

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 60
5389378

BETWEEN CORY JOHANSEN
 Applicant

A N D MORMILK FARM LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Harrison, Advocate for Applicant
 Jane Traynor, Counsel for Respondent

Investigation Meeting: 30 January 2013 at Hamilton

Submissions Received: 04 February 2013 from Applicant
 11 February 2013 from Respondent
 15 February 2013 from Applicant

Date of Determination: 20 February 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Johansen did not apply for parental leave under the Parental Leave and Employment Protection Act 1987 (PLEPA) so Mormilk Farm Limited (Mormilk) did not breach the PLEPA.**
- B. Mormilk unjustifiably disadvantaged Mr Johansen in his employment by issuing him with warnings which did not comply with basic procedural fairness requirements. No remedy is awarded to reflect Mr Johansen's contribution to the situations that gave rise to his disadvantage grievances.**
- C. Mormilk's dismissal of Mr Johansen was substantively and procedurally unjustified. It is ordered to pay Mr Johansen lost**

remuneration from 28 March to 18 May 2012 and \$500 distress compensation.

- D. Mormilk is ordered to reimburse Mr Johansen's mother \$431.25 towards the costs she reimbursed Mormilk after it paid to clean the farm accommodation.**
- E. Mormilk is not required to reimburse Mr Johansen for the repairs to the farm accommodation or for the grazing costs his mother paid on his behalf.**
- F. Mormilk is ordered to pay Mr Johansen \$329.80 unpaid holiday pay.**

Employment relationship problem

[1] Mormilk employed Mr Johansen in June 2009 as a dairy worker. The terms of his employment included farm accommodation and free grazing for his calves. His first two years of employment were without incident but the relationship deteriorated. Mormilk say that occurred around November 2011 when Mr Johansen's behaviour and performance and in particular his attendance and timekeeping became erratic. Mr Johansen says the problems only began after he took time off work to attend the birth of his child in January 2012.

[2] Mr Johansen was dismissed without notice by a text message on 28 March 2012 when he failed to return to work after his lunch break. Mr Johansen was due to return to work at 1pm but did not contact his employer until around 4.30pm, when he texted to say he had fallen asleep.

[3] Prior to his dismissal Mr Johansen received a verbal warning on 13 February 2012 for not attending work, a written warning on 1 March 2012 for not attending work on 28 February 2012, and a final warning on 14 March 2012 for not turning up to milking.

[4] Mr Johansen claims:

- (i). Mormilk breached the PLEPA because he was pressured to return from parental leave early and that he was disadvantaged because his request

for parental leave resulted in the breakdown of the employment relationship

(ii).each of his warnings unjustifiably disadvantaged him in his employment

(iii). his dismissal is unjustified

(iv). Mormilk should reimburse him for cleaning and repair costs his mother paid on his behalf after he left the farm accommodation

(v).Mormilk should reimburse him for the grazing costs it charged him for his 30 calves which remained on Mormilk's property after his employment ended

(vi). unpaid holiday pay.

[5] Mormilk says the PLEPA does not apply because Mr Johansen did not apply for parental leave in accordance with the requirements of that Act. Mormilk says Mr Johansen requested and was granted 1.5 days paid annual leave to attend the birth of his child. Mormilk denies disadvantaging Mr Johansen under the PLEPA. It says Mr Johansen was given all of the time off he asked for and that he was not pressured to return to work early.

[6] Mormilk summarily dismissed Mr Johansen when he failed to show up for work on 28 March 2012. It says Mr Johansen's dismissal and his prior warnings were all justified.

Issues

[7] The issues to be determined include:

(i). Did Mormilk breach the PLEPA?

(ii). Did Mr Johansen's warnings unjustifiably disadvantage him in his employment?

(iii). If so, what if any remedy should be awarded?

(iv). Was Mr Johansen's summary dismissal justified?

- (v). If not, what if any remedies should be awarded?
- (vi). Should Mr Johansen be reimbursed for payments his mother made to Mormilk for the cleaning and repair costs it incurred?
- (vii). Should Mr Johansen be reimbursed for the grazing costs he was charged by Mormilk for his calves after his employment ended?
- (viii). Is Mr Johansen owed outstanding holiday pay?
- (ix). Should any award made to Mr Johansen be reduced?

Did Mormilk breach the Parental Leave and Employment Protection Act?

[8] An employee who wishes to take parental leave must give their employer written notice stating the proposed date and duration of the leave. Section 31 of the PLEPA sets out the notice requirements which must be given to the employer three months before the expected date of delivery.

[9] Mr Johansen's notice had to be accompanied by a certificate confirming his partner was pregnant and recording her expected due date. He also had to provide Mormilk with a written assurance from his pregnant partner that she is his partner and he intends to assume the care of the child to be born.

[10] These notice requirements are fundamental to the operation of the parental leave entitlements provided under the PLEPA. These notice requirements ensure an employer has time to plan effectively for an employee who wishes to exercise their statutory rights to take parental leave under the PLEPA.

[11] Mr Johansen admits he did not provide written notice of his intention to take parental leave as required by s.31 of the PLEPA. He says he gave verbal notice which was accepted by his employer and that he wrote his parental leave dates on the farm wall calendar. The original wall calendar was produced to the Authority and it did not include any references to parental leave.

[12] Mr Johansen was unable to satisfy me on the balance of probabilities that he ever applied for parental leave. None of the elements of the PLEPA notice requirements were present. He did not provide written notice as required, he did not notify his employer of the expected date of delivery, he did not identify how long he

wanted to take off as parental leave, he did not provide a medical certificate certifying that his partner was pregnant nor did his partner provide written assurance that he was her partner and intended to assume care of the child to be born.

[13] I find Mr Johansen casually informed his employer that he intended to be at his child's birth and that Mormilk agreed to that. I do not accept Mr Johansen's evidence that he was pressured to not take parental leave or to return to work after the birth of his child. Mr Johansen acknowledged he was never asked to return from his leave early and the perceived pressure came from his awareness that it was a very busy period at the farm.

[14] Because Mr Johansen did not exercise his entitlement to take parental leave under the PLEPA Mormilk could not have breached any obligations it had to him under the PLEPA.

Did the warnings Mr Johansen received unjustifiably disadvantage him in his employment?

[15] I find Mormilk had genuine and legitimate concerns about Mr Johansen's performance, timekeeping and attendance at work. However, the way it went about implementing each of the various warnings it imposed on Mr Johansen breached basic procedural fairness and natural justice requirements.

[16] None of the warnings were imposed after a disciplinary process. This meant no specific allegations were put to Mr Johansen to respond to so he did not know he would be subject to disciplinary action if his explanation to Mormilk's concerns was deemed unsatisfactory. Mr Johansen was not given a reasonable opportunity to consider Mormilk's concerns or to prepare his response. He was not advised of his right to take advice or be accompanied to a disciplinary meeting by a representative or support person.

[17] I find that each time a warning was imposed on Mr Johansen Mormilk had already decided Mr Johansen's behaviour was unacceptable. Each warning was imposed on Mr Johansen immediately without Mormilk first observing its basic procedural fairness obligations. Each of the warnings was predetermined because they were imposed before Mr Johansen had a reasonable opportunity to respond to Mormilk's concerns.

What, if any, remedies should be awarded?

[18] I decline to award Mr Johansen distress compensation for the unjustified warnings because I consider he fully contributed to the situations which gave rise to his unjustified disadvantage grievances in respect of each warning.

[19] I find on the balance of probabilities Mr Johansen was continually late for work and failed to attend work as expected which placed considerable pressure on Mormilk and its other employees during its busiest period. Although Mormilk raised its concerns about this with Mr Johansen his unsatisfactory behaviour continued. It would not be just or equitable to award Mr Johansen a remedy in these circumstances.

Was Mr Johansen's summary dismissal justified?

[20] Although Mormilk had dealt with other instances of poor timekeeping or failure to attend work as misconduct issues, it dealt with the last incident, when Mr Johansen admits he failed to show up for work on 28 March 2012, as serious misconduct. I consider that was not what a fair and reasonable employer could have done in all the circumstances¹ because dismissal for misconduct could only have occurred on notice after a graduated warning process had been exhausted.

[21] In this case Mr Johansen's failure to attend work is a misconduct issue, as that is how Mormilk had been treating such actions up until that date. Mormilk is unable to rely on any of the warnings it issued for poor timekeeping and non attendance at work because I find they were all implemented in a procedurally unfair manner so were unjustified. I therefore find Mormilk's summary dismissal of Mr Johansen is substantively unjustified.

[22] Mormilk's dismissal of Mr Johansen is also procedurally unjustified because it was carried out in an unfair manner. He was dismissed by a text message after not attending work and his dismissal letter was hand delivered to him by his manager (who appeared at his door unannounced) the next day. I do not accept Mormilk's evidence that Mr Johansen was given an opportunity to explain his absence.

[23] I find Mr Johansen's manager, Mr Andrew Hodgson, made an immediate decision on 28 March that Mr Johansen's employment had to end because he was too unreliable. That decision was made before he had spoken to Mr Johansen about his

¹ As per the s.103A justification test in ERA.

failure to attend work. His decision was therefore predetermined because it was made before Mr Johansen could have provided any explanation to the concern arising from his failure to attend work.

What, if any, remedies should be awarded?

Lost remuneration

[24] Mr Johansen claims 13 weeks' lost remuneration amounting to \$10,290.02. I am satisfied that Mr Johansen attempted to mitigate his loss by applying for three farming roles and one scrap metal yard position.

[25] Mr Johansen resigned on 13 February 2012 and gave notice his last day of work would be 18 May 2012. His resignation was accepted so he cannot claim lost remuneration after 18 May 2012 because if he had not been dismissed his employment would have ended on that date. His resignation therefore breaks the chain of causation for lost remuneration from 18 May 2012 onward.

[26] Mormilk is ordered to pay Mr Johansen lost remuneration under section 128(2) of the Employment Relations Act 2000 (the Act) from 28 March 2012 being the date of his dismissal until 18 May 2012 being the date his resignation would have taken effect.

[27] The parties have 14 days to attempt to agree on that amount with leave reserved to apply to the Authority to fix that amount if agreement is not reached. Any application for the Authority to fix the amount of lost remuneration must be received within 28 days of the date of this determination.

Notice

[28] Mr Johansen seeks four weeks' notice pay because he was summarily dismissed when he says dismissal (if justified) should have been on notice. I do not accept that Mr Johansen is entitled to notice pay. His dismissal was unjustified so he has been awarded lost remuneration which covers what would have been any notice period.

Distress compensation

[29] Mr Johansen claims \$4,000 compensation for the distress he says he suffered as a result of his unjustified dismissal. I consider Mr Johansen's evidence in support of such a claim was minimal. He merely referred to (unsubstantiated hearsay) rumours Mormilk had been destroying his reputation and says he felt his dismissal punished him for looking after his wife and child.

[30] Mormilk is ordered to pay Mr Johansen \$1,000 under section 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered.

Contribution

[31] Section 124 of the Act requires me to consider the extent to which Mr Johansen contributed to the situation which gave rise to his dismissal grievance and to reduce remedies accordingly.

[32] I consider Mr Johansen has a high level of contribution to the situation which gave rise to his unjustified dismissal. He did not turn up to work at all in the middle of calving which was one of Mormilk's busiest periods of the year. That occurred against a background where Mormilk had been raising ongoing concerns about his timekeeping and attendance. Mr Johansen admitted his attitude and work ethic had deteriorated after his child was born.

[33] I consider it appropriate to reduce the lost remuneration and distress compensation Mr Johansen has been awarded by half to reflect his contribution to the situation which gave rise to his dismissal grievance.

Should Mr Johansen be reimbursed for the amounts his mother reimbursed Mormilk for the costs it incurred in cleaning and repairing the farm accommodation?

[34] Mormilk charged Mr Johansen \$862 for cleaning the farm accommodation after he had left. Mr Johansen says he returned to the accommodation after he had moved out to finish cleaning it but by then Mormilk had already paid a cleaner and a builder to repair holes in the walls. Mr Johansen says he had a builder friend who was

going to fix the holes in the walls he did not get a chance to do so because Mormilk had already paid its own builder \$724.50 to undertake repairs.

[35] Mr Johansen's mother paid Mormilk for its cleaning and repairs costs and Mr Johansen seeks reimbursement of those amounts. I find it was not unreasonable for Mormilk to make its own arrangements to clean and repair the farm accommodation because it was needed for the replacement worker. Mr Johansen had moved out without making suitable arrangements for these issues to be addressed. If he needed more time to clean or repair the property then it was up to him to arrange that with Mormilk. I find he failed to do so.

[36] Mormilk say that the farm accommodation was left in an uninhabitable state. This was disputed by Mr Johansen. I find, on the balance of probabilities, Mr Johansen did not leave the farm accommodation in a clean and tidy condition. That is evident by him and his then partner returning to the property after their departure to finish off cleaning up. That did not occur until approximately three weeks after he had been given notice to vacate the accommodation which I consider was too late. I find Mormilk were entitled to engage professional cleaners and a builder to undertake repairs.

[37] However, I am not prepared to allow Mormilk to claim the entire costs of cleaning because I find on the balance of probabilities the farm accommodation required significant cleaning by Mr Johansen and his partner when they moved in. I accept the evidence of Mr Johansen and his former partner that when they moved into the farm accommodation it had dead birds and bird poop inside, which they cleaned at no cost to Mormilk.

[38] I therefore order Mormilk to reimburse Mr Johansen's mother \$431.25 being half of the cleaning costs she has already paid it. I consider Mr Johansen is responsible for paying for repairing two holes in the wall. I did not accept his evidence that one hole in the wall was fair wear and tear or that the second was caused by a member of the Hodgson family. Mr Johansen's stated intention to get his builder friend to repair this damage after he had moved out indicates Mr Johansen believed he was responsible for such repairs. I decline to reimburse Mr Johansen's mother for the repair bill she paid Mormilk on her son's behalf.

Should Mr Johansen be reimbursed the cost of grazing his calves on Mormilk's property after his employment ended?

[39] Mr Johansen's mother paid Mormilk \$1,173 for the costs it claims it incurred by providing grazing for Mr Johansen's calves after his employment ended. I find that while the parties agreed free grazing would be provided to Mr Johansen's calves whilst he was employed there was no agreement that would continue after Mr Johansen's employment ended. I find Mr Johansen was told he would be charged grazing if he failed to move the calves from Mormilk's property so it is reasonable for Mormilk to have done so when he did not remove his calves from its property.

[40] I decline to reimburse the grazing costs Mr Johansen's mother paid Mormilk on his behalf.

Is Mr Johansen owed outstanding holiday pay?

[41] The parties agreed Mr Johansen was not paid any holiday pay upon termination and that when his employment ended he was owed 2.5 days annual holiday. Mormilk submits Mr Johansen should have 1.5 days paid leave deduced from his annual holiday entitlement to reflect the time he took off work for the birth of his child.

[42] I do not accept that submission. Mormilk's witnesses told me Mr Johansen was paid 1.5 days annual leave to attend the birth of his child. Mormilk obviously agreed to Mr Johansen taking paid annual holiday at the time so they cannot now renege on that. Mormilk is ordered to pay Mr Johansen \$329.80 being 2.5 days unpaid annual holiday pay.

Should the amounts awarded to Mr Johansen be reduced?

[43] Mormilk submits any award made to Mr Johansen should be offset against what it claims are overpayments of his salary. Mormilk claims it should be reimbursed because Mr Johansen was paid his normal salary although he allegedly only attended work for less than 25 hours per week. Mormilk calculates this overpayment to be \$248.86 per week for eight weeks from 6 February 2012 until 28 March 2012, which it says amounts to \$1,990.88.

[44] I decline to reduce the remedies awarded on the basis claimed by Mormilk. It failed to raise any overpayment issues with Mr Johansen whilst he was employed. I

was also not convinced by the evidence Mormilk produced in support of its allegation Mr Johansen had worked less than 25 hours per week from 6 February 2012 onward. I note Mormilk did not reduce Mr Johansen's pay while he was employed to reflect the reduced hours it claimed he had worked. I find the evidence Mormilk relies on to support its submission unreliable.

[45] The only deductions to the remedies awarded are to reflect the contribution Mr Johansen had to the situation that have rise to his disadvantage and dismissal grievances.

Summary

[46] I make the following findings and orders:

- (i). Mr Johansen did not apply for parental leave under the PLEPA and Mormilk did not breach its obligations under the PLEPA.
- (ii). The verbal warning on 13 February, the first written warning on 1 March and the final written warning on 14 March 2012 were all unjustified and therefore disadvantaged Mr Johansen in his employment. No remedy is awarded to reflect Mr Johansen's contribution to each of the situations which gave rise to the unjustified warnings which disadvantaged him.
- (iii). Mormilk's dismissal of Mr Johansen was substantively and procedurally unjustified. Mormilk is ordered to pay Mr Johansen lost remuneration from 28 March to 18 May 2012 which is to be calculated by the parties and then reduced by 50% to reflect contribution.
- (iv). Mormilk is to pay Mr Johansen \$500 distress compensation (being \$1,000 reduced by 50% to reflect contribution).
- (v). Mormilk is ordered to pay Mr Johansen's mother \$431.25 to reimburse her for part of the cleaning costs she paid for the farm accommodation after Mr Johansen's employment ended.
- (vi). Mr Johansen is not to be reimbursed for the repairs or grazing costs his mother paid Mormilk on his behalf after he was dismissed.

(vii). Mormilk is ordered to pay Mr Johansen \$329.80 unpaid holiday pay.

Costs

[47] As the successful party Mr Johansen is entitled to a contribution towards his actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible then costs will be dealt with by an exchange of memorandum. Proof of the actual costs incurred is required in support of a costs application.

[48] Mr Johansen has 14 days within which to apply for costs and Mormilk has 14 days to respond. This timetable will be strictly enforced.

[49] In order to assist the parties, I can indicate the Authority will adopt its usual notional daily tariff based approach to costs. The current notional daily tariff is \$3,500 which will then be adjusted to reflect the particular circumstances of this case. The parties are therefore invited to identify in their submissions any factors they say warrant an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority