

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 150
5364826

BETWEEN RANGITAIKI TOHAIA
Applicant
AND IHAIA TE MARA TRUST
Respondent

Member of Authority: P R Stapp
Representatives: Alex Hope and Georgia Derbyshire, Counsel for the
Applicant
James and Kelly Langton, for the Respondent
Investigation Meeting: 10 July 2012 at New Plymouth
Submissions in writing 9 August 2012, 3 and 13 September 2012
Determination: 3 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem involves strongly held opinions about who said what to whom on 30 May 2011 or 1 June 2011 during a discussion relating to Mr Tohaia allegedly taking unauthorised leave and allegedly admitting that he smoked marijuana. The parties are also in dispute as to whether Mr Tohaia was at work on 7 June and when he was dismissed.

[2] James Langton, trustee and farm manager, says that Mr Tohaia is an unreliable witness and that Mr Tohaia abandoned his employment. Mr Langton has denied all Mr Tohaia's claims.

The claims

[3] Mr Tohaia was a farm worker employed by the Ihaia Te Mara Trust on and off between 2007 and 2011. His role included milking, organising and shifting stock, calving, caring for calves, farm track maintenance, pasture management and fertilising. He was employed under an individual employment agreement based on a Federated Farmers template. He was paid \$37,264 per annum. He reported to Mr James Langton the farm manager and a trustee of the respondent. Other trustees included Mr Langton's mother, and a lawyer. Mr Tohaia lived close to the farm with his family. Mr Langton's mother lived next door. There was at least one other person employed as a farm worker, and a contractor.

[4] Mr Tohaia claims that he was allowed to text Mr Langton about any absence from work and that Mr Langton approved his absences. Mr Tohaia denies that he admitted smoking marijuana during a discussion with Mr Langton on 30 May 2012. Whatever the date was it is common ground that they did meet and had a discussion. Mr Tohaia did not work between 31 May and 6 June 2011 as he took off Queen's Birthday on 6 June 2011, but he says that went to work on 7 June 2011, the day before he was dismissed.

[5] Mr Langton says he did not authorise Mr Tohaia to take any leave and he says that he discouraged Mr Tohaia texting to inform him of any absences. Mr Langton says that Mr Tohaia's absences from work on 26 and 27 and 31 May 2011, briefly turning up for work on 1 June 2011 and not showing up at all from 2 June until 6 June, contributed to the decision being made that Mr Tohaia had abandoned his employment. During some of the time Mr Tohaia went to Levin on personal matters and says he sent a text to Mr Langton that he would be delayed returning to work. At another time he says he contacted Mr Langton concerning matters he had with the Police and Mr Langton told him to hand himself in. Mr Tohaia had a week off with Mr Langton's approval to sort out the Police matters. Mr Tohaia also says he sent a text message to Mr Langton asking whether he was required to work on the holiday, but did not get a reply back and thus assumed that he was not required to work Queen's Birthday holiday.

[6] Mr Langton says that on 1 June 2011 he asked Mr Tohaia whether or not he was using "P" (methamphetamine) and Mr Tohaia denied it, but Mr Langton says that Mr Tohaia went on to say that he was smoking marijuana. During the Authority's

investigation Mr Langton for the first time added that Mr Tohaia said “he had an ounce of marijuana”, and Mr Langton told me that if he had been aware of the need to mention it earlier he would have. Mr Tohaia denies the claim.

[7] Mr Langton also says that Mr Tohaia did not work on 7 June 2011. Mr Langton decided that Mr Tohaia had abandoned his employment and was in breach of his employment agreement and that, as Mr Tohaia admitted smoking marijuana, that these reasons justified dismissing him. Mr Langton says that he gave Mr Tohaia a letter dated 7 June 2011 that day, which effectively ended Mr Tohaia’s employment

The issues

[8] The issues for the Authority to determine are:

- (a) Who said what to whom on either 30 May 2011 or 1 June 2011? In other words can Mr Langton prove that Mr Tohaia admitted smoking marijuana?
- (b) Were Mr Tohaia’s absences authorised?
- (c) Did Mr Tohaia work on 7 June 2011?
- (d) How did the employment end and on what date did the employment end?
- (e) What were the reasons for the employment ending?

Credibility

[9] Mr Tohaia and Mr Langton genuinely believe what they are saying, I hold. Neither of them was proven to be lying. Therefore, I must decide as to who is more reliable in regard to the various disputes that have arisen in this matter.

[10] Mr Tohaia’s reliability has been challenged by Mr Langton who has relied on Mr Tohaia not being a reliable witness because he was on the run from the Police, that Mr Tohaia is in prison, and that Mr Tohaia allegedly admitted smoking marijuana and that he was the cause for the town being shut down while the Police looked for him.

[11] Mr Langton has been challenged by Mr Tohaia in regard to his defence of the matter and whether there is sufficient evidence to support his side of the story. At this point, I simply note that Mr Langton's views on this matter have been influenced by Mr Tohaia's alleged behaviour and his background. This is highlighted by Mr Langton's persistence in simply referring constantly throughout the Authority's investigation meeting to Mr Tohaia's absences from work and that Mr Tohaia admitted smoking marijuana, which he could not condone for safety reasons at least. There were no witnesses to the conversation that took place between both men on 30 May and/or 1 June 2011.

The facts and the Authority's findings

Was Mr Tohaia's absence from work authorised?

[12] If the absences had been authorised, there would have been no abandonment of work issue. However, what did emerge during the Authority's investigation meeting was a dispute about texting and whether or not the leave was authorised and whether or not Mr Tohaia worked on 7 June 2011. Earlier leave had been condoned by Mr Langton, I hold.

[13] There are no proper records and Mr Langton has relied on his diary, which I find is incomplete and not consistent as to the entries for leave and/or absences from work. Any arrangements relating to Mr Tohaia taking leave probably involved him being allowed to text Mr Langton. At the very least, if no approval was given, the issue here is about whether or not the leave was unauthorised and this was not a reason relied upon by Mr Langton at the time that he made his decision to dismiss Mr Tohaia from employment. He used the matter of absences as background and wanted explanations, but never referred to them being unauthorised.

[14] I accept that Mr Tohaia did work on 7 June 2011 because:

- (a) Arrangements were made by text.
- (b) Mr Langton did not rely on the unauthorised leave as a reason at the time of the dismissal.
- (c) Inconsistencies relating to Mr Langton's diary.

- (d) Mr Langton raised new matters for the first time at the Authority's investigation meeting
- (e) Mr Langton has attempted to prove wrong doing by Mr Tohaia after the event.

[15] Given that he did most likely work on 7 June, he can not have abandoned his employment.

The dismissal

First reason: abandonment of employment

[16] The dismissal on 8 June 2011 becomes a crucial element of the employment relationship problem. I hold that this matter involved Mr Langton dismissing Mr Tohaia from his employment with the Trust. The proof for this is found in the letter dated 7 June 2011 that confirms that there was a dismissal with reasons. Next the evidence from the statement in reply concedes that there was a dismissal. Mr Langton's statement of evidence also conceded that there was a dismissal. He had an opportunity to make any corrections, alterations, additions and/or deletions to his evidence at the Authority's investigation meeting, but did not do so in regard to this issue.

[17] The dismissal was unjustified, I hold. The abandonment reasoning has not stood up to scrutiny because of the conflict over whether or not the leave taken was authorised, the conflict over the arrangements of advising Mr Langton about any leave, the absence of any formal process for taking time off and a diary from Mr Langton that is not consistent on the references to taking time off, and the real possibility that it was more likely than not that Mr Tohaia turned up for work on 7 June 2011. Therefore, it is more likely than not that Mr Tohaia worked on 7 June 2011, I hold, and before Mr Langton gave him the letter of dismissal the next day.

[18] This is despite Mr Langton's earlier attempts to contact Mr Tohaia either by phone, visits to the house and/or text messages. Mr Langton failed however to properly follow the employment agreement and to contact Mr Tohaia in writing before making any decision as required:

23.2 *The Employer acknowledges that before an Employee is deemed to have abandoned his/her employment, the Employer will take reasonable steps (telephone and writing to the address provided by the Employee) to warn the Employee that the Employer intends to rely on this clause, in the event the Employee fails to contact or attend for work.*
(Source: employment agreement)

[19] Mr Langton's reliance on Mr Tohaia breaching the abandonment clause in the employment agreement was flawed because:

- (a) Mr Langton knew that Mr Tohaia had a matter concerning the Police;
- (b) Mr Tohaia had not walked out on his job, albeit that he might have taken leave without authority;
- (c) No investigation was conducted;
- (d) Mr Langton failed to consider any other options before reaching such a conclusion;
- (e) Mr Langton failed to write to Mr Tohaia to warn him about the reliance on using the abandonment clause in the employment agreement. I accept Mr Langton says he tried to contact Mr Tohaia but his attempt fell short of what he was required to do, I hold.
- (f) Mr Langton did not give Mr Tohaia any opportunity to be heard (after 30 May and before writing the dismissal letter dated 7 June).
- (g) Mr Tohaia had returned to work.

Second reason: alleged admission smoking marijuana

[20] Mr Tohaia and Mr Langton had an informal meeting at work either on 30 May 2011 or 1 June, I hold. The date is immaterial as there is common ground the men had a discussion in regard to "P" and marijuana. This was not a formal meeting. It was not planned and nothing in advance of the meeting put Mr Tohaia on any notice of any concerns that Mr Langton might have had. There is a dispute about what they said to each other and in particular whether or not Mr Tohaia made an admission that he smoked marijuana after Mr Langton accused him of using "P".

[21] It is difficult to assess whether or not Mr Tohaia admitted to smoking marijuana because:

- (a) There were no witnesses.
- (b) Mr Langton's insistence on Mr Tohaia being unreliable based on Mr Tohaia being in prison and his beliefs about Mr Tohaia's personal behaviour.
- (c) Mr Langton has not been able to draw any linkage between Mr Tohaia's behaviour and abandoning his employment. Certainly Mr Tohaia had taken time off work, but there is his evidence of making attempts to keep Mr Langton informed some of the time.
- (d) The respondent's attempt to justify and defend its actions by using information obtained after the events.
- (e) The respondent's use of information, which it has not been able to establish as reliable. For example witness statements made after the events that the applicant has challenged. Also Mr Langton and his mother have raised new matters relating to Mr Tohaia during the Authority's investigation that could have been reasonably raised much earlier. Indeed given the matters they raised I would have expected that if they had occurred they would have raised them earlier. The way they have dealt with the matters makes me unsure that they did occur.
- (f) Mr Langton's differing unsupported accounts of trying to contact Mr Tohaia.
- (g) The different conflicting evidence from the witnesses about Mr Tohaia and the evidence from Mr Tohaia's wife and Mr Langton's mother and wife.

[22] I am satisfied that there was a discussion, but given the divergent versions of the conversation it has to be viewed in the context that it was a discussion, and as such any admission from Mr Tohaia about using cannabis has to be put into context. There was no proof that that any admission related to any allegation and/or that Mr Tohaia had been using cannabis while he was working at the time and/or that it related to any

other complaint. Mr Langton has not produced sufficient proof that Mr Langton was a danger to him self and/or other people. Mr Langton was rightly concerned if Mr Tohaia did smoke cannabis, especially at work, he would put himself and others at risk. Furthermore if there was any serious misconduct relating to this Mr Langton would be entitled to deal with it, so long as he did so properly.

[23] Further I hold that Mr Langton has not been able to prove that Mr Tohaia admitted smoking marijuana during that discussion given Mr Tohaia's denial.

[24] There was no investigation and for Mr Langton to rely on what he says Mr Tohaia said at their meeting on 30 May and/or 1 June is flawed because there was an absence of an investigation. Even if he did say it, Mr Langton could not have drawn an adverse opinion from the statement because he has not been able to put it in context for serious misconduct and the discussion happened in an informal meeting. An employer is able to rely on an admission in regard to any improper behaviour. However such an admission would need to be made in an appropriate and fair way. That has not happened here because there are no details that are available as to when Mr Tohaia allegedly smoked marijuana and whether or not it happened during work time and if as a result of such an admission Mr Tohaia's alleged behaviour impacted on the work. These are matters that could be expected to have been discovered in a proper inquiry.

[25] Since Mr Tohaia denies the claim (which he has done consistently throughout), Mr Langton has the difficulty of proving without witnesses what he says he heard at the time. Under the law he can only rely on the information he had at the time to justify the claims. Any investigation could have been organised without Mr Langton's direct involvement considering that there were two other trustees involved in the Trust, and that Mr Langton's wife could have become involved in the process. Evidence from one other witness since the matter was raised, and whom Mr Langton wished to rely upon, was obtained after the decision was made to dismiss Mr Tohaia. Even that person's evidence raised the very real prospect of some disparity of treatment.

The procedure

[26] Mr Langton's procedure was flawed. He has relied on what he says he heard during a conversation. There was no other meeting for:

- (a) An investigation; and
- (b) An opportunity for Mr Tohaia to have any input and to make any comment in a disciplinary meeting based on any proper findings.

[27] Mr Langton failed to properly investigate the issues and allegations, albeit I do accept that an employer is entitled to rely upon an admission, but in this instance, the reliance on the admission is affected by the lack of any witnesses at the time and the lack of any detail and Mr Tohaia's denials. Also I hold that the farm is a small business with few employees and a working proprietor. It is run by a trust and its resources are based on the involvement of other trustees to help on the farm and in managing the books and professional advice. Therefore a proper investigation could have been conducted, I hold.

[28] Mr Langton failed to provide Mr Tohaia with an opportunity to have input and comment on a decision and a penalty since Mr Langton was relying on what he says happened, even although he cautioned Mr Tohaia on 30 May with regard to serious misconduct and the possibility of a warning and/or dismissal. The comments implicitly meant that Mr Langton had to carry out an investigation and to assemble the information supporting his allegations and then to give Mr Tohaia the opportunity to be heard and on a penalty too. None of that happened and as such a fair and reasonable employer could not have concluded that there had been two serious breaches to justify dismissal given the circumstances, I hold. Mr Langton can not rely on Mr Tohaia being on the run, Mr Tohaia's imprisonment and allegations about Mr Tohaia personal behaviour to prove now what he had to do at the time. Also, Mr Langton allowed Mr Tohaia's employment to continue without issue until 7 June. Given the dismissal related to comments allegedly made on 30 May the time lapse without any action does not support Mr Langton's position. This is particularly so as he could have considered suspending Mr Tohaia, under the terms of clause 27 of the employment agreement.

[29] Mr Langton prepared his letter including his decision and Mr Tohaia had no input and any opportunity to comment.

[30] The allegation was a very serious one and to that extent Mr Langton had to obtain sufficient evidence to satisfy the gravity of the allegation. I hold that he did not do that considering he was relying solely on what he says he heard at the time. This is

a small employer, but one that did rely on advice from Federated Farmers and some legal input. Furthermore one of the trustees is a lawyer. Any advice is only as good as the information provided, and I have no certainty that Mr Langton was objective, given he was alone with Mr Tohaia and he was the decision maker based on what he says happened when Mr Tohaia denies it.

[31] Mr Langton says that everyone in town knew that Mr Tohaia was on P, but failed to provide any proof. In any event Mr Langton never relied upon it at the time, it was never properly put to Mr Tohaia with any details other than the question he put to Mr Tohaia, who denied it, and therefore I must give it very little weight.

[32] Mr Langton has attempted to justify his actions after the event when he obtained written statements from people about Mr Tohaia. Mr Tohaia has raised some doubts about the reliability of the statements, but in any event as they were not relied upon at the time I can not give them any weight.

Remedies

[33] I conclude that Mr Tohaia has a personal grievance and that he is entitled to consideration for remedies under the Employment Relations Act.

[34] First there is a claim for lost wages. Mr Tohaia's pay at the time under the employment agreement was \$37,264 per annum. He was paid weekly. This amounts to \$716.61 per week. His employment ceased on 8 June 2011. This is a case where the applicant has inadequately covered off his claim for lost wages and left it to the Authority to quantify. I can only do the best from the information I have. I presume Mr Tohaia was paid at least his final pay and entitlements up to 7 June 2011. Given the paucity of any details on the income received from 8 June I have restricted the claim to 4 weeks wages on the basis that Mr Tohaia at least tried to get a job with another farm. He says he was ashamed to apply for further farming positions, which I hold does not meet the requirement to mitigate his lost wages. There is no other income to deduct. I hold that he did not contribute to the situation because of the conduct of the employer and how it handled the matter.

[35] There is the matter of the drug use allegations. Mr Langton called a witness who confirmed smoking cannabis and attempted to implicate Mr Tohaia. Mr Langton also produced the written statements about Mr Tohaia. These are serious allegations and have to be proved to a standard, which has been affected by information of a drug

test from a doctor's surgery that does not prove any wrong doing by Mr Tohaia. Mr Langton has alleged that somehow Mr Tohaia influenced the test, but the evidence falls short of establishing that, I hold. These have not been sufficiently established for me to make any link with contribution, I hold.

[36] Therefore Mr Tohaia is entitled to \$2,895.53 gross lost wages.

[37] Second Mr Tohaia has claimed compensation for humiliation hurt and loss of dignity and injury to feelings. I have not been satisfied that the claims made by Mr Tohaia warrant any compensation. This is because he is a robust individual and had his eyes wide open about the situation he was in. He simply has not satisfied me of his claim beyond making mere assertions about the impact on him. Much of the matters have involved his own personal circumstances that he was attempting to deal with at the time. Also I have had regard to the fact that he worked on and off for the trust. He seemingly suited himself about taking leave and telling Mr Langton what he was doing, for example his trip to Levin. He needed time off for his Police matters to be dealt with. I hold that it would take a lot to hurt and humiliate Mr Tohaia and to make him "*sad*", having regard to his evidence and demeanour and the other matters happening in his life. The employment side seems incidental I hold. He has not therefore established a claim for hurt and humiliation relating to being dismissed.

[38] In final submissions a claim was made for \$275 in lieu of the half beef and half pig Mr Tohaia would have received had he continued working for the Trust up and until the hearing. The claim was not made in the statement of problem. It was not identified as a claim to resolve the employment relationship problem when the personal grievance was raised. Mr Tohaia referred to it in his statement of evidence (paragraph 4.8), but fell short of actually claiming it. The sum claimed has not been quantified adequately and this is wholly inadequate. I hold that the sum can not be claimed now because the employer was not put on proper notice until too late. There is no contractual entitlement to a sum in lieu, I hold.

[39] Ihaia Te Mara Trust is required to pay Rangitaiki Tohaia \$2,895.53 gross lost wages.

Costs

[40] The parties have requested that costs be reserved. I agree.

P R Stapp
Member of the Employment Relations Authority