

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 95
3031431

BETWEEN KIERAN FERGUSON
 Applicant

AND BW SILVESTER LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Roland Samuels for Applicant
 Bryce Silvester for Respondent

Investigation Meeting: 20 February 2019

Oral Determination: 20 February 2019

Record of Oral
Determination: 21 February 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Ferguson’s employment were affected to his disadvantage by the unjustifiable actions of BW Silvester Limited.**
- B. Mr Ferguson’s dismissal was unjustified.**
- C. BW Silvester Limited is ordered to pay to Mr Ferguson the following amounts within 28 days of the date of this determination:**
- a) Lost wages of \$4,515 net under s 123(1)(b) of the Act; and**

b) \$7,000 under section 123(1)(c)(i) of the Act.

D. The application for a penalty is declined.

E. Costs are reserved.

Employment relationship problem

[1] Mr Ferguson worked as a farm assistant for BW Silvester Limited from 2 October 2017 until his employment was terminated. BW Silvester owns and operates a dairy farm. Mr Ferguson's immediate manager was his father. Both his father and his father's partner worked on the farm.

[2] On 27 November 2017 Mr Ferguson suffered from a workplace injury which required him to be off work until 27 December. During this time he was in receipt of ACC payments.

[3] Mr Ferguson returned to work on 28 December. After taking 30 and 31 December off work he returned to work on 1 January 2018. On 3 January Mr Ferguson experienced pain relating to his previous injury and was unable to work. Although he was cleared to return to work on 18 March Mr Silvester advised Mr Ferguson he no longer had a job. This advice was confirmed in writing after Mr Ferguson approached Mr Silvester in April 2018.

Issues

[4] In order to resolve Mr Ferguson's employment relationship problems I must determine the following issues:

- a) Were one or more conditions of Mr Ferguson's employment affected to his disadvantage by the unjustifiable actions of BW Silvester and if so what, if any remedies should be awarded?
- b) Was Mr Ferguson unjustifiably dismissed and if so what, if any remedies should be awarded?
- c) Did BW Silvester breach its obligations of good faith and if so should a penalty be imposed?

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Disadvantage

[6] Mr Ferguson claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of his employer when he was issued with a written warning in January 2018. Warnings may be a disadvantageous action because they put an employee closer to dismissal than they would otherwise be without a warning on their record.

[7] Under s 103A of the Act I must objectively determine whether BW Silvester's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[8] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, BW Silvester sufficiently investigated the issues, raised its concerns with Mr Ferguson, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to issuing the warning.

[9] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Ferguson being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a action being found to be unjustified.

[10] There is no dispute that Mr Bryce Silvester, a director and shareholder, wrote the letter setting out the reasons for the written warning in January 2018. It was given to Mr Ferguson while he was absent due to his injury between 3 and 31 January.

¹ Employment Relations Act 2000 (the Act), s 103A(5).

[11] I am satisfied the letter was written in the absence of any meetings. This means Mr Ferguson was not provided with a reasonable opportunity to respond to Mr Silvester's concerns or for that response to be given genuine consideration.

[12] The failures by BW Silvester were not minor and resulted in Mr Ferguson being treated unfairly. The action by BW Silvester in issuing a written warning in the absence of any process was not the action an employer acting fairly and reasonably could take.

[13] Mr Ferguson has established one or more conditions of his employment were affected to his disadvantage by the unjustified action of BW Silvester and is entitled to a consideration of remedies.

The dismissal

[14] Mr Ferguson was injured in a work related accident. The injury was exacerbated on 3 January 2018 after he had returned to work on 28 December 2017. This resulted in Mr Ferguson taking further time off work for recovery.

[15] Between 3 January and 1 March Mr Ferguson was provided with medical certificates which cleared him to undertake light duties for three hours each day on 5 days of the week. The farm was not able to accommodate the light duties and so he did not attend work between 3 January and 2 March. With the exception of the medical certificate issued on 1 March, each of the medical certificates were provided to the farm manager.

[16] At his medical appointment on 1 March Mr Ferguson was cleared by his doctor to return to work on 18 March. Mr Ferguson met with Mr Silvester on 2 March and showed him his latest medical certificate. At that time Mr Ferguson advised Mr Silvester he was cleared to return to work on 18 March. Mr Silvester told Mr Ferguson that there was no job for him to return to.

[17] I have concluded Mr Ferguson's employment was terminated on 2 March when Mr Ferguson was told there was no job for him.

[18] I have concluded on balance that there were mixed reasons for the termination of employment. The first reason was the length of time Mr Ferguson had been away

from work and the second was because of his dysfunctional relationship with his father and his father's partner.

Incapacity

[19] Justifiability of dismissals for incapacity will depend on the particular circumstances surrounding the dismissal. An employer is not bound to hold a job open indefinitely for an employee who is unable to return to work.² An employer will be justified in dismissing an employee for long term absence where it can be shown that the decision was substantively and procedurally justified.³ Factors to be taken into account in determining justifiability include the terms of the employment agreement.⁴

[20] The terms of Mr Ferguson's employment were set out in a written employment agreement. The employment agreement allowed for the termination of Mr Ferguson's employment in the event that he was incapacitated or injured to the extent that he was unable to fulfil his duties under the agreement.

[21] In those circumstances the agreement required BW Silvester to consult with Mr Ferguson and take into account all relevant information or opinions provided during that consultation process. BW Silvester was required to take reasonable steps to obtain an informed medical opinion as to Mr Ferguson's ability to perform the required duties and to consider alternatives to termination.

[22] Before deciding termination of employment was the appropriate option BW Silvester was required to take into account:

- a) the nature of the injury including the prospect of recovery;
- b) the duration of Mr Fergusons employment;
- c) his position and the length of time the position could reasonably be held open;

² *Lal v The Warehouse Ltd* [2017] NZEmpC 66 at [30].

³ *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585; *Dunn v Waitemata District Health Board* [2014] NZEmpC 201 at [25].

⁴ Above n 2 at [33].

- d) whether the injury, being work related would justify a lengthier absence from work than otherwise; and
- e) any circumstances in addition to medical reports, Mr Ferguson wished to put forward to BW Silvester.

[23] Mr Silvester did not follow the requirements set out in the employment agreement. These failures and the failure to enquire into Mr Ferguson's prognosis and ability to return to his role before making the decision to end the employment relationship have rendered the decision to dismiss unjustified.

Relationship with his father

[24] During Mr Ferguson's absence in January and February the brother of Mr Ferguson's father's partner was employed to replace him. At the investigation meeting Mr Ferguson told me his relationship with his father was "rocky" and he did not get on at all with his father's partner.

[25] At the investigation meeting Mr Silvester told me he felt he had to choose between retaining Mr Ferguson's father and his partner and his partner's brother or Mr Ferguson. He decided to keep the three workers he had and let Mr Ferguson go because if he kept Mr Ferguson on it was highly likely he would lose the father's partner and her brother.

[26] Mr Silvester did not put any of this to Mr Ferguson prior to making his decision to end the employment relationship with Mr Ferguson.

Conclusion

[27] Evaluating Mr Silvester's actions against the objective standard of what a fair and reasonable employer could have done in the circumstances I have concluded BW Silvester Limited has acted unjustifiably. BW Silvester's actions also fell well short of the obligation on employers to be constructive in maintaining a productive employment relationship.

[28] Mr Ferguson has established a personal grievance and is entitled to a consideration of remedies.

Remedies

[29] I have taken a global approach to remedies for both personal grievances. In his statement of problem Mr Ferguson seeks the payment of lost wages and compensation.

[30] Mr Ferguson obtained alternative employment and was working by 20 April 2018. He was out of work for a period of seven weeks. He is entitled to reimbursement of lost wages for this period which amounts to \$4,515 net.

[31] I received little evidence of the impact of the dismissal on Mr Ferguson. He told me he had to rely on his mother and others for payment of debts and for transport to and from job interviews.

[32] The evidence is at the lower end of the scale and an appropriate amount of compensation under s 123(1)(c)(i) of the Act is \$7,000.

[33] Under s 124 of the Act I must consider whether any remedies awarded should be reduced due to the conduct of Mr Ferguson if his conduct contributed to the situation giving rise to his grievances. There is no evidence sufficient to make such a reduction.

[34] BW Silvester Limited is ordered to pay to Mr Ferguson the following amounts within 28 days of the date of this determination:

- c) lost wages of \$4,515 net under s 123(1)(b) of the Act; and
- d) \$7,000 under section 123(1)(c)(i) of the Act.

Penalties

[35] The statement of problem lodged on Mr Ferguson's behalf sought penalties for "breach of good faith pursuant to s 4A [of the Act]". No further detail about the nature of the breach was provided. I am unwilling to make penalty orders where the basis for the claim is unclear. The application for the imposition of penalties is declined.

Additional claims

[36] Additional claims for arrears of wages including holiday pay were made in the submissions made on behalf of Mr Ferguson. These claims were not signalled in the

statement of problem, nor during the investigation meeting. BW Silvester has not been put on notice of these claims and has been unable to defend them. It is not appropriate to raise new or additional claims for the first time in submissions.

[37] It is open for Mr Ferguson to make a claim for arrears of wages if he wishes but these matters do not fall within the scope of this determination.

Costs

[38] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Ferguson shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. BW Silvester shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[39] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority