

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 345/08
5115871

BETWEEN Robert Peter Neil
AND Ivan and Sharon Lammas

Member of Authority: Janet Scott
Representatives: Sam Hood for applicant
 No appearance for respondents

Investigation Meeting: 4 September 2008 in Hamilton
 29 September 2008 in Hamilton
Submissions Received 4 September 2008 for applicant

Determination: 01 October 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Neil worked for the respondents as a farm manager. He was dismissed from his employment on 7 December 2007. Mr Neil claims that dismissal was unjustified and he seeks lost remuneration and compensation to remedy his grievance.

[2] The respondents did not file a Statement in Reply. I am satisfied that the Statement of Problem and the notice of Investigation Meeting were served on the respondents.

[3] The respondents did not attend the Investigation Meeting which was set for 2 September 2008. That meeting had to be adjourned because the Member originally assigned to the matter was ill and a new date was set for 4 September. The applicant attended the Investigation Meeting set for 4 September and his evidence was heard at that meeting. The respondents were served with notice that the Investigation Meeting would be reconvened on 29 September 2008 to allow their evidence in the matter to be heard and considered. The respondents did not attend the reconvened meeting and

pursuant to the provisions of Clause 12 Schedule 2 of the Act I have proceeded to hear and determine the matter before me.

Issues for Determination

[5] Was Mr Neil unjustifiably dismissed?

[6] If he was what remedies are available to him?

Background

[4] The applicant knew the farm in question having undertaken work in relation to its conversion to dairying. He says that prior to the commencement of the 2007/8 season he was asked by Mr Lammas if he would like to work for him for that season. However, Mr Neil advised he had decided to work in the South Island for the 2007/8 season.

[5] In November 2007 Mr Neil returned to Hamilton to attend a wedding. Whilst he was in Hamilton he made a visit to Ivan and Sharon Lammas. The upshot of that visit was that Mr Lammas offered him a job as farm manager and after he had discussed it with his current employer and other interested parties he agreed to leave the South Island to return to work for the respondents for the rest of the session. The terms of the agreement were somewhat vague. Mr Neil could say only that he expressed to the Ivan Lammas his “*expectations*” as to salary (\$55,000 per annum). He says too there was an understanding that he would work normal hours for farm work of this type (50-60 hours per week) and it was agreed accommodation would be provided.

[6] Mr Neil then made three two way trips to the South Island to collect his belongings and he believes he started work on the Lammas property on or about 22 November. He set himself up in the single quarters on the farm. There was an agreement, he said, that a farmhouse on the property would shortly become available and that he would move into it.

[7] Mr Neil says that on 6 December he witnessed Mr Lammas assaulting another worker. He fully expected that worker would report the assault to the police.

However, he was very surprised to see that later in the day matters had been resolved and the worker was doing the pm milking as usual.

[8] It is Mr Neil's evidence that he went to get the cows in for milking early in the morning of 7 December. He said that Mr Lammas had turned off the power to the fences and three herds had broken into other paddocks. Some were mixed up with dry cows and two were up to their necks in peat swamp. He realised he could not get the cows in on his own and he went to the shed where he met Mr Lammas and explained the problem.

[9] Mr Neil says that Mr Lammas abused him, calling him a "*queer cunt*". He criticised Mr Neil's ability to complete the herding and told him to get into the shed or leave the farm while he did the herding. Mr Neil said he found the abuse to be unwarranted and intimidating. Given what he had witnessed the previous day he feared for his safety and he went to the office attached to the milking shed to get his rope and his torch. Mr Lammas then yelled at him through the window. He told him to get out of the accommodation by 9 December. Mr Lammas then slammed the window shut almost crushing Mr Neil's fingers.

[10] As he believed he had been dismissed Mr Neil left the property immediately.

[11] On Sunday 9 December he went to see Mr Lammas to try and reconcile the relationship. Mr Lammas swore at him "*I've told you guys you're spoiled cunts. Fuck off*".

[12] Mr Neil says it was one month before he got new work. He seeks lost remuneration for that period, compensation of \$10,000 pursuant to s.123 (1) (c) (i) of the Act for hurt and humiliation and \$1,200 as loss of the accommodation benefit. He also seeks a recommendation by the Authority to the respondents in this matter as to action the respondents should take to prevent future problems of this nature. (s. 123 (1) (ca)).

Legal Test

[13] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new s.103A.

For the purposes of s.103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those *of a fair and reasonable employer... in all the circumstances.... at the time....*

[15] The Employment Court examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06) and stated that the objects of the Act including the object of good faith must inform any objective assessment of what a fair and reasonable employer would do in all the circumstances.

Discussion and Findings

[16] Mr Neil presented as a credible witness and I find that he was indeed dismissed by the words and actions of Ivan Lammas on 7 December 2007.

[17] Having found that there was a dismissal, the burden rested with the respondents to show that the dismissal was justified in accordance with the s.103A test described above.

[18] The respondents have not appeared to defend the claim and have therefore not discharged the burden of showing this dismissal was justified.

Determination

[19] I determine that Mr Neil was unjustifiably dismissed from his employment by the respondent, Mr Lammas. He has a personal grievance against his former employers.

Remedies

[20] Mr Neil was out of work for four weeks. He commenced new employment on 9 January 2008.

[21] I have been faced with some difficulty in assessing the loss of remuneration in this matter. This is because the information on the salary agreed between the parties was sparse. Mr Neil said he stated his expectations to Mr Lammas when he met him on 11 November 2007 that he would be paid \$55,000 per annum. He believes however that what he was paid would suggest his remuneration equated to \$50,000 per annum. The only records Mr Neil has of wages actually paid to him were two net payments of \$833.62 and \$583.54¹ paid to his bank account by the respondents on 5 and 11 December 2007. Mr Neil has also obtained IRD records which show that the respondents paid him gross income of \$2530 in the 07/08 tax year. If this gross figure reflected only 2 weeks work this would suggest that Mr Neil was to be paid approximately \$65,000 per annum.

[22] Further inquiries have not thrown additional light on the subject.

[23] On balance therefore I am accepting Mr Neil's assessment that his actual remuneration was \$50,000 per annum and I am setting his lost remuneration having regard to that figure.

Contribution s.124

[24] There is no evidence to support a finding that Mr Neil's actions contributed to the situation that gave rise to his personal grievance.

Lost remuneration s.123 (1) (b)

[25] Mr Neil lost four weeks remuneration as a result of his grievance. *The respondents are directed to pay Mr Neil the sum of \$3,846.15 gross to remedy him for remuneration lost as a result of his grievance.*

¹ Adjusting these payments for tax would result in an annual remuneration of approximately \$50,000.

Lost Benefit s.123 (1) (c) (ii)

[26] Mr Neil lost the benefit of the accommodation provided with his job. *I am setting the value of that benefit at \$120 per week and direct the respondents to pay to Mr Neil the sum of \$480 to compensate him for the loss of that benefit.*

Compensation pursuant to s.123 (1) (c) (i)

[27] Mr Neil gave evidence of the effect on him of his dismissal. I direct the respondents to pay to Mr Neil the sum of \$3,000 net under this head to remedy him under this head.

Recommendation pursuant to s.123 (1) (ca)

[28] The respondents have taken no part in these proceedings despite having been served with the statement of problem and notice of investigation meeting. I also understand they have left the farm in question. Given this there seems little point in stipulating recommendations that would assist the respondents to avoid similar problems occurring again.

Costs

[29] Costs are reserved. The parties are to file and exchange submissions on costs by 10 October to allow costs to be determined.

Janet Scott

Member of the Employment Relations Authority

