

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 46/10
5157188

BETWEEN DANIELLE JODY PIVOTT
Applicant
AND ROSS MILKING LIMITED
Respondent

Member of Authority: Paul Montgomery
Representatives: Patrick O'Sullivan, Advocate for Applicant
Damien Pine, Counsel for Respondent
Investigation Meeting: 4 November 2009 at Invercargill
Submissions Received: 18 November and 6 December 2009 for Applicant
4 December 2009 for Respondent
Determination: 3 March 2010

DETERMINATION OF THE AUTHORITY

[1] Ms Pivott claims her dismissal by the respondent from her position as full time milker was unjustified and also that she was disadvantaged by the unjustified action of her employer. The applicant seeks reimbursement of lost remuneration in the sum of \$4,616.00, compensation for hurt and humiliation of \$15,000.00, compensation of \$1,600.00 for the loss of a benefit and costs. Ms Pivott also seeks a penalty for the respondent not supplying a copy of the employment agreement and also for a breach of the Health and Safety in Employment Act 1992 (s.49).

[2] The respondent denies it dismissed the applicant without justification and further, that it took any action which unjustifiably disadvantaged Ms Pivott. It therefore declines to provide the remedies the applicant wants. The parties attempted to resolve their differences in mediation but were unable to do so.

[3] In respect of the claim for a penalty under the HSE Act the applicant alleges the respondent failed in its implied obligation to provide the applicant with a safe workplace which resulted in a fall in the milking shed.

[4] The Authority is unable to consider this matter as it is not open to an employee to bring proceedings seeking damages or penalties on the ground of physical injury (see *Brittain v. Telecom Corporation of NZ Ltd* [2001] 1 ERNZ 647 (CA)).

The essential facts

[5] The applicant was employed under a fixed term agreement from 29 November 2008 through to 31 May 2009. Both parties signed an agreement on 1 December 2008, however there is a dispute over whether Ms Pivott was given the opportunity to take advice and whether she was given a signed copy at the time the parties completed the agreement.

[6] The applicant was provided with accommodation and from February 2009 paid a \$10.00 bond weekly to ensure the house was cared for. The agreement was altered to reflect this and initialled by both parties.

[7] From the time Ms Pivott began milking she experienced problems with pain in her hands. Initially, she believed it was due to having not milked for some months. Ms Pivott says she mentioned this to Tracey and Warren Ross, her employers, on several occasions.

[8] The condition deteriorated and the applicant took pain medication on the night of 13 December 2008. That, combined with her caring for an infant who kept her awake, led, she says, to her being late in getting up. Ms Pivott sent a text message to Mrs Ross explaining she was too tired to drive to the farm from Outram. The applicant arrived at the farm around 10.30am on 15 December and was spoken to by Mr and Mrs Ross who asked whether the applicant was able to do the job. A verbal warning was issued according to the Ross account, Ms Pivott says it was not. Ms Pivott was not given a written record of the verbal warning.

[9] A series of incidents followed. Apart from the one described, above a further eight occurred between 24 December 2008 and 23 March 2009. The respondent says, warnings were issued and the final one came on 19 March 2009 when the Mr and

Mrs Ross say a final warning was given for lateness another incident *would result in dismissal*. Again Ms Pivott was not given a copy of this warning.

[10] On 21 March 2009 the applicant was also considerably late for work. When questioned, Ms Pivott said she had set six alarms but had only woken when her daughter woke at 7am and she could not explain the incident as she had been in bed by 8pm the previous evening.

[11] Ms Pivott says Mrs Ross and she had earlier discussed the pain in the applicant's hands and arms and Mrs Ross told her it could be caused by carpal tunnel, a condition Mrs Ross' mother had suffered from previously. Mrs Ross says she did not have such a discussion with the applicant.

[12] In mid December Ms Pivott approached Mrs Ross to get time off to go to her doctor. She attended on 22 December 2008, having been asked by Mr and Mrs Ross to let them know the doctor's views when she returned to the farm. Ms Pivott says she agreed to that. On her way home from the morning milking the following day, the applicant called at Mr and Mrs Ross' home to discuss the diagnosis of carpal tunnel syndrome and advised Mrs Ross she had been prescribed medication to relieve the symptoms.

[13] The applicant says after a few days on the medication she noticed she was feeling sleepier than usual. She studied the information sheets on the medication noting its possible side effects. She said she spoke to Mr Ross at the shed as they were setting up for the afternoon milking and asked if he wanted a copy of the information. She said Mr Ross declined and seemed disinterested.

[14] On 24 February 2009, while letting some milked cows out of the shed, the applicant was set off balance when the lead cow bolted lifting a gate which struck the applicant sending her backwards. She felt on her buttocks which she says were *tender but I continued working*. The applicant says she took four Panadol tablets and returned to the shed for the afternoon milking.

[15] As she was due for four days leave, Ms Pivott says she thought a rest would take care of her lower back however, at 2am on 28 February she woke with severe pain and her husband Jared telephoned his mother (a nurse) and asked for her advice. Mrs Pivott advised that they go to the hospital without delay. The medical staff were uncertain as to the cause of the pain and prescribed Diazepam and Codeine Phosphate

and some other medication. Ms Pivott says she told the doctor what medication she was taking for carpal tunnel syndrome and says the doctor told her the drugs were compatible.

[16] An ACC was filled in and the doctor put the applicant on sick leave for five days.

[17] After leaving the hospital the applicant and her husband went to Mrs Pivott's home. From there the applicant telephoned Tracey Ross to advise she would need an additional day given the medical certificate. Tracey asked if Ms Pivott had signed the accident register. The applicant said she did not know there was one. Mrs Ross said she wanted a copy of the ACC form when the applicant returned to the farm and exhorted her not to tell anyone about the incident.

[18] Ms Pivott says she told Tracey she was on a *cocktail of drugs* for her back injury. The applicant's mother in law who was present at the phone call, confirms this was said. The applicant later called at Mr and Mrs Ross' house, signed the accident register, showed Tracey the information leaflets but, she says, Mrs Ross just shrugged her shoulders. The respondent maintains they were never made aware the applicant was on any medication which could affect her employment.

[19] The applicant says she did not report her fall as it appeared not be serious at the time but did so when its results became serious. The applicant told the Authority *[the medication] made me sick and I was awake quite a lot at night with my head hanging over the toilet bowl. A lot of the time I felt like I was on a high and at other times I felt heavy and sleepy.*

[20] The applicant was rostered for morning milking on 21 March with a 4.30am scheduled start. She arrived at the shed over two hours late and while milking with him, told Mike Benfell how the medication was affecting her. She says he did not make any comment. Following the completion of milking, Mr Benfell sent a text to the Ross's who were away from the farm, advising them of the incident. Mr and Mrs Ross asked Mr Benfell to advise Ms Pivott she was to meet them in their home that evening upon their return.

[21] Ms Pivott was dismissed on two weeks notice at that meeting because the respondent could not rely on her to be at work every morning. The applicant says she

was feeling sick, her legs shaking and that she felt dizzy. She also says when asked by Tracey Ross if she had anything to say, she *could only mumble no*.

[22] The applicant returned home and thought the situation over. She then returned to the Ross's home, explaining the problems she was having with medication, that she had spoken to them about her carpal tunnel and back problems following the fall in the shed. The response received was that the Ross's would like to change their minds as the applicant was a good worker, but she could not be relied on so they were standing by the decision.

[23] During the notice period Ms Pivott asked for a copy of her employment agreement. She did not receive it until it was requested by her representative.

Issues

[24] To resolve this matter the Authority needs to make findings on the following issues:

- Was the applicant unjustifiably dismissed; and
- Was the applicant disadvantaged by an unjustified action on the part of the respondent; and
- If so, what remedies is the applicant entitled to; and
- To what, if any extent, did the applicant contribute to the circumstances giving rise to the grievance?

The test

[25] The test of justification is set out in s.103A of the Employment Relations Act 2000 and requires the Authority to determine the question of whether a dismissal or an action was justifiable 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.

The investigation meeting

[26] As a result of an unusual chain of events, the applicant did not attend the investigation meeting. Ms Pivott and her husband moved to Tasmania with their three

children to make a new start. Regrettably, the attempt was unsuccessful and the couple were engaged in a custody battle in the Australian Family Court on 4 and 5 November 2009. Mr O'Sullivan advised of these witnesses' unavailability to attend by email on 2 November 2009 as soon as he had instructions. Those instructions were to proceed with Mrs Karen Pivott in person and on the basis of the applicant's unsworn statements of evidence and Jared Pivott's affidavit.

[27] For the respondent Mr Warren Ross, Mrs Tracey Ross and Ms Luana Robbie gave evidence in person. Statements or affidavits were received from Garrie Pearce, Royden Sutherland, Michael Benfell, Kendrick Sutherland, Margaret Jones and Mr and Mrs Bruce Robyn Johnston.

[28] The Authority acknowledges the assistance of all who gave evidence and the work of both representatives whose submissions have been considered in coming to this determination.

Analysis and discussion

[29] The major issue for the Authority in this case is the inability of the Authority and the representatives to question Ms Pivott on her evidence. Of necessity the Authority needs to treat unsworn evidence with considerable caution although in the present matter, I have no doubt that but for the applicant's need to attend the Australian Family Court, Ms Pivott and Jared would have sworn or affirmed their written statements. Their unavailability for questioning however, is a very significant matter giving rise to issues in respect of weight to given such evidence.

[30] At the heart of this matter are two issues:

- The frequent lateness of the applicant; and
- The alleged warnings given to her by Mr and Mrs Ross.

[31] A matter overarching these is the issue of the applicant's prescribed medication and its alleged causal relationship to the lateness.

Warnings

[32] The employment agreement sets out the agreed disciplinary and dismissal procedures at clause 19. Clause 19.3 states:

Should the employer have cause to warn the employee in regard to the employee's misconduct or substandard performance, the employer shall advise or confirm such warning in writing particularising the details of the misconduct or substandard performance, and that the employee's employment is in jeopardy if the misconduct is repeated or the substandard performance is not adequately addressed.

[33] The respondent presented to the Authority two documents (K and L) which appear to diary the occasions on which Ms Pivott was spoken to over issues of misconduct. Document K is a handwritten warning in relation to what is said to have been the unlawful taking of a work vehicle used by the applicant to move between the farm and her accommodation. There is no need to detail the matter here, but the Ross's say that when spoken to by telephone by Tracey Ross, the applicant was told the matter was serious and that she would be receiving a written a warning. The document is somewhat curious in that it closes, *we spoke to her again today (9 January 2009) as we just got back and explained the seriousness of the matter and again informed her of this written warning.* The letter is signed Tracey Ross.

[34] Document L appears to be a list of the occasions on which the applicant was spoken to or verbally warned over particular matters the majority of which relate to lateness. This list refers to four occasions on which the applicant was *spoken to* by her employer. It also refers to four verbal warnings only one of which relates to lateness. Curiously, the entry under MISCONDUCT SERIOUS is dated 6/1/09 – *stealing of motor vehicle – cops involved – verbal warning given.*

[35] This entry refers to the warning referred to above which is clearly a written warning, although I am far from convinced given its wording, a copy was ever handed to Ms Pivott. In considering other matters of evidence put before the Authority, I have come to the view that Mr and Mrs Ross operated a relatively informal system of record keeping. Nor am I convinced that the diary or list of interactions with Ms Pivott in relation to misdemeanours of various sorts was not completed for the purposes of the respondent defending itself against Ms Pivott's allegations.

[36] I accept that this list or diary was never shown to Ms Pivott but I am persuaded the entries were not made contemporaneously with the events to which they refer. In respect of the car incident, I think it highly improbable that the diary note indicates the warning given on that matter was verbal when clearly a written document was produced. The diary is in Tracey Ross's handwriting as is the letter.

Had the entry and the letter been prepared at the time the written warning was issued, there could be no confusion as to its status and would never have been diaried as a *verbal warning*.

[37] That is not to say the incidents recorded did not occur, but rather indicate the respondent's inexperience in dealing with poorly performing employees. Given that the respondents produced only the one written warning which, as I have observed above, appears not to have been given to Ms Pivott at the time the warning was issued, I am of the view that apart from the diary notes, no other confirmation of verbal warnings was ever recorded, let alone given to the applicant.

Accident reporting

[38] Schedule 2 to the IEA covers the course to be covered in the event of a workplace accident. The document makes it clear that the obligation to report an accident sustained in the course of employment is to be notified to the employer as soon as practicable after the accident occurs and before the end of the employee's normal working day. It also sets out the information required under the HSE Act 1992.

[39] While the obligation to report an accident such as that sustained by Ms Pivott is clear, two relevant considerations apply in this case. The first is the non-notification by the respondent of the location of the accident register and also the applicant's initial assessment of the accident as a minor incident.

[40] On the evidence, I am satisfied Ms Pivott did not have a copy of the agreement containing the accident reporting procedures as she had not been given one when the agreement was originally signed. For that reason, she was not able to familiarise herself with the requirements of reporting a workplace accident. Further, having initially assessed her fall as minor, the applicant simply took some Panadol tablets and soldiered on until the injury manifested itself as more serious.

[41] Of considerable concern was the failure of the respondent to take into account the effects of the applicant's medication. I am satisfied Ms Pivott offered the information to her employers after the diagnosis of carpal tunnel and after advising Tracey Ross she was on a cocktail of drugs as a result of her fall in the milking shed. The applicant was employed to work with large livestock in confined spaces which

calls for alertness and, occasionally, the ability to react quickly and take evasive action.

[42] The side effects of the drugs prescribed for carpal tunnel (anti-inflammatory and antacid) include dizziness, drowsiness, headaches and nausea. Those prescribed following the applicant's fall (codeine phosphate and diazepam), have possible side effects of confusion, dizziness, drowsiness, sleep problems and loss of reflexes.

[43] Although the applicant was not available for questioning as to the extent to which she suffered from any of these symptoms, it is the respondent's position that trust and confidence was the key issue leading to the dismissal. In describing what occurred at the dismissal meeting, Mrs Ross told the Authority (paras.39-42):

I then went through the number of warnings that had previously been issued and reinforced that Danielle had been told that further occurrences of lateness would end up in dismissal.

I explained how being late affects everybody on the farm and the farm itself.

I gave Danielle a further chance to respond but she didn't say anything.

I told her that given the previous incidents of lateness that I felt no choice but to terminate her agreement. We needed someone that was reliable and we did not feel that they [sic] could rely on Danielle and that it could affect the business. We had lost trust and confidence in Danielle as an employee.

[44] Mrs Ross also told the Authority:

At no stage did Danielle ever mention the medication as being the reason for her being late. The first use of medication as an excuse for this lateness came following a visit by Danielle to her advocate after termination.

[45] I accept this may have been the case. However, I am satisfied Ms Pivott offered information and the offers were declined. Accepting and studying the information might well have led to a discussion between the parties as to how the situation might be managed or resolved. An opportunity was missed by the respondent taking the course of action it eventually followed.

[46] On the other hand, Mr and Mrs Ross had other matters to contend with; a relief milker and a full time milker had resigned as they and the applicant were incompatible. Mr and Mrs Ross were also coping with a new baby and the stress of

managing and staffing their operations at a very busy time of the year. I have come to the view Mr and Mrs Ross are not unreasonable people but rather inexperienced and unfamiliar with managing staff, particularly at times of pressure.

[47] I have also formed the view from the evidence before the Authority that Ms Pivott was a good worker whose personal affairs were askew, but who was trying to get these in order while earning a living milking.

[48] In all the circumstances, I find a fair and reasonable employer would have provided the original agreement to the applicant following the time of its signature; would have provided copies of all warnings issued to the applicant to her; and would have discussed the effects of the medication she was taking prior to making any decisions to dismiss.

The determination

[49] Returning to the issues as set out above in this determination, I find:

- The applicant was unjustifiably dismissed;
- The applicant was disadvantaged by the failure of the respondent to provide her with a copy of the employment agreement and its attached schedule;
- The applicant does have a personal grievance and is entitled to remedies;
- I find the applicant contributed to the circumstances which gave rise to her personal grievances and will address the extent to which that has affected remedies below.

Remedies

[50] In assessing remedies, I have weighed the untested evidence against that which was able to be tested and have approached quantum on an equity and good conscience basis. I have also borne in mind the limited term of the employment relationship and its fixed term nature.

[51] The respondent is to pay the applicant the sum of \$4,616 gross in respect of remuneration lost as a result of the dismissal.

[52] The respondent is to pay the applicant the compensatory sum of \$4,000 under s.123(1)(c)(i) of the Act for hurt and humiliation.

[53] The respondent is to pay the applicant the compensatory sum of \$500 for unjustifiably failing to provide the applicant with a copy of the signed agreement pursuant to s.123(1)(c)(i) of the Act.

[54] The application for loss of benefit of the accommodation is declined. I find there was no firm, mutual agreement that the applicant was to be retained for the season following that for which she had been employed.

[55] The application for a penalty is declined. The matter has been dealt with above under s.123(1)(c)(i) of the Act.

Contribution

[56] Section 124 of the Act requires the Authority, if it has determined that an employee has a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[57] With the exception of the compensatory sum of \$500 in respect of unjustifiable disadvantage, the above sums are to be reduced by 25%, the extent to which I find the applicant's behaviour contributed to the grievances.

Costs

[58] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If that is not able to be achieved, Mr O'Sullivan is to have 14 days from the date of issue of this determination to lodge and serve his memorandum. Mr Pine is to have a further seven days in which to lodge and serve his memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority