

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 262
5405157

BETWEEN VICKI RAUMAWEA
Applicant

AND BILLY ATWAL (aka BALIHAR
SINGH)
Respondent

Member of Authority: Helen Doyle

Representatives: Robyn Black, Advocate for Applicant
Respondent in person

Investigation Meeting: 30 October 2013 in Christchurch

Determination: 20 December 2013

DETERMINATION OF THE AUTHORITY

- A. I have ordered Billy Atwal to pay to Vicki Raumaewa the sum of \$241.41 net being unpaid wages.**
- B. I have found that Vicki Raumaewa was unjustifiably dismissed from her employment.**
- C. I have ordered Billy Atwal to pay to Vicki Raumaewa the sum of \$3,133.36 net being lost wages.**
- D. I have ordered Billy Atwal to pay to Vicki Raumaewa the sum of \$5,000 compensation without deduction.**
- E. I have not ordered any payment toward later transport costs.**
- F. I have reserved the issue of costs and set a timetable for an exchange.**

Preliminary matters

[1] There are two preliminary matters to deal with at the outset.

[2] The first is that the statement of problem referred to two respondents, Billy Atwal also known as Balihar Singh and Atwal Ag Limited. Mr Atwal confirmed at the Authority investigation meeting that proceedings should not be against the company. By consent I dismissed the claim against Atwal Ag Limited.

[3] The second matter is that the applicant sought a penalty of \$2,000 for a breach of the duty of good faith. The application for the penalty was formally withdrawn by Ms Black at the commencement of the investigation meeting.

Employment Relationship Problem

[4] Vicki Raumaewa was employed by Mr Atwal as a farm assistant to work on a farm on which he had a share milking agreement. The employment was arranged by telephone, email and text following the placement by Mr Atwal of an advertisement in a publication known as Fencepost for a farming assistant in or about May 2012. At the time Ms Raumaewa responded to the advertisement she was living in Winton and the farm on which Mr Atwal worked was in Whataroa on the West Coast. Ms Raumaewa and Mr Atwal only met in person the day before Ms Raumaewa commenced work on 16 July 2012.

[5] There was no written employment agreement entered into. The arrangement about payment and other terms and conditions of employment is found in an email dated 20 June 2012. There was to be payment for transport costs. One cattle beast, free milk and a mudbug bike were to be provided. The figure mentioned for wages was *approximately \$1300* a fortnight after tax and this was for 1.5 positions. The arrangement was that Ms Raumaewa's partner Tony Hogeboom was to be employed for the 0.5 position. There was also a house provided. Mr Hogeboom has not lodged a claim.

[6] Four days after commencing employment on 20 July 2012 Ms Raumaewa says that she was unjustifiably dismissed following a somewhat heated exchange about her concern regarding an absence of water in a paddock containing cattle. Ms Raumaewa did not return to work after that date and was not paid wages for the work she had undertaken.

[7] Mr Atwal says that Ms Raumaewa simply walked off the farm and abandoned her employment after she got angry during a discussion with him about water provision to a paddock, and she then demanded her pay. He said that he tried to get Ms Raumaewa and Mr Hogeboom to return to work but he was unsuccessful in doing so.

[8] Ms Raumaewa seeks unpaid wages in the sum of \$520.00, loss of wages for a three month period from the date of dismissal in the sum of \$7,800, travel cost expenses and compensation for humiliation, loss of dignity and injury to feelings in the sum of \$10,000 together with costs.

The Issues

[9] The Authority needs to determine the following issues:

- (a) Are there outstanding wages owed to Ms Raumaewa and if so what is the amount owing?
- (b) How did the relationship end?
- (c) If it is found that Ms Raumaewa was dismissed then applying the test in s.103A of the Employment Relations Act 2000 was the dismissal justifiable?
- (d) If the Authority concludes that Ms Raumaewa's dismissal was unjustified then what remedies is she entitled to and are there issues of mitigation and contribution?

Are there outstanding wages owed to Ms Raumaewa?

[10] There is some dispute about what hours Ms Raumaewa worked over the four day period. There is no dispute that she was not paid for the hours she did work. Mr Atwal said that was because he had paid the cost of the transport for the family, Ms Raumaewa, Mr Hogeboom and two young children in the sum of \$520. He says that then Ms Raumaewa simply abandoned her employment.

[11] Ms Raumaewa is I find entitled to be paid for the work that she performed on the farm.

[12] In the absence of any written information about hours worked and having listened to the evidence from both Ms Raumaewa and Mr Atwal I find the following hours worked:

16 July 2012; 3 hours worked

17 July 2012; 5 hours worked

18 July 2012; 6 hours worked

19 July 2012; 5.5 hour worked

[13] The amount Ms Raumaewa has claimed for unpaid wages is based on \$1,300 net per fortnight. That does not take into account that Mr Raumaewa and Mr Hogeboom were paid from that net sum each fortnight. I have therefore divided the net sum of \$1,300 by three and then multiplied that figure by two to arrive at Ms Raumaewa's fortnightly net pay. The appropriate calculation is based on the full time position only. That is \$866.67 net per fortnight. One of the difficulties I have is that given the absence of any written agreement I am unable to accurately conclude what hours Ms Raumaewa would actually have worked each week. The Authority is required to deliver practical solutions. I have considered the hours actually worked that first week by Ms Raumaewa and I will base my calculations on a 35 hours week. \$866.67 divided by 70 is \$12.38 net per hour. I have then multiplied that amount by 19.5 hours and arrived at \$241.41 net.

[14] I order Billy Atwal to pay to Vicki Raumaewa the sum of \$241.41 net being unpaid wages.

How did the relationship end?

[15] Ms Raumaewa said that she was concerned within the first three days of her employment commencing because there was no written employment agreement as she had been led to believe there would be, or written job description. She was also concerned that it was unclear exactly what hours the part time role consisted of. She said that Mr Atwal got a little annoyed when these matters were raised.

[16] Mr Atwal said that he was concerned because Ms Raumaewa talked to the farm manager and he felt that she did not recognise that he was her employer.

Mr Atwal also became concerned that Ms Raumaewa had misled him as to the experience she had.

[17] Matters came to a head on Thursday 19 July 2012. The accounts of Ms Raumaewa and Mr Atwal differ.

[18] Ms Raumaewa said that she asked Mr Atwal if he was going to move some cows because there was no water in the paddock. There was some discussion about whose issue the water was and Ms Raumaewa advised Mr Atwal it was his issue. Ms Raumaewa said that Mr Atwal told her to *get off the farm*. She asked him *are you firing us?* She says that he responded in the affirmative. Later that day she says she asked for payment for work done and also advised Mr Atwal's wife, Mandeep Rakkar that she had been fired. Then Ms Raumaewa said there was a series of text messages between Mr Hogeboom and Mr Atwal in which Mr Atwal stated that he wanted Mr Hogeboom to work full-time and Ms Raumaewa part-time. Ms Raumaewa says that although there had been the promise of a meeting at which written employment agreements would be provided Mr Atwal was not present at the arranged meeting and the relationship did not continue.

[19] Mr Atwal has a different recollection. He said that Ms Raumaewa started arguing with him about there being no water in the trough in one of the paddocks. Mr Atwal said he told Ms Raumaewa that the farm owner intended to fix the main water line by the shed and that he would bring his digger to the paddock and that there was in the meantime plenty of water in the drains for the cows in the paddock. He said that Ms Raumaewa continued to argue with him and got angry and kept repeating herself. He told her *it's enough* and then Mr Atwal says that Ms Raumaewa took off on his bike at full speed to see Mr Hogeboom. He accepted under questioning that Ms Raumaewa had asked if he was firing her but did not accept that he confirmed he was. He said that both Ms Raumaewa and Mr Hogeboom returned on their bikes and Ms Raumaewa asked for payment using profanities. He then tried to sort the situation out with Mr Hogeboom by telephone and text.

[20] After lunch on that day Mr Atwal said that he started texting with Mr Hogeboom about some options. Mr Atwal proposed that Mr Hogeboom should work full-time and Ms Raumaewa part-time. It is clear from a transcript of the text messages provided between Mr Atwal and Mr Hogeboom that Mr Hogeboom wanted to have a written job description and employment agreements for himself and

Ms Raumaewa before agreeing to any changes. Mr Hogeboom also advised Mr Atwal that it was Ms Raumaewa that he gave the full-time job to and not him. Mr Atwal responded that circumstances changes and we *want team players*.

[21] Both Mrs Raumaewa and Mr Hogeboom thought that they were going to be attending a meeting on Sunday 22 July 2012 at 4pm to discuss the new offer. Neither of them had worked following 19 July 2012 on the farm. Ms Raumaewa said that she had been told by Mr Atwal that a written job description would be available at midday on that day to consider before that meeting but there was no one at the house at that time. I accept that evidence as likely.

[22] There is a dispute as to when Ms Raumaewa and Mr Hogeboom attended at Mr Atwal's house for the 4pm Sunday 22 July 2012 meeting. Mr Atwal says that it was about fifteen minutes before the expected time for the meeting at 4pm and that was why he was not present at the meeting. That is not accepted by Ms Raumaewa and Mr Hogeboom who say it was about 4pm.

[23] In any event Ms Rakkar was at the house and Mr Atwal was not. Ms Rakkar confirmed to Mr Hogeboom and Ms Raumaewa that she did not have any documents with her. Ms Rakkar explained that at that stage they only wanted Mr Hogeboom to work full time. Ms Rakkar said that whilst she asked that they wait until Mr Atwal returned home Ms Raumaewa got angry and left although that is not accepted by Ms Raumaewa.

[24] Even if they had been early to the meeting and not waited Mr Atwal made no attempt to follow up. Mr Atwal explained that this was because he knew that Mr Hogeboom had managed to obtain some work form the owner of the farm.

Conclusion

[25] It is not uncommon in the employment area that following a heated argument an employee and an employer have a different recollection about what was said. The focus for the Authority in these cases is not only on what was said and done at the time of the argument but what followed after a period of cooling off.

[26] In this case that is particularly important. I do not find at the point the heated argument ended Ms Raumaewa had abandoned her employment but rather had formed a view rightly or wrongly that she had been fired. Instead of correcting that view or

putting forward an alternative view that Mr Atwal considered Ms Raumaewa had abandoned her employment, Mr Atwal made a decision that he did not want Ms Raumaewa to work for him full time and he wanted her to do part-time milking. It may have been if there was written employment agreements and job descriptions Ms Raumaewa and Mr Hogeboom could have agreed to the proposed changes because they had come a long way to work and had enrolled the two children at the local school. For reasons that I could not really understand Mr Atwal seemed reluctant to commit his new offer to writing and did not.

[27] Mr Atwal had some concerns about Ms Raumaewa's performance and abilities but these were never put to her fairly so that she could answer them before he decided her employment should be changed and her hours reduced.

[28] I do not find that Ms Raumaewa abandoned her employment. I find that Ms Raumaewa was dismissed from her full-time employment following a heated exchange when Mr Atwal unilaterally decided she could only continue in employment if she agreed to work a part time role when she had been originally employed on a full time basis.

If it is found that Ms Raumaewa was dismissed then applying the test in s.103A of the Employment Relations Act 2000 was the dismissal justifiable.

[29] There is a test of justification in s.103A of the Employment Relations Act 2000 (the Act). The question of whether a dismissal was justifiable is determined by the Authority on an objective basis by applying the test whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must consider matters of procedural fairness set out in s.103A(3).

[30] Ms Raumaewa's dismissal did not meet any of the procedural requirements set out in s.103A(3) (a) to (d) of the Act. Mr Atwal's concerns were not raised with Ms Raumaewa before she was dismissed. She could not therefor respond to them and have that response genuinely considered.

[31] I find that dismissal was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[32] Ms Raumaewa has a personal grievance that she was unjustifiably dismissed from her employment and is entitled to remedies.

Remedies

Lost Wages

[33] Ms Raumaewa attempted to find other employment on the West Coast and she had some limited success. I do not consider the failure to accept a part-time position was a failure to mitigate loss because such an offer was never produced in writing and confirmed.

[34] At the investigation meeting I asked Ms Raumaewa to provide an IRD statement to confirm any wages received since her employment with Mr Atwal terminated and that was duly provided.

[35] I have taken from the confirmation of income details that wages were received by Ms Raumaewa from Lash Fisheries Limited of \$10,830 gross for the six month period between August 2012 and January 2013.

[36] Ms Raumaewa claims lost wages for a three month or thirteen week period which should be based on the fortnight pay of \$866.67 multiplied 6 plus one extra week which is \$5,633.36 net. The relevant three month period for which lost wages are claimed is from 20 July to 12 October 2012.

[37] I have taken Ms Raumaewa as being without income for the first four weeks. She is owed \$1,733.34 net for those first four weeks. For the period 20 August 2012 to 19 October 2012 which is nine weeks it is somewhat difficult to calculate how much Ms Raumaewa received for that period from what has been provided to the Authority.

[38] Again dealing with the matter in a practical way I find it fair to deduct \$2,500 from the balance which is nine weeks lost wages. I have reached that figure in this way. The sum received by Ms Raumaewa over the six month period following her dismissal averages out at \$1,805 gross per month. I have then taken into account that the amount on her IRD confirmation is a gross and not a net figure and also that Ms Raumaewa may not have received that same amount each month. In doing that I

conclude \$2,500 is a fair figure to deduct from the balance of nine weeks lost wages. The balance of nine weeks wages of \$3,900.02 less \$2,500 is \$1,400.02 net.

[39] In conclusion I find that Ms Raumaewa is owed the sum of \$3,133.36 net for lost wages. That is the combined sums as set out above of \$1,733.34 and \$1,400.02 net.

[40] I order Billy Atwal to pay to Vicki Raumaewa the sum of \$3,133.36 net being lost wages under s.123(1)(b) of the Act.

Compensation

[41] Ms Raumaewa was I accept distressed by her dismissal. She had shifted with her partner and two young children a considerable distance and the promised employment had ended after four days leaving the family in considerable financial difficulties. I do note that the family was able to stay on in the farm accommodation for a period when Mr Hogeboom worked for the farm owner so that was some relief in that regard. Ms Raumaewa seeks the sum of \$10,000. I am of the view that an appropriate award of compensation in all the circumstances is \$5,000.

[42] I order Billy Atwal to pay to Vicki Raumaewa the sum of \$5,000 without deduction under s.123 (1)(c)(i) of the Act.

Contribution

[43] I am not satisfied on the balance of probabilities that Ms Raumaewa contributed to the situation that gave rise to the personal grievance. Whilst there may have been an argument I am not satisfied that Ms Raumaewa's conduct was such so as to find contribution. The dismissal seemed in any event to be based more on Ms Raumaewa's performance than her conduct during the argument.

Travel costs

[44] Ms Raumaewa wanted to be reimbursed for the costs in January 2013 of shifting to Leeston. I am not minded to make an award for those costs in the circumstances where they arose sometime after the dismissal and the chain of causation if not broken is at least not clear.

Costs

[45] I reserve the issue of costs. Ms Black has until 24 January 2014 to lodge and serve submissions as to costs and Mr Atwal has a further three weeks after that date until 14 February 2014 to lodge and serve a response.

Helen Doyle

Member of the Employment Relations Authority