

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 76
5323722

BETWEEN ALEXANDRA MAY DIXON
 Applicant

AND SHAMROCK PASTURES
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Rex Hancock, Advocate for Applicant
 Nanette Bolstad, Advocate for Respondent

Investigation Meeting: 27 May 2011 at Christchurch

Determination: 31 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alexandra Dixon worked for Shamrock Pastures Limited in its dairy farm business in Canterbury from June 2010 until she was summarily dismissed on 28 September 2010 as a result of her incorrectly marking a cow during milking some days earlier. Ms Dixon says that she was treated differently from others, not afforded her rights under the contractual disciplinary procedure and dismissed for an undisclosed reason.

[2] Cliff Hocking and Belinda Hocking are the shareholders and directors of Shamrock Pastures Limited. They say that they justifiably dismissed Ms Dixon for serious misconduct following an investigation into the negligent actions of Ms Dixon that created a risk of substantial fines against the company.

[3] There are some evidential disputes that need to be resolved which I will do as part of explaining more fully the sequence of events.

[4] Neither party suggested that the statutory amendment to s.103A that came into force on 1 April 2011 is relevant and I agree that justification must be assessed in accordance with the pre 1 April 2011 law.

The performance review

[5] It is common ground that there was a performance review shortly before the events that led to Ms Dixon's dismissal. To summarise, it was agreed that Ms Dixon was not performing her work as a senior farm assistant to an adequate standard so she would relinquish some responsibilities and have her salary reduced. However, this got overtaken by the following events.

The incident

[6] On or about 23 September 2010 Ms Dixon and a junior employee (Ricky) were doing the milking. Ms Dixon was at *cups on* while Ricky was at *cups off*. Ms Dixon noticed a cow that she thought needed to be watched for retained foetal membrane (RFM). She marked it with red spray. The cow had tag 284 but Ms Dixon did not record that information anywhere.

[7] There is a dispute about where Ms Dixon put the marking. Penicillin cows are marked with a red cross on the udder. This cow should have been marked with a different colour above the udder. Any cow with that RFM marking would be allowed to exit the platform at *cups off* and return to the paddock. A penicillin cow or a cow identified as requiring penicillin would not be milked with the normal herd. Despite the red marking, Ricky did not identify this cow for drafting so it exited the milking platform and returned to the paddock with the normal herd.

[8] Ms Dixon and Ricky milked the herd for the next day or two. The usual practice is to rotate between *cups on* and *cups off*. Neither Ms Dixon nor Ricky identified the cow marked by Ms Dixon with red spray although it must have been milked each time.

[9] Mr Hocking and his second in command (Willie King) did the milking on Saturday 25 September 2010. Mr Hocking was at *cups on* and he noticed the red

marking on the cow as he was about to put the cups on the cow. His evidence, which I accept, is that he noticed the marking when other staff might not because he is very experienced and very vigilant. He stopped the platform. The board recorded cow 284 as a penicillin cow. It therefore appeared that the cow at the platform was a penicillin cow which might have been milked with the normal herd over previous days. Mr Hocking initiated protocols on that basis to mitigate the risk that the farm might have supplied contaminated milk to Fonterra. However, within a relatively short time Mr Hocking learnt that the penicillin herd included cow 284 so the cow at the platform could not be the one recorded as a penicillin cow.

[10] Meantime Mr King had been dispatched to get Ms Dixon from her house to come to the milking shed and help sort out matters. When she arrived Ms Dixon confirmed that the cow at the platform was different from the penicillin cow. At that point it became apparent that there were two cows numbered 284. Ms Dixon was asked why she used red spray and she said that there was no other colour available. In evidence she also accepted that she might have been asked about where the cow should have been marked. Accordingly I accept Mr Hockings evidence that he did ask this. It further leads to the conclusion that Ms Dixon must have marked the cow on rather than above the udder. If the cow had been marked in the correct position there would have been no need for the question.

[11] Mr Hocking's evidence is that he told Ms Dixon that he would investigate further and she would be required to come to a meeting to discuss the outcome after her rostered days off. Mr Hocking also says that he told Ms Dixon that she was entitled to bring a support person or representative with her. The company in its statement in reply asserts that Ms Dixon was told that the meeting would be at 2pm on Tuesday but that is not the evidence.

[12] Ms Dixon's evidence is that there was no mention on the Saturday about further investigations, a meeting or her right to support/representation. She says that the first she knew about the proposed meeting was on Tuesday morning when she was told that there would be a meeting that afternoon. Nothing was said to her about representation at that point either. I prefer Ms Dixon's evidence on these points. I note that Mr Hocking sent Ms Dixon a text message at about 1.30 pm on the Tuesday

in which he mentioned Ms Dixon's right to representation or support and I accept her evidence that this was the first point at which it had been mentioned.

The dismissal

[13] Present at the meeting on 28 September 2010 were Ms Dixon, Mr Hocking and Mrs Hocking.

[14] It is common ground that Mrs Hocking asked at the outset whether Ms Dixon would be accompanied by a support person and offered to defer the meeting if Ms Dixon needed that but the offer was declined. That evidence resolves the complaint about the company not advising Ms Dixon of her right to representation. Mr Hocking explained that Ms Dixon had used the wrong colour spray and marked the cow in the wrong place which resulted in the concern that it might have been a penicillin cow and milked with the normal herd. He told her that she had failed to draft the cow out of the main herd as should have happened for a penicillin cow. Ms Dixon said that she marked the cow with red spray because that was the only colour available but accepted that she knew the correct procedure. Mr Hocking referred to the risk that the company had been exposed to because of the serious financial consequences of supplying contaminated milk. Mr Hocking went on to say that they were left with no choice but to dismiss Ms Dixon for serious misconduct effective immediately.

[15] When told of the dismissal Ms Dixon got upset and began to cry. Mrs Hocking asked if there was anyone who they could call, such as family. Ms Dixon declined because she was concerned about how her parents might react. Mrs Hocking told Ms Dixon that they would keep it confidential so it was up to her to speak to her parents and friends and tell them whatever she wished about what had happened. Finally Ms Dixon was told that while normally the supplied accommodation had to be vacated within 48 hours she could take longer to clear out her possessions.

[16] Later Ms Dixon received a letter from Mr & Mrs Hocking confirming the dismissal which in part reads:

Further to our meeting with you on Tuesday 28 September 2010 concerning the incorrect marking of a cow in main herd, creating a penicillin cow. As we discussed with you, this is regarded as serious misconduct because the cow was left in the main herd marked as a penicillin cow and was subsequently milked.

Justification

[17] Whether the decision to dismiss Ms Dixon was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[18] S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made. In addition, the employment agreement between Ms Dixon and the company says:

- 9.4.2 *The procedure for summary dismissal will be as follows:*
- a. *The employee must be advised of his/her right of 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.*

[19] The evidence for the company is that there were discussions about Ms Dixon's actions between Mr Hocking, Mr King and Mrs Hocking prior to the meeting on Tuesday 28 September 2010. Mr Hocking put it this way *Both Willy and I agreed that Alexandra should face serious disciplinary action for creating the situation and putting the farm at serious risk and I discussed these findings with Belinda [Hocking] later on in the day and she concurred with the findings of our investigation. Mr King's evidence is As it was found that Alex was responsible for the incorrect marking and the potential risk of a significant fine, the disciplinary action to be taken*

against her was determined to be a higher level. Mrs Hocking gave the following evidence: *Cliff, Willy and I discussed what was to be done about Alexandra's involvement as hers was by far the most serious and came to the conclusion that it was serious misconduct as she had knowingly marked the cow and returned it to the herd even though she was well aware of the implications and protocols on the farm.* In her oral evidence, Mrs Hocking attempted to soften the picture of pre-determination by saying that she and Mr Hocking had decided that Ms Dixon would be dismissed unless she gave a reasonable explanation during their meeting. However, I find that the overwhelming picture that emerges from the evidence is that Mr & Mrs Hocking decided that Ms Dixon should be dismissed for serious misconduct before the Tuesday meeting. In doing so, the company breached its contractual and statutory obligations. A fair and reasonable employer would not have acted in this way.

[20] There is evidence for the company to the effect that Mr Hocking fully investigated matters before the Tuesday meeting. Upon scrutiny what that referred to (about from the exchange with Ms Dixon on the Saturday morning) was Mr Hocking asking Ricky what he knew about the cow. Ricky said he knew nothing. That was never put to Ms Dixon prior to the decision to dismiss her. Her evidence is that Ricky knew about the cow because she told him to watch for it coming off the milking platform. Mr Hocking obviously accepted what Ricky said but failed to ask Ms Dixon about her exchanges with Ricky. If he had, Ms Dixon could also have told him that she had asked Ricky to check in the office for a different coloured spray can but was told that there were none. Ms Dixon could also have said that she had requested some more spray cans a day or two earlier. In evidence Mr Hocking claimed that there were other colours available in the office but when questioned he acknowledged that he never actually checked at the time to see if that was so. From this I conclude that the company failed to *fully investigate* despite being contractually required to do so. A fair and reasonable employer would have fully investigated matters.

[21] The case for the company is that Ms Dixon's actions created a risk of serious financial consequences. The statement in reply describes it thus:

Miss Dixon was dismissed for using incorrect markings and procedures, resulting in farm income and reputation being put at an unnecessary high risk.

[22] No fair and reasonable employer could have reached that conclusion in the circumstances. Ms Dixon incorrectly marked the cow, leading Mr Hocking to think it might be a penicillin cow; but it never was. Mr Hocking's initial fear was quickly dispelled. There was never a risk of any financial consequences. Marking the cow incorrectly did not turn it into a penicillin cow so as to impose an obligation for it to be drafted off and only milked with the penicillin herd. I also accept the evidence that the primary obligation for drafting was with the person working at *cups off*, or in this case Ricky. At worst, Ms Dixon failed to comply with *general rules or lawful instructions* regarding correct markings, a misdemeanour that the employment agreement identifies as ordinary misconduct for which warnings must precede dismissal.

[23] I should note that if the company had applied the procedure in the employment agreement for dealing with serious misconduct it probably would not have made the fundamental error just mentioned. The agreement requires the employee to advise the employee of the *specific allegation*. The allegation is described in the dismissal letter as *creating a penicillin cow which was left in the main herd marked as a penicillin cow and was subsequently milked*. If the allegation had been put to Ms Dixon in that manner, if she had been given a proper opportunity to respond and if her response had been considered with an open mind the company could not have concluded that she was guilty of *creating a penicillin cow*.

[24] Another part of Ms Dixon's grievance is that she was treated differently from Ricky who received a verbal warning for not noticing the marking on the cow. Given the foregoing findings about the company's fundamental errors it is not necessary to comment further on this aspect.

[25] Ms Dixon also says that she was dismissed because the company's agreement was due to end in May 2011. I do not accept this view. Ms Dixon's employment agreement could have been justifiably terminated for redundancy in due course. There is no reason to think that the company dismissed Ms Dixon pretending it was serious misconduct to avoid subsequently dealing with a redundancy situation.

[26] For the reasons explained above, Ms Dixon was unjustifiably dismissed and she has a personal grievance against her former employer.

Remedies

[27] I am required to consider the extent to which Ms Dixon contributed in a blameworthy way to the circumstances giving rise to her grievance. I find that Ms Dixon did so contribute. The incorrect marking caused some brief concern for Mr Hocking. Ms Dixon also failed to communicate with Mr King and Mr Hocking about why the cow needed to be watched. If she had done so the concern would not have arisen. Mr Hocking's evidence is that less experienced staff might have missed the marking on the cow in subsequent milkings without that necessarily amounting to carelessness on their part. Accordingly I do not find there was anything blameworthy in Ms Dixon not identifying the cow in the subsequent milkings leading up to the Saturday morning. The company must bear responsibility for the failure to properly investigate, the predetermination and the failure to properly identifying the nature of Ms Dixon's misconduct. I find that a reduction of 20% properly recognises Ms Dixon's blameworthy contribution.

[28] I am satisfied that Ms Dixon lost wages and other benefits as a result of her personal grievance. Her evidence is that she started relief milking at the end of November 2010 but had no other income before then. I have not been given any evidence about her earnings from that time on so the safest course is to limit the recovery of lost remuneration to the two months following the termination of her employment in respect of which the loss has been proven. Ms Dixon's salary inclusive of the employer's kiwisaver contribution was \$40,800.00 which means her lost remuneration for two months was \$6,800.00. After accounting for her contribution to the circumstances of the grievance there will be an award of \$5,440.00 (gross).

[29] There is a modest amount of evidence to establish that Ms Dixon suffered humiliation, injured feelings and lost dignity as a result of her grievance, all of which I accept. I assess an appropriate award to compensate her for that loss is \$5,000.00, subject to her contribution.

Summary

[30] Ms Dixon was unjustifiably dismissed.

[31] Shamrock Pastures Limited is to pay Ms Dixon the sum of \$5,440.00 (gross) pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000.

[32] Shamrock Pastures Limited is to pay Ms Dixon the sum of \$4,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[33] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority