

[3] Mr and Mrs James deny the claims.

Disadvantage

[4] Mr Foote claims he was disadvantaged in his employment because of bullying he suffered at the hands of Mr Heather and that he was required to work for nine weeks undertaking calving duties without time off and worked for eight weeks undertaking AB and Natural Mating duties without any time off.

[5] I am required to examine Mr and Mrs James actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 the dismissal or action occurred.

[6] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Mr and Mrs James actions disadvantaged Mr Foote in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[7] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Mr and Mrs James establish justification for a disadvantageous action, there is no grievance.²

[8] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

Bullying by Stan Heather

[9] Mr Foot says he was bullied, intimidated, assaulted, harassed, threatened and verbally taunted by Mr Heather. Mr Foote says he raised these issues with Mr and

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

Mrs James and asked for assistance. He says Mr and Mrs James failed to address the issues and ultimately Mr Foote lodged a formal complaint with the Police.

[10] Mr Heather says Mr Foote was an extremely slow worker, who would not undertake tasks as required of him and would not listen when given instructions. Mr Heather told me he became extremely frustrated by Mr Foote's slow work rate and that he probably yelled at him from time to time. Mr Heather denies intimidating Mr Foote, and says that he himself felt intimidated by Mr Foote.

[11] On or about 15 July Mr Foote says he was asked to work in the dark and wet and that he suffered an accident as a result. Mr Foote says he had advised Mr Heather it was too dangerous to perform the task in the dark and wet however, he was instructed to do so.

[12] Mr Heather was on annual leave at this time. He had asked Mr Foote to put up a small fence to stop the stock breaking through as the farm was getting short on grass. Mr Foote had not completed the task during the day and when Mr Heather discovered it had not been done, required Mr Foote to complete the task before he finished for the day. Due to a combination of the natural lay of the land where the fence was needed, and the rain, Mr Foote slipped and injured his ankle. He was off work for the next two days.

[13] On 10 December 2008 Mr Foote reported to the Opotiki Police Station that he had been subject to an assault and intimidating behaviour by Mr Heather. Coincidentally this was the same day Mr Foote was invited to his first disciplinary meeting with Mr James. Mr Foote's statement to the Police describes two incidents.

[14] The first occurred on 28 October 2008 at about 11.50am. Mr Foote had come down off a hillside where he had been spraying weeds. Mr Heather approached him and told him to go back and finish the spraying. Mr Foote says he told Mr Heather he was entitled to take time out for lunch at which time Mr Heather grabbed his sleeve and manhandled him.

[15] In his oral evidence Mr Heather told the Authority he had asked Mr Foote to put the tractor up on the hill as he had to shift the herd into another paddock. Mr Foote was heading back to the shed at about 11.00am. Mr Heather says Mr Foote told him he was off for his lunch and therefore did not have to listen to him. Mr Heather acknowledges grabbing Mr Foote by the shirt sleeve out of frustration.

[16] The second incident is reported as occurring on 21 November 2008 as Mr Foote was spraying weeds in a paddock. Mr Foote reports that Mr Heather and he argued about his hours worked and Mr Heather threw a bucket of water over him twice.

[17] Mr Heather told me Mr Foote and Mr Roger Merrimen a relief farm worker, had been spraying a paddock while Mr Heather had gone into town to pick up some farm supplies. He says that while he was gone, Mr Merrimen had become frustrated with Mr Foote's slow work rate and the two had had words. On his return to the farm Mr Heather, Mr Foote and Mr Merrimen had a lunch break.

[18] After lunch Mr Merrimen assisted Mr Heather with the milking while Mr Foote was to continue the spraying and finish the paddock. After the milking had been completed Mr Heather checked up on Mr Foote to see if the spraying had been completed. Mr Heather says he found Mr Foote sitting down and not working. Mr Foote asked Mr Heather what time he would be finishing. Mr Heather told him he would finish when the job was done. Mr Heather says Mr Foote then demanded to be paid overtime.

[19] Mr Foote then made a personal comment about Mr Heather's sons, at which time he tipped a bucket of water over Mr Foote. The diary notes provided by Mr Heather indicate he threw two buckets of water at Mr Foote. At the investigation meeting Mr Heather acknowledged that he lost his temper with Mr Foote.

[20] Following this second incident Mr Foote left the worksite and went home. He says Mr Heather followed him on his ATV and drove into the rear of the ATV being used by Mr Foote. Mr Heather then picked up a spare ATV wheel and threw it at Mr Foote's car.

[21] Mr Heather acknowledges that he did follow Mr Foote home and they had words, but that when he went to get off his ATV it kept moving forward and moved into the ATV Mr Foote had been using but Mr Foote was not on it at the time. Mr Heather also says that he did not throw the tyre at Mr Foote's car, rather he was rolling it toward the ATV as he was taking it away to use it, and it rolled into his car. At the investigation meeting Mr Heather accepted that he was angry with Mr Foote at the time of this incident.

[22] As a result of Mr Foote's formal complaint to the Police Mr Heather received a formal warning both verbally and in writing.

[23] That same day on 10 December Mr Foote advised Mr James for the first time, about the conduct and behaviour of Mr Heather and asked Mr James to do something about it. In answer to questions at the investigation meeting Mr Foote accepted that Mr James asked Mr Foote to put the details in writing for him. Rather than do that Mr Foote provided Mr James a copy of the Police Report.

[24] Clearly Mr Heather and Mr Foote were not getting along in the workplace. Mr Heather was continually being frustrated by Mr Foote's conduct and this was leading to unacceptable retaliation by Mr Heather.

[25] Once on notice that there were issues to address with regard to the working relationship between Mr Heather and Mr Foote, Mr James set about investigating the issues. As a result of his investigation he counselled Mr Heather on appropriate conduct. Mr Heather was required to and did apologise to Mr Foote for the incidents and advised Mr Foote it would not happen again. Mr Heather says Mr Foote asked him to apologise in front of Mr James, which he did and also provided Mr Foote with a written apology for his conduct. It was not disputed that the apology was accepted by Mr Foote and the matters then resolved.

[26] Mr Foote also claims he suffered from stress due to the number of hours he was required to work. This issue was also raised with Mr James for the first time on 10 December. Mr James immediately instituted a system of monitoring to assist with his investigation into Mr Foote's complaints. Mr Foote, however, did not comply with the instruction given to him by Mr James, that he was to record the tasks he completed and the start and finish time of each task.

[27] Mr Foote says Mr Heather's behaviour was also contributing to his stress. Mr Foote raised this with Mr James again on 24 December. Mr James acted swiftly to separate the two workers by negotiating with Mr Heather that he would commence a period of 3 weeks annual leave immediately. Mr James did this to give him time to investigate Mr Foote's complaint. It was agreed that during Mr Heather's absence Mr Foote would be responsible for the farm.

[28] Standing back and considering the evidence and submissions of the parties objectively I am not satisfied Mr Foote was disadvantaged in his employment by unjustifiable actions of the respondent. As soon as Mr James became aware of the issues between Mr Foote and Mr Heather he acted swiftly to investigate the

complaints, put in processes to assist in monitoring the issues and ultimately took steps to separate the two workers concerned. Mr Foote's claim in this regard fails.

Breach of the Employment Relations Act

[29] Mr Foote claims he has received no employment agreement, just a job description and document stating his remuneration package and hours/days of work. Mr Foote claims this as a breach of the Employment Relations Act. Mr James says that through the documents provided to Mr Foote, the Respondent has met its obligations pursuant to section 65 of the Act.

[30] The documents outlining the terms and conditions of Mr Foote's employment including the job description document meet all the requirements of section 65 of the Act with the exception that there was no plain language explanation of the services available for the resolution of employment relationship problems. As there are no specific remedies available for a breach of this section of the Act I can take the issue no further.

Breaches of the employment agreement

[31] Mr Foote claims the Respondent has breached the employment agreement because he has not received the meat owed to him under the agreement, did not receive a promised increase in his salary after three months, and he did not receive all his weekends off.

Side of beef

[32] The employment agreement between the parties requires a side of beef to be supplied to Mr Foote every six months. Mr Foote was dismissed in January 2009. He had therefore, completed six months employment. According to the employment agreement he was entitled to a side of beef during that six month period. There is no dispute that Mr Foote has not received his entitlement. This failure is a breach of the employment agreement.

[33] **Pursuant to sections 133 and 134 of the Act WB & SI James are ordered to pay a penalty of \$150 for a breach of the employment agreement. The penalty shall be paid to Mr Foote.**

Increased salary

[34] The employment agreement states: “Salary: \$33,000 pa moving to \$35,000.00 pa after 3 months if performing well.”

[35] As can be seen, the promised increase in salary was entirely dependant on Mr Foote performing well in his duties. Mr James had a meeting with Mr Foote at the end of his first three months of employment where Mr Foote was advised that he was not performing his role as well as expected and would not receive the increase in remuneration. This was something clearly anticipated by the written terms of the agreement. There has, therefore been no breach of the employment agreement.

Weekends off

[36] The relevant provisions of the employment agreement provides for Mr Foote to have every second weekend off except during calving and mating. Having considered all the evidence from Mr Foote on this matter I am satisfied Mr Foote received all his required weekends off. Mr Foote told me in his evidence that the only time he did not get is weekends off was during calving or mating. This was in accordance with the agreed terms of his employment.

Minimum wage claim

[37] Mr Foote was paid a salary of \$33,000 per annum. Mr Foote says that when you consider the number of hours he was actually required to work this amounts to \$9.00 per hour.

[38] Mr James denies Mr Foote worked the hours he now claims. After raising his issues of stress with Mr James, Mr Foote was requested to keep a record of the hours he worked but he never complied with this request. At the investigation meeting Mr Foote said he could not complete the start and finish times of the tasks he had to undertake as he did not have a watch and the Department of Labour advised him not to sign anything.

[39] Mr Foote was paid on the basis of an annual salary. This method of payment recognises payment for the overall performance of duties and covers all the hours Mr Foote was required to work. It was common ground that Mr Foote’s finishing times on each day were flexible and on weekends when he was milking Mr Foote was not required to do more than the milking. Generally speaking if Mr Foote finished all his

tasks early, he was free to finish for the day. The onus is on Mr Foote, in the first instance to make out his claim and he has failed to do that to the standard required.

Claim for unjustifiable dismissal

[40] Pursuant to section 103A the Authority must scrutinise the respondents 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.

[41] 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 employer⁴.

[42] Although the Authority does not have unbridled licence to substitute its decision for that of the employer⁵ it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred⁶.

Warnings

[43] On 10 December Mr Foote was invited to attend a disciplinary meeting to discuss a performance issue relating to his failure to mark an antibiotic cow. As a result of this failure the milk of that cow was put into the Vat instead of being dumped. Mr Foote could provide no explanation for his failure and was issued with a warning on 15 December.

[44] On 19 December Mr Foote was invited to a second disciplinary meeting to discuss issues relating to a failure to sign the work book and an allegation that he was smoking in the cowshed during milking, after being instructed not to. Mr Foote denied the allegation of smoking in the cowshed. With regard to the failure to sign and notate the workbook with starting and finishing times of his tasks, Mr Foote told Mr James he had been told by the Department of Labour not to sign anything. Mr

⁴ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

⁵ *X v Auckland District Health Board* [2007] 1 ERNZ 66.

⁶ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

James did not accept Mr Foote's explanations and issued him with a second and final written warning.

The dismissal

[45] On 5 January 2009 Mr Foote was invited to a further disciplinary meeting. The allegation was that Mr Foote had mistreated a cow, and had left the milking herd and dry stock without water for a day.

[46] On 3 January Mr Foot was working with a relief worker (as Mr Heather was on annual leave) carrying out the milking. Mr James was also away on holiday, but had left clear instructions with Mr Foote that he was to contact Mr James with any questions or problems. One of the cows got caught in the pipe-work during milking. After some considerable time had passed the cow was moved but subsequently died. Mr Foote had been in contact with Mr James that day (3 January), at a time after the cow had become caught, but failed to advise Mr James of the problem. Three days later Mr James returned to the farm and discovered the issue of the dead cow. After asking Mr Foote why the cow was left in the rail for so long Mr Foote's only explanation was that he did not know what to do and could provide no explanation as to why Mr James was not contacted.

[47] Mr Foote's explanation that he did not know what to do about the cow was not accepted by Mr James as Mr Foote and Mr James had had a telephone conversation just three hours after the cow had become caught and nothing was said. Mr James says that during that telephone conversation Mr Foote was specifically asked if everything was going alright and Mr Foote confirmed everything was good. He made no mention of the cow or the possible need to get a Vet in to attend to the cow.

[48] Mr Foote claims the respondent did not carry out a full and fair investigation into the alleged misconduct. Mr Foote was aware that Mr James considered the matter to be serious and that dismissal was a possible outcome. Mr Foote was supported at the meeting by his father having been advised that he was entitled to support or representation. Mr Foote had a letter from Aysha Dougan, the relief milker who had been assisting Mr Foote during Mr Heather's absence on annual leave, which he also provided to Mr James during the disciplinary meeting.

[49] At the disciplinary meeting Mr Foote was provided with a full opportunity to put his side of the story with respect to the dead cow. It was common ground that his

version of events largely confirmed what Mr James had already ascertained. During the course of the meeting Mr Foote tried unsuccessfully to raise the issues with regard to Mr Heather and says that Mr James failure to take those issues into account was unfair.

[50] Mr Foote says that he was treated with disparity as nine other cows had died before this cow died and no-one was dismissed as a result of those deaths. Mr James says Mr Foote was dismissed for causing the unnecessary death of an animal. The animal had been left in an inhumane situation for about 24 hours and was then put in a paddock with an oxidation pond into which the cow had fallen. It was these factors directly which caused its death.

[51] Mr Foote was on notice that his performance was being monitored closely as he had received two warnings already.

[52] I am satisfied Mr James carried out a full investigation which disclosed conduct amounting to serious misconduct. The welfare of animals on a farm is paramount. Standing back and considering the evidence objectively, I am satisfied a fair and reasonable employer in the circumstances of this case would have dismissed Mr Foote as a result of a finding of serious misconduct.

Conclusion

[53] Mr Foote has been successful in only one of his claims. That claim was with respect to a breach of his employment agreement and a penalty of \$150 has been awarded for that breach.

Costs

[54] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. Given Mr Foote's very limited success in this matter compared with the Respondent's significant success I am inclined to award costs to the Respondent. If the parties fail to reach agreement on the matter of costs, WB & SI James may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged 14 days from receipt.

[55] I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority