

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 106
5521707

BETWEEN MORGAN TUAU
 Applicant

AND CRAIG SOUTHALL
 Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Foster for Applicant
 Lucy Tucker for Respondent

Investigation Meeting: 26 March 2015

Submissions Received: 26 March 2015 from Applicant
 27 March 2015 from Respondent

Determination: 10 April 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Tuau was unjustifiably dismissed.**

- B. Mr Southall is ordered to pay to Mr Tuau the sum of \$2,550 without deduction within 28 days of the date of this determination.**

- C. The counter-claims against Mr Tuau are dismissed.**

- D. Costs are reserved.**

Employment relationship problem

[1] Mr Morgan Tuau claims he was unjustifiably dismissed from his job as a Farm Manager working for Mr Craig Southall and seeks remedies including lost remuneration, compensation and a contribution to his legal costs.

[2] Mr Southall denies the claims and has counter-claimed damages from Mr Tuau for his failure to teat spray the cows and also claims Mr Tuau was overpaid wages and holiday pay.

Background

[3] Mr Tuau commenced employment as a Farm Hand for Mr Southall in August 2013. The terms and conditions of his employment were set out in an individual employment agreement. The employment agreement is the standard Federated Farmers employment agreement. Initially the employment was for a fixed term period to cover the 2013/2014 milking season. The employment agreement became a permanent ongoing agreement in May 2014 when the parties agreed orally, to extend the employment relationship.

[4] At the time of Mr Tuau's employment, his partner was already employed at the farm as the Farm Manager. In January 2014 Mr Tuau's partner resigned from her employment. Mr Tuau was promoted and took over the duties of the Farm Manager role in February 2014.

[5] On 22 September 2014 Mr Tuau claims he was milking the cows at the shed and asked Mr Southall if they could sort the weekends Mr Tuau says were owed to him. During the discussion Mr Southall raised concerns that Mr Tuau had failed to attend work on 15 and 20 September 2014 and he had failed to teat spray the cows. The discussion ended in a heated exchange between the two which then resulted in an allegation that Mr Southall had assaulted Mr Tuau.

[6] After milking had finished Mr Tuau returned to his home. He was visited by Mr Daniel Tibbotts a farm worker who worked with Mr Tuau. Mr Tibbotts advised Mr Tuau that Mr Southall wanted to meet with him and Mr Phillip Mackey, a friend of Mr Southall, to try and resolve the issues raised during the altercation. Mr Tuau told Mr Tibbotts he would not meet as he was off to see the doctor and would be calling into the Police Station.

[7] At or about 9.00am that same morning, Mr Mackey attended Mr Tuau's residence and presented Mr Tuau with a document dated 22 September 2014 which states (verbatim):

This is a formal warning for not giving advance notice of when taking time of work eg 15th night milking & 20th night milking Sept/2014.

I am also giving you a warn to teat spray the cows at all times as previously you have been warned verbally. Also there should be 2 milkers at all times as per the contract.

[8] The document was signed by both Mr and Mrs Southall although at the investigation meeting Mr Southall acknowledged that Mrs Southall was not Mr Tuau's employer.

[9] Mr Mackey also extended an invitation on behalf of Mr Southall to meet to discuss his concerns and resolve the matters which led to the incident earlier that morning.

[10] Later that morning Mr Tuau formally reported the allegation of assault to the Otorohanga Police Station and completed a statement. Mr Tuau then attended his doctor who put Mr Tuau on sick leave for a period of two weeks. Mr Tuau and his partner then attended the farm. Mr Tuau gave Mr Southall the medical certificate and informed Mr Southall that he had reported the incident from earlier that day, to the Police.

[11] On 23 September 2014 Mr Tuau received a letter from Mr Southall when it was hand delivered to his home. The letter provided two week's notice of the termination of Mr Tuau's employment. The notice of dismissal was signed by both Mr and Mrs Southall.

[12] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Tuau and Mr Southall but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[13] The issues for determination are:

- a) Was Mr Tuau's dismissal unjustified;
- b) Was Mr Tuau overpaid wages;
- c) Should Mr Southall's counter-claim succeed?

Dismissal

[14] The fact that Mr Tuau was dismissed is accepted. The onus falls upon Mr Southall to justify whether his actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹

[15] In applying this test, the Authority must consider the matters set out in the Employment Relations Act 2000 (the Act) at section 103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[16] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly.² A failure to meet any of the section 103A(3) tests is likely to result in a dismissal being found to be unjustified.³

[17] The parties had signed a written employment agreement which set out the procedure to be followed in the event that Mr Southall was concerned about Mr Tuau's conduct. The employment agreement requires as a minimum:

- 25.1.1 The Employee receive written detailed particulars of the concern or allegations (and the seriousness of it), disclose all of the facts that the Employer is relying on, identify whether the matter is potentially general misconduct or serious misconduct and the most serious potential outcome of the investigation and state that the Employee is entitled to bring a supporter, or representative with the Employee to the meeting.
- 25.1.2 Arrange a formal meeting (giving at least 48 hours' notice of the meeting).
- 25.1.3 Provide the Employee with a proper opportunity to respond to the matters of concern at that meeting.
- 25.1.4 Consider the Employee's responses and determine whether the conduct amounts to general misconduct or serious misconduct and the appropriate Employer's response. The Employer will confirm the decision in writing.

¹ Employment Relations Act 2000 section 103A(2).

² Ibid at section 103A(5).

³ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

[18] Mr Tuau was dismissed as a result of the incident on 22 September 2014 in the vat room of the milking shed and the fact that Mr Tuau then reported the incident to the Police. Mr Tuau says he asked Mr Southall about wages he believed were owed to him. Mr Southall agrees Mr Tuau did ask about wages owed but did so in a confrontational manner and that he was yelling at him.

[19] Mr Southall says Mr Tuau would not allow Mr Southall to leave the vat room as he stood in the doorway blocking his exit and was intimidating him. Mr Southall says that in the end he had to push past Mr Tuau to get out of the room. It was this push that formed the basis of Mr Tuau's complaint to the Police.

[20] Mr Southall says that during his employment Mr Tuau was verbally warned on a number of occasions and he continually disobeyed instructions. By way of example Mr Southall says:

- a) Mr Tuau was supposed to record the penicillin cows, and other cows getting treatments in the dairy. He knew he was supposed to do this, as he had been told. Mr Tuau did not record any treatment cows in August or September 2014.
- b) Mr Tuau did not tag the calves correctly. Mr Tuau had been told he needed to tag the calves as soon as possible after they calved, when they were close to their mother so the calves could be properly identified. As a result of the mistagging of calves the farm records were not accurate.
- c) Mr Tuau had been told not to water the calf milk down but he continued to do so.

[21] At the investigation meeting Mr Southall acknowledged that he had not followed the steps set out in the employment agreement. Mr Southall relies on the invitations to Mr Tuau through Mr Tibbotts and Mr Mackey to attend a meeting to discuss and resolve matters as his attempts to set up a meeting to discuss his concerns.

[22] For a number of reasons, I have rejected these attempts at setting up a meeting as attempts by Mr Southall to meet the requirements set out in the employment

agreement. Firstly, at the time Mr Tuau was invited to meet with Mr Southall, he was not considering disciplinary action. The stated purpose of the meetings was to resolve the matters which culminated in the complaint being made to the Police by Mr Tuau.

[23] Secondly, the employment agreement requires the arrangement of a formal meeting with not less than 48 hours' notice accompanied by notification of the concerns to be addressed, the seriousness of those concerns, the possible consequences and the opportunity for Mr Tuau to be represented at the meeting. None of these requirements were met.

[24] At the investigation meeting Mr Southall acknowledged that one of the reasons for Mr Tuau's dismissal was the fact that he had made a complaint to the Police. Mr Southall says the complaint was untrue, however, at the time Mr Southall made the decision to dismiss Mr Tuau he had not seen a copy of the complaint and neither had the Police been in contact with him. He was therefore not in a position to know whether what Mr Tuau had told the Police was correct or not.

[25] I am satisfied it is more likely than not that both Mr Tuau and Mr Southall were engaged in a very heated exchange on 22 September 2014. The Police investigated Mr Tuau's complaint and found the incident to be a very minor assault by pushing. Mr Southall received a formal warning but no further action was taken against him.

[26] I am satisfied on the balance of probabilities that Mr Tuau was yelling at Mr Southall. I noted at the outset of the investigation meeting that Mr Tuau had difficulty hearing. During the investigation meeting questions had to be repeated several times in order to assist Mr Tuau in hearing the questions so that he could respond. I have concluded that it is likely that Mr Tuau's hearing difficulties may have contributed to him raising his voice on 22 September 2014.

[27] Mr Southall says he dismissed Mr Tuau because he felt threatened, he did not feel safe on his own farm and Mr Tuau had made a false complaint to the Police. I accept that Mr Tuau's actions were likely to have left Mr Southall feeling threatened and unsafe while he was in the vat room with Mr Tuau. However, at the time Mr Southall made the decision to dismiss he was not in a position to know whether the complaint Mr Tuau made to the Police was accurate. Mr Southall had not spoken to the Police or seen a copy of Mr Tuau's statement.

[28] Mr Southall has failed to follow the requirements set out in section 103A of the Act and also the steps set out in the employment agreement. These failures are not minor deficiencies and have rendered the dismissal unjustified. Mr Tuau is therefore entitled to a consideration of remedies.

Remedies

Lost wages

[29] Mr Tuau claims lost wages for the period 26 September 2014 to 31 May 2015. While not pursued in submissions, this claim appears to be premised on the basis that the verbal agreement in February 2014 to extend the original fixed term employment agreement means the employment would lapse on 31 May 2015.

[30] As I pointed out to the parties during the case management call, section 66 of the Act prevents such an interpretation. In order for there to be a valid fixed term agreement, the employment agreement must state in writing the way in which the employment will end and the reasons for ending the employment in that way. The lack of any such written statements at the time the parties verbally agreed to vary the agreement means the employment cannot be treated as fixed term but became ongoing in nature.

[31] The onus is on Mr Tuau to prove any loss of income resulting from his dismissal. In *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*,⁴ Chief Judge Colgan explained the obligations of a dismissed employee in relation to a loss of earnings claim in these terms:

...dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[32] Mr Tuau's evidence is that he did not seek work after his dismissal because he was not well. Mr Tuau has not provided the Authority with any evidence to support his contention except to tell me that he attended his doctor the week before the investigation meeting.

⁴ (2009) 6 NZELR 530 at [78].

[33] Mr Tuau is required to provide evidence in relation to his obligation to mitigate loss. The Authority should not be left to speculate or guess. I am not persuaded Mr Tuau has taken adequate steps to mitigate his loss. I decline to make an award under this head.

Compensation

[34] Mr Tuau seeks the payment of compensation pursuant to section 123(1)(c)(i) of the Act. Mr Tuau has not quantified his claim despite a direction during the case management call to be specific as to the remedies being sought by him.

[35] Mr Tuau has provided no evidence as to the impact of the dismissal on him. The Authority can only exercise its discretion to award remedies such as this on the basis of evidence. In this case the evidence was non-existent. I have no doubt that the suddenness of the dismissal, and the way it was carried out did have an impact on Mr Tuau.

[36] In the absence of any direct evidence and subject to my findings on contribution I find an appropriate award under this heading to be \$3,000.00.

Contribution

[37] I find Mr Tuau contributed to his dismissal through his actions on 22 September 2014 when he attempted to prevent Mr Southall from leaving the vat room which resulted in Mr Southall pushing Mr Tuau out of his way.

[38] Mr Tuau's actions were such that they warrant a minor reduction in remedies which I assess at 15%.

[39] Mr Southall is ordered to pay to Mr Tuau the sum of \$2,550 pursuant to section 123(1)(c)(i) of the Act without deduction within 28 days of the date of this determination.

Counter-claim

[40] Mr Southall claims he suffered losses as a result of Mr Tuau's failure to treat spray the cows from 15 July 2014 to the date of his dismissal on 22 September 2014.

[41] Mr Southall also claims he overpaid wages to Mr Tuau and seeks reimbursement of the overpayment.

Failure to teat spray the cows

[42] Mr Southall says that as a result of Mr Tuau's failure to teat spray the cows his business suffered the following losses:

- a) A reduction in the value of a number of animals in the herd which have been affected by a higher somatic cell count (SCC) and subsequent mastitis;
- b) Increased veterinary care and medication required to care for animals affected by mastitis; and
- c) A reduction in the value of the milk cheque due to the high SCC levels.

[43] It was not clear in the counter-claim the amount Mr Southall claimed was the actual loss he suffered and consequently the damages he was seeking. During the investigation meeting it became even clearer that Mr Southall himself was unsure exactly what damages he suffered and that could be shown as causative of the lack of teat spraying.

[44] In his written evidence Mr Tuau told the Authority Mr Southall was aware the cows were not being teat sprayed, as he did not supply any teat spray. Mr Tuau says he repeatedly asked Mr Southall to buy teat spray when they were out. This is denied by Mr Southall who says teat spray was always available on the farm and he had told Mr Tuau on numerous occasions that he had to use the teat spray at all milking's but Mr Tuau would argue with him about it and refused to follow his instructions.

[45] Mr Tibbotts gave evidence that there was always at least half of a 20 litre container of teat spray in the milking shed. Mr Tibbotts told the Authority that not long after he started working for Mr Southall he asked Mr Tuau why they were not teat spraying the cows. Mr Tibbotts says Mr Tuau told him he didn't believe in teat spraying and he didn't have to teat spray.

[46] At the investigation meeting and in answer to questions Mr Tuau told the Authority that he did teat spray sometimes but not all of the time. He said he had no excuse for not teat spraying.

[47] Ms Jessica Spatz Shelgren is a senior Veterinarian engaged by Vetfocus. Mr Southall has been and continues to be a client of Vetfocus, a relationship that has existed for about five years. Ms Shelgren specialises in milk quality and the control of mastitis on dairy farms. Ms Shelgren has undertaken research in the USA on the effect of teat disinfection, dry cow vaccinations, and closure of cows' teats at dry off.

[48] Ms Shelgren gave evidence calculating the probable losses she contends were suffered by Mr Southall as a result of the failure by Mr Tuau to undertake teat spraying. In her evidence Ms Shelgren attributes a loss of \$61,500 being the sum of the loss suffered by Mr Southall of having to have 73 cows culled due to mastitis as well as the costs associated with treatment of the herd and discarded milk due to milk quality issues.

[49] The Authority has received no evidence that Mr Southall had 73 cows culled from his herd. Ms Shelgren acknowledged that her report relied on a figure provided by Mr Southall but she did not check the accuracy or validity of that figure.

[50] During the investigation meeting Mr Southall appeared to resile from Ms Shelgren's evidence and was unable, when questioned, to explain what the actual losses were that could be attributed to Mr Tuau's actions from 15 July to 22 September 2014.

[51] Mr Southall's milk production records show that at times the milk did have high SCC levels. A high SCC level is related to mastitis infections in cows. As a result of violating Fonterra's SCC limit, a farmer is penalised by being charged demerits. For the entire 2014/2015 milking season Ms Shelgren has calculated the possible cost for Mr Southall as being \$456.00. This figure is based on Mr Southall receiving demerit points on 4 and 7 March 2015.

[52] In her report Ms Shelgren identifies four possible reasons for an increase in SCC including malfunctioning milking plant, undetected and untreated mastitis and lack of effective teat disinfection.

[53] At the investigation meeting Ms Shelgren acknowledged that she had not inspected the plant. Mr Southall acknowledged that the plant was old. In her report Ms Shelgren states that the number of cows culled for mastitis infections supports a finding of a chronic infection not responding to treatment or not treated, but also supports a finding of a poorly functioning milk plant.

[54] I find it is not possible to accurately determine whether the reason for the high SCC levels was as a direct result of Mr Tuau's lacklustre approach to teat spraying, or was affected by the use of old machinery, the drought or a combination of all three.

[55] I do find it is more likely than not that the demerit points received by Mr Southall were as a direct result of the incidence of mastitis in his cows. However, for the following reasons I will not be making any awards against Mr Tuau for any losses suffered by Mr Southall in relation to the mastitis infections in his cows.

[56] Firstly, Mr Southall had access at all times to the herd information including the SCC results which were available online. This information showed the SCC ratings for his herd on a daily basis. Mr Southall acknowledged he saw that the cell count was trending upwards and did tell Mr Tuau to teat spray but took no formal action to enforce his instructions. The employment agreement set out a clear process which could be followed by Mr Southall in the event that he was dissatisfied with aspects of Mr Tuau's performance including his failure to teat spray the herd when instructed.

[57] Secondly, Mr Southall acknowledged that the farm had suffered through two draughts and the level of mastitis can increase when there is less grass.

[58] Thirdly, it is not certain that the increased cell count was only caused by the lack of teat spraying the cows after milking. There has been no consideration of the impact of the farm machinery and the droughts as factors contributing to the high cell counts.

[59] Finally, Mr Tuau's actions affected only the first two months of milking for the 2014/2015 season and he had been gone from the farm for almost 6 months when the downgrades were applied by Fonterra in March 2015.

Overpayment of wages and holiday pay

[60] Mr Southall claims Mr Tuau was overpaid wages of \$1,348. He says this came about when he paid Mr Tuau an advance on his wages in February 2014.

[61] The wages record produced by Mr Southall shows Mr Tuau received an additional payment of \$4,230.20 gross on 7 February 2014 two days after his normal pay day on 5 February 2014. Mr Tuau says this payment was not to him at all, it was in fact his partners' final pay. This evidence was not refuted by Mr Southall.

[62] I find Mr Southall has not satisfied me on the balance of probabilities that Mr Tuau was overpaid.

[63] The counter-claims against Mr Tuau have not been successfully made out and I decline to make any awards against him.

Costs

[64] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Tuau shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Southall shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority