

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 258
3169822

BETWEEN RIKKY DOWLING
Applicant

AND PHILLIPA SIMS
First Respondent

AND NATHAN SIMS
Second Respondent

Member of Authority: Lucia Vincent

Representatives: David Cain, advocate for the Applicant
Phillipa Sims in person
Nathan Sims in person

Investigation Meeting: 7 March 2023 at Greymouth

Submissions Received: 7 March 2023 from the Applicant
None from the Respondent

Date of Determination: 23 May 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Rikky Dowling worked for Phillipa and Nathan Sims as a Dairy Assistant on the West Coast for about eight months. Mr Dowling and the Sims recalled the employment relationship starting amicably. Regrettably it deteriorated rapidly towards the end.

[2] Mr Dowling says the Sims started a disciplinary process designed to dismiss him after he told Mr Sims he had recorded interactions between them on his cell phone (interactions Mr Dowling said showed Mr Sims spoke in a threatening and abusive manner to him). The Sims say they dismissed Mr Dowling for serious misconduct after his alarming, threatening and

erratic behaviour when trying to meet with him about a legitimate concern they had about how he carried out the routine plant wash procedure (PWP).

[3] Mr Dowling says the Sims unjustifiably dismissed him for no good reason and without fair process. The Sims say they had good reason to dismiss Mr Dowling, that any procedural defects were minor and that even if Mr Dowling's personal grievance was upheld - he contributed so significantly to the situation giving rise to his grievance that he should not be awarded any remedies (or they should be significantly reduced).

How did the Authority investigate?¹

[4] Mr Dowling lodged a written witness statement along with a statement of problem. The Sims lodged a statement in reply but no written witness statements. I had several supporting documents including copies of correspondence, text messages and video recordings.

[5] At the investigation meeting, Mr Dowling and the Sims answered questions under oath or affirmation from me. Mr Dowling's representative gave written closing submissions.

[6] I have had regard to all information and evidence in making my determination.

What are the issues?

[7] I investigated and determined the following issues:

- (a) Did the Sims unjustifiably dismiss Mr Dowling?²
- (b) If the answer to (a) is yes, what remedies should I award?³

Did the Sims unjustifiably dismiss Mr Dowling?

[8] As a preliminary point I note that Mr Dowling accepted through his advocate that he had attempted to raise a personal grievance for unjustified disadvantage regarding events that occurred more than 90 days prior. The Sims did not consent to this being raised out of time. To the extent I refer to any events subject of that grievance, I do so as background only.

¹ As permitted by section 174E of the Employment Relations Act 2000 (Act), my determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. I have not recorded all evidence and submissions received.

² Section 103(1)(a).

³ Section 123.

What did the parties agree?

[9] Mr Dowling started working for the Sims on or around 1 June 2021. Prior to this, the Sims had provided him with a standard form Federated Farmers individual employment agreement (agreement) to consider. Mr Dowling signed and dated the agreement on 4 April 2021; the Sims on 24 April 2021.

[10] The agreement contained clauses the Sims later referred to in a letter dated 4 February 2022, recording reasons for dismissing Mr Dowling. Relevant clauses included that:

- (a) The Sims expected Mr Dowling to use courteous and considerate behaviour in all dealings with his colleagues and to refrain from language or conduct likely to cause offence to or about any person or group.⁴
- (b) If the Sims had a concern about Mr Dowling's conduct, they would start a formal investigation to determine the facts meaning at minimum they would (among other things):⁵
 - (i) Provide Mr Dowling with written detailed particulars of the concern(s) or allegation(s) (and their seriousness);
 - (ii) Arrange a formal meeting with at least 48 hours prior notice;
 - (iii) Advise Mr Dowling he was entitled to bring a support person or representative with him to the meeting;
 - (iv) Provide Mr Dowling with a proper opportunity to respond;
 - (v) Consider any responses and determine whether the conduct amounted to general or serious misconduct and the appropriate response; and
 - (vi) Confirm the decision in writing (which could include penalties such as a written warning or dismissal without notice which the Sims reserved for serious misconduct).
- (c) Examples of what might constitute serious misconduct included:⁶

⁴ Clauses 8.5 and 8.6 of the agreement.

⁵ Clause 23.

⁶ Clause 23.3 and Schedule 3.

- (i) Refusing to undertake the duties of the position or to carry out any proper and lawful instructions given by the Sims;
- (ii) Improperly harassing another employee or the Sims, such as any unwelcome behaviour that was severe, persistent or pervasive and had the intent or effect of interfering with someone's work;
- (iii) Failing to follow instructions or otherwise acting in a manner that threatened safety, health or hygiene in the workplace or in a manner that hindered the safe and proper performance of the duties of the Sims or other employees; or
- (iv) Performing a deliberate action or inaction that led or would lead to profit loss for the Sims, such as causing or attempting to cause grading or non-acceptance of milk by a dairy company.

[11] Should the Sims have held concerns about health and safety for the workplace or other employees (or had other good reason), the agreement also included a clause saying they could suspend Mr Dowling on full pay at any time for any period and not allow him onto the premises (following a discussion of the proposed suspension with him).⁷

What was the workplace culture?

[12] One aspect of the general working environment requires mention. Mr Dowling and Mr Sims used robust language in the workplace including regularly using expletives. In the main, this was unoffensive for either of them. Later in the relationship, both claim it became abusive.

[13] Mr Dowling's recordings failed to capture an accurate overall picture of how the parties communicated but they did provide a sample of communication under pressure. A recording of some 27 minutes in duration demonstrated robust language being used by both Mr Sims and Mr Dowling in a conversational, confrontational and even-handed way. The recording of Mr Dowling's dismissal on 1 February 2022 disclosed similar communication including by and with Mrs Sims.

[14] I find it more likely than not that the even-handed nature of these exchanges continued throughout the employment relationship. Although on occasion these exchanges became more aggressive and at times offensive to the other, no one exchange became as entirely one-sided

⁷ Clause 24.

as alleged. These exchanges must be viewed through the lens of a workplace where robust language was the norm rather than the exception and parties tolerated what might be considered discourteous and offensive communication and behaviour otherwise.

When did the employment relationship deteriorate?

[15] Although the employment relationship started well, it began to deteriorate significantly after the Sims became concerned about the PWP carried out by Mr Dowling on 26 January 2021. Mrs Sims observed Mr Dowling carrying it out incorrectly. When she asked him about it, she recalled he said he had been deliberately doing it incorrectly and the way he was not taught by Mr Sims. An adverse grading occurred several days later – something they had good cause to raise with Mr Dowling.

[16] Mr Sims spoke to Mr Dowling about the PWP issue a few days later. Mr Sims asked Mr Dowling if he had “sucked shit up” which he denied. During what became a fractious interaction Mr Dowling told Mr Sims he had been recording Mr Sims.

[17] The PWP issue featured in a handwritten letter from the Sims to Mr Dowling dated 1 February 2022 (PWP letter) which Mrs Sims gave to Mr Dowling that morning. The PWP letter invited Mr Dowling to a meeting two days later to discuss the Sims’ concern about the PWP being performed incorrectly, the potential consequences (Mr Dowling could be dismissed) and inviting him to bring a support person (despite Mr Dowling later claiming he was not told he could bring someone). So far, so good, in terms of process.

[18] The Sims said they intended for the PWP letter to help work out what were performance issues with Mr Dowling at that stage, because of the importance of the PWP to their work and livelihoods and in hopes of resolving things. However, Mr Sims (who realised mistakes happen) expressed frustration about blanket denials by Mr Dowling. The PWP letter addressed the issue in a more formal manner to get the relationship back on track.

[19] Mr Dowling did not react well to the PWP letter. He sent a series of emails and text messages to the Sims in short succession on the same day he got the letter, accusing the Sims of predetermining his dismissal in retaliation of him having recorded Mr Sims. Mr Dowling pushed his views about the PWP issue including denying having said he did it incorrectly deliberately and that the Sims had relied on “false information.” Mr Dowling referred to major companies who “wouldn’t want to be associated with someone or something” like how Mr

Sims spoke to him. Mr Dowling raised concerns about Mr Sims' communication, accused the Sims of trying to get rid of him, and said he hoped the Sims had a "decent lawyer" (sic).

[20] The Sims kept their written communication professional - unsuccessfully encouraging Mr Dowling to bring his concerns to their meeting two days later. At that stage I find it likely that however frustrated, the Sims genuinely wanted to meet with Mr Dowling to hear his responses and were open to hearing his concerns – evident in an email responding to Mr Dowling saying (among other things) "... you have raised very serious allegations and moving forward we would like to have a further meeting discussing that as that is not the employee employer relationship we intend to have." Unfortunately, no such meeting occurred. Following Mr Dowling's written communications to the Sims and what they described as "alarming, threatening and erratic" behaviour by Mr Dowling in person, the Sims dismissed him.

How did the Sims dismiss Mr Dowling?

[21] On the day of the dismissal, when Mrs Sims had met with Mr Dowling to give him the PWP letter at her home, Mrs Sims says Mr Dowling told her she had two options in a manner she found threatening: option one, forget all about it and he would leave in June, or option two, he would take everything he had to his people including recordings of Mr Sims abusing him and he hoped they had a good lawyer. Mrs Sims asked Mr Dowling to leave because she felt unsafe.

[22] Mr Sims recalled Mr Dowling approaching him in the cowshed during milking in the afternoon, also in a threatening manner. Mr Sims recalled Mr Dowling mockingly saying, "oh you're not such a tough guy now you're being recorded are you" and laughing at him, holding up his phone and saying he had taken photos of the farm and none of the big companies would have anything to do with the Sims once they were out (on social media). Mr Sims asked Mr Dowling to stop recording him and go home however he refused. Mr Sims felt forced to leave before things escalated further.

[23] Mr Sims believed he was baited by Mr Dowling deliberately during the afternoon milking described above. Mr Sims said if Mr Dowling had behaved that way in public, he would have called the police.

[24] No recording of the behaviour described by Mr Sims surfaced – this was despite Mr Dowling admitting holding his phone up as if recording Mr Sims. Mr Dowling says he

pretended he was recording Mr Sims. That Mr Dowling later referred to recordings as a form of “insurance” against abuse he suffered at the hands of Mr Sims casts doubt on the pretence of his recording. However even without a recording, I find it more likely than not that Mr Dowling became antagonistic towards Mr Sims after feeling upset about having received the PWP letter and expressed his concerns about a process he believed was predetermined to dismiss him. I find it likely he laughed at Mr Sims who did his best not to react – as Mr Dowling acknowledged, Mr Sims was “... the most reserved I’ve ever seen him.” It is likely Mr Sims felt so exasperated by Mr Dowling’s behaviour that he left the shed to escape it.

[25] To Mr Dowling’s credit, he frankly admitted trying to get Mr Sims to “blow out” on the day of his dismissal. He said he had had enough and was standing up for himself. He felt somewhat apologetic and was not entirely proud of everything he said and did. This is consistent with someone who knew they had stepped over a line and felt remorseful.

[26] When the Sims came to the shed where Mr Dowling was, he started recording on his cell phone. The recording confirmed the following about how Mr Dowling’s dismissal unfolded:

- (a) Mrs Sims arrived at the shed and asked Mr Dowling to talk to her.
- (b) Mr Dowling said he would “love to,” “absolutely” and would “love to hear what you have to say” – he sounded sarcastic.
- (c) Mr Dowling walked out of the shed and the video briefly showed Mr Sims standing by a Ute several metres away. Mrs Sims stood out of view. Due to the angle of Mr Dowling’s cell phone which appeared to be concealed by his clothing, most images were obscured for the duration of the recording.
- (d) The Sims said Mr Dowling needed to “leave” and “go home,” numerous times.
- (e) Mr Dowling laughed.
- (f) When Mrs Sims asked Mr Dowling to leave again, Mr Dowling laughed again and suggested he be back the next day.
- (g) Mrs Sims said “No, you’re fired, you’re gone,” and to “get out of the house.”
- (h) When Mr Dowling asked for reasons, the Sims said it was for serious misconduct and referred to Mr Dowling’s photos of the farm and social media.

- (i) Mr Dowling denied it and told them “That’s serious misconduct” as he pointed his arm towards them.
- (j) Mr Dowling got louder saying “hold up” when the Sims continued to tell him to leave. He eventually said he would get his things from inside and left.

[27] Several days later, the Sims recorded their reasons for dismissing Mr Dowling in a letter dated 4 February 2022. In summary:

- (a) They dismissed Mr Dowling due to his conduct after getting the PWP letter inviting him to a meeting to discuss what appeared to be a deliberate refusal or failure to follow the PWP.
- (b) Mr Dowling’s behaviour breached clauses in his contract by:
 - (i) behaving offensively towards the Sims;
 - (ii) refusing to cooperate in a routine investigation regarding the PWP letter (including making it clear he would not meet with them);
 - (iii) making baseless accusations of abuse and harassment (yet engaging in harassing and frightening behaviour himself that caused the Sims to feel unsafe);
 - (iv) threatening to try to damage the Sims’ business with the big companies they relied on; and
 - (v) the above amounting to refusing to carry out proper and lawful instructions and preventing the Sims from getting on with work, ultimately destroying their trust and confidence in him.

Can the Sims justify their decision to dismiss Mr Dowling?

[28] The Sims accepted they dismissed Mr Dowling on 1 February 2022 and could have followed a better process in doing so. They remained resolute in their view Mr Dowling had behaved in a way that justified his dismissal.

[29] I must determine whether the Sims have justified their dismissal of Mr Dowling as fair and reasonable in all the circumstances having regard to relevant factors including fair process.⁸

⁸ Section 103A.

[30] Despite the PWP letter aspiring to meet and discuss what were framed as performance issues, Mr Dowling was dismissed for different reasons than they outlined in their letter dated 4 February 2022. The Sims said they tried to meet but Mr Dowling was so obstructive that they simply could not, they felt unsafe and that his aggression warranted dismissing him immediately. I do not consider that a reasonable position to take.

[31] In a robust working environment where parties held their own, reasonable alternatives existed. The recording confirmed that before telling Mr Dowling he was fired, he had agreed to leave and go home. The Sims could have allowed Mr Dowling time to cool off before advising him of the new allegations and then proceeding with a meeting capturing the concerns that had arisen since handing him the PWP letter. They could have proposed a period of paid suspension as provided for in the agreement until a meeting had taken place and a decision made following fair process. If the parties did not want to meet in person, they could have set up an online meeting with representation present.

[32] As will be clear, on a procedural basis, I have found the Sims' dismissal of Mr Dowling unjustified. The Sims failed to meet any of the minimum requirements of section 103A let alone the minimum requirements set out in the agreement. These cannot be described as minor. The extensive reasons set out belatedly in the dismissal letter conclusively show the Sims did not give Mr Dowling advance written notice of their further concerns, arrange a meeting within 48 hours, advise him he had a right to bring someone, provide an opportunity to respond to their concerns and consider those responses and an appropriate disciplinary sanction. Having failed to undertake a fair process, the Sims also could not fairly and reasonably conclude serious misconduct had occurred justifying dismissal.

[33] I have considered whether the Sims could rely on the process started with the PWP letter and Mr Dowling's behaviour during the disciplinary process to justify expanding the allegations, escalating the outcome and shortening the process.⁹ Ultimately this could not assist them because the Sims did not give Mr Dowling proper notice of their further concerns and did not complete the process they had started.

⁹ Noting in *George v Auckland Council* [2013] NZEmpC 179 the Employment Court confirmed an employer can raise dishonesty during a disciplinary process as an allegation resulting in more serious disciplinary action despite initial allegations amounting to misconduct, provided the employer follows a full and fair process – at [97], [101] and [111].

[34] The Sims have not justified their decision to dismiss Mr Dowling. Mr Dowling has a personal grievance for unjustified dismissal. Noting my comments about Mr Dowling's behaviour, I take this into account in setting the level of remedies.

What remedies should I award?

[35] Having concluded Mr Dowling has a personal grievance for unjustified dismissal, I now determine what remedies to award. This includes consideration of any:

- (a) Reimbursement of wages or other money lost because of any personal grievance (subject to evidence of reasonable endeavours to mitigate loss)?¹⁰
- (b) Compensation for any humiliation, loss of dignity, and injury to Mr Dowling's feelings?¹¹
- (c) Reduction for any conduct by Mr Dowling that contributed to the situation giving rise to his personal grievance?¹²

Should I reimburse Mr Dowling's wages or other money lost?

[36] Mr Dowling has claimed a reasonable level of reimbursement. He found work within two weeks. He has claimed \$3,925.82 (gross), an amount taking into account what he would have earned in the 12 weeks following his dismissal, being wages for two weeks without work plus the difference for ten weeks between his wages with the Sims and what he earned in his new lower paying role. I consider this an appropriate award to make.

Should I award Mr Dowling compensation?

[37] Mr Dowling seeks compensation of between \$15,000 and \$20,000.¹³ He gave evidence of how he felt because of his dismissal. He described feeling disappointed, frustrated, angry, sad, and confused and that he sought counselling assistance to cope. He did not describe the sort of significant long-term impact I would expect for a claim of the level sought.

[38] I have considered the extent of the harm Mr Dowling suffered, where it sits when compared with other cases, then stepped back and assessed what I consider a fair and just

¹⁰ Sections 123(1)(b) and 128.

¹¹ Section 123(1)(c)(i).

¹² Section 124.

¹³ Applicant's submissions, at [29].

amount in the circumstances.¹⁴ I consider an award of \$8,000 appropriate, subject to any reduction for contribution, an issue I address next.

Should I reduce any remedies awarded to Mr Dowling?

[39] I must in deciding the nature and extent of remedies for any personal grievance, consider the extent to which Mr Dowling acted in a way that contributed to the situation that gave rise to his grievance.¹⁵

[40] The Employment Court has summarised key principles relating to contribution as follows:¹⁶

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (c) Third, what is a fair assessment of the extent of the contribution?
- (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[41] The Employment Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.¹⁷ Mr Dowling's advocate accepted contribution may be considered a factor by the Authority, warranting a reduction of 10 to 15 percent at most.¹⁸

[42] The Sims said in their statement in reply that no remedies should be awarded due to the totality of Mr Dowling's behaviour being sufficiently egregious that no remedies are warranted.¹⁹ I disagree. I am also not satisfied as an alternative that I should reduce remedies by 100 percent.²⁰

[43] I accept Mr Dowling behaved poorly and failed (at least initially) to participate in a process that would have allowed him to respond to concerns raised by the Sims who had

¹⁴ Relevant factors considered in *Mikes Transport Warehouse & Anor v Vermuelen* [2021] NZEmpC 197 at [72]. See average awards in the Authority at <https://www.employment.govt.nz/about/employment-law/compensation-and-cost-award-tables/jul-dec-2022/>

¹⁵ Section 124.

¹⁶ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [73].

¹⁷ *Xtreme Dining Limited trading as Think Steel v Dewar* [2016] NZEmpC 136 at [217] to [222].

¹⁸ Applicant's submissions, at [40].

¹⁹ Referring to *Lawson v New Zealand Transport Agency* [2016] NZEmpc 165 at [320].

²⁰ The Court has concluded section 124 "does not permit complete removal of a previously established remedy" *Dewar* at note [17] above at [216].

reasonably progressed the PWP issue with Mr Dowling in a disciplinary setting. He failed to engage constructively in that process consistent with his duty of good faith.²¹ This contributed to the reasons for why and how he was dismissed. I find to that extent Mr Dowling behaved in a blameworthy way warranting a reduction to his award of compensation of 15 percent.

Summary of findings and orders

[44] The Sims unjustifiably dismissed Mr Dowling.

[45] I order the Sims to pay Mr Dowling:

- (a) Remuneration lost of \$3,925.82 (gross); and
- (b) \$8,000 compensation, less 15 percent, being \$6,800.

Should I award costs?

[46] Costs are reserved. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²² As this matter lasted around half a day, it is likely to be appropriate to award half a day of the applicable tariff rate of \$2,250 to Mr Dowling, plus a filing fee of \$71.56, in the absence of any other relevant factors.

[47] 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 Mr Dowling may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Sims 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.

Lucia Vincent
Member of the Employment Relations Authority

²¹ Section 4(1A)(b) of the Act, reflecting a duty that the Employment Court considered extends to being responsive and communicative during disciplinary proceedings - relied on in *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149 at [55] to [56] to reduce remedies by 50%.

²² See www.era.govt.nz/determinations/awarding-costs-remedies.