

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 363
5332016

BETWEEN KATHRYN DRAWBRIDGE
Applicant

AND KIWI X FARMERS LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Stan Austin for Applicant
 Greg Malcolm for Respondent
Investigation Meeting: 5 July 2011 in Whakatane
Determination: 18 August 2011

DETERMINATION OF THE AUTHORITY

- A. Kiwi X Farmers Limited unjustifiably dismissed Kathryn Drawbridge on 31 December 2010.**
- B. Kiwi X Farmers Limited must settle Ms Drawbridge's personal grievance by paying her:**
- (i) lost wages and holiday pay for nine weeks, less \$1009.50 she earned in mitigation of her loss; and**
 - (ii) \$6000 as compensation for injury to her feelings, an amount reduced by one third for her contribution to the situation giving rise to her grievance.**
- C. Kiwi X Farmers Limited must pay Ms Drawbridge \$4394.32 in wage arrears for alternative holiday and public holiday entitlements not paid to her when due.**
- D. Costs are reserved.**

Employment relationship problem

[1] Kathryn Drawbridge worked for four-and-a-half years as a milker for Kiwi X Farmers Limited (KXFL). She worked on a dairy farm jointly owned by KXFL and the Raroa Trust. KXFL also managed two neighbouring farms owned solely by the Trust. The farms are in the Waimana valley, around 26 kilometres south of Whakatane.

[2] Ms Drawbridge's personal grievance application said she was unjustifiably dismissed by KXFL director Greg Malcolm on 31 December 2010. She said she had her dog with her that morning and the dog was barking to move the cows along when Mr Malcolm unexpectedly arrived at the milking shed. Mr Malcolm had yelled at the dog which ran into the shed pit. He had then shouted at Ms Drawbridge saying "there's no dogs allowed in the pit" and pulled the dog out of the area by its collar. She said she grabbed Mr Malcolm's hand and he let the dog go.

[3] Mr Malcolm, in his account of events, said he had then told Ms Drawbridge to "take your apron off and bugger off". He said those words because he was annoyed that Ms Drawbridge had her dog at the milking shed, the dog was chasing the cows and Ms Drawbridge did not respond to repeated requests from him to immediately remove the dog from the area. He said Ms Drawbridge had a 400mm long piece of alkathene pipe that she used to tap and move cows along into the dairy shed rows and had thrown the pipe at him, hitting him in the back. He said Ms Drawbridge had become angry when she heard him call her a "silly bitch" and had let un milked cows out of the shed and then turned off the milking machines before she left the area.

[4] Mr Malcolm denied he told other people later that day that he had dismissed Ms Drawbridge or that he tried to make arrangements to hand over her final pay later on that day or the next day. KXFL said Ms Drawbridge misinterpreted what was said at the milking shed, did not respond to later requests to talk about what had happened, and abandoned her job by not returning for any further milking duties.

[5] Ms Drawbridge's application to the Authority included a wage arrears claim. She claimed not to have been paid for all the hours for which she was contracted to work and to have been short paid her holiday and public leave entitlements. The

claim was the subject of inquiry and assessment by a Labour Inspector prior to the Authority's investigation, with KXFL accepting the inspector's opinion while Ms Drawbridge did not.

The investigation

[6] The issues for investigation and determination were:

- (i) Whether Ms Drawbridge's employment ended by way of dismissal or abandonment; and
- (ii) if by way of dismissal, whether that was justified; and
- (iii) if Ms Drawbridge was unjustifiably dismissed, what remedies should be awarded (considering lost wages and distress compensation); and
- (iv) whether any remedies awarded should be reduced for any blameworthy conduct by Ms Drawbridge contributing to the situation giving rise to her personal grievance; and
- (v) whether Ms Drawbridge was owed any wages and holiday pay; and
- (vi) costs.

[7] The Authority heard oral evidence from Ms Drawbridge, her partner Paul Wesselon, neighbour and farm worker Geoff Watt, Mr Malcolm, his wife and fellow KXFL director Jody Malcolm, and Raroa Trust chairman Monty Kora. Each witness had provided a written statement which, under oath or affirmation, they confirmed before answering questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions.

[8] In preparing this determination I reviewed the parties' statements and submissions and the written and oral evidence of the witnesses. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but sets out findings of fact and law and expresses conclusions on matters for determination.

Did Mr Malcolm dismiss Ms Drawbridge?

[9] I find Mr Malcolm did dismiss Ms Drawbridge by his actions and words at the milking shed on 31 December 2010. I reached that conclusion on the basis of Mr

Malcolm's own evidence, Mr Kora's evidence of what Mr Malcolm told him shortly afterwards, and Mr Watt's evidence of what Mr Malcolm told him later that day.

[10] Mr Malcolm's words – which he said were “*take your apron off and bugger off*” – were set out in a written account of events that he and Mrs Malcolm prepared and which he attested to be true before a local justice of the peace on 22 March 2011.

[11] I consider any objective observer of the situation and words used would have concluded that Ms Drawbridge was unequivocally ‘sent away’ from her employment – that is dismissed – by what Mr Malcolm said. This was reinforced when Mr Malcolm asked Ms Drawbridge whether he needed to call the police. He said he asked that question because Ms Drawbridge would not let go of a gate that she was holding open and letting un milked cows out. She responded by going to the machine room, turning off the milking machines, calling her dog and leaving the farm on her bike.

[12] Mr Kora's evidence was that he met Mr Malcolm on the morning of 31 December while driving down a track on one of the Trust's neighbouring farm. Mr Kora said Mr Malcolm told him that he had “just sacked” Ms Drawbridge.

[13] Mr Malcolm sought to cast doubt on Mr Kora's evidence, suggesting Mr Kora may have been drinking and did not accurately recall their conversation. Mr Malcolm said he told Mr Kora that he “may have to sack” Ms Drawbridge. However Mr Malcolm's own evidence was that Mr Kora did not appear drunk, he did not see Mr Kora drink anything, and he did not smell alcohol on Mr Kora's breath.

[14] I prefer Mr Kora's evidence as likely to be the more accurate. The Trust was in partnership with KXFL on one farm and relied on its services on two other Trust-owned farms. As Trust chairman Mr Kora had no commercial motive to give evidence contrary to that of Mr Malcolm. Rather I consider Mr Kora's evidence more likely to be true because it went against the interests of the Trust's business partner.

[15] Mr Malcolm called into Mr Watt's house later that day. He thought he might find Ms Drawbridge there as he had seen her car parked outside it earlier. Mr Watt's evidence was that Mr Malcolm said he had dismissed Ms Drawbridge and had her

final pay and a form for her to sign. Mr Malcolm denied telling Mr Watt that Ms Drawbridge was dismissed but said he did tell Mr Watt what had happened and that a dismissal “could eventuate”.

[16] I prefer Mr Watt’s evidence as more likely to be accurate. He had become friends with Ms Drawbridge and her partner Mr Wesselson since moving to Waimana three years earlier. However he was on similarly friendly terms with Mr and Mrs Malcolm through contact at social events in the valley. He had made it clear to Ms Drawbridge and Mr Malcolm from the outset of this employment problem – as they both confirmed in their evidence – that he was neutral and would not ‘take sides’. Mr Watt worked for a neighbouring farmer and Mr Malcolm agreed Mr Watt had “no axe to grind” with him.

[17] While it has not been necessary to rely on what Ms Drawbridge and Mr Wesselson said in evidence to reach the conclusion that Ms Drawbridge was dismissed, their evidence was consistent with that finding.

[18] Mr Wesselson was at the house he and Ms Drawbridge shared when Mr Malcolm drove up the driveway at around 5.30pm on 31 December. Mr Wesselson said he went out to meet Mr Malcolm who asked if Ms Drawbridge was home. Mr Wesselson said that he replied ‘no’ and Mr Malcolm had then said he had Ms Drawbridge’s final pay with him. Mr Wesselson asked for it but Mr Malcolm said he needed to hand it to Ms Drawbridge personally. He asked Mr Wesselson to get Ms Drawbridge to ring him and left. Mr Malcolm returned to the house around 9am the next morning but left when Mr Wesselson said Ms Drawbridge was unavailable.

[19] Ms Drawbridge’s evidence was that Mr Malcolm left her a phone message on the afternoon of 4 January in which he said he had “some paperwork and final payslip and stuff here” and asked her to ring him so he could bring it down to her house. Mr Malcolm agreed he left a phone message on that day but could not recall exactly what he said and doubted that he referred to a final payslip. While the message was later deleted, I accept it was as stated by Ms Drawbridge.

[20] Of itself the reference in the telephone message to a final payslip is not decisive as by 4 January several milking days had passed and Ms Drawbridge had not

attended work. Mr Malcolm and a relief milker had done the work meantime.

[21] However Mr Malcolm accepted in his evidence that Mr Wesselson had seen “papers” in his hand when he called at Ms Drawbridge’s home on 31 December. He said those papers were “an incident report and holiday pay she was owed”. He said having the holiday pay was part of being prepared for “things to come to a head” when he and Ms Drawbridge spoke. However I consider it more likely that this was documentation about the “final pay” he had mentioned to Mr Watt and Mr Wesselson, confirming that he understood that he had already ended Ms Drawbridge’s employment, just as he told Mr Kora and Mr Watt earlier that day.

[22] I was not dissuaded from that conclusion by Mr Malcolm’s evidence that he thought Ms Drawbridge had decided to leave the job because someone – whom he did not name – had reported to him that Ms Drawbridge had returned to the milking shed on the afternoon of 31 December and removed some personal possessions. Ms Drawbridge confirmed in her evidence that she had returned to pick up some belongings. However I do not accept this demonstrated an intention by her to leave the job, rather it reflected her understanding that Mr Malcolm had dismissed her.

[23] That understanding, rather than abandonment of employment, was the reason that she did not turn up for milking that evening or in the following days. It was an understanding Mr Malcolm must have shared because he made arrangements for himself or a relief milker to do milking duties over those days.

Was the dismissal justified?

[24] I find the actions of Mr Malcolm, in the way Ms Drawbridge was sent away from her employment on the morning of 31 December, were not what a fair and reasonable employer would have done in all the circumstances at the time – that is they were unjustified.

[25] His words – objectively assessed – were not, as he claimed, merely to “defuse” the situation and get Ms Drawbridge away from it until there was an opportunity to calmly and rationally assess what had happened.

[26] This is not to say however that Mr Malcolm did not have legitimate concerns. He came into a work situation where he considered Ms Drawbridge's dog was behaving badly and upsetting the cows at milking time. It was a circumstance where he could act decisively and Ms Drawbridge accepted, in answer to a question from me, that Mr Malcolm was entitled to tell her to get her dog out. However the situation quickly got out of hand. Mr Malcolm thought Ms Drawbridge was either ignoring him or moving too slowly and he acted to get the dog away. Ms Drawbridge reacted to what she saw as unnecessarily harsh handling of her dog. Tempers rapidly overheated on both sides. He is certain that she then threw the tapping pipe. He called her a silly bitch. They were both shouting at one another. That was probably necessary over the noise from the animals, a radio playing in the shed and the milking machinery, but it also heightened the tension.

[27] In those circumstances Mr Malcolm might reasonably have told Ms Drawbridge to get herself and her dog away, let him finish the milking and they would talk later. In the heat of the moment, he did not communicate any such temporary arrangement. He used unequivocal words which he clearly meant and acted on from what he told Mr Kora, Mr Watt and Mr Wesselson later than day.

[28] A fair and reasonable employer would have taken steps to promptly sit down and talk with Ms Drawbridge about what had happened once the participants had cooled down. Mr Malcolm suggested that was what he sought to arrange by calling at her house in the evening of 31 December and the morning of 1 January but I have found those visits were to hand over final pay documentation – that is to confirm the employment relationship was at an end rather than make arrangements to meet and talk over problems in it. Such a discussion may have resulted in a disciplinary warning about the presence of the dog in the work area rather than dismissal of Ms Drawbridge. Calmly assessed, the matter of throwing the pipe – assuming it to be true and an instance of misconduct – may well have been accepted as a heat of the moment response provoked by how the dog was being removed from the area. However Mr Malcolm made no such arrangements to talk over and properly assess what happened.

Remedies

[29] For her personal grievance of unjustified dismissal Ms Drawbridge sought

compensation of \$14,000 under s123(1)(c)(i) of the Act and an award of lost wages.

Lost wages

[30] If Ms Drawbridge was not dismissed she would, most likely, have worked through to the end of the milking season but would not have been paid in the winter stand down period that followed. Information I had KXFL provide following the investigation meeting showed the shed in which she had worked produced milk through to the first week of March 2011. The period of lost wages was therefore from 31 December 2010 to 4 March 2011 – that is nine weeks.

[31] I am satisfied Ms Drawbridge made reasonable endeavours to mitigate her loss during that period by seeking work and gaining some casual employment with a neighbouring farmer. Bank records provided by her after the investigation meeting confirmed she earned \$1009.50 net from that casual work.

[32] Under s123(1)(b) of the Act I order KXFL to pay Ms Drawbridge lost wages for nine weeks – that is the ordinary wage she would have earned in that period, plus any allowances usually paid, and holiday pay on that amount. From the total due, KXFL may deduct \$1009.50.

Distress compensation

[33] I accept Ms Drawbridge's evidence that she was embarrassed and humiliated by KXFL's actions in dismissing her and news of it which circulated quickly in the local community. While visiting the Waimana general store in the following days she separately met Mr Watt and Mr Kora who both told her that they knew of her dismissal and had discussed it with Mr Malcolm. While Mr Malcolm and Mrs Malcolm said they had subsequently seen Ms Drawbridge at local social functions, and that she appeared happy and relaxed, I accept she suffered injury to feelings, loss of dignity and humiliation as a result of her dismissal and how it was carried out. It continued to distress her and undermine her confidence. Having regard to the particular circumstances of this case, and the general range of awards in cases of this type, I consider an award of \$9000 is the appropriate level of compensation KXFL should have to pay Ms Drawbridge under s123(1)(c) of the Act.

Contributory conduct

[34] Under s124 of the Act the Authority must consider whether reduction of those remedies is required where culpable or blameworthy conduct of the employee contributed towards the situation giving rise to the personal grievance.

[35] I consider a reduction is required because of the following circumstances confirmed, I find, by the evidence heard:

- (i) Ms Drawbridge had her dog in the working area rather than in the kennel near the shed where it should have been tied up during milking; and
- (ii) Mr Malcolm had previously cautioned Ms Drawbridge that the dog, which she had not sought prior permission to have on the farm, would be removed if it were found to “dogging stock hard”; and
- (iii) Mr Malcolm was entitled to remove the dog from the milking shed in the circumstances which he found on arriving that day; and
- (iv) Ms Drawbridge threw the tapping pipe at Mr Malcolm which, while it caused him no real harm and was an emotive response to what she saw as harsh treatment of her dog, was an act of misconduct; and
- (v) Ms Drawbridge let out unmilked stock and turned off the machines before she left the milking shed, which was unnecessary and spiteful regardless of how provoked she may have felt by Mr Malcolm’s actions.

[36] Ms Drawbridge’s blameworthy conduct contributing to the situation giving rise to her grievance is to be marked by a one-third reduction in the amount of compensation awarded to her under s123(1)(c)(i) of the Act. The reduction is not to be applied to the award of lost wages.

Wage arrears

[37] Ms Drawbridge’s original claim said she was not properly paid for public holidays and her weekly wage of \$540 was less than the minimum wage as it was paid for duties she was required to perform over 43.50 hours each week.

[38] The parties agreed to have the arrears claim assessed by a Labour Inspector.

Following interviews with Mrs Malcolm, who kept KXFL's pay records, and Ms Drawbridge (with her representative in attendance), the inspector concluded Ms Drawbridge worked six hours and 45 minutes (that is 6.75 hours) each day, six days a week. As a result no arrears were due under the minimum wage legislation. However the inspector did identify shortfalls in the payments to which Ms Drawbridge was entitled for alternate holidays and for work done on public holidays. Total arrears owed were assessed to be \$4392.32.

[39] KXFL accepted the assessment but Ms Drawbridge did not. In a more detailed claim provided by her representative shortly before the investigation meeting and refined in closing submissions, Ms Drawbridge said she was entitled to be paid for 11.5 hours a day, six days a week from 1 April 2009 until 31 December 2009 at the prevailing minimum wage rates through that period. The claim, including a loading for holiday pay, totalled more than \$27,000.

[40] I do not accept the claim reflected the actual terms of employment agreed between Ms Drawbridge and KXFL. Her claim relied on a reference to the hours of work in a Federated Farmers standard form agreement she was given in 2009. That gave the hours normally worked as from 5am to 5.30pm. However that was, I find, never the hours of work intended or actually agreed between the parties. Rather, as Ms Drawbridge's own frank evidence confirmed, she worked between 6.5 and 7 hours on an ordinary day attending to the morning and afternoon milkings. For that she was paid \$540 a week plus a motorbike allowance of \$40. Her holiday pay of eight per cent was also paid on a weekly basis.

[41] A job description included duties additional to milking, such as paddock care and keeping stock records, but I find Ms Drawbridge largely attended to those duties coming to and from getting the cows in for milking or during the actual milking time. There were some extra farm tasks that she did do from time to time but she was paid for that work at a casual rate of \$14 an hour in addition to her normal weekly wage. That practice was confirmed by KXFL's pay records.

[42] If Ms Drawbridge understood she was supposed to be paid for 11.5 hours a day, rather than 6.75, she would have sought such payment much earlier. The agreed weekly wage was a modest amount to have to live on and if she was entitled to more,

she would most likely have asked for it. The reality is she did not because she knew she was getting the agreed amount for the agreed hours each week.

[43] Accordingly I decline Ms Drawbridge's amended wage arrears claim but confirm the amounts identified in the inspector's report as due and owing to her for alternative holiday and public holiday entitlements she was not paid earlier. If KXFL has not already paid the amount of \$4394.32 due, it must do so now without delay.

[44] The parties and the Authority benefited from the inspector's independent and thorough analysis of the entitlements due and I record my thanks for that assistance.

Costs

[45] Costs are reserved. The parties are encouraged to agree any issue of costs between themselves. If they cannot and an Authority determination of costs is required, Ms Drawbridge's representative should lodge and serve a memorandum as to costs within 28 days of the date of this determination. KXFL would then have 14 days from the date of service to lodge a reply memorandum. No application will be considered outside this timetable without prior leave. If the Authority were required to determine costs, it would most likely be on the notional daily rate of \$3000, subject to any relevant information in the parties' memoranda and the application of the principles discussed in *PBO v DaCruz* [2005] ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority