

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 306
3118352
3118353

BETWEEN JORDAN RHODES
First Applicant

AND CRYSTAL PEPPERELL
Second Applicant

AND MARKEATON FARMS
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Dave Cain, advocate for the Applicants
Russell Drake, advocate for the Respondent

Investigation Meeting: 26 January 2022 in person and 11 April 2022 by audio-visual link

Further information and submissions received: 25 January and 15 February 2022 from the Applicants
11 March 2022 from the Respondent

Determination: 11 July 2022

DETERMINATION OF THE AUTHORITY

- A. Jordan Rhodes and Crystal Pepperell were unjustifiably dismissed by Markeaton Farms Limited.**
- B. No later than 5 pm Monday 8 August 2022, Markeaton Farms Limited is to pay Jordan Rhodes the following as remedies:**
- (i) \$2,734.69 (gross) in lost wages;**
 - (ii) interest on lost wages calculated as set out in this determination; and**
 - (ii) \$12,500 compensation for hurt and humiliation.**

C. No later than 5 pm Monday 8 August 2022, Markeaton Farms Limited is to pay Crystal Pepperell the following remedies:

(i) \$1,989.32 (gross) in lost wages;

(ii) interest on lost wages using the same methodology described below; and

(iii) \$7,500 compensation for hurt and humiliation.

D. Costs are reserved.

Employment Relationship Problem

[1] Jordan Rhodes and Crystal Pepperell worked for Markeaton Farms Limited (Markeaton Farm) as fixed-term employees. Their six-month employment agreements ended while there was still some three and a half months left to run with them and the applicants say that they were unjustifiably disadvantaged and unjustifiably dismissed from employment. In addition to lost wages and compensation, they seek penalties against Markeaton Farm for breach of an employment agreement and breach of good faith under s 4 of the Employment Relations Act 2000 (the Act).

The Authority's investigation

[2] For the Authority's investigation witness statements were lodged from Ms Rhodes and Ms Pepperell. For Markeaton Farm, Mr Derek Watt and his nephew, Barry Watt, provided witness statements with the latter attending the investigation meeting by audio-visual link (AVL). All witnesses answered questions under oath or affirmation from the Authority and the representatives.

[3] By the time Mr Watt's questioning was completed, it was approximately 5.25 pm. The investigation meeting was further adjourned for the hearing of closing oral submissions by AVL. On 23 February 2022, Mr Drake advised the Authority that he was no longer acting for Markeaton Farm. In early March 2022, the Authority contacted Mr Watt to ascertain whether he wished to make any further submissions now that he was representing his company. However, on 7 March 2022, Mr Drake was re-engaged as representative. A submissions' hearing by Zoom was subsequently set down on 11 April 2022 which was attended by both representatives.

[4] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) Were the applicants unjustifiably disadvantaged and/or unjustifiably dismissed by Markeaton Farm?
- (b) If Markeaton Farm's actions were not justified (in respect of disadvantage and/or dismissal) what remedies should be awarded considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss);
 - Compensation under s123(1)(c)(i) of the Act; and
 - Penalties under ss 4 and 134 of the Act.
- (c) Should either party contribute to the costs of representation of the other party.

Relevant facts

[6] Ms Rhodes started working for Markeaton Farm on 10 April 2019. She was provided with her individual employment agreement on 7 May 2019 which she took to her father to get some advice about before she signed it on 9 May 2019. Her individual employment agreement stated that she was to be employed as a "Calf Rearer" and that her employment would finish on or about 31 October 2019.

[7] Ms Rhodes was paid \$22 per hour and the purpose of her role was to provide assistance to the farming operation by rearing calves over the calving season. However, that purpose could be achieved prior to the completion of the fixed term period and in such case, one weeks' notice of termination could be given by her employer.

[8] Clause 2.1.b of the employment agreement made clear that where notice of termination was given, consistent with the termination provisions within the agreement, the employee had no entitlement for payment for any period of the fixed term period not worked.

[9] Ms Pepperell stated that she commenced working for Markeaton Farm on 17 April 2019. However, owing to the passage of time, she may be mistaken as Markeaton Farm's records showed that she started work on 24 April 2019. By in large, her individual employment agreement was on all fours with Ms Rhodes's employment agreement with the exception that the expiration period of her employment was 24 October 2019.

[10] The work the pair did included mixing up milk formula, feeding milk and meal to the calves, dehorning and weighing calves, and moving calves to different paddocks. Ms Pepperell also did tractor work moving silage bails into the paddocks and pallets.

[11] At the time of their employment, Markeaton Farm operated across two properties that were 6.3 km apart: Maungataurauri Road and Norwegian Road. Mr Watt was responsible for the day-to-day operations at Maungataurauri while his nephew, Barry Watt, operated the farm at Norwegian Road.

[12] It is noted that the applicants' individual employment agreements stated that they could be expected to work at either location. However, it is common ground that Ms Rhodes and Ms Pepperell only ever worked at Maungataurauri although the latter had visited the Norwegian farm for five or so minutes to deliver a milk feeder.

[13] In addition to Ms Rhodes and Ms Pepperell, Markeaton Farm employed three other calf rearers all of whom had worked a number of calving seasons already for the business. While they too were on fixed term contracts, these were rolled over from one season to the next. I regard these workers as permanent staff.

[14] The Maungataurauri farm in particular had two calving seasons each year; an early season that started in late March/early April and went to July, and a late season, when spring calves arrived in August and remained on the farm until about late October.

[15] At the commencement of the 2019 season, all rearing operations at Maungataurauri were undertaken in open paddock areas. It took calf rearers considerable time to move small groups of calves from one feeding area to another. Whilst inefficient this was the traditional way that calving operations were undertaken.

[16] The calf rearing operations for the 2019 season at Maungataurauri was a little different to previous seasons in that Markeaton Farm had commenced the construction of a \$500,000 shed at Norwegian Road which, once completed, would streamline its operations. Earthworks commenced in March 2019 but wet weather delayed construction by six to eight weeks. In July 2019, the shed was all but complete but for hot water which was installed by the end of August 2019.

[17] The new shed doubled Markeaton Farm's capacity to feed calves. It took only two calf rearers to feed the calves which could all be kept under one roof without the need to move stock across different paddocks. It was intended that all calves would be fed at Norwegian Road including calves at Maungataurauri.

[18] Mr Watt never raised any issues with either Ms Rhodes or Ms Pepperell regarding their performance. This is in spite of multiple text messages from Ms Rhodes (four in April 2019, three in May 2019, two in June 2019, and three in July 2019) stating that she was not able to work or that she was running late.

[19] Ms Pepperell sent similar messages by text to Mr Watt but with less frequency (one in April, May and June 2019 and two in July 2019) stating that she was not able to attend work or would be arriving late as Ms Rhodes was her only ride.

[20] Around the end of April 2019, Ms Rhodes discovered that she had fallen pregnant and informed Mr Watt. He did not consider this to be an issue and Ms Rhodes considered that it was safe for her to keep working.

[21] There is a dispute as to the date but the applicants say that on Sunday 14 July 2019 (they initially stated it was Sunday 7 July 2019 in their statement of problem) Mr Watt called them individually in the evening to inform that there would be no more work for either of them in the next two weeks.

[22] Mr Watt states that he called the pair individually on Friday 5 July 2019 (he initially claimed the date was Sunday 7 July 2019 in the statement of reply) to advise that, due to the end of the first part of the season and the change to operations associated with the new shed at Norwegian Road, he no longer required their assistance for the

remainder of the season. He therefore gave Ms Rhodes and Ms Pepperell one week's notice of termination of their employment.

Whether the applicants were unjustifiably disadvantaged and/or unjustifiably dismissed?

[23] As Ms Rhodes and Ms Pepperell's claims of unjustified disadvantage and unjustified dismissal are essentially alternative pleadings of the same set of facts, I have proceeded with the unjustified dismissal claim to avoid any mischief arising from a duplicity in pleading. In any event, as will be seen, neither Ms Rhodes nor Ms Pepperell considered themselves to have been suspended from employment (the alleged unjustified disadvantage) but that Mr Watt had left them in limbo regarding their work.

Telephone call occurred on Sunday 14 July 2019

[24] The investigation meeting was partly delayed because of the COVID-19 pandemic. The effluxion of time may account for the applicants' mistaken belief that the telephone call they received from Mr Watt occurred on Sunday 7 July 2019 rather than the following week, Sunday 14 July 2019. While the date of the telephone conversation was changed on the morning of the investigation meeting, I do not regard this as affecting Ms Rhodes and Ms Pepperell's overall credibility. The assessment of credibility is not reducible to a memory test.

[25] It is to be noted that the change was in the order of only a week and that the applicants were steadfast that they had been called by Mr Watt on a Sunday and not some other day. Ms Rhodes stated that Mr Watt never called her on a weekend and that she usually put her children to bed early on a Sunday. She was adamant that the call did not occur on Friday 5 July 2019 as (now) contended by Mr Watt. Moreover, Ms Rhodes pointed to a text message she sent to Mr Watt on Sunday 14 July 2019 at 6.05 pm which stated:

Hi Derek. I tried returning your calls but couldn't get through, I now have two sick kids.

[26] Ms Pepperell's evidence was less helpful because she simply referred back to Ms Rhodes' text message as noted above.

[27] Before the investigation meeting commenced, among other procedural matters, I explained to the parties that it was important that witnesses gave truthful evidence to the Authority and that they should not exaggerate or invent. During my questioning of Mr Watt, he stated – for the first time in these proceedings – that he kept a record of the 5 July (or 14 July) 2019 telephone conversation in an “old diary.”

[28] This evidence must be treated with caution as there was no previous mention of the diary in Markeaton Farm’s statement in reply which was filed with the Authority on 24 September 2020. Nor was there any reference to the diary in Mr Watt’s witness statement which he signed as being true and accurate on 22 March 2021. A diary entry, if one existed, could potentially be a contemporaneous record of an important conversation which the applicants candidly acknowledged neither had recorded. Further, the diary was not part of Mr Drake’s cross-examination of the applicants. I find that this was because, as a recent invention by Mr Watt, his representative knew nothing about the diary’s purported existence.

[29] On balance, I find that the applicants were telephoned by Mr Watt on Sunday 14 July 2019.

The content of the telephone conversation

[30] Ms Rhodes stated that her conversation with Mr Watt was very short and did not last five minutes. She was told that there was no work for the next two weeks but that Mr Watt would call her. Nothing more was said. Ms Rhodes further stated that there was no hint from Mr Watt’s call that she had been terminated or that work for her was coming to an end.

[31] By the end of the two weeks, Ms Rhodes texted Mr Watt multiple times wanting to know about the status of her work:

Hi Derek tried calling you, was just wanting to know when work will pick up again (Thursday 25 July 2019).

Hi Derek can you please give me a call (Friday 26 July).

Morning Derek. What is happening with work? When will we be starting up again? (Saturday 27 July 2019)

[32] Mr Watt failed to respond to any of above text messages from Ms Rhodes.

[33] Ms Pepperell's evidence was similar to Ms Rhodes. The Sunday 14 July 2019 telephone call from Mr Watt was not long, lasting a minute or two only. She was told that he would get in touch with her in two weeks' time about work but he did not contact her again. Ms Pepperell had no inkling that she had been terminated from employment and she expected that she would return to work after two weeks. This is evident from the following text messages from Ms Pepperell to Mr Watt:

Hi Derek it's Crystal, Jordan and I aren't too happy that we have no idea about what's going on. We have both tried to contact you and we would really appreciate if you could answer us. We have bills to pay and our children to feed and it's hard living without an income for two weeks. We are still on a contract and we only got 24 hours' notice instead of 7 days like it is stated in the contract. If we have no job with you anymore then please let us know so we can find somewhere else and come collect our things off your farm. Thanks. (27 July 2019)

Hi Derek? What is going on? Both me and Jordan have lost our houses due to us not being able to ... (12 August 2019).

[34] There was no response by Mr Watt to Ms Pepperell's text messages.

[35] Mr Watt's witness statement records that, due to the end of the first part of the 2019 calving season (late March/early April to July) and the change to operations associated with the new shed at Norwegian farm, he no longer required the applicants' assistance for the remainder of the season. Under the arrangements the respondent had with the applicants, Mr Watt stated that he had given Ms Rhodes and Ms Pepperell one weeks' notice of termination of employment when he telephoned them on Sunday 14 July 2019.

[36] I find Mr Watt's account of his telephone conversation with Ms Rhodes and Ms Pepperell not plausible. Had he in fact given the applicants one weeks' notice of termination, neither of them would have been texting him about when they could return to work after the two-week period was over. If the pair had somehow misunderstood Mr Watt, this would mean that Ms Rhodes and Ms Pepperell had made the same mistake about a conversation they had with the same person about the same subject matter. In my view, such a common mistake is unlikely. Even if I am wrong with this, it remains that Mr Watt made no attempt to respond to any of Ms Rhodes or Ms Pepperell's text messages which may have rectified the misunderstanding (if any).

[37] The question of whether a dismissal or other action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. The test is 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 or action occurred.

[38] Parties to employment relationships must deal with each other in good faith. Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employees' employment, to provide potentially affected employees with access to relevant information and an opportunity to comment on that information.

[39] Both Ms Rhodes and Ms Pepperell worked exclusively at Maungataurauri and neither knew nor had been told about the large shed being constructed at the Norwegian farm. When I asked Ms Rhodes whether she knew anything about the shed, she stated that she had only learned about it from Mr Watt's witness statement that was filed with the Authority. As for Ms Pepperell, she admitted having briefly visited the Norwegian farm in April 2019, which coincided with the shed's construction, but she was onsite for approximately five minutes and was there to deliver a milk feeder. Once that was done, she immediately returned to the Maungataurauri. She saw no shed during her brief visit to the Norwegian farm.

[40] I find Ms Rhodes and Ms Pepperell to be credible. It has not been established that Markeaton Farm made either of them aware of the shed being built at Norwegian Road and how that would affect their employment. It is acknowledged that the respondent has sole prerogative to determine whether the applicants' assistance to the farming operation is required. However, even so, that prerogative must be exercised fairly and reasonably which was not the case here.

[41] As Ms Rhodes and Ms Pepperell's text messages make clear, the pair were kept in the dark concerning the Norwegian farm shed and, consequently, they were oblivious as to why there was no more work for them after the two-week period was over.

[42] I do not regard the applicants to have been suspended by Markeaton Farm as Ms Rhodes and Ms Pepperell's text messages indicate that they did not consider

themselves as having been suspended from work for a work-related disciplinary matter. However, when Mr Watt failed to respond to their text messages and did not get back to them after the two-week period was over (Monday 29 July 2019), it was reasonable from that point for Ms Rhodes and Ms Pepperell to consider that they had been dismissed by their employer.

[43] There were significant failings on the part of Markeaton Farm, including not being active and constructive in establishing and maintaining a productive employment relationship. The applicants were not provided with relevant information about the Norwegian farm barn and how that would affect the remainder of Ms Rhodes and Ms Pepperell's fixed-term employment. They would not have minded an abridged expiration period but not in the order of some three and half months.

[44] Another apparent reason for the applicants' dismissal came to light during Barry Watt's cross examination by Mr Cain. When asked why Ms Rhodes and Ms Pepperell had been identified for termination, the nephew stated that this was because of their performance. I have not given much weight to the nephew's impromptu response and it remains that he did not manage the pair. It is sufficient in my view that Markeaton Farm failed to respond to the applicants' multiple text messages and failed to provide them with relevant information that affected their employment. The errors here were not minor and undermined the justification behind Ms Rhodes and Ms Pepperell's dismissal. A decision to dismiss in all the circumstances known at the time was not therefore one that a fair and reasonable employer could have made.

[45] I find that the applicants were unjustifiably dismissed from their employment with Markeaton Farm.

Remedies

Lost wages

[46] The Act permits reimbursement to an employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance.

[47] Reimbursement of 16 weeks was sought for Ms Rhodes on account of her pregnancy at the time which would have made it less likely for her to find alternative

employment. It is noted that, with the installation of hot water at the Norwegian shed in late August 2019, it was fully operational from that point onwards. I find that Markeaton Farm could reasonably exercise its prerogative to abridge the applicants' employment from 31 August 2019 but not sooner. It is clear that their services would no longer be required given the efficiency gains of the new shed which required less staff to feed calves. Markeaton Farm already had three permanent staff that could undertake that work.

[48] There is approximately seven weeks between 14 July 2019 and 31 August 2019, which is when a fair and reasonable employer could have ended Ms Rhodes' employment. Over the period of her employment, her average earnings were approximately \$390.67 (gross). I therefore find that she is entitled to reimbursement in the sum of \$2,734.69 (gross) ($\390.67×7 weeks) under s 123(1)(b) of the Act.

[49] As for Ms Pepperell, she confirmed at the investigation meeting that she had managed to find alternative employment with a former employer on 2 September 2019. It is noted that despite not working for Markeaton Farm after 14 July 2019, for reasons which remain unclear, she continued to be paid by Mr Watt on 17 and 24 July 2019. It may be that Ms Pepperell's better work attendance record than Ms Rhodes and the fact that she did tractor work also were contributing factors for the *ex gratia* payments. Support for this view is found in a third gratuitous payment on 1 August 2019 for Ms Pepperell of \$464.27 (gross) which she thanked Mr Watt for in a text message of 5 August 2019.

[50] As there are approximately four weeks between Ms Pepperell's last payment from Markeaton Farm and when the Norwegian farm shed became fully operational, and noting her average weekly earnings of \$497.33, I find Ms Pepperell is entitled to lost wages of \$1,989.32 (gross) ($\497.33×4 weeks).

Interest

[51] Pursuant to cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. As the applicants have been deprived of the use of what is owed to them, the Authority orders that Markeaton Farm pay Ms Rhodes interest on \$2,734.69 from 31 August 2019 until the

date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later than 5 pm Monday 8 August 2022.¹

[52] I make a further order that Markeaton Farm pay Ms Pepperell interest on \$1,989.32 following the same methodology noted above.

Compensation

[53] Ms Rhodes seeks compensation for unjustified dismissal in the amount of \$15,000 for hurt and humiliation. As I have not found that the applicants were suspended by Markeaton Farm, it is not necessary that I consider the applicants' claim for compensation of \$5,000 each for unjustified disadvantage.

[54] The loss of employment for Ms Rhodes was significant. She advised Mr Watt in April 2019 that she was pregnant. While I do not hold Markeaton Farm accountable for Ms Rhodes' personal vehicle being repossessed or her being evicted from her rented accommodation because these are processes that do not occur overnight but over an extended period of time, the suddenness in which Ms Rhodes found herself without work added to her stress levels particularly as an expectant mother. While she was still physically able to work, Ms Rhodes would have counted on working longer in her role and would not have anticipated it ending in the abrupt manner that it did.

[55] I do not consider that Ms Rhodes contributed towards the situation that gave rise to her personal grievance. Although there were multiple instances of her being absent from work or arriving to work late, no disciplinary process was undertaken against her by Markeaton Farm. Mr Watt dismissed Ms Rhodes knowing fully that she was particularly vulnerable owing to her pregnancy. In my view, Ms Rhodes could have been spared the humiliation, loss of dignity, and injury to feeling she experienced if Mr Watt understood his obligation as an employer to be responsive and communicative.

[56] I find Ms Rhodes is entitled to payment of compensation in the sum of \$12,500 under s 123(1)(c)(i) of the Act.

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

[57] As for Ms Pepperell, I note that she felt let down by Mr Watt. Even so, compensation is for the effects on the employee of the grievance and it noted that Ms Pepperel nevertheless received three *ex gratia* payments from Markeaton Farm. In addition, she was able to find alternative employment in the space of approximately seven weeks (14 July 2019 to 2 September 2019).

[58] The emotional impact of the dismissal was not as significant on Ms Pepperell as it was on Ms Rhodes but it is acknowledged that Ms Pepperell had a dependent child then aged two and a half years to support. It is further noted that Ms Pepperell was not able to meet her finance payments towards her car which was subsequently repossessed. She also moved out of her rented accommodation because she could not afford the rent. Similarly, I do not hold Markeaton Farm solely responsible for these events as there appear to be other factors in play besides the loss of Ms Pepperell's job. Even so, I find that Ms Pepperell is entitled to compensation for hurt and humiliation in the sum of \$7,500. For the same reasons given for Ms Rhodes, I find no evidence under s 124 of the Act that she has contributed to her own personal grievance.

Penalties?

[59] The applicants seek penalties against Markeaton Farm for breach of an employment agreement and breach of good faith. However, the remedies awarded to the applicants are sufficient. Given the nature and extent of the breaches, a penalty in my view would be disproportionate particularly given the ephemeral nature of the applicants fixed-term employment agreements.

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[61] If they are not able to do so and an Authority determination on costs is needed the applicants may lodge, and then should serve, a memorandum on costs by 4 pm Monday 8 August 2022. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Peter Fuiava
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].