

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 224
5627474

BETWEEN ROBERT MURRAY ROSSON
Applicant

A N D SILVER FERN FARMS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: T P Cleary, Counsel for Applicant
Mark Deacon, Counsel for Respondent

Investigation Meeting: 15 December 2016 at Dunedin

Date of Determination: 19 December 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Rosson) alleges he was unjustifiably dismissed from his employment by the respondent (Silver Fern) and he seeks permanent reinstatement together with compensation, lost wages and costs.

[2] Silver Fern resists those claims.

[3] Mr Rosson had been employed at the Finegand Plant for 39 seasons, 38 as a slaughterman. All but 11 of those years were in his current role in the sticking pen.

[4] In March 2016, Mr Rosson was accused of mistreating a lamb whilst he was operating the stun gun, immediately prior to the slaughter of the animal.

[5] A senior supervisor viewed the CCTV footage of the incident on 16 March 2016 and discussed the animal welfare issue with Mr Rosson.

[6] On 17 March 2016, an investigation meeting was held between senior management at the plant and Mr Rosson, together with his Union adviser. The CCTV footage was viewed again.

[7] On 18 March 2016, a disciplinary meeting was held which resulted in a decision to dismiss Mr Rosson.

The issues

[8] The first question in the present case is whether Mr Rosson has been unjustifiably dismissed.

[9] If the answer to that question is in the affirmative, the second question is what remedies Mr Rosson is due.

Was Mr Rosson unjustifiably dismissed?

[10] Despite the efforts of Mr Rosson's counsel, I have not been persuaded that Mr Rosson was unjustifiably dismissed.

[11] The law is well settled. Section 103A of the Employment Relations Act 2000 (the Act) sets out the test of justification which requires me to decide if a good and fair employer, in Silver Fern's position, could have dismissed Mr Rosson, after conducting a proper investigation.

[12] It is important to remember that the effect of this test is to postulate a number of possible outcomes that a fair and reasonable employer could arrive at, not just one "correct" one: *Angus v Ports of Auckland* [2011 NZEmpC 160 applied.

[13] I have concluded that one of the possible outcomes a good and fair employer could have come to is a decision to dismiss Mr Rosson. I now set out the reasons for this conclusion.

[14] While it is not always helpful to separate procedural elements from substantive issues, there are criticisms of the procedure advanced for Mr Rosson.

[15] I have difficulty accepting these criticisms because the procedure followed by Silver Fern was mandated by the collective employment agreement (clause 38), the longstanding arrangements between Silver Fern and Mr Rosson's Union (a union

which represented him during this disciplinary process) and by Mr Rosson's apparent acceptance of the process while it continued.

[16] That said, it is apparent Mr Rosson now wishes he had adopted a different stance but his conduct must be judged at the relevant time, not with the benefit of hindsight.

[17] Moreover, Mr Rosson was very clear in his evidence that, so far as he was concerned, he had done nothing wrong so that assessment of his own behaviour was the same now as it was at dismissal. That fact suggests that whatever process was adopted, Mr Rosson would maintain he was blameless.

[18] The substantive basis for the dismissal is that, in Silver Fern's judgement, Mr Rosson failed to perform his duties to a good, workmanlike standard in that, in a particular stunning action, he sought to stun a lamb four times instead of the mandated one time and that on some of those attempts he adopted an exaggerated arm motion, both of which constituted animal cruelty.

[19] Moreover, Silver Fern says that as such, Mr Rosson was in breach of the work standards set out in the Employee Handbook 2016 which proscribe a list of indicative examples of misconduct and serious misconduct. Under the heading *Misconduct* there appears an example of failing to perform work to the required standard and under the heading of *Serious Misconduct* there appears the example of "*frequent or repetitive occurrences*" of any of the examples of continuing misconduct. It follows that because Mr Rosson is said to have performed the complained of conduct more than once, it becomes serious misconduct.

[20] But even if that logic strains the categories too far, there are other problems for Mr Rosson. First, he was already on a final written warning that had yet to expire. That meant that in terms of the procedure agreed between Mr Rosson's Union and Silver Fern, after receipt of a final written warning, while that warning remained current, other disciplinary action could include consideration of that earlier warning, and might result in dismissal.

[21] That potentially allowed Silver Fern to contemplate dismissal as a sanction for the totality of the current offending and the earlier breach despite each individual breach, taken singly, not amounting to dismissal.

[22] However, Silver Fern's decision-maker told me in his evidence that he might well have moved to dismiss anyway, even without the historical breaches, because of the importance of animal welfare in the industry and the potential damage to the Silver Fern brand.

[23] Another difficulty for Mr Rosson is that he neither denied the allegations against him nor sought to apologise for them. Indeed, his defence at the time, and before the Authority, was based on the contention that everyone did what he had done, or at least that it was not uncommon.

[24] I heard supporting evidence from a former co-worker, Mr Brown, who seemed to agree that attempting to stun a sheep four times was "*not uncommon*". But he went on to say that "*at some stage you had to make a judgement that the animal has had enough and you release the animal*".

[25] Put shortly, Silver Fern thought Mr Rosson should have released the subject animal well before subjecting it to a multiplicity of stuns whereas Mr Rosson saw nothing fundamentally wrong with his actions.

[26] He was supported in that view, he claimed, by the absence of any numerical indication of the number of stuns in the Silver Fern Farms Humane Slaughter Training Programme which was before the Authority. That document seems to proceed on the expectation that one attempt would be enough to stun any animal before slaughter, although I am satisfied on the evidence I heard, including from Silver Fern witnesses, that that view is not necessarily practised.

[27] I expressed the view, without deciding the matter, that this document ought to provide staff with better guidance than it does.

[28] Silver Fern says in response that it relies on the expertise, workmanship and commonsense of its staff and while Mr Rosson says his years of service ought to allow him a second chance, Silver Fern says his years of service ought to give him the experience not to make the wrong decision which will hurt, or potentially hurt, the animal.

[29] It is axiomatic that animal welfare is an important consideration in the meat industry. Despite the fact the animals are slaughtered for human consumption, nonetheless there is an obligation on all involved in the industry to ensure that these

creatures are not harmed while they live and breathe. At its simplest, Silver Fern says that what it observed Mr Rosson do, and what he never denied, breached that fundamental standard, and had it not taken the action it did, there was the potential for damage to its brand because of action taken by the Ministry for Primary Industries whose veterinarian indicated as much in her evidence, or indeed from overseas customers.

[30] I conclude then that a fair and reasonable employer in the position Silver Fern was in could have concluded after an investigation which found the conduct complained of admitted, that it could dismiss despite there being other obvious alternatives. Mr Rosson's poor disciplinary record counted against him, as well as his apparent inability to see that there was a grave risk his behaviour harmed the animal.

[31] The operative employment agreement postulates a Disciplinary Process which is peculiar to the particular plant. That process is agreed between Silver Fern and the Union and includes the weight to be put on the existing final written warning and the very procedure Silver Fern used to decide Mr Rosson's fate. If Mr Rosson had had a clean prior record and had understood why his actions had caused concern, there might have been some appetite for retraining or redeployment but that context militated against such an outcome.

Determination

[32] I have not been persuaded that Mr Rosson has any viable personal grievance.

Costs

[33] Costs are reserved but I express the view that Silver Fern may see the merit in not seeking to pursue costs against Mr Rosson who has lost his lifetime livelihood, not found other employment and will have incurred his own legal costs in his unsuccessful action.

James Crichton
Chief of the Employment Relations Authority