

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 50  
5337407

BETWEEN

BRETT MATHYS  
Applicant

AND

SUZY and ROSS BOLTON  
Respondents

Member of Authority: P R Stapp

Representatives: Alex Hope and Victoria Dryden, Counsel for the  
Applicant  
William Wright, Counsel for the Respondents

Investigation Meeting: 15 November 2011 at New Plymouth

Submissions: By 24 January 2012

Determination: 26 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is an employment relationship problem about whether or not a fair and reasonable employer would have come to an honestly held belief that Mr Mathys broke Cow 436's tail on or about 9 December 2010. Did Suzy and Ross Bolton act fairly and would a fair and reasonable employer have dismissed Mr Mathys?

[2] Mr Mathys denied that he broke the cow's tail. He claimed his dismissal was unjustified. Also he claimed that he was required to work long hours and was tired.

[3] Suzy and Ross Bolton have rejected the claims and remedies made by Mr Mathys.

**Issues**

[4] A number of factual matters are at issue between Mr Mathys and Mr Bolton. These factual issues include whether or not Mr Stephen Cooper, farm manager, would have seen what Mr Mathys was doing to Cow 436, across the dairying platform, on 9 December 2010. Also would Mr Cooper have mistaken which cow had a broken tail when he culled it out of the herd and carried out an inspection with Mr Bolton?

[5] Another factual issue is how many cows had broken tails on this farm? Mr Mathys claimed that about a quarter of the herd of 900 cows had broken tails. He was supported by another former employee, Mr Tim Headley. Mr Bolton and the farm manager claim that about 12-14 cows out of the full herd had broken tails.

[6] In essence because Mr Bolton relied upon what someone else says they saw would a fair and reasonable employer have come to an honestly held belief that Mr Mathys broke Cow 436's tail?

[7] Did the employer follow a fair process?

[8] Which party is entitled to costs, and how much?

**The facts**

[9] Brett Mathys was employed by Suzy and Ross Bolton on their dairy farm at Kaipi Road, Egmont Village, Taranaki, as a herd manager. Mr Mathys was paid \$52,000 gross per year. He was paid fortnightly.

[10] The Boltons employed two other employees, Tim Headley and another person, both of whom resigned during the time Mr Mathys was employed on the Boltons' farm. Mr Bolton says that they resigned because of Mr Mathys. Mr Mathys and Mr Headley both claim that this is untrue, and that Mr Headley resigned because of stress associated with long hours and Mr Bolton's abuse. Mr Bolton denied abusing Mr Headley, except that he did accept that he swore and yelled at him for making basic mistakes.

[11] Mr Mathys says that shortly after commencing work he noticed a large number of cows on the farm had broken tails. He did not report this or take the matter up with Mr Bolton at the time. Mr Bolton says that he noticed shortly after Mr Mathys started work on the farm that a number of cows had broken tails. He also

said that he noticed Mr Mathys kicking and “booting” cows, on three occasions. Mr Bolton says he tried to discuss these matters with Mr Mathys, but he was thwarted by Mr Mathys’ verbal reaction and refusal to discuss such matters. Mr Mathys denied kicking cows, but he did accept that he swore at them to get them to move and do what he wanted them to do.

[12] Mr Bolton employed Brendon Cookson to work as a farm assistant on the farm, and then in 10 days appointed him as the farm manager. Mr Cookson started work on the farm on 30 November (diary entry). Mr Cookson made diary notes from this date about Mr Mathys, his relationship with Mr Bolton, and different matters relating to Mr Mathys leaving the dairy shed early, leaving cows to be milked, not completing his jobs at the end of the day, being away and on one occasion that Mr Mathys came to work under the influence of alcohol. Mr Cookson’s diary entries, particularly Monday 6 December, Tuesday 7 December, Wednesday 8 December and Thursday 9 December, indicate a deteriorating relationship on the farm. The diary entries ceased from 10 December 2010.

[13] On 9 December, Mr Cookson reported to Mr Bolton that he had seen Mr Mathys twist Cow 436’s tail. He reported that Mr Mathys “violently” twisted the cow’s tail. Mr Cookson was requested by Mr Bolton to put his allegation in writing for it to have any substance. Mr Cookson did provide a written report dated 10 December that included the following matters:

- (a) Mr Mathys’ treatment of animals;
- (b) Mr Mathys’ finishing times;
- (c) Mr Mathys’ behaviour in not following instructions;
- (d) Mr Mathys being under the influence of alcohol at work;
- (e) That Mr Mathys grabbed cow 436’s tail and violently twisted it.

[14] Mr Cookson confirmed that he walked around the dairy shed platform. He added that he stopped for about 30 seconds on the platform, went to the computer, drafted Cow 436 out of the herd and reported the incident to Mr Bolton. They say they thereupon inspected the cow and discovered the tail had been broken. Mr

Cookson does not accept that he was confused or that he was mistaken about the cow which had the broken tail because he was able to identify it immediately.

[15] Mr Bolton wrote to Mr Mathys on 10 December 2010. This letter included much of the detail contained in Mr Cookson's report. It is unclear when Mr Cookson's report was given to Mr Mathys. It is more than likely that this report was handed to Mr Mathys during a meeting that was held on 13 December 2010. Mr Mathys has complained that he did not have time to get a lawyer for help over the weekend before this meeting. However, he did take his partner, Nicole Stephens, to the meeting as a support person. Mr Mathys denied all the allegations.

[16] Quickly this meeting deteriorated and became acrimonious, with Mr Cookson at one stage appearing to want to hit Mr Mathys, because of Mr Mathys's comments to Ms Bolton. Mr Mathys, Mr Bolton and Mr Cookson agree that they all were swearing. Mr Mathys left the meeting, calling out that he was going to get his lawyer.

[17] Mr Bolton, in the meantime, had decided to get legal advice on what to do, and decided to get an opinion from a vet. A vet's opinion was provided in writing on 14 December. This was provided to Mr Mathys for his comment and Mr Bolton provided him with the choice of providing a reply in writing or to request another meeting.

[18] On 16 December, Mr Mathys replied in writing with the following comments:

*Reply to letter dated 15th December 2010*

*In regards to this letter and also the vet report. You have no proof that I was the one who broke Cow 436's tail. I have a signed statement from Brendon Cookson that I was only holding the cow's tail by one hand not two. As you were both not there to witness it this allegation it must be dropped.*

*As reported in the vet's letter in regards to this matter, Cow No 394 was not the cow of concern at the time and should not have been brought up as this is another allegation that you do not have the sufficient evidence for.*

*In the vet's report it states that 'the most common cause of this type of injury to a cow's tail is by a human physically breaking the tail by bending it with two hands until it breaks'. It was not possible for me to have broken it as I only held the tail by one hand. This is confirmed by the witness's statement. If you have any concerns please put it in writing.*

*Brett Mathys*

[19] Upon receiving this reply, Mr Bolton requested further details on broken tails in the dairy herd from the vet. A further veterinary report was provided dated 17 December 2010. Mr Bolton says that he left the vet's report for Mr Mathys in the upper office in the dairying shed. In his answers to questions at the Authority's meeting, Mr Bolton disclosed for the first time that he met with Mr Mathys briefly on 18 December 2010, but was not sure what he said to Mr Mathys. Mr Mathys denied any meeting taking place on this date. There is no record that has been kept of the meeting. It is therefore improbable that such a meeting took place that had anything to do with the investigation and disciplinary process, I hold. On the same day Mr Bolton says he deliberated on what to do and decided to dismiss Mr Mathys. He arranged for Ms Bolton to type up the following dismissal letter. The letter reads as follows:

*Decision regarding alleged misconduct – decision to dismiss.*

1. *Thank you for meeting with us on Monday 13 December to discuss our allegation that you mistreated stock (Cow 436) to the extent that your actions amounted to serious misconduct.*
2. *As we have discussed with you and put to you in our letter dated 10 December 2010, Brendon reported that he saw you breaking a cow 436's tail on 9 December 2010. He reported that you did this without any obvious reason.*
3. *At the meeting, you admitted that you twisted that particular cow's tail. You did not provide us with any reason as to why you did this. In fact, you reserved the right to do it again. However, you did challenge us to prove that you had broken or dislocated the cow's tail.*
4. *As a result of your comments, we asked a vet to come onto the farm and examine Cow 436 on Tuesday 14 December 2010. The vet confirmed that the Cow's tail was broken recently. You were provided with a copy of the vet's report and given at least one day to make any comment or response on that report. You have not provided me with any response.*
5. *As you are aware, mistreatment of animals is an incredibly serious issue. The cows are our livelihood. Not only can abuse result in stress and injury to animals, (as occurred in this case) it can also create serious animal welfare issues. Schedule 1 of your employment agreement states that serious misconduct includes "animal abuse leading to injury ...".*
6. *We have found that you broke the cow's tail and injured it without any reason at all. We have decided that your conduct in breaking the cow's tail was inexcusable and serious misconduct. As a result, we have decided to terminate your*

*employment without notice under clause 19.1 of your employment agreement.*

7. *Because we have decided to terminate your employment without notice, we have decided not to make a finding and to end our investigation in respect of the other allegations raised in our letter of 13 December 2010 (sic).*
8. *Please also note that you will have two weeks from today to leave your accommodation in a tidy and reasonable state. This time limit can of course be reduced under the Residential Tenancies Act 1986 if we find a replacement worker who requires accommodation.*
9. *We are sorry that this relationship has ended on this note. However, physical mistreatment of animals simply cannot be excused. If you require, we will provide you with a certificate of service or reference and you will receive your minimum statutory entitlements.*

### **Determination**

[20] Starting with the last letter dated 18 December 2010 first, the following points emerge. Mr Bolton's letter of 10 December 2010 did put all the allegations to Mr Mathys. The central matter is whether or not Mr Bolton would have come to an honestly held belief that Mr Mathys broke Cow 436's tail, from the information available at the time. Mr Bolton concluded that Mr Cookson reported that he saw Mr Mathys breaking Cow 436's tail on 9 December 2010. However Mr Cookson did not see that actually happen. What Mr Cookson saw was Mr Mathys twisting the cow's tail with one hand while Mr Mathys was trying to manage the cups. Mr Cookson says this was a violent action. Mr Mathys has admitted that he twisted the cow's tail but denied that he broke it. In their evidence, Mr Mathys and Mr Bolton are in dispute as to whether or not Mr Mathys made the comment that he would "*reserve the right to beat the cow if it did not do what he wanted it to do*". Mr Mathys has accepted that he did swear in an uncouth way at the cows, but denied ever saying the above comment, which Mr Bolton says he heard on three occasions (two of them reported in his evidence and the third raised during the Authority's investigation meeting for the first time).

[21] Mr Mathys did provide a written response on 16 December to the vet's report of 14 December. The parties now dispute what the vet meant by the tail being broken "*recently*".

[22] Clearly, Mr Bolton made a decision that Mr Mathys broke the cow's tail and injured the cow without any reason at all. However, what has emerged during the course of the Authority's investigation meeting is the distinct possibility that Mr Mathys was stressed in coping and managing milking the cows. This is evidenced by his language and, at the very least, what Mr Cookson says he observed on 9 December, when Mr Mathys admitted that he twisted the cow's tail, although he denied that he broke the cow's tail. It is a fact that Cow 436's tail was discovered broken a short time later when the cow was inspected after being drafted by Mr Cookson.

[23] Mr Bolton's decision to dismiss Mr Mathys was made without him giving Mr Mathys any opportunity for input on a penalty. I accept that Mr Mathys was on notice that his job was in jeopardy, but this was dependent on an adverse finding and outcome on the investigation arising out of the disciplinary meeting dated 13 December. This is one of those occasions where such a meeting and an opportunity for some input was important. This is because the different categories of misconduct and serious misconduct are included under the employment agreement and that there was a credibility issue and the possibility of other circumstances arising that could impact on any decision.

[24] Under misconduct as to an offence which could constitute serious misconduct to give rise to summary dismissal is the provision "*animal abuse leading to injury or death of stock (as a direct or indirect result of the abuse)*". Under the examples of behaviour which could lead to dismissal after warnings is the category: "*the mistreatment of stock leading to potential distress, illness or injury*". Thus there was more than one penalty open for consideration.

[25] Also, previously, Mr Bolton had decided to let go instances of alleged kicking and booting of cows because he considered that he could talk to Mr Mathys and talk him through such a problem. Therefore, given his condonation of that behaviour earlier, and the apparent stressfulness of the work that Mr Mathys was finding in his employment, a fair and reasonable employer would have had a second meeting for input on a penalty. A proper investigation would have disclosed that Mr Mathys was under stress. This is especially so given that Mr Bolton was receiving legal advice and where Mr Mathys was finding it difficult to obtain advice himself.

[26] This is one of those cases where the employer has to satisfy that it had reasonable grounds to come to an honestly held belief in regard to the allegation. Also the employer's evidence in support of such an allegation had to be as convincing in its nature as the gravity of the charge (*Honda NZ Ltd v. NZ (with exceptions) Shipwrights etc. Union* [1990] 3 NZILR 23 (CA)). This is affected by Mr Mathys's denial of the allegation, that there were a number of cows in the herd that had broken tails, that there was some ambiguity around what the vet meant by the word "recently", and that Mr Bolton failed to sufficiently explain how he determined credibility between Mr Cookson and Mr Mathys. The latter is especially important since it has emerged that Mr Cookson never actually saw Mr Mathys break the cow's tail. Also, the cows' tails were broken in different places according to the vet. There were other ways in which cows' tails could be broken on the farm. Mr Cookson was adamant that he saw Mr Mathys twisting cow 436's tail that led to his conclusion it was Mr Mathys who broke the cow's tail and that it was cow 436's tail. He concluded Mr Mathys broke the cow's tail because he had heard verbal abuse, there was no obstruction to his line of sight from where he was standing on the platform and where the cow was, he saw the cow's reaction as Mr Mathys tried to put the cups on the cow, he walked around the platform, stopped the platform, he looked at the same cow, put the identity of the cow in the computer and subsequently drafted it out of the herd for inspection with Mr Bolton. I accept that Mr Cookson was certain about what he says he saw, but that he did not see the tail being broken.

[27] Mr Bolton did not make a finding on credibility at the time, as it is clear from the documents and his statement. There was a belief formed that Mr Mathys had broken cow 436's tail. Also, Mr Bolton accepted that there was no scrutiny at the time as to whether or not Mr Mathys acted deliberately when he twisted the cow's tail given that Mr Mathys' behaviour was likely to have been associated with his stress on the job. Also there was no enquiry made as to any abuse and mistreatment of stock, given the differences over the number of cows with broken tails. Mr Bolton accepted that he did not cover the factors off at the time. At the time the issue was that the tail had been broken, although there was no witness. At the Authority's meeting Mr Bolton said that Mr Mathys acted deliberately by twisting the cow's tail instead of simply lifting it.

[28] Mr Mathys has been critical of the vet's visit being a day after the cow had been drafted out of the herd in making an assessment of when the tail had been

broken. The vet did not say when the break had occurred. Mr Mathys was not involved in the vet's inspection. Mr Mathys' evidence to the contrary was that the cow's tail was clean and that the cow had not been identified the day before as proof that the tail could have been broken earlier and that he did not notice anything, although he accepted that he twisted the cow's tail instead of lifting it. These are additional factors that create some doubt about the situation, and that a fair and reasonable employer would have assessed, I hold.

[29] Mr Bolton's process (as outlined in his letter dated 10 December) goes some way to meet the requirements expected of a fair and reasonable employer, but at the last hurdle he failed to meet the requirements for a fair process for Mr Mathys. As fair and reasonable employer Mr Bolton would have had a last meeting and ensured that Mr Mathys had an opportunity to have legal representation and an opportunity to have input into a penalty. The failure to do this was unfair, I hold.

[30] For the above reasons, Mr Mathys has a personal grievance.

### **Remedies**

[31] Mr Mathys has claimed lost wages for the month he was without work (37 days: \$5,100) and three months where his earnings were reduced (\$1,625) amounting in total to \$6,725. Also, he has claimed \$20,000 compensation for hurt humiliation and loss of feelings.

[32] Mr Mathys found other work a month after his dismissal. This has involved less work than on the farm, and thus involved a reduction in income. I am satisfied that he attempted to mitigate his loss.

[33] I hold that the following factors are relevant for an assessment of contribution. These are:

- That Mr Mathys's denied the allegation. There were no witnesses.
- That there were a number of cows on the farm in the herd that had broken tails.
- That there was some ambiguity around what the vet meant by the word "*recently*".

- That Mr Bolton failed to sufficiently explain how he determined credibility between Mr Cookson and Mr Mathys, especially since it has emerged that Mr Cookson never actually saw Mr Mathys break the cow's tail.
- That there were a number of cows' tails broken in different places, according to the vet's report.
- That there were other ways in which cows' tails could be broken on the farm.
- That there is the possibility of the cows being mistaken by Mr Cookson and Mr Bolton.

[34] For the above reasons the evidence falls short of establishing that Mr Mathys broke the cow's tail. However, his treatment of the cows in other respects, means that he has left it open to a conclusion that he was abusive when there was reference made to him saying that he would "kick" and "boot" the cows. He was responsible for the cows in his charge while he was milking them and one of the cows was found to have a broken tail when it was checked. His behaviour and treatment of the livestock has contributed to the situation. In particular he admitted to bending and twisting the cow's tail and if the tail was broken at the time, based on what Mr Cookson says he witnessed, and that if he correctly identified the cow, it would have been because Mr Mathys was careless, and that does not meet the level of care required, even in the circumstances of stress and hazards in the workplace, if Mr Mathys had been working long hours and was tired. Thus, I hold his contribution is 30%.

[35] Mr Mathys is entitled to \$4,707.50 gross lost wages after deduction for contribution.

[36] In addition, Mr Mathys is entitled to compensation for hurt and humiliation reduced by 30%. His evidence was notable for having very little information relating to a claim for \$20,000. In fact the information simply does not support such a claim, I hold. He said that he was shocked about the allegation and stunned about being dismissed. He provided no other detail of the impact of the dismissal on him. Therefore I conclude his entitlement is only \$3,000 net less 30 %.

[37] Costs are reserved.

**Summary of remedies**

[38] Suzy and Ross Bolton are jointly and severally liable to pay Brett Mathys:

- a. \$4,707.50 gross lost wages.
- b. \$2,100 net compensation for hurt and humiliation.

P R Stapp  
Member of the Employment Relations Authority