

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 5
3007231

BETWEEN ALLAN DUNSTAN
Applicant

A N D SOUTH PACIFIC MEATS
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: David Beck, Counsel for Applicant
Max Williams, Counsel for Respondent

Investigation Meeting: 4 October 2017 at Christchurch

Submissions Received: 24 October 2017 for Applicant
1 November 2017 for Respondent

Date of Determination: 18 January 2018

DETERMINATION OF THE AUTHORITY

A. I decline Allan Dunstan's claim for a personal grievance:

- a. **South Pacific Meats Limited did not unjustifiably dismiss Mr Dunstan;**
- b. **South Pacific Meats Limited did not act in an unjustifiable way which caused disadvantage to Mr Dunstan's employment.**
- B. **South Pacific Meats Limited did breach s 63A of the Employment Relations Act 2000 but, given the circumstances, I will not award any remedy for this.**
- C. **South Pacific Meats Limited did not breach the duty of good faith and I will not impose a penalty.**
- D. **I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] Allan Dunstan worked for South Pacific Meats Limited from 1 August 2016 until 31 December 2016. He was employed as a labourer at the Malvern processing plant on what appeared to be two seasonal arrangements.

[2] During the time that he worked for South Pacific Meats, Mr Dunstan was involved in three incidents:

- (a) He urinated in an apron wash;
- (b) He pushed a fellow employee to the ground during an altercation; and
- (c) He crashed his car on company grounds as he was trying to retrieve his mobile telephone that he had dropped in the car whilst driving.

[3] Mr Dunstan received a final written warning for urinating in the apron wash. No sanction was imposed on him for the altercation with a fellow employee or the car accident as South Pacific Meats was carrying out an investigation into the incidents but never concluded this.

[4] The reason these two issues were not concluded is because Mr Dunstan's employment ended on 31 December 2016 and this made it unnecessary to complete the ongoing investigations.

[5] South Pacific Meats says Mr Dunstan was on a seasonal fixed term employment agreement and this employment ended on 31 December 2016 as set out in the employment agreement and in line with the season he was employed to work in.

[6] South Pacific Meats also says the incidences it was investigating had no direct bearing on Mr Dunstan's employment ending, as there was no requirement for him to work a new season based upon the plant's workload.

[7] Mr Dunstan says he was dismissed and this was unjustified. This is because he was not employed under a valid fixed term employment agreement and/or because the circumstances under which he signed the relevant employment agreement did not meet the bargaining requirements of s 63A of the Employment Relations Act 2000 (the Act).

[8] Mr Dunstan also complains that the final written warning he received was unjustified, which includes the way he was treated in the process leading up to the warning being issued. And he complains that, in many aspects of South Pacific Meats' dealings with him as an employee, it failed to comply with the duty of good faith.

Unjustified dismissal

Mr Dunstan's first period of employment

[9] Mr Dunstan applied for and was offered employment with South Pacific Meats in July 2016.

[10] On 13 July 2016 South Pacific Meats sent Mr Dunstan a letter offering him a full-time seasonal position for three months employment commencing on 1 August 2016.

[11] Mr Dunstan then signed an employment agreement dated 20 July 2017 (the First IEA). The First IEA recorded that an employee engaged in a seasonal role is not guaranteed or even inferred employment in a following season. It goes on to state that there may be insufficient work at the end of one season or the commencement of another to provide ongoing employment as a seasonal employee.

[12] The signature page of the standard employment agreement used by South Pacific Meats has a section which identifies the employees employment status. There are three options, “New Worker” subject to a 90 day trial period, “Seasonal Worker” with a season identified by type and date and “Casual”. Only one category of employment status is to be selected.

[13] The First IEA records Mr Dunstan’s employment status as a “New Worker” subject to a 90 day trial period. It also has recorded that he was employed for the “Bobby Calf Flexi” season from 18 July 2016 until 30 September 2016; however, the “Seasonal Worker” employment status was not selected.

[14] Whilst there is reference to Mr Dunstan being a new worker and subject to a 90 day trial period it is clear from the offer letter, the references in the First IEA to seasonal work and the First IEA having a “seasonal conclusion date” listed as 30 September 2016 that Mr Dunstan was employed on a fixed term. And Mr Dunstan knew this.

[15] Mr Dunstan’s case was first advanced on the basis that the First IEA did not comply with the statutory requirements set out in s66 of the Act and, in any event, his employment continued beyond the fixed term (if it did apply) so he became a permanent employee.

[16] The problem with this is that on 7 October 2016 Mr Dunstan signed a new employment agreement (the Second IEA). The Second IEA had the same provisions relating to seasonal roles and it had the employment status recorded as “Seasonal Worker” for the New Lamb/Local Trade Beef season from 1 October 2016 until 31 December 2016.

Mr Dunstan did not raise any issues with the Second IEA and worked under its terms until 31 December 2016.

[17] It is my view that the claims advanced relating to the First IEA are of no consequence. Mr Dunstan did not become a permanent employee because he continued to be employed by South Pacific Meats beyond 30 September 2016 or because the First IEA may not have complied with s66 of the Act. The Second IEA replaced the First IEA and this governed his employment and any termination.

Mr Dunstan's second period of employment

[18] Turning to the Second IEA Mr Dunstan says this employment agreement also failed to meet the requirements of s 66 of the Act and was not, therefore, a valid fixed term employment agreement.

[19] I am satisfied that Mr Dunstan was employed in accordance with s 66 of the Act, pursuant to the Second IEA:

- (a) South Pacific Meats and Mr Dunstan had agreed his employment would come to an end at the expiry of a period of time, complying with s 66(1) of the Act.

This is clearly stipulated in the Second IEA that Mr Dunstan signed and in oral evidence he confirmed he had read and understood the Second IEA, specifically the provisions relating to the term of the Second IEA and the nature of the fixed term arrangement.

It is also clear that Mr Dunstan knew of the seasonal periods of employment from his previous employment in the industry and his dealings with South Pacific Meats over the First IEA;

- (b) South Pacific Meats had genuine reasons for the employment ending at the expiry of this period and it advised Mr Dunstan of this, complying with s 66(2) of the Act.

I am satisfied that Mr Dunstan knew of the fixed term proposal and the reasons for it as this had been discussed with him when he first applied for work at South Pacific Meats and during his first period of employment, and this was evident from the First IEA and the Second IEA. The reason for Mr Dunstan's employment ending was a genuine one – South Pacific Meats operates a seasonal based processing plant and its employment needs are based around these seasons which vary in work type and amount. In this case, South Pacific Meats' seasonal requirements are a genuine reason for fixed term agreements and Mr Dunstan knew this;

- (c) The fixed-term agreement stated when Mr Dunstan's employment would end, complying with s 66(4) of the Act.

Bargaining for individual employment agreement

[20] An alternative argument advanced in the investigation meeting and articulated further in the submissions for Mr Dunstan was that, the Second IEA was procured in breach of s 63A of the Act. The argument being that South Pacific Meats failed to meet the requirements for good faith bargaining when it presented the Second IEA to Mr Dunstan for him to consider and sign (if accepted by him).

[21] Section 63A of the Act provides:

- (1) This section applies when bargaining for terms and conditions of employment in the following situations:
- (a) ...
 - (e) in relation to terms and conditions of an individual employment agreement, including any variations to that agreement:

(f) where a fixed term of employment, or probationary or trial period of employment is proposed:

(g) ...

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement under discussion; and

(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and

(c) give the employee a reasonable opportunity to seek that advice; and

(d) consider any issues that the employee raises and respond to them.

(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

[22] Mr Dunstan's evidence was that he was told around "mid-August 2016" that he would have ongoing work. However, this was not confirmed until 7 October 2016 when James McFarlane, a Personnel and Health and Safety Officer at South Pacific Meats, approached him and asked him "can you come and see me and you need to sign a new contract". Mr Dunstan went to Mr McFarlane's office and was presented with the draft Second IEA that he signed after receiving an assurance from Mr McFarlane that "nothing really has changed, hourly rate is the same all you need to do is just sign it."

[23] If this evidence is correct then it appears that South Pacific Meats has failed to advise Mr Dunstan that he is entitled to seek independent legal advice on the Second IEA nor has it provided him with a reasonable opportunity to obtain that advice.

[24] South Pacific Meats' evidence on this issue was less specific. Mr McFarlane and James Lynch¹ gave evidence and this was that the normal process for engaging employees on a subsequent fixed term agreement is that a manager would provide a copy of the proposed employment agreement to the employee to take away and consider prior to the

¹ Mr Lynch's evidence was provided by affidavit after the investigation meeting in response to questions I directed South Pacific Meats to investigate and report on, regarding the Second IEA and the circumstances leading up to and including, Mr Dunstan signing it.

commencement of the new employment. The employee would then sign it and return it if he/she was happy with it or he/she would discuss any issues with his/her manager or Mr McFarlane.

[25] Mr Lynch was not involved with presenting the employment agreements to employees in September or October 2016. He says a colleague, Moses Lolohea, undertook this task. Mr Lynch says he was aware that Mr Lolohea had meetings with employees to give them the proposed employment agreement and that Mr Lolohea followed up with employees.

[26] As well as giving evidence about South Pacific Meats' procedure for offering further periods of employment, Mr McFarlane said he did not recall speaking to Mr Dunstan as alleged, requiring him to sign the Second IEA. However, Mr McFarlane did say he might chase employees who had not returned the signed employment agreement to find out if there were issues or when it would be returned, he just did not recall doing this with Mr Dunstan.

[27] On the face of all of the evidence on this issue, it is possible that Mr Dunstan did not receive a copy of the Second IEA before he signed it on 7 October and he signed it with Mr McFarlane as he says. However, it is also possible that this did not happen based upon what South Pacific Meats says about its process, the confirmation that Mr Lolohea did undertake this process in September/October 2016 and that Mr McFarlane does not recall speaking to Mr Dunstan about signing the Second IEA as alleged.

[28] In order to resolve this conflict in the evidence and determine if the events did occur as Mr Dunstan has described I have considered a number of additional features of the evidence and the witnesses:

- (a) Mr Dunstan was absent from work from 27 September 2016 and remained off work around the time that the new fixed term season started.
- (b) Mr Dunstan's claim was advanced on the basis of the First IEA only. So, he was either deliberately misleading everyone (including his own counsel) about

only having one employment agreement or at the time of his dismissal and when he raised his claim he could not remember that he had signed the Second IEA. Either way this is significant given the precision with which he articulated the events surrounding the Second IEA in his brief of evidence, completed almost 12 months after the Second IEA was signed.

- (c) Mr Dunstan's recollection of dates that three significant events occurred during his employment were wrong and not simply by a few days. So, for example, he stated that he was suspended in September 2016 yet it was clear from other evidence that the events that gave rise to his suspension occurred in November 2016 and not September as he asserted.
- (d) Mr Dunstan could not remember the detail of various significant events that occurred around the end of 2016 in connection with his relationship with his wife. Either he was being deliberately evasive on these events when questioned or, again, his recollection of matters occurring in 2016 was not reliable.
- (e) The Second IEA was signed by Mr McFarlane on 29 September 2016 which is consistent with the South Pacific Meats' procedure for presenting new employment agreements to employees.
- (f) Mr Dunstan signed a declaration as part of the Second IEA, which states that he had received a copy of the agreement, he had read and understood the agreement, he had been advised that he was entitled to seek independent legal advice and he had been given a reasonable opportunity to seek that advice before signing the agreement.

[29] The result of this analysis is that I must accept that it is probable that Mr Dunstan did not receive the draft of Second IEA at the end of September 2016 as he was not at work. Had

he been at work then I think, on balance, that it would be likely that he was given the draft of the Second IEA.

[30] Further, whilst Mr Dunstan's evidence was not wholly reliable, in order to dismiss what he says about his meeting with Mr McFarlane I would have to conclude that he lied under oath – his evidence is more than just a comment that might reflect someone being mistaken about what occurred or misremembering an event or date. There is no basis for me to conclude that Mr Dunstan lied about this issue.

[31] Finally, South Pacific Meats cannot disprove what Mr Dunstan says. Mr McFarlane says it could have happened as he did chase up employees who had not signed their new employment agreements and he simply could not recall if he did or not with Mr Dunstan.

[32] So, my conclusion on the alleged breach of s 63A is that Mr Dunstan has satisfied me that he did not receive the draft Second IEA before he signed it on 7 October 2016 and as a result there is a breach of s 63A.

[33] However, further matters that arise from the evidence on this point are relevant to the breach of s 63A. In answer to my questions about this issue, Mr Dunstan said that when he looked at the Second IEA he realised it was the same as the First IEA so he signed it. Mr Dunstan was not prejudiced by the failure to provide the draft Second IEA to him in advance of him signing it because he knew what the agreement stated as it was the same as the one he had already signed and worked under.

[34] And, Mr Dunstan signed the declaration in the Second IEA stating he had been told he could get legal advice and he had an opportunity to do so. Mr Dunstan knew what he was signing because he read the Second IEA and/or because he had read the First IEA, which was the same, and he did not object to this part of the declaration, he did not strike it out nor did he ask about it or suggest he might need some time to take advice. Effectively he waived the option to take advice and, in my view, he would not have taken advice had he had time in any

event – he effectively confirmed he did not want to take advice or need to, by signing the declaration without any protest.

[35] These circumstances affect the remedies that I may award Mr Dunstan.

[36] In terms of remedies, it is important to note that s 63A provides that a breach does not affect the validity of the employment agreement. So this means Mr Dunstan cannot rely on this breach to support a claim for unjustified dismissal, on the basis that the Second IEA was not a valid agreement and South Pacific Meats could not rely on the fixed term provision to bring his employment to an end.

[37] It is possible that I could treat the breach of s 63A as a breach of s 68 of the Act i.e. a breach of the unfair bargaining provision. If there has been a breach of s 68 I can cancel the agreement pursuant to s 69 of the Act. In this case, I do not consider it appropriate to make an order cancelling the Second IEA as this was not a claim advanced by Mr Dunstan nor is it appropriate given my conclusions in paragraphs [33] and [34].

[38] The remedy that Mr Dunstan seeks for the breach of s 63A is a penalty. This is not a penalty pursuant to s 63A(3) as Mr Dunstan's counsel rightly concedes this was not sought within the requisite 12 month period. Rather Mr Dunstan's counsel submits that the breach of 63A is effectively a breach of good faith, particularly ss 4(4)(ba) and (bb) - the claim for a penalty for breach of good faith having been raised within the 12 month time frame. I accept this may be possible but given that the breach had no adverse effect on Mr Dunstan, as discussed above, I determine that it is not appropriate to award a penalty.

Conclusion on unjustified dismissal

[39] As there was a valid fixed term employment agreement, which was not displaced or affected in any way by the breach of s 63A of the Act, which expired thereby terminating the employment relationship, there is no dismissal and no basis for Mr Dunstan's unjustified dismissal grievance.

Unjustified action causing disadvantage

[40] On 16 November 2016 Mr Dunstan urinated in an apron wash. An apron wash is a wash station for cleaning prior to entry into a processing part of the plant. It transpires that Mr Dunstan was suffering from an enlarged prostate which caused him to need to urinate with very little warning. Mr Dunstan was not aware of this at the time but subsequently was diagnosed.

[41] This incident was reported to South Pacific Meats and it conducted an investigation and disciplinary process. The incident was a serious one because it related to a matter of hygiene, which is significant to South Pacific Meats and its operations.

[42] In the course of the disciplinary process, Mr Dunstan was able to submit a specialists report about his medical condition and explain that he had to urinate at very short notice.

[43] South Pacific Meats accepted this evidence and in the end decided Mr Dunstan should only receive a warning. It was satisfied that the event occurred and that whilst Mr Dunstan may have had limited control over the need to urinate and the time he had for this, he could have avoided using the apron wash.

[44] Mr Dunstan subsequently complained that this was an unjustified action both in terms of the process and the substantive decision to issue a warning.

[45] I have considered the process in light of the test for justification under the Act and am satisfied that South Pacific Meats met the requirements for procedural fairness:

- (a) it did investigate the allegation;
- (b) it did raise the allegation with Mr Dunstan providing him with all of the relevant material relating to its investigation and the allegation;
- (c) it met with Mr Dunstan and gave him an opportunity to respond to the material and the allegation;

(d) it listened to what Mr Dunstan said; and

(e) it considered Mr Dunstan's explanation as part of its decision making process.

[46] Also I am satisfied that South Pacific Meats' decision to impose a warning against Mr Dunstan was a decision a fair and reasonable employer could have come to in all of the circumstances.

[47] I conclude that South Pacific Meats' process, including any suspension was justified and the conclusion to issue a warning was justified. There is no basis for an unjustified action causing disadvantage grievance.

Breach of good faith

[48] In addition to the breach of s 63A of the Act giving rise to a penalty for breach of the duty of good faith, which I have already considered, Mr Dunstan claims a penalty for breach of good faith based on the following allegations:

- (a) South Pacific Meats failed to follow its own agreement on notification of change to employment status.
- (b) South Pacific Meats did not have an employment agreement for Mr Dunstan at the time he was dismissed.
- (c) South Pacific Meats did not follow a fair process in connection with two other disciplinary matters it was investigating in December 2016. It simply ceased any disciplinary process on the basis that the season had come to an end and Mr Dunstan's employment had terminated.

Change to employment status

[49] This allegation appears to be based on an assumption that Mr Dunstan was a permanent employee and any purported change to fixed term, that South Pacific Meats relied

on to terminate Mr Dunstan's employment, was not notified to him. It was raised in the statement of problem, which was premised on Mr Dunstan only ever having signed one employment agreement, the First IEA.

[50] It has since become clear that Mr Dunstan was employed on a fixed term agreement, the First IEA that came to an end and then he was employed for a second fixed term for which there was a signed agreement. There was no change in employment status that was not notified and this allegation cannot form part of any alleged breach of good faith.

No current employment agreement

[51] As with the previous allegation of breach of good faith this allegation, that there was no employment agreement for Mr Dunstan at the time of the termination of his employment, was set out in the statement of problem and based upon the incorrect assertion that there was no second fixed term agreement, i.e. the Second IEA.

[52] As there was a valid fixed term employment agreement at the time that Mr Dunstan's employment terminated this allegation cannot form part of any alleged breach of good faith.

Fair process for the other disciplinary matters

[53] On 13 December 2016, Mr Dunstan was involved in an altercation with another employee. The details of this altercation are not important for my determination. The essential element is that because of that altercation South Pacific Meats investigated what occurred to establish if a disciplinary process was required.

[54] Then on 17 December 2016, Mr Dunstan was involved in a car accident at work. Again, I need not set out the detail of this incident other than explain that South Pacific Meats also investigated this matter to establish if a disciplinary process was required.

[55] In the course of its investigations, South Pacific Meats invited Mr Dunstan to attend an investigation meeting.

[56] The meeting never occurred because Mr Dunstan's employment ended on 31 December 2017. South Pacific Meats did not offer him further seasonal work as there was insufficient work at the time.

[57] South Pacific Meats was entitled to investigate disciplinary and performance matters pertaining to Mr Dunstan. To the extent that it did this but did not resolve any issues because Mr Dunstan's employment had terminated, I cannot find any fault that would give rise to a breach of good faith.

Conclusion on claim for a penalty

[58] There has been no breach of the duty of good faith as alleged and I cannot impose a penalty.

Determination

[59] I decline Mr Dunstan's claim for a personal grievance:

- (a) South Pacific Meats Limited did not unjustifiably dismiss Mr Dunstan;
- (b) South Pacific Meats Limited did not act in an unjustifiable way which caused disadvantage to Mr Dunstan's employment.

[60] South Pacific Meats Limited did breach s 63A of the Employment Relations Act 2000 but, given the circumstances, I will not award any remedy for this.

[61] South Pacific Meats Limited did not breach the duty of good faith and I will not impose a penalty.

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority