

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 665
3155301

BETWEEN JAYDAN KERR-PEACOCK
 Applicant

AND NEW ZEALAND PURE BRED
 PIG GENETICS LIMITED
 Respondent

Member of Authority: Sarah Kennedy

Representatives: Dave Cain, advocate for the Applicant
 Brittany Gibson, counsel for the Respondent

Investigation Meeting: 23 August 2022

Submissions Received: 23 August 2022 from the Applicant
 23 September 2022 from the Respondent

Date of Determination: 15 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jaydan Kerr-Peacock was briefly employed by New Zealand Pure Bred Pig Genetics Limited (NZPBPG) which is a company that is owned and operated by Jeffrey Cooley. Mr Kerr-Peacock started work on 31 May 2021 as a farmhand but says he was summarily dismissed on 14 June 2021. This was after he gave Mr Cooley an indication as a “heads up” that he was considering leaving in around four weeks’ time to work for another employer.

[2] NZPBPG says that there was no dismissal and instead Mr Kerr-Peacock resigned of his own accord and then failed to work his notice period.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Kerr-Peacock and his partner, and Jeffrey Cooley and his daughter Stacey Cooley on behalf of NZPBPG. All witnesses answered questions under oath or affirmation from me and the parties' representatives. Written submissions were timetabled after the investigation meeting.

[4] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has been considered.

[5] Mr Kerr-Peacock claims that he was unjustifiably dismissed but Mr Cooley says Mr Kerr-Peacock either resigned or was asked to leave in order to allow him time to cool down but either way he was not dismissed. In order to determine this matter I will need to determine whether there was a dismissal or a resignation, or both.

What happened on 14 June 2021?

[6] Mr Kerr Peacock had found the job at NZPBPG on Trade Me because he wanted to move back to the area to be closer to his family. Not long after he started work his father-in-law approached him about another farming job that was going nearby. He says he had spoken with the Trust about the job and for him it sounded more appealing than what he was doing at NZPBPG because the hours were less with a higher hourly wage and it came with a house meaning he could be closer to his kids. In his evidence he was very clear that he did not actually have the new job. It had not been offered to him and he had not spoken to the main boss, but it was an opportunity he was very keen on.

[7] On 14 June 2021, Mr Kerr-Peacock says when he started work he let Mr Cooley know he was thinking of resigning but that if he did, he would give him four weeks' notice in writing. He did not intend it to be a formal resignation at that time. Conscious of the fact Mr Cooley had given him employment that had allowed him to return to his home district, but not wanting to pass up what he considered a better opportunity, he thought he was doing the right thing by letting his new employer know his intentions had changed. However, by the mid-morning Mr Kerr-Peacock says he had been dismissed from his employment by Mr Cooley on behalf of NZPBPG.

Why does Mr Kerr-Peacock say that he was dismissed?

[8] In general terms it is accepted by both parties there was an altercation on 14 June 2022 and they both used loud voices before Mr Kerr-Peacock left the property, but they differ on the detail. Mr Cooley says he did send Mr Kerr-Peacock away but that was never intended to be a dismissal but rather it was to allow a cooling down period because of Mr Kerr-Peacock's increasingly aggressive behaviour but Mr Kerr-Peacock denies the more aggressive behaviour and says he was in fact dismissed.

[9] After arriving at work that morning Mr Kerr-Peacock said he was pushing a trolley of food and they were walking down towards the piglet shed when he let Mr Cooley know that he was thinking about this other job that he had lined up. Mr Kerr-Peacock said Mr Cooley became pretty upset saying he would have to find someone else to employ and spoke to him in a raised voice.

[10] Mr Kerr-Peacock says he was upset about that because he was wanting to be fair to Mr Cooley but he kept working. Then he recalled twinging his back while pushing the feed trolley up a ramp and was struggling with discomfort from his back. Mr Kerr-Peacock says he was still able to work but he asked Mr Cooley for some extra help with heavy lifting.

[11] Mr Cooley suggested he went to the doctor but Mr Kerr-Peacock replied that he did not need to go to the doctor, just needed some help with heavy lifting. Then Mr Cooley said Mr Kerr-Peacock was of no use to him and that he did not need him now, or words to that effect and added he would be contacting WINZ to find a replacement for Mr Kerr-Peacock. Mr Kerr-Peacock's evidence does not deal with what happened in between being told he was of no use to his employer and leaving the property whereas Mr Cooley and his daughter Stacey gave considerable evidence about what was said and done before Mr Kerr-Peacock went home.

[12] Mr Kerr-Peacock did say he felt devastated when he left because it was his understanding that he had been fired. He went home immediately and sent a text message at 10.33am recording how upset he was that he had been fired when all he said was he was resigning and giving four weeks' notice ending 20th July. The text went on to say:

I twinged my back and you said I was no use to [sic] and may as well leave, so with no employment agreed me [sic] so I guess that's hard luck on my part. Can you get me a termination letter for wins [sic] as I'll have to go on a benefit till July 20th...."

[13] The reference to the employment agreement in the text is explained by Mr Kerr-Peacock's evidence that he was never given a copy to sign. He said coffee got spilt on the version they discussed and Mr Cooley said another one would be printed out for him to sign but it never was. It is not disputed that they agreed on the terms of employment and had both discussed a draft employment agreement.

[14] The law in relation to dismissals says there must be a clear statement of dismissal. The classic definition of dismissal is found in *Wellington, Taranaki & Marlborough Clerical v Greenwich*.¹ That case makes it clear that the termination of employment must be at the initiative of the employer and this approach has been followed in many cases since.

[15] Mr Cooley maintains that it made no sense that he would dismiss Mr Kerr-Peacock because he had only just started, and without him, he and his daughter had to cover all the work. Also, Mr Cooley had been initially impressed with Mr Kerr-Peacock's work and had increased his pay, was paying him for more hours than he worked (eg if he finished early Mr Cooley still paid him until the finish time of 4.00pm) and he was arranging for him to go on a course.

[16] After Mr Kerr-Peacock sent texts to Mr Cooley on more than one occasion asking for a termination letter because he needed one for WINZ, Mr Cooley provided such a letter stating that Mr Kerr-Peacock's employment was terminated on 14 June 2021. Mr Kerr-Peacock says this letter, together with the sending away from the property amounted to a dismissal.

Why does NZPBPG say Mr Kerr-Peacock resigned?

[17] Mr Cooley's evidence was largely the same about what happened that morning but he recalls Mr Kerr-Peacock becoming increasingly loud and abusive about his back and threatening, particularly when he spoke to Stacey Cooley, his daughter, when she came out of the office because she heard raised voices. He said Mr Kerr-Peacock was "nutting off" and also said he "knew how to work the system" and that he would "get ACC money", and that he had already found another job that "had a house" and told Mr Cooley to "watch himself".

[18] Ms Cooley was concerned that there was going to be violence because of Mr Kerr-Peacock's behaviour and she told Mr Cooley that he could ask him to calm down or to leave the property if he did not calm down. Mr Cooley said after Mr Kerr-Peacock swore at Ms

¹ *Wellington, Taranaki & Marlborough Clerical v Greenwich* (1993) ERNZ Sel Cas 95 AC at 103

Cooley he was asked to leave. They both say Mr Kerr-Peacock continued yelling as he stormed off the property until he got in his car and he did not show up for work after that.

[19] Mr Cooley does not recall Mr Kerr-Peacock telling him about his new job until he was walking off the property and his evidence is that the altercation was about Mr Kerr-Peacock's sore back.

[20] Mr Cooley says that he and his daughter were extremely concerned and afraid of Mr Kerr-Peacock and the threats he was making against them. Mr Cooley thought Mr Kerr-Peacock was going to hit either himself or his daughter which is why he directed him to leave the property. He wanted to give Mr Kerr-Peacock time to cool down and get his back addressed should he need to. Mr Cooley never considered that in doing so he was dismissing him and was surprised to receive the text from Mr Kerr-Peacock recording that Mr Kerr-Peacock was "gutted" that he was dismissed.

[21] Mr Cooley says he did not reply because he was concerned he was being set up for something and he was fearful after the events that and explained he wrote the termination letter after texts from Mr Kerr-Peacock insisting on one. Submissions were made on Mr Cooley's and NZPBPG behalf that he felt pressure from Mr Kerr-Peacock to give him a termination letter to enable him to get a benefit from WINZ. In order to stop any contact, he says without legal advice, he wrote the letter of termination dated 16 July without realising the legal implications.

[22] Together with the Cooley's evidence, NZPBPG relies on Mr Kerr-Peacock's letter raising his personal grievance for an unjustified dismissal to show that he in fact resigned (that letter states he had resigned on 14 June 2021 and had given four weeks' notice) and that Mr Kerr-Peacock's text indicates that he had resigned and was giving four weeks' notice.

[23] Resignation is a unilateral act. It does not involve the employer's agreement or disagreement and it is also well-established that the test is an objective one.² Mr Kerr-Peacock's evidence was that he did not intend that conversation to be a resignation, but on the other hand, the letter raising his personal grievance and the text message sent shortly after on the same day provide me with strong documentary evidence that he resigned.

² *Mike Transport Warehouse v Vermuelen* [2021] NZEmpC 197 at [40].

Was Mr Kerr-Peacock dismissed or did he resign?

[24] I think there were several misunderstandings between Mr Cooley and Mr Kerr-Peacock but after listening to their evidence and reviewing all the material available to me about what transpired, I find it is most likely that Mr Kerr-Peacock did tell Mr Cooley about the new job at the start of the day. His and his partner's evidence about how the new job came about, what it was that they preferred about the new role, including a house, together with Mr Kerr-Peacock's statement that he wanted to do the right thing and give Mr Cooley a heads up, especially given the short amount of time he had been employed by Mr Cooley, is credible.

[25] Given the documentary evidence (the text and the grievance letter) I am satisfied that Mr Kerr-Peacock did resign that morning before the back issue occurred and things became heated between the parties.

[26] I must also consider whether there also was a dismissal. The issue is whether it was reasonable for somebody in Mr Kerr-Peacock's shoes to have considered that his employment had been terminated. The legal test requires that the lens must be trained on the employee's understanding of the events which it is alleged the employer has initiated.

[27] Mr Kerr-Peacock was certain that he heard Mr Cooley say he was of no use to him now, or words to that effect. These words were hurtful and impacted on Mr Kerr-Peacock and I observed that he was unequivocal in his evidence about those words being said to him. Their statements differ about what that was in response to but I accept that words to that effect were said to Mr Kerr-Peacock and on hearing that and after being asked to leave the property he could have formed a view that he was dismissed.

[28] Then in circumstances where Mr Cooley was surprised by the text referencing a dismissal, but as the employer he did not respond to correct that assertion and the termination letter he wrote I find that there was also a dismissal. However, at that point in time, after Mr Kerr-Peacock had already resigned, any dismissal could only have shortened Mr Kerr-Peacock's employment by the notice period which appears to have been up until 20 July 2021.

[29] This means that despite the resignation, given the circumstances of the dismissal, taking into account the guidance in s 103A of the Act, the dismissal was abrupt and without any process and Mr Kerr-Peacock's claim for unjustified dismissal has been successful.

Remedies

[30] Mr Kerr-Peacock seeks lost wages and the Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance. Because I have found that Mr Kerr-Peacock resigned first before the dismissal any lost wages can only relate to the notice period which in this case had been signalled by Mr Kerr-Peacock as being 20 July 2021. The period from 14 June to 20 July 2021 is equal to five weeks. Five weeks x 37.5 hours per week x \$22.00 per hour = \$4,125.00.

Compensation

[31] Mr Kerr-Peacock's evidence established that he was humiliated by the way in which his employment ended. He described feeling worthless, said he had never been fired on the spot before, was snappy at his partner and kids, lost his appetite and just wanted to be left alone. The sending away from the property and the animosity between the parties continued and later involved Police and trespass notices meaning Mr Kerr-Peacock was worried about whether that would impact on his new employment. His partner's evidence confirmed that he was impacted and hurt by the way matters were handled by NZPBRG.

[32] Noting the short period of employment of under three weeks and the fact that new employment was in contemplation I consider that a modest compensation award of \$4,000.00 to be appropriate.

Contributory conduct

[33] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. The evidence of Mr Cooley is supported by his daughter, Stacey Cooley, that Mr Kerr-Peacock used swear words and raised his voice and they became concerned for their safety. While Mr Kerr-Peacock accepts he raised his voice after he had been instructed to leave the farm immediately, it is my assessment of the evidence that he was upset and annoyed mostly about the comment Mr Cooley made about him being of no use to Mr Cooley now and that occurred at the start of the work day. On that basis, I find that Mr Kerr-Peacock became upset used a raised voice and swear words prior to being asked to leave the farm.

[34] In this case I find that Mr Kerr-Peacock's conduct contributed to the situation and some of his behaviour was blameworthy in that it was inappropriate in an employment setting to use a raised voice and swear words. Accordingly, a reduction in remedies by 25 per-cent is appropriate.³

Orders

[35] New Zealand Pure Bred Pig Genetics Limited is ordered to make the following payments to Jayden Kerr-Peacock:

- (a) Lost wages amounting to \$4,125.00 under s 123(1)(b) of the Act; and
- (b) The sum of \$3000.00⁴ under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Mr Kerr-Peacock because of his unjustified dismissal.

Costs

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Furniss may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the Respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[37] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Sarah Kennedy
Member of the Employment Relations Authority

³ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

⁴ \$4,000.00 less 25 per-cent.

⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1