



dismissal. They also say that the retention of the final pay due to Ms Wiseman was the exercise of a right provided by the employment agreement entered into by the parties.

### **Background Facts and Evidence**

- [3] Ms Wiseman commenced her employment as a dairy farm worker on or about 1<sup>st</sup> June 2008. Mr and Mrs Drinkwater are contract sharemilkers on land owned by another party. At the relevant times, in addition to Ms Wiseman, there were two other staff members, one of which was Ms Wiseman's partner, Mr David Gardiner. Two relief milkers were also engaged as and when required. Ms Wiseman and Mr Gardiner lived in a farmhouse on the property. The terms and conditions of Ms Wiseman's employment are set out in a fixed term employment contract (1<sup>st</sup> June 2008 to 31<sup>st</sup> May 2009) signed by both parties.
- [4] Upon the evidence available to the Authority it appears that the initial months of Ms Wiseman's employment were more or less uneventful though it appears that Mr and Mrs Drinkwater were made aware by a relief manager of some concern regarding the work habits of Ms Wiseman but they gave her "*the benefit of the doubt.*"
- [5] The first tangible issue arose in November 2008. Ms Wiseman had been notified, and subsequently reminded by Mr Drinkwater, that a representative from QCONZ (Quality Consultants of New Zealand), Mr Whittle, was to be present at the farm to "sign off" on the Milk Quality 2 paper which Ms Wiseman was seeking to obtain. Mr Whittle duly arrived to carry out his role but Ms Wiseman failed to appear at the cowshed at the pre-arranged time. Mr Drinkwater rang Ms Wiseman at her house and was informed by her that she was eating her lunch. The evidence of Mr Drinkwater is that he instructed Ms Wiseman to immediately come to the cowshed where Mr Whittle was waiting for her. Mr Drinkwater says that the response of Ms Wiseman was that she would finish her lunch before coming. The evidence of Ms Wiseman at the investigation meeting is that she got in her car immediately and went to meet the QCONZ person. I do not accept Ms Wiseman's version and prefer the

evidence of Mr Drinkwater. His evidence appears to be corroborated by the fact that having been informed by Mr Drinkwater of Ms Wiseman's response to the request to come and meet with him, Mr Whittle, apparently failed Ms Wiseman in regard to the paper in question, due to her attitude, and departed, albeit upon the request of Mr Drinkwater, he agreed to come back again to assess Ms Wiseman at a later date.

- [6] The written evidence of Mr Drinkwater is that he warned Ms Wiseman about her "attitude and manner" and he elaborated in his oral evidence that he spoke to her at the time for about 20 minutes and told her he wasn't happy with her attitude.
- [7] On 18 December 2008, an issue arose regarding Ms Wiseman's attendance at the end of year staff meeting and barbeque. It was expected by Mr and Mrs Drinkwater that all staff should attend the final staff meeting for the year. Ms Wiseman initially refused to do so. She only attended (two hours late) after Mrs Drinkwater, another staff member, then finally, Mr Drinkwater, made separate requests for Ms Wiseman to attend the staff meeting and barbeque. In itself this appears to be a rather minor incident and on its own could be put down as an episode of petulance. However, taken into account with various other matters, it is an example of the attitude and behaviour that subsequently led to the dismissal of Ms Wiseman. The further relevance is that all staff were informed on this day that there would be farmhouse inspections after Christmas and that they should all be prepared for them.
- [8] Mrs Drinkwater went on holiday to Canada in December (26<sup>th</sup>) with Mr Drinkwater following in January 2009. They returned to the farm on 8<sup>th</sup> February 2009. From their analysis of the milk reports provided by the dairy company, Mr and Mrs Drinkwater concluded that while they were on holiday, the "middle herd" of cows had been milked at irregular times.
- [9] On the afternoon of 8<sup>th</sup> February, Mr Drinkwater discovered that Ms Wiseman was not at work and was informed by one of the relief milkers (Mr Viggers) that Ms Wiseman had allegedly injured her foot and couldn't work. It was the opinion of Mr and Mrs Viggers that Ms Wiseman had not injured herself.

Nonetheless, Mr Drinkwater anticipated that Ms Wiseman would make contact with him about her alleged injury. It seems that Mr and Mrs Viggers were also able to convey to Mr Drinkwater some further negative information relating to Ms Wiseman's actions during his absence.

[10] The next day, 9<sup>th</sup> February, Ms Wiseman was rostered off work due to taking a day off in lieu of working on a public holiday. Mr Drinkwater phoned her later this day to obtain information about Ms Wiseman's injury and to ascertain if she would be able to return to work. Mr Drinkwater says he also wanted to arrange a meeting with Ms Wiseman to discuss what had happened on the farm in his absence.

[11] A meeting with Ms Wiseman, Mr Gardiner and Mr and Mrs Drinkwater took place on the evening of 9<sup>th</sup> February. Ms Wiseman was asked why an ACC certificate had not been presented relevant to her injury and why she had not contacted Mr and Mrs Drinkwater about her injury, which had now, seemingly, mended. The response from Ms Wiseman was that she didn't know that Mr and Mrs Drinkwater were home. Mr Drinkwater was of the view that Ms Wiseman would have been aware they were home given that she parked her motorbike outside their house. The matter of animals living in the farmhouse was then raised with Ms Wiseman. The employment contract provides that only one cat is allowed within the house. Mr and Mrs Drinkwater put it to Ms Wiseman that they had reason to believe that a dog and pups were living in the house. Ms Wiseman denied this. The matter of a change in milking times was put to Ms Wiseman and Mr Gardiner but no explanation appears to have been forthcoming. Ms Wiseman was also asked why she had to be woken up by a relief milker with the effect that the first milking of the cows was two hours later than normal. Mr and Mrs Drinkwater say they received no response to this question but I accept that Ms Wiseman did say that she was under pressure and being unfairly treated, albeit it appears that she did not elaborate on this nor did Mr and Mrs Drinkwater pursue it. Upon being questioned about this aspect by Mr Scott at the investigation meeting, Mrs Drinkwater said she understood Ms Wiseman was referring to her personal life.

- [12] The evidence of Mr and Mrs Drinkwater is that at a point in the meeting, Ms Wiseman got angry and left the room. Mr Drinkwater consequently advised Ms Wiseman that she should return and continue the discussion and she did. Mr Drinkwater says that he then gave Ms Wiseman a verbal warning about her attitude to her work, the way she was treating animals and the treatment of other staff members. The evidence of Mrs Drinkwater collaborates that of Mr Drinkwater in regard to the verbal warning. Ms Wiseman denies that she received a verbal warning and she stated to the Authority that she knows when she is getting a warning as she had received verbal warnings from a previous employer. Ms Wiseman's qualified denial was remarkably candid but I also have no reason to doubt the evidence of Mr and Mrs Drinkwater as to their view concerning this issue. However, they also said that they never intended the meeting to be of a disciplinary nature. Hence, if disciplinary action in the way of a formal warning was being contemplated, Ms Wiseman should have been forewarned about this. It is not conclusive that a warning was given but even if it was, the aptness would be arguable, given this was not intended to be a disciplinary meeting. Nor would have such warning met the requirements of the relevant provisions of the employment agreement. Even so, I conclude that Ms Wiseman should have clearly understood that her attitude, work performance and keeping banned animals in the farmhouse, were all unacceptable and that she was under close scrutiny.
- [13] If Ms Wiseman ever understood that there were concerns about her attitude at the conclusion of the meeting on 9<sup>th</sup> February, this understanding seems to have vanished overnight. The next day Mr and Mrs Drinkwater received a complaint from another staff member (Andrea) who had received an abusive cell phone text early the next morning from Ms Wiseman, informing her that she should "*pick her fucking gloves*" up from the dairy floor. Mrs Drinkwater sought legal advice but there is no evidence that this incident was ever raised with Ms Wiseman.
- [14] On Thursday 12<sup>th</sup> February 2009, a further problem arose pertaining to Ms Wiseman. At the morning milking she was advised by Mr Drinkwater that the vet would be coming to scan the cows in the afternoon with the possible result that the afternoon milking could be a little later than normal. Mr Drinkwater

says that Ms Wiseman became “really angry” and stated that: “there was no way that she was working late.” Following the morning milking, Ms Wiseman went to her house for breakfast but failed to return after allowing a reasonable time for the break. Mr Drinkwater went Ms Wiseman’s house, knocked on the front door but there was no response. Shortly after, Mr and Mrs Drinkwater both went to Ms Wiseman’s house but again received no response, albeit they say they could hear Ms Wiseman inside the house. Ms Wiseman never returned to work this day and did not communicate at all with Mr and Mrs Drinkwater.

[15] The next day, Friday 13<sup>th</sup> February, was a rostered day off for Ms Wiseman. Mr Drinkwater says that late this evening he received a cell phone text from Ms Wiseman along the lines of: “*hey, do you want me back at work tomorrow.*” Mr Drinkwater says that he didn’t respond to the text as Ms Wiseman knew that she was rostered to work for the weekend. Ms Wiseman did not turn up for work on Saturday 14<sup>th</sup> or Sunday 15<sup>th</sup> February. Monday 16<sup>th</sup> February was a rostered day off for Ms Wiseman.

[16] Given the failure of Ms Wiseman to turn up for work on the Saturday and Sunday as required, Mrs Drinkwater sought advice from the Department of Labour and the Federated Farmers’ employment lawyer, the outcome being, that a letter was then delivered to Ms Wiseman on 16<sup>th</sup> February 2009. Given that the purpose and content of this letter is contentious, it is produced in full (as written):

“FOR THE ATTENTION OF MISS AMY WISEMAN

A meeting will be held at 6pm on Monday 16<sup>th</sup> February at Ross and Lisa’s house. This will give the chance to give a response to the following allegation.

Following our talk about your attitude to the job and the state of your property on Monday 9<sup>th</sup> February you still went on to do the following

- Ross spoke to you at 7.30am on Thursday 12<sup>th</sup> February about scanning and milking that day your response was you are not going to be late in anyway and then going back into the cow shed and shouting abuse at the cows and not wanting to milk them Ross then asked you to come and speak to Ross and Lisa when you had finished milking you never did so Ross called at the house and knocked several times and asked to speak to you, you did not open the door or give any response so Ross went down home and Ross and Lisa came

up to the property and Ross knocked and asked to speak to again and did not give any response. Also you did not return to work that day

On Friday 13<sup>th</sup> February this was your scheduled day off but you still did not try to contact us apart from a text with a very poor message which to us was inappropriate for this serious situation. On Saturday 14<sup>th</sup> February, Sunday 15<sup>th</sup> February and So far Monday the 16<sup>th</sup> February you still have not contacted us in anyway even after Ross left a message on your phone.

Your faithfully

Lisa Drinkwater

PLEASE NOTE: THIS ALLEGATION COULD RESULT IN DISMISSAL”

- [17] In a submission for Ms Wiseman, Mr Scott is justifiably critical of the content of this letter as apart from the fact that is badly composed; it is not clear what the allegation is that Ms Wiseman had to answer at the meeting later that day and why dismissal could be a result.
- [18] A meeting did take place at 7:30p.m on 16<sup>th</sup> February. Ms Wiseman had Mr Gardiner with her as a support person. The evidence of Mrs Drinkwater is that Ms Wiseman was unable to explain why she didn't come to work on Saturday 14<sup>th</sup> and Sunday 15<sup>th</sup> February or why she didn't return to work on the morning of 12<sup>th</sup> February. Ms Wiseman accepts that she never gave any explanation for her absence from work on the three days in question. She also told the Authority that she admitted that she should have returned to work on the 12<sup>th</sup> of February.
- [19] The further evidence of Mrs Drinkwater is that during the meeting Ms Wiseman became very angry and said: “*I don't have to put up with this fucking shit.*” The meeting appears to have concluded with no discernable outcome or disciplinary action taken.
- [20] Mrs Drinkwater wrote again to Ms Wiseman on 17<sup>th</sup> February and informed that an inspection of the house occupied by Ms Drinkwater and Mr Gardiner would take place the next day at 9:00a.m. Ms Wiseman was also informed that: “After the inspection a decision will be made on your employment.”

[21] The next day (18<sup>th</sup> February) Mr and Mrs Drinkwater conducted an inspection of the house with Ms Wiseman and a friend present. The evidence of Mr and Mrs Drinkwater is that the condition of the interior of the house was “disgusting”. Mr Drinkwater refers to “cat and dog faeces and urine everywhere” with what was previously new carpet, being ruined. Mrs Drinkwater was so turned by what she saw she vomited after completing the inspection. The Authority has viewed the photos which were taken of the conditions existing within the house. It seems that some of the photos were taken on the day of the inspection and others were taken after Ms Wiseman vacated the premises but nothing rests on this. The evidence is demonstrably clear. The filth and general degradation that existed is indefensible and one is left to wonder how people could live in such foul conditions. Ms Wiseman says that if she had been given the opportunity she would have rectified things but this is not credible, particularly given that she occupied the house for two weeks after her dismissal on notice and made no effort to rectify the squalor before departing. Additionally, the carpet was in such a state it could not be cleaned and had to be replaced. Furthermore, Ms Wiseman had been put on notice on the 18<sup>th</sup> of December 2008 that there would be a house inspection early in 2009. It is accepted by Mr and Mrs Drinkwater that they failed to give Ms Wiseman 48 hours notice of a house inspection as required by her employment contract and the relevant provisions of the Residential Tenancy Act 1986. But, Ms Wiseman consented to the inspection, was present throughout and consented to photos being taken. She told the Authority that her only objection was that photos were taken of the laundry area where personal underwear was in view.

[22] Via a letter dated 22<sup>nd</sup> February 2009, written by Mrs Drinkwater, Ms Wiseman’s employment was terminated on two weeks notice. The evidence is that Ms Wiseman was not rostered on, and did not work, during the notice period and just remained living in the farm house for this period of time. The letter informing Ms Wiseman of her dismissal is long, incoherent and difficult to comprehend. It refers to a variety of matters but the main points raised appear to be:

- (a) The response of Ms Wiseman to Mr Drinkwater when she was informed on 12<sup>th</sup> February that the afternoon milking may be a little later than normal.

- (b) Ms Wiseman shouting abuse in the cow shed after a problem with a cow. No date or time is mentioned but it seems this relates to a matter which was raised at the meeting on 9<sup>th</sup> February.
- (c) The matter of Ms Wiseman not returning to work after breakfast on 12<sup>th</sup> February and her refusal to answer the door when Mr and Mrs Drinkwater came to her house.
- (d) The text sent by Ms Wiseman to Mr Drinkwater on the evening of 13<sup>th</sup> February.
- (e) Reference to a rather vague alleged discussion with a hairdresser concerning Ms Wiseman not being available to work.
- (f) Reference to discussions about other staff members and their hours of work.
- (g) Allegations regarding Ms Wiseman's "appalling attitude to work" and rudeness to staff members and the ITO Training Officer including the "second chance" at an assessment.
- (h) Reference to the house inspection on 18<sup>th</sup> February 2009, the "appalling" condition of the inside of the house, a dog and her pups living there, the laundry stinking of dog excrement and a lack of aeration in the house.

Remarkably, there is no mention of the failure of Ms Wiseman to come to work on Saturday 14<sup>th</sup> or Sunday 15<sup>th</sup> February.

[23] The letter concludes (as written):

"After assessing the situation we have come to the conclusion that it would be better for both parties that Amy is dismissed from her position of farm assistant with Lisa and Ross Drinkwater on 860 Oreipunga Road on Sunday 22<sup>nd</sup> February 2009. Amy Wiseman is been given 2 weeks notice as stated in her contract also she requires to be vacated the house and farm property by Tuesday 10<sup>th</sup> March which gives 14 days which is also stated in her contract or she will be escorted of the property.

Please Note: Wages owing, Holiday pay and grade bonus will be held for the property to be commercial cleaned and carpets replaced if necessary after cleaning. Also any power bills owing and as the bonus was paid up front for the season in December wages will be reduced to cover payment back to Lisa and Ross for the amount of weeks still remaining for the season.

You will need to provide an address for any payslips and wages owing when you vacate the property so I can forward these on."

- [24] The termination of Ms Wiseman's employment was effective immediately on 22<sup>nd</sup> February 2009 as she was not offered any further work for the two week notice period.

## **Analysis and Conclusions**

### **The Dismissal**

- [25] The law applying to how a troublesome employee such as Ms Wiseman should be treated in such circumstances is well established. When determining the justification (or otherwise) for the dismissal of an employee in circumstances such as those faced by the parties in this case, the Authority must examine both the procedural and substantive aspects of the dismissal and then apply the test of justification provided by s.103A of the Employment Relations Act 2000 ("the Act").
- [26] It has been submitted for Ms Wiseman that her dismissal was unjustified as there had not been a formal procedure or any warnings put in place in regard to her overall performance, including the care of her accommodation. I accept that this is largely correct, albeit I find that Ms Wiseman did receive at least one verbal warning relating to her failure to turn up for the ITO assessment. I also have no doubts that Ms Wiseman was fully aware that Mr and Mrs Drinkwater were most dissatisfied with her attitude to her employers, her work, other staff and the neglectful lack care of her accommodation. The general attitude displayed by Ms Wiseman was that she was: "*Not putting up with this shit.*" She carried this attitude over to the investigation meeting where she was quite forthcoming about her views of Mrs Drinkwater in particular.
- [27] Nonetheless, clause 19 of the employment agreement which the parties signed up to is quite specific in regard to the application of disciplinary and dismissal procedures in that at sub-clause 19.3 it states that:
- "Should the employer have cause to warn the Employee in regard to the Employee's misconduct or substandard performance, the Employer shall advise or confirm such warning in writing particularising the details of the misconduct or substandard performance, and that the Employee's employment is in jeopardy if the misconduct is repeated or the substandard performance is not adequately addressed."

And at sub-clause 19.4:

“If the Employee is warned in regard to misconduct or substandard performance, the Employer shall advise the Employee how the Employee’s performance should be addressed and the Employer shall give the Employee a reasonable time within which to attain the required standard.”

[28] The First Schedule of the employment agreement sets out various categories of serious misconduct which may give rise to summary dismissal following an assessment of the facts and a “full and fair” investigation. None of the misdemeanours of Ms Wiseman appear to fall into the serious misconduct category, rather they fall squarely into examples of; “acts or omissions which may, after appropriate warnings” lead to dismissal; i.e:

- “persistent failure to achieve performance standards;
- the use of abusive, obscene, or threatening language to another person in the workplace;
- unauthorised absence from duty;
- failure to maintain the accommodation in a reasonably clean and tidy condition.”

[29] Apart from the failure of the employers to recognise the provisions of the employment agreement, the minimum requirements in regard to procedural fairness are well recognized. They are:

1. Notice to the employee of the specific allegations of misconduct to which the employee must answer and of the likely consequences if the allegation is established;
2. An opportunity which must be real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or to mitigate his or her conduct; and
3. An unbiased consideration of the employee’s explanation in the sense that the consideration must be free from predetermination and uninfluenced by irrelevant considerations.<sup>1</sup>

[30] Unfortunately, the employers in this case failed at step one of the above criteria. Ms Wiseman was not given any notice at all of the allegations of

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<sup>1</sup> *NZ (with exceptions) Food Processing etc IUOW v Unilever* [1990] 1 ERNZ 35, at p.46.

misconduct or the likely consequences, let alone given an opportunity to obtain representation and/or explain or mitigate her conduct, or receive an unbiased consideration of anything she may have had to say in her defence.

[31] Given the above findings I am bound to find that the dismissal of Ms Wiseman was substantively and procedurally unfair and therefore unjustified. She has a personal grievance.

### **Remedies**

[32] Having determined that Ms Wiseman has a personal grievance, pursuant to s.123(1) of the Act, the Authority may provide various remedies. Furthermore, pursuant to s.124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided:

- “(a) consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.”

[33] I have to say that I gave serious consideration as to whether or not, given the derogatory attitude and generally destructive behaviour of Ms Wiseman, the employment relationship was capable of being terminated on the grounds that the essential qualities of trust and confidence had been so damaged by Ms Wiseman as to be deemed no longer viable. Indeed, I sought submissions from the parties on this very point. However, given the overall analysis, I have concluded, by a narrow margin, that matters were not quite at this stage. However, Ms Wiseman’s contribution to the situation which gave rise to the situation was substantial and must be taken into account by a reduction in remedies accordingly. I take into account that Ms Wiseman:

- (i) sent an abusive text to another employee on 10<sup>th</sup> February;
- (ii) swore at her employers at a meeting on 16<sup>th</sup> February and was generally belligerent and uncooperative;
- (iii) failed to return to work on 12<sup>th</sup> February 2009;
- (iv) failed to come to work at all on 14<sup>th</sup> and 15<sup>th</sup> February without good reason;

- (v) had extra animals living in her house including a dog and pups in breach of her employment agreement (clause 10.10); and
- (vi) failed to maintain the accommodation provided by her employer in a reasonably clean and tidy condition as required by the terms of her employment agreement (clause 10.8) plus the degradation which existed was extreme.

[34] Had it not been for the possibility that some of the behaviour of Ms Wiseman may have been corrected, or she would have put on notice that her continued employment was in jeopardy, if the employers had taken appropriate action under the disciplinary procedures provided by the employment agreement (clause 19), and that there was no procedural fairness at all accorded to Ms Wiseman in regard to the manner in which her dismissal was implemented, with the additional fact, that Ms Wiseman forfeited her final pay in order to rectify the damage to caused to the accommodation, I would have found that her contribution was such that she is not entitled to any remedies. In the round I assess her contribution to the events that gave rise to the personal grievance at 80%.

#### *Reimbursement of lost wages*

[35] Ms Wiseman was engaged under a seasonal fixed term agreement which expired on 31<sup>st</sup> May 2009. She is seeking full reimbursement of wages from the time of her dismissal until this date. Taking into account the two weeks notice, this is a total of 12 weeks at \$615.38 per week being \$7,384.56 (gross). There was very little evidence of Ms Wiseman's attempts to mitigate her losses but she told of earning "about" \$300 while employed as a relief milker; a loss of \$7,084.56 - which shall be reduced by 80% - leaving a residue of \$1,416.91. An order for this amount will follow.

#### *Compensation*

[36] Ms Wiseman claims the sum of \$20,000 as compensation for hurt and humiliation arising from her dismissal. Apart from the unrealistic nature of this claim given the circumstances of this case, I have seen no evidence at all of any hurt or humiliation being visited upon Ms Wiseman. On the contrary, my observations of Ms Wiseman were that the events pertaining to her loss of employment had been shrugged off with little care or concern at all. I decline to make any order under this head.

### **The claim for outstanding wages and holiday pay**

[37] Ms Wiseman claims the sum of \$3,624.73 comprising wages and holiday pay which she says was withheld by Mr and Mrs Drinkwater in order to rectify the damage to her accommodation. Ms Wiseman also says that she is entitled to payment for the two weeks notice she was given upon the termination of her employment.

[38] Mr and Mrs Drinkwater say that they have retained the sum of \$3,394.22 comprising pay for 5 weeks (and holiday pay), which includes the notice of two weeks. They say that they are entitled to withhold this sum under the terms of the employment agreement (clause 10.9) as the damage to the accommodation was not due to fair wear and tear. I agree. The replacement of the carpet cost \$4,890 and there was also the cost of commercial cleaning (clause 10.11) of \$950, making a total expenditure of \$5,840.00. Even with the retention of Ms Wiseman's final pay there is a shortfall of \$2,446. It follows that Ms Wiseman has no entitlement to the sum she is claiming.

### **Determination**

- [39] (a) I find that Ms Wiseman was unjustifiably dismissed. She has a personal grievance.
- (b) Pursuant to s.123(1)(b) of the Employment Relations Act 2000, Mr and Mrs Drinkwater are to pay to Ms Wiseman the gross sum of \$1,416.91 as reimbursement of lost wages.
- (c) Ms Wiseman has no further entitlements.

**Costs**

[40] Given the overall outcome of this case it is appropriate that costs should lie where they fall.

**K J Anderson**

**Member of the Employment Relations Authority**