

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 12
5414108

BETWEEN HENRY RICHARD COOPER
Applicant

A N D FJ RAMSEY INVESTMENTS
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Mark Henderson, Counsel for Applicant
Simon Menzies, Counsel for Respondent

Investigation meeting: 5 December 2013 at Christchurch

Submissions Received: At the investigation

Date of Determination: 29 January 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Henry Cooper, claims he was unjustifiably dismissed by the respondent, FJ Ramsey Investments Limited (Ramsey Investments), on 29 January 2013.

[2] Mr Cooper also claimed he was unjustifiably disadvantaged by virtue of the way in which he was dismissed. Given the duplicity and s.122 of the Employment Relations Act 2000 (the Act), this claim was withdrawn.

[3] Ramsey Investments accepts it dismissed Mr Cooper. It claims it was entitled to do so given his medical incapacity and contends the dismissal occurred fairly.

Background

[4] Mr Cooper was employed by Ramsey Investments as a senior shepherd on Mt Pember Station in North Canterbury in May 2012.

[5] Ramsey Investments relies, to some extent, on a belief Mr Cooper may have had an pre-existing medical condition he failed to disclose. This belief stems from two things.

[6] The first is what Mr John Ramsey (Ramsey Investments sole director) says was Mr Cooper's advice he required a day off a month to visit his doctor. Mr Ramsey says the conversation occurred after Mr Cooper commenced. Mr Cooper denies the claim. He says the visits were no more frequent than three monthly and he advised the company at his interview. He says other doctor's visits were the result of the condition which struck him down in December (8 below), though the cause of his discomfort was not known till then.

[7] The second is Mr Ramsey's observation that Mr Cooper was not fully participating at work on 20 November. Mr Ramsey challenged Mr Cooper who replied he was on light duties. Mr Ramsey says he demanded a medical certificate but it was not forthcoming. Mr Cooper accepts a discussion occurred and attributes his avoidance of heavy lifting to his doctor's advice after a bout of breathlessness whose cause was then unknown. He denies he was asked for medical certificate.

[8] On Saturday 8 December 2012 Mr Cooper felt unwell and suffered sudden chest pains. Mr Cooper has a history of cardiac issues but says this felt different. He was airlifted to Christchurch Hospital.

[9] His pain was attributed to a new and previously undiagnosed condition. It was also concluded his situation required urgent surgical intervention. The surgery proceeded and Mr Cooper was ultimately discharged on 8 January 2013.

[10] In the interim, a medical certificate dated 10 December 2012 had been handed to Mr Ramsey by Mrs Cooper. It advised the need for surgery followed by a period of rehabilitation. The rehabilitation period was to be advised but there was an indication it could be several months.

[11] Mrs Cooper says Mrs Ramsey was present when she passed the medical certificate. Mrs Cooper says she explained the situation and Mrs Ramsey commented they had a family member with a similar condition and aware *these things take time*.

[12] Mrs Cooper goes on to say that during the time her husband was in hospital she tried to telephone Mr Ramsey eight times. She says she never made contact but left a voice message asking Mr Ramsey phone her the first time. She says he did not but she accepts Mr Ramsey had, prior to the first call, made one unsuccessful attempt at contacting her.

[13] As already said, Mr Cooper was discharged from hospital on 8 January 2013. He says he went to the shearing shed the following day to talk to Mr Ramsey. He says Mr Ramsey responded with a blunt request for advice as to when he was returning to work. Mr Cooper says he was taken aback by the aggressive approach and responded, in a lighthearted way, that he had just had surgery. Mr Cooper says he tried to recommence the conversation shortly thereafter but Mr Ramsey walked away.

[14] Mr Cooper returned the following day in a further attempt to discuss his condition and a possible return to work with Mr Ramsey. Mr Cooper says he waited about 30 minutes for an opportunity to speak to Mr Ramsey however every time he approached Mr Ramsey walked away.

[15] Mr Cooper felt unwell on 11 January and was readmitted to hospital the following day. Discharge followed on 14 January 2013 and Mr Cooper arrived home late that evening.

[16] On 15 January, Mr Cooper attended a doctor's appointment in Christchurch. That evening he received a letter delivered by Mrs Ramsey. The letter, while signed by Mr Ramsey, was penned by Ms Anne Kelly, general manager of the FJ Ramsey Group of Companies. About its opening she says:

This letter clearly outlined our concerns – minimal contact from Mr Cooper – possibility of a pre-existing medical condition – the amount of time Mr Cooper had already been absent from work and the amount of time Mr Cooper may be away from work ie. two / three months and that at the end of this time that he may not be fully fit.

[17] The letter goes on to cite two pertinent provisions from Mr Cooper's employment agreement. They are:

19.0 *TERMINATION OF EMPLOYMENT*

...

19.5 *Termination on Medical Grounds.*

In the event the Employee has been absent from work for three (3) days which should represent an extended break from employment because of illness, the Employer shall be entitled to require the Employee to undergo a medical examination by a registered medical practitioner nominated by the Employer, at the Employer's cost. In assessing the Employee's fitness for work, the Employer shall take into account any report provided as a result of that examination, and any other medical report provided by the Employee within a reasonable time frame. If, in the reasonable opinion of the Employer, the Employee is incapable of the proper performance of their duties by reason of illness, the Employer may terminate this agreement by the provision of at least seven (7) days notice.

and

Schedule B – HOUSE RULES

...

GENERAL RULES(a) *Work Accidents and Injury or Illness occurring outside work hours*

...

In the event of a longstanding illness and/or injury, the employer must be satisfied with the medical evidence assessing you as fit to resume your normal duties. Any person deemed "unsuitable" or "not capable" of performing a particular duty for any reason may be placed in another area or position on a rate of pay application to that position. The employer reserves the right to terminate an employee's contract if ongoing injuries or sickness prevent them from performing their duties in a competent manner.

[18] The letter then goes on to ask:

Could you please if necessary urgently visit your Doctor to get a full understanding of how long your rehabilitation will be and what is the expectation about your ability to perform your job at the end of this period.

Could you then please put all the information/answers etc in writing to me to allow me time to consider and then I will contact you to arrange a meeting where we can discuss all of this.

[19] It closes by advising:

To be fair Richard, it has already been a month since you last worked and I do not believe I can hold your position open for an extended period of time as it has already put severe pressure on not only myself but the other staff and also the farm.

[20] Mr Cooper says the claim of pressure was inaccurate and called two witnesses to support that contention.

[21] Mr Cooper goes on to say:

On 16 January 2013, I rang the office to speak with John. I spoke with Mrs Ramsey and explained that I had been back in hospital that I was temporarily not allowed to drive due to the surgery. I asked that John call in to see me at the cottage at any time or to contact me and arrange a time to meet. I also offered to go to him at a time when Judith was free to drive me. I could then talk through what John wanted in the letter of 15 January. Mrs Ramsey said that she would pass on the message.

[22] Mr Ramsey did not respond but Ms Kelly phoned on 18 January to advise she was now handling the issue as Mr Ramsey was too busy. Mr Cooper says she advised she would contact him to organise a meeting once she had received the information requested on 15 January. Ms Kelly accepts this evidence is accurate.

[23] On 21 January, Mr Cooper wrote to Ramsey Investments. The letter explains, in some detail, his whereabouts since 8 December 2012 and suggests it would have been difficult to make contact in the circumstances. The letter takes issue with Mr Ramsey's failure to contact Mr Cooper when other colleagues had and Mr Ramsey's failure to speak meaningfully when Mr Cooper went to the farm on 8 and 9 January. Attached is a letter from Mr Cooper's GP, Dr Adrian Gamble.

[24] Dr Gamble's letter advises the surgery resulted from a conclusion Mr Cooper needed coronary artery bypass grafts and repairs to his aortic valve. It goes on to refer to the allegation regarding a previous and undisclosed condition by stating:

Whilst Richard was known to have aortic stenosis he was not impaired by this. He was not known to have ischaemic heart disease and as such the episode on 8/12/12 was an entirely new condition.

[25] It goes on to advise Mr Cooper would require a prolonged period of rehabilitation before saying:

Although predicting someone's recovery is at best guessing based upon averages, it would seem likely, given the physical nature of his work, that he will require 3 months off from the date of the operation. Once he returns to work it will be essentially experimental and it is essential that he start slowly and increase his workload as he is able. Having been Richard's GP for several years now I have no doubt that he will return to work sooner and work harder than he should.

[26] Mr Ramsey and Ms Kelly considered the documentation. They decided to dismiss and advised Mr Cooper by letter dated 29 January 2013. The letter, having quoted Dr Gamble's comments about the recovery prognosis, states:

You commenced your employment with us in May 2012 and now after approx 7 months of service you require three months off work to recuperate and you will not, at the end of this time, be fully fit to continue with your duties as per your job description.

Unfortunately we are unable to accommodate this due to the pressure it has already and will continue to put on myself, other staff and the farm.

We therefore advise that we are terminating your employment effectively in seven (7) days from the date of this letter.

[27] The day on which Mr Cooper's notice period expired (5 February 2013), was also one on which he was again examined at Christchurch Hospital. The examination led to a clearance for light duties. Mr Cooper says he telephoned Mr Ramsey to ask if they could have a discussion the following day. Mr Cooper says Mr Ramsey advised he was going away and a meeting was not therefore possible. Mr Cooper takes issue with the alleged absence as he saw Mr Ramsey on the farm the following day.

[28] Mr Cooper telephoned again on 7 February and advised Mr Ramsey of the clearance. He says the response was that he should contact Ms Kelly but she was away until 11 February 2013.

[29] When questioned about these calls Mr Ramsey stated he had no recollection of either though he did say he recollects telling Mr Cooper to ring Ms Kelly.

[30] As events transpired, there was no further communication between the parties till Mr Cooper raised his personal grievance on 18 February 2013.

[31] Mr Cooper obtained a clearance to perform full duties in March.

Determination

[32] As already said Ramsey Investments accepts it dismissed Mr Cooper. In doing so it also accepts it is required to justify the dismissal.

[33] Section 103A of the Act, states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[34] In applying the test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[35] Similar obligations exist in respect of termination due to medical incapacity which can be considered a frustration scenario. As was said in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585:

... if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair.

[36] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially as the elements referred to in 25 (b) to (d) have a procedural focus. They also summarise that which has long been accepted. An employer is required to put issues in its mind, allow a response and consider it.

[37] Ramsey Investments' justification for dismissing Mr Cooper is his inability to perform his duties by reason of incapacity combined with uncertainty as to when the situation would rectify itself.

[38] I conclude Ramsey Investments' will be unable to justify the decision. Its process was flawed in that there was no discussion with Mr Cooper before the decision to dismiss. No putting of concerns and no opportunity of response – at least not via a face to face meeting.

[39] Ramsey Investments' response to this failure is a meeting was unnecessary given the comprehensive information provided by Mr Cooper. Its concerns were put via the letter of 15 January and Mr Cooper responded through his comprehensive letter of 21 January. Ramsey Investment's then considered the response. Focusing on Dr Gamble's estimation of a three month rehabilitation period and their view the farm was struggling with the workload, it decided to dismiss.

[40] The above explanation is, I conclude, inadequate. Ms Kelly accepts Mr Cooper was told there would be a meeting to discuss his written feedback. The meeting did not occur and there is a long line of authorities to the effect that an employer's failure to follow a procedure it has either prescribed or is contractually obliged to follow will render the resulting dismissal unjustified.

[41] Such failure is also normally considered an act of bad faith (see, for example, *NZ Baking Trades Union IUW v Cormack* [1990] 1 NZILR 906). Acting in bad faith is, obviously, failing to act in good faith and that also renders a dismissal unjustified under the current statutory scheme (*Jinkinson v Oceania Gold (NZ) Ltd* (No 2) [2010] NZEmpC 102).

[42] The evidence also raises questions about the decisions substantive justification.

[43] When answering questions both Ms Kelly and Mr Ramsey referred to what Ms Kelly described as her *disappointment* regarding Mr Cooper's various medical conditions and the allegation he gave no prior notification they existed. As Mr Ramsey put it – he was concerned these conditions and the events of 8 December were linked. That concern is reflected in the letter of 15 January. Mr Cooper's written response makes it clear the concern had no validity yet answers given by both

Ms Kelly and Mr Ramsey show it remained and influenced their decision. This is unacceptable given the lack of further investigation.

[44] Similarly the answers made it clear another influencing factor was Mr Cooper's alleged absenteeism prior to 8 December. Again there is a dispute about its true level but no evidence the employer's concerns had validity given a lack of documentation or discussion about this with Mr Cooper.

[45] There is then the fact Ramsey Investments' justification for their decision is based, to a large extent on a claim the farm could not cope with Mr Cooper's absence given the workload it was experiencing. This claim is undermined by two factors. The first is the evidence of other farm workers who essentially say no, *we were managing as normal*. The second factor was the presence of a casual worker whose departure would have coincided with Mr Cooper's return to full duties. In other words the shortfall had been addressed though I also note neither the casual nor Mr Cooper were replaced. Here I must also note Ms Kelly's concession this concern was not raised or discussed with Mr Cooper.

[46] Finally there is Ramsey Investments' failure to consider Mr Cooper's return on light duties. At the time he confirmed an ability to do so he remained an employee. His employment agreement expressly provides for light duties though in the context of a work related injury. It also gives the employer the right to place an employee deemed incapable of performing their normal duties in another area or position at the appropriate rate.

[47] The inclusion of such express provisions would naturally create an expectation light duties might be considered. They weren't, with Ramsey Investments' putting this down to the fact the agreement was written for another of the firms operations and not really suitable for a farm employee. That is a flawed approach as this was the applicable agreement which the parties had entered into.

[48] When I consider the above factors I conclude Ramsey Investments' has failed to justify its decision to dismiss.

[49] The conclusion the dismissal was unjustified raises the issue of remedies. Mr Cooper seeks wages lost as a result of the dismissal and \$10,000 as compensation for hurt and humiliation. He also seeks reimbursement for additional lost benefits and the cost of relocating.

[50] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Mr Cooper asks that I exercise this discretion and reimburse his full loss. This totals \$18,197.75 including holiday pay and covers the period until Mr Cooper commenced a new job on 10 June minus a small amount earned from casual employment. The total period out of work was some seventeen and a half weeks.

[51] For two reasons I will not exercise the discretion and award the full loss. First the documentary evidence is Mr Cooper's first job application was sent on 3 April and when questioned he could not confirm he made earlier inquiries. There is a duty to mitigate and while it is clear Mr Cooper actively sought work after 3 April he was selective in doing so. There is also the fact he did not obtain a full work clearance until 25 March and the lack of a clearance would have adversely affected his attempts to source work.

[52] Three months pay is \$12,500 and I conclude that amount is due.

[53] The additional benefits relate to various reimbursing allowances. By not working Mr Cooper was not fulfilling the criteria requiring reimbursement so I conclude these monies are not payable.

[54] Mr Cooper also seeks reimbursement for costs associated with his shift and a capital investment in respect of a dog house. Ramsey Investments' should not be asked to pay for Mr Cooper's capital purchases and the cost of moving was something he was about to incur as the farm was for sale. In any event, the terms of the move were agreed through the solicitors representing the parties so I must conclude this issue has already been dealt with.

[55] There is then the interest. Aside from the fact interest on lost wages is not a remedy specified in the Act, I note interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. Until the issuing of this determination there was no known entitlement and therefore no loss of use in the interim. The claim is declined.

[56] Turning to compensation. Mr Cooper seeks \$10,000 and proffered evidence in support of his claim. He talks of stress and anxiety that resulted from a perception of unfair treatment and the financial pressures which arose from his loss of income. His

evidence was not disturbed by cross-examination and having considered it I conclude \$6,000 would be an appropriate award.

[57] The conclusion remedies accrue means I must, in accordance with the provisions of s.124, address whether or not Mr Cooper contributed to his dismissal in any significant way. The nature of Ramsey Investments' defence, frustration due to medical incapacity, must mean the answer is no.

Conclusion and Orders

[58] For the above reasons I conclude Mr Cooper has a personal grievance as he was unjustifiably dismissed.

[59] As a result the respondent, FJ Ramsey Investments Limited, is ordered to pay the applicant, Mr Henry Cooper, the following:

- i. \$12,500.00 (twelve thousand, five hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$6,000.00 (Six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[60] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority