

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA156  
3075732

BETWEEN

TRISTAN SMITH  
Applicant

AND

SCOTT MICKLESON T/A TOI  
TOI FARMS  
Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Darryn Mitchell, advocate for the Applicant  
Shima Grice, counsel for the Respondent

Investigation Meeting: 17 March 2020

Submissions Received: 17 March 2020 from the Applicant  
17 March 2020 from the Respondent

Date of Determination: 20 April 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Scott Mickleson operates a farming business in Utiku, Taihape trading as Toi Toi Farms. Tristan Smith started employment with Mr Mickleson on 28 January 2019 and signed an employment agreement which amongst other things provided for a salary of \$40,000 plus accommodation at \$200 a week. The position as general farmhand was a full-time permanent position.

[2] On 31 May 2019, Mr Smith was on the farm cutting firewood when Mr Mickleson came over to him stating they needed to have a chat. Following that conversation

Mr Mickleson advised Mr Smith that he was terminating his employment on two weeks' notice. On the same day Mr Mickleson provided Mr Smith with a letter dated 31 May 2019 confirming the dismissal and advising Mr Smith his employment would cease on 14 June 2019 because:

You have breached the terms of your employment by:

Poor performance – as listed above –

Breach of contract – no full driver's licence.

[3] The letter also listed five examples of concerns which had allegedly been raised with Mr Smith prior to 31 May as follows:

- May 8 2019 I observed you racing your quad bike towards a cattle beast causing it to jump through a fence. I cautioned you at the time and told you this behaviour was unacceptable. This was a second time I had observed this occurring.
- In spite of being told several times you are regularly late for work in the mornings, take extended lunch hours and finish early at the end of the day. This is still occurring.
- Failure to obtain a full driver's licence in spite of this being a condition of employment. Reminders have been given frequently by both myself and Vivienne.
- Lack of care and empathy towards animals as evidenced by the death of two pups whilst in your care.
- When discussing your employment here you talked of getting some working dogs. This is a vital part of farm work and has not eventuated.

[4] Mr Smith claims:

- (a) His dismissal was unjustified;
- (b) He suffered disadvantage during his employment due to the unjustified actions of his employer;
- (c) Mr Mickleson breached s 130 of the Employment Relations Act 2000 (the Act) by failing to provide a complete copy of the applicant's wages and time records as requested.

He asks for the following:

- (i) Compensation of \$20,000 for hurt and humiliation pursuant to s 123(1)(c)(i) of the Act ;

- (ii) Compensation for lost wages pursuant to s 123(1)(b) of the Act;
- (iii) A penalty to be imposed against Mr Mickleson pursuant to s130(4) of the Act;
- (iv) Costs.

[5] Mr Mickleson denies the claims of unjustified dismissal, unjustified disadvantage and a failure to provide a copy of wage and time records. He states further that Mr Smith owed him for:

- (d) A power account of \$88.71;
- (e) A pair of gloves ordered without authorisation costing \$89;
- (f) The cost of having a carpet stain cleaned.

### **Issues**

[6] The following are the issues for investigation and determination by the Authority:

- (g) Was Mr Smith's dismissal on notice justified in all the circumstances?
- (h) Was Mr Smith disadvantaged in his employment by an unjustified action of Mr Mickleson?
- (i) Should a penalty be imposed on Mr Mickleson pursuant to s 130(4) of the Act?

### **The Authority's Investigation**

[8] It is not disputed that the reasons for the dismissal are set out in Mr Mickleson's letter of 31 May 2019 although Mr Mickelson added to these whilst giving evidence. At the investigation meeting I heard evidence from Mr Smith, his mother, Valerie Bowden, Mr Mickleson and Vivienne Mickleson, Mr Mickleson's stepmother, who drafted the dismissal letter and was in charge of administration for Mr Mickleson's business. Prior to giving evidence, each witness affirmed their evidence as true and correct.

[9] Mr Smith's evidence was straightforward. He stated that on 8 May 2019 there had been an incident when a cattle beast jumped through a fence whilst he was riding his quad bike nearby. He stated he had come round a corner about 20 metres from where the cattle beast was and slowed down from approximately 12 kilometres per hour to 6 kilometres per

hour. He then saw the cattle beast jump into the fence. He stated that after this event, Mr Mickelson approached him. He states he was angry and swore at him. He stated he tried to explain to Mr Mickleson that he had not been speeding and that Mr Mickleson said to him “It’s my way or the highway” and that if he carried on like this he would be down the road. He states the incident was never again raised with him until his dismissal on 31 May 2019.

[10] Mr Smith advised that there had been an earlier incident a few weeks prior to this when he had been accused of scaring a cattle beast. He stated however that he did not believe he was at fault in either event but was not given the opportunity to explain with Mr Mickleson speaking across the top of him in an angry manner. Part of his complaint was that these matters had not been raised properly with him but in any event, as he was not given a warning, he put the matters behind him.

[11] Mr Mickleson’s evidence differed somewhat. He said that on 8 May 2019 he had observed Mr Smith racing his quad bike down a laneway towards a cattle beast causing it to jump through the fence. He states he caught up to Mr Smith in the next paddock and gave him a formal oral warning. As evidence of this, he relied on page 66 of the bundle of documents. The document contained a note which said amongst other things “Tristan was told not to drive a quad bike at speed towards a cattle beast and if it happened again he will have to leave”. Mr Mickleson confirmed he had not gone through the process outlined in the employment agreement under the heading “Performance and Misconduct”.<sup>1</sup>

[12] Mr Smith then said that on 20 May 2019 he had been attempting to locate Mr Mickelson to find out what the next job was for that day. Mr Mickleson was not there but his teenage daughter, Sophie, told him that a dog had given birth over the weekend. The dog was an older bitch and had damaged nipples, so in Mr Smith’s view should not have had pups in the first place. He was aware that at least four pups from this litter had died already. He states that he was told Mr Mickleson would shortly be leaving to go down to the South Island for a few days and that he was to feed the bitch and her two remaining pups whilst he was away. Shortly thereafter, he said Mr Mickleson approached him, having returned from wherever he was, advising him to keep an eye on the dogs which were in an outside pen with some blankets. He advised he was told to put horse blankets over the pen in order to keep them warm. He states he fed the dogs that evening and he said as much to his mother, Valerie Bowden, who had arrived to stay with him.

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<sup>1</sup> Individual employment agreement, page 5.

[13] He went over to check on the pups and feed them. Both were alive, however when he returned to feed the dogs at the end of the day one had died. By the following morning the last pup had also died.

[14] Mr Smith rejects the suggestion that he did not care about the pups dying. He states he had a number of work tasks to do and it would be wrong to say that looking after the pups was his main priority for that week. He states he had done what he was asked to do, and although he left the farm to travel to Palmerston North, he still checked on the dogs before and after. He states he was not responsible for the death of the pups.

[15] Mr Mickleson has a different view of what transpired in respect of the pups. He states it was part of Mr Smith's role to raise and train pups to be working dogs on the farm. Mr Mickleson accepted that the bitch was an old dog. However, prior to 20 May 2019 he had taken her to the vet for a pre-birth check-up. He advised that the vet explained the bitch was in good condition but might have birthing complications.

[16] Mr Mickleson explained that the bitch had had six pups overnight on 17 and 18 May 2019. Four of the pups were stillborn but the other two were in good health. Mr Mickleson and his daughter looked after the pups over the weekend of 18 and 19 May 2019. He advised that on 20 May 2019 he was due to leave the farm for a few days but prior to leaving discussed with Mr Smith the importance of keeping the pups warm because the weather was cold. He ensured that there were horse covers there to keep them warm. He advises that he specifically told Mr Smith that looking after the pups was the most important task to carry out during his absence.

[17] Mr Mickleson's evidence was that when he returned to the farm a week later he discovered that the pups had died. He was horrified at what had happened and was very upset. He stated he questioned Mr Smith about the two pups and was told that when Mr Smith returned on the evening of Tuesday 21 May 2019 to feed the dogs, they had both died of exposure.

[18] Mr Mickleson stated that in his mind it was clear why the pups had died, because the bitch had dug a hole about a foot and a half deep in an attempt to provide warmth.

[19] There was a discussion regarding Mr Smith's claim that he had attempted to ring Mr Mickleson on Tuesday 21 May 2019 to explain the dogs had died. However, I do not need to resolve this issue in order to make a decision.

[20] Mr Mickleson was also concerned that Mr Smith had left the farm without his knowledge or approval. However, he accepted that Mr Smith had told his stepmother, Mrs Mickleson, but felt that was not the same as telling him. He stated that if he had known that Mr Smith would have been away, he would have arranged for someone else to care for the puppies. He felt this was a clear case of neglect and cruelty towards farm animals.

[21] He stated after taking a few days to cool down and think things over he told his stepmother that he was going to have a discussion with Mr Smith in the paddock and wanted her to observe the meeting.

[22] Mr Mickleson gave evidence that it was not his intention to dismiss Mr Smith. Rather, he wished to have a discussion with him to put forward his concerns. He expected Mr Smith to respond with some contrition and acceptance he needed to improve. However, he stated this did not happen. Mr Mickleson was upset especially regarding the death of the pups and when Mr Smith showed no remorse and no acceptance of wrongdoing, Mr Mickleson felt the trust required for the employer/employee relationship had broken down. Accordingly, he decided to terminate Mr Smith's employment on two weeks' notice.

[23] In respect of the issue regarding a full driver's licence, Mr Smith's evidence was that when he started work he already had a provisional licence and did not believe there had been a need for him to have a full licence. However, when the issue was raised by Mr Mickleson, Mr Smith had said he was progressing the matter.

[24] Mr Mickleson confirmed that he did not follow the process set out in the employment agreement in respect of performance and misconduct, but that it would not have made any difference to his decision if he had. This was because Mr Smith had denied all wrongdoing and accordingly there was nothing in that information that would make him reconsider his decision to dismiss.

[25] He also advised that he had withheld the final pay but once it was explained to him this was incorrect, he arranged to pay it forthwith. He did, however, make deductions for an outstanding power account of \$251.04, \$89.99 for gloves and \$100 for cleaning the carpet.

These deductions totalled \$441.03. He confirmed he had not paid 2.5 days of holiday pay, totalling \$384.62 but had offset that against the amounts owing by Mr Smith.

## **Discussion**

[26] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. Likewise, I have not referred to all the submissions for the parties in this determination, I record I have fully considered them.

[27] There was little dispute between the parties regarding matters of process. Mr Mickleson confirmed that he had not issued Mr Smith a warning in a formal sense but did record the incident which occurred on 8 May 2019 on Mr Smith's file. He confirmed this document had never been shown to Mr Smith who it might be said remained blissfully unaware of an intention to warn.

[28] Further, Mr Mickleson confirmed he did not look at the employment agreement which had been drafted by his stepmother. He accepted that page 5 of the employment agreement provided as follows:

Should the employer have cause for concern he will provide the employee with a written account of the alleged concerns and discuss them with the employee, who is entitled to bring a support person to the meeting. 48 hours' notice must be given, prior to such a meeting taking place. The employee must be given the opportunity to respond to the concerns that had been raised. Depending on the outcome of the discussion and the severity of the concerns the employee may be issued with a written warning, a final written warning, and dismissal on notice or in the event of serious misconduct dismissal without notice.

[29] The dismissal letter dated 31 May 2019 set out the grounds for dismissal. In evidence Mr Mickleson stated, and indeed it was argued by counsel, that although not mentioned in the letter, the fundamental reason for dismissal was a lack of trust and confidence caused by Mr Smith's failure to be contrite and to accept responsibility for what he was accused of.

[30] Section 103A of the Act provides that an employee may have a personal grievance against his employer for unjustified dismissal. The test of justification is provided for in s 103A of the Act. This section reads:

### Section 103A Test of Justification.

1. For the purposes of s 103A and B the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in sub-section (2).

2. The test is whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[31] In applying that test, s 103A (3) requires consideration of a number of matters. That section reads:

In applying the test in sub section (2), the Authority of the Court must consider:

- (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[32] In essence, the statutory provision contained in s 103A of the Act is also contained in the employment agreement as set out above. Mr Mickleson did not follow the process set out in the employment agreement and did not comply with the provisions of s 103A of the Act. There was no provision in the employment agreement for a verbal warning. Even if there had been, it was clear from the evidence before me that Mr Smith was not given an opportunity to be heard or indeed respond to a proposal to issue a verbal warning. If indeed a warning had been given, I would have expected a copy of the record to have immediately been given to Mr Smith so that he would have been aware of the consequences of any repetition.

[33] Likewise, the dismissal is very problematic for Mr Mickleson. Again, no process was followed. There was no proper investigation, there was no opportunity for Mr Smith to prepare for the meeting, there was no opportunity for him to have representation. There was very little evidence of any investigation. I find that any investigation which may have occurred, must be seen as inadequate. Coupled with this, Mr Mickleson's evidence is that he did not intend to dismiss Mr Smith when he initially asked to speak to him. In other words, the dismissal was in essence a knee jerk reaction to Mr Mickleson's belief which he was not entitled to have, that Mr Smith was not accepting responsibility, was guilty as charged, and was not contrite. It was not open for Mr Mickleson based on the evidence before the

Authority to reach a conclusion that he had no trust and confidence in Mr Smith. That was not the action of a fair and reasonable employer.

[34] The 31 May 2019 letter set out the reasons Mr Mickleson was relying on to justify the dismissal at the time. None of them were fairly put to Mr Smith and there is no evidence of any investigation into the truth or otherwise of the allegations.

[35] For the above reasons the dismissal is both substantively and procedurally unjustified. It is also clear that Mr Smith was significantly disadvantaged in his employment by the process adopted by Mr Mickleson. However, I find the disadvantage grievance is inextricably linked with the dismissal.

[36] Mr Smith gave evidence of the hurt and humiliation he had suffered. That evidence was corroborated by Mrs Bowden, his mother. Mr Smith said, amongst other things, that he felt stressed out of his mind. He felt belittled and lacking confidence. He was required to stay on friends' lounge floors. He had to borrow money to move and he stated it took him quite some time to get his confidence back. Mrs Bowden gave further evidence that in her view he seemed devastated in losing his job. It took him two months and two days after the termination of his employment before he gained further employment. Mr Smith gave evidence regarding his attempts to find work and I am satisfied that he took appropriate steps to mitigate his loss.

[37] I also find that Mr Mickleson should not have made any deduction from Mr Smith's pay. He was not entitled to do that without discussing the matter with Mr Smith and gaining his agreement that this should occur. Relying on the provision in the employment agreement was insufficient and is a breach of s 5(1A) of the Wages Protection Act 1983. Mr Smith accepted the amounts owing to Mr Mickleson, but these cannot be satisfied by way of set-off without Mr Smith's agreement.

[38] S124 of the Act requires me to consider whether or not Mr Smith contributed in any way to his dismissal. I find that Mr Smith did not contribute to his dismissal in any blameworthy way. The process followed by Mr Mickleson simply didn't allow him to come to the conclusions he relied on to justify the dismissal.

## **Orders**

[39] Mr Mickleson is ordered to pay the following:

- (a) The sum of \$18,000 for hurt and humiliation in terms of s 123(1)(c)(i) of the Act;
- (b) Unpaid holiday pay of \$384.62;
- (c) \$6,885.83 (less PAYE) as compensation for lost wages.

[40] Mr Smith remains liable to Mr Mickleson for the following:

- (a) \$251.04 for outstanding power;
- (b) \$89.99 for the gloves purchased at Farmlands.

[41] I make no award regarding cleaning of the carpet as there is insufficient evidence as to whose responsibility that was and whether the matter had ever been raised with Mr Smith.

**Costs**

[42] Costs are reserved.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**