

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 273  
3033472

BETWEEN

DUNCAN GUY  
Applicant

AND

SOPHIE INVESTMENTS  
LIMITED  
Respondent

Member of Authority: Vicki Campbell  
Representatives: Tania Allan for Applicant  
Ruth Oakley for Respondent  
Investigation Meeting: 29 March 2019  
Further Information Received: 1 April 2019  
Determination: 6 May 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. Within 28 days of the date of this determination Mr Guy is ordered to pay to Sophie Investments Limited the sum of \$1,172.75 as reimbursement for diesel used by him during his employment.**
- B. The Authority has no jurisdiction to investigate and determine Mr Guys unjustified disadvantage claim.**
- C. Mr Guy was unjustifiably dismissed.**

**D. Sophie Investments Limited is ordered to pay to Mr Guy the following sums within 28 days of the date of this determination:**

**a) \$15,706.29 for lost wages and other money lost under s 123(1)(b) of the Employment Relations Act;**

**b) \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act.**

**E. Mr Guy breached his statutory obligations of good faith.**

**F. Costs are reserved.**

### **Employment relationship problem**

[1] Sophie Investments Limited owns and operates a sheep and cattle farm called Te Hekenga Station. Mr Clifford Heath is the major shareholder and, at the time of the events leading to Mr Guy's application, was one of two directors. In 2018 the number of directors increased to four.

[2] Mr Guy started working for Sophie Investments on 16 November 2015 as the Stock Manager. The parties have never executed a written employment agreement however, they acknowledge that the main terms of their employment relationship include an annual salary, that Mr Guy could have a maximum of six working dogs with dog food provided by Sophie Investments and that farm accommodation under a service tenancy would be provided with rent and power paid by Sophie Investments.

[3] Mr Guy was given notice on 7 August 2017 that his employment was to end on 4 September and he was required to vacate the farm accommodation.

[4] Mr Guy challenges his dismissal which he says was unjustified. He also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Sophie Investments that Sophie Investments breached the Employment Relations Act 2000 (the Act) and he seeks reimbursement of work related costs. At the investigation meeting Mr Guy withdrew a claim for arrears of wages.

[5] Sophie Investments says the Authority has no jurisdiction to investigate and determine the disadvantage grievance because it was not raised within the statutory 90 day period.

[6] By way of counter-claim Sophie Investments claims Mr Guy breached his statutory duties of good faith. A second claim for reimbursement of diesel owned by Sophie Investments was resolved and by consent I make the following order:

- a) Within 28 days of the date of this determination Mr Guy is ordered to pay to Sophie Investments Limited the sum of \$1,172.75 as reimbursement for diesel used by him during his employment.

### **Issues**

[7] In order to resolve Mr Guy's application I must determine the following issues:

- a) Did Mr Guy raise personal grievances for disadvantage within the statutory 90 day period?
- b) If the answer to a) is yes - were one or more conditions of Mr Guy's employment subject to his disadvantage by the unjustified actions of Sophie Investments Limited and if so what if any remedies should be awarded?
- c) Was Mr Guy unjustifiably dismissed by reason of redundancy and if so what if any remedies should be awarded?
- d) Did Sophie Investments Limited breach the Employment Relations Act 2000 (the Act) and if so what if any penalty should be imposed?
- e) Is Mr Guy entitled to reimbursement of service costs associated with machinery used on the farm.

[8] To resolve Sophie Investments claim against Mr Guy I must determine whether Mr Guy breached his statutory duty of good faith.

[9] 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.

### **90 day issue**

[10] Mr Guy has asked the Authority to investigate and determine a personal grievance for disadvantage. Sophie Investments objects to the Authority investigating these claims on the basis that they were not raised within the requisite 90 day statutory period.

[11] Section 114(1) and (2) of the Act deals with the timeframe for the raising of personal grievances in the following terms:

#### **114 Raising personal grievance**

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[12] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[13] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to address that grievance. To do so, the employer must know what to do.<sup>1</sup> There is no formality involved in notifying a grievance to an employer.<sup>2</sup>

[14] It is not enough to simply say the employee considers they have a personal grievance. In order to properly raise a personal grievance the employee needs to have

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<sup>1</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>2</sup> *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

conveyed to the employer enough information, so that the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.<sup>3</sup>

[15] Mr Guy's claims of disadvantage are in relation to the following two matters:

- a) Failure to maintain farm accommodation; and
- b) Failure to provide a written employment agreement.

### ***Maintenance of farm accommodation***

[16] It was common ground that Mr Guy had accepted a service tenancy and that the accommodation he moved into in November 2015 was not up to an acceptable standard.

[17] The house had not been used for a number of years and needed repairs. Mr Heath told me Mr Guy moved into the accommodation earlier than expected and while the house had been commercially cleaned and some minor repairs undertaken there was still work to be done. Further building work was carried out after Mr Guy had moved in.

[18] Mr Guy's claim regarding his accommodation is not within the jurisdiction of the Authority. This is because service tenancies are covered by the Residential Tenancies Act 1986.

### ***Employment agreement***

[19] Section 63A of the Act requires employers to provide employees with a copy of the intended agreement. Mr Guy claims Sophie Investments has breached the Act and this breach resulted in him being disadvantaged.

[20] Mr Guy was initially provided with a proposed employment agreement on 22 October 2015. This was prior to him commencing work on 16 November 2015. The covering email invited Mr Guy to look through the agreement and note any required

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<sup>3</sup>Above n 1.

changes. The employment agreement was not returned to Sophie Investments and was never signed by Mr Guy.

[21] Mr Heath told me he sat down with Mr Guy soon after his employment started and went through a different copy of an employment agreement, recorded Mr Guy's name on the front of the agreement and as a result of discussions with Mr Guy altered the number of dogs Mr Guy could have on the farm from four to six. Mr Heath told me Mr Guy wanted to take the agreement away with him to get it checked and he was happy for that to happen.

[22] The issue about an employment agreement was raised again in October 2016. At that time a second copy of the agreement discussed earlier but without the amendments was given to Mr Guy at a meeting on Monday 10 October 2016.

[23] An email dated 13 October confirming the discussions held on 10 October records Mr Heath inviting Mr Guy to take the employment agreement away and to return with it at the next meeting with any requested amendments. Mr Heath asked Mr Guy to complete and sign the employment agreement by the end of October. Mr Guy has not signed the employment agreement.

[24] I have concluded there was no failure on the part of Sophie Investments to provide a written employment agreement. Even if I were wrong about that the action alleged to amount to a personal grievance was known to Mr Guy by October 2016 at the latest. Raising a grievance in September 2017 is well outside the 90 day period and accordingly I do not have jurisdiction to investigate and determine this claim.

### **Unjustified dismissal**

[25] Mr Guy was dismissed by reason of redundancy on 7 August 2017. In order for a redundancy to be justified Sophie Investments must demonstrate the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether Sophie Investments met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[26] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.<sup>4</sup> That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on business requirements.<sup>5</sup> This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[27] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

### ***Events on 31 July***

[28] Mr Guy and Mr Heath met in the morning on 31 July 2017 on the roadside where they discussed the feeding of stock. Mr Guy says he was so concerned about the stock that he told Mr Heath he was worried they would starve. Mr Guy told Mr Heath he could farm the way he wanted, but he was resigning after his holiday and after he talked to his wife.

[29] A dispute then arose about the amount of notice Mr Guy was required to give. Mr Heath told Mr Guy he had to give a month's notice but Mr Guy was of the view that he only had to give two weeks notice.

[30] Mr Heath confirmed his understanding of their discussion at 6.11pm that evening by email. He confirmed that Mr Guy advised him he had resigned with two weeks' notice with a last day of employment of 13 August. In reliance on this understanding Mr Heath gave Mr Guy a months' notice to terminate the tenancy for the farm accommodation. Mr Heath asked Mr Guy to confirm that his understanding of the conversation that day was correct.

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<sup>4</sup> [2014] NZCA 541.

<sup>5</sup> [2013] NZEmpC 81.

[31] In response Mr Guy denied he had resigned. He told Mr Heath that he had indicated that he would be resigning but would formally notify him of that after he had discussed it with his wife. Mr Guy undertook to advise Mr Heath within 48 hours of his intentions and details of his resignation.

[32] By 3 August Mr Heath had not received any further clarification from Mr Guy as to the status of his intended resignation. He emailed him requesting Mr Guy confirm the date from which his resignation would be effective or the date of his last day of work.

[33] Mr Guy responded acknowledging he had expressed dissatisfaction with his employment and again denying that he had resigned. He agreed to meet the following day.

#### ***4 August meeting***

[34] Mr Guy and Mr Heath met, as scheduled on 4 August. Mr Guy covertly recorded this meeting. I have been provided with a copy of the recording and a transcript. It is clear there was a dispute as to whether Mr Guy had resigned on 31 July. Mr Heath took the position that Mr Guy had resigned and wanted to know when Mr Guy's last day of employment would be.

[35] Mr Heath was concerned that docking would be starting in October and he would need to start interviewing on 7 September in order to secure a new employee prior to docking. Mr Heath told Mr Guy he would need the farm accommodation to be vacated by 7 September so he could show prospective employees through the house as part of the interviewing process.

[36] Mr Guy said he only indicated an intention to resign and could not provide a date to Mr Heath.

[37] From the record of the meeting I have concluded Mr Guy intended to resign from his employment but was not at the stage of confirming his resignation in writing and providing a final date. Mr Heath was upset that he was unable to plan with any certainty and tried without success to get a commitment from Mr Guy as to his last date of employment. The record of the discussion shows Mr Heath was adamant that

if Mr Guy would not give him a date he would set one for him. He instructed Mr Guy to provide a date by Monday 7 August.

[38] Following the meeting Mr Heath confirmed in writing his understanding of the discussion and confirmed his need to have a definitive answer on Mr Guy's last day of employment. Mr Heath also confirmed his instruction at the meeting for Mr Guy to provide a statement of the cattle management grazing plan through to calving and block stock numbers for ewes for lambing.

### ***7 August***

[39] On 7 August Mr Guy advised Mr Heath that he no longer wished to resign and therefore a meeting scheduled for later that day would be unnecessary. In response Mr Heath advised Mr Guy that the situation had changed and that the meeting would proceed as scheduled to discuss what would happen moving forward.

[40] Mr Guy and Mr Heath met later that day as scheduled. Again Mr Guy covertly recorded the meeting. I have been provided with a copy of the recording and a transcript.

[41] At that meeting Mr Guy was given a letter dated the same date stating that due to a number of circumstances the company had decided to restructure its management and staffing. The letter set out the following areas to be restructured:

- a) The current resident shareholder and director, Mr Heath was to be absent from the property for health reasons;
- b) Colin Heath would become the resident shareholder;
- c) An independent Overseer would be appointed to oversee the property and set the stock management strategy;
- d) The staff will receive direction and be accountable to the Overseer;
- e) A Block Manager/Senior Shepherd would be appointed to do the day to day stock work;

- f) Once the Overseer was in place an assessment of the situation would be completed and decision made on future direction, farming practices and other staffing.

[42] Mr Guy was advised that his last day of employment would be 4 September and on that date he was also to vacate the farm accommodation. Mr Guy's last day of employment was changed by agreement to 1 September.

***Was the redundancy for genuine commercial reasons?***

[43] Following the meeting on 4 August and the subsequent email communications between him and Mr Heath, Mr Guy emailed Mr Heath on the morning of 7 August and told him he did not wish to resign. Despite this notification Mr Heath insisted on the parties meeting that day at which time Mr Guy was given a letter advising him that his employment would end on 4 September as a result of a restructuring.

[44] There was no discussion at that meeting about the reasons for the restructuring. Mr Heath is recorded as telling Mr Guy he was not interested in getting into any debates or arguments and that as far as he was concerned he wanted the employment relationship to be over and done with so he could hand the job over to someone else.

[45] Following the meeting Mr Guy requested reasons for the restructuring. In an email dated 9 August Mr Heath reminded Mr Guy he had approached him [Mr Heath] earlier in the year about the possibility of leasing the property. He said in the months preceding the August meetings he had been in discussion with a farming real estate firm exploring options around leasing.

[46] Mr Heath advised Mr Guy that the catalyst for moving forward with an absentee owner model with an Overseer was the uncertainty of outcome created by Mr Guy because Mr Heath felt he could not be certain he would have any staff on the farm in two weeks' time, what his personal workload would be and whether he could physically fill the gap until a new person was on site. He confirmed the decision had been made on Sunday 6 August.

[47] I have concluded the decision to disestablish Mr Guy's position and to terminate his employment was made because of the dispute between the two men

about whether Mr Guy was leaving and if so when that would happen. The current staff at the farm includes a Stock Manager which is the same or similar role done by Mr Guy.

[48] Accordingly I find Sophie Investments has not established the restructuring was for genuine commercial reasons.

### ***Procedure***

[49] There were no consultation meetings with Mr Guy regarding the possibility of redundancy. Redundancy became the reason for terminating his employment after Mr Guy and Mr Heath had a dispute about Mr Guy's resignation. Mr Heath made it clear to Mr Guy on 4 August that if Mr Guy did not provide a date for his final day of employment Mr Heath would make that decision for him.

### ***Conclusion***

[50] For the following reasons the decision to dismiss Mr Guy by reason of redundancy was not a decision an employer acting fairly and reasonably could make in all the circumstances.

[51] Sophie Investments has not established the redundancy was based on genuine commercial reasons. The procedure followed by Sophie Investments was non-existent. Sophie Investments failed to follow the requirements prescribed by the Act. There was no consultation with Mr Guy prior to the decision being made to terminate his employment. There was no evidence Mr Guy knew or ought to have known that a restructuring was being considered by Sophie Investments. There was no opportunity for Mr Guy to provide any response to the reasons for the redundancy or have any input into the decision made by Sophie Investments.

[52] There was no exploration of alternatives to redundancy. Sophie Investments had determined prior to 7 August that Mr Guy's employment would terminate.

[53] Sophie Investments' failure to comply with the statutory requirements was not minor and resulted in Mr Guy being treated unfairly. The procedural failings contributed to the lack of justification for the dismissal. Accordingly I find Mr Guy was unjustifiably dismissed from his employment with Sophie Investments and is entitled to a consideration of remedies.

## **Remedies**

[54] Mr Guy has established a personal grievance for unjustified dismissal. To remedy his grievance he seeks reimbursement of lost wages and compensation for humiliation, distress and injury to feelings.

[55] Mr Guy was required to mitigate his loss. Mr Heath says he has failed to mitigate his loss because Sophie Investments asked to rescind the letter dated 7 August so that he could retain his employment. This offer was made on 25 August. Mr Guy's rejection of the offer to rescind his dismissal was not unreasonable. From the evidence I received it seems to me that by the time the offer was made the relationship between the two men had deteriorated significantly.

[56] There was very little evidence of the actual steps taken by Mr Guy to mitigate his loss. For that reason I will not award lost wages beyond the three month period.

[57] At the investigation meeting it became apparent that Mr and Mrs Guy operate their own business. This has been the case for a number of years and I have been provided with the financial records of the business to assess what, if any income, Mr Guy might have received through the business during the three months following his dismissal. I have reviewed the records and am satisfied that during the three month period following Mr Guy's dismissal his earnings from the business did not increase over and above the earnings he had previously received from the business.

[58] Mr Guy's earnings lost as a result of his grievance equates to \$20,000 gross. From this \$4,755.25 is to be deducted to reflect earnings received by Mr Guy during the three months following his dismissal. Added to this will be compensation for dog food in the amount of \$461.54.

[59] Mr Guy seeks compensation for humiliation, distress and loss of dignity. There was very little evidence to support this claim, however, I accept there is inherent humiliation in being dismissed. Mr Guy relied on his employment for his accommodation. After receiving notice of his dismissal he had to make arrangements for him and his family. Fortunately his parents in law had purchased a new family home which they moved into earlier than they expected so that Mr Guy and his family could move into their vacant house.

[60] In all the circumstances of this case an award of \$10,000 is appropriate.

[61] Sophie Investments Limited is ordered to pay to Mr Guy the following sums within 28 days of the date of this determination:

c) \$15,706.29 for lost wages and other money lost under s 123(1)(b) of the Act;

d) \$10,000 compensation under s 123(1)(c)(i) of the Act.

### **Contribution**

[62] Having found Mr Guy is entitled remedies for his personal grievance for unjustified dismissal, I am required by s 124 of the Act, despite this being a redundancy situation, to consider whether he contributed to the situation giving rise to his grievance.

[63] Mr Guy's conduct was unhelpful when he indicated he wished to resign and then resiled from that but only after several attempts by Mr Heath to secure a confirmed final date of employment. However, that conduct did not contribute to Sophie Investment's decision to terminate Mr Guy's employment by reason of redundancy. I find Mr Guy did not contribute in any blameworthy way to the decision by Sophie Investments to terminate his employment. Accordingly, no reduction for contribution will be made.

### **Breach of the Act**

[64] Mr Guy claims Sophie Investments failed to provide him with a written employment agreement and that this is a breach of the Act and seeks penalties.

[65] Recovery of a penalty must be commenced within 12 months of the date when the cause of action first became or should reasonably have become known to Mr Guy. Notes of an agenda for a meeting on Monday 10 October 2016 refers to the need for an employment agreement. I have concluded that by this date at least Mr Guy first became or should reasonably have become aware that he did not have an employment agreement.

[66] Mr Guy commenced his action for recovery of a penalty on 18 July 2018. This is more than 12 months after the date he became aware of the breach. Mr Guy's application for a penalty to be imposed on Sophie Investments is declined.

[67] Even if I am wrong about this Mr Guy was presented with at least three copies of proposed employment agreements. On 13 October, after being given the third employment agreement, he was asked to complete and sign the document and return it before the end of October. Mr Guy did not return the employment agreement as requested.

### **Reimbursement of work related costs**

[68] Mr Guy claims reimbursement of agreed equipment servicing costs of \$6,006.46. Mr Heath acknowledged that he agreed Mr Guy would be reimbursed for servicing costs associated with equipment he owned and which he used in his job.

[69] The bulk of the servicing costs relate to a quad bike owned by Mr Guy which Mr Guys says was used by casual workers and the fencer employed by Sophie Investments. Mr Heath told me he purchased a new quad bike for Mr Guy's use which arrived on the farm on 28 September 2016. At that time he paid for the costs of servicing Mr Guys quad bike and expected from that time onwards Mr Guy would not need to use his own quad bike.

[70] Mr Guy said even after the new quad bike arrived others needed to use his bike. Mr Heath told me there were two other quad bikes and a nearly new Suzuki off-road vehicle which could be used. I am satisfied there was no reason for Mr Guy to continue using his own quad bike for work purposes after 28 September 2016 and that following this date there was no agreement for the servicing costs associated with Mr Guy's quad bike to be met by Sophie Investments.

[71] The remainder of the costs related to the servicing of chainsaws. Mr Heath told me, and I have accepted his evidence, that there was no need for Mr Guy to use his own chainsaws as there were four chainsaws at the farm that were all in good order.

[72] For the reasons set out above Mr Guy's claim for reimbursement of servicing costs is declined.

### **Counter-claim**

[73] Sophie Investments claims Mr Guy breached his statutory duties of good faith when he covertly recorded the two discussions on 4 and 7 August.

[74] Covertly recording discussions is a breach of the duty of good faith. While recording discussions covertly is not unlawful it undermines the employment relationship.

[75] Sophie Investments has not asked the Authority to impose a penalty on Mr Guy for his conduct. If it had, I am of the view that a penalty may have been appropriate. This is because Mr Guy's conduct was contrary to promoting good faith behaviour in the employment relationship.

### **Costs**

[76] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Guy shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Sophie Investments 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.

[77] 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