

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 370
3086092

BETWEEN RAYMOND UTUTAONGA
Applicant

AND NORTH WESTERN FARMS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Emma Smith, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further
evidence 10 August 2020 from the Applicant
14 August 2020 from the Respondent

Determination: 14 September 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Raymond Ututaonga, claims in the Statement of Problem filed on 31 December 2019 that his claim is that he is owed unpaid wages, an entitlement to a supply of beef and that he has a personal grievance in connection with bullying, degrading and a breach of good faith against the Respondent, North Western Farms Limited (NWFL).

[2] These claims were subsequently resubmitted in submissions filed on 10 August 2020 as unjustifiable dismissal, breaches of the employment agreement, unpaid wages, unlawful wage deductions and a breach of good faith.

[3] NWFL denies that Mr Ututaonga was unjustifiably dismissed or is owed any monies in respect of unpaid wages, unlawful deductions from wages, or that it acted in breach of good faith. Moreover NWFL claims that Mr Ututaonga is out of time to raise a number of the claims and does not consent to Mr Ututaonga raising the claims out of time.

[4] This determination addresses the preliminary issue of whether or not Mr Ututaonga raised the claims as set out above with NWFL within 90 days of the grievances occurring or coming to his notice whichever was the later in accordance with the requirements of s 114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

The Authority's investigation

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Note

[6] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by, and submissions from, the parties.

Issues

[7] The issues requiring investigation are whether or not Mr Ututaonga raised a personal grievance or any other claim within the statutory time limit in respect of:

- Unjustifiable dismissal
- Breaches of clauses 13 and 16 of the Employment Agreement
- Unpaid wages
- Breach of good faith

Background

[8] NWFL (formerly known as Reynard Smith Limited) is a farming entity which had been focused for the approximately twelve years prior to 2017 solely on dairy farming.

[9] During 2017 Mr Robert Smith, sole director and shareholder, decided to diversify into beef farming, and the transition from 100% dairy operation into a combined dairy and beef farming operation occurred during 2018 to 2019.

[10] The transition of the farm operation necessitated a change in staff loading and Mr Smith commenced a consultation process with all employees including Mr Ututaonga in November 2018.

[11] Mr Ututaonga was employed as 2IC with his job responsibilities as described in the individual employment agreement signed by Mr Smith and Mr Ututaonga (the Employment Agreement) being: “To provide support to Employer and to assume responsibility for operation [in] owners absence from the farm.”

[12] The Employment Agreement included the following clauses:

12.4 For salaried Employees:

12.4.1 Your gross annual salary will be: \$55,000.00

12.4.2 The market value of your accommodation, to be deducted from your salary, is agreed at: \$150.00 per week

13 Payment of wages or salary and deductions

13.3 You authorise us to deduct from wages, salary and final wages including holiday pay, any monies owed by you to us. These monies include, but are not limited to:

13.3.1 Rent ...

13.3.2 Damage to accommodation ...

13.3.3 Cleaning, accommodation and carpets ...

13.3.4 Any unreturned chattels and property ...

13.3.5 ACC payments ...

13.4 Before we make a deduction under clause 13.3 above, we will consult with you as to the amount of the deduction.

13.5 By signing this agreement you are providing your consent to deductions under the Wages Protection Act 1983 and dated 1 May 2017.

16.31 You are liable for damage arising from your action/inaction which is not attributable to fair wear and tear. You agree to deductions being made (following consultation with you) from your wages, including your final wages and holiday pay to cover any such damage.

16.32 At the conclusion of the tenancy, you agree to leave the accommodation in a clean and habitable condition ...

16.33 In the event that the property is not left in a clean and tidy condition, you authorise us, after consultation with you, to make a deduction from any monies owed to you of a sum equivalent to the cost of having the property reasonably cleaned, whether we engage commercial cleaners, or undertake the cleaning personally.

[13] Mr Smith engaged Ms Smith of Tailored Legal Solutions Limited to assist him with the restructure process. On 25 November 2018 Ms Smith wrote to Mr Ututaonga advising him of the restructure proposal and stating:

... that as part of that process we are reviewing all of the roles within the business and how work is completed. ...

It is also considered appropriate that a 2IC role on the beef farm would be fulfilled by a self-employed contractor due to the seasonal demands of that role. As a result it is proposed that the current role of 2IC on the dairy farm would be disestablished. ...

All these changes will affect your position within the business and we need to consider this with you.

At this stage we have not made a final decision about this and we are ready to consider all suggestions and alternatives to such action.

[14] The letter concluded by inviting Mr Ututaonga to attend a meeting to discuss the proposal on 30 November 2018.

[15] On 4 December 2018 Ms Smith wrote to Mr Ututaonga stating:

Further to our letter of 25 November we are informed by your employer that following discussion about the proposal outlined in that letter you confirmed your intention to look for alternative employment closer to Auckland for the 2019 season in any event. You sought Mr Smith's consent to start looking for alternative employment opportunities and Mr Smith agreed that he was content for you to do so.

Following that discussion and the deemed acceptance on your behalf of the proposed restructuring, we confirm that with effect from 31 May 2019 your role as 2IC for Reynard Smith Limited will be disestablished and your employment with Reynard Smith Limited will be terminated on the grounds of redundancy.

[16] Mr Ututaonga left the employment of NWFL on 26 April 2019 and was paid his final wage payment on 3 May 2019.

[17] Monies were deducted from Mr Ututaonga's final pay as set out in a letter from Ms Smith dated 9 May 2019. The letter stated that upon inspection of the accommodation resided in by Mr Ututaonga during his employment with NWFL, NWFL had found the property: "to be in an unacceptable, filthy and damaged condition."

[18] The letter referred Mr Ututaonga to clauses in the Employment Agreement including clauses 13.3.2 and 13.3.3 which authorised NWFL to make deductions from his final pay for costs associated with damage to the property. The letter set out the amount due and deductions made:

We are instructed that your final gross pay is \$3,591.04 including the value of one freezer beast. However deductions for damage may only be made against your net pay which is \$2,791.04 ...

On those grounds, when \$3,511.00 is deducted from your final net pay a balance is due from you to the employer in the sum of \$1,085.38.

The employer has proposed not to seek to recover that amount from you but rather simply deduct from your final pay the amount available as a contribution towards those costs.

[19] Mr Ututaonga filed a statement of problem on 31 December 2019 in which the claims were listed as being:

(a) Unpaid last wages

- (b) 2 years' worth of beef
- (c) Grievance which includes bullying, degrading and not working in good faith.

[20] The parties filed submissions in July 2020 on the preliminary issue of whether or not the personal grievances raised by Mr Ututaonga had been raised within the 90 day statutory time limitation period pursuant to s 114(1) of the Act.

[21] In the submissions Mr Ututaonga had itemised his claims as:

- (a) Unjustifiable dismissal
- (b) Breach of the Employment Agreement
- (c) Unpaid wages: breaches of Wages Protection claim
- (d) Deductions from wages without consultation
- (e) Breach of good faith

Raising of a Personal Grievance

[22] Section 114(1) of the Employment Relations Act 2000 states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period;

[23] Mr Ututaonga must therefore establish that he raised the issues in respect of which he is claiming a personal grievance within 90 days of it having occurred, or come to his notice, whichever is the sooner.

Was a personal grievance in relation to unjustifiable dismissal raised within the 90 day statutory time limitation period pursuant to s 114(1) of the Act?

[24] Mr Ututaonga's employment with NWFL terminated on 26 April 2019 with final pay being completed on 3 May 2019. The statement of problem filed on 31 December 2019 which refers to: "bullying" and "degrading" not only does not refer to unjustifiable disadvantage, provide dates on when such an event took place and/or when it was advised to NWFL, but such a claim would be raised outside the statutory 90 day time limit for bringing such a claim.

[25] The later claim of: "unjustified dismissal" made in the July 2020 submissions would be significantly outside the statutory 90 day time limit.

[26] Mr Ututaonga submitted voice recordings of a meeting purported to have taken place on 31 January 2019 in which he claims he raised a personal grievance about the restructuring proposal and the termination of his employment.

[27] NWFL submits that during the 31 January 2019 meeting Mr Ututaonga submitted his resignation for personal reasons unconnected to the restructuring proposal.

[28] I have listened in detail to the recordings provided but cannot detect anything on them that is helpful as support for either party's position. I also note that the recordings are not one recording of a single meeting, but are in seven separate sections, and it is possible that there has been editing, or that portions of the discussion are not included as part of the recordings provided. I therefore disregard the recordings as determinative of this issue.

[29] The letter dated 4 December 2018, which predates the discussion on 31 January 2019, refers to discussions about the restructuring proposal which was outlined in the letter dated 25 November 2018. The letter refers to Mr Ututaonga having stated his intention to look for alternative employment and seeking Mr Smith's consent to start the process, which Mr Smith had granted.

[30] It was on that basis that NWFL advised in the letter dated 4 December 2018 that it had accepted Mr Ututaonga's: "deemed acceptance of the proposed restructuring" and confirmed the disestablishment of his role as 2IC.

[31] There is no evidence that Mr Ututaonga disputed that as being the correct position, specifically that he rejected the perception by NWFL that he had accepted the restructuring and the disestablishment of his position as 2IC in the period between December 2018 and April 2019.

[32] I determine that Mr Ututaonga did not raise his personal grievance claim for unjustifiable dismissal within the statutory time frame.

Was a personal grievance or any other claim in relation to breaches of the employment agreement raised within the statutory time limitation period?

[33] Section 16.33 of the Employment Agreement set out that Mr Ututaonga as the employee authorised NWFL to make deductions from him in the event that costs were incurred by it for reasonable cleaning of the property Mr Ututaonga used during his employment with NWFL.

[34] Mr Ututaonga submits that NWFL did not consult with him regarding the deductions from his net final pay which related to deductions for damage and repair to the property in which he resided during his employment with NWFL and that this is in breach of clause 13 and clause 16 of the Employment Agreement.

[35] The remedy for a breach of an employment agreement is a penalty pursuant to s 134 of the Act which states: “Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.”.

[36] The claim for a penalty must be brought within 12 months of either the cause of action first becoming known to Mr Ututaonga, or him reasonably becoming aware of it pursuant to s 135 (5) of the Act which states:

s 135 Recovery of penalties

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –

(a) the date when the cause of action first became known to the person bringing the action, or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

[37] Mr Ututaonga received his final pay on 3 May 2019 and was informed of the deduction in the letter dated 9 May 2019.

[38] Mr Ututaonga raised a claim for: “Unpaid last wages” in the Statement of Problem filed on 31 December 2019 and referred to NWFL not having consulted him prior to making the deduction.

[39] Whilst the claim for a penalty has not been made and therefore cannot proceed, I find this claim is rightly categorised as a claim for unlawful deduction of wages. The limitation period for claims which are not personal grievances is 6 years.¹

[40] On that basis I determine that Mr Ututaonga may pursue his claim in respect of the deductions made from his final pay.

¹ Section 142 of the Employment Relations Act 2000.

Was a personal grievance or any other claim in relation to unpaid wages raised within the statutory time limitation period?

[41] Mr Ututaonga submits that he was paid less than the minimum wage pursuant to the Minimum Wage Act 1983. This is on the basis that his wage was averaged out across a season resulting in periods when he was paid less than the minimum wage per hour.

[42] Mr Ututaonga did not raise this claim with NWFL prior to the submissions in July 2020. He is therefore outside the statutory time frame for raising a personal grievance.

[43] Pursuant to the Wages Protection Act 1983 employees must bring an action for recovery of wages no later than 6 years from the date on which the cause of action arose.

[44] Mr Ututaonga's period of employment with NWFL fell within that 6 year period.

[45] I determine that Mr Ututaonga raised his unpaid wages claim within time such that he may pursue it.

Was a personal grievance or any other claim in relation to a breach of good faith raised within the 90 day statutory time limitation period pursuant to s 114(1) of the Act?

[46] Section 4 of the Act sets out the requirement that parties to an employment relationship deal with each other in good faith.

[47] Mr Ututaonga raised a claim of: "not working in good faith" in the statement of problem filed on 31 December 2019. This was more than 90 days after the date of termination of employment and I find has not been raised within the statutory 90 day time period.

[48] A penalty is the remedy for a breach of good faith. This must be brought within 12 months pursuant to s135(5) of the Act.

[49] Mr Ututaonga has not raised a claim for a penalty to be imposed on NWFL for a breach of good faith.

[50] I determine that Mr Ututaonga did not raise a personal grievance for a breach of good faith within the statutory 90 day time period.

Should Mr Ututaonga be granted leave to raise the unjustifiable dismissal and breach of good faith personal grievance claims out of time pursuant to s 114(4) and s 115 of the Act?

[51] NWFL does not consent to Mr Ututaonga raising his unjustifiable dismissal or breach of good faith grievances outside the statutory 90 day timeframe.

[52] As set out in s 114(3) of the Act where an employer does not consent to a personal grievance being raised after the 90 day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(4) of the Act which states.

On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

(a) Is satisfied that the delay, in raising the personal grievance was occasioned by exceptional circumstance (which may include any 1 or more of the circumstances set out in section 115); and

(b) Considers it just to do so.

[53] Examining the three criteria which must be fulfilled I note firstly that Mr Ututaonga has made no application to raise the personal grievances outside the 90 day statutory time frame.

[54] The second criterion is that the delay arose due to exceptional circumstances. None of the exceptional circumstances set out in s 115 of the Act have been submitted as applying in this case.

[55] I find no evidence supporting the conclusion that there was an exceptional circumstance basis for the delay in Mr Ututaonga raising the personal grievance outside of the 90 day statutory time frame.

[56] In considering the third criterion of whether or not it is just to allow Mr Ututaonga to bring his personal grievance claim out of time I find that given the fact that a substantial period of time has passed since the events said to give rise to the grievances arose, and in that time Mr Ututaonga had taken no steps to raise a grievance or apply for leave to raise one, it would not be in the interests of justice to allow him to do so now.

[57] In making this decision I note that this will not cause any injustice to arise in connection with Mr Ututaonga's wages claims.

[58] I determine that Mr Ututaonga should not be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act.

Next Steps

[59] The Authority will convene a case management call in due course to set down a timetable for progressing Mr Ututaonga's wages claims.

Costs

[60] Costs are reserved and will be determined following the conclusion of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority