

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 130
5425774

BETWEEN	TONY HOGEBOOM First Applicant
	VICKI RAUMAWEA Second Applicant
A N D	KERSHEVIN FARMS LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Anna Oberndorfer, Advocate for Applicants
David Beck, Counsel for Respondent

Investigation Meeting: 6 August 2014 at Christchurch

Submissions Received: 12 August 2014 and xx August 2014 from Applicants
19 August 2014 from Respondent

Date of Determination: 28 August 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Tony Hogeboom and Vicki Raumaewa, claim they were unjustifiably dismissed by the respondent, Kershevin Farms Limited (Kershevin), on 20 May 2013.

[2] Kershevin accepts it dismissed both, but contends the decision was justified by reason of redundancy.

[3] The applicants have three additional claims. The first is an application Kershevin be penalised for failing to consult about the redundancy in good faith. The second is wage arrears claim with the applicants' stating their final pays were

deficient. The third is a request the applicants be reimbursed \$1,200 for the purchase of wet weather gear.

[4] These claims are denied by Kershevin which counters with its own claim. It seeks reimbursement of various sums incurred as a result of what it says were inappropriate actions by the applicants.

Kershevin's attendance at the investigation meeting

[5] Kershevin intended relying on the evidence of one witness; Judith Jones, one of two directors and shareholders. Her brief of evidence was filed prior to the investigation meeting in accordance with an agreed schedule.

[6] Approximately 50 minutes before the investigations scheduled commencement Mr Beck telephoned to advise his client, who resides in Hokitika, was unable to attend due to weather conditions on route. A perusal of both the New Zealand Transport Agency and Automobile Association websites, and a telephone call to local Police, cast doubts on the claim. The Arthurs and Lewis Passes were both open and neither had recently closed.

[7] Mr Beck was told to attend as scheduled and discuss his client's absence. The discussion included telephone contact between Mr Beck and Ms Jones. It ended with Ms Jones advising she would come to Christchurch and be in attendance at a recommencement time of 1.30pm.

[8] When the investigation reconvened Ms Jones was not present. Her continued absence was neither advised nor explained. She did not answer her telephone or respond to messages left on it.

[9] Given the circumstances, the advice in the notice of investigation meeting the Authority may proceed in the absence of a respondent and Mr Beck's willingness to continue without his client, I chose to proceed. I did so as if the respondent had attended given the continued presence of their agent to protect their interests.

[10] Finally I note further, unsuccessful, attempts to contact Ms Jones that afternoon.

Background

[11] Mr Hogeboom and Ms Raumaewa were employed as farm managers and commenced with Kershevin on 24 January 2013.

[12] The relationship quickly deteriorated with various tensions arising. The first related to the employment agreement with Ms Jones proffering a document written by her daughter a couple of weeks after the applicants' commencement. Mr Hogeboom and Ms Raumaewa wished to use that recommended by Federated Farmers. The issue was finally resolved with the assistance of Sam Lucas, a farm adviser engaged by Kershevin, and saw adoption of the Federated Farmers agreement. Each applicant signed on 11 April. Ms Jones signed on 26 April.

[13] A second source of tension was Ms Jones' daughter's advice the applicants were to report to her and ensuing uncertainty when Ms Jones contradicted the statement. There were other issues such as a pending appearance in the District Court by Ms Raumaewa and frequent visits to the farm by Kershevin's creditors seeking payment. The creditors inevitably approached either Mr Hogeboom or Ms Raumaewa who had no control over, or ability to address, the issues.

[14] The most serious problem was Mr Hogeboom's and Ms Raumaewa's concerns about the stability of their employment with uncertainty arising from the above factors. They say they often asked Ms Jones about job security and the response was always along the lines of *your jobs are safe*.

[15] That, however, did not prove to be the case. On 26 April 2013, and just after receiving her signed employment agreement, Ms Raumaewa got a text from Ms Jones who sought a meeting the following morning.

[16] The following morning Ms Jones arrived at the applicants' house accompanied by her daughter. She handed Ms Raumaewa a handwritten document dated 26 April and entitled *Notice of Potential Redundancy*.

[17] It opens by saying:

As you will be aware from our discussion we are in a very difficult financial position regarding our dairy farm and as you are both aware it is currently on the market on advice from our accountant we have to immediate cut overheads.

As the costs of staffing is a significant issue we have to be upfront and tell you we have an offer from our daughter and extended family members to assist us in return for minimal remuneration and provision of housing. We intend to look at this offer carefully but before doing so we need to get your input on this proposal.

[18] The letter went on to discuss various options for ending the employment relationship and the applicants were given till midday 29 April to provide feedback.

[19] Mr Hogeboom was not present and Ms Raumaewa says notwithstanding the statement the letter conveyed a proposal she was given the impression the outcome was already decided. Both applicants strenuously deny they were aware the farm was for sale before mid-April. They say they approached Ms Jones when it came to their attention and Ms Jones advised she was only advertising the farm to keep her bank happy but had no intention of actually selling.

[20] The following Monday, 29 April, Mr Hogeboom received a telephone call from Mr Beck. He claims Mr Beck tried to pressure him into providing feedback and he responded by advising he would not do so until he had legal advice. While he did not give evidence, Mr Beck's questions clearly indicate he accepts Mr Hogeboom advised he would not respond till he had legal advice.

[21] Equitable Employment Solutions Limited was approached and Ms Oberndorfer responded to Mr Hogeboom the following day (30 April). She then contacted Mr Beck and subsequently told Mr Hogeboom he may no longer have to meet Kershevin as the representatives were now discussing the issues. Those discussions, however, do not appear to have gone far.

[22] On Friday 3 May Ms Jones delivered another handwritten note. It is dated 1 May and reads:

As outlined in our letter of 26 April 2013 we were contemplating terminating your employment on the grounds of redundancy due to our financial circumstances. As we have not heard from you with your feedback we have decided to proceed with our plan to engage family to reduce our overheads.

We regret to advise your employment will terminated 30 May 2013. We will also provide you with references. Thank you for your work on the farm we hope you both can find a suitable alternate job.

[23] Further correspondence and discussion ensued, particularly over when the applicants would vacate the house they occupied. Various dates were discussed, agreed, then altered.

[24] As events transpired the applicants ceased working and vacated the house on 20 May 2013. They claim Kershevin undertook to pay them until the end of the month as required by their employment agreement but failed to do so.

[25] Immediately prior to leaving Mr Hogeboom conducted a *walk around* with Mr Lucas. A *walk around* is a final inspection before an outgoing manager departs and common practice in the industry. Ms Jones claims Mr Lucas was not engaged to do the *walk around* and as she did not do a final check she was not immediately aware of the damage and absent equipment which forms the basis of the counterclaim. That said, the evidence is while she did not accompany Mr Hogeboom and Mr Lucas on the *walk around*, she was present at the time and did not prevent it.

Determination

[26] As already said, there are five claims to be considered. The first, and most significant, is the applicants' claim they were unjustifiably dismissed by Kershevin. Kershevin accepts it dismissed the applicants but contends its actions justified on the grounds of redundancy.

[27] It is well established that when reviewing redundancy decisions the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it is carried out. The inquiry into each factor is carried out separately (*Coutts Cars Ltd v. Bageley* [2001] ERNZ 660 (CA)).

[28] For three reasons I conclude the redundancy was not genuine. First the supporting evidence offered by Kershevin is limited to general assertions in Ms Jones' brief of evidence. The evidence lacks detail. It was not tested given Ms Jones absence and there is no documentary support such as bank statements and/or budgets.

[29] Secondly, there is the evidence of Bernard Reiher. He and his partner were employed to replace the applicants and commenced shortly after their departure. Replacement completely undermines Kershevin's claim the applicants were redundant. I also note Mr Reiher's comment Ms Jones had told him she was having problems as she wanted rid of the applicants but they didn't want to go.

[30] Finally there is Mr Lucas' evidence and particularly that about his involvement in budget setting and his statement Kershevin's bank had provided various loan facilities which would sustain the business as it was prior to the redundancies (albeit with careful management). His evidence was not disturbed by cross examination.

[31] There is then Ms Jones' claim the applicants were well aware the business was struggling and no longer viable. Aside from the fact her claim was not put to the test, there is the response of the applicants. While they accept there was evidence of difficulties, particularly the visits of creditors, they deny knowledge of unsustainability. They attribute the problems to Ms Jones' tardiness in paying as opposed to an inability to do so and, again, this approach was not disturbed by cross examination.

[32] Turning to process. Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss.103A(3)(b) to (d) of the Act). That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s.4(1a)(c) of the Act and the relationship between the two sections is confirmed by the Court in *Jinkinson v. Oceanagold (NZ) Ltd* [2010] NZEmpC 102.

[33] I find these requirements were not met by Kershevin. That is because there is no evidence of any discussion about the substantive merits of the proposal outlined in the letter of 26 April. Indeed, Kershevin relies on this and argues it was entitled to proceed with the dismissals on the grounds the applicants refused to participate in the consultation process when asked in the letter dated 26 April 2013. In the statement in reply it is claimed ... *the period of consultation over implementing the decision to end the applicants' employment was constrained by the applicants' aggressive approach to such consultation ... and ... communication is a reciprocal duty and the applicants' have not fulfilled their obligation to be responsive.*

[34] Further on it is stated:

Ms Jones will assert that she instructed counsel to contact the applicants with a view to engaging in a discussion about the content of the 27 (sic) April letter but the applicants refused to meaningfully engage in any consultation and after refusing to attend a 1 May meeting embarked upon a strategy to enforce a monetary settlement.

As a result of an indication of non engagement and the attached (annex 4) letter of 2 May from the applicants' counsel ... the respondent considered it had no choice but to proceed with its proposal and issue a notice of redundancy on 3 May 2013.

[35] This argument is, I conclude, unsustainable. There is again Ms Jone's absence and the inability to test her evidence but, in any event, the facts undermine the approach. The evidence is while Mr Hogeboom refused to meet on 1 May, he did not reject the possibility of meeting in its entirety. Instead he sought a postponement while he obtained legal assistance and that is a right bestowed by statute.

[36] Similarly, the letter of 2 May which Ms Oberndorfer sent to Mr Beck appears to be of little relevance. That is for two reasons. First, it does little more than raise the fact there appeared to be an employment relationship problem and give the applicants' views about its background. Underlying those is the belief dismissal was a fait accompli ([19] above). It was open for Kershevin to counter the proposition dismissal had effectively occurred. It did not.

[37] Secondly, and more importantly, the letter advising termination is dated 1 May. The decision had already been made. It was made in the absence of consultation, despite knowledge the applicants had obtained a legal assistant who had, according to the evidence I have about the phone conversation between Ms Oberndorfer and Mr Beck on 30 April, expressed a willingness to discuss the issues.

[38] For the above reasons, I find the dismissal unjustified.

[39] The conclusion the dismissal is unjustified raises the issue of remedies. The applicants each seek \$11,000 compensation under s.1213(1)(c)(i) of the Act. They also seek wages lost as a result of the dismissal.

[40] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Both applicants commenced with a new employer on 1 June 2013 and the claim is limited to the period 21 to 31 May 2013. The period 21 to 30 May is dealt with in paragraphs [46] to [50] below. That leaves one day (31 May) which, given s.128(2), is payable. The amount is \$137.36 each.

[41] The applicants each seek \$11,000 compensation for the hurt and humiliation. They supported their claim with evidence of the hurt, the difficulties faced in uprooting their family and the angst of sourcing new jobs. Against that I must balance the fact they quickly found alternate employment and the effect was relatively temporary. Having considered the evidence I consider an average award (\$5,000 each) appropriate.

[42] There is also a claim for the reimbursement of costs incurred as a result of the enforced shift. These are the cost of a container to move household belongings (\$3,622.50) and a contribution of \$400 toward accommodation for the period 20 May to 1 June.

[43] These remedies will not be granted as there is no supporting evidence in the form of invoices or receipts. Indeed the amounts were advised via submission and neither applicant mentioned them. I cannot accept that as evidence.

[44] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, address whether or not the applicants contributed to the situation in which they found themselves. The answer is no as Kershevin's defence, redundancy, automatically implies no fault.

Penalty claim

[45] The applicants ask I penalise Kershevin's for its failure to consult in good faith. I decline to do so as that failure is integral to the conclusion the dismissal is unjustified. A penalty would add to the remedies that flow from the dismissal which are, in my view, sufficient and appropriate.

Wage claim

[46] There is then the wage claim. Notwithstanding the earlier departure date, the evidence suggests the parties agreed Mr Hogeboom and Ms Raumaewa would both be paid until 30 May 2013. That is the date that would have been required under their employment agreements. They say they were not.

[47] Attached to the statement of problem is a one page handwritten document entitled *Final Pay 20 May 2013*. The evidence suggests it was forwarded to Ms Oberndorfer on or about 17 May 2013. It indicates each of the applicants was due

\$1,928.08 as their final fortnightly pay and that took payment through to 30 May. It also indicates each was due \$549.44 in lieu of working public holidays and a further \$1,420.09 holiday pay.

[48] Mr Hogeboom and Ms Raumaewa claim two deficiencies in respect of these payments. First, they claim the date on the document of 30 May is misleading and they received nothing after the 20th on the basis they could not have been paid to the latter date as they always received wages in arrears. Secondly, they say only one, but not both, payments were made.

[49] Attached to the statement in reply are two documents which would appear to be each of the applicants' time and wage records. They seem to suggest both were paid their entitlements in full, but they are hard to decipher and Ms Jones' absence means I cannot be sure.

[50] Against that though, I must balance the fact the onus is upon an applicant to establish a *prima facie* case before a respondent need answer. I conclude the applicants have failed to do so in this instance. This is because there is no supporting evidence for their claims such as bank accounts confirming only one payment was made and the explanation re payment in arrears was offered by Ms Raumaewa in what appeared to be an unconvincing afterthought. I therefore decline to award the amounts sought.

Wet weather clothing

[51] There is also a claim I reimburse the applicants for the purchase of wet weather clothing. For three reasons, I decline to do so.

[52] First, and primarily, there is no evidence the expenditure was actually incurred such as receipts.

[53] Secondly the evidence suggests the applicants still have the benefit of owning and using this equipment.

[54] Finally there is Mr Lucas' evidence. He stated this farm was an oddity in that it did not provide much of the equipment necessary for the performance of an employee's work as most did. At Kershevin employees tended to provide their own equipment.

[55] While it may have been unusual Mr Hogeboom indicated, when answering questions, he was aware the farm was almost devoid of equipment and while he may not have liked it he accepted he was providing his own. He made that choice and his decision cannot be revisited in the absence of a contractual right to reimbursement.

Kershevin's counterclaim

[56] Turning to the counterclaim. Kershevin seeks \$250 to clean the calf shed after it was allegedly used by the applicants' pigs; \$745 to repair a tractor with the damage allegedly attributable to Mr Hogeboom's neglect; \$565 for missing calf tags; \$300 for a missing electric fence metre; \$250 to clean a freezer and \$500 to clean the cow shed.

[57] Mr Hogeboom's accepts the tractor was damaged. He says this was caused by the ingestion of diesel residue when it ran out of fuel. It ran out because its fuel gauge did not work and Kershevin refused to fix it. He responds to the missing calf tags by noting each farm has unique identifiers and the tags are unusable anywhere else. He denies any of the other claims have validity.

[58] I accept Mr Hogeboom's denials. I do so for two reasons. Once again, Ms Jones was not present at the investigation and there is no evidence to support Kershevin's claims. Indeed, there is no evidence the costs were actually incurred in the form of invoices or receipts. Secondly, there is again Mr Lucas' evidence. He conducted the final walk around with Mr Hogeboom. His evidence is clear. From what he saw, there is absolutely no validity to the claims. That evidence was subject to cross examination and survived the test.

Conclusion and orders

[59] For the above reasons I conclude Mr Hogeboom and Ms Raumaewa each has a personal grievance as s/he was unjustifiably dismissed.

[60] As a result the respondent, Kershevin Farms Limited, is ordered to pay the first applicant, Tony Hogeboom:

- i. \$137.36 (one hundred and thirty seven dollars and thirty six cents) gross as recompense for wages lost as a result of the dismissal; and

- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[61] Kershevin Farms Limited is ordered to pay the second applicant, Vicki Raumaewa :

- i. \$137.36 (one hundred and thirty seven dollars and thirty six cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[62] The ancillary claims (penalty, outstanding wages and reimbursement for the purchase of wet weather clothing) are all dismissed, as is Kershevin's counterclaim.

[63] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority