IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 297/10
5281263

	BETWEEN	WAYNE DABB Applicant
	AND	K & S EMPLOYMENT AGENCY LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	James Parlane for Applicant Samuel Hood for Respondent
Investigation Meeting:	13 April 2010
Submissions Received:	30 April 2010 from Applicant 4 May 2010 from Respondent
Determination:	25 June 2010

DETERMINATION OF THE AUTHORITY

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[1] Mr Wayne Dabb was employed by K & S Employment Agency Limited ("K & S") from 10 August 2009 for the 2009/2010 dairy season which was to end in February 2010. K & S is contracted to provide labour to meet the casual and seasonal needs of Open Country Dairy Limited and Open County Cheese Company Limited (both entities will be referred to as "OCD").

[2] On 27 July 2009 Mr Dabb signed a written employment agreement which sets out the terms and conditions applying to his employment with K & S. The agreement at clause 9 sets out the term of the agreement as being a fixed term due to the seasonal nature of the dairy industry. It also provides for Mr Dabb's employment to end when his work was completed and the labour requirements for OCD have reduced or changed. The agreement does not require any notice where employment is to terminate as a result of the work being completed.

[3] Clause 5 of the agreement outlines to Mr Dabb the right of OCD to act on behalf of K & S in respect of his employment. Mr Dabb was obliged to follow the instructions of OCD's management and line supervisors. This obligation is confirmed in the standard terms and conditions document attached to the employment agreement. Through paragraph G of that document Mr Dabb is required comply with OCD's policies and instructions. Further, at paragraph 13.5 it is acknowledged that K & S may delegate OCD Management to conduct disciplinary matters on its behalf. This clause does not limit any delegations to day to day matters.

[4] Finally, the agreement at clause 13.8 provides for the termination of employment on one weeks notice where OCD gives K & S notice that it no longer accepts the services of an individual.

[5] After working for just over one month Mr Dabb was told by his OCD team leader, Mr Jason Ardern that he was no longer required. Mr Dabb claims this amounted to an unjustified dismissal and he seeks an order for reinstatement, lost wages and compensation.

[6] K & S denies Mr Dabb was dismissed and says Mr Dabb left his employment voluntarily on 19 September and has not returned. It claims Mr Dabb did not raise his grievance in accordance with section 114 of the Act and further, that Mr Dabb is in breach of his employment agreement because he did not first discuss his problem with his employer as required by clause 20 of the agreement.

[7] The issues for determination are whether Mr Dabb raised his grievance in accordance with the Act and whether he was in breach of his employment agreement. If the Authority is satisfied the grievance was raised in accordance with section 114 a determination on the question of whether Mr Dabb was dismissed will be made. If that enquiry is answered in the affirmative then the Authority will consider what, if any, remedies should follow.

Was Mr Dabb's personal grievance raised pursuant to s.114

[8] The respondent has raised an issue as to whether Mr Dabb raised his personal grievance in accordance with section 114 of the Employment Relations Act. In its submissions K & S say Mr Dabb lodged his grievance before raising it with the Respondent and did not provide enough detail of his personal grievance to allow it to address it.

[9] Mr Dabb, through his lawyer, completed a statement of problem on 22 September. The statement of problem was received and receipted in the Authority on 23 September. This was the same day Mr Dabb wrote to K & S claiming he had been dismissed. The statement of problem was received by K & S on 24 September.

[10] A letter addressed to Mr Ken Atkinson, a Director and shareholder of K & S, and which he received on 23 September purporting to raise a personal grievance on behalf of Mr Dabb states that he has been dismissed without good reason and he has a claim for unjustifiable dismissal. The letter also records that Mr Dabb is seeking a payment of $48,329.50.

[11] Mr Atkinson responded to Mr Parlane that same day advising that he was not aware of a dismissal and asked who had dismissed Mr Dabb. Mr Parlane responded, also on 23 September, and advised that Mr Ardern had dismissed Mr Dabb and enquired as to whether Mr Ardern had the authority to dismiss. No answers were provided at that time to indicate that Mr Ardern did not have the authority to dismiss Mr Dabb.

[12] I am satisfied K & S knew Mr Dabb alleged he had been dismissed and that he was not satisfied with the dismissal. Further Mr Dabb had put K & S on notice as to what he wanted in order to resolve his employment relationship problem. Mr Dabb may have acted prematurely in forwarding his statement of problem to the Authority before raising his grievance with K & S, but I am satisfied this did not deny the respondent the opportunity to address Mr Dabb's grievance informally in the first instance.

[13] K & S and Mr Parlane exchanged written correspondence on 23 September however, there was nothing preventing Mr Atkinson from picking up the telephone and entering into a discussion with Mr Parlane where uncertainties could have been raised and dealt with.[1]

[14] I find Mr Dabb did raise a personal grievance pursuant to section 114 of the Act.

Did Mr Dabb breach the employment agreement?

[15] The Respondent also raised an issue with regard to the employment agreement and claims Mr Dabb has breached the employment agreement by not following the

[1] *Board or Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 at [58].

process outlined in the agreement for the resolution of his claim. The process of resolution outlined in the employment agreement is general in nature but does require Mr Dabb to enter into discussions with K & S in the first instance. It is clear he did not do this. This constitutes a breach of the employment agreement, however I am not satisfied the breach was such as to warrant the imposition of a penalty.

Was Mr Dabb dismissed?

[16] Mr Dabb commenced work for OCD on 17 August. Within the first five days it was acknowledged that he was struggling with the cheese packing work and Mr Ardern suggested he move out to the tanker bay and undertake milk testing. Mr Dabb underwent training for this work and worked without incident until Wednesday 16 September. On that day Mr Dabb was asked to meet with Mr Atkinson. Coincidentally on that day also, a second employee started working with Mr Dabb in the milk testing area.

[17] It was common ground that at the meeting on 16 September Mr Atkinson and Mr Dabb discussed the fact that both OCD and Mr Dabb were satisfied with Mr Dabb's skills in the milk testing area but that there were concerns about Mr Dabb being able to keep up with the cheese packing. Mr Atkinson and Mr Dabb discussed Mr Dabb's rate of pay and it was agreed it would remain at $16.50 even though he was working in the milk testing.

[18] It was also common ground that Mr Atkinson advised Mr Dabb that if he was asked to do packing he should see Mr Mike Lawson, a manager with OCD, or contact Mr Atkinson directly to see whether other arrangements could be made.

[19] On 19 September and without any warning, Mr Ardern advised Mr Dabb that he was to finish up at the end of the day. Mr Ardern says he advised Mr Dabb to contact K & S but Mr Dabb does not recall this part of the conversation. Mr Dabb did as he was instructed and left the workplace that afternoon at the completion of his shift.

[20] K & S claims Mr Dabb left his employment on 19 September and did not return, thereby terminating his employment through abandonment. In order to rely on that argument K & S must show that Mr Dabb failed to turn up for work for two consecutive days. Mr Dabb was on his usual rostered days off when he wrote to Mr Atkinson raising his personal grievance. He had at that point in time, not failed to turn

up for work it is therefore not feasible to rely on an argument that Mr Dabb had abandoned his employment.

[21] Further, given that Mr Atkinson was on notice before Mr Dabb was due to recommence his shift on 24 September that he believed he had been dismissed it was within Mr Atkinson's power to pick up the telephone and advise Mr Parlane of the misapprehension and to clarify immediately that no dismissal had in fact taken place. However, after receiving the letter of personal grievance and following the initial enquiry as to who had dismissed Mr Dabb, K & S took no further action.

[22] The employment agreement at clause 13.8 states:

> The employee acknowledges that the employer's contract with OCD requires the employer to supply such personnel as OCD requires from time to time for its casual and seasonal needs and provides the right to OCD to refuse to accept the services of any particular individual or to cease to accept the services of any particular individual on giving the employer one week's notice. If OCD gives notice to the employer that it will cease to accept the services of the employee then the employee agrees that this contract may be terminated on one week's notice on the grounds of redundancy. [my emphasis]

[23] A number of emails produced to the Authority, after it questioned Mr Ardern at the investigation meeting show that as early as 6 September steps were being taken to replace two of the employees placed at OCD by K & S employment.

[24] On 6 September in an email to Mr Atkinson, a Ms Louise Trower of More Limited, advised Mr Atkinson that OCD was not happy with the performance of two of the temp employees. Ms Trower told Mr Atkinson that she was to discuss this with Mr Lawson the following day and she thought Mr Lawson wanted to "get rid" of them. Ms Trower expressed concerns about how that might be done after reading the employment agreements that were in place as she recognised they would be leaving due to being replaced, and not because their work was ending.

[25] On 7 September Mr Atkinson advised Ms Trower that it would be him getting rid of any employees as it would be K & S that had no further requirement for their services and that it would probably be best coming from him. Mr Atkinson told Ms Trower and he would go to Wairoa at a time when the two employees were at work and deal with the situation.

[26] On 10 September at 6.07pm Mr Lawson emailed Mr Atkinson advising that Mr Dabb had to go as he was struggling to do as he was asked. Mr Lawson advised that a replacement for Mr Dabb would be needed.

[27] Twenty minutes later Ms Trower emailed Mr Atkinson and asked him to get rid of Mr Dabb and advised that she would arrange a replacement. That replacement was put in place on 16 September when Mr Dabb was still working for OCD.

[28] It seems to me that between 10 September and 16 September when Mr Atkinson met with Mr Dabb to discuss concerns about Mr Dabb's performance, Mr Atkinson assumed that the steps taken by OCD had addressed the issue. That is, Mr Dabb was taken out of the cheese packing area, and put into the milk testing area, an arrangement which Mr Dabb believed suited both himself and OCD. This assumption by Mr Atkinson proved to be wrong on all counts.

[29] On 16 September, before Mr Atkinson had met with Mr Dabb, Ms Trower had already provided a replacement employee for Mr Dabb. This action was taken in reliance on the notice given to K & S on 10 September that OCD would no longer accept the services of Mr Dabb.

[30] When he sent Mr Dabb away on 19 September Mr Ardern was acting on instructions that he had received from Mr Lawson that Mr Dabb was no longer required by OCD. This is entirely consistent with the message sent to Mr Atkinson on 10 September.

[31] After receiving the two letters on 23 September a fair and reasonable employer would, in all the circumstances of this case have made immediate contact with Mr Dabb to clear up the misunderstanding and confirmed, if that was the case, that he had not been dismissed.

[32] Further, if Mr Atkinson had been acting as a fair and reasonable employer he would also have made some further enquiries of OCD which would have established that Mr Dabb's services were no longer required by it.

[33] The actions of K & S in not contacting Mr Dabb, taking no steps to get Mr Dabb back to work, or to establish that his services were no longer required by OCD constitutes a dismissal which is unjustified.

Remedies

Contribution

[34] I am required to consider the extent to which the actions of Mr Dabb contributed toward the situation that gave rise to the personal grievance, and, if necessary, reduce the remedies that would otherwise have been awarded accordingly.

[35] Mr Dabb was subject to a written employment agreement at all times during this employment. That agreement sets out a clear process for employees to raise employment relationship problems. The first step in that process was to discuss the problem with his employer. Just as it was open for Mr Atkinson to pick up the phone on the 23 September, it was also open to Mr Dabb to do likewise. Indeed the employment agreement required it. His failure to do so, has contributed to the situation giving rise to his grievance.

[36] In all the circumstances of this case I consider that I must apply some reduction to the monetary remedies but not to the extent that Mr Dabb should be deprived of any remedy. I consider that a 25% reduction is appropriate.

Reinstatement

[37] Mr Dabb seeks reinstatement to his position. That is not practicable given that the season ended in February and there is no dispute that Mr Dabb was subject to a fixed term agreement which would conclude at the end of the season.

[38] The employment agreement is clear that OCD is under no obligation to accept Mr Dabb's services. Given that OCD had provided notice to K & S that it no longer wished to utilise Mr Dabb's services it follows that K & S would not have a position available to which Mr Dabb can be reinstated.

Lost Wages

[39] Mr Dabb seeks the payment of $48,000 in lost wages based on a calculation of 202 working days that he expected to work before the end of the season. Based on the evidence given at the investigation meeting, I have calculated that if his employment had proceeded to the end of the season Mr Dabb would have worked to the end of February 2010. This amounts to a total loss of $15,840.00.

[40] Mr Dabb's employment agreement sets out the arrangement in clause 13.8 whereby if OCD cease to use Mr Dabb's services during the period of the employment

agreement then Mr Dabb agrees his employment may be terminated with one week's notice on the grounds of redundancy. I find that it is unlikely, had K & S applied the terms of its employment agreement, that Mr Dabb could have expected employment to continue beyond one week.

[41] Subject to contribution I have calculated Mr Dabb's lost wages as amounting to $792.00 gross being one week's pay for lack of notice.

Compensation

[42] Mr Dabb seeks the payment of $10,000 to compensate him for his distress and humiliation. In submissions Mr Parlane, on behalf of Mr Dabb, urged the Authority to elevate the award of damages and submitted (verbatim):

> [The Authority] should apply the full force of the law against this rouge employer and a firm message must be sent out to all employers, particularly those employers in the dairy industry, who engage in lock outs and other calculated and mischievous behaviour designed to manipulate employees, that New Zealand is not the third world and while managers of Dairy Companies and their staff do not stoop as low as to put poison in the baby formula here, yet, They may well go on to do so if they remain able to do whatever they like whenever they like.

[43] The purpose of compensation is not to punish conduct towards others, but to compensate Mr Dabb personally for his own distress and hurt feelings. However, I find there was no direct evidence to support a claim for $10,000. I am left to infer that Mr Dabb was distressed and humiliated by his dismissal. These circumstances call for an award of compensation at the lower level which I assess, subject to contribution, at $3,500.

Summary of orders

[44] K & S Employment Agency Limited is ordered to pay to Mr Dabb within 28 days of the date of this determination the following amounts:

- $594.00 gross pursuant to section 123(1)(b) of the Employment Relations Act; and
- $2,625.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act.

Costs

[45] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Dabb may lodge and serve a memorandum as to costs within 28 days of the date of this determination with submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority