

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 374
3031773

BETWEEN EDWARD PIRIWIRITUA
TE MOANA EMERY
Applicant

A N D TIROA E and TE HAPE B
TRUST
Respondent

Member of Authority: T G Tetitaha

Representatives: E Emery in person
R Drake, Advocate for Respondent

Investigation Meeting: 13 and 14 November 2018 at Hamilton

Submissions Received: 14 November 2018 from Applicant
14 November 2018 from Respondent

Date of Determination: 22 November 2018

DETERMINATION OF THE AUTHORITY

- A. Edward Emery was unjustifiably dismissed by the Tiroa E and Te Hape B Trust.**
- B. Mr Emery was not unjustifiably disadvantaged by the suspension.**
- C. Edward Emery was unjustifiably disadvantaged by the Trust's requirement he undergo a work assessment or work trial during his notice period.**
- D. The counter claim is dismissed.**
- E. I decline to reinstate Mr Emery.**
- F. I decline to award any lost wages because he has not mitigated his losses.**

G. Tiroa E and Te Hape B Trust is ordered to pay Edward Piriwiritua Te Moana Emery the sum of \$2,000 compensation. The payment is to be made within 28 days of the Determination.

H. There is no order of costs given Mr Emery was unrepresented at hearing.

Employment relationship problem

[1] Edward Piriwiritua Emery was dismissed for redundancy following a restructuring. He alleges this action and the imposition of a suspension and work trial were unjustified.

Relevant Facts

[2] Tiroa E and Te Hape B Trust (“Trust”) is an Ahuwhenua Maori land trust comprising two blocks of farmland known as Tiroa E and Te Hape B. The Trust operates a farming business upon these blocks. There are seven trustees in total. The current chairperson is Rowyne Yeatman. Mr Emery and his whanau are beneficiaries of the Trust.

[3] Mr Emery became involved with Trust in 2010. A former trustee of the Trust had offered him a vacant house upon the land in or around 2010 without consulting his fellow trustees. A number of issues then arose between Mr Emery and the Trust.

Offer of Employment 2011

[4] Some of these issues may have resolved themselves by an offer of employment to Mr Emery in 2011. He signed an employment agreement in 2011.

[5] Mr Emery alleges he was promised a “job for life” but the signed employment agreement does not reflect this. Mr Emery produced at hearing minutes of the meeting in 2010 that records how he came to occupy a Trust house. These do not refer to his employment or any “job for life”. They do however refer to matters that raise concerns about Mr Emery’s propensity for violence.

August IEA

[6] Between 2011 and 2014 further issues arose between Mr Emery and the Trust. Paul Thackray was appointed as the liaison between the Trust and Mr Emery. He drafted a further employment agreement. His evidence was that the intention of the

employment agreement was to provide better definition of Mr Emery's responsibilities on the farm. Mr Emery signed this agreement on 7 August 2014 (the August IEA).

[7] The August IEA set out a number of terms and conditions pertaining to his role as a "caretaker (kaitiaki)/general hand". The kaitiaki role was summarised in Appendix 2 by the single paragraph below:

Primary Purpose of Position – Caretaker (Kaitiaki)

The caretaker is responsible for maintaining the general appearance of roadside verges & entries to Tiroa/Waipā Station and Te Hape Station. In addition to this role the caretaker is responsible for the up-keep of Waahi Tapu areas. Nga Whenua Rahui areas and Riparian planting along streams and rivers is another task that the caretaker will undertake. The caretaker will assist in environmental issues pertaining to the business.

[8] In contrast the role of General Hand listed a number of activities over two pages. Although no time was allocated to the performance of each role, it is clear from the job description that the majority of time in this position was intended to be on general hand duties.

[9] The agreement also included a "Memorandum of Service Tenancy" that provided accommodation in a house on the Trust property at a reduced rent of \$100 per week. This was deducted from his salary.

[10] This agreement replaced "any previously expressed, implied or written contractual terms or provisions (including those implied by custom and practice) that may have existed prior to the date of this agreement coming into force" (clause 1.3).

[11] This included replacing any previously agreed term about a job for life. There was now provision for **termination** upon medical grounds; serious misconduct; abandonment of employment and redundancy. Upon termination all Trust property was to be returned.¹

[12] The employee was entitled to four weeks' notice of termination of employment unless summarily dismissed. Payment could also be made in lieu of working out the notice period.²

¹ August IEA clauses 9.6.1; 9.3.2; 9.3.6; 9.3.7; and 24.

² August IEA clauses 9.3.5, 9.5, 24.5 and Appendix One.

[13] The Trust had the contractual right to suspend an employee on pay pending resolution of a disciplinary procedure and to suspend prior to summary dismissal.³

[14] Performance and pay reviews were to occur ideally twice annually in October and February.⁴

Events leading to termination

[15] Both parties agree this employment relationship was far from harmonious.

[16] On 16 October 2015 Mr Emery sustained a work injury. He required surgery and did not return to work until mid-January 2017. He received ACC during this period of time and provided the Trust with various medical certificates. By January 2017 he was assessed as being fit to return to work.

Restructuring

[17] During this period Rowyne Yeatman was appointed Chairperson. She had been undertaking a review of the Trust's farming business. This included Mr Emery's role. From her investigations she found he was undertaking very few (if any) general hand duties and spending no more than 1-2 days per fortnight on kaitiaki duties.

[18] The Trust's primary business is farming. The payment of a fulltime worker to undertake kaitiaki duties 2 days per fortnight and no general hand duties was unsustainable. There was insufficient kaitiaki work to justify a paid role for the kaitiaki role.

[19] She took advice. Her advisor told her the kaitiaki position needed to be restructured and assisted with the drafting of a restructuring proposal. Ms Yeatman met with Mr Emery on 13 February 2017 and handed him the proposal to restructure his role.

[20] The proposal provided for the disestablishment of his current role undertaking only kaitiaki duties. This was to be replaced with "a new form of general hand role where approximately 85% - 90% of the role would be associated with the undertaking of general farm hand duties and the remaining 10% - 15% of the role would maintain

³ August IEA clauses 9.4.5 and 9.5.2(c).

⁴ August IEA clause 23.

some kaitiaki functions.” The kaitiaki function was to take no more than one day in each seven day period.

[21] The rationale for the restructuring was that the greater amount of time required was for the farm hand role not the kaitiaki and given his employment history has been “characterised by periods of ACC and the stated inability to undertake a number of physical activities usually associated with the general hand role” the kaitiaki function by default has “significantly outgrown the amount of time ... spent on general farm hand functions.” The kaitiaki function on other Trust lands of greater acreage required significantly less time than the amount spent by Mr Emery in the current role. Mr Emery was to be offered first right of refusal to the appointment as the general farm hand role if the restructuring occurred.

[22] Ms Yeatman met with Mr Emery and Paul Thackray on 28 February 2017 to discuss the proposal but little feedback was able to be obtained. Mr Emery insisted on receiving minutes from various meetings with trustees in 2010 or earlier before he would provide feedback.

[23] It is accepted no minutes were provided. The relevance of these minutes to the proposed restructuring remains unknown. The 2010 minute Mr Emery provided to the Authority had no relevance to his employment at all.

[24] The restructuring process continued without receiving any feedback from Mr Emery. Several attempts by Ms Yeatman to meet with Mr Emery were rebuffed or ignored.

Suspension

[25] Around 15 March 2017 the Trust had received verbal and written complaints from two managers and their wives about intimidation and harassment by Mr Emery.

[26] The Trust wrote to Mr Emery on 27 March 2017 regarding an investigation into his behaviour towards other employees and their families. The complaints were of harassment, intimidation and threats as well as feeling unsafe around him. The letter proposed suspension. He was asked to provide a reply to the proposal by 29 March 2017.

[27] On 30 March 2017 the Trust wrote to Mr Emery confirming they were imposing a paid suspension. During the period of suspension he was directed not to enter into any part of the Trust's farms without the prior permission of Trust's chairperson (except the areas immediately associated with his accommodation) and not to make contact with any employee or family member in relation to any matter associated with the employment or complaint.

Termination

[28] On 6 April 2017 Mr Emery was advised his existing role had been disestablished and replaced with two new roles. These were a full time farm hand and a casual kaitiaki role for one to two days per fortnight. The basis for the proposed restructure was that they no longer required a full time caretaker (kaitiaki) and had a genuine need for a role primarily supporting the farm manager in the day-to-day activities of the farm.

[29] The letter gave four weeks' notice of the termination of his employment effective immediately.

[30] The Trust then proposed to commence a recruitment process to appoint a full time general hand and part time kaitiaki roles. He was asked to apply within seven days if interested.

[31] The letter then went on to talk about the investigation. It recorded that he was still being subjected to a formal investigation process about the complaints by staff.

[32] Given the decision to disestablish his existing role with immediate effect the period of formal suspension was now no longer required. It noted that if he is appointed to either of the new roles a period of suspension may be implemented prior to him commencing work. That suspension would apply until the investigation and potential disciplinary proceedings concluded.

Work trial

[33] On 28 April 2017 Mr Emery was offered the job of general hand subject to Mr Emery "satisfactorily completing a one (1) week physical assessment process in which he will be required a full range of typical duties associated with the general hand role." The letter then attached the range of responsibilities he may be asked to

complete during the one week assessment process. It is accepted that most of the responsibilities set out therein were the same or similar to those of the general farm hand role in the August IEA.

[34] Mr Emery undertook a five day trial with Wayne Fraser. Mr Fraser was one of the complainants about his behaviour in the disciplinary process. Mr Fraser was happy to continue to working with Mr Emery. The other manager and families involved in the complaint were not.

[35] Mr Fraser reported on 9 May about the work trial to another farm consultant. The outcome was not favourable. There were inexplicable absences during the working day; slow completion or no work being done as directed. Unless managed closely he displayed deliberate avoidance of work. There was also an incident with his farm bike that was not reported as required. The above concerns were provided to Mr Emery's representative whom provided a reply. Further information was then provided by the farm manager.

[36] On 9 May 2017 the Trust's representative sent Mr Emery's representative a letter stating it had no confidence and trust to appoint Edward to this role on a permanent basis. The offer of employment was withdrawn. The Trust could not redeploy Mr Emery and confirmed termination of his employment. He was then asked to vacate the accommodation.

[37] No further action was taken in respect of the investigation of the complaints.

[38] Mr Emery subsequently raised a personal grievance of unjustified dismissal and unjustified disadvantage. He then filed a statement of problem. Mediation was directed but failed to resolve the grievances.

Counterclaim

[39] The parties have also been to the tenancy tribunal. Mr Emery refuses to vacate the property. The Trust has now obtained an order from the tenancy tribunal for his eviction. It has also changed the locks on the accommodation. It now seeks to recover its costs in the tenancy tribunal as well as rent arrears of \$6,000.

[40] Immediately prior to the hearing the Trust became aware Mr Emery had retained a motorbike owned by the Trust valued at \$8,000. At hearing Mr Emery

stated he was entitled to retain it to continue his kaitiaki duties. He was unwilling to return it. They sought recovery of the value of the motorbike by way of the counterclaim and/or conditions on payment of compensation.

Issues

[41] The issues for determination were set out in an earlier telephone conference between the parties:

- (a) Was Mr Emery unjustifiably dismissed for redundancy?
- (b) Was Mr Emery unjustifiably disadvantaged by:
 - (i) Suspension in April 2017 and
 - (ii) Offer of an unfair work trial
- (c) Is there a counter claim for rent owed under a service tenancy?

No briefs hearing

[42] Both parties had been directed to file their evidence by the end of October 2018. Neither party had complied with the directions. Mr Emery's solicitor had also withdrawn from acting on his behalf on 30 October 2018. He was unable to give any contact details for Mr Emery.

[43] As a consequence the parties were asked at the start of the hearing whether they wished to continue to hear this matter or seek adjournment. Both parties confirmed their preference to continue to hear the matter on the basis their evidence was the material filed on their behalf and oral evidence to be given at hearing.

[44] Mr Emery confirmed he had received his file from his previous solicitor and was prepared to represent himself. He was assisted at times by a former trustee Paul Thackray (whom also gave evidence on his behalf) and one of the current Trust trustees Hine Moana.

Was Mr Emery unjustifiably dismissed?

[45] Section 103A of the Employment Relations Act 2000 (“the Act”) requires the Authority to decide objectively whether the actions of the employer meet the standard of a “fair and reasonable employer”.⁵

[46] The decision to make an employee redundant following a restructuring must be shown to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee).⁶ In order for a redundancy of an employee following restructuring to be justified, an employer must demonstrate that the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must consider whether the employer met the minimum standards of procedural fairness outlined in s.103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.⁷

[47] There appears to be a misapprehension by the Trust about what has occurred here. Mr Emery had been made redundant following the implementation of a restructuring proposal. Therefore the onus is upon the employer to justify this was a true redundancy situation.

[48] Clause 24 of the August IEA defined what constituted a redundancy situation:

24.1 For the purposes of this agreement, redundancy is a condition in which the employer has staff surplus to requirements because of the reorganisation or the closing down of the whole or any part of the employer’s operations due to a change in plant, methods, materials or products, economic circumstances or like cause requiring a reduction in the number of employees.

[49] Mr Emery’s role clearly continued to exist post restructuring. There was no staff surplus to requirements. His job continued to exist post restructure but was split into two roles. He should have been redeployed to one or other job because they were the same duties he had performed or should have been performing before the restructure had occurred.

⁵ *Grace Accounting Limited v Brake* [2014] ERNZ (CA) at [85].

⁶ See above.

⁷ *Stormont v Peddlethorp Aitken Limited* [2017] NZEmpC 71 at [52].

[50] It was clear there were concerns about his performance. He was just not performing his job as set out in the August IEA because he would not or could not perform any general farm hand duties.

[51] The Trust should have undertaken a performance review pursuant to clause 23 of the August IEA. If he continued to refuse to undertake general farm hand duties, the Trust could have considered disciplinary action.

[52] The redundancy cannot have been genuine because there was no staff surplus. Given there were no genuine reasons for the redundancy, the process leading to his dismissal cannot justify it.

[53] In the circumstances, Edward Emery was unjustifiably dismissed by the Tiroa E and Te Hape B Trust.

Was Mr Emery unjustifiably disadvantaged by his suspension in April 2017?

[54] There is a contractual right for the Trust to suspend Mr Emery under clause 9.4.5 of the August IEA:

9.4.5 If, in the opinion of the employer, the situation warrants it, an employee may be suspended on pay pending the resolution of the matter(s) causing concern.

[55] There is also the power to suspend if the Trust was considering summary dismissal under clause 9.5.2(c). The clause the Trust is operating under to suspend Mr Emery is not stated in its letter dated 30 March 2017.

[56] The suspension required he not enter any part of the Trust's farms without the chairperson's permission and not approach the complainants whom also lived on the farm.

[57] There good reason to suspend Mr Emery from this workplace. One of the complaints alleged he had threatened another Trust farm manager in his home in front of his family. Given the seriousness of the complaints and the contractual right to suspend, suspension was a justified action.

[58] There was no flaw in the process leading to his suspension. Mr Emery was not disadvantaged. He continued to live in his farm based accommodation throughout the period of suspension and received his full pay.

[59] In the circumstances I find Mr Emery was not unjustifiably disadvantaged by the suspension. This disadvantage grievance is dismissed.

Was Mr Emery unjustifiably disadvantaged by offer of a Work Trial?

[60] Given my finding that the redundancy was unjustified, the work trial he was required to undergo during his notice period must also be unjustified. Therefore, he cannot have been fairly placed on any work assessment in those circumstances.

[61] Edward Emery was unjustifiably disadvantaged by the Trust's requirement he undergo a work assessment or work trial during his notice period.

Counter Claim

[62] As indicated to respondent counsel, I do not have the power to order recovery of Residential Tenancy Act rent arrears. Nor can I order the recovery of the Trust's costs spent in the Tenancy Tribunal.

[63] The Trust did not include the lost motorbike as part of its counterclaim due to its late discovery. Therefore I cannot take it into account as part of its counterclaim. I shall address this issue in determining damages.

[64] The Trust can make a Police complaint about stolen property and/or take breach of employment agreement action for non-return of property under clause 9.3.6 August IEA.

[65] In the circumstances, the counter claim is dismissed.

Remedies

[66] Mr Emery has a personal grievance of unjustified dismissal. He is entitled to seek remedies of lost remuneration and compensation. He also seeks reinstatement.

Reinstatement

[67] Reinstatement is no longer the primary remedy. It is one of a suite of remedies the Authority may award. Reinstatement may be awarded where it is reasonable and practicable to do so.

[68] There was substantial evidence about Mr Emery's unacceptable behaviour. In his closing submissions he told the Authority that he is currently before the Court on

trespass charges involving neighbouring Kiwirail land. At the time of dismissal there were complaints by co-workers about his threatening and intimidating behaviour. Mr Emery himself also gave me evidence of minutes from a meeting between himself and the Trust trustees held on 4 October 2010. The minute records Mr Emery apologising for his part in “an altercation that got out of hand and resulted in [M] being knocked to the ground” by him.

[69] Ms Yeatman gave evidence about the trustees’ fear of Mr Emery at times. Mr Emery confirmed Ms Yeatman’s views when he told me under oath that he “hated these trustees” and became very agitated. He could give no solution about how he could reconcile with the trustees other than to reinstate him to the workplace. In my view that would not be a reasonable or practicable solution. It would simply expose the trustees and its employees to ongoing risks of violence.

[70] In the circumstances I decline to reinstate Mr Emery.

Lost wages

[71] There were indications Mr Emery may have been dismissed in any event due to his violent behaviour and performance issues.

[72] If the Trust had completed its disciplinary investigation and/or undertaken a performance review it was likely to have resulted in his termination for serious misconduct. At best his remedies would be confined to the notice period.

[73] However Mr Emery admitted at the start of the hearing that he had made no efforts to find any work. He told me he was unemployable. Given the lack of effort to find any work, I decline to award any lost wages because he has not mitigated his losses.

Compensation

[74] Mr Emery had been employed by the Trust for at least six years at the time of his dismissal. He expressed frustration, anger and at times outright hatred of the Trust and trustees. He did not require any medical assistance. The brute force of his emotions were however clear.

[75] Similar cases where there has been an unjustifiable dismissal for redundancy have awarded \$8,000 to \$10,000.⁸

[76] In the circumstances of this case I would award Mr Emery \$10,000 subject to any reduction for misconduct.

Subsequently discovered misconduct

[77] Mr Emery admitted during evidence that he has retained the use of a motorbike valued at \$8,000 which he refuses to return since the ending of his employment. Subsequently discovered misconduct can be taken into account in reducing remedies.⁹

Contributory conduct

[78] There was evidence of misconduct during the employment relationship that may reduce remedies under s124 of the Employment Relations Act 2000. Mr Emery's refusal to undertake any farm hand duties caused the restructure proposal. This behaviour was blameworthy because he was contractually required to undertake those duties. There was evidence of his threatening behaviour and attitude towards the Trust preventing any communication about his employment.

[79] In these circumstances I am prepared to significantly reduce the amounts payable by \$8,000.

[80] The Tiroa E and Te Hape B Trust is ordered to pay Edward Piriwiritua Te Moana Emery the sum of \$2,000 compensation. The payment is to be made within 28 days of the Determination.

[81] There is no order of costs given Mr Emery was unrepresented at hearing.

T G Tetitaha Member of the Employment Relations Authority

⁸ *Hare v Galvanising (H.B.) Limited* [2018] NZERA Wellington 104; *Nelson v Westlake Girls High School Board Of Trustees* [2018] NZERA Auckland 355.

⁹ *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [104]