I simply do not find Ms Dickson’s position to be credible. It is clear that she was good friends with Mr Fraser-Jones and that regular contact existed. However, apart from that, the interviews that Mr Wickham conducted with various NZGC clients, Mr McDonnell and the Calverts in particular, verified that Ms Dickson was aware that NZGC was losing clients to Mr Fraser-Jones. Mr Wickham was reasonably entitled to conclude that she had been in possession of this knowledge for some time and had not seen fit to inform him.

- [41] Furthermore, I accept Mr Wickham’s evidence that at the Service Manager’s meeting on 11 February 2005, Ms Dickson, while acknowledging that the attaining of stock numbers in her region was reduced, also espoused the view the stock was not going elsewhere. I find that on the balance of probabilities, Ms Dickson did then know that some of her clients whom NZGC could reasonably have expected renewed contracts with, had gone instead to WHG, and for reasons perhaps only known to her, she did not see fit to inform Mr Wickham .

- [42] While I find that it is inconclusive whether Ms Dickson intentionally or deliberately withheld

the knowledge that she had from Mr Wickham, I do conclude that she had a duty to inform him of what was happening to certain stock in her region and that the failure to do so was an action or inaction, that significantly undermined the relationship of trust and confidence between her and her employer, to such a degree, that on any objective view, her dismissal was an action that was fairly and reasonably available to Mr Wickham. I find that the dismissal of Ms Dickson was justified

[43] While I accept that the process that was adopted leading up to the dismissal of Ms Dickson was flawed in some respects, I do not find that those flaws were of such degree to render her dismissal unjustified on procedural grounds, or warrant a finding of unjustified disadvantage. Even if I were to find otherwise, the substantive grounds pertaining to the dismissal are such, that any remedies that may have been available to Ms Dickson would be negated.

The counterclaim of the Respondent

[44] While I have found that the dismissal of Ms Dickson was justified on the grounds that she breached the duty of fidelity and loyalty owed to her employer, I am unable to find that her actions were the direct cause of a loss of income to NZGC. Perhaps if Ms Dickson had informed Mr Wickham that some of the NZGC clients had placed their business with WHG, then he may have able to take certain actions, such as an injunction to prevent further loss of clients and associated income. However, the causal link between the failure of Ms Dickson to convey the knowledge that she had to Mr Wickham, and the loss of income incurred by NZGC, is of sufficient uncertainty that I am unable to find that damages should be awarded.

Determination

[45] Upon a close consideration of the substantial evidence available to me and for the reasons set out above I find that:

1. The dismissal of Ms Dickson was justified. She does not have a personal grievance and the remedies that she seeks are declined.
2. I am unable to find that there is a certain causal link between the conduct of Ms Dickson and the loss of income incurred by New Zealand Grazing Company Limited and an award of damages is declined.

Costs

[46] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority