

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 242
5351709

BETWEEN

ALAN ROCKELL
Applicant

A N D

RAINBOW FALLS ORGANIC
FARM LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: B Quarrie, Counsel for Applicant
R Mark, Counsel for Respondent

Investigation Meeting: 11, 12 & 15 February 2013 at Whangarei

Submissions Received: 26 February 2013 from Applicant
22 February 2013 from Respondent

Date of Determination: 11 June 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Rockell was unjustifiably dismissed by Rainbow Falls;**
- B. Given Mr Rockell's contributory behaviour which was both causative of the outcome and blameworthy, the remedies otherwise payable are reduced to nil.**
- C. Rainbow Falls is ordered to pay Mr Rockell wage arrears pursuant to s.131 of the Act totalling \$42,793.12.**
- D. Cost submissions are to be filed within 14 days of the date of the determination.**

Employment relationship problem

[1] Mr Alan Rockell was employed as a farm manager in November 2006 by Rainbow Falls Organic Farm Limited (Rainbow Falls). He was allegedly dismissed for “tipping” the horns of the dairy herd effective 31 May 2011. Following dismissal, allegations arose of misconduct including lost production, stock losses, neglected maintenance and damage to its equipment.

[2] Mr Rockell accepts he “tipped” the horns, but submits it was required to prevent further injury by horned cattle to other members of the dairy herd. He denies the alleged further misconduct.

[3] Rainbow Falls submits he disobeyed a direct instruction not to cut the horns of the dairy herd. It raises a counterclaim against Mr Rockell seeking damages of \$426,050.

Issues

[4] The following issues arise:

- a) Was Mr Rockell unjustifiably dismissed?
- b) If yes, what remedies should be ordered?
- c) What wage arrears (if any) is Mr Rockell entitled to?

Was Mr Rockell unjustifiably dismissed?

[5] Mr Rockell claims he was unjustifiably dismissed because:

- a) Rainbow Falls did not raise its concerns with him, give him a reasonable opportunity to respond or consider his explanation. The dismissal was harsh and abrupt.
- b) This was not a minor procedural defect but was fundamental because there was simply no process.
- c) There were mixed motives for the dismissal. Another employee had been engaged to replace Mr Rockell prior to the discovery of the tipping.

[6] Rainbow Falls disagrees and submits:

- a) There was substantive justification for dismissal.
- b) Mr Rockell defied a lawful instruction from Rainbow Falls not to dehorn the cows.
- c) The procedural shortcomings were a failure to provide advanced notice of Rainbow Falls' concerns regarding the dehorning, failure to invite the employee to be represented or have a support person present, and a failure to warn the employee that his position may be in jeopardy.
- d) None of the procedural shortcomings would have affected the outcome.
- e) Any contrary evidence about the motive for the dismissal can be explained.

Legal framework

[7] The fact of Mr Rockell's dismissal is accepted. The onus falls upon Rainbow Falls to justify whether its actions "*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*" (s.103A(2)).

[8] The Authority must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s.103A(5)).

[9] There is a substantial conflict of evidence between the parties. This requires express findings of credibility upon the evidence given by brief and orally at hearing.

[10] Credibility can be assessed upon two bases – the witness personally and the story the witness tells. Relevant factors to personal credibility are inconsistencies and contradictions; prevarication; motivation to lie; contentions made where due, despite risk to the witness's own credibility in giving evidence.

[11] Credibility of the story is an assessment if it was in the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?

[12] The Authority may draw inferences and fill gaps in evidence by application of commonsense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities situation. Bearing this framework in mind, the Authority turns to consider the matter before it.

Was the dismissal unjustified?

[13] Mr Rockell accepted he tipped the cow horns. Photographs were produced of the dairy herd showing cattle whose horns had been allegedly tipped. Mr Rockell accepted the photographs showed the dairy herd he had managed.

[14] Oral evidence from two veterinary surgeons produced by the parties confirmed tipping was the removal of the insensitive end of a horn. A cow whose horns had been taken down to hair level was considered to have been “dehorned”. Dehorning or de-budding was not performed upon cattle over nine months without pain relief. Otherwise it would be painful and cause distress. Dehorning was undertaken by veterinarians using a local anaesthetic and sedative. Both veterinarians confirmed horned cattle within a dairy herd were unusual. Ideally only dehorned or polled animals should be bred. A subsequent farm manager also confirmed an organic farm was more difficult to manage than non-organic.

[15] Both veterinarians accepted some of the cattle shown in the photographs appeared to have been dehorned and were over nine months old. Mr Rockell accepted at hearing he had tipped the cattle himself without anaesthetic or sedative. He also accepted he tipped at least one of the cattle both veterinarians believed had been dehorned.

[16] Injury to the dairy herd by horned cattle was occurring. There was some dispute about how this could have been prevented. Mr Rockell believed tipping was required. Mr McKenzie believed better herd management was required.

[17] The herd and farm management was largely left to Mr Rockell. Mr McKenzie lived in Hong Kong. The other directors took little or no active part in the farm management.

[18] Mr Rockell accepted he had been instructed by Rainbow Falls director, Allan McKenzie, not to dehorn the dairy herd. Mr McKenzie stated this instruction was because Rainbow Falls wanted a fully biodynamic farm herd including horned cattle.

[19] Rainbow Falls had financial issues. Oral evidence from its accountants confirmed at times, there were insufficient funds to meet its accounts and Mr Rockell was required to pay them himself.

[20] This decision to include horned cattle as part of the fully biodynamic plan appeared to occur in 2008, partway through Mr Rockell's employment. This represented a change in the skills required for farm management of this property. The resort to tipping and/or dehorning cattle without veterinarian assistance infers Mr Rockell lacked the skills to manage a horned herd. Performance reviews may have prevented this, but none were undertaken.

[21] Serious misconduct “... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”¹ It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”²

[22] Direct disobedience must be an open and deliberate refusal by employees to obey a lawful and reasonable instruction given by a person in authority.³ A ‘lawful and reasonable order’:⁴

- a) does not require the employee to perform any act contrary to law;
- b) is within the scope of the employee's contractual obligations; and
- c) does not demand the performance of any impossible or dangerous task.

[23] It is accepted the instruction not to dehorn was given, but disobeyed. The instruction did not require performance of an unlawful act.

¹ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319.

² *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483.

³ *New Zealand Printing and Related Trades IUOW v Clark and Matheson Ltd* [1984] ACJ 283

⁴ *Wellington etc Clerical etc IUOW v College Group Ltd* [1984] ACJ 315

[24] However, the consequence of the instruction was a change in Mr Rockell's scope of contractual obligations. Prior to 2008 Mr Rockell was managing a non-horned dairy herd. Following 2010 he had a partially horned dairy herd.

[25] An employment agreement and a schedule of work were produced by Rainbow Falls.⁵ Neither document refers to herd management of horned cattle. Given the unusual and, it is inferred, specialist skills required for herd management of horned cattle, this type of work should have been recorded within the documentation. At the very least a performance review should have occurred, to ensure Mr Rockell had the skills to manage a horned dairy herd from 2008 onwards.

[26] Horned cattle within the dairy herd presented danger to Mr Rockell of being gored and did result in injury to the dairy herd.

[27] Neither party appears to have turned their mind to the best method of resolving the horned cattle dilemma. Mr McKenzie lived in Hong Kong and observed the farm infrequently. Mr Rockell had concerns about the continuing injuries to the cattle but lacked the skills to adequately manage a horned dairy herd. Rainbow Falls had financial problems. It is inferred they may have lacked the financial ability to employ specialist advice on horned herd management as a consequence.

[28] Without more, the direct instruction not to dehorn the cattle cannot in and of itself have been reasonable in the circumstances. This does not excuse what Mr Rockell did. That is a matter to be considered under contribution below.

[29] The process leading to dismissal was defective. There is no evidence Rainbow Falls met any of the mandatory considerations set out in s.103A(3). There was no investigation of the allegations before dismissal. There was no raising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of any explanation before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Rockell being treated unfairly (s103A(5)).

[30] Given the above, the Authority determines dismissal was unjustified.

What remedies are payable?

⁵ Brief of evidence A McKenzie para 2.

[31] Given the determination Mr Rockell was unjustifiably dismissed, the Authority must order the payment of lost remuneration being “... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*” (s128(2)). Mr Rockell found employment starting 1 June 2011. His termination date was 31 May 2011. There was no lost remuneration to be ordered as a consequence.

[32] Mr Rockell seeks compensation for hurt and humiliation of \$10,000 pursuant to s123(c)(ii). An award of \$5,000 would have been appropriate subject to contribution below.

[33] The Authority must consider the extent to which Mr Rockell's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124).

[34] There is no doubt Mr Rockell's actions contributed directly to the situation. Advice should have been sought on herd management of horned cattle. Taking matters into his own hands and dehorning mature cattle was cruel and resulted in unnecessary suffering by these animals. There were other ways of dealing with this matter which he did not consider before taking the drastic step of dehorning mature cattle. This is especially in circumstances where he had never tipped or dehorned cattle before.

[35] This was contributing behaviour where Mr Rockell's actions were both causative of the outcome and blameworthy.⁶

[36] In the circumstances the Authority reduces the amount of compensation payable to Mr Rockell to nil.

Counterclaim

[37] Rainbow Falls raises a counterclaim against Mr Rockell seeking damages of \$426,050 for lost production (\$306,000), stock losses (\$54,750) and repairs (\$65,900).

Lost production

[38] Rainbow Falls submits from 1998 to 2005 the farm produced on average 40,274 kg of milk solids (kg/MS) per annum. If the extreme years are removed, the average over five years was 45,900 kg/MS per annum. In 2005 to 2006 the farm

⁶ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

produced 34,798 kg/MS. Rainbow Falls asserts the average production during the period of Mr Rockells employment should have been 40,000 kg/MS excepting 2009 to 2010 when there was a drought and the average production would be 10,000 kg/MS less. It asserts the average price of \$6.00 per kilo of milk solid should be applied to losses. Therefore during Mr Rockell's employment there were production losses as set out below:

Year	Annual Production Figures	Production Losses
2006-07	21,651 kg/MS	18,349 kg/MS
2007-08	40,184 kg/MS	Nil
2008-09	27,007 kg/MS	12,993 kg/MS
2009-10	15,731 kg/MS	14,269 kg/MS ⁷
2010-11	16,155 kg/MS	23,845 kg/MS

[39] Mr Rockell submits any loss of production was due to Rainbow Falls' decision-making, for example insufficient fertiliser and leaving horned cattle within the dairy herd causing severe damage to others. He also submits loss of production was affected by drought conditions which continued to affect production during 2008-09 and 2010-11.

[40] There is no expert evidence quantifying what the production losses are based on. Factors such as market demand, weather and management decisions have not been properly factored into these calculations. It is at best a 'guesstimate'. This is exemplified by the deduction of 10,000 kg/MS for drought conditions in 2010-11. There is no logical basis for the amount of this deduction – it could have been higher or lower. It is insufficient to meet the burden of proof required. This counterclaim is dismissed.

Stock Losses

⁷ The calculation is based upon drought conditions and average production has been adjusted to 30,000 kg/MS.

[41] Rainbow Falls alleges stock losses were due to Mr Rockell's management. This fails to account for natural attrition, unavoidable and accidental deaths, management decisions and financial resources for fencing the swamp where some of the deaths occurred. Performance review may have detected these issues earlier and prevented stock losses. No performance review occurred.

[42] The evidence is insufficient to meet the burden of proof required. This counterclaim is dismissed.

Repairs

[43] Rainbow Falls undertook a review of the farm following dismissal. It submits the farm was in good working order at the time Mr Rockell took over. When he was dismissed, there were repairs required including fencing (\$48,000), vehicle repairs (\$6,800), cleaning troughs (\$1,500) and dairy/shed repairs labour only (\$9,600).

[44] Mr Rockell submits the repairs were hampered by Rainbow Falls' finances and management decisions prioritising other matters over repairs. Some of the repairs are alleged to have been pre-existing.

[45] There is evidence of financial concerns regarding Rainbow Falls. It is inferred some matters would have taken priority over others if finances were tight. Some of the claimed repairs include materials. Performance review may have detected these issues earlier and prevented the amount of repairs. No performance review occurred.

[46] The evidence is insufficient to meet the burden of proof required. This counterclaim is dismissed.

What wage arrears are due?

[47] Rainbow Falls submits the burden lies upon Mr Rockell to prove he worked holidays and statutory holidays. The evidence of the poor state of the farm shows he was not working as alleged including the weekends he claims.

[48] The holiday, wage and time records were produced at hearing by Rainbow Falls' accountant, Poustma Arden. The records confirmed Mr Rockell did not take holidays or statutory holidays.

[49] An employer must keep the wages and time record⁸ and holiday and leave record.⁹ Given the employer must keep the records, it is illogical for the employee to bear a burden of ensuring they are accurate. The alleged employment agreement does not place the burden upon Mr Rockell to prove his holidays were taken. Holidays are to be taken at times to suit both parties, preferably within six months (clause 14). Public holidays are to be taken on the day or a day substituted (clause 15).

[50] Mr Rockell worked weekends despite an entitlement to have one in every two weekends off. This is supported by the lack of payment for a relief milker. If he had taken a weekend off, a relief milker would have been engaged.

[51] There is no dispute regarding the days Mr Rockell allegedly worked. The Authority accepts the calculated amounts owed as set out in Mr Rockell's brief paragraphs 42 to 48. Accordingly, the Authority determines Mr Rockell is owed \$42,793.12. The Authority declines to order interest as no application for payment of interest was set out in the statement of problem but referred to at the end of Mr Rockell's brief of evidence only, and Mr Rockell contributed to delays in bringing this matter on for hearing.

[52] Given the above determination, the Authority orders:

- a) Mr Rockell was unjustifiably dismissed.
- b) Given Mr Rockell's contributory behaviour which was both causative of the outcome and blameworthy, the remedies otherwise payable are reduced to nil.
- c) Rainbow Falls is ordered to pay wage arrears pursuant to s.131 of the Act totalling \$42,793.12.
- d) Costs submissions are to be filed within 14 days of the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority

⁸ Section 130 Employment Relations Act 2000

⁹ Section 81 Holidays Act 1981