

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 5
3159841

BETWEEN FORBES MINTO
 Applicant

AND RICHARD WEDD
 First Respondent

Member of Authority: Antoinette Baker

Representatives: Chrissy Gordon, advocate for the Applicant
 Respondent in person

Investigation Meeting: 13 October 2022 at Christchurch

Submissions received: On the day

Determination: 10 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Wedd, a contract sharemilker, employed Mr Minto to assist him on a dairy farm owned by a third party. The employment commenced in October 2020 and ended in August 2021.

[2] Mr Minto says he was disadvantaged in his employment when Mr Wedd suspended him without pay and that he was unjustifiably dismissed hours later on the same day.

[3] Mr Wedd denies suspending Mr Minto and says the dismissal was justified. He says Mr Minto resigned and that the dismissal was to ensure the employment was terminated.

[4] Mr Minto claims lost wages, compensation and costs.

The Authority's investigation

[5] For the Authority's investigation the parties lodged initiating documents and evidence. Mr Wedd instructed a lawyer during the time of lodging a statement in reply and a telephone conference. By the time of the investigation meeting Mr Wedd was no longer represented. At the investigation meeting I heard applicant evidence from Mr Minto and his partner, Ms Tara Peneha; I heard respondent evidence from Mr Wedd and his stepdaughter Ms Candy, and a neighbour of the workplace farm, Mr Playter. After hearing the evidence, I heard oral submissions from the representative for Mr Minto. Mr Wedd was given an opportunity to consider the written synopsis of those submissions. He then chose to give oral submissions.

[6] In the telephone conference Mr Wedd said a phone recording of a conversation at the time of the dismissal (front door recording) was not relevant because it was about the separate issue of accommodation. I concluded in my Directions of the Authority dated 2 May 2022 that I had listened to the recording and that it was relevant to the termination. A transcript was available to the parties at the investigation meeting.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

The issues

[8] The issues are:

- a. Was there a suspension without pay?
- b. If so, was the suspension without pay an unjustified action that caused Mr Minto disadvantage in his employment?
- c. Was Mr Minto unjustifiably dismissed?
- d. What remedies are to be ordered for:
 - a. Compensation under s 123(c)(i) of the Act
 - b. Lost wages under s 123(1)(c)(ii) of the Act?
- e. Is there to be an order for costs and the filing fee?

What caused the employment relationship problem?

[9] The parties have known each other for over 30 years since Mr Minto was very young. Mr Minto as a young teenager had lived with the older Mr Wedd and his family for a short time when they were involved in the 'Gypsy Fair' which I understand is a travelling trade stall fair that has operated for some years throughout the North and South Islands of New Zealand. Mr Minto also at one time lived in the home of Mr Wedd's stepdaughter, who is a witness for Mr Wedd in this matter.

[10] The parties give different versions of how the employment came about but either way Mr Minto commenced work in October 2020 after relocating his young family (Ms Peneha and three young children) from a different part of the country where he had previously been working on a farm.

[11] An individual written employment agreement was signed on 8 December 2020 (the IEA). The IEA is comprehensive and carries a footer to indicate it was a template prepared by Federated Farmers of New Zealand (FFNZ). The parties agree that a FFNZ representative came to meet with them at around the time they signed the IEA.

[12] The IEA describes Mr Minto's role as '2IC farmer.' The Job Description records the 'purpose of the position' was 'to assist in the day to day running of the farm'¹.

¹ Schedule 1 at page 33.

[13] The IEA sets out employment relationship obligations and includes terms and conditions associated with the accommodation that came with the position as well as a drug and alcohol policy which included the prohibited use or involvement with non-prescription drugs at work and in the accommodation².

[14] The parties both openly confirm they are social cannabis users, and that Mr Wedd knew this when he employed Mr Minto. Mr Wedd says he only used cannabis with Mr Minto outside of work hours.

20 August 2021

[15] On 20 August 2021 Mr Minto was off work sick. There was a phone call discussion on the evening of 20 August 2021 between Mr Minto and Mr Wedd. Each man gives a slightly different version of their recall of what was said but ultimately Mr Minto worked the next two days on 21 and 22 August 2021 either because he felt pressured by Mr Wedd to work (even though he says he was still unwell) or because he felt he was needed to get work done and chose to work.

23 August 2021

[16] On 23 August 2021 Mr Minto worked in the morning. Mr Wedd says Mr Minto was impaired by cannabis. In his oral evidence Mr Wedd said he came to this conclusion when he observed Mr Minto that morning from out a window of his house. He says Mr Minto was struggling with the operation of a magnesium spreader. He also says he smelt cannabis on Mr Minto and in relation to any sickness did not believe Mr Minto was ill.

[17] Ms Peneha says Mr Minto was impaired that morning by illness and not cannabis and that their whole family had been battling cold like symptoms as had others in the district. Ms Peneha gave evidence that Mr Minto was the last in their family to get sick after her and their young children. She recalls getting some over the counter chemist product to help Mr Minto's cold symptoms.

² Schedule 5 of the IEA.

[18] Mr Wedd says at some time that morning he raised issues with Mr Minto about cannabis use impairing his performance, but that Mr Minto just wanted to talk about his pay and conditions rather than listen to him. Mr Minto says it was the other way around and that he was the one raising issues about his 15-minute paid breaks after talking with Mr Wedd's relative who Mr Minto says had complained to him about having to work for free on the farm for Mr Wedd.

[19] At lunchtime that day the two men met and discussed pay and conditions. Mr Wedd said he would put the rent component for the accommodation up from \$50.00 to \$200.00 per week. Mr Minto says he would need a pay rise because this would compromise his family income. Mr Wedd did not agree to a pay rise. Mr Minto initialled the relevant IEA page to the increase written in by Mr Wedd, to increase the accommodation rent from \$50.00 to \$200.00 per week. Mr Minto says he initialled the IEA under duress. Mr Wedd says that it was "out of frustration" that he increased the rent because "Mr Minto was avoiding the concerns he was trying to raise with him about his alleged drug use." By the end of the employment, no rent had been deducted from Mr Minto's pay throughout his employment and Mr Wedd says he has never sought any rent arrears.

[20] Mr Minto then left the workplace after the lunch time meeting, saying he was unwell. He consulted a doctor by phone³ that evening and obtained a doctor's certificate putting him off work until 27 August 2021 with advice to isolate and take a COVID-19 test given the symptoms described.

[21] Sometime after the lunchtime meeting Mr Wedd became aware through his relative that Mr Minto had posted a social media photo of dried cannabis with a single line saying, "Lock down sussed.hmu." Mr Minto accepts this post was his and it was a photo of his cannabis but that it was a small amount and was not for sale. The parties both explained in the course of the investigation meeting that 'hmu' stands for 'hit me up.'

³ The doctor was consulted by phone because all of New Zealand was placed into a 'level four' lockdown at 11.59pm on 17 August 2021 which lasted until 11.59pm on 31 August 2021, <https://covid19.govt.nz/about-our-covid-19-response/history-of-the-covid-19-alert-system/#timeline-of-key-events>

[22] That evening after finding out about the social media photo Mr Wedd messaged Mr Minto saying he wanted to see him the next morning. Mr Minto says he did not reply because he did not see the message until the morning of the 24 August 2021.

Morning of 24 August 2021

[23] Just after 7.00 am in the morning there was a phone discussion between Mr Minto and Mr Wedd. Mr Wedd reiterated he wanted Mr Minto to come to the milking shed to meet him because he said that Mr Minto had put him in a “serious position”. Mr Minto said the doctor had put him off sick and he had to isolate pending a COVID-19 test. Mr Minto says he went to the milking shed after Mr Wedd insisted that he do this. Mr Wedd says that he doubted Mr Minto was truly sick at the time. Mr Wedd says the haste to meet was to get things sorted out.

[24] The milking shed meeting likely lasted no more than ten minutes. Discussion occurred while Mr Wedd put milking cups on cows. Nothing was recorded or written down. It is not in dispute that the following occurred at the meeting:

- a. Mr Wedd mentioned the social media photo he had discovered but did not show it to Mr Minto. Mr Minto says he made an assumption about what it was and his assumption was correct.
- b. Mr Wedd gave two options to Mr Minto that Mr Minto describes in his evidence as⁴:
 1. I could go home, sort out my shit, and come back to work and nothing further will happen; or
 2. I could go to the doctor and book into rehab as I had a drug problem.

[25] There is a dispute about what else was said including how the milking shed meeting ended. Mr Wedd says in his statement in reply⁵ that he told Mr Wedd his preliminary view of the situation was that Mr Minto had committed serious misconduct by attending work “stoned” and posting a photo suggesting that he had drugs for sale from the accommodation he was in and that this would justify instant dismissal. Mr Minto says that Mr Wedd

⁴ Brief of Evidence of Forbes Minto dated 14 September 2022 at paragraph 29.

⁵ Paragraph 2.21 e. Statement in reply dated 3 February 2022

immediately suspended him without pay and in response to this Mr Minto says he called an end to the discussion and left saying he would follow his doctor's advice and isolate at home. Mr Wedd says this indicated that Mr Minto had resigned.

Afternoon of 23 August 2021

[26] Mr Minto went home after the milking shed meeting. Ms Peneha sent Mr Wedd a message at 9.56 am asking for payslips for Mr Minto's pay and clarification about a recent deduction made. Her evidence is that she and Mr Minto were struggling to understand what had happened at the milking shed, and that she was very concerned about how they would manage financially given she understood the suspension was without pay. She says she asked for payslips and records because she had then become concerned as to whether Mr Wedd was paying Mr Minto correctly.

[27] Mr Wedd did not respond by providing the payment documentation. At 12.39 pm a further text was sent from Ms Peneha's phone to Mr Wedd asking for an email address to send him Mr Minto's doctor's certificate. There was no response to this text. At 2:49 pm Mr Wedd emailed with "Details of your job termination will be drafted tonight, Forbes. All details in your contract."

[28] At approximately 7:00 pm Mr Wedd visited Mr Minto's home, remained at the front door, and had a conversation with Mr Minto and Ms Peneha which was in part recorded by Ms Peneha in the front door recording. Mr Wedd also handed Mr Minto a pre-prepared letter dated 24 August 2021 (dismissal letter). The dismissal letter included the following:

Termination of your employment – dismissal without notice

This letter confirms my advice to you that you are dismissed without notice. This means that your employment ends immediately.

In our meeting on 24 August at the milking shed we discussed the details of your serious misconduct being as written in

Schedule 3, page 43 of your formal contract

- Bringing drugs onto the workplace or into the accommodation
- Committing or allowing illegal activities to occur in the accommodation

You told me this was not true; however, you have advertised your drugs for sale on social media, and I understand that this is well known throughout the district. I also believe you are using drugs during work hours.

As discussed during the meeting your serious misconduct constitutes dismissal without notice.

I notified you that my preliminary view was that I considered your actions to be serious misconduct justifying your summary dismissal (dismissal without notice) and you also stated that you quit.

I have taken your feedback into account and have decided that it is appropriate to dismiss you without notice on the basis of your serious misconduct. This letter is formal notice that your employment is terminated as of the date of this letter.

You are required to return all property, including the fence tester.

You will be paid any entitlements and outstanding remuneration, including pay, and holiday pay up to and including the date of this letter.

I wish you well for the future.

If you have any questions about this letter, please contact me directly.

Yours sincerely,

Richard (Dick) Wedd

Front door recording

[29] The front door recording includes Mr Minto saying, “You can’t terminate nothing” and Mr Wedd saying that until the accommodation was vacated there would be no pay. Ms Penaha objects to having to move the family during the then COVID-19 lockdown to which Mr Wedd replies aggressively: “Is that my problem? Is that my problem?”.

[30] The record of this interchange finishes with:

Mr Wedd: Just remember you get no pay until you fuck off-ok-so fuck off

Mr Minto: You can’t terminate someone on a medical certificate

Mr Wedd: Hey I can terminate you on your fuck ups cunt

Mr Minto: What fuck ups?

Mr Forbes: Because you grow drugs in this house which is illegal;

Mr Minto: Prove it

Mr Wedd: Prove it?

Mr Wedd: Got heaps to prove bro

Mr Minto: Go on then

[31] Mr Wedd gave 14 days' notice to vacate the accommodation. Mr Minto alleges he harassed his family before they left by driving around the property including early in the morning. Mr Wedd denies this. Mr Minto's family found temporary accommodation and within two weeks he found temporary work on a local farm which resulted in a permanent position.

Was there a suspension without pay and if so, was the suspension without pay an unjustified action that caused Mr Minto disadvantage in his employment?

[32] Mr Wedd says he did not suspend Mr Minto without pay. Mr Minto says he did.

[33] Clause 25 of the IEA includes that the employer is able to suspend an employee for 'good reason' which includes the need to preserve the integrity of any investigation process for alleged serious misconduct or for health and safety reasons including those of the employee, other employees or stock.

[34] Clause 25 ends with: 'Before we make any decision to suspend you, we must discuss the proposal of suspension with you and consider your views.'

[35] Whatever was said between the two men about a suspension was likely spoken during the brief discussion at the milking shed meeting. I find it likely Mr Wedd suspended Mr Minto during this meeting. While he tells me Mr Minto resigned this is inconsistent with his actions in the subsequent hours when he communicated and then delivered a letter confirming dismissal. That Mr Wedd suspended Mr Minto is also consistent with a social media video by Mr Minto which I accept he made soon after the milking shed meeting and refers to suspension. It is also consistent with the evidence of Ms Peneha who I found to be a straightforward witness.

[36] While Mr Wedd says the milking shed meeting was a disciplinary meeting where he had explained the purpose and gave the option of a support person, I find none of this to be plausible. Even taking into account his submission that he is not overly good with written words, there was little time to have done all of this explanation verbally over the noise and workings at operational milking time.

[37] While Mr Minto says he had figured out what the social media post was that Mr Wedd referred to, I am satisfied there was little clarity about the reasons for suspension. Even if I am wrong about this, there is no evidence that Mr Wedd sought and then considered any feedback from Mr Minto about suspension as required by the IEA.

[38] I find a likelihood that the suspension was something that had a stressful effect on Mr Minto as the sole earner for his family. Ms Pencha was clearly involved in supporting Mr Minto when he came back home upset after the milking shed discussion. I find that at least for a brief period of hours pending what was then a dismissal Mr Minto was disadvantaged in his employment as a result of the suspension, a suspension that was not carried out with any fair process or with any consideration of Mr Minto's views. I will return to the issues of remedies below.

Was Mr Minto unjustifiably dismissed?

[39] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to suspend or dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[40] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a reasonable employer could have done in the circumstances.

[41] In relation to the decision to instantly dismiss Mr Minto I do not find Mr Wedd acted in a way that a fair and reasonable employer could have done in the circumstances at the time for the following reasons:

- a. While the dismissal letter says that Mr Minto was instantly dismissed for breaching the IEA for "bringing drugs into the workplace" and "committing or allowing illegal activities to occur in the accommodation" there was no investigation about these things. I do not accept these things were canvassed with any clarity in the milking shed meeting. I do not find there could have been any

feedback that Mr Wedd could have genuinely considered which is inconsistent with the dismissal letter.

- b. While the dismissal letter says that Mr Wedd believed Mr Minto was “using drugs within work hours” I am not satisfied this was sufficiently investigated beyond a belief. I accept there was a likelihood that Mr Minto was impaired by illness over the time Mr Wedd says he thought he was drug impaired and at the very least an employer acting reasonably ought to have investigated drug impairment.
- c. The IEA that Mr Wedd relies on to dismiss includes a comprehensive schedule outlining a ‘Drug and Alcohol Policy’⁶. This includes a regime of drug testing and a process that I am satisfied was not carried out. In particular, the schedule links to clause 24 of the IEA which sets out the process of investigation in any disciplinary matter for serious misconduct. I am satisfied little or none of this process was carried out by Mr Wedd. The process includes giving 48 hours’ notice of a disciplinary meeting which was clearly not given. I am not satisfied the milking shed meeting can reasonably be taken as such a meeting, but notice was well short if it was. None of the issues being investigated were put in writing which a reasonable employer could be expected to have done for such serious claims. Mr Wedd communicated little about what his concerns were, other than apparently reacting in an emotive manner to a single social media photo.
- d. While Mr Wedd says he contacted FFNZ to get advice I find it unlikely that such advice would have supported the lack of investigation and process that I find Mr Wedd used.
- e. I accept Mr Minto and Ms Peneha’s evidence that there was a sudden change of situation from the milking shed meeting when he was suspended without pay to the communication by email only hours later when Mr Minto was terminated from his employment. I accept this was the first time that dismissal was referred to.
- f. While Mr Wedd has denied swearing in the way that Mr Minto says he did at the front door when he delivered the dismissal letter, I accept the front door recording is an accurate reflection of the interchange that evening. I find Mr Wedd’s approach far from what a fair and reasonable employer could have done.

⁶ Schedule 5 on pages 48 to 51 of the IEA.

- g. While Mr Wedd in his evidence refers to other things to support his decision to dismiss Mr Minto including evidence from his stepdaughter and Mr Playter, I am satisfied this was not information he had available at the time of the dismissal or if it was, it was not sufficiently raised with Mr Minto before he decided to instantly dismiss him.

[42] Weighing the above I find that Mr Minto was unjustifiably dismissed due to an insufficient investigation and lack of any fair procedure. Mr Minto is entitled to remedies, and I will now consider these below.

Compensation under s 123(c)(i) of the Act

[43] Mr Minto submits that the suspension and dismissal should attract two separate awards of compensation. I find the situation is more suitably dealt with by one global award. This is because the time frame was hours between the suspension and compensation, and one led into the other.

[44] Mr Minto says that the way Mr Wedd treated him left him feeling less confident as a farmer. He describes loving the job when he started and feeling a sense of worth when Mr Wedd soon after left him in sole charge. Ms Peneha's evidence supports this. Both say that Mr Minto's confidence took a hit when the suspension and dismissal occurred. Mr Minto says he had to face what he and Ms Peneha perceived as a negative community view that he was a bad person. He was particularly concerned about what the school community would think of him. This evidence is vague and countered by the fact that Mr Minto and Ms Peneha have stayed happily in the community with Mr Minto enjoying the work that he secured soon after the dismissal. On the other hand, I understand Mr Wedd has left the community and his evidence is that he is the one who was painted in a poor light in the community. Ms Peneha describes Mr Minto as having panic attacks, but I have no medical evidence to support this type of serious diagnosable condition.

[45] Overall, I accept there would have been an adverse effect on Mr Minto and that there was humiliation and hurt feelings. The front door recording in particular shows me a level of aggression from Mr Wedd that is likely to have had a distressing impact on Mr Minto. I find in the circumstances that a global figure of \$12,000.00 compensation is appropriate.

Lost wages under s 123(1)(c)(ii) and s128 of the Act?

[46] Mr Minto submits that he should be reimbursed for the earnings he ought to have received if he had not been dismissed. I am satisfied that the evidence provided supports a reimbursement of the difference between what Mr Minto lost in wages after the dismissal and what he earned from his subsequent employer.

[47] Accordingly, subject to issues of contribution that I will return to, I find this reimbursement is \$7,242.71.

Should the remedies be reduced because Mr Minto contributed to the circumstances giving rise to the grievance?

[48] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance.

[49] At some time after the milking shed meeting and before Mr Wedd communicated that Mr Minto was to be dismissed Mr Minto posted a social media message video (the snapchat video). He says that he knew the snap chat video would be seen by Mr Wedd's relatives, the relatives who he understood had told Mr Wedd about the earlier social media photo of his cannabis. Mr Minto said the snap chat video was not directed at Mr Wedd's relatives, or inconsistently that he was joking or that he thought it would "wind them up". I found Mr Minto's attitude and responses to my questions about his intentions in relation to the snap chat video showed a lack of maturity and common-sense. Mr Wedd says he believes Mr Minto is "stoned" in the snap chat video presumably backing up his view that Mr Minto was impaired by cannabis at work that day. I have no reliable evidence that Mr Minto is "stoned" in the video. On a basic viewing he could equally be suffering from cold symptoms or tired or both, which is his evidence. However, I find Mr Minto's demeanour on the snapchat post does not by any reasonable viewing come across as a "joke". Mr Minto starts with an extended middle-finger gesture and then with an obviously aggressive manner says:

Fuck you little narks. Social media is a beautiful thing ... Covid test today boss, somebody let him know please seen as I'm suspended without pay and immediately for my drug empire (laughs)... .

[50] It is submitted for Mr Minto that there is no contributory behaviour. The submission focuses on Mr Wedd's knowledge that Mr Minto used cannabis when he hired him. However, I find that the snap chat video contributed to a worsening of the situation between the milking shed when Mr Minto understood he was suspended, and the decision made by Mr Wedd to dismiss. I find by any reasonable reading of it, Mr Minto's manner is aggressive and retaliatory and not just aimed at Mr Wedd's relatives (who would likely be about half Mr Minto's age) but also at Mr Wedd himself. Mr Wedd's actions have not been admirable, but I can understand him having a humanly negative reaction to this type of post directed at his young relatives.

[51] Mr Minto confirmed in his oral evidence that he understood the rules in his IEA about not having cannabis in the accommodation. Mr Minto, in openly acknowledging he grew cannabis for his own use at the accommodation, was breaching the IEA that he signed.

[52] Accordingly, in these unusual circumstances before me with the overlay of a long-term familial type of relationship, I find that Mr Minto has contributed to the situation he has found himself in and to some extent to the circumstances that have given rise to the grievances.

[53] The Employment Court has summarised an approach when considering the issue of contribution⁷. It made observations about past awards for contribution when reducing a 50% contribution award made by the Authority to no more than 20%. In that case the employee's contribution was described by the Court as blameworthy because he had incurred infringements in a work vehicle, failed to report them, lost his licence and continued to drive the employer's vehicle while on notice that his licence had been suspended. The contribution finding was focused on his non-communication with his employer about his situation. The Court noted however that he could not "be blamed for other deficiencies in the process which worked significantly against him." I consider Mr Minto's contribution should result in a 15% reduction to the remedies awarded.

⁷ *Maddigan v Director-General of Conservation* [2019] NZEmpC190 at [71] to [77].

Is there to be an order for costs and the filing fee?

[54] I was not asked to reserve costs and will deal with them now. I acknowledge that Mr Minto changed representatives and that the second one only became involved just before the investigation meeting. The daily tariff starting point in the Authority is \$4,500.00 for the preparation towards and attendance at a one-day investigation meeting. I am satisfied I should not depart from this. While I have found contribution by Mr Minto this has already been dealt with as part of the remedies ordered. The investigation meeting concluded at approximately 2.30 pm. Three quarters of the day's tariff is \$3,375.00. Mr Wedd is to pay this amount to Mr Minto for a contribution to his legal costs together with the filing fee of \$71.56.

Summary of orders

[55] Richard Wedd is ordered to pay Forbes Minto:

- a. **\$6,156.31** gross under s 123(1)(b) of the Act being \$7,242.71 gross less 15% (\$1,086.40).
- b. **\$10,200.00** being \$12,000.00 compensation under s 123(1)(c)(i) of the Act less 15% (\$1,800.00).
- c. **\$3,375.00** costs
- d. **\$71.56** Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority