

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Phillip William Peacock (Applicant)

AND Allan Titchmarsh (Respondent)

REPRESENTATIVES G Jenkins for Applicant
K Stretton for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 14 and 15 July 2004 at Napier

MEETING

DATE OF 30 July 2004

DETERMINATION

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. Mr Peacock claims that he was constructively dismissed by being demoted to a lesser position and then subsequently summarily dismissed when he resigned. He also claims that he is owed monies for underpaid salary, unpaid overtime and a failure to reimburse telephone expenses. Mr Titchmarsh's view is that Mr Peacock resigned as a result of substantial performance issues and that no monies remain owing to him although some amounts owing were not paid until after the employment ended.
2. I must record that the parties' inability or unwillingness to follow the Authority's directions in this matter has caused a great deal of inconvenience. Neither party took responsibility for preparing and forwarding an agreed timeline and bundle of documents. Furthermore, both parties' witness statements were not provided to the Authority and the other party until well after the date directed. This caused considerable inconvenience to the Authority and the other party in preparing for the investigation meeting.

The Facts

3. Mr Titchmarsh lives in Te Puke and owns several farms, including one in Stockade Road, Waipawa. He employed the applicant, Mr Peacock, as the manager of this farm following interviews held in May 2003. Mr Peacock commenced employment on 1 June 2003.
4. Mr Titchmarsh and Mr Peacock have different views about the total remuneration package that was to be paid to Mr Peacock. Having heard all the evidence I am satisfied that Mr Peacock misinterpreted the agreement and that while a figure of \$60,000 per year was mentioned, that was not exactly what was agreed. Rather, what was agreed was a salary of \$50,000 plus bonuses, which might extend to as much as \$60,000 if all the performance targets set were met. Because the bonuses were performance related, total remuneration could not constitute a set figure as such. In fact, because of the short term nature of the employment (as it turned out) and the issues relating to farm production, Mr Peacock never became entitled to any of the bonuses held out to him. Although Mr Peacock was in fact only ever paid at the time on the basis of a salary of \$42,080 per year, for reasons that are not in the parties' interests to specify, I am also satisfied that Mr Peacock was subsequently paid at the appropriate level of \$50,000 per year, albeit after the termination of his employment. I am also satisfied that there was no allowance made for overtime. The job was purely a salaried role and therefore there can be no claim for time in lieu which was worked by Mr Peacock.
5. Part of the agreement was also that Mr Peacock would be reimbursed for work phone calls. It is accepted that Mr Peacock was never reimbursed for these, but neither has he provided any details of the expenses he incurred. He makes a claim for \$3,000. This seems excessive for the three months that he ended up working for Mr Titchmarsh. I consider that an appropriate sum in equity and good conscience in this regard is \$300.
6. I do not consider it in the interests of either party for me to detail much of the history of the employment relationship between Mr Titchmarsh and Mr Peacock. Both must take a great deal of responsibility for the extremely poor performance of the farm. On

the one hand Mr Titchmarsh struggled to provide leadership from a distance, was far from generous in providing needed capital to the farm and was not at all a clear communicator. On the other hand Mr Peacock, even although he was a new manager, has to take some responsibility for a failure of leadership and ability to concentrate his and the staff's efforts on the main factors which would ensure strong and stable production levels. If one were to put one single phrase on it, poor communication led to many of the problems which ensued.

7. In essence, over the three months that Mr Peacock ran the farm, concerns mounted over inexperienced staff, excessive stock deaths, some animal welfare issues, excessive expenditure on maintenance and poor production levels. Mr Titchmarsh raised some of these issues with Mr Peacock over the course of his employment but things did not improve. Poor weather was also a significant factor.
8. Mr Peacock accepted that there were significant problems on the farm and that he was partly responsible. However, he believed that the majority of the responsibility lay with another under-performing staff member who would not accept his authority and a failure by Mr Titchmarsh to provide sufficient finance to pay for vets and feed for under fed stock. By contrast, Mr Titchmarsh believed that Mr Peacock as the manager was ultimately responsible for running the farm efficiently.
9. Towards the end of August 2003 Mr Titchmarsh believed that matters had reached crisis point. He had concerns following a meeting with the farm vet over animal treatment issues, because high hours being worked by staff and over what was seen as excessive spending by Mr Peacock on repairs and maintenance. At that time Mr Titchmarsh raised with Mr Peacock his belief that Mr Peacock would have to be replaced by another manager. Mr Peacock wished to continue and as a result nothing was changed in relation to farm management positions.
10. Around a week later, after determining that there had been little or no improvement in farm performance, Mr Titchmarsh elected to call in a farm consultant to recommend what changes were urgently needed to get the farm running efficiently, and also to replace Mr Peacock as manager - albeit that he intended to try and keep him on in a lesser position.

11. Mr Titchmarsh therefore offered Mr Peacock a position as assistant farm manager, but at a reduced salary of \$40,000 per year. He would also have to move his family to a different house as the new farm manager would need the farm manager's house. Following that meeting, which occurred in late August, Mr Peacock's representative wrote to Mr Titchmarsh raising his concerns, as set out in the introduction, over his existing salary.
12. As a result of the visit by the farm consultant, which highlighted the severe problems facing the farm alluded to above, Mr Titchmarsh and the farm consultant held a meeting with Mr Peacock and his partner on 3 September. At that meeting it was made clear to Mr Peacock that he could not stay on as farm manager, but that he could be retained as assistant manager on a salary of \$50,000 until February, or \$40,000 through to the end of the season. At the end of that meeting Mr Peacock was given a standard Federated Farmers employment agreement and asked to consider the offered position.
13. Mr Peacock's written response, following legal advice, was to resign on four weeks notice, claiming constructive dismissal. Mr Titchmarsh gave Mr Peacock another day to reconsider his decision to resign, but was told that the resignation would stand. Mr Titchmarsh then asked Mr Peacock if he wanted to work out his notice and Mr Peacock replied that he would stay if he was wanted.
14. Mr Titchmarsh then took his own legal advice. The result was a letter dated 5 September (but delivered to Mr Peacock on 8 September) stating that he was not able to retain his services for a further four weeks, and dismissing him summarily. Mr Peacock was given fourteen days to leave the house. He was also told that what monies were owed to him would be calculated and paid without delay. This did not occur. Mr Peacock then determined to stay on in the house until he found further employment and accommodation. Mr Titchmarsh retaliated, after the fourteen day period, by cutting off the power and water. That matter has been the subject of proceedings in the Tenancy Tribunal.
15. Mr Peacock was able to find alternative employment, albeit at a salary of \$40,000, on 3 October. That employment continued until the end of the season. Mr Peacock has

subsequently been employed in the present season at a higher salary. Mr Peacock therefore has lost four week's salary of \$3,846 before he got a new job and subsequently \$10,000 per year for 8 months, which equates to \$6,667.

Determination

16. It is clear on the facts that this was an unjustified constructive dismissal, which was followed by an unjustified summary dismissal. Mr Titchmarsh did not attempt to go through any form of disciplinary procedure with Mr Peacock concerning his performance. That the issues in dispute were ones of performance rather than trust and confidence can be shown by the fact that Mr Titchmarsh was quite prepared to have Mr Peacock stay on working at the farm, albeit in a lesser position. There should therefore have been a warning process instituted before any demotion occurred.
17. Mr Peacock was therefore within his rights to refuse to take up the lesser position and instead to accept the repudiation of his employment agreement by Mr Titchmarsh. Matters were only worsened by the quite unacceptable behaviour of Mr Titchmarsh in terminating Mr Peacock's employment summarily, rather than accepting his resignation upon four weeks notice. That notice would have given Mr Peacock a much better opportunity to find alternative employment and thus minimise the cost of this employment relationship problem for all concerned.
18. I accept that Mr Peacock was greatly distressed at his treatment by Mr Titchmarsh. He has been greatly troubled by the events that occurred and is entitled to significant compensation of \$10,000, I hold. He is also entitled to the sums owing as a result of his unfair treatment as assessed in the facts section.
19. In determining remedies I must, however, consider any actions by Mr Peacock which contributed towards the situation that gave rise to the personal grievance. Even Mr Peacock accepted that his performance as farm manager was not up to scratch. The evidence of the farm consultant was damning in respect of how poorly the farm was operating and the serious animal welfare issues that had arisen as a consequence. That information on poor performance must be taken into account by the Authority in determining remedies.

20. I find that Mr Titchmarsh must also bear some responsibility for the poor performance of the farm, but also total responsibility for the procedural failings in the way that Mr Peacock was treated, particularly in respect of the summary dismissal that followed the resignation. But for the latter fact, the level of Mr Peacock's contribution would have been higher. Taking all these matters into consideration, I determine in equity and good conscience that the sums awarded to Mr Peacock, except for the telephone reimbursement charges, should be reduced by 35%.
21. I therefore order the respondent, Allan Titchmarsh, to pay to the applicant, Phillip Peacock, the following sums –
- (a) \$6,500 in compensation under section 123(c)(i);
 - (b) \$6,833.45 gross in lost remuneration; and
 - (c) \$300 reimbursement for telephone calls.

Costs

22. Costs are reserved.

G J Wood
Member of Employment Relations Authority