

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 552
5369075

BETWEEN LUKE SCHMIDT
 Applicant

A N D McNALLY FARMS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: A Witten-Hannah, Counsel for Applicant
 H Burdon, Advocate for Respondent

Investigation Meeting: 6 August 2013 at Hamilton

Submissions Received: 12 September 2013 from Applicant
 27 August and 2 September 2013 from Respondent

Date of Determination: 3 December 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Luke Schmidt, claims that he was unjustifiably dismissed on 30 October 2011. Mr Schmidt asks the Authority to find that he has a personal grievance and award him various remedies. Mr Schmidt also claims that he has various entitlements pertaining to: payment in lieu of notice, annual leave, payment in lieu of rostered days off, and wages due for the last three days of his employment.

[2] The respondent, McNally Farms Limited (MFL), acknowledges that Mr Schmidt was dismissed and accepts that there was a procedural error, in relation to a misinterpretation of the notice of termination given to Mr Schmidt on 30 October 2011. However, MFL says that notwithstanding the procedural errors, Mr Schmidt would have been summarily dismissed in any event.

Background

[3] Mr Schmidt was employed by MFL as a farm manager. He commenced his employment on 7 November 2010; entering into an employment agreement signed by both parties on 20 November 2010.

[4] Relevant to this dispute, to some extent, is that attached to the employment agreement is a Service Tenancy Agreement which is subject to the Residential Tenancies Act 1986; with the tenancy beginning on 7 November 2010.

The dismissal of Mr Schmidt

[5] The evidence of Mr Schmidt is that on 30 October 2011, he was presented with the following letter:

To Luke Schmidt, Farm Manager

Re: Notice of Termination of Employment Clause 8 of Contract

Under clause 8 of your contract we hereby terminate your employment. One month's notice is given. You will vacate the house on Thursday 3 November 2011 at 12 noon. (This is in accordance with clause 8 where the accommodation is provided as part of your employment and accommodation must be vacated on or before termination of the contract).

The house will be left clean and tidy, lawns mown, carpets cleaned.

You will finish work on Sunday 30 October 2011, and [sic] paid one month's wages plus 3 days annual leave owing. Gross one month \$5,673.04, less allowances \$800, less tax \$1,289, net pay \$3,584.04, plus three days' annual leave \$607.83 less allowances \$85.72 and PAYE \$138.11, net pay \$384. Cheque enclosed \$3,968.04.

All records and farm property in your care will be returned to the employer immediately.

[6] The letter is signed on behalf of MFL by Mr Geoffrey McNally and Mrs Vivienne McNally. There is a provision for Mr Schmidt to sign the letter, but for obvious reasons he declined to do so.

[7] The letter was given to Mr Schmidt by Mrs McNally who (then), with her husband, owned and operated the dairy farm where Mr Schmidt was employed. The evidence of Mr Schmidt is that upon inquiring from Mrs McNally regarding why he was being dismissed, she responded that there was no reason and that she did not have to give him one. Mr Schmidt says that he left the letter with Mrs McNally and she

subsequently delivered it to his wife. Mr Schmidt also says that he did not agree with the monetary sums that were set out in the letter and hence he never banked the cheque.

[8] Mr Schmidt attests that his dismissal came “completely out of the blue” and that he had not received any informal or formal warning beforehand.

[9] The evidence of Mr McNally is that there had been a number of concerns regarding Mr Schmidt’s overall conduct for some time. Mr McNally makes reference to the previous farm manager (Mr Legg) leaving a few months after Mr Schmidt commenced his employment; apparently because Mr Legg was unhappy about working with Mr Schmidt. Mr McNally also attests to Mr Schmidt receiving a pay increase when he became farm manager. But this is at odds with the evidence revealed by the employment agreement. It records that Mr Schmidt commenced employment on 7 November 2010 in: “...the position of Farm Manager”.

[10] Mr McNally attests to receiving complaints from other employees and alludes to the conduct of Mr Schmidt being a contributing factor to some employees leaving their employment with MFL. But the evidence about this is inconclusive and it appears that there were various reasons for people leaving.

[11] The further evidence of Mr McNally relates to a variety of issues that caused dissatisfaction for the McNallys and some of these issues appear to have come to a head during July 2011. Whilst the evidence is somewhat unclear, it appears that Mr McNally required an operation on his hip and in his absence, Mr Schmidt was required to account to Mrs McNally. There is some evidence that Mrs McNally had occasion to speak to Mr Schmidt about a number of concerns that she had regarding his conduct. These concerns are recorded in a letter dated 25 July 2011 that Mrs McNally apparently prepared but never gave to Mr Schmidt. It seems that this letter was intended to be a: “*Notification of 1st Warning*”, but because it was never given to Mr Schmidt, it cannot be seen to have any such status. At best, it is a record of some concerns that arose pertaining to Mr Schmidt’s alleged conduct. But there is little tangible evidence before the Authority in regard to validation of these purported concerns.

[12] The letter also makes reference to a meeting proposed for 5 August 2011, to discuss various matters, and Mr McNally also refers to this meeting in his evidence.

But it seems that not only was the aforementioned letter never given to Mr Schmidt, neither was there a meeting with him on 5 August 2011.

[13] There is evidence of another letter, dated 19 October 2011, purporting to be a: *First and final warning and dismissal notice*. This letter was also (apparently) prepared by Mrs McNally, but never given to Mr Schmidt, hence it has no validity. Nonetheless, it reveals that as at 19 October 2011, the McNallys were contemplating the termination of Mr Schmidt's employment on various grounds, that were discussed before the Authority; being:

- (a) Mr Schmidt neglecting his duties to the farm animals;
- (b) Leaving the farm on Wednesday, 19 October 2011 without authority;
- (c) Calves being fed late;
- (d) Mr Schmidt setting work for junior staff and not carrying out his normal farm duties¹ whilst Mr McNally was in hospital;
- (e) Mr Schmidt being rude to Mrs McNally;
- (f) Mr Schmidt drawing an offensive image on the cowshed whiteboard thereby causing conflict with another employee.

[14] While this letter was never given to Mr Schmidt, it is clear that as of this date, the McNallys had decided to terminate his employment, and it had been decided then, that he would be required to vacate the farmhouse on Thursday, 3 November 2011; as recorded in the subsequent letter that was given to Mr Schmidt on 30 October 2011 (at para [5]).

Analysis and conclusions

[15] In determining, on an objective basis, whether a dismissal was justifiable, the Authority must apply this 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 or action occurred.²

¹ As the result of Mr Schmidt injuring his leg some accident compensation issues arose, albeit it appears the injury was an out-of-work accident.

² Section 103A(2) of the Employment Relations Act 2000

[16] Then in applying the test, the Authority must consider:

- (a) Whether having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.³

Was the dismissal of Mr Schmidt what a fair and reasonable employer could have done in all the circumstances?

[17] The Authority is left with no option but to answer this question in the negative. The dismissal of Mr Schmidt was procedurally and substantively unjustified. This is because, firstly, the employer completely failed to observe the fundamental requirements of s.103A(3) of the Employment Relations Act 2000 (the Act) and even taking into account the lack of appropriate resources and the obvious inexperience of Mr McNally in such matters, had he obtained even basic advice, more probably than not, he could have avoided getting it so badly wrong. This is not a case whereby the employer has slipped up on minor or technical matters. The procedural failures are at the most negative end of the scale in regard to such matters.

[18] Secondly, while there is some evidence that Mr Schmidt may not have been performing his duties to the satisfaction of his employer, the matters at issue appear to have been such that, at best, a warning may have been appropriate and suitable performance management put in place. But even then, Mr Schmidt was entitled to have such issues raised with him and be given the opportunity to respond before any decision about a disciplinary sanction was reached.

[19] It appears that the McNallys believed that clause 8 of the employment agreement gave a legitimate right to terminate Mr Schmidt's employment, providing one month's notice was given.

³ Section 103A(3) of the Employment Relations Act 2000

Clause 8 provides that either party may terminate the employment agreement by giving one month's notice in writing to the other party. But of course, in an employment relationship setting, as compared with, for example, some commercial contracts, this provision cannot override the statutory requirements of the Employment Relations Act and well recognised employment law principles established by the Courts over many years in regard to the application of natural justice; as set out in s.103A(3) of the Act (above).

Remedies

[20] Having found that the dismissal of Mr Schmidt was unjustified, it follows that he has a personal grievance for which remedies are available under s.123(1) of the Act.

Reimbursement of lost wages

[21] Pursuant to s.128(2) of the Act, where the Authority determines that an employee has a personal grievance and as a result, there is lost remuneration, then the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. Then, at s.128(3), the Authority may, at its discretion, order that lost remuneration for more than three months shall be paid.

[22] Mr Schmidt was dismissed midway through the milking season and was unable to gain new employment on a dairy farm until June 2012, at the beginning of the new season. He was without employment for seven months, apart from some casual work he obtained. Mr Schmidt has provided a credible record of the positions that he applied for and in some cases, the responses he received. Mr Schmidt is relatively young and it appears that he has only worked in the dairy industry. He is currently in a second milking season with a new employer and it appears that this relationship is quite successful.

[23] While one can question why Mr Schmidt did not attempt to obtain employment outside the dairy industry, the Authority accepts that he is intent on pursuing a career in this industry and had been saving to purchase his own herd of cows in order to go share milking. Therefore, without any contributory fault on the part of Mr Schmidt, he would have been entitled to be reimbursed for his loss of remuneration for seven months, less the wages he received for casual work (\$2,603).

[24] However, the Authority has an obligation under s.124 of the Act to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. And I am cognisant of the finding of Chief Judge Goddard in *Davis Trading Company Ltd v Lewis*⁴:

But once contributory fault is established, there seems no warrant for exercising in the respondent's [employee's] favour the discretion to award more than the minimum loss [3 months'] and even that requires to be reduced ...

In *Davis*, Chief Judge Goddard also stated that:

... the deduction should be of such an amount as is equitable having regard to the rights and obligations of the wronged person and the wrongdoer towards each other. The [employee] had the right not to be unjustifiably dismissed but he also had an obligation not to damage the relationship of trust and confidence to such an extent as to induce his employer to destroy it.

[25] Taking all of the circumstances into account, including his contribution to the events that gave rise to the grievance, I award Mr Schmidt three months' reimbursement of wages under s.128(2) of the Act. This award is in addition to the one month's wages in lieu of notice that Mr Schmidt was entitled to under the terms of his employment agreement; the subject of a later order in this determination.

Compensation

[26] Mr Schmidt seeks the sum of \$30,000 under s.123(1)(c)(i) of the Act; an exceptional sum given the circumstances and the general awards of the Authority and the Employment Court. However, it is accepted that the dismissal of Mr Schmidt, without any prior warning by the McNallys, did have a considerable effect on Mr Schmidt.

[27] He attests to the shock of the sudden loss of his employment, compounded by the fact that he and his wife had to suddenly move out of their accommodation and make alternative arrangements, including having to pay a relocation business the sum of \$8,500 to package and store their possessions because he and his wife had to move in with family, as there was not time to make other accommodation arrangements. And Mr Schmidt was hopeful of obtaining another farm position that would provide accommodation, as is often customary in the farming industry. Mrs Kirsty Schmidt

⁴ [1993] 2 ERNZ 272 at 288.

also gave graphic evidence of the effect of the sudden loss of Mr Schmidt's employment and having to leave their accommodation suddenly. MFL attempted to justify the sudden removal of Mr and Mrs Schmidt from their home by reference to the special provisions for terminating service tenancies under s.53(2) of the Residential Tenancies Act 1986. But the overall evidence reveals that the arguments advanced in defence of such callous action are quite baseless. Mr Schmidt also refers to having to resort to living off savings that had been accumulated by him and his wife, for the purpose of owning a herd of cows and the intention of eventually going sharemilking.

[28] Mr Schmidt says that the worst aspect of the dismissal was having to explain to prospective employers that he had been dismissed from his role as a farm manager mid-season and the probable effect of this on his reputation in the industry. But I note that Mr Schmidt left his previous employment mid-season.

[29] Taking all of the circumstances into account, and subject to the following reduction, I conclude that an award of compensation in the sum of \$15,000 is appropriate.

Contribution

[30] Pursuant to s.124 of the Act, the Authority must consider the extent to which the actions of the employee may have contributed towards the situation that gave rise to the personal grievance and decide if any reduction in remedies is appropriate accordingly.

[31] Mr McNally has given some evidence regarding alleged misconduct on the part of Mr Schmidt. There was some attempt to corroborate Mr McNally's evidence by two other witnesses; Mr Daniel McNally and Mr Robert Mack. Apart from the fact that I did not find the evidence of these two witnesses to be very convincing, mostly, but not totally, I prefer the evidence of Mr Schmidt in response to the allegations that were made against him.

[32] While I accept that there were a number of misconduct issues that arose during Mr Schmidt's employment, his behaviour could not be seen as serious misconduct and could have been simply addressed by Mr McNally adopting a proper disciplinary process and appropriate performance management. In the round, I assess the blameworthy contribution of Mr Schmidt to be moderate, warranting a reduction in

the remedy of compensation awarded by 20%. In regard to the remedy of reimbursement of lost wages, Mr Schmidt's contribution has been taken into account by the minimum award of 3 months' wages.

The monetary claims advanced by Mr Schmidt

[33] The letter dated 30 October 2011 informing Mr Schmidt of the termination of his employment with one month's notice set out various monetary entitlements that the McNallys understood were due to Mr Schmidt. A cheque was attached to this letter for the net sum of \$3,968. But Mr Schmidt was of the view, at that time, that the calculation of his entitlements was incorrect and he did not bank the cheque because, as the Authority understands it, he believed that to do so would have been taken as acceptance of the dismissal and the monies due to him.

One month's pay in lieu of notice

[34] It seems that MFL accepts that Mr Schmidt is entitled to be paid the gross sum of \$4,615.38⁵ as one month's pay in lieu of notice as recorded in the letter dated 30 October 2011.

Annual leave

[35] Mr Schmidt says that he is entitled to be paid for 13 days' annual leave. I note that in his closing submissions he has amended his claim of 8 days as set out in the *Statement of Problem*. While it is unclear, I understand that the further five days is added as Mr Schmidt now alleges that these five days were taken as annual leave and they should have been sick leave, but Mr Schmidt has not enlightened the Authority as to what this means and given the late amendment, I decline to consider it.

[36] Pursuant to s.81 of the Holidays Act 2003, employers are required to keep a holiday and leave record which, among other matters, must contain:

- The employee's current entitlement to annual holidays;
- The date on which the employee last became entitled to an annual holiday; and
- The dates on which any annual holiday has been taken.

⁵ \$55,000 divided by 12 months.

[37] If MFL did keep such a record for Mr Schmidt, it has not been produced to the Authority. On the other hand, Mr Schmidt has specified the dates on which he took annual leave and pursuant to s.83(4) of the Holidays Act, I accept as proven, in the absence of evidence to the contrary, that Mr Schmidt is entitled to be paid for 8 days' annual leave based on his annual salary of \$55,000.

Payment for rostered days not taken off

[38] Under clause 3 of the employment agreement, although rather badly drafted, it seems that Mr Schmidt was entitled to every third weekend off. Apparently, although one cannot be certain, a roster of some description would have been in place. But regrettably, as with a number of such disputes before the Authority pertaining to the dairy farming industry, when it comes to keeping the records required by the Holidays Act and the Employment Relations Act, this appears to be a low priority. If certain dairy farm employers, such as MFL, adopted modern human resource and employment practices, including keeping appropriate records for their employees; with the same admirable diligence that is applied in regard to ensuring that maximum production from their herds is obtained, many disputes about monetary entitlements could be avoided.

[39] Mr Schmidt has provided credible details of the rostered days off that he says that he was entitled to. Given that MFL is unable to provide evidence to the contrary, I accept that Mr Schmidt is entitled to be paid for 20 days' pay in lieu of the rostered days off that were not taken, rather than the 8 days that MFL says that he is entitled to but has provided no evidence to support that proposition.

Payment for 28, 29 and 30 October 2011

[40] It appears that MFL accepts that Mr Schmidt is entitled to be paid for these three days.

Determination

[41] For the reasons set out above, the Authority finds that the dismissal of Mr Schmidt was procedurally and substantively unjustified and not what a fair and reasonable employer could do in the circumstances.

Summary of orders of the Authority

[42] Pursuant to sections 123 and 128 of the Act, McNally Farms Limited is ordered to pay to Mr Schmidt the gross sum of \$13,750.00 (\$55,000 divided by 52 x 13 weeks).

[43] Pursuant to s.123(1)(c)(i) of the Act, McNally Farms Limited is ordered to pay to Mr Schmidt the sum of \$12,000 (without deduction) as distress compensation (\$15,000 less 20%).

[44] McNally Farms Limited shall pay to Mr Schmidt:

- (a) One month's pay in lieu of notice, the gross sum of \$4,583.33;
- (b) Pursuant to the Holidays Act 2003, 8 days' annual leave;
- (c) Pursuant to clause 3 of the employment agreement, 20 days' pay in lieu of rostered days off not taken;
- (d) Payment of wages for 28, 29 and 30 October 2011.

Costs

[45] Costs are reserved. The parties are invited to resolve this matter. In the event that they are unable to do so, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority