

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 269
5349067

BETWEEN ADRIAN DISHER
 Applicant

A N D JKD FARMS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: H Burdon, Advocate for Applicant
 J Dodunski, Advocate for Respondent

Investigation meeting: 17 July 2012 at Hamilton

Date of Determination: 6 August 2012

DETERMINATION OF THE AUTHORITY

The claims

[1] Mr Disher commenced employment as a dairy farm manager with JKD Farms Limited on 17 February 2009. He ceased his employment there on 31 May 2011.

[2] Mr Disher presents several claims relating to an entitlement to annual holidays and working on public holidays. Additionally, Mr Disher says that he did not receive his entitlement to time off in regard to having a three day weekend each month, pursuant to clause 6.3 of his employment agreement (IEA). Finally, Mr Disher claims that he did not receive his contractual entitlement to one afternoon off each week pursuant to clause 6.2 of the IEA.

Annual holidays

[3] Mr Disher claims that he did not receive his legal entitlement to annual leave pursuant to the Holidays Act 2003.

[4] While he acknowledges that he took 17 days of annual leave during the time he was employed, Mr Disher claims that he is entitled to be paid for a further minimum of 23 days of annual leave that he never had the opportunity to take off during the total period of his employment.

Working on public holidays

[5] Mr Disher claims that he worked on 20.5 public holidays and did not receive a day off in lieu pursuant to s.44B of the Holidays Act 2003 (the Act).

[6] Mr Disher also claims that he is entitled to be paid time and a half, pursuant to s.50 of the Act for working on the 20.5 public holidays.

The claims under clauses 6.2 and 6.3 of the IEA

[7] Mr Disher claims payment of wages for a total of 59 days under clause 6.2 of the IEA. This clause allows for him to have one afternoon each week off work.

[8] Mr Disher says that for the total period of his employment (more than two years) he was never given the opportunity to have an afternoon off each week.

[9] Clause 6.3 of the IEA provides that Mr Disher is entitled to a three day weekend each month and he says that he never had the opportunity to have that time off during the total period of his employment. He claims payment for 82.5 days accordingly.

[10] Given that Mr Disher was largely unsupervised as the farm manager, because Mr Dodunski resides in Taranaki, whereas Mr Disher worked in the Te Awamutu area, it seems most unlikely that Mr Disher did not take at least some of his contractual entitlement to time off.

Counterclaims

[11] The managing director of JKD Farms Limited is Mr James Dodunski. He says that the claims of Mr Disher have no validity at all and refers the Authority to some evidence that suggests that Mr Disher had more annual holidays than he says and the availability of other staff to allow Mr Disher to take time off. Mr Dodunski presents several counterclaims. First, he says that Mr Disher damaged three farm bikes and a

Suzuki four wheel drive vehicle during the course of his employment. But evidence of the damage to these vehicles and the cost of any repairs, has not been produced.

[12] As I understand it, Mr Dodunski also operates a small engineering/repair business and he says the he arranged for the purported damage to the vehicles in question to be repaired at that business.

[13] There is also a counterclaim for lost tools but no details have been provided.

[14] The second counterclaim is that Mr Disher was responsible for the “loss” of “more than” 130 cows. In support of this allegation, Mr Dodunski has produced an invoice from another farmer who apparently had cows on the property managed by Mr Disher. The invoice pertains to monies being sought from JKD Farms Limited in the sum of \$209,702.50 for un-returned cows (103) and various freight costs incurred.

[15] Mr Dodunski alleges that Mr Disher was responsible for the animals in question and that he was negligent in regard to accounting for them properly. Precisely what happened to all of the missing cows has not been revealed.

Analysis of Mr Disher’s claims

[16] Mr Disher has presented what purports to be a summary of the days that he had off during his employment. By inference, he says that this shows that he is entitled to the further days claimed: of annual leave, working on public holidays and other time off under the respective clauses of the IEA.

[17] When asked how this summary was prepared, Mr Disher said it came from entries made in his diaries over the relevant periods. But he cannot produce these diaries or any other tangible material that gives support to his claims. Equally, and unfortunately, JKD Farms Limited has not kept proper holidays and wage and time records.

[18] However, I find that the claims of Mr Disher are not convincing, or supported by tangible evidence to the degree required to support any orders in his favour. It follows that the claims of Mr Disher cannot be upheld on any of the fronts that he has advanced.

The counterclaims

[19] The counterclaims made by JKD Farms Limited also must be rejected due to the total failure to provide any substantive evidence showing that Mr Disher should bear responsibility for the alleged damage to farm vehicles or the loss of the animals in question.

Determination

[20] The respective claims of Mr Disher and JKD Farms Limited are rejected in their entirety due to the failure of both parties to present evidence of sufficient clarity or weight to support them.

[21] I feel obliged to make the observation that this type of dispute could have been avoided if JKD Farms Limited had kept proper holiday and leave records as required by s.81 of the Holidays Act 2003; and proper wages and time records as required by s.130 of the Employment Relations Act 2000.

[22] JKD Farms Limited should be aware that if Mr Disher had been able to present credible evidence in regard to his claims for annual holidays and public holidays; and given that the employer failed to keep and provide proper records of such, pursuant to s.83 of the Holidays Act 2003, Mr Disher may have been successful with his claims. JKD Farms Limited is strongly advised to ensure that proper records are kept for every employee, regardless of the nature of their employment.

[23] On the other side of the coin, while JKD Farms Limited have not been able to produce adequate evidence to support the counterclaims against Mr Disher, one would suggest that in future, proper supervision and performance management of employees such as Mr Disher, should ensure that such issues are avoided. Indeed, one is left to ponder how a properly managed business could incur the alleged damages referred to in this matter over the time involved.

Costs: Costs are to lie where they fall.

K J Anderson
Member of the Employment Relations Authority