

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 212
3079152

BETWEEN JESSE KOMENE
Applicant

AND GUARDIAN FARMS LIMITED
Respondent

Member of Authority: Jenni Maree-Trotman

Representatives: Alex Kersjes, advocate on behalf of the Applicant
No appearance by the Respondent

Investigation Meeting: 18 May 2020

Date of Determination: 27 May 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Guardian Farms Limited operates a farm in Whangarei. Jesse Komene was employed by Guardian Farms in July 2018 in the position of second in charge.

[2] On 2 November 2018 Mr Komene was provided with two weeks' notice of his dismissal. He alleges his dismissal was unjustified and claims lost wages and compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] No Statement in Reply was filed by Guardian Farms.

The Authority's process

[4] On 19 November 2019 the Authority issued a minute wherein it confirmed that Guardian Farms had not filed a Statement in Reply. Guardian Farms was advised:

Pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, the Respondent will require the leave of the Authority to reply or respond to the application. If an application for leave is filed by the Respondent this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[5] Guardian Farms was also directed to provide a copy of Mr Komene's individual employment agreement, wage and time records, leave and holiday records, payslips and final pay details.

[6] Guardian Farms did not file a statement in reply, nor provide the documents that were directed by the Authority. In addition, there was no appearance for or on its behalf at the investigation meeting that was conducted by telephone. This was despite the Authority Officer contacting the parties by email the week prior to the investigation meeting to remind them of the investigation meeting and to again provide the details for connection to the investigation meeting.

[7] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Guardian Farms had duly attended or been represented.

[8] As permitted by 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 but has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination were:

- a) Was Mr Komene unjustifiably dismissed?
- b) If Mr Komene was unjustifiably dismissed, what remedies should be awarded?
- c) If any remedies are awarded, should they be reduced, under s 124 of the Act, for blameworthy conduct by Mr Komene that contributed to the situation giving rise to his grievance?

- d) Should either party contribute to the costs of representation of the other party?

[10] A claim for unpaid Kiwisaver and penalties was withdrawn prior to the investigation meeting.

Relevant background facts

29 October 2018 – Mr Komene is suspended

[11] On 29 October 2018 Mr Komene discovered that the power was off at the farm and the water pump wasn't working. Shane Holland, Guardian Farm's sole Director, went to the paddock to investigate the cause. Upon his return to the milk shed Mr Holland advised Mr Komene:

- a. A power pole was down in the field and that was why the power was off and the pump wasn't working.
- b. He had phoned a Linesman and he was on his way.
- c. He had discovered a nick, about half the size of a Bic lighter, on the corner of the power pole about 2 metres up.
- d. He accused Mr Komene of hitting the power pole when he was using a B18 roller to carry out work in the paddock on 28 October.

[12] Mr Komene advised Mr Holland that he was not aware of hitting the pole. He explained that, due to the speed he was operating the tractor, had he hit the power pole then the force of his tractor would have pushed the pole over, causing the lines to come down and he would have been electrocuted. It was therefore impossible for him to have hit the pole and not known.

[13] Mr Holland told Mr Komene that this was a serious matter and he was standing him down on full-pay while he investigated the matter further. Mr Komene asked if he could view the damage to the power pole and was told that he could not. He was also told that whilst the investigation was underway he was not permitted to return to the farm and was to remain in the immediate surrounds of his farm house.

1 November 2018 – the disciplinary meeting

[14] A meeting was arranged for 1 November 2018 to hear Mr Komene's version of events. Prior to this meeting Mr Komene spoke with Mr Holland and asked him if he could hold the meeting later in the day so that he could have a support person present. He said his request was denied. He was told that the purpose of the meeting was just to discuss what happened with the power pole, a support person was not necessary, and no further action would be taken. Mr Komene took the last comment to mean there would be no disciplinary outcome.

[15] At the meeting Mr Holland provided further detail of the allegations. Namely, that while rolling the B18 tractor Mr Komene had hit a power pole, pushing it over and snapping the cross members, and had failed to report the incident. Instead leaving the site in a dangerous position for livestock and staff. He was advised that Mr Holland considered this to be a very serious matter that, if proved, could be considered to be serious misconduct and that one possible outcome was dismissal.

[16] Mr Komene was then provided with an opportunity to put forward his explanation and any other information he believed relevant to the allegations. Mr Komene said he was unprepared for the gravity of the allegations that were made or the possible outcomes. However, he put forward several explanations.

[17] First, he denied causing damage to the power pole. He repeated the explanation provided to Mr Holland on 29 October as to why he could not have caused the damage. He also referred to the fact that the farm still had power after he had worked in the paddock. Had he hit the power pole, as alleged, it would have triggered the trip switch to turn the power off. Instead the power stayed on until the following day.

[18] Second, he pointed to other possible explanations for the damage. First, that Mr Holland and his father had been working in the paddock in the days leading up to him working there and could have caused the damage. Next, he pointed to the age of the pole and to research he had undertaken that showed power poles should be replaced every 20 years. This, combined with a substantial and severe storm that had occurred on the evening of 28 October, could have caused the damage.

[19] Mr Komene said that Mr Holland did not accept any of his explanations and dismissed them outright. He maintained that the power pole was fine before Mr

Komene began working in the paddock and, in terms of the trip switch, told him that the trip switch was faulty which is why the power did not go off until much later.

[20] Mr Komene said he asked Mr Holland to provide him with a copy of photographs Mr Holland had taken of the alleged damage to the pole and also a copy of the Linesman's report. Mr Holland told him he would send through the photographs after the meeting and would send through the report when it was received. This was not done.

The termination meeting

[21] On 2 November Mr Holland came to Mr Komene's home and asked him to come to the cow shed for a talk. When Mr Komene arrived he said Mr Holland was visibly upset. Mr Holland told him that although he wanted Mr Komene to remain working for him, the owner of the farm wanted him off the farm and therefore he was going to have to dismiss him. He would be paid two weeks' wages in lieu of notice and had two weeks to move out of the farm house he occupied.

[22] That evening Mr Komene received a text message from Mr Holland confirming that he had been dismissed. A letter particularising the reasons for this decision was subsequently provided.

Issue One: Unjustified dismissal

The law

[23] The onus falls upon Guardian Farms to prove that its actions in dismissing Mr Komene were justified.

[24] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Guardian Farms, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[25] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the

employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[26] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.¹

[27] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Analysis

[28] Having carefully considered Mr Komene's claim I am satisfied, on balance, that Guardian Farm's decision to terminate Mr Komene's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I am fortified in this finding by the following evidence:

- a. Mr Komene was invited to attend the meeting on 1 November without any forewarning that it was going to be a disciplinary meeting and without notice of the extent of the allegations. Rather, when asked what the purpose of the meeting was, Mr Komene was told that Mr Holland just wanted to talk about what happened and that there would be no outcome. He took this later comment to mean no disciplinary action would be taken.
- b. Mr Komene sought, but was denied, an adjournment of the investigation meeting by several hours to enable him to have a support person present.
- c. Prior to the meeting, and subsequently, Mr Komene was not provided with access to relevant information to enable him to fully and fairly respond. For example, access to the photographs relied upon by Guardian Farms as showing the damage to the power pole and access to the power poles to view the damage for himself.

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

- d. During the meeting Mr Komene raised a number of possible reasons for the damage to the power pole that did not involve negligence on his part. I am not aware of any investigation Guardian Farms undertook of these matters before making its decision to dismiss. A fair and reasonable employer could have spoken to the other worker who worked on the property before Mr Komene, checked to ascertain if the trip switch was faulty and/or why the power did not turn off immediately, ascertained if the power pole could have come down due to its age and poor weather, and reviewed the Linesman's report before making its decision to terminate.

[29] Had Guardian Farms investigated the cause of the damage to the power pole and genuinely considered Mr Komene's explanations, rather than approaching the investigation with a pre-determined view that Mr Komene caused the damage, the outcome may well have been different.

Finding on Issue One

[30] Mr Komene was unjustifiably dismissed from his employment with Guardian Farms.

Issue two: Remedies

Lost wages

[31] Section 123(1)(b) of the Act provides for the reimbursement by Guardian Farms of the whole or any part of wages lost by Mr Komene as a result of his grievance. Section 128(2) provides that I must order Guardian Farms to pay Mr Komene the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.²

[32] Mr Komene's individual employment agreement provided that he was to be paid \$57,600 per annum (\$1,107.69 gross per week). Mr Komene was paid two weeks' notice. His final day of employment was 16 November 2018.

[33] Mr Komene started a new job on 5 December 2018 that paid him \$55,000 per annum (\$1,057.69 gross per week). He said he continued in this new job until 30

² Employment Relations Act 2000, 128(3).

January 2019 when he resigned for personal reasons unconnected to his personal grievance.

[34] I am satisfied Mr Komene has lost wages as a result of his personal grievance in the sum of \$3,169.22 gross calculated as follows:

- a. For the period from 16 November 2018 until he started his new job on 5 December 2018, a period of 2.5 weeks. Multiplying \$1,107.69 gross by 2.5 weeks I reach a figure of \$2,769.22 gross.
- b. For the period from 6 December 2018 until Mr Komene resigned from his new job on 30 January 2019 (8 weeks). Multiplying the difference between what Mr Komene would have earned each week but for the personal grievance and what he actually earned (\$50 gross difference) by 8 weeks I reach a figure of \$400 gross.

[35] For completeness I have not awarded any lost wages for the period from 31 January 2019 onwards as I am satisfied that any loss was not attributable to Mr Komene's personal grievance but due to decisions he made relating to his health.

[36] Guardian Farms is ordered to make payment to Mr Komene of the sum of \$3,169.22 for lost wages. Payment must be made within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[37] Mr Komene claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[38] Mr Komene gave evidence of the effects that the dismissal had on him. He explained how shocked he was by the decision and described the impact this had on him. He explained how the loss of his job meant he was required to vacate the farmhouse where he and his pregnant partner and infant child resided. He felt humiliated when they had to move into his partner's family home. The loss of income left his family under financial pressure until he found a new job and for a period of time thereafter.

[39] I am satisfied Mr Komene suffered humiliation, loss of dignity and injury to his feelings as a result of his personal grievance, but not to the extent he sought.

[40] Taking into account the short duration Mr Komene endured before he found a new job, and was able to move with his family to new accommodation, and there being no evidence of any on-going distress attributable to the personal grievance after he obtained new employment, I find an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$10,000 is warranted.

[41] Guardian Farms is ordered to make payment to Mr Komene the sum of \$10,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue three: Contribution

[42] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.³

[43] I am satisfied that Mr Komene did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

Costs

[44] In light of his success in bringing this application, Mr Komene is entitled to an order for a contribution to his costs of representation and for reasonable disbursements associated with the bringing of his claim to the Authority. He claims a sum of \$1,500 towards his costs.

[45] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.⁴ These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.⁵ The principles include:

³ Employment Relations Act 2000, s 124.

⁴ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

⁵ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience is to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. Costs generally follow the event.
- h. Without prejudice offers can be taken into account.
- i. Awards will be modest.
- j. Frequently costs are judged against notional daily rates.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[46] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500 for the first day of an investigation meeting.⁶ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[47] The investigation meeting took one quarter day. The starting point for a consideration of costs is \$1,125. I am satisfied that no adjustment is warranted. There were no attendances outside of those anticipated by the daily tariff.

⁶ Practice Note 2, Costs in the Employment Relations Authority.

[48] To this figure must be added the Authority's filing fee of \$71.56 bringing the total legal fees payable by Guardian Farms to \$1,196.56.

Finding

[49] I order Guardian Farms to pay to Mr Komene the sum of \$1,196.56 towards his legal costs and disbursements pursuant to clause 15 of Schedule 2 of the Act within 14 days.

Outcome

[50] The overall outcome that I have reached is:

- a. Jessie Komene was unjustifiably dismissed from his employment with Guardian Farms Limited.
- b. Guardian Farms Limited is ordered to pay Jesse Komene the following amounts within 14 days of the date of this determination:
 - i. A sum of \$3,169.22 gross for lost wages;
 - ii. A sum of \$10,000 under s 123(1)(c)(i) of the Act;
 - iii. Legal costs and disbursements of \$1,196.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority