



never completed and was then subject to a restructuring process during which his job was identified as surplus to requirements.

[4] The issues for this determination are:

- Were one or more conditions of Mr Corporaal's employment affected to his disadvantage by an unjustifiable act of the respondent?
- Was Mr Corporaal dismissed by an unjustifiable action of the respondent?
- Did Mr and Mrs Catley breach their obligations of good faith toward Mr Corporaal?
- What, if any, remedies should follow?

### **Disadvantage Grievance**

[5] Mr Coporaal claims he was disadvantaged in his employment by the unjustified actions of Mr and Mrs Catley. He claims the Catley's fabricated allegations about his performance which then became common knowledge in their local community. He claims the Catley's stole a pig from him, withheld wages and bonuses, and breached oral terms of their agreement by not providing a cattle beast.

[6] I am required to examine the actions of Mr and Mrs Catley in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[7] I must scrutinise Mr and Mrs Catley's actions and ascertain whether their actions have led to one or more conditions of Mr Corporaal's employment being affected to his disadvantage. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

*Resignation*

[8] On 4 February 2008 Mrs Catley advised Mr Corporaal that her brother Paul had told her Mr Corporaal was leaving his employment to take up a new job. Mrs Catley asked Mr Corporaal to clarify whether he was taking the new job as he was required to provide three weeks notice of termination of employment and he was about to commence a period of 12 days leave.

[9] Mr Corporaal says he told Mrs Catley he was not leaving. Mrs Catley, however, says Mr Corporaal indicated he was resigning and she was simply requesting that Mr Corporaal confirm his resignation in writing. I don't accept that Mr Corporaal was clear that he was leaving. Notes provided to the Authority and confirmed by Mrs Catley at the investigation meeting show that there was certainly an understanding by Mrs Catley that Mr Corporaal was probably leaving, however, Mr Corporaal did not outright deny he was leaving.

[10] Mr Corporaal advised Mrs Catley that he wanted to work towards the end of the season and that he would think about what he was doing while he was on holiday over the next twelve days.

[11] When Mr Corporaal returned to work from his holiday, on 20 February, Mrs Catley, who was under the misapprehension that Mr Corporaal was resigning from his employment, met with Mr Corporaal to discuss his leaving. This meeting took place on 21 February 2008.

[12] Notes of that meeting, which were largely confirmed by Mr Catley at the investigation meeting, show that Mr Corporaal made it clear he was committed to the job and he intended to continue working for the Catley's.

[13] Mr Corporaal produced a letter to the Authority, dated 21 February, which Mr Corporaal says he handed to the Catley's at the meeting but which the Mr and Mrs Catley say they never received. The letter confirms what Mr Catley confirmed at the investigation meeting, which was that during the meeting Mr Corporaal was clear that he intended to remain in his job.

[14] I am satisfied that as at 21 February Mr Corporaal had not resigned from his employment and had been clear with his employers that he intended to remain in employment until at least mid May 2008 at which time discussions relating to the following season were to take place.

*Performance issues*

[15] The employment agreement between the parties provided for a process for dealing with misconduct or substandard performance. That process required, at clause 19.4 of the employment agreement, for the Catley's to advise Mr Tiemen, with regard to substandard performance, how his performance should be addressed and that he would be provided with a reasonable time frame within which to attain the required standard. The standard for dealing with alleged poor performance is also well-established in case law (see *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659).

[16] Ms and Mr Catley held concerns about Mr Corporaal's performance which required addressing. Ms Catley first intimated to Mr Corporaal that there were issues with his performance when she advised him during their conversation on 4 February regarding the possible resignation, that she felt that while Mr Corporaal was being paid a Farm Managers salary, he was only operating at the level of a Herd Manager.

[17] Then during the meeting on 21 February following Mr Corporaal's return from Annual Leave, Mrs Catley unwisely advised Mr Corporaal that if he wouldn't resign, she could get rid of him for misconduct. Ms Catley then discussed issues of misconduct and poor performance and referred to a calf dying of dehydration, calves escaping into the neighbours and heifers escaping onto the road. Mrs Catley also reiterated what she had told Mr Corporaal on 4 February that in her view Mr Corporaal was not doing a good job. The meeting ended after it was agreed that the parties were "going around in circles".

[18] On 22 February 2008 Mrs Catley wrote to Mr Corporaal setting out concerns which she considered constituted misconduct. The list of concerns included:

- Refusal to undertake the following duties:
  - fence repairs (insulators) at the run off;
  - water blasting cowshed and house;

- using a grader blade to scrape out calf pens and tidying up maize pad; and
- removing calf pen and maize pad material to a waste area.
- Not repairing the fences which allowed stock to escape onto the main road, and 23 head of weaned calves were subsequently found in the neighbours property;
- Animal abuse which lead to injury and death of stock with specific reference to a calf referred to as “calf 35”.

[19] On 25 February 2008 a second letter outlining the same concerns as those listed in the 22 February letter was sent to Mr Corporaal. This letter acknowledges that the issues relate mainly to poor performance, but identifies that the issues relating to the animal abuse and the escaping stock could be considered serious misconduct. Mr Corporaal is advised that dismissal is a possibility.

[20] The parties met on 29 February. The full extent of Mr Corporaal’s response was to admit that some of the issues raised in the letters had occurred while denying there was any misconduct or poor performance on his part.

[21] On 4 March Mrs Catley wrote once again to Mr Coporaal offering him a second opportunity to put forward his explanations to the concerns raised in the letters of 22 & 25 February. Mr Corporaal was advised that in the absence of any explanation a decision adverse to him, may be taken. The tenor of the letter indicates that Mrs Catley was under the misapprehension that Mr Corporaal had not responded or worse, had refused to respond to the allegations at the first meeting on 29 February. In fact, Mr Corporaal had responded at the meeting on 29 February, albeit not in any detail. As stated earlier he accepted some of the issues raised in the letters of 22 and 25 February had occurred but denied any serious misconduct or poor performance on his part.

[22] The second meeting was to take place on 7 March, however, unbeknown to Mr Corporaal a letter had been dispatched by the Catley’s but not received by Mr Corporaal, changing the meeting date and time. Mr Corporaal was unhappy, when after waiting on 7 March for about 30 minutes, Mr and Mrs Catley failed to show. He made telephone contact with Mrs Catley and quite rightly, suggested she could have telephoned to advise that the meeting date and time needed to be changed.

[23] The parties eventually met again on 10 March. At this meeting Mr Corporaal read out a pre-prepared statement. Both Mr Corporaal and his partner made it clear to the Catley's that they would not meet again with just the four of them, but that any future meetings would be in the presence of a Department of Labour mediator. At the end of the meeting Mr Corporaal was provided with a list of jobs which were to be completed by the end of the week. The meeting appears to have ended amicably with Mr Corporaal agreeing to complete the list of tasks.

[24] Mr Corporaal says Mrs Catley only raised her concerns with him, after they had heard he was looking for alternative employment and had refused to resign. However, I am not satisfied that is how things occurred in reality. Certainly the letters raising the performance issues were written after the 21 February meeting where Mr Corporaal made it clear he was not resigning, however, the notes produced to the Authority by Mr Corporaal show that his performance was an issue for Mrs Catley as early as 4 February when she first questioned Mr Corporaal as to whether he was intending to resign.

[25] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Mr and Mrs Catley's actions disadvantaged Mr Corporaal in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act (see *Mason v Health Waikato* [1998] 1 ERNZ 84).

[26] Disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000).

[27] I find Mr Corporaal's employment was not affected to his disadvantage. While he was subjected to a number of meetings and letters which consistently identified performance and misconduct issues no disciplinary or other action was taken by Mr and Mrs Catley. What did happen was that lists were developed each

week to identify the tasks which Mr Corporaal was then required to undertake. No issue has been taken with the making of the lists. Indeed, during the remainder of his employment, Mr Corporaal has recorded that he made contact with Mrs Catley on a regular basis and discussed with her what jobs he could complete and those he couldn't.

*Withheld wages and bonus payment*

[28] Following the ending of the employment relationship Mrs Catley wrote to Mr Corporaal setting out his final wages due to him, including the bonus he was due and setting out items for which money had been withheld pursuant to clause 21.3 of the Employment Agreement.

[29] At the investigation meeting Mr Corporaal conceded that he had to pay the rent deducted from his final pay. However, I am satisfied that deductions in the amount of \$717.61 should not have been made to Mr Corporaal's final pay. The items making up the \$717.61 were all items supposedly not present or accounted for when Mr Corporaal left the accommodation provided to him while working for the Catley's. The Property Inspection Report completed on 3 May 2008 indicates that some items were present while the Report does not list or record other items as being part of the property inspection.

[30] The deductions were made after the end of the employment relationship so this action does not contribute to the claim for disadvantage. However, I have found the deductions were made unlawfully and therefore the Catley's are ordered to pay to Mr Corporaal the sum of \$717.61 gross wrongfully deducted from his final pay.

*The stolen pig*

[31] In his submissions Mr Corporaal accepts that the Catley's paid for all three pigs which Mr Corporaal looked after. Mr Corporaal claims one of the pigs was supposed to come to him.

[32] During a conversation with a recently employed worker, Mr Willie Ellis, Mr Ellis accepted that he had taken a pig and had killed it for the Catley's.

[33] The employment agreement signed by the parties at the commencement of the employment relationship does not touch on the topic of pigs. However, there is no dispute that Mr Corporaal was entitled to one of the pigs if he looked after them. I find Mr Corporaal carried out his end of the bargain and that he is entitled to receive a pig from Mr and Mrs Catley.

#### *Provision of a beast*

This is another claim which is not contained in the employment agreement and which Mr Corporaal claims was owed to him. The onus of proof lies with Mr Corporaal in the first instance. He has failed to demonstrate that there was an agreement that he be provided with a beast and therefore this claim fails.

#### **The redundancy**

I am required to scrutinise Mr and Mrs Catley's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart* [2006] 1 ERNZ 825).

[34] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Mr Corporaal redundant and otherwise act in a way that was not likely to mislead or deceive him, that is, in good faith?

#### **Was the redundancy genuine?**

[35] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[36] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business

operations will function including decisions to make positions or employees redundant.

[37] A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739).

[38] Section 4 of the Employment Relations Act 2000 requires Mr and Mrs Catley to deal with Mr Corporaal in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[39] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[40] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of consultation in the context of redundancy and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[41] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an

employee for redundancy is "...tainted by some inappropriate motive..." and the redundancy is "...masking another and different reason...", the worker will have a valid grievance (*Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40).

[42] The employment agreement between the parties requires three weeks notice to be given by either party to terminate the employment relationship including in the case of redundancy. Clause 21.4 provides that where accommodation is provided as part of the employment agreement, notice to terminate the agreement is deemed to also be notice to vacate the accommodation.

### *Genuineness*

[43] The Catley's Tokoroa farm had been badly affected by drought and the herd in Whakatane was not performing to expectations. It was the undisputed evidence of Mr and Mrs Catley that milk production on both farms was low and income levels had decreased significantly while expenses had increased disproportionately.

[44] In January 2008 the Catley's approached Mrs Catley's mother, Mrs Kitty Knight, by email with a view to Mrs Knight providing some financial relief for them for a twelve month period. The proposal was for Mrs Knight to take on the ownership and management of the herd at Whakatane and in return the Catley's would oversee the management of the herd on Mrs Knight's behalf.

[45] Mrs Knight accepted the proposal and it was agreed the herd would be sold and the share milking agreement would end on 1 May 2008.

[46] Mr Corporaal was on notice that the financial performance of the farm was not meeting expectations. During the meeting on 21 February to discuss the possibility of his resignation, Mr Catley also alluded to the prospect that the structure of the farm may change, something Mr Corporaal acknowledged had been discussed when he was interviewed for the job.

[47] Further, during a telephone conversation with Mrs Catley on 25 February, Mrs Catley informed Mr Corporaal that she was disappointed with production levels. Mr Corporaal did not deny the production levels were low but attributed the low

production levels to factors such as lack of fertiliser, high pregnancy rate and the drought which was affecting everyone.

[48] I am satisfied that the decision to make financial savings resulting in the cancellation of the share milking agreement relating to the Whakatane farm was a genuine commercial decision in the circumstances. It therefore follows, that the need for the restructuring was genuine.

*Process*

[49] The Catley's were aware of the financial issues they faced as early as January 2008. This was when they put the proposal to Mrs Knight. While it is not clear when the agreement was reached, I am satisfied it was before the end of February 2008.

[50] On 16 March 2008 the Catley's wrote to Mr Corporaal advising that it was possible that they may sell their herd and that if that happened, Mr Corporaal's position would no longer be necessary. A meeting was to have occurred on 20 March, however, it was common ground at the investigation meeting that that meeting never took place. I am satisfied that by this time communication lines between Mrs Catley and Mr Corporaal were suffering markedly and the employment relationship was deteriorating quickly.

[51] On 25 March Mrs Catley wrote to Mr Corporaal and once again advised him that a decision was imminent regarding the selling of their herd with effect from 1 May 2008. Mrs Catley invited Mr Corporaal to attend a meeting with her and Mr Catley to ask any questions, alternatively Mr Corporaal was invited to make contact by telephone or in writing.

[52] By this time, Mr Corporaal had already secured alternative employment but had chosen not to advise his employers. At the investigation meeting Mr Corporaal admitted that he had received an offer of employment and had accepted that offer some time in mid March. He told me he did not want to tell the Catley's until he really had to.

[53] Mr Corporaal did not respond to Mrs Catley until 28 March 2008. He did so in two ways. Firstly, he telephoned Mrs Catley and told her he was not interested in discussing something that had not yet been decided. Secondly he wrote to the

Catley's on that same day requesting a meeting with a mediator from the Department of Labour and setting out claims that he was being harassed in his employment and complaining that the behaviour of the Catley's was unfair and unreasonable.

[54] Mrs Catley responded to Mr Corporaal's letter on 4 April agreeing to attend a mediation but requested the mediation take place in Rotorua so that both parties would have a similar distance to travel.

[55] During a telephone conversation on 10 April regarding farm matters, Mrs Catley asked Mr Corporaal if he wished to take annual leave or have a break before he left on 1 May. Mr Corporaal said he would think about it and get back to her.

[56] On 11 April Mr Corporaal rang Ms Catley and requested that she confirm in writing the decision to sell the herd.

[57] From the notes provided to the Authority it is clear to me that Mrs Catley did not wish to confirm the sale of herd to Mr Coporaal until such time as they had had the opportunity to meet and discuss the issues. However, Mr Corporaal seemed intent on only acting on written advice that the herd would be sold. On 14 April Mr Corporaal rang Mrs Catley. According to Mr Corporaal's undisputed notes, that conversation went like this (verbatim):

I rang Megan to once again request a letter from her detailing the sale and what it means for me. Megan says I should have met her to discuss. I interrupted her and told her to send letter if she is saying we have to leave on 1 May 2008. She reluctantly says she will send letter.

[58] By letter dated 13 April the Catley's advised Mr Corporaal their understanding that Mr Corporaal no longer felt the need to meet with a mediator present and provided him with 2 ½ weeks notice of the termination of his employment. At the same time Mr Corporaal was instructed to vacate the farm house on his last day of employment, being 30 April 2008. This notice was not in accordance with the employment agreement which required three weeks notice.

[59] Mr Corporaal wrote back on 22 April 2008 and advised he did not receive the letter dated 13 April until Saturday 19 April. He disputed that the Catley's had sold their herd and requested proof that they had indeed sold it. He also denied that

he had told the Catley's that a meeting was not necessary and confirmed that he had arranged a mediation to take place on 9 May.

[60] After receipt of Mr Corporaal's letter Mrs Catley wrote back to him and instructed Mr Corporaal to cease work immediately. Mrs Catley advised Mr Corporaal that she would be taking over the farm work herself. Mr Corporaal was instructed to leave all farm property in the milk room for Mrs Catley.

[61] I record here concerns I have about the conduct of both parties to this employment relationship problem. Firstly, Mr and Mrs Catley made it clear to me that they only embarked on the formal disciplinary/poor performance process to "...cover their arse...". Secondly, I am satisfied the Catley's were aware as early as February 2008 that they would be selling their herd and the share milking agreement would end on 1 May 2008, however they did not begin consulting with Mr Corporaal until 16 March 2008. By this stage, the decision had already been made and Mr Corporaal was denied the opportunity to have any input into the proposal.

[62] Thirdly, I have concerns over the appointment of Mr Ellis. Initially Mr Ellis was engaged to undertake work for Mrs Knight on the Whakatane farm. When that role was completed Mr Ellis then worked for the Catley's on their Tokoroa farm which was approximately mid March. Further Mrs Catley advised Mr Corporaal at the meeting on 21 February that she had found Mr Ellis and that it was her intention that Mr Ellis would replace Mr Corporaal. It was common ground that following the termination of Mr Corporaal's employment, Mr Ellis approached Mr Corporaal enquiring as to when he could move into the farm accommodation.

[63] In all the circumstances of this case Mr and Mrs Catley have failed to act as a fair and reasonable employer. The Catley's embarked on a consultation process which was in effect a sham. The decision to sell the herd and end the share milking agreement had been made well before 16 March 2008. The Catley's failed to provide the specified notice from the employment agreement and then, before Mr Corporaal could work out his notice period, he was summarily dismissed without notification of what had prompted that decision, nor any opportunity to refute the issues that led to the decision.

[64] I find that while the restructuring was carried out for genuine commercial reasons, the way the Catley's went about implementing the restructuring makes the dismissal by reason of redundancy unjustified.

### **Good faith**

[65] This employment relationship deteriorated from the day the Catley's found out Mr Corporaal may have accepted an alternative job. Mr Corporaal has made a general claim of breach of good faith and I am satisfied that with respect of their good faith obligations pursuant to section 4 of the Act, the Catley's are in breach.

[66] Good faith of course, is a two way street. The cause of the difficulties arising in communication and conduct between the parties in this case must be shared. Mr Corporaal himself, engaged in misleading conduct when he kept from the Catley's the fact that he had been offered and accepted alternative employment in mid March.

[67] I find that in all the circumstances of this case, no penalty should be imposed for a breach of good faith.

### **Remedies**

[68] This was a genuine redundancy. Mr and Mrs Catley were experiencing significant financial difficulties and had to seek the financial assistance of Mrs Knight who, in consideration for the herd and the cancellation of the share milking agreement at the Whakatane Farm, took over the payments of Mr and Mrs Catley's mortgage. It follows that Mr Corporaal can not be compensated for the loss of his job. However, he can be compensated for the failure by Mr and Mrs Catley to act fairly and reasonably in implementing their decision to restructure their business.

[69] Taking all relevant factors into consideration I set the level of compensation at \$3,000.

### **Consideration**

The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr Corporaal contributed towards the situation that gave rise to his

personal grievance, and if those actions so require, to reduce the remedies. I am satisfied Mr Corporaal has not contributed to the actions giving rise to his personal grievance. It follows that the remedies awarded to Mr Corporaal will not be reduced.

### **Summary of orders**

[70] Mr and Mrs Catley are ordered to pay to Mr Corporaal the sum of \$717.61 gross, wrongfully deducted from his final pay.

[71] Mr and Mrs Catley are ordered to pay to Mr Corporaal the sum of \$3,000 without deduction, pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[1] Costs are reserved. Given that both parties achieved a modicum of success I am of a mind to let costs lie where they fall. However, I encourage the parties to resolve the matter of costs between them. If the parties fail to reach agreement on the matter of costs, Mr Corporaal may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority