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## Nicholson v Ackk Trusts Partnership (Wellington) [2018] NZERA 2074; [2018] NZERA Wellington 74 (29 August 2018)

Last Updated: 14 September 2018

### IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 74  
3022822

BETWEEN ANGELA NICHOLSON Applicant

AND ACKK TRUSTS PARTNERSHIP Respondent

Member of Authority: Trish MacKinnon

Representatives: Mark Nutsford, Advocate for Applicant

Megan Gundesen, Counsel for Respondent

Investigation Meeting: 30 May 2018 at New Plymouth and 28 June 2018 by telephone

Submissions Received: From the Applicant 5 and 19 July 2018

From the Respondent 12 July 2018

Determination: 29 August 2018

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

#### Employment relationship problem

[1] Angela Nicholson worked for the respondent on its commercial dairy goat farm from July 2015 until March 2017 when her employment was terminated for redundancy. Ms Nicholson claims her dismissal was unjustifiable and the reasons for the redundancy were false. She says the respondent continued milking goats after her employment had terminated and her position was replaced by that of a casual worker.

[2] Ms Nicholson seeks a number of financial remedies, including lost wages, loss of future benefits, and compensation for hurt, humiliation and injury to feelings.

[3] ACKK Trusts Partnership (ACKK) comprises Adam Walsh who works full-time on, and manages, the farm; Caysea Walsh, who is also a manager of the farm and works on it on a part-time basis; and Kevin and Karen Walsh, parents of Adam and parents-in-law of Caysea Walsh. I shall refer to the latter couple as Mr and Ms Walsh senior. The four have owned and managed the goat farming operation since 2014.

[4] ACKK denies Ms Nicholson was dismissed unjustifiably. It says the redundancy of her position was genuine and it was preceded by a fair and lawful process. During Ms Nicholson's notice period an incident occurred in respect of which she was required to attend a disciplinary meeting.

[5] ACKK says her refusal to attend the meeting meant the disciplinary matter was not able to be resolved. This resulted in Ms Nicholson not being offered further employment when the milking season was extended beyond the expiry of her notice. It also resulted in her not being offered re-employment at the commencement of the next season.

[6] The parties attended mediation but were unable to resolve the matter.

### **Relevant background**

[7] ACKK supplies its milk to the Dairy Goat Co-operative (the Co-operative). From the evidence provided by the parties I understand the Co-operative operates a system in which farms are constrained in the amount of milk they can supply by the number of shares they have been allocated or otherwise acquired.

[8] By all accounts the first year of Ms Nicholson's employment went well with no problems being recorded. She enjoyed the work and was appreciated by her employers as a hard worker who looked after the goats very well. An incident occurred in October 2016 which led to an investigation and a meeting with Ms Nicholson.

[9] The upshot, according to Mr and Ms Walsh, was a written warning that was given to Ms Nicholson on 5 November 2016. Ms Nicholson denies receiving the warning until 21 March 2017.

[10] On 16 January 2017 Ms Nicholson and Caitlin McKee, who at that time was a part-time goat milker, attended a meeting called by their employer to discuss business

circumstances and possible redundancy. They had been informed the meeting would be the first of three on the same subject that would take place over several weeks.

[11] The agenda prepared for the meeting records that the meeting's purpose was to discuss the possible redundancies and explain the commercial reasons behind them. It noted that employees were "to provide feedback in relation to the proposed redundancy, including any suggested alternatives".

[12] Mr Walsh senior, Mr Walsh and Ms Walsh attended the meeting for ACKK, with the latter taking notes that were signed at the conclusion of the meeting by all attendees. The notes of the meeting disclose the employer explained it had insufficient shares and was actively trying to acquire more.

[13] The second meeting took place on 8 February and Ms Nicholson and Ms McKee were reminded the day before that their feedback, including any suggested alternatives, was welcomed at the meeting. Ms Walsh again took notes of the meeting which all present signed at the conclusion. The notes suggest much of the meeting was spent discussing the Co-operative shares issue; ACKK's efforts to acquire more shares; and the effect its failure in that regard would have on the date the milking season would end.

[14] The third meeting took place on 21 February 2017. According to Ms Walsh's notes the employer explained to Ms Nicholson and Ms McKee that ACKK's efforts to obtain new Co-operative shares had been unsuccessful and the anticipated last date for milking would be 21 March. Both employees were given notice of the termination of their employment to take effect on that date.

[15] Ms Walsh's notes, which were signed by all attendees, record that Ms Nicholson then gave her employer a letter suggesting a number of alternatives to redundancy. The employer undertook to review its contents and have a further meeting with Ms Nicholson.

[16] The employer's review and consideration of the contents was followed by a further meeting with Ms Nicholson on 28 February 2017 at which she was informed her alternative proposals were not accepted, and why that was so. Ms Nicholson's notice period remained in place.

[17] On 9 March 2017 an incident occurred that resulted in Ms Nicholson being suspended pending her employer's investigation of it. That matter was not resolved before Ms Nicholson's notice period expired on 21 March 2017 and her employment ended. Ms Nicholson remained on paid suspension until that time.

[18] During Ms Nicholson's notice period, operational events occurred which extended the milking period to 27 March. Following that, ACKK obtained additional lease shares that enabled them to continue milking until 28 April 2017. Ms Nicholson was not offered an extension of employment and her employment ended on 21 March 2017.

[19] Ms Nicholson raised a personal grievance through her advocate by letter dated 18 May 2017.

### **Issues**

[20] The main issue for determination is whether Ms Nicholson was unjustifiably dismissed. This will involve consideration of:

a. Whether Ms Nicholson's redundancy was for genuine business reasons;

and

b. Whether ACKK was obliged to continue Ms Nicholson's employment when milking was extended beyond the expiry of her notice.

[21] If Ms Nicholson's dismissal is found to be unjustifiable, issues relating to remedies will arise.

### **The Authority's investigation**

[22] Ms Nicholson gave evidence on her own behalf. Five witnesses, including Ms Walsh, Mr Walsh and Mr Walsh senior, gave evidence for ACKK at the investigation meeting. One witness for ACKK was hospitalised at that time and the investigation meeting was reconvened by agreement, by telephone, on 28 June 2018 to hear and test her evidence.

[23] I have not referred in this determination to all the evidence and submissions received. I have, however, set out the material facts and made findings on issues

relevant to the determination of Ms Nicholson's claims in accordance with [s.174E](#) of the [Employment Relations Act 2000](#) (the Act).

[24] Shortly before the investigation meeting Ms Nicholson's representative, Mr Nutsford, indicated the applicant had an additional personal grievance claim that had not previously been raised. Following correspondence with the parties it was decided to proceed with the investigation meeting on the basis of the matters raised in the current statement of problem.

[25] If the applicant wished to raise a new grievance out of time she would be required to seek leave to do so as the respondent did not consent to it being raised at this late stage. Alternatively, as the matter appeared to involve alleged wages owing, it could be raised as a wage arrears claim at a later time should the applicant wish. The matter was discussed at the commencement of the investigation meeting and that approach was reiterated.

### **Legal considerations**

[26] The test for assessing whether a dismissal is justifiable is set out at [s 103A](#) of the Act. It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[27] The Act specifies at s.103A(3)(a)-(d) the following factors the Authority must consider in applying this test:

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[28] Section 103A(4) provides that, in addition to the above factors, the Authority may consider any other factors it thinks are appropriate.

[29] Section 103A(5) constrains the Authority from determining a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[30] The Court of Appeal in *Grace Team Accounting Ltd v Brake*<sup>1</sup> confirmed that the test at s.103A is the relevant test for dismissals for redundancy, as adapted to the

circumstances:

...it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it considers appropriate") in redundancy cases."<sup>2</sup>

[31] The good faith provisions of the Act require an employer who is proposing to make a decision that could adversely affect employees' continued employment to provide those employees with access to relevant information. The employer is required to provide the employees with the opportunity to provide comment to the employer on that information before the decision

is made.<sup>3</sup>

[32] The employer's actions must also meet the requirements of good faith that are specified in detail in s. 4 of the Act. The parties to an employment relationship have mutual obligations to deal with each other in good faith. These entail, amongst other matters, not doing anything, directly or indirectly, to mislead or deceive each other, or likely to mislead or deceive each other. Parties to the employment relationship are required to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

### **Relevant provisions of Ms Nicholson's employment agreement**

[33] Ms Nicholson's employment was permanent and full-time. Her terms and conditions of employment are specified in an individual employment agreement (IEA) to which is appended a Position Description and a General Terms and Conditions of Employment document.

<sup>1</sup> [\[2014\] NZCA 541](#)

<sup>2</sup> N1 at [77]

<sup>3</sup> Section 4(1A)(c) of the Act

[34] The IEA contains redundancy and restructuring provisions that define redundancy as being a situation where the employee's position is surplus to the employer's requirements. Relevant parts of the clause provide that:

#### **24.2 Information**

We will give you as much information and notice as possible if your position is likely to be affected by any proposal that that may make your

position redundant or any restructuring proposal. We will, if possible and as appropriate, consult with you about what is proposed.

#### **24.3 Redundancy**

##### **24.3.1 Where either:**

Your position becomes surplus to our requirements; or

Your duties, authority or status materially change on a permanent basis, or the skill requirements for your position change, for reasons not attributable to and justified by your failure to perform your duties in a manner satisfactory to us, then;

Your position may become redundant. If so, notice will be given in accordance with clause 234 of this Agreement.

24.3.2 There shall be no compensation or any other payment for redundancy but we will offer what reasonable assistance we can to you, such as outplacement assistance and time off to attend interviews and the like.

#### **Were there genuine grounds for the redundancy of Ms Nicholson's position?**

[35] Ms Nicholson submits this is a case of an employer wanting to be rid of an employee it no longer liked and using redundancy to achieve this. In her view her position encompassed many duties over and above milking. She submits this provided scope for her to remain fully employed during the period the goats were dried off when there were no milking duties. She refers in written evidence to having continued to carry out farm work after the goats had been dried off in May 2016 until the new season started in July that year.

[36] In Ms Nicholson's submission her employer should have accepted the alternatives to redundancy that she put forward and there was no need for her employment to be terminated. The alternatives, contained in the letter she handed to her employer on 21 February 2017, included cutting down milking to once a day, and "putting off" relief milkers. If ACKK insisted on shutting down the farm until

kidding took place, Ms Nicholson proposed that she would take her holidays and, if

<sup>4</sup> Clause 23 provides for written notice of not less than 4 weeks for salaried employees, such as Ms

Nicholson

necessary, work reduced hours. She would be prepared to take leave without pay if her employer wanted her to be off work after she had used up all her holidays.

[37] Ms Nicholson submits the employer did not consider her proposals and had no right to make her redundant when she

had given "valid, plausible alternatives". She describes Mr Walsh's evidence that ACKK met to discuss her proposals as "disingenuous" because she was given notice of the termination of her employment the same day that she put forward those proposals.

[38] I do not accept those submissions. The evidence indicates that Ms Nicholson was valued as an employee by ACKK. Her care of, and skill with, the goats was acknowledged by all three of the trust partners who gave evidence. Her view that her employer wished to "get rid of her" because it no longer liked her is not credible and is likely to have been based on the event for which she was suspended during her notice period, which I will return to later.

[39] I also note from Ms Nicholson's evidence that she was aware from at least December 2016 of the inevitability of an early end to the season if ACKK could not buy or lease additional Dairy Co-operative shares. She had discussed this with Mr Walsh senior in December 2016 and he advised her to speak with Mr and Ms Walsh who would be making any decisions.

[40] While Ms Nicholson submits the redundancy was a sham, motivated by her employer's wish to terminate her employment, her own evidence reveals she was concerned two months before being given notice that her employment may be at risk due to the prospect of an early drying off of the goats.

[41] I find nothing disingenuous about Mr Walsh's evidence of ACKK having considered the proposals Ms Nicholson put forward in the letter she handed to her employer on 21 February 2017. It is clear from the record of the meeting that Ms Nicholson had received written notice before handing her employer her own letter containing her feedback on the redundancy proposal.

[42] I accept that ACKK considered Ms Nicholson's proposals carefully. Notes of the meeting of three of ACKK's four trustee partners record that they explored, but ultimately rejected, each alternative proposal put forward. Their reasons were explained to Ms Nicholson in a meeting held with her on 28 February 2017, which again Ms Walsh recorded in a set of notes which all attendees signed.

[43] The notes record Ms Nicholson's proposals regarding culling, milking and feeding of goats were rejected for pragmatic, technical and animal welfare reasons. Her suggestion regarding relief milkers was rejected on the grounds that the relievers were not paid out of the farm account but from the salaries of Mr and Ms Walsh who used relief milkers when they needed them.

[44] Ms Nicholson was advised that, if her suggestion regarding holiday pay and unpaid leave were to be accepted, she would need to take a full three months' unpaid leave. The notes of the meeting also record she was told that, if the employer knew what was happening in the next season with regard to Ms Nicholson's position, it would accept her suggestion. However, due to uncertainty over the coming season they were not willing to do so.

[45] It was explained that the uncertainty arose from two main factors. The first was that Mr and Ms Walsh, who then had two young children, were considering whether it would be better for them both to work full time on the farm and engage childcare for their children. If that happened they would not require a full-time employee: they would need only one part time or casual employee to relieve them.

[46] The second major unknown was whether they would be able to acquire further shares. At the time they anticipated the next season would also end early, possibly in December (2017) or January (2018). The notes of the meeting record the employer was not willing to go through the redundancy process again for what may only be six months' work in the new season.

[47] The meeting notes also record that, if any position were to be available the next season, ACKK would like Ms Nicholson to apply. In answer to her query if a full-time employee would be required when the goats were kidding (the next season), the trustee partners responded that they did not know at this stage but would contact her if they did require someone full-time then.

[48] I accept the employer's evidence of having genuinely considered the alternatives Ms Nicholson had put forward. The fact that the employer reached a different conclusion from Ms Nicholson about her suggestions does not undermine the genuineness of its consideration of those suggestions or the validity of the conclusions it reached on them.

[49] I find there were genuine grounds for the redundancy of Ms Nicholson's position. These related to ACKK's calculations over when it would reach its milk quota and the uncertainty over what would happen in the next season. By 21 February 2017 it had not succeeded in obtaining extra quota and had no confidence of doing so. It was facing a similar situation the following season where it appeared likely the end of the season could occur as early as December 2017.

[50] On the family front, Mr and Ms Walsh were considering how they wanted to operate the farm and whether they could do it largely by themselves if they engaged childcare for their children which would allow Ms Walsh to take on full-time duties

on the farm rather than part-time as she had until then.

[51] Faced with an early dry off and uncertainty over what was to happen in the next season I find it was reasonable for ACKK to consider making Ms Nicholson's position redundant and to make the decision to do so following a period of consultation.

[52] In coming to this conclusion I note the part-time employee, Ms McKee, underwent the same process and was similarly made redundant. I find the grounds for redundancy were genuine and the process followed by ACKK was a fair one which allowed for real and reasonable consultation.

### **Should Ms Nicholson have been offered extended employment when the milking season was extended?**

[53] Ms Nicholson claims she should have been offered further work when the milking was extended beyond the expiry of her notice period. ACKK says it did not do so because of an unresolved matter with Ms Nicholson that potentially involved serious misconduct. It had attempted to resolve the issue by holding a meeting with her and/or by attending mediation but Ms Nicholson refused.

[54] In Ms Nicholson's submission, her employer manufactured the incident that led to that unresolved matter to ensure it did not have to reemploy her in the new season. The incident occurred in the milking shed on the afternoon of 9 March 2017, which fell approximately half way through Ms Nicholson's four week notice period.

It involved an altercation between Ms Nicholson and Ms Walsh when they were preparing to milk the second herd of goats. It ended with Ms Walsh directing Ms Nicholson to leave the milking shed.

[55] Their exchange started after some male goats were let into the shed along with the female goats that were to be milked. Ms Walsh asked Ms Nicholson to ensure that did not happen again, citing health and safety issues created by the presence of the bucks. Accounts of the incident and what occurred next differ between Ms Walsh and Ms Nicholson. Each claims to have been calm and polite in her conduct and each accuses the other of swearing and being aggressive.

[56] As a consequence of the incident Mr Walsh telephoned Ms Nicholson that evening to ask her for her account of what had occurred that afternoon. When she declined to provide a statement until she had consulted her employment advocate, as she was entitled to do, Mr Walsh placed her on "paid stand down" until the matter was sorted.

[57] I note here that what Mr Walsh described as "paid stand down" was in effect suspension. It was also, arguably, an unjustifiable action on the part of the employer as Ms Nicholson had no opportunity to comment on the issue of suspension before it was imposed. However, no personal grievance was raised relating to this matter. It was only in submissions made on Ms Nicholson's behalf after the Authority's hearing that the employer's right to suspend her was questioned. In these circumstances, I will not consider this matter further.

[58] Returning to the events of 9 March, Mr Walsh texted Ms Nicholson later that evening, asking her to provide a statement about the events of the afternoon. It was Mr Walsh's evidence that he also contacted Ms Nikki Clarry that evening and asked her to write a statement about what she had observed that afternoon. Ms Clarry had arrived at the milking shed during the altercation and witnessed much of the incident.

[59] Ms Nicholson provided a statement by email late in the afternoon of 13 March and Ms Clarry provided hers on 16 March. ACKK wrote to Ms Nicholson on 16

March confirming it wished to hold a disciplinary meeting with her over the 9 March incident. The employer proposed 22 March 2017 as the date for the meeting as its lawyer, Ms Gundesen, was unfortunately unavailable until that date. It also put forward mediation as a possible alternative to the disciplinary meeting.

[60] The letter from ACKK noted the employer was aware the proposed meeting date fell after the expiry of Ms Nicholson's notice on 21 March. However, it recorded that it wished to proceed with the meeting in order for Ms Nicholson to have the opportunity to have her say about what happened on 9 March.

[61] Mr Nutsford responded on Ms Nicholson's behalf on 21 March, advising Ms Nicholson would not be attending any meetings in relation to the matter. In Mr Nutsford's view it was "pointless and completely unnecessary", given that Ms Nicholson's employment terminated on 21 March. Ms Gundesen replied on 22

March, noting that the Trust Partnership was aware of the possibility it may need to look at re-hiring laid-off staff when the next season commenced and noting that it needed the disciplinary issue to be resolved in case Ms Nicholson wished to be considered for work with ACKK in the future.

[62] Ms Nicholson was clear in her evidence to the Authority that she believed the outcome of the disciplinary process would not have been favourable to her. She referred in her written evidence to receiving an email on 20 March asking her to attend a meeting with her employer which she regarded as being a bullying tactic.

[63] In her view the whole milking shed incident had been magnified out of proportion to ensure she did not have to be offered work in the next season. She acknowledged under questioning ACKK had never said it would not re-employ her the following season if it found itself in a position of needing assistance. She conceded that was simply an assumption she had made, despite the employer advising her on 28 February that if it had a position available in the next season, it would like her to apply.

[64] Ms Nicholson also said, when questioned in the course of the Authority's investigation, that she was unavailable on 22 March as she was commencing a trial that could lead to alternative employment. She did not disclose that information to ACKK at the time as the reason she did not wish to meet.

[65] She was under no obligation to disclose it or to take part in a disciplinary meeting or mediation after her notice period had expired. However, I find it unreasonable for Ms Nicholson to claim subsequently the employer was obliged to offer her work after 21 March, given her unwillingness to participate in a process that

could have resolved the employment issue with ACKK and potentially removed the impediment to her being offered work until the goats were dried off.

[66] I do not accept Ms Nicholson's submission that the 9 March incident was either manufactured by her employer or that it was magnified out of all proportion. I find the employer's decision to investigate the matter and, after it had received statements from those concerned and Ms Clarry, to hold a meeting with Ms Nicholson to be a reasonable response to a matter it believed potentially involved serious misconduct.

[67] Nor do I accept her submission that ACKK unreasonably delayed the investigation process in order that her notice would expire before it was completed. It sought statements about the milking shed incident in a timely fashion from both Ms Nicholson and Ms Clarry. It sought a meeting with Ms Nicholson as soon as its legal representative was available. It was unfortunate that the meeting could not occur until one day after her notice period expired.

[68] While it clearly would have been preferable for the investigation to have been completed before Ms Nicholson's notice expired on 21 March, I find no evidence that the employer deliberately or unreasonably delayed the process.

[69] In the circumstances I accept the ACKK's submission that the unresolved disciplinary situation precluded it from offering Ms Nicholson further work when milking continued past the expiry date of her notice, firstly as a result of operational failures and then as a result of its acquiring further shares.

## **Determination**

[70] I have found Ms Nicholson's redundancy was for genuine reasons and was effected following a fair and reasonable process in which the alternative proposals she formulated were considered by her employer. Ms Nicholson's claims are dismissed.

## **Costs**

[71] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority